

No. 98495-6

No. 79573-2-I

IN THE COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

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GAILIN HESTER, BRETT YACKLIN,  
DOUG CLEVINGER, and GREG ULRICH,  
each individually and on behalf of their respective marital  
communities, and on behalf of all others similarly situated,

Petitioners,

v.

STATE OF WASHINGTON;  
WASHINGTON DEPARTMENT OF RETIREMENT SYSTEMS;  
and WASHINGTON STATE PATROL,

Respondents.

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APPELLANTS' CORRECTED OPENING BRIEF

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## I. INTRODUCTION

“No State shall . . . pass any . . . Law impairing the Obligation of Contracts.” Const., Art. I, § 10. Appellants Gailin Hester, Brett Yacklin, Doug Clevenger and Greg Ulrich are current and former Washington State Patrol (“WSP”) officers commissioned before July 1, 2001 (collectively the “Troopers”). These Troopers are members of the Washington State Patrol Retirement System (the “Plan”). From when the Plan began in 1947 until July 1, 2001, the State guaranteed all troopers a pension calculated from their “Average Final Salary,” which calculation included all of a trooper’s overtime earned during the applicable benefit calculation period.

Then in 2001, the Legislature passed a statute to exclude broad categories of overtime from troopers’ retirement benefit calculation, and applied that exclusion to these Troopers:

“Salary,” for members commissioned prior to July 1, 2001, shall exclude any overtime earnings related to [certain transportation projects], or any voluntary overtime, earned on or after July 1, 2001.

Laws of 2001, Ch. 329, § 3, codified in current form at RCW

43.43.120(21)(a) (the “Overtime Exclusion”).<sup>1</sup> Most of that excluded

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<sup>1</sup> In 2017, the Legislature changed this definition of “salary” to include up to 70 hours a year of the overtime previously excluded by the 2001 legislation, which change now appears in RCW 43.43.120(21)(a). Troopers challenge this revised definition as well if it

“voluntary overtime” consists of services WSP provides to third-parties (such as the National Football League), who are contractually required to reimburse WSP for “overtime salary and benefits.” *E.g.*, CP 810-867. Troopers still work that overtime, the third-parties continue to pay the State for that overtime (including retirement benefits), but the State no longer counts that overtime toward troopers’ retirement benefits.

These Troopers challenge that change as an unconstitutional impairment of their retirement benefits. When the State legislates to modify its own contracts, such changes are subject to heightened scrutiny. *Tyrpak v. Daniels*, 124 Wn.2d 146, 151-52, 874 P.2d 1374 (1994). Public employees’ pension benefits are contractual, vest at the inception of employment and may not later be reduced except in extreme circumstances. *Bakenhus v. City of Seattle*, 48 Wn.2d 695, 701-702, 296 P.2d 536 (1956); *accord Bowles v. Wash. Dep’t. of Retirement Sys.*, 121 Wn.2d 52, 65, 847 P.2d 440, 446 (1993). “[T]he cases established flat rules prohibiting the State from altering pension rights in a manner that is disadvantageous to the [public] employees.” *Bowles*, 121 Wn.2d at 67.

Below, the State conceded impairment, but claimed the Overtime Exclusion was still constitutional, and argued that the Troopers’ suit was

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does not count any overtime over 70 hours a year, and refer to both the original 2001 complete exclusion and the 2017 cap on overtime as the “Overtime Exclusion.”

too late. So broadly speaking, this appeal presents issues related to two legal questions: (1) whether the State met its heightened burden to show that the impairment was both reasonable and necessary to achieve a legitimate public purpose and (2) when do the Troopers' claims accrue for statute of limitations purposes and what limitations period applies.

As explained further below, the State failed to show any legitimate public purpose for this detrimental change, and the trial court was incorrect in holding otherwise. Preventing the exercise of a contractual right is never a legitimate public purpose. Were it otherwise, the Contracts Clauses of the State and Federal Constitutions would be meaningless. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 (1977). In the realm of pension benefits, the only acceptable public purpose is that the change was required to preserve the system. *Bakenhus*, 48 Wn.2d at 701-702. It is undisputed that the Plan was fully solvent (indeed overfunded) in 2001. When the State fails to show a legitimate public purpose, "even minimal impairment of contractual expectations in public contracts violates the contract clause where there is no real exercise of the police power to justify the impairment." *Pierce County v. State*, 159 Wn.2d 16, 28, 148 P.3d. 1002 (2006).

Further, even if the State could show a public purpose, the Legislature did not provide sufficiently comparable offsetting advantages

to save the Overtime Exclusion. The “advantages” posited by the State were not true advantages and did not make up for the lost initial retirement benefit. The trial court erred when it denied the Troopers’ motion for summary judgment on impairment, as the State could not (as a matter of law) show any legitimate public purpose for the Overtime Exclusion, and it did not provide comparable new advantages to these Troopers (or any other troopers commissioned before 2001).

As to the statute of limitations and laches questions, the Supreme Court has repeatedly held that a claim for impairment of pension benefits does not accrue, and the statute of limitations does not begin to run, until an employee retires. *E.g., Washington Educ. Ass’n v. Washington Dep’t of Ret. Sys.*, 181 Wn.2d 233, 248, 332 P.3d 439 (2014). The trial court correctly held that the Troopers’ claims accrue when they retire and that laches does not bar these claims. CP 896.

But the trial court was incorrect in deciding a three-year statute of limitations applies to these claims, and that the “continual accrual” doctrine does not apply. CP 896. Pension claims are subject to a six-year statute of limitations “when the statutory language and the circumstances establish a legislative intent to create rights contractual in nature which are enforceable against the State.” *Noah*, 112 Wn.2d at 845. Here, the Troopers’ contractual rights were established by the pension statute itself

(RCW Ch. 43.43), and so should be subject to at least a six-year statute of limitations like any other contract claim.

Further, “[t]he right to receive periodic payments under a pension is a continuing one, and any time limitation upon the right to sue for each instalment necessarily commences to run from the time when that instalment actually falls due.” *Abbott v. City of Los Angeles*, 50 Cal. 2d 438, 462, 326 P.2d 484 (1958) (internal citation omitted). This is known as the continual accrual theory. The trial court was incorrect in refusing to apply the continual accrual theory here. CP 896.

## **II. ASSIGNMENTS OF ERROR**

**First Assignment of Error.** Whether the trial court erred by denying the Troopers’ motion for partial summary judgment as to liability on their state and federal Contracts Clause claims.

- ***Issue 1.*** Did the State meet its burden to show that the Overtime Exclusion was necessary for a legitimate public purpose, as the state and federal constitutions require?
- ***Issue 2.*** If the State met its burden to show the Overtime Exclusion was necessary for a legitimate public purpose, did it also meet its burden to show that the Overtime Exclusion replaced the lost pension benefits with “comparable” new advantages?

- **Issue 3.** Are the Trooper’s contribution rates relevant in comparing supposed new benefits and if so, was the change a benefit?

- **Issue 4.** Are variable cost-of-living adjustments in the future a “comparable new benefit” when the Trooper’s initial defined benefit at retirement is lower than it would otherwise be without the Overtime Exclusion, and it is unclear whether any Trooper will live long enough to see a benefit from the cost-of-living adjustment?

**Second Assignment of Error.** Whether the trial court erred when it held that the Troopers’ contract impairment claims were all subject to a three-year (rather than six-year) statute of limitations, and that all the claims accrued upon retirement rather than be subject to the “continuous accrual” rule that would allow a new claim to accrue with each diminished pension check?

