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NO. 88546-0

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON DEPARTMENT OF RETIREMENT SYSTEMS and
THE STATE OF WASHINGTON,

Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION, et al.,

Respondents.

RESPONDENTS' ANSWER TO AMICUS CURIAE BRIEFS

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I. INTRODUCTION

Pension statutes are different – they are “not subject to full legislative control.” *Noah v. State*, 112 Wn.2d 841, 844, 774 P.2d 516, 517 (1989). This is because “[p]ension and other retirement plans are unique property rights ... in the nature of deferred compensation, as such they are not mere expectancies, but are vested rights possessed by employees.” *Farver v. Dept. of Retirement Systems*, 97 Wn.2d 344, 346, 644 P.2d 1149, 1150 (1982). *Amici* argue that a right to withdraw pension benefits, even after work has been performed, may be reserved. As this Court recently recognized in *Navlet*, “[W]e cannot give effect to such an attempted reservation of rights by an employer” because Reservation Clauses are inconsistent with the nature of deferred compensation. *Navlet v. Port of Seattle*, 164 Wn.2d 818, 848, 194 P.3d 221, 230, 237 (2008). In rejecting Reservation Clauses, this Court quoted *McGrath v. R.I. Ret. Bd.*, 88 F.3d 12, 18-19 (1st Cir. 1996), for this “emergent common-law rule”:

[O]nce an employee fulfills the service requirements entitling him or her to retirement benefits under a pension plan, the employee acquires a contractual right to those benefits, and ***the employer cannot abridge that right despite its aboriginal reservation of a power to effect unilateral amendments or to terminate the plan outright.***

Id. (emphasis added).

In addition to ignoring this principle, *amici*, without exception, ignore the critical fact that every class member in this case worked under

1973 COLAs promised by RCW 41.32.499 (PERS) or RCW 41.40.195 (TRS). These statutes mandated automatic cost of living adjustments throughout retirement whenever such adjustments were, as determined by DRS, met by Plan 1 earnings. CP 593-97. In 1995, these two statutes were *replaced* by the Uniform COLA. See Laws 1995, ch. 345, §11(3), (5); CP 182. But the Legislature did more than just replace all the prior COLAs. It inserted the Reservation Clause – a clause which did not appear in the 1973 COLA statutes. In 2011, when it invoked that clause, it did not reinstate the 1973 COLA. It left the class with *nothing*. This is exactly what the Constitution prohibits:

Thus, the same pension opportunities available to [class members] at the time of [their] employment were denied to [them] at the time of [their] termination.

Eagan v. Spellman, 90 Wn.2d 248, 250-51, 581 P.2d 1038, 1040 (1978).

Amici seek to justify this confiscatory result by pointing to other legislative priorities. *Amici*'s focus on these alleged “real world” effects adds nothing to the constitutional analysis:

[A] state cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors.

Caritas Services v. DSHS, 123 Wn.2d 391, 406, 869 P.2d 28, 37 (1994)

(quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 29, 97 S. Ct. 1505, 1521 (1977)).

Two *amici* claim that this Court, even if it affirms, should void the UCOLA benefits based on a severability argument. *Amici*'s severability argument, however, was never advanced by any party in this litigation. It cannot be raised now. RAP 9.12; *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548, 550 (1962). There is a very good reason why the State never advanced a severability argument. The legal underpinnings of the argument – that the subjective intent of the Legislature in enacting pension legislation controls – does not apply under *Bakenhus* and its progeny. *Navlet*, 164 Wn.2d at 834-35 (“The obligation arises independent of any required showing of the employer’s express intent to provide retirement benefits....”). If the Court concludes that the pension benefit is a vested property right, then neither the Legislature nor the Court may constitutionally deprive the class of its deferred compensation.

