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SUPREME COURT No. 88546-0

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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WASHINGTON DEPARTMENT OF RETIREMENT SYSTEMS and  
THE STATE OF WASHINGTON,

Petitioners,

vs.

WASHINGTON EDUCATION ASSOCIATION, *et al.*,

Respondents.

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**PETITIONERS' SUPPLEMENTAL BRIEF**

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 ORIGINAL

## I. INTRODUCTION

In responding to amicus briefs and at oral argument, Plaintiffs emphasized a 1973 statute, arguing that it barred the Legislature from terminating the UCOLA. In their merits briefing, however, Plaintiffs mentioned the 1973 statute only in passing, never citing its text or mentioning it specifically in the Argument section of their brief. Because of the significance of this case, because the State had no opportunity to respond in writing to Plaintiffs' reply to amicus briefs, and because the Court's questions at oral argument suggested interest in the 1973 statute, the State is filing this supplemental brief under RAP 10.1(h) to address solely that limited issue.

Plaintiffs now argue that the UCOLA was a replacement benefit for the 1973 COLA, and if the UCOLA can be terminated, then it was an inadequate replacement benefit. That argument fails for two reasons.

First, Plaintiffs have failed to meet their burden of proving, beyond a reasonable doubt, that the UCOLA statute—even with its reservation of rights—was an inadequate replacement for the 1973 COLA (and the other limited COLAs available prior to 1995). The Department of Retirement Systems never paid the 1973 COLA between 1980 and 1995 to PERS 1 members and never paid the 1973 COLA at all to TRS 1 members, and Plaintiffs offered no evidence that the pre-condition for it to be paid

again—excess funds in Plan 1—would ever be met in the future. By contrast, Plan 1 retirees received hundreds of millions of dollars in payments through the UCOLA between 1995 and 2011, and received other significant benefits in the same statute that remain in effect. Moreover, Plan 1 retirees who already received UCOLA adjustments will continue to receive the benefit of those adjustments throughout their lifetimes. The fact that the UCOLA could be and was terminated cannot mean that the hundreds of millions of dollars it provided (and will provide) are inadequate to replace a benefit that had not been paid for decades and might never have been paid again.

Second, even if the 1995 statute had not provided adequate replacement benefits, the time to make that argument has long since passed. Plaintiffs suggested otherwise at oral argument by claiming that they could not tell initially whether the 1995 statute was an adequate replacement benefit due to the statute's language. Their claimed understanding of the statute, however, would render the reservation of rights superfluous, and provides no justification for failing to raise this issue sooner.

## II. ARGUMENT

### A. **Even With the Reservation of Rights, the 1995 UCOLA Statute Was A More Than Adequate Replacement for the 1973 COLA and Other Prior COLAs.**

Plaintiffs now claim that the 1995 UCOLA statute's reservation of rights rendered it an inadequate replacement for the 1973 COLA and the other, limited pre-1995 COLAs. When the Legislature modifies a pension plan, however, the changes will be upheld so long as they "are reasonable and equitable." *Vallet v. City of Seattle*, 77 Wn.2d 12, 21, 459 P.2d 407 (1969). The burden is on Plaintiffs to offer facts proving, beyond a reasonable doubt, that any modification fails this test. *Retired Pub. Emps. Council of Wash. v. Charles*, 148 Wn.2d 602, 623, 62 P.3d 470 (2003); *Letterman v. City of Tacoma*, 53 Wn.2d 294, 299, 333 P.2d 650 (1958).

Plaintiffs, however, have offered no evidence whatsoever that they would have been better off under the 1973 COLA and the other, limited pre-1995 COLAs. They ask this Court to assume that they would have been better off because the 1973 COLA contained no reservation of rights. But this Court repeatedly has refused to simply assume that pension changes harm plaintiffs. *See, e.g., Charles*, 148 Wn.2d at 627 (rejecting plaintiffs' claim where they failed to show harm from change to retirement system); *Letterman*, 53 Wn.2d at 299 (where a plaintiff fails to offer "facts which would establish that" he was better off under a prior pension statute,

then a later statute “can validly be applied to” him). The Court should do the same here and find that Plaintiffs have not met their burden of proving beyond a reasonable doubt that they are now worse off. This is so for two reasons.