- **Issue 5.** Should the continual accrual rule apply here, which would allow the Troopers to challenge each impaired payment retirement check received within the limitations period, no matter when they retired?

- **Issue 6.** How long is the limitations period for the Troopers’ claims of contract impairment: six years as it is for all written contracts, or only three years because the WSPRS statute did not comprise the whole of the contract?

### III. STATEMENT OF THE CASE

**A. For over fifty years, troopers' "Average Final Salary" has included all overtime worked.**

The WSPRS was created in 1947, and its administration was vested in a seven-member Retirement Board, most of which were required to be WSP employees. Laws of 1947, Ch. 250, § 3. From the beginning, a troopers' monthly retirement benefit was calculated "based on his average salary allowed." Laws of 1947, Ch. 250, § 15. The Legislature did not define "salary" in that original act (and "salary" remained undefined until the Overtime Exclusion). Most state employees similarly receive a pension based on an average final compensation calculation that includes overtime.<sup>2</sup>

In 1951, the Legislature added a definition for "Average Final Salary," which was generally "the average monthly salary received by a member during his last ten years of service as an employee of the Washington state patrol . . . ." Laws of 1951, Ch. 140, § 1(n). The Legislature also put in a permanent funding mechanism that increased the troopers' contributions to 5% of salary (Laws of 1951, Ch. 140, § 9), and required the State to contribute a further amount sufficient to "provide for

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<sup>2</sup> *E.g.*, RCW 41.32.010(6) ("average final compensation" does not exclude overtime for Teachers' Retirement System); RCW 41.40.010(8)(b) ("compensation earnable" includes overtime for Public Employees Retirement System).

the payment of all future benefits for such members . . .” Laws of 1951, Ch. 140, § 3.<sup>3</sup>

In 1963, the Legislature increased the member contribution to 7%, which remained the member contribution until 2000. Laws of 1963, Ch. 175, § 4. In 1969, the Legislature changed the definition of “average final salary” to mean the “average monthly salary received by a member during his last two years of service or any consecutive two year period of service, whichever is greater . . .” Laws of 1969, Ch. 12, § 1(14). That definition remained essentially static until 2001.

In 1971, the monthly retirement benefit was increased to 2% of “average final salary” times number of years served (up to 75% of salary), which remains the Plan’s retirement benefit today. Laws of 1971, 1<sup>st</sup> Ex. Sess., Ch. 278, § 1. Thus, by 1971, these Troopers’ contract terms were fixed by statute. Until July 1, 2001, everything earned by a trooper (including all overtime) was included in that Average Final Salary calculation. *E.g.*, CP 62 (“Also, included in AFS for WSPRS members is any overtime pay.”)

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<sup>3</sup> That provision continued to appear in RCW Ch. 43.43 in essentially the same form until 1989, when the Legislature tinkered with all public employee pension plans, and for the Plan, mandated a State contribution rate of 21.47%. Laws of 1989, Ch. 273, § 6.

**B. When commissioned, these Troopers expected to have all overtime worked count toward their pensions.**

The four named plaintiffs all joined the WSP around the 1990s. Greg Ulrich was commissioned in 1991 (CP 50-52), Gailin Hester was commissioned in 1995 (CP 42-44), Doug Clevenger was commissioned in 1996 (CP 48-49), and Brett Yacklin was commissioned in 1987. CP 45-47. When they were commissioned, all of their salary, including all of their overtime, worked during their highest paid two years would count toward their “Average Final Salary.” *E.g.*, CP 62. The Troopers relied on that understanding of their pension benefits when they took their jobs. The pension benefit is especially important to Troopers because, unlike other state employees, state troopers do not pay into or collect Social Security. CP 65.

Troopers have always had a fraction of their paycheck deducted for their contributions to the Plan. But from 1963 through 1997, the State (through the WSP) contributed at least twice as much as the troopers to ensure that the Plan was fully funded.<sup>4</sup> CP 84-85, 96-97.

Unlike most other state employee retirement plans, the WSPRS had only one plan and one retirement benefit for all members until July 1, 2001, when ESB 5143 went into effect. While other state retirement plans

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<sup>4</sup> Before 1963, the State contributed at a 3:1 ratio. CP 96-97.

(such as the Public Employees Retirement Plan, or PERS) created “Plan 2s” and “Plan 3s” with lesser benefits for new enrollees throughout the 1970s, 1980s and 1990s because of various perceived funding crises, the Plan remained a unitary and fully funded system. CP 59-66.

In 1998, the Legislature created a “Pension Funding Council,” who was tasked with setting the State’s future contribution rate for the Plan. Laws of 1998, Ch. 283, § 6. That legislation transferred the previous powers of the Retirement Board (which Board had always included troopers and which had been managing the Plan for half a century) to the PFC. By eliminating the Board, Washington would become one of only “three states that doesn’t have an independent body to protect members’ interests.” CP 224. Perhaps not coincidentally, at about the same time, the State dropped its contribution rate to the Plan below the historical 2:1 ratio for the first time in fifty years. CP 96-97.

By 1999, the State stopped contributing to the Plan altogether. CP 96. According to the Legislature’s Joint Committee on Pension Policy, the State ceased its contributions “due to the sound funding status of the WSPRS . . .” CP 59. But as also noted in that Report, the unique benefits of the Plan “would not likely be possible without the high level of state funding in support of the” Plan. CP 59. The Troopers’ Plan is unique:

The features of the Washington State Patrol Retirement System make it distinct from other State administered retirement plans. Its longevity alone (53 years) gives it a unique status; no other open plan has been in place longer than 23 years. As a result, the records of WSPRS members and annuitants are more historically complete than the closed Plan 1 systems, or the currently open plans. Beyond its duration, the other features that make the WSPRS unique are those that were specifically excluded from the more recent plans; features that would not likely be possible without the high level of state funding in support of the system.

CP 66.

As is evident from contemporaneous pension legislation, the State continued to contribute to almost all other state employee retirement systems at the historical 2:1 ratio. Laws of 2000, 2<sup>nd</sup> Sp.S., Ch. 1, § 903. Although the State stopped its contributions to the Plan in 1999, it continued to deduct 7% from troopers' paychecks to fund the Plan.

CP 96-97.

Because of the Plan's surplus, the Legislature reduced the troopers' deduction from 7% to 3% of their monthly paycheck in 2000. Laws of 2000, Ch. 17, § 1; *see also* CP 84-85 (House bill analysis on that law). At that time, the Plan was hyper-solvent. According to the State's December 2002 actuarial valuation, the Plan had at least a \$57 million surplus at that time based on current projections. CP 118, *see also* CP 84 (\$184 million surplus as of 1999).

As noted by the 2000 Joint Committee on Pension Policy Report,  
at that time:

The average WSPRS retiree had an estimated salary of \$46,977 and an average final compensation of \$57,633, which was 23 percent above the final two-year regular salary. An estimated 60% of that 23% was attributable to overtime earning in the last two years of employment.

CP 63. In other words, before 2001, the average trooper earned an extra \$6,394 per year working overtime in his or her (usually last) two years, which constituted almost 14% of their Average Final Salary. The effect of the Overtime Exclusion was to lower the Average Final Salary – and the initial benefit – of any trooper who worked voluntary or other excluded overtime during the period for calculating their pension benefits. CP 308. Despite the “sound funding” of the Plan, the State unconstitutionally cut these Troopers’ benefits by enacting the Overtime Exclusion.