II. ARGUMENT

A. All Class Members Had Vested COLA Rights Under a 1973 Statute.

Amici ignore the facts when they claim that all of the pre-1995 COLA were *ad hoc* or one-time grants. WSAMA/AWC Brf., p. 12; WSAC Brf., pp. 5-6. As inflation began to surge in the 1970s, the Legislature enacted cost of living adjustments for all Plan 1 members. Under the 1973 COLA benefit, retirement benefits were annually adjusted based on the Consumer Price Index:

Each service retirement allowance payable from July 1st of *any year after 1973* until any subsequent adjustment, pursuant to this subsection *shall be adjusted so as to equal the product of the cost-of-living factor for such year and the amount of said retirement allowance on the initial date of payment...*

Laws 1973, 2d ex. sess., ch. 14, §1 (RCW 41.40.195, repealed 1995; RCW 41.32.499, repealed 1995 (emphasis added) (attached at *Appendix A*). The Legislature retained no discretion, and the legislation contained no Reservation Clause. Adjustments were only contingent upon a finding, by DRS, that Plan 1 had the assets to pay:

PROVIDED, That the board finds, at its sole discretion, that the cost of such adjustments shall have been met by the excess of the growth in the assets of the system over that required for meeting the actuarial liabilities of the system at that time.

Id. DRS therefore had the “sole discretion” to do the math, *i.e.*, to actuarially determine whether the cost of the adjustments could be met by the Plan’s earnings growth. If it could, then the COLA was mandatory. For years, it was paid. *See Retired Pub. Employees Council of Washington v. State*, 104 Wn. App. 147, 149, 16 P.3d 65, 67 (2001). This Court described this 1973 COLA benefit as follows:

RCW 41.40.195 provides for a cost-of-living increase in pension payments if the cost of such increase has been met by the excess of the growth in assets of the system over that required for meeting the actuarial liabilities of the system. This increase has been granted each year since its authorization.

Wash. Ass’n of County Officials v. Wash. Public Employee’s Ret. Sys. Bd.,

89 Wn.2d 729, 731, 575 P.2d 230, 231 (1978).

The 1995 UCOLA legislation repealed the 1973 COLAs. Laws 1995, ch. 345, §11(3), (5) (repealing RCW 41.32.499 and 41.40.195); CP 182. Under *Bakenhus*, the UCOLA was a “comparable benefit” to the pre-1995 COLAs. CP 186 (Senate Bill Report: replacement is a “trade-off [which] is worth it.”). It was not a gratuity, but rather *a modification of an already vested COLA benefit to which existing Plan 1 members were entitled*. The legislative intent confirms this. See CP 160.

The Legislature could not have repealed the 1973 COLAs without providing a corresponding benefit. *Bakenhus v. Seattle*, 48 Wn.2d 695, 702, 296 P.2d 536, 540-41 (1956); CP 190 (State: “In cases in which the pension plan contains *no reservation clause*, the courts have held that ... the employee acquires a vested ‘pension right’ in receiving the full compensation that he has earned.”). However, the State is attempting to eliminate vested benefits through a two-step “replace and repeal” process. The end result is that class members, all of which vested under the 1973 COLA, are left with absolutely no COLA of any type.¹

If pension benefits could be eliminated in such a manner, then no

¹ Plans 1 closed to new members in 1977. RCW 41.40.010(27); RCW 41.32.010(31). The 1973 COLAs were in place through 1995. As a result, all class members worked while the 1973 COLA was in place, with many class members working for over *two decades* under that benefit. CP 126 (18,524 class members had not yet retired in 2011).

vested benefit of any type would be safe. The 2011 repeal as to these class members is unconstitutional because they all vested under the 1973 COLA. They are entitled to receive the UCOLA unless and until it is properly replaced under the standards set forth in *Bakenhus*.²

B. The Legislature May Not Reserve a Right to Repeal Pension Benefits.

Even without the vesting of the 1973 benefits, the class would prevail because the Legislature cannot reserve a right that it does not constitutionally possess. It is the role of this Court, not the Legislature, to determine the nature of the relationship between the State and its employees for purposes of applying constitutional limitations on the exercise of legislative power. *Caritas Services*, 123 Wn.2d at 414-15 (“[W]hatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. ... [It] depends on the nature of the contractual relationship with which the challenged law conflicts.”). Pension benefits are one area where such limits apply: “[I]t is clear that if the challenged legislation can properly be characterized as pension legislation, the principles of *Bakenhus* ... will govern its

² Respondents agree that pension rights should be determined by the last act that can constitutionally be applied. See WSAMA/AWC Brf., pp. 15-20; *Dailey v. City of Seattle*, 54 Wn.2d 733, 739, 344 P.2d 718, 721 (1959) (employees “will be presumed to have acquiesced in legislative modifications that do not unreasonably reduce or impair existing pension rights; or stated positively, if the modifications are reasonable and equitable.”). The trial court invalidated the *2011 repeal* of the UCOLA. The existing law prior to the repeal – the 1995 UCOLA statute – is the last act that can constitutionally be applied.

