

No. 98495-6

No. 79573-2-I

IN THE COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

---

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,

Appellants,

v.

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

Respondents.

---

APPELLANTS' REPLY BRIEF

---

Brian W. Esler  
Clemens H. Barnes  
Kellen A. Hade  
Katie Loberstein  
MILLER NASH GRAHAM & DUNN LLP  
Pier 70, 2801 Alaskan Way, Suite 300  
Seattle, Washington 98121  
206.624.8300  
[brian.esler@millernash.com](mailto:brian.esler@millernash.com)  
[clem.barnes@millernash.com](mailto:clem.barnes@millernash.com)  
[kellen.hade@millernash.com](mailto:kellen.hade@millernash.com)  
[katie.loberstein@millernash.com](mailto:katie.loberstein@millernash.com)

Attorneys for Appellants

TABLE OF CONTENTS

I. INTRODUCTION ..... 1

II. ARGUMENT ..... 4

**A.    A Six-Year Statute of Limitations Should Apply  
          and a New Claim Accrues With Every Impaired  
          Payment. .... 4**

        1.    Pension impairment claims accrue at  
              retirement, the first time the State pays a  
              trooper less than what it promised at hire. .... 5

        2.    The continual accrual rule is not novel,  
              tracks existing Washington contract law and  
              is the law in many other states. .... 8

        3.    A six-year limitations period applies  
              because WSPRS is a self-contained pension  
              statute. .... 11

**B.    The Overtime Exclusion Is an Unconstitutional  
          Impairment of These Troopers’ Contracts..... 12**

        1.    Preventing Troopers From Exercising Their  
              Contractual Right to Have All Overtime  
              Count Toward Their Pension Benefit  
              Calculation Is Not a Legitimate Public  
              Purpose..... 12

        2.    The COLA and contribution rates are not  
              “comparable” advantages to the lost  
              overtime. .... 20

        3.    The Overtime Exclusion Is Severable..... 23

III. CONCLUSION..... 25

## TABLE OF AUTHORITIES

### Cases

<i>1000 Virginia Ltd. P’ship v. Vertecs Corp.</i> , 158 Wn.2d 566, 146 P.3d 423 (2006).....	6
<i>Abbott v. City of Los Angeles</i> , 50 Cal.2d 438, 326 P.2d 484 (2006) .....	6, 10, 18, 20
<i>Alameda County Deputy Sheriff’s Assn. v. Alameda County</i> , 19 Cal. App.5th 61, 227 Cal. Rtr.3d 787 (2018).....	14, 18, 19, 20
<i>Alameda Cty. Deputy Sheriff’s Assn. v. Alameda Cty. Employees’ Ret. Assn.</i> , 413 P.3d 1132 (Cal. 2018) .....	19
<i>Allen v. City of Long Beach</i> , 45 Cal.2d 128, 287 P.2d 765 (1955) .....	14, 17, 18
<i>Bakenhus v. City of Seattle</i> , 48 Wn.2d 695, 296 P.2d 536 (1956).....	2, 5, 6, 17
<i>Bauers v. City of Lincoln</i> , 514 N.W.2d 625 (Neb. 1994).....	10
<i>Bowles v. Wash. Dep’t of Retirement Sys.</i> , 121 Wn.2d 52, 847 P.2d 440 (1993).....	3, 5
<i>Brazelton v. Kansas Public Empl. Ret. Sys.</i> , 227 Kan. 443, 607 P.2d 510 (1980).....	14
<i>Carlstrom v. State</i> , 103 Wn.2d 391, 694 P.2d 1 (1985).....	<i>passim</i>
<i>City of Algona v. City of Pac.</i> , 35 Wn. App. 517, 667 P.2d 1124 (1983).....	7
<i>Cooke v. City of Culver</i> , 2008 WL 683928, at *10 (Cal. Ct. App. Mar. 14, 2008).....	10
<i>Edmundson v. Bank of Am.</i> , 194 Wn. App. 920, 378 P.3d 272 (2016).....	9