**C. In 2001, the Legislature eliminated “voluntary” and other overtime from troopers’ average final salary, even though the Plan was solvent.**

In 2001, WSP had 1,027 active troopers, with an average age of 38 and an average annual salary of \$58,633. CP 133. At that time, the Plan had 696 retired members, drawing an average monthly benefit of \$2,647 (\$31,764 per year). CP 133. As of 2001, the Plan’s total assets had a market value of at least \$608 million. CP 135. The Plan at that time had at least a \$57 million surplus (even after accounting for future retirement

benefits under the existing Plan). CP 118. The Defendants have offered no legitimate explanation for why, given the hyper-solvency of the Plan, the Legislature decided to cut troopers' initial retirement benefits in 2001. But cut it did.

Senate Bill 5143, as originally offered in January 2001, proposed – for the first time in over 50 years – a definition of “salary” for the Plan. CP 226. In that original bill, the term “salary” was defined as only excluding “any overtime earnings related to RCW 47.46.040 earned on or after July 1, 2001.” CP 201. The referenced statute dealt with public-private transportation demonstration projects.

But in March, Senators Long and Brown added an amendment (that later passed) creating another category of excluded overtime – so-called “voluntary” overtime. CP 216-217. There was and is no definition of “voluntary” overtime, and over the years it has grown to encompass anything that the WSP wants to define as “voluntary,” as explained below.

As enacted, the 2001 Overtime Exclusion defined “salary” to “exclude any overtime earnings related to RCW 47.46.040 [certain public-private transportation demonstration projects], or any voluntary overtime, earned on or after July 1, 2001.” CP 183. ESB 5143 is codified in its current form at RCW 43.43.120(21). Although ESB 5143 did not define what constitutes “voluntary overtime,” the practical impact of that

legislation is to reduce troopers' retirement benefits by reducing the amount of their Average Final Salary.

As admitted by the state actuary then: "We do not have the data to estimate the average effect of eliminating voluntary overtime. This will have an effect on individuals who have a large amount of voluntary overtime in their last two years of employment." CP 560.

ESB 5143 included a few other changes as well. For the first time in 50 years, it required troopers to contribute at the same rate as the State, but put a 2% floor on troopers' contribution rate (so they would have to contribute at least 2% of their salary even when the Plan was fully funded and the State contributed nothing). That floor was meant to save the State money at the troopers' expense: "However, until the [P]lan is no longer fully funded this cost [i.e., the State's contribution] will be 'funded' by the surplus in the [P]lan and the employee's 2% contribution rate." CP 218.

It also changed troopers' COLA from a fixed 2% per year to a variable compounding CPI-based COLA with a maximum increase of 3% per year. RCW 43.43.260(5). Since the turn of the century, the CPI has been under 2% during eight years, and over 3% in only six years. CP 308, 869-70. RCW Ch. 43.43 also included a severability clause: "If any provision of this chapter or its application to any person or circumstance is

held invalid the remainder of the chapter, or its application to any other person or circumstances is not affected.”<sup>5</sup> CP 872.

**D. The Overtime Exclusion harms these Troopers and all other troopers commissioned before July 1, 2001.**

Appellants Gailin Hester (commissioned in 1995) and Brett Yacklin (commissioned in 1997) served as sergeants in the Washington State Patrol (“WSP”) until retiring in 2017 and 2014, respectively. CP 42-47. Appellants Clevenger (commissioned in 1996) and Ulrich (commissioned in 1991) were working as WSP troopers when the case started; trooper Ulrich retired at the end of last year. CP 48-52. As a result of the Overtime Exclusion, the Troopers’ initial pension benefits have been reduced. CP 308.

Appellant Ulrich’s testimony succinctly captures the paradox of the Overtime Exclusion:

As a motorcycle officer, escorting is always a big part of what we do on a regular basis, escorting dignitaries from around the world who visit Seattle. I have recently escorted the Prince of Saudi Arabia and one of the leaders from Japan. I’ve escorted all our Presidents in the last 19 years. These details are mostly straight-time, but when they exceed the ten-hour shift, it is overtime that counts toward my retirement.

On the other hand, I and fellow officers also escort visiting teams for all the NFL games, visiting teams that play the

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<sup>5</sup> This provision was part of the chapter for many years (including in 2001 when the Overtime Exclusion went into effect), but appears to have been omitted in 2016.

Huskies football team, some Mariners games, and some world soccer games played in Seattle. We also provide security for the NFL and college games. What's puzzling to me is these are all classified on WSP payroll as "voluntary" overtime. We also work many bridge closures and Seafair details that are also considered "voluntary" and don't count toward retirement calculations. Before 2001, all of these assignments would count toward my Average Final Salary used to calculate my pension.

My last two years of pay stubs show I had about 300 hours of overtime that was considered "voluntary," and thus are not considered earnings toward my pension.

CP 51. Similarly, appellants Hester's and Yacklin's overtime counts toward their Average Final Salary while patrolling the public highways, but when they patrol the Hood Canal Bridge, the State classifies that overtime as "voluntary" and excludes it from their Average Final Salary calculation. CP 42-47. In short, these Troopers' duties are the same whether they are working "regular" overtime or "voluntary" overtime.

So what is the distinction between "regular" overtime escorting presidents and princes, and "voluntary" overtime escorting ball teams and patrolling bridges? The principal difference is that the excluded "voluntary" overtime consists of security services WSP contractually provides to third-parties (such as the National Football League or the Navy). CP 849 – 857. WSP's contracts with those third-parties require that "the Purchaser shall reimburse WSP for . . .[o]vertime salary *and benefits* for actual hours worked by Officer(s)" as well as all indirect

costs. CP 850, 855, 860, 865. The State has entered into over 3,000 such contracts since the Overtime Exclusion went into effect. CP 810-847.

These third-parties would be mostly responsible for the payments necessary to fund the inclusion of “voluntary” overtime in the calculation of Average Final Salary. This uncontested fact undercuts all of the State’s policy arguments. The Overtime Exclusion did nothing to prevent “pension-spiking,” as troopers whose duties do not include working on such third-party contracts can still increase their Average Final Salary by working lots of non-voluntary overtime. But for other troopers who are assigned to escort football teams or stop traffic to let Navy ships pass unmolested under a bridge, their overtime does not count toward their retirement benefit. There is and was no good reason for eliminating that overtime from the calculation of Average Final Salary, as the burden for funding this class of overtime (including the associated pension benefits) is borne mainly by third-parties, not the state’s taxpayers.

**E. The Legislature repealed part of the Overtime Exclusion in 2017, but these Troopers’ pension benefits are still impaired.**

In 2017, the Legislature again changed the definition of “salary,” so that Troopers can now count up to 70 hours of “voluntary” overtime earned on or after July 1, 2017 toward Average Final Salary. RCW 43.43.120(21)(a). That partial restoration is more evidence that there was

no legitimate public purpose for the original Exclusion.<sup>6</sup> *See Eagan v. Spellman*, 90 Wn.2d 248, 258, 90 P.2d 1038 (1978) (Rosellini, J. concurring)(noting that King County’s restoration of previously eliminated pension rights was itself evidence that the earlier change was an unconstitutional impairment).

**F. The proceedings below.**

In November 2017, the Troopers sued to challenge the Overtime Exclusion as an unconstitutional impairment of their pension contracts, and proposed to do so as a class action. CP 1-9. Before class certification,<sup>7</sup> the parties cross-moved for summary judgment.