constitutionality.” *Washington Fed’n of State Employees v. State*, 98 Wn.2d 677, 683, 658 P.2d 634, 637 (1983). Pension benefits are scrutinized because “[t]his Court has recognized that state employees’ pension rights are of a contractual nature....” *Fed’n of Employees v. State*, 127 Wn.2d 544, 561-62, 901 P.2d 1028, 1037 (1995). The Court therefore “established flat rules prohibiting the State from altering pension rights in a manner that is disadvantageous to the PERS I employees.” *Bowles v. Wash. Dep’t of Ret. Sys.*, 121 Wn.2d 52, 67, 847 P.2d 440, 448 (1993).

But *amici* claim that *Bakenhus* does not apply because the Legislature has “deemed” the UCOLA pension benefit to be non-contractual. Under this theory, the Legislature can alter the inherent nature of the employment relationship between itself and its employees for the sole purpose of circumventing the Contracts Clause. If permitted, the State could alter what traditionally were considered to be contractual relationships by fiat, such that there would be nothing to stop the State from enacting a statute which stated, for example, that “any agreement or promise entered into by the State is not to be considered a contract under Article 1, Section 23 of the Constitution, and the State may therefore modify and/or void any such agreement at any time.” Alternatively, under *amici*’s approach, the Legislature could statutorily disclaim all vested pension rights simply by passing legislation stating that its employees

have none. *Bakenhus* and the contracts clause prevent this type of legislative re-characterization because:

... construing the clause in [this] manner ... would allow [the State] unilaterally and retroactively to modify its contracts at will and without prior explicit notice. This result is antithetical to the intent of the contract clause. A promise in a contract that gives one party the power “to deny or change the effect of the promise is an absurdity.” *United States Trust Co.*, 431 U.S. at 25, n. 23.

Caritas Services, 123 Wn.2d at 407. It is not so simple for the Legislature to end-run the Constitution: “*even an explicit reservation of state power against vested rights would not automatically pass muster...*” *Id.* at 414.

Agreements become contracts entitled to protection under the Contracts Clause not because of the term that the Legislature assigns to the relationship, but as a result of the nature of the arrangement itself:

[A] legislative enactment may contain provisions which, *when accepted as the basis of action by individuals*, become contracts between them and the State...

Gruen v. Tax Commission, 35 Wn.2d 1, 54, 211 P.2d 651, 681 (1949) (quoting *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 58 S. Ct. 443 (1938)). A contractual relationship may exist even when the State did not intend to make a contract: “The obligation [to provide a retirement benefit] *arises independent of any required showing of the employer’s express intent* to provide retirement benefits...” *Navlet*, 164 Wn.2d at

834-35 (emphasis added).³ In fact, a contractual relationship may arise even when the intent was to *not* create a contractual right:

Even assuming that the reservation of rights language in the trust agreement and the SPD *indicated the Port's intent not to provide a vested right* to retirement welfare benefits in the CBA, *we cannot give effect to such an attempt at reservation of rights by an employer.*

Id. at 848 (emphasis added). It is the “[c]ompensatory nature of the employment relationship” rather than intent that determines whether a contract subject to the Contracts Clause limitations exists. *Id.* at 834-35.

As this Court has consistently held, pension rights *are* in the nature of contractual benefits for work already performed:

[U]nder *Bakenhus* and its progeny the pension statutes are, at the least, contractual in nature – they are not subject to full legislative control. But this court in *Bakenhus* never held that a public retirement statute in and of itself constitutes a complete contract. In fact, there is no statutory analysis in *Bakenhus*. Further, as the court recognized in *Bakenhus*, the contract analysis might

not be flawless in a purely legalistic sense, [but it] gives effect to the reasonable expectations of the employee and at the same time allows the legislature the freedom necessary to improve the pension system and adapt it to changing economic conditions.