<i>El Centro De La Raza v. State</i> , 192 Wn.2d 103, 428 P.3d 1143 (2018).....	24
<i>Energy Reserves Group, Inc. v. Kansas Power &amp; Light Co.</i> , 459 U.S. 400 (1983).....	2
<i>Fletcher v. Peck</i> , 10 U.S. 87 (1810).....	12
<i>Harris v. City of Allen Park</i> , 483 N.W.2d 434 (Mich. App. 1992).....	10, 17
<i>Marin Assn. of Pub. Employees v. Marin Cty. Employees’ Ret. Assn.</i> , 2 Cal. App.5th 674, 206 Cal. Rptr.3d 365 (Ct. App. 2016).....	18
<i>Marin Assn. of Pub. Employees v. Marin Cty. Employees’ Ret. Assn.</i> , 383 P.3d 1105 (Cal. 2016).....	19
<i>Martin v. City of Spokane</i> , 55 Wn.2d 52, 55, 345 P.2d 1113 (1959).....	5, 6, 8, 9
<i>Mascio v. Public Employees Ret. Syst. of Ohio</i> , 160 F.3d 310.....	14
<i>Noah v. State by Gardner</i> , 112 Wn.2d 841, 774 P.2d 516 (1989).....	9, 11, 12
<i>Pierce County v. State</i> , 159 Wn.2d 16, 148 P.3d 1002 (2006).....	3
<i>State v. Abrams</i> , 163 Wn.2d 277, 178 P.3d 1021 (2008).....	23
<i>Stenberg v. Pac. Power &amp; Light Co.</i> , 104 Wn.2d 710, 709 P.2d 793 (1985).....	7, 8
<i>Tyrpak v. Daniels</i> , 124 Wn.2d 146, 874 P.2d 1374 (1994).....	2, 3, 23

<i>United States Trust Co. v. New Jersey</i> , 431 U.S. 1 (1977).....	1, 2
<i>Univ. of Washington v. Gov’t Employees Ins. Co.</i> , 200 Wn. App. 455, 404 P.3d 559 (2017).....	6
<i>Washington Educ. Ass’n v. Washington Dep’t of Ret. Sys.</i> , 181 Wn.2d 233, 332 P.3d 439 (2014).....	5
<i>Zuver v. Airtouch Communications, Inc.</i> , 153 Wn.2d 293, 103 P.3d 753 (2004).....	23
<b>Statutes</b>	
RCW 43.43.260 .....	7
RCW Ch. 43.43.....	12
<b>Other Authorities</b>	
United States Constitution Article 1 Section 10 .....	2, 12

## I. INTRODUCTION

This case is about whether the State can change its contracts at will simply because it later decides it made a bad deal. The State admits that Troopers had an existing contractual right as of 2001 to have all overtime included in their pension benefit calculation. The State admits the Overtime Exclusion impaired that contractual right. But the State continues to defend its impairment by arguing that its desire to prevent so-called “pension spiking” was a legitimate government purpose that justified impairment of existing Troopers’ contract rights.

Below, the trial court refused to examine whether that was a legitimate public purpose because it thought it could not “second-guess the Olympia legislature as to whether or not the allegations of spiking . . . were legitimate concerns.” RP (10/12/18) 61:8-11. When the State impairs its own contracts, such “deference to legislative judgment is reversible error.” *Carlstrom v. State*, 103 Wn.2d 391, 396, 694 P.2d 1 (1985). “[C]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State’s self-interest is at stake.” *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 (1977); accord *Carlstrom*, 103 Wn.2d at 394. “Second guessing” is required to enforce the Contract Clause of the Constitution, which clause explicitly limits the power of states to legislate, no matter the reason for

the law.<sup>1</sup> “If a State could reduce its financial obligations whenever it wanted to . . . , the Contract Clause would provide no protection at all.” *United States Trust Co.*, 431 U.S. at 26.

That is why statutes that may impair the State’s own contracts—and the purported purposes behind them—are subject to heightened scrutiny. *Tyrpak v. Daniels*, 124 Wn.2d 146, 151-52, 874 P.2d 1374 (1994); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 n.14 (1983). By arguing that the Overtime Exclusion was allegedly required to prevent “pension spiking,” the State also admits that it enacted the Overtime Exclusion mainly to save itself money at the expense of these Troopers by lowering their initial benefit. To paraphrase our Supreme Court, since “the State only relied on financial considerations to justify [the Overtime Exclusion], its assertion of the police power does not save the measure.” *Carlstrom*, 103 Wn.2d at 397. The State’s naked desire to save money by limiting existing pension obligations is illegitimate. *United States Trust Co.*, 431 U.S. at 26; *accord Bakenhus v. City of Seattle*, 48 Wn.2d 695, 701-102, 296 P.2d 536 (1956) (sole permissible purpose for impairing pension benefits is to maintain system’s

---

<sup>1</sup> “No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ” Const., Art. 1, § 10. Section 10 of the Constitution is entitled “Powers Denied to States,” and is the section of the original Constitution that directly prohibits states from enacting certain types of legislation, regardless of the purpose for the legislation.

integrity); *Bowles v. Wash. Dep't of Retirement Sys.*, 121 Wn.2d 52, 65, 847 P.2d 440, 446 (1993) (“the cases established flat rules prohibiting the State from altering pension rights in a manner that is disadvantageous to the [public] employees”).