First, Plaintiffs have not shown that they would have received more under the 1973 COLA than they have received and will receive via the UCOLA. The 1973 statute authorized DRS to pay COLAs if it found, “at its sole discretion,” that there were sufficient excess funds in Plan 1 to cover the cost of a COLA. Laws of 1973, 1st ex. sess., ch 189, § 9(6); Laws of 1973, 1<sup>st</sup> ex. sess., ch. 190, § 11(4). DRS never made such a finding as to TRS 1, and never made such a finding between 1980 and 1995 as to PERS 1, so retirees received no payments under the 1973 statute during that time. *Retired Pub. Emps. Council of Wash. v. State*, 104 Wn. App. 147, 149, 16 P.3d 65 (2001). Moreover, Plaintiffs have offered no facts to prove that COLAs ever would have been paid again under the 1973 statute. To make such a showing, they would need to prove that Plan 1 will have excess funds available to cover the cost of such COLAs in the future. That is far from a foregone conclusion. PERS 1 is currently only 69% funded, and TRS 1 is only 79% funded. *See* Appendix to Brief of Amicus Curiae Washington State Legislature at 8. Both plans are closed to new employees, so the number of employees working in each

plan dwindles by the day while the number of retirees increases, which reduces contributions, reduces funds available to earn investment returns, and increases payouts. Thus, Plaintiffs cannot plausibly ask this Court to assume that they would eventually have received payments under the 1973 statute in the future. The mere fact that a COLA would still be theoretically possible under the prior statute cannot suffice to show that the hundreds of millions of dollars already provided by the UCOLA and the hundreds of millions more that retirees will receive through the UCOLA increases now built into their pensions were an inadequate replacement.

Second, the 1995 UCOLA statute contained a number of other significant pension enhancements that included no reservation of rights and that the Legislature left in place when it repealed the UCOLA. For example, the 1995 statute increased the minimum pension payment retirees receive by over 30 percent, and provided that the minimum payment would increase annually. *See* Laws of 1995, ch. 345, §§ 3(3), 7(3). Retirees over age 79 receiving the minimum benefit also got a permanent increase in their pension. *See id.* §§ 4(2), 8(2). And the statute provided that anyone who had turned 70 by July 1, 1993, and had been receiving pension benefits as of July 1, 1988, would receive a permanent increase in their pension of \$3/month per year of service (e.g., a person

who had worked for 30 years received a \$1,080 annual increase in their pension). *See id.* §§ 4(1), 8(1). Moreover, the 1995 statute provided permanent increases in retirement allowances for Plan 1 beneficiaries who were over age 70. *See id.* §§ 4(3), 8(3). Thus, the 1995 statute contained a number of enhancements besides the UCOLA, enhancements that remain in effect.<sup>1</sup>

For both of these reasons, Plaintiffs have failed to prove beyond a reasonable doubt that they are any worse off under the 1995 statute than they would have been under the prior regime. This failure of proof dooms their claim that the 1995 statute, even with its reservation of rights as to the UCOLA, was not a “reasonable and equitable” replacement. *Vallet*, 77 Wn.2d at 21.

**B. Even if the 1995 Statute Were An Inadequate Replacement for Prior COLAs, the Time to Challenge It Has Long Since Passed.**

At oral argument, Plaintiffs suggested that the limitation period for challenging the reservation of rights in the 1995 UCOLA statute did not begin in 1995. They claimed that they suffered no harm at that time, and that they could not tell at that time that the reservation of rights allowed

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<sup>1</sup> Plaintiffs’ argument also ignores the additional substantial increase in the alternate minimum benefit that accompanied the UCOLA’s repeal in 2011. *See* Laws of 2011, ch. 362, §§ 4(5), 7(6).

the UCOLA to be repealed without the provision of replacement benefits. Neither argument withstands scrutiny.