³ The Legislature’s argument concerning the “unmistakability doctrine” – that there must be a clear statutory intent to create a contract right – is unavailing. Legis. Brf., p. 7. As noted in *United States v. Winstar Corp.*, 518 U.S. 839, 880, 116 S. Ct. 2432, 2457 (1996), the “application of the doctrine will ... differ according to the different kinds of obligations the Government may assume and the consequences of enforcing them.” In the context of pension rights, *Bakenhus* and its progeny specifically hold that the State may bind itself to pay pension benefits *even if it did not subjectively intend to do so*. See, e.g., *Navlet*, 164 Wn.2d at 834-35. See also *Architectural Woods, Inc. v. State*, 92 Wn.2d 521, 526-27, 598 P.2d 1372, 1375 (1979)

Noah, 112 Wn.2d at 844-45 (quoting *Bakenhus*, 48 Wn.2d at 701). The State cannot overrule *Bakenhus* simply by saying that pension rights are not contractual in order to avoid constitutional limits on its power.

The Legislature argues that “California – the source of the rule adopted in *Bakenhus* – refused to apply the California Rule in precisely the circumstances presented here....” Legis. Brf., p. 9. Its reliance on *Walsh v. Board of Administration*, 6 Cal.Rptr.2d 118, 4 Cal.App.4th 682 (1992), underscores the protected nature of the rights at issue here.

In *Walsh*, the issue was whether a former legislator’s pension benefits could be modified. The case turned on a specific provision of *the California Constitution* that expressly reserved the power of the Legislature to limit the retirement benefits of members of the Legislature before their retirement. See Cal. Const., Art. IV, §4, para. 3. Because modification of Walsh’s retirement benefits was consistent with this *constitutional* reservation (and the specific constitutional provisions concerning legislators’ retirement benefits took precedence over the more general contracts clause), the court approved the modification. In doing so, however, the court indicated that absent the specific constitutional provision applicable to legislators, the modification would have violated the Contracts Clause. *Walsh*, 4 Cal.App.4th at 698. It discussed *Legislature v. Eu*, 54 Cal.3d 492, 529-533, 816 P.2d 1309, 1331-1335

(1991), which held that pension rights are not subject to a take-away:

Pension rights, unlike tenure of civil service employment, are deferred compensation earned immediately upon the performance of services for a public employer “[and] cannot be destroyed ... without impairing a contractual obligation....”

Id. at 533 (cited in *Walsh*, 4 Cal.App.4th at 704).⁴

This rule does not, as *amici* assert, turn every pension statute into a perpetual benefit. Grants plainly limited to a stated number of years could pass constitutional muster. As explained in *Navlet*, there is a fundamental difference between a time-limited benefit and an otherwise perpetual benefit which may, or may not, be withdrawn at some unidentified future point. Limiting a welfare benefit – such as linking it to the term of a collective bargaining agreement – is acceptable. *Navlet*, 164 Wn.2d at 849 (“If the Port wanted to limit its obligation to provide welfare benefits, then it could have insisted on limiting the right to retirement welfare benefits in the CBA itself.”). What is improper is the provision of a pension benefit “subject to” the right to withdraw it:

Even assuming that the reservation of rights language in the Trust Agreement and the SPD indicated the Port's intent to not provide a vested right to retirement welfare

⁴ WSSDA relies on *Ass'n of Capitol Powerhouse Eng'rs v. Div. of Bldg. and Grounds*, 89 Wn.2d 177, 570 P.2d 1042 (1977) to mistakenly argue that pensions are like other terms of employment for civil service employment and are controlled by statute. WSSDA Brf., p. 17. This Court has plainly distinguished pension benefits from other terms of employment. *Washington Fed'n of State Employees, AFL-CIO, Council 28 AFSCME v. State*, 101 Wn.2d 536, 541, 682 P.2d 869, 872 (1984).

benefits in the CBA, we cannot give effect to such an attempted reservation of rights by an employer. In *Jacoby* we held that

“even though the employer has reserved the right to amend or terminate the plan, once an employee, who has accepted employment under such plan, has complied with all the conditions entitling him to participate in such plan, his rights become vested and the employer cannot divest the employee of his rights thereunder.”

Navlet, 164 Wn.2d at 848 (quoting *Jacoby v. Grays Harbor Chair & Mfg. Co.*, 77 Wn.2d 911, 916, 468 P.2d 666, 669 (1970)). In so holding, this Court quoted *McGrath v. R.I. Ret. Bd.*, 88 F.3d 12, 18-19 (1st Cir. 1996), which set out the common-law rule: an employer cannot abridge a pension right “despite its aboriginal reservation of a power to effect unilateral amendments or to terminate the plan outright.” *Id.* (emphasis added). See also *Kulins v. Malco*, 121 Ill. App. 3d 520, 526, 459 N.E.2d 1038, 76 Ill. Dec. 903 (1984) (“[T]he lack of a promise to vest does not revoke the employer's obligation to pay.”) (quoted in *Navlet*, 164 Wn.2d at 849).