Here the State offered no evidence that retroactive application of the Overtime Exclusion to these Troopers was reasonable or necessary for any legitimate public purpose. The Plan was fully-funded in 2001, and had included all overtime worked by troopers in calculation of the pension benefit since its inception half a century before. It is undisputed that most of the overtime excluded from these Troopers' benefit calculation is not paid for by taxpayers—rather, it is paid for by third-parties who are contractually required to reimburse WSP for “overtime salary and benefits.” CP 810-867. The trial court was wrong to defer to the Legislature, as a desire to prevent Troopers from exercising their contractual rights is never a legitimate public purpose. And without a legitimate public purpose, any impairment is unconstitutional without even considering its reasonableness or necessity. *Pierce County v. State*, 159 Wn.2d 16, 28, 148 P.3d 1002 (2006); *Tyrpak*, 124 Wn.2d at 151-52.

But even if the Court determined the Overtime Exclusion was motivated by a legitimate public purpose, the State still must show that its purposes could not be achieved without impairment and that it provided

Troopers with comparable new advantages. The very audit that the State says supports its case recommended other, non-impairing means of controlling overtime, which again shows the State has not met its burden. *Carlstrom*, 103 Wn.2d at 396. Furthermore, the alleged new advantages are not in any way “comparable,” since they are neither true advantages nor make up for the lost initial retirement benefit. The trial court erred as a matter of law when it denied the Troopers’ motion for summary judgment on liability.

As to the statute of limitations, the law is clear: pension claims first accrue at retirement, when the State first breaches the contract and pays a benefit less than what it promised previously. This Court should similarly find that a new claim accrues each time the State pays an impaired benefit—i.e., the continual accrual rule. And because these Troopers’ pension plan was defined by statute, and the Legislature changed that plan by statute, the longer six-year written contract statute of limitations should apply.

## **II. ARGUMENT**

### **A. A Six-Year Statute of Limitations Should Apply and a New Claim Accrues With Every Impaired Payment.**

This Court should hold that the Troopers’ impairment claims first accrue at retirement, continue to accrue each time the State pays an impaired pension payment and are subject to a six-year limitations period.

**1. Pension impairment claims accrue at retirement, the first time the State pays a trooper less than what it promised at hire.**

Our Supreme Court considers this issue “well settled”: “the limitations period [on pension impairment claims] begins to run upon the employee’s retirement from service.” *Bowles*, 121 Wn.2d at 78 (citing *Noah v. State by Gardner*, 112 Wn.2d 841, 843, 774 P.2d 516 (1989)); *Washington Educ. Ass’n v. Washington Dep’t of Ret. Sys.*, 181 Wn.2d 233, 248, 332 P.3d 439 (2014). The State acknowledges this precedent but argues it does not apply because the Troopers challenge a legislative amendment rather than an administrative interpretation. According to the State, the Supreme Court has “never addressed when a cause of action accrues on a challenge to an amendment of a public pension statute.” Resp. Br. at 13.

But at least two Supreme Court cases have involved legislative changes, including one—*Bakenhus v. City of Seattle*—that is the seminal on pension contracts. The public employee in *Bakenus* successfully challenged an amendment to his pension benefits the government enacted 13 years before he retired. *Id.*, 48 Wn.2d 695, 697, 296 P.2d 536 (1956). Likewise in *Martin v. City of Spokane*, the public employee challenged a legislative amendment enacted 20 years earlier, and the state raised the statute of limitations as a defense. *Id.*, 55 Wn.2d 52, 55, 345 P.2d 1113

(1959). Yet neither *Bakenhus* nor *Martin* held the claims untimely as to challenges to pension payments made within the applicable statute of limitations.<sup>2</sup> See also *Abbott v. City of Los Angeles*, 50 Cal.2d 438, 460-464, 326 P.2d 484 (2006) (rejecting similar laches and statute of limitations arguments when plaintiffs sued 30 years after change in law).

Even if this Court sees a gap in existing precedent, the limitations period here still begins at retirement because that is when the Troopers' claims first accrue. "Statutes of limitations do not begin to run until a cause of action accrues." *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 575, 146 P.3d 423 (2006). The familiar elements of a contract claim are a promise, a breach of that promise and damages. See *Univ. of Washington v. Gov't Employees Ins. Co.*, 200 Wn. App. 455, 467, 404 P.3d 559 (2017).