**1. The State moved for summary judgment, arguing all claims are barred by the statute of limitations or laches, and the trial court granted the motion in part.**

The State moved to dismiss the Troopers’ claims, arguing that the claims accrued (and the limitations period started running) when the legislature enacted the 2001 Overtime Exclusion and that the three-year

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<sup>6</sup> Trooper Hester worked “voluntary” overtime in 2016 and in 2017, but only his “voluntary” overtime from July 1, 2017 through the date of his retirement in November 2017 counted toward his Average Final Salary. Trooper Yacklin retired before the change so got no benefit.

<sup>7</sup> The Troopers moved for class certification early in the case, but on the morning of the hearing, the assigned judge recused herself. CP 23. The Troopers moved again for class certification along with their summary judgment motion. CP 28–40. Even so, the trial court deferred ruling on that motion until after summary judgment; once the summary judgment order was entered, the Troopers sought discretionary review. Appellants believe there are over 500 troopers affected by the Overtime Exclusion (i.e., commissioned before July 1, 2001). CP 282-304. The proposed class would not include troopers commissioned after that time.

limitations for unwritten contracts claims applied, not the six-year limitations period for claims based on written contracts. CP 609-630

The Troopers cross-moved for judgment in their favor on these issues. CP 742-766. They argued that their impairment claims accrue at retirement, since that is the first time the State pays a pension benefit less than what it promised, as previous Washington cases have held. They argued that a six-year limitations period applies, because the statute itself created the contract—there was no need to refer to an administrative interpretation or other extra-statutory authority. And they argued that a separate impairment claim accrues (and a new limitations period starts) every time the State pays an impaired monthly benefit.

The trial court granted the State's motion in part. It held that the Trooper's claims accrued upon retirement, but that they were subject to only a three-year statute of limitations and that the continual accrual theory did not apply to extend that period. Thus, the trial court dismissed trooper Yacklin's claims. CP 894-897.

**2. The Troopers moved for partial summary judgment as to the State's liability, the State conceded impairment, but the trial court denied summary judgment.**

The Troopers moved for partial summary judgment on liability. CP 311-334. They argued that the Overtime Exclusion impaired their pension benefits by lowering the Average Final Salary used to calculate

their initial benefit, so there was impairment. The Troopers also argued that the State could not meet its heightened burden to show that the Exclusion was both reasonable and necessary to serve a legitimate public purpose.

In response, the State conceded that “the exclusion of voluntary overtime from the WSPRS’s definition of salary impaired that [contractual] relationship.” CP 683; RP (10/12/18) 36:9-13, 41:1-8. But the State argued that it enacted the Overtime Exclusion to prevent “pension spiking,” and that preventing such “pension spiking” was a legitimate public purpose. CP 684; RP (10/12/18) 42:9-12. The State also argued that the 2001 law excluding “voluntary” overtime earnings also added “comparable new benefits” because it lowered the Troopers’ monthly contribution rates and provided them with a better cost-of-living adjustment (COLA) that the State argued will eventually overcome the lower initial monthly benefit if Troopers live long enough. CP 686.

The Troopers responded that their contribution rates were lowered before the 2001 Overtime Exclusion and, in any event, that lowered rates are not an offsetting benefit.<sup>8</sup> As Sergeant Hester explains:

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<sup>8</sup> See, e.g., *Alameda County Deputy Sheriff’s Ass’n v. Alameda County Employees’ Retirement Ass’n*, 19 Cal. App. 5th 61, 227 Cal. Rptr 3d 787, 831 n.24 (2018) (holding that lowered employee contributions rates are not a “comparable benefit” to save an unconstitutional pension impairment). The California Supreme Court accepted review of the *Alameda County* case, but no date for oral argument has been set.

Starting out retirement with the full amount calculated on the basis of including all overtime would allow me more flexibility to do what I want with my money as earned over many years of working while I'm still relatively healthy, as there is no guarantee that any variable COLA (as was instituted in 2001) will ever make up for the amount of benefits lost by not counting all overtime toward my average final salary.

CP 43. Both the State's economist and the Troopers' economist agreed that the Overtime Exclusion reduced the initial monthly benefit paid to all troopers who worked excluded overtime. CP 308. For Sergeant Hester, actuarial tables confirm that he is likely to be dead before he realizes any benefit from the CPI adjustment. CP 802-806; *see also* RP (10/12/18) 41:10-16.

The trial court ruled that the State had met its burden to show a legitimate public purpose, since the trial court did not believe that it could "second-guess the Olympia legislature as to whether or not the allegations of spiking . . . were legitimate concerns." RP (10/12/18) 61:8-11. But the trial court ultimately denied the State's cross-motion for summary judgment, finding a factual dispute about whether the Overtime Exclusion provided comparable offsetting advantages to the Troopers. CP 894-897.

The trial court certified its Order for immediate discretionary review of the Order under RAP 2.3(b)(4), and this Court accepted review. CP 942-945.

#### IV. ARGUMENT

From *Bakenhus* onwards, courts in this state have consistently found unconstitutional impairment when, after a public employee has started working, the government tinkers with the method of determining that employee's pension benefit in a way that potentially lowers the initial amount the employee will receive upon retirement. *E.g.*, *Bakenhus*, 48 Wn.2d at 702 (statutory cap on the maximum initial benefit to be paid was an unconstitutional impairment for any police officers employed before statute went into effect); *Eisenbacher v. City of Tacoma*, 53 Wn.2d 280, 284-285, 333 P.2d 642 (1958)(statutory cap on maximum initial benefit to be paid as well as attempt to apply later statutory definition of "rank" found to be unconstitutional impairments for firefighters employed before the change); *Eagan v. Spellman*, 90 Wn.2d 248, 257-258, 581 P.2d 1038 (1978) (lowering PERS retirement age from 70 to 65 had the effect of reducing the initial amount received and constituted an unconstitutional impairment for public employee hired before the change); *Washington Fed. of State Employees v. State*, 98 Wn.2d 677, 688-689, 658 P.2d 634 (1983) (portion of statute that prospectively excluded lump-sum payments of unused vacation time from "average final compensation" under PERS unconstitutionally impaired contracts of those already employed); *Bowles*, 121 Wn.2d at 67-69 (regulatory changes that had the effect of excluding

certain vacation and sick leave cashouts in calculating “average final compensation” unconstitutionally impaired contract rights of those employed before the changes).

This case should be no different. The State conceded impairment, could not prove a legitimate public purpose, and the alleged benefits it claimed Troopers received were irrelevant or insufficient to make up for the initially lower benefit. This Court should reverse the trial court’s denial of the Trooper’s motion for partial summary judgment, hold that the Overtime Exclusion is unconstitutional, and remand for further proceedings on class certification and damages.

Further, while the trial court was correct in holding the statute of limitations accrued upon retirement, it was incorrect in holding that only a three-year statute of limitations applied that could not be extended by the continual accrual theory. As explained below, the pension statute itself (RCW Ch. 43.43) establishes the Troopers’ contractual rights and these claims should have been subject to a six-year statute of limitations like all other written contract claims. *Noah*, 112 Wn.2d at 845. Further, “[t]he right to receive periodic payments under a pension is a continuing one, and any time limitation upon the right to sue for each instalment necessarily commences to run from the time when that instalment actually falls due.” *Abbott*, 50 Cal. 2d at 462 (internal citation omitted). The Court

should reverse the trial court's decision on the length of the statute of limitations, hold that a six-year period applies, and that a new claim accrues with each impaired payment received.