There are practical reasons for the rule against Reservation Clauses. Employees can plan and prepare when the benefit is, on its face, time-limited. *The conditions of employment are fixed and certain at the time they earn the benefit, i.e., at the time work is performed.* If the conditions are unacceptable, employees can negotiate for better benefits, or terminate their employment if the benefits are not competitive. They cannot when the pension is subject to the future whims of the grantor:

The inducement prevented these employees from finding alternative ways to prepare for retirement, either by finding other employment with greater benefits or by negotiating with the Port for higher wages in exchange for the lack of retirement benefits so that they could start their own personal retirement accounts in order to pay for retirement welfare benefit premiums.

Navlet, 164 Wn.2d at 849.

C. The Contracts Clause Contains No Exception for Costly Contracts.

There are, no doubt, many good things that the Legislature could do with additional funds. But no matter how admirable the goal, the Legislature does not have carte blanche to acquire money anyway it sees fit, nor is it this Court's role to "engage in a utilitarian comparison of the public benefit and private loss":

[A] State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors.

United States Trust Co., 431 U.S. at 28-29. *See also Caritas Services*, 123 Wn.2d at 406 (same). Nor is it proper for *amici* to suggest that this Court step aside in difficult economic times and abdicate its protective role. *Carlstrom v. State*, 103 Wn.2d 391, 396, 694 P.2d 1, 5 (1985) ("Financial necessity, though superficially compelling, has never been sufficient of itself to permit states to abrogate contracts."). Doing so would mean that "the contract clause provide[s] no protection at all." *Carlstrom*, 103 Wn.2d at 396.

Not only is *amici*'s argument about cost legally irrelevant, it is improperly cited. Cost was not at issue in the UCOLA case: the plaintiffs conceded for purposes of their summary judgment motion that the State satisfies the fiscal emergency requirement of *Bakenhus*. Resp. Brf., p. 12. *Amici* ignore this, seeking to introduce material that was never before the trial court. Specifically, the Legislature attaches a 2013 State Actuary report to its brief, and the WSSDA makes repeated references to web-linked evidence which is not of record. Legis. Brf., App. A; WSSDA Brf., pp. 5-7, 9-13. None of this material is properly before this Court, *see* RAP 9.12, and it must all be stricken and disregarded.

If the new evidence is considered, then it should be understood that the “cost” that *amici* claim is a manufactured loss. When the 1995 UCOLA replaced the other COLAs, the impact was documented and budgeted. CP 148. When the UCOLA was repealed, the Legislature simultaneously lowered the contribution rates of employers. CP 124-25 (“This bill eliminates certain post-retirement ... COLAs ... and lowers minimum employer contribution rates ...”); CP 148. Thus, what *amici* bemoan is not any sudden or unexpected “loss” from the 1995 budget, which was fully disclosed and known. The “loss” is the windfall they received by the 2011 repeal – a windfall created solely on the backs of long-time employees and retirees of the State.

D. Severability Principles Cannot Constitutionally Be Applied.

The Legislature and WSAMA/AWC argue that the Reservation Clause is non-severable from the legislation granting the UCOLA, and any decision that voids the Reservation Clause also must void the benefit itself. WSAMA/AWC Brf., pp. 10-19.; Legis. Brf., pp. 15-19. In addition to the practical difficulties of this argument (for more than fifteen years a number of retirees have been paid the UCOLA), the argument is flawed on both procedural and analytical grounds.

1. Amici Cannot Raise New Arguments on Appeal.

Amici's severability argument does not make it out of the starting gate. No party raised this issue before the trial court. CP 85-102, 239-63, 647-62, 663-696, 906-935. *Amici* are not permitted to raise it now: "It is further well established that appellate courts will not enter into the discussion of points raised only by *amici curiae*." *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548, 550 (1962).

"[T]he case must be made by the parties litigant, and its course and the issues involved cannot be changed or added to by friends of the court." This is a long established practice of Washington courts....