That is why pension claims accrue first at retirement. Retirement is the first time public employees are paid less than what the State promised when it hired them—i.e., when the State breaches the contract. Before then, an employee does not know whether a particular legislative act will affect the pension benefit the employee ultimately receives. The Legislature might fix the problem before the employee retires (as it tried to

---

<sup>2</sup> See discussion at Sec. II(A)(2) about the continual accrual rule.

do in 2017),<sup>3</sup> or the legislation may not end up affecting the employee's pension (like if a trooper does not work excluded overtime, for example). It is not enough that the Troopers knew or should have known about the Overtime Exclusion itself, as the State argues.<sup>4</sup> Rather, the Troopers' claims accrue only when the Overtime Exclusion causes the State to breach its contractual obligations. That occurs no sooner than "[u]pon retirement from service," when the Troopers receive their first impaired payment. RCW 43.43.260.

Finally, the policy underlying the statute of limitations does not require this Court to revisit Washington's accrual at retirement rule. "Statutes of limitations are in their nature arbitrary" and meant to protect defendants against stale claims, lost evidence and fading memories. *Stenberg v. Pac. Power & Light Co.*, 104 Wn.2d 710, 714, 709 P.2d 793 (1985) (internal citation omitted). The State claims the time that has elapsed since 2001 has disadvantaged its defense. Yet the State cannot point to a single relevant record or witness that is purportedly unavailable. To the contrary, the State defended against the Troopers' claims with

---

<sup>3</sup> As the State acknowledges, the Legislature has amended the WSPRS six times since 2001. Resp. Br. at 19.

<sup>4</sup> Anticipatory breaches do not trigger the statute of limitations. *City of Algona v. City of Pac.*, 35 Wn. App. 517, 522, 667 P.2d 1124 (1983). Regardless, as explained above, Washington law is that the breach occurs, and the claim accrues, no earlier than retirement.

expert witnesses and the extensive written legislative record—the same evidence the Troopers are using to prosecute their claims. The State does not explain why it needs other records or witnesses from 2001 in a case about how the legislation affects the Troopers today.

This Court should follow precedent and affirm the trial court’s conclusion that the Troopers’ claims accrue at retirement.

**2. The continual accrual rule is not novel, tracks existing Washington contract law and is the law in many other states.**

This Court should reverse the trial court’s refusal to apply the continual accrual rule to the Troopers’ claims. The continual accrual rule provides that a new impairment claim accrues each time the State pays a pension benefit that is less than what it promised. The Court will find this rule supported by binding precedent, Washington contract law and the law of many other states.

Contrary to the State’s briefing, our Supreme Court did not reject the continual accrual rule in pension cases. It did just the opposite in *Martin*, where it explicitly addressed whether the “statute of limitations [is] applied against each monthly installment as it became due.” *Id.*, 55 Wn.2d at 55. While the Court did hold the employee’s claims untimely, that was because the employee sought damages for pension installments outside the applicable limitations period. Citing *Bakenhus*,

the State had conceded that the employee was owed damages for all impaired pension installment payments made within the limitations period, even though he had retired over a decade earlier. That is, retirees can challenge future pension payments and past payments if they are within the limitations period, but not payments that are older. *Martin* impliedly—if not expressly—adopts the continual accrual rule. The State’s only other Washington authority purportedly rejecting the continual accrual rule does not do so, but cites *Martin* approvingly. *Noah v. Gardner*, 112 Wn.2d 841, 846, 774 P.2d 516 (1989); *see also* Resp. Br. at 28.

The continual accrual rule also tracks the common law on installment contracts. For 75 years Washington courts have held that “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, 930-31, 378 P.3d 272, 277 (2016) (citing *Herzog v. Herzog*, 23 Wn.2d 382, 161 P.2d 142 (1945)). Pension contracts are like installment contracts; they obligate the State to make payments over time. The State cites no Washington authority to explain why this Court should treat pension contracts differently from other installment contracts.