**A. The Overtime Exclusion is an Unconstitutional Impairment of These Troopers' Contracts.**

**1. The Constitution Requires Strict Scrutiny of a State's Impairment of its Own Contracts.**

Both the federal and state Constitutions prohibit the state from passing any law that impairs its contractual obligations. U.S. Const. Art. I, § 10; Wash. Const. Art. I, § 23. Chief Justice Marshall described the Contracts Clause, along with its accompanying clauses banning bills of attainder and *ex post facto* laws, as a “bill of rights for the people of each state.” *Fletcher v. Peck*, 10 U.S. 87, 138 (1910). The very purpose of the Contracts Clause is to restrict the State's legislative power and to protect contractual expectations “from the effects of those sudden and strong passions to which men are exposed.” *Fletcher*, 10 U.S. at 138. In other words, the Contracts Clause prevents the State from changing its contracts for political expedience.

Courts apply a more stringent level of review to legislation that may affect the State's own contracts. *Washington Fed'n of State Employees v. State*, 127 Wn.2d 544, 561, 901 P.2d 1028 (1995). When the State is a party to the contract:

complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

*United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 (1977); accord *Tyrpak*, 124 Wn.2d at 151 (holding that heightened scrutiny is applied to State's change to its own contracts). Even if a legitimate public purpose is shown for impairment, the State must still show that the circumstances that necessitated the change "were unforeseen and unintended by the legislature" when the contract was formed. *U.S. Trust Co.*, 431 U.S. at 31. Further, under traditional Contracts Clause analysis, the State also has to show that (1) it could not have implemented any other, less drastic modification, and (2) it could not have achieved its stated goals without the modification. *U.S. Trust Co.*, 431 U.S. at 29-30. As explained in the Fiscal Note accompanying ESB 5143 (CP 216-220), the Overtime Exclusion was expected to save the State almost \$2 million per year at the expense of state troopers.<sup>9</sup>

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<sup>9</sup> According to the Fiscal Note, the "average salary for the active member is \$57,496" and there were 968 active members, which would mean a total salary cost of about \$55,656,128. CP 217. So before enactment of ESB 5143, the Plan would have needed total contributions of about \$10,953,126 to fund expected Trooper retirement benefits (19.68% of \$55,656.128); after enactment, the Plan only needed contributions of about \$9,194,392 (16.52% of the same amount). CP 218 (identifying percentage costs under old and new plans). So by the State's own calculations, it would save around \$1,758,734

To determine whether an act of the Legislature impairs a contract, the Court uses a three-part test: (1) whether a contractual relationship exists; (2) whether the legislation substantially impaired the contractual relationship; and (3) if there is a substantial impairment, whether it is (i) reasonable and (ii) necessary to serve a legitimate public purpose. *Washington Federation*, 127 Wn.2d at 561. But in the area of state pensions, the test is further refined. *Washington Educ. Ass’n v. Washington Dep’t. of Retirement Systems*, 181 Wn.2d 233, 247, 332 P.3d 439 (2014) (holding that *Bakenhus* pension analysis “strongly informs” applying the three-part test in public pension cases). For state employee pensions, any legislation that “alters [the pension’s] terms, imposes new conditions, or lessens its value” is considered a substantial impairment. *Retired Publ. Employees Council of Wash. v. Charles*, 148 Wn.2d 602, 625, 62 P.3d 470 (2003). Here, the State agrees that the Overtime Exclusion resulted in substantial impairment of these Troopers’ contracts.<sup>10</sup> CP 683.

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a year because of the reduced benefits to Troopers. Excluding overtime “would result in approximately an 8% decrease in benefits.” CP 217.

<sup>10</sup> “A public employee’s right to a pension is a ‘vested, contractual right based on a promise made by the State at the time an employee commences service.’” *Bowles v. Washington Dep’t of Retirement Systems*, 121 Wn.2d 52, 65, 847 P.2d 440 (1993). Public pension legislation is always liberally construed in favor of beneficiaries. *Bates v. City of Richland*, 112 Wn.App. 919, 929, 51 P.3d 816 (2002).

Hence, the question below (and on appeal) is whether the State met its heightened burden under the third prong of the test. It is the State's burden to show that (a) the change was reasonable *and* (b) the change was necessary to serve a legitimate public purpose. *Bakenhus*, 48 Wn.2d at 702. As explained by the United States Supreme Court:

If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem. . . . The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests.

*Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411-412, 103 S.Ct. 697, 704-705, 74 L.Ed.2d 569 (1983) (internal citations omitted). As noted there, when the State acts to impair its own contracts, courts do not defer to the legislative judgment as to the necessity of that impairment. *Energy Reserves*, 459 U.S. at 412; *accord Mascio v. Public Employees Retirement Syst. of Ohio*, 160 F.3d 310 (6<sup>th</sup> Cir. 1998)(finding state's purported policy concerns insufficient when applied retroactively to impair existing pension rights).

To survive the strict scrutiny required by the Contracts Clause, the State must produce compelling evidence that the change was necessary to serve a legitimate public purpose. *Bakenhus*, 48 Wn.2d at 541; *accord Alameda County Deputy Sheriffs' Ass'n v. Alameda County Employee's*

*Ret. Ass'n*, 227 Cal.Rptr. 3d. 787, 832 (Ct. App. 2018) (noting that “application of the detrimental changes to legacy members can only be justified by *compelling* evidence” that change necessary for the pension’s successful operation) (emphasis in original).<sup>11</sup> And in the arena of public pension benefits, the Supreme Court has repeatedly held that the *sole* permissible purpose is to keep the pension system flexible and maintain its integrity. *Bakenhus*, 48 Wn.2d at 701; *Washington Fed’n of State Employees v. State*, 98 Wn.2d 677, 683-84, 658 P.2d 634 (1983).

Only if the State meets its burden to show by compelling evidence a legitimate public purpose does the Court move on to the inquiry about whether the change was “reasonable,” which involves weighing the detriment against any offsetting benefits. To show that the change was “reasonable,” the State must show that any detrimental changes to pension benefits came with “comparable new advantages.” *Bakenhus*, 48 Wn.2d at 702. As a matter of law, the State did not satisfy its burden here.

**2. The State failed to show any legitimate public purpose, as the Plan was solvent and prospective application of the Exclusion would have been sufficient.**

As has been established since at least *Bakenhus*, public employee pension benefits are a form of deferred compensation. 48 Wn.2d at 698.

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<sup>11</sup> The *Bakenhus* court explicitly looked to the approach of California for determining pension contract impairment, as it found California’s law and constitution most closely agreed with that of Washington. *Bakenhus*, 48 Wn.2d at 698.

Because the State has already received the employee's services, but has not yet paid the employee that deferred compensation, there is always a strong temptation to raid that deferred compensation fund for other purposes. As noted by the United States Supreme Court long ago, "[i]f a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *United States Trust Co.*, 431 U.S. at 26.

Here, the State admits that the Overtime Exclusion impaired these Trooper's pensions, so the question of whether the State demonstrated a legitimate public purpose is a threshold issue, as without such proof, any impairment is unconstitutional. "Hence, 'even a minimal impairment of contractual expectations violates the contract clause where there is no real exercise of police power to justify the impairment.'" *Tyrpak*, 124 Wn.2d at 156 (quoting *Birkenwald Distrib. Co. v. Heublein, Inc.*, 55 Wn. App. 1, 9, 776 P.2d 721 (1989)); accord *Pierce County*, 159 Wn.2d at 28 (same).