Bldg. Indus. Ass'n of Washington v. McCarthy, 152 Wn. App. 720, 749, fn. 12, 218 P.3d 196, 210, fn. 12 (2009) (citations omitted). This rule flows directly from RAP 9.12: "On review of an order granting or denying a motion for summary judgment the appellate court *will consider only*

evidence and issues called to the attention of the trial court.”

2. The Severability Argument Fails on the Merits.

a. Neither the Legislature nor the Court Can Invalidate Vested Benefits.

If this Court concludes that the repeal of the UCOLA violated the Contracts Clause by depriving Plan 1 members of their vested pension benefits, then the failure to pay those same benefits under a severability analysis is equally unconstitutional. Constitutional constraints apply equally to all branches of government.

b. Under *Bakenhus*, the Subjective Intent of the Legislature Is Irrelevant.

Amici's severability argument is premised upon the legal principle that the Court's "primary duty in interpreting any statute is to discern and implement the intent of the legislature." Legis. Brf., p. 18. *Amici* fail to understand that pensions are subject to a different statutory analysis. The whole point of *Bakenhus* is that the Legislature, *notwithstanding its own intent*, is bound to provide pension benefits because it reflects compensation that has already been earned by the employee. *Navlet*, 164 Wn.2d at 834-35.

Precedent illustrates the flaw in *amici*'s position. In *Leonard*, for example, the Legislature intended to strip retirees of pension benefits if they committed a felony. *Leonard v. City of Seattle*, 81 Wn.2d 479, 484,

503 P.2d 741, 745 (1972). Therefore, the City argued that under then-existing RCW 41.20.110, Mr. Leonard was not entitled to any pension benefit due to his felony conviction. *Id.* at 484. Legislative intent, however, did not carry the day. Relying upon *Bakenhus*, this Court held that despite the forfeiture requirement, Mr. Leonard had vested property rights in his pension benefit that could not be forfeited. *Id.* at 485-86. It rejected the City's argument – the same arguments made by *amici* here – that his property right was “no greater than the contractual rights which created it, and plaintiff's pension vested conditionally only, to be canceled upon occurrence of the very condition upon which he had agreed it should be discontinued.” *Id.* at 485. Nor did this Court void his pension under a severability analysis because it was the Legislature's intent to only pay pensions to non-felons. The result is no different here.

c. The Constitutionality of the Repeal, Not the Original Enactment, Is at Issue.

In arguing that the UCOLA benefit is not severable from the Reservation Clause, *amici* fail to understand which statute was declared unconstitutional. WSAMA/AWC Brf., p. 10 (stating that the “Plaintiffs’ argument hinges on whether this Court will strike down Section 5(6) of SHB 5119 (1995) [RCW 41.40.197(5)].” The trial court did not invalidate any part of the 1995 UCOLA statute, nor did it invalidate the Reservation Clause itself. Rather, the trial court invalidated the 2011

legislation which attempted to repeal the UCOLA for a specific class. CP 1004-06. The class never asked the court to invalidate the reservation language itself. The class does not dispute that the Legislature could amend or repeal the 1995 COLA so long as it meets the *Bakenhus* test. The problem here is not that a Reservation Clause was placed into the 1995 legislation. The problem is that it was invoked in 2011 in an unconstitutional manner when no comparable benefit was provided upon its repeal.

d. The Clauses are Severable in Any Event.

The general rule is that when part of an enactment is unconstitutional, only that section will be invalidated. *Collier v. City of Tacoma*, 121 Wn.2d 737, 761, 854 P.2d 1046, 1058 (1993). To overcome this rule, *amici* must prove that “it is evident” that the constitutional parts would never have been enacted:

Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law.

Buckley v. Valeo, 424 U.S. 1, 108, 96 S.Ct. 612, 677 (1976).

Here, the Reservation Clause is inherently separate from the grant of the UCOLA benefit. As the Supreme Court held in finding that an unconstitutional legislative veto provision was severable, a veto (like a reservation) is separate from the substantive provisions of a law:

Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently [citation omitted]. ***This is not a concern, however, when the invalid provision is a legislative veto, which by its very nature is separate from the operation of the substantive provisions of a statute.*** Indeed, when Congress enacted legislative-veto provisions, it contemplated that activity under the legislation would take place so long as Congress ***refrained*** from exercising that power.

Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684-685, 107 S. Ct. 1476, 1479 (1987) (emphasis added). The Reservation Clause, like a legislative veto, “contemplated that activity under the legislation would take place so long as [the Legislature] ***refrained*** from exercising that power.” *Id.*

With no structural argument, *amici* are left to speculate that the Reservation Clause was so critical to the legislation that it would not have passed without it. This they cannot prove, despite the reams of legislative history which are part of the record here. Like the 1973 COLA, COLAs without Reservation Clauses were commonplace. CP 561-70; 593-97.

There is ***nothing*** in the legislative history to suggest that a Reservation Clause was critical to the 1995 legislation, or that the consolidation of existing COLAs would not have occurred without it. Section 1 of the Legislation – legislative intent – details five specific reasons for the UCOLA. CP 160. ***Reserving a right to repeal is conspicuously absent.*** Likewise, the Senate Bill Report describing the

effect of the legislation says *nothing* about any Reservation Clause. CP 185-87. The Floor Notes do not mention it, either – they state, without qualification, that the “flat rate increases by three percent each year, and is cumulative.” CP 156. The Fiscal Note also affirmatively assumes permanence: “The new annual automatic COLA, effective as of July 1, 1995, will be calculated as 62 cents per month per year of service, which will be increased each July 1 by three per cent.” CP 145.

The driving force behind the 1995 legislation was to “repeal the various cost-of-living adjustments (COLAs) ... and replace[] them with a new COLA design.” CP145. Given these valid reasons – all of which *do* appear in the legislative history – *amici* simply cannot clear the high bar of establishing “that it could not be believed that the legislature would have passed one without the other.” *State v. Abrams*, 163 Wn.2d 277, 285-86, 178 P.2d 1021, 1025 (2008).

III. CONCLUSION

“This court has a long history of protecting an employee’s vested right to retirement benefits....” *Navlet*, 164 Wn.2d at 834. The long-time employees and retirees of the State – many of whom worked for decades for the various *amici* who now oppose them – seek nothing more than the payment of their deferred compensation for work already performed.

DATED: October 14, 2013.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER

/s/ Richard E. Spoonemore

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury pursuant to the laws of the United States and the State of Washington, that on October 14, 2013, a true copy of the foregoing RESPONDENTS' ANSWER TO AMICUS CURIAE BRIEFS was served upon counsel of record as indicated below:

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DATED: October 14, 2013, at Seattle, Washington.

/s/ Richard E. Spoonemore
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APPENDIX A



3 of 4 DOCUMENTS

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*** ARCHIVE MATERIAL ***

*** THIS SECTION IS CURRENT THROUGH THE 1994 EDITION ***
 *** [1994 FIRST SPECIAL SESSION OF THE LEGISLATURE] ***

TITLE 41. PUBLIC EMPLOYMENT, CIVIL SERVICE AND PENSIONS
 CHAPTER 41.32. TEACHERS' RETIREMENT
"PLAN I"

Rev. Code Wash. (ARCW) § 41.32.499 (1994)

§ 41.32.499. Service retirement allowance adjustments based on cost-of-living factors

(1) "Index" for the purposes of this section shall mean, for any calendar year, that year's annual average consumer price index for urban wage earners and clerical workers, all items (1957-1959 equal one hundred) -- compiled by the Bureau of Labor Statistics, United States Department of Labor;

(2) "Cost-of-living factor" for the purposes of this section for any year shall mean the ratio of the index for the previous year to the index for the year preceding the initial date of payment of the retirement allowance, except that, in no event, shall the cost-of-living factor, for any year subsequent to 1971, be

(a) less than 1.000;

(b) more than one hundred three percent or less than ninety-seven percent of the previous year's cost-of-living factor; or

(c) such as to yield a retirement allowance, for any individual, less than that which was in effect July 1, 1972;

(3) The "initial date of payment" for the purposes of adjusting the annuity portion of a retirement allowance for the purposes of this section shall mean the date of retirement of a member.

(4) The "initial date of payment" for the purposes of adjusting the pension portion of a retirement allowance for the purposes of this section shall mean the date of retirement of a member or July 1, 1972, whichever is later: PROVIDED, That *this 1973 amendment to this subsection shall be retroactive to July 1, 1973.

(5) Each service retirement allowance payable from July 1, 1973, until any subsequent adjustment pursuant to subsection (6) of this section shall be adjusted so as to equal the product of the cost-of-living factor for 1973 and the amount of the retirement allowance on the initial date of payment.