The 1995 UCOLA statute made crystal clear that: “The legislature reserves the right to amend or repeal this section in the future and no member or beneficiary has a contractual right to receive this postretirement adjustment not granted prior to that time.” Laws of 1995, ch. 345, §§ 2(6), 5(6). This language clearly put Plaintiffs on notice that the UCOLA could end, it never suggested that repeal or amendment was contingent on providing replacement benefits, and it did not appear in other pension enhancement provisions in the same act, such as the increase in the minimum pension. *See* Laws of 1995, ch. 345, §§ 3, 7.

At oral argument, Plaintiffs claimed that they were not required to sue within three years of the statute’s enactment because they suffered no damages until later, when the UCOLA was repealed. But if Plaintiffs had contract rights in the prior system and the enactment of the allegedly inadequate replacement impaired those rights, that impairment is what started the limitation period, not any subsequent damage. *See, e.g., Taylor v. Puget Sound Power & Light Co.*, 64 Wn.2d 534, 538, 392 P.2d 802 (1964) (“Running of the statute of limitations against the breach of contract . . . is not postponed by the fact that the actual or substantial damages did not occur until a later date.”). Plaintiffs suggested at

argument that the impairment did not occur until the legislature terminated future UCOLA increases, but the exercise of a power specifically granted by a contract (here, the statute) cannot be an impairment of the contract. *See City of Tacoma v. Boutelle*, 61 Wn.434, 440, 112 P. 661 (1911) (finding no impairment where the City merely exercised a power it had reserved in the original enactment).

Plaintiffs next claimed that the limitation period did not begin in 1995 because they could not tell at that time that the reservation of rights allowed the UCOLA to be repealed without the provision of replacement benefits. That argument fails because their claimed understanding of the statute ignored its plain language by writing the reservation of rights out of the statute. Even without a reservation of rights, the legislature can end a pension benefit by providing comparable replacement benefits. *Vallet*, 77 Wn.2d at 20-21. Thus, the legislature would not have needed to include a reservation of rights to keep that option open, and the reservation clause would be meaningless. Plaintiffs cannot claim that the statute was unclear based on a reading that gave the reservation clause no effect. *See, e.g., City of Seattle v. Williams*, 128 Wn.2d 341, 349, 908 P.2d 359, 363 (1995) (“[W]e are duty-bound to give meaning to every word that the Legislature chose to include in a statute and to avoid rendering any language superfluous.”). Yet that is exactly what they are doing here. The plain

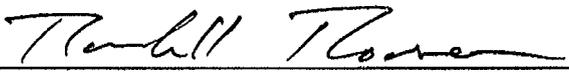
language of the 1995 statute put Plaintiffs on notice that the UCOLA could be amended or repealed, and they cannot justify delay in challenging that provision based on an untenable reading of it.

### III. CONCLUSION

It was Plaintiffs' burden to prove beyond a reasonable doubt that the UCOLA—even with its reservation of rights—was not a “reasonable and equitable” replacement for prior COLAs. They have not met their burden because they offered no evidence whatsoever that the hundreds of millions of dollars they have received and will receive via the UCOLA is less than they would have received under the prior regime. Even if they had offered such evidence, it is too late now to argue that the 1995 statute was an inadequate replacement. The Court should therefore reject Plaintiffs' theories and enforce the plain language of the UCOLA statute.

DATED this 12<sup>th</sup> day of November, 2013.

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*Washington Department of Retirement Systems, et al. v. Washington Education Association, et al.*  
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Dear Clerk of the Court:

Attached for filing please find the following documents in regard to the above referenced action:

1. Petitioners' Supplemental Brief, and;
2. Certificate of Service.

Thank you  
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