The Supreme Court long ago explained that there is only one acceptable public purpose for even a minimal impairment of pension contracts – such detrimental modifications can be made "**only** for the purpose of keeping the pension system flexible and maintaining its integrity." *Bakenhus*, 48 Wn.2d at 702 (emphasis added). Washington

adopted that rule from California, and California cases have explained that to meet that standard, the State must show such “extreme hardship” that the system “is on the brink of insolvency” and might collapse without the proposed change. *Ass’n of Blue Collar Workers v. Wills*, 232 Cal. Rptr. 174, 182-83 (Ct. App. 1986). The State is required to show such dire straits because the purpose of the pension system is to provide pension beneficiaries “with a reasonable degree of economic security” that cannot be altered by future legislatures without a true financial threat to the entire pension system. *United Firefighters of L.A. City v. City of Los Angeles*, 259 Cal. Rptr. 65, 74 (Ct. App. 1989); *see also U.S. Trust*, 431 U.S. at 27 (state’s desire to save money or spend it differently is never a legitimate public purpose for impairing contract).

Here, the State does not dispute that the Plan was fully solvent (indeed, overfunded) at the time of the 2001 Overtime Exclusion. The Plan had operated well and remained solvent for over 50 years by including all overtime in the Average Final Salary calculation; the State has offered no reason for the Overtime Exclusion except for its own distaste for troopers who were exercising their contractual rights to maximize their pension benefits.

Below, the State posited that, despite the admitted solvency of the Plan, there was a legitimate public purpose – to prevent what the State

calls “pension ballooning” or “pension spiking.” ER 613. The Senate Bill report on ESB 5143 acknowledged that the Troopers had an existing contractual right to maximize their Average Final Salary by working extra overtime during the pension calculation period: “The use of a two-year average pay period permits very large increases in the retirement benefit close to retirement by inclusion of voluntary overtime and lump sum payments.”<sup>12</sup> ER 339.

What the State may call “pension spiking” is just a pejorative term for Troopers exercising their contractual rights. *See, e.g., Mascio*, 160 F.3d at 314 (rejecting similar state concerns about “double-dipping” as plaintiff had a contractual right to “double-dip”). It is no different than previous public employees insisting on inclusion of unused vacation or sick leave time in their average final salary, the exclusion of which the Supreme Court has twice declared to be an unconstitutional impairment (regardless of the State’s desire to stop that practice). *Bowles*, 121 Wn.2d at 65; *Washington Federation*, 98 Wn.2d at 688-89. The State’s desire to prevent the exercise of such contractual rights is never a legitimate public purpose. Were it otherwise, the Contracts Clauses of the State and Federal

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<sup>12</sup> Washington law already has provisions governing excess compensation to state employees. RCW Ch. 41.50; *see also* ER 712-713 (describing the history of that statute).

Constitutions would be meaningless. *United States Trust Co.*, 431 U.S. at 26.

Further, the Overtime Exclusion itself actually does nothing to prevent “pension spiking,” as the State’s own evidence confirmed. Below, the State posited that a 1999 Performance Audit of the Plan supported the need to eliminate this overtime. That Audit did confirm that, on average, inclusion of overtime in the troopers’ Average Final Salary increased troopers’ annualized retirement benefit by about 14 percent. CP 879. But that Audit did not recommend eliminating any overtime from the AFS calculation. It also did not mention “voluntary” or transportation-related overtime on its list of the top ten “most common purposes of overtime worked by persons approaching retirement.” CP 886.

Had the Legislature wanted to curb “pension spiking,” it would have sought to curb some of the overtime listed among the ten “most common” forms of overtime used to enhance pensions. Even after the Overtime Exclusion, troopers continue to “spike” their pensions by working those other forms of overtime.

Instead, the State excluded primarily forms of overtime incurred under contracts that WSP enters with third-parties such as the NFL, which allows the State to retain more of those contract funds at the expense of these Troopers. State troopers still have to work those overtime security

details, the third-parties still pay the State for those services (including all benefits), but troopers do not get to include that overtime in their pension calculation.

But the bottom line is that the State's purported justification is not, as a matter of law, a legitimate public purpose. While the State is free to exclude such overtime prospectively (i.e., for new enrollees), the *only* public purpose acceptable for impairing the pensions of existing enrollees is "that the reduction was necessary to preserve and protect the system." *Bakenhus*, 48 Wn.2d at 703. Here, it is undisputed that the Plan was not just solvent, but over-funded, in 2001. Eliminating this overtime from the Average Final Salary calculation was not "necessary to preserve" the Plan. Were there any doubt on that, the State itself put that to rest when it partially restored some of this overtime in 2017, which restoration is evidence itself that the 2001 Overtime Exclusion was not required for the pension Plan's successful operation. *Eagan*, 90 Wn.2d at 258 (Rosellini, J., concurring). The trial court was incorrect in holding that the State had met its burden to show a legitimate public purpose here. Without such a purpose, the Overtime Exclusion is per se unconstitutional.

**3. The Overtime Exclusion was not accompanied by “comparable new advantages.”**

In the specific area of pensions, the State also must show that any detrimental changes to pension benefits came with “comparable new advantages.” *Bakenhus*, 48 Wn.2d at 702. The State has argued that the Overtime Exclusion was reasonable because it allegedly lowered the amount contributed by troopers and provided an improved COLA. Upon closer examination, neither one is an “advantage” that is comparable.

**a. The “change” to contribution rates was not a comparable new advantage.**

In 2000, the Legislature decided to lower State troopers’ required salary deduction for pension contribution from the 7% rate implemented in 1963 to only 3%, which was the contribution rate in place when the Legislature passed the Overtime Exclusion.<sup>13</sup> Laws of 2000, Ch. 17, § 1. Benefits provided by previous legislation “prior to the adoption of an amendment imposing a detriment ‘have no bearing upon the reasonableness’ of the detriment so imposed . . .” *Betts v. Board of Administration*, 582 P.2d 614, 618 (Cal. 1978) (citations omitted); *accord Abbott v. City of San Diego*, 332 P.2d 324, 329 (Cal. App. 1958) (same). Moreover, as a matter of law, lowered contribution rates are not

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<sup>13</sup> See generally *Washington Educ. Ass’n v. Washington Dep’t of Retirement Systems*, 181 Wn.2d 212, 218, 332 P.2d 428 (2014) (explaining how the economic boom of the 1990s allowed state employers to lower their contribution rates).

considered “comparable advantages,” as the purpose of a pension is to provide fixed benefits in retirement, not extra money while working.

*Alameda County Deputy Sheriff’s Ass’n*, 227 Cal. Rptr. 3d at 831 n.24.

What the State did starting in the late 1990’s was to raid the Plan to “fund” its own contractually required contributions. It admitted this explicitly in the 2001 Fiscal Note accompanying ESB 5143: “However, until the [P]lan is no longer fully funded this cost [i.e., the State’s contribution] will be ‘funded’ by the surplus in the plan and the employee’s 2% contribution rate.” CP 218.

ESB 5143 required Troopers to contribute a “floor” of at least 2% of their salary to the Plan, even if the State contributed nothing. This contribution “floor” does not exist in any other State pension plan as far as the Troopers are aware, and was put into the Plan to prevent the Troopers from stopping contributing altogether. The 2001 changes (i.e., ESB 5143) further abandoned the historical 2:1 contribution ratio between the State’s contributions and the Trooper’s contributions, and replaced it with a less-favorable (at best) 1:1 split. In 2001, Troopers contributed about \$1 million from their combined paychecks to fund the Plan; the State contributed nothing. CP 139. Had the State maintained the historical 2:1 ratio of employer-to-employee contributions, Troopers would have contributed much less and the State would have contributed much more.