(6) Each service retirement allowance payable from July 1st of any year after 1973 until any subsequent adjustment pursuant to this subsection shall be adjusted so as to equal the product of the cost-of-living factor for the year and the amount of the retirement allowance on the initial date of payment: PROVIDED, That the director finds, at his or her sole discretion, that the cost of the adjustments shall have been met by the excess of the growth in the assets of the system over that required for meeting the actuarial liabilities of the system at that time.

HISTORY: 1991 c 35 § 56; 1973 2nd ex.s. c 32 § 1; 1973 1st ex.s. c 189 § 9.

NOTES:

0-000000593

*REVISER'S NOTE: "this 1973 amendment" changed the date in subsection (4) from "June 30, 1970" to "July 1, 1972", as appears above.

INTENT -- 1991 C 35: See note following RCW 41.26.005.

EMERGENCY -- SEVERABILITY -- 1973 2ND EX.S. C 32: See notes following RCW 41.32.310.

SEVERABILITY -- 1973 1ST EX.S. C 189: See note following RCW 41.50.215.

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, part, article, chapter or title.



1 of 1 DOCUMENT

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*** ARCHIVE MATERIAL ***

*** THIS SECTION IS CURRENT THROUGH THE 1994 EDITION ***
*** [1994 FIRST SPECIAL SESSION OF THE LEGISLATURE] ***

TITLE 41. PUBLIC EMPLOYMENT, CIVIL SERVICE AND PENSIONS
CHAPTER 41.40. WASHINGTON PUBLIC EMPLOYEES' RETIREMENT SYSTEM
"PLAN I"

Rev. Code Wash. (ARCW) § 41.40.195 (1994)

§ 41.40.195. Adjustment in pension portion of service retirement allowance for prior pensions

(1) "Index" for the purposes of this section, shall mean, for any calendar year, that year's annual average consumer price index for urban wage earners and clerical workers, all items (1957-1959 equal one hundred) -- compiled by the Bureau of Labor Statistics, United States Department of Labor;

(2) "Cost-of-living factor", for any year shall mean the ratio of the index for the previous year to the index for the year preceding the initial date of payment of the retirement allowance, except that, in no event, shall the cost-of-living factor, for any year subsequent to 1971, be

(a) less than 1.000;

(b) more than one hundred three percent or less than ninety-seven percent of the previous year's cost-of-living factor; or

(c) such as to yield a retirement allowance, for any individual, less than that which was in effect July 1, 1971;

(3) "Initial date of payment" shall mean:

(a) The date of retirement of a member, or

(b) In the case of beneficiary receiving an allowance pursuant to the automatic application of option II pursuant to RCW 41.40.270(2), the first day of the month following the date of death;

(4) Each service retirement allowance payable from July 1, 1973 until any subsequent adjustment pursuant to subsection (5) of this section shall be adjusted so as to equal the product of the cost-of-living factor for 1973 and the amount of said retirement allowance on the initial date of payment.

(5) Each service retirement allowance payable from July 1st of any year after 1973 until any subsequent adjustment pursuant to this subsection shall be adjusted so as to equal the product of the cost-of-living factor for such year and the amount of said retirement allowance on the initial date of payment: PROVIDED, That the department finds, at its sole discretion, that the cost of such adjustments shall have been met by the excess of the growth in the assets of the system over that required for meeting the actuarial liabilities of the system at that time.

(6) The cost-of-living increases provided by this section shall be applicable to those individuals receiving benefits calculated pursuant to chapter 41.44 RCW and paid by the public employees' retirement system pursuant to RCW 41.40.407.

0-000000596

Rev. Code Wash. (ARCW) § 41.40.195

HISTORY: 1991 c 35 § 79; 1973 2nd ex.s. c 14 § 1; 1973 1st ex.s. c 190 § 11; 1971 ex.s. c 271 § 6; 1970 ex.s. c 68 § 1.

NOTES:

*REVISER'S NOTE: RCW 41.40.407 was decodified pursuant to 1991 c 35 § 4.

INTENT -- 1991 C 35: See note following RCW 41.26.005.

SEVERABILITY -- 1973 1ST EX.S. C 190: See note following RCW 41.40.010.

SEVERABILITY -- 1971 EX.S. C 271: See note following RCW 41.32.260.

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, part, article, chapter or title.

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Dear Clerk:

Attached for filing in the above-referenced matter is Respondents' Answer to Amicus Curiae Briefs (with Appendix A).

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