Since the Plan was established in 1947, state law has required that the expenses of the Plan be paid solely from appropriations for the Washington State Patrol (i.e., not from deductions from troopers' salaries). RCW 43.43.220; see also Laws of 1947, Ch. 250, § 11 (substantially the same). Starting in 1999, the State borrowed from the Plan to fund its own "contributions" (including the expenses for operating the system), continued borrowing from the Plan for its "contributions" through 2005 (during which time the State contributed nothing), and is now deducting even more from Troopers' paychecks to repay that loan. CP 96-97. Meanwhile, the State continues contractually collecting the estimated costs of troopers' pension benefit from third-parties such as the NFL for the troopers' "voluntary" overtime, even though the troopers do not get to count that overtime in calculating their Average Final Salary.

To describe ESB 5143's requirement that Troopers always contribute at least 2% percent of their salary (even when the State does not match that contribution) and its replacement of the historical 2:1 funding ratio with an (at best) 1:1 funding ratio as a "benefit" is absurd. Adding a contribution "floor" and detrimental change to the funding ratio provided no benefit, and led to Troopers contributing more (and the State contributing less) than had been the case before the 2001 Overtime Exclusion.

**b. The change from a fixed 2% COLA to a variable compounding COLA was not a comparable new advantage.**

Before the 2001 changes, retired State troopers received a steady, 2% COLA increase each year of their retirement. As a result of the 2001 Amendment, retired Troopers annually receive a compounded COLA adjustment that fluctuates based on the Seattle-Tacoma-Bremerton Consumer Price Index for Urban Wage Earners and Clerical Workers (“CPI”), but which is capped at no more than 3% per year (i.e., if the CPI change is 4%, Troopers only get a 3% increase). As noted by Peter Nickerson (plaintiffs’ expert), the Federal Reserve’s Federal Open Market Committee tries to maintain an inflation rate of 2%, which is roughly a “CPI” for the nation, so it is likely that on average the new COLA adjustment will be in the 2% range anyway. CP 308. Indeed, for six of the last ten years, the CPI adjustment has been less than 2%. CP 308.

As was undisputed below, Troopers who worked overtime now excluded from their Average Final Salary start retirement with a lower annual payment in the first year of retirement than they would have had otherwise. CP 308. Although the new compounded CPI adjustment is likely to hover around two percent (2%) most of the time (and has been much less recently), the return troopers could make on the earnings now excluded from their initial retirement benefit in even a conservative

mutual fund investment would usually be much higher than that CPI. CP 309. Thus, “any Trooper who has a lower initial benefit under the revised plan more likely than not will suffer discernable and quantifiable losses over time from the lower initial benefit . . .” CP 309.

In short, the 2001 Overtime Exclusion takes money out of these Troopers’ pockets immediately when they retire (because of their lower starting retirement benefit), but the State posits that someday, maybe, if inflation is high enough and these Troopers live long enough, they might get that money back. Essentially, the 2001 Overtime Exclusion took the Troopers’ guaranteed expected deferred compensation and gave them in return a lottery ticket.

The State’s own documents analyzing the effect of ESB 5143 makes it plain that the legislation decreased the State’s liability for the Troopers’ deferred compensation by reducing their retirement benefits. According to the Fiscal Note accompanying ESB 5143, the “average salary for the active member is \$57,496” and there were 968 active members, for a total payroll amount of about \$55,656,128. CP 217. So before enactment of ESB 5143, the Plan would have needed contributions of around \$10,953,126 to fund Trooper retirement benefits (19.68% of \$55,656.128); after enactment, the Plan only needed contributions of around \$9,194,392 (16.52% of the same amount). So by the State’s own

calculations, it would save about \$1,758,734 a year by reducing benefits to troopers, which is exactly what the Overtime Exclusion did. CP 217 (Overtime Exclusion “would result in approximately an 8% decrease in benefits.”) Or in plainer terms, as concluded by the plaintiffs’ expert, these Troopers are likely to be dead before they realize any purported benefit from the CPI adjustment. CP 802-806. That is not a “comparable new advantage.”

**B. The Trial Court Was Correct that the Troopers’ Claims Accrue Upon Retirement, But Was Incorrect in Holding that a Three-year Statute of Limitations Applies That Cannot Be Extended Through Use of the Continual Accrual Theory.**

Troopers become eligible to receive plan benefits upon retirement, and it is only then that the State is obligated to calculate and pay that benefit. RCW 43.43.260. And since their Average Final Salary is calculated from their two highest years of salary, neither troopers nor the State will know what two years will count until the trooper retires. Hence, for over half a century, Washington courts have held that the statute of limitations on a claim for impaired pension benefits begins to run when an employee retires.<sup>14</sup> *Washington Educ.*, 181 Wn.2d at 248; *Bowles*, 121

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<sup>14</sup> The police officer plaintiff in *Bakenhus* retired in 1950, and later sued challenging a 1937 statutory change in the pension laws, which he claimed impaired his pension contract. *Bakenhus*, 48 Wn.2d at 697. He obtained a judgment for four years’ of underpaid benefits, along with a declaration that the 1937 amendment was “void as to him (and all who became members of the department prior to the 1937 enactment).” *Bakenhus*, 48 Wn.2d at 697.

Wn.2d at 78; *Noah*, 112 Wn.2d at 843; *Bakenhus*, 48 Wn.2d at 697; *see also California Teacher's Ass'n v. Governing Bd.*, 169 Cal. App. 3d 35, 44, 214 Cal. Rptr. 777 (Ct. App. 1985) (following the same rule). The trial court was correct in following that case law, and holding that the statute of limitations for these Troopers' claims only started running once they retired.

While the trial court was correct that the statute of limitations on the Troopers' claims did not begin to run until they retired, the trial court was incorrect in holding that the Troopers' claims were subject to only a three-year (not six-year) statute of limitations, and that the continual accrual rule did not apply. As recognized by Supreme Court, pension claims are subject to the longer six-year statute of limitations "when the statutory language and the circumstances establish a legislative intent to create rights contractual in nature which are enforceable against the State." *Noah*, 112 Wn.2d at 845. As explained below, the Troopers contend that their contractual rights were established by the pension statute itself (RCW Ch. 43.43 RCW), should be subject to at least a six-year statute of limitations like any other contract claim and that a new claim accrues—with a new limitations period—for each underpayment.

**C. Pension Impairments are Continuing Violations, and a Separate Claim Accrues for Each Impaired Payment of Retirement Benefits, like Installment Contracts.**

As discussed, the Supreme Court has held that pension claims first accrue at retirement, since that is the first time that the State pays a retirement benefit less than the amount it promised on the date of hire. The Supreme Court has not directly addressed whether a retiree has an impairment claim for each payment made after retirement. *See Martin v. City of Spokane*, 55 Wn.2d 52, 55, 345 P.3d 1113 (1959)(acknowledging but not reaching the issue). But at least one other state has.

Washington treats pension rights as contracts, a rule it adopted from California. Under California law, a new impairment claim accrues every time that the state makes a payment less than what it promised when it hired the employee. “The right to receive periodic payments under a pension is a continuing one, and any time limitation upon the right to sue for each instalment necessarily commences to run from the time when that instalment actually falls due.” *Abbott*, 50 Cal. 2d at 462 (internal citation omitted). This is known as the continual accrual theory. Under the continual accrual theory, “a series of wrongs or injuries may be viewed as each triggering its own limitations period, such that a suit for relief may be partially time-barred as to older events but timely as to those within the applicable limitations period.” *Baxter v. State Teachers’ Ret. Sys.*, 18 Cal.

App. 5th 340, 378–79, 227 Cal. Rptr. 3d 37, 67 (Ct. App. 2017), *review denied* (Feb. 21, 2018).

The California Supreme Court applied the continual accrual theory to pension rights in a case with similar facts. *Abbott*, 50 Cal. 2d at 462 (1958). It restated the rule that each payment gives rise to a separate impairment claim with a separate statute of limitations, and held:

[T]he statutory time limitation upon the right to sue for each pension instalment commences to run from the time when that installment falls due. It follows that even though plaintiffs might have earlier brought suit for declaratory relief. . . , their failure to do so does not operate to bar their right to declaratory relief with respect to future pension payments as well as to a monetary judgment for the difference [for payments within the limitations period] between the amount of the [promised] and [impaired] pensions.

*Abbott*, 50 Cal. 2d at 463–64. Under California’s continual accrual theory, retirees have monetary claims to past underpayments within the statute of limitations and the right to seek declaratory relief for future payments, regardless of the date they retire. *See also Bishop v. State, Division of Retirement*, 413 So. 2d 776, 777–78 (Fla. App. 1982); *Harris v. Allen Park*, 193 Mich. App. 103, 107, 483 N.W.2d 434 (1992) (both applying continual accrual theory to pension payments).

The continual accrual theory is identical to how Washington law treats claims on installment contracts. Like a pension contract, an

installment contract evidences a promise to make periodic payments to the recipient in the future. In Washington “when recovery is sought on an obligation payable by installments, the statute of limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it.” *Edmundson v. Bank of Am.*, 194 Wn. App. 920, 930, 378 P.3d 272 (2016) (citing *Herzog v. Herzog*, 23 Wn.2d 382, 388, 161 P.2d 142 (1945)).

The Court should hold that the continual accrual theory applies to pension claims and each pension payment gives rise to a separate impairment claim that accrues when the retiree receives a payment less than the State promised. *See Harris*, 483 N.W.2d at 436 (“Pension benefits are similar to installment contracts and the period of limitation runs from the date each installment is due.”); *Bauers v. City of Lincoln*, 514 N.W.2d 625, 632 (Neb. 1994) (“[P]ension benefits are similar to installment contracts, and courts have stated that with each installment a cause of action arises from that installment regardless of when the initial breach occurred.”). Under that theory the focus of the limitations period is on the date of the impaired payment, not necessarily on the date of retirement (although as discussed above, a pension claim will *first* accrue at retirement, since that is when the first impaired payment is made).

**D. The Court Should Apply a Six-Year Statute of Limitations, Because WSPRS Plan 1 Qualifies as a Written Contract.**

The Court next must decide which statute of limitations applies: six years for written contracts or three years for non-written contracts. *Compare* RCW 4.16.040(1)(an “action upon a contract in writing, or liability express or implied arising out of a written agreement” must be commenced within six years) *with* RCW 4.16.080(3)(any other “action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument” must be commenced within three years). The Troopers acknowledge that the Supreme Court has said it is “well-settled that retirees are subject to a three-year statute of limitations for actions alleging a breach of pension contracts.” *WEA*, 181 Wn.2d at 248 (citing *Bowles*, 121 Wn.2d at 79-80 and *Noah*, 112 Wn.2d at 842-43). That statement traces back to the *Noah* decision, which held a three-year limitations period applied to a pension claim involving a different retirement plan and a different alleged impairment. The Troopers believe that *Noah*—and so too *Bowles* and *WEA*—is distinguishable on the narrow issue of whether the six-year statute of limitations should apply.

**1. *Noah* held that PERS (RCW Ch. 41.40) lacked the elements of a written contract; it did not analyze WSPRS (RCW Ch. 43.43).**

Though later opinions have cited *Noah* as holding a three-year statute of limitations always applies to pension impairment claims, the *Noah* holding rests on a specific and narrow set of facts. There, employees enrolled in the Public Employees Retirement System (“PERS”) were challenging how agencies treated unused vacation pay to calculate retirement benefits. The practice was inconsistent across the dozens of agencies that contribute to PERS. Some agencies calculated an employee’s “average final compensation” to include accumulated unused vacation pay, which increased the employees’ monthly benefits at retirement. But other agencies excluded vacation pay from the calculation. “The practice of using accrued vacation pay in calculating ‘average final compensation’ resulted from administrative interpretation; it is not specifically authorized by [the PERS] statute.” *Noah*, 112 Wn.2d at 842.

The *Noah* court considered what statute of limitations applied to the PERS employees’ claim. The court recognized that under “very limited circumstances a statute may be treated as a contract: when the statutory language and the circumstances establish a legislative intent to create rights contractual in nature which are enforceable against the State.”

*Noah*, 112 Wn.2d at 843. Acknowledging that PERS created some type of contractual rights under *Bakenhus*, the Supreme Court in *Noah* held that a pension statute is a “written contract” with a six-year limitations period if the statute “contain[s] all the essential elements of the contract.” *Noah*, 112 Wn.2d at 845. But the court held that the PERS statute did not have all those elements. It reasoned that the practice the employees were challenging—whether to include vacation pay as part of “average final compensation”—varied from agency to agency and thus depended on an administrative interpretation of the PERS statute. “The right of certain PERS I employees to use accrued vacation pay in calculating retirement benefits is not found in the statute.” *Noah*, 112 Wn.2d at 845. Because the plaintiffs had to rely on evidence extrinsic to the statute, PERS (RCW Ch. 41.40) was not a “written contract” for statute of limitations purposes. Thus a three-year limitations period applied.

*Noah* sets out the rule the Court uses to decide which statute of limitations applies. But the *Noah* court held only that PERS is subject to a three-year limitations period. When a different retirement system is at issue (like WSPRS), the Troopers suggest that the Court should conclude that the statute is a written contract with a six-year limitations period even under *Noah*’s analysis.

**2. WSPRS is a self-contained statute that has all the elements of a written contract.**

WSPRS has all the elements of a written contract under *Noah's* statute of limitations analysis. The Troopers' claim differs from the PERS claim in *Noah*: the Troopers are challenging an amendment to the *pension statute* itself. The WSPRS statute provided every element that the State needs to calculate retirement benefits, and it still does. But from 1947 through July 1, 2001, the statute did not define the "salary" included in "average final salary," and under the plain words of the statute, all overtime earned was part of "average final salary." ESB 5143 added a definition of "salary" that excluded overtime worked on certain transportation projects, as well as "voluntary" overtime, though no definition of what constituted such "voluntary" overtime was included.

As is obvious from the fact that the Legislature had to amend the statute to exclude these categories of overtime, the statute itself created the contract, and its amendment impaired it. Unlike in *Noah*, the Troopers' claims do not require the Court to look outside the WSPRS statute. Because every element of the pension claims at issue is in the WSPRS statutory scheme (RCW Ch. 43.43), WSPRS is a written contract under *Noah's* rule, and its impairment is subject to a six-year statute of limitations.

## V. CONCLUSION

As a matter of law, the State unconstitutionally impaired these Troopers' pensions. Moreover, because that right is created by statute, a six year statute of limitations should apply that renews with each underpayment. This Court should declare the Overtime Exclusion unconstitutional, and remand for determination of a class and further proceedings regarding damages and other remedies.

DATED this 2<sup>nd</sup> day of December, 2019.

*s/Brian W. Esler*

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**DECLARATION OF SERVICE**

The undersigned declares as follows: on the 2<sup>nd</sup> day of December, 2019, I served the foregoing document on counsel for Respondents in the manner indicated.

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**December 02, 2019 - 11:16 AM**

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