Though this Court need rely only on Washington law to apply the continual accrual rule, it can look to the law of other states, too. *See 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.”); *Harris v. City of Allen Park*, 483 N.W.2d 434, 436 (Mich. App. 1992) (“Pension benefits are similar to installment contracts and the period of limitation runs from the date each installment is due.”). The State’s attack on California law is misguided. In fact, *Abbott v. City of Los Angeles* adopted the continual accrual rule, as the State admits in its briefing: “[*Abbott*] held that the ‘right to sue for each pension instalment commences to run from the time when that instalment actually falls due.’”<sup>5</sup> Resp. Br. at 27 (citing *Abbott*, 50 Cal.2d 438, 462, 326 P.2d 484 (1958)). And in *Cooke v. City of Culver*, the California Court of Appeals distinguished between challenges to how benefits are calculated from challenges to the right to receive a pension at all. *Id.*, No. B196716, 2008 WL 683928, at \*10 (Cal. Ct. App.

---

<sup>5</sup> *Abbott* ultimately found that while plaintiffs could have challenged the legislative change to their pension benefits when it was passed, “their failure to do so [did] 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 past payments within the limitations period”—i.e., the continual accrual rule. *Abbott v. City of Los Angeles*, 50 Cal.2d 438, 463–64, 326 P.2d 484 (1958).

Mar. 14, 2008). Here the parties admit the Troopers have a vested right to receive a pension benefit; they disagree about how to calculate that benefit. As a result, California also would apply the continual accrual rule to the Troopers' claims.

This Court should follow longstanding Washington authority to hold that a new impairment claim accrues each time the State pays a pension benefit less than what it promised, with each claim triggering a separate limitations period.

**3. A six-year limitations period applies because WSPRS is a self-contained pension statute.**

Finally, this Court should reverse the trial court and hold that a six-year limitations period applies to the Troopers' claims. Though Washington authority to date has applied the three-year limitations period for unwritten contracts to pension claims, this case is different in an important way: the WSPRS contains all the essential elements of the Troopers' pension contracts. The Supreme Court recognized this situation as one in which the six-year limitations period for written contracts would apply. *Noah*, 112 Wn.2d at 843-45.

The State argues that *Noah* compels a three-year statute of limitations here. Yet the State admits that *Noah* is "fact specific" and its analysis limited to the PERS statutes. Unlike the challenge to PERS in

*Noah*, the Troopers' claims do not require the Court to look outside the pension statute, evidenced by the fact that to exclude overtime, the Legislature needed to change the WSPRS statute itself. 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. This Court should reverse the trial court's conclusion otherwise.

**B. The Overtime Exclusion Is an Unconstitutional Impairment of These Troopers' Contracts.**

**1. Preventing Troopers From Exercising Their Contractual Right to Have All Overtime Count Toward Their Pension Benefit Calculation Is Not a Legitimate Public Purpose.**

Section 10 of Article 1 of the United States Constitution limits the power of states to enact certain laws, and was particularly concerned with restricting the ability of states to change their own contracts on a political whim. As explained by James Madison in the Federalist Papers, "laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation." Federalist Papers, No. 44. The Supreme Court's first decision under the Contracts Clause overturned Georgia's attempt to renege on its contracts.

*Fletcher v. Peck*, 10 U.S. 87 (1810). There, the Georgia legislature had sold much of what today is Alabama and Mississippi for what was

perceived by a later legislature as a below-market price (and widely thought the result of bribery). But that a later legislature regretted the deal made by its predecessors, and that the citizens of Georgia may have been outraged, was not a sufficient reason to allow those contracts to be impaired.

As our Supreme Court has recognized, deference to the Legislature's judgment when the State impairs its own contracts "is reversible error." *Carlstrom*, 103 Wn.2d at 396. As the Court went on to explain: "The court's independent determination of reasonableness and of necessity requires consideration of whether the legislative purpose could have been achieved by means that either did not impair or less drastically impaired the contract." *Carlstrom*, 103 Wn.2d at 396. Hence, alleged "[f]inancial necessity, though superficially compelling, has never been sufficient of itself to permit states to abrogate contracts." *Carlstrom*, 103 Wn.2d at 396.

When the State posits a purpose for impairment that could have been anticipated at the outset of the contract, "the state cannot impair those contracts on the basis of problems that have only changed in degree rather than in kind." *Carlstrom*, 103 Wn.2d at 397. Here, troopers had been entitled to include all overtime in their Average Final Salary since the beginning of the Plan, and had done so for half a century without

imperiling the Plan. Opening Brief, at 7-12. Since the State had been aware of troopers' ability to "spike" their pensions since the inception of the Plan in 1947, any change in troopers' behavior by 2001 was at best only "a change in degree, not kind;" allegations of "spiking" are insufficient as a matter of law to constitute a legitimate purpose for impairment of these Troopers' pensions. *Carlstrom*, 103 Wn.2d at 397.

The State's allegation that so-called "pension spiking" might undermine public confidence in the pension system (Respondent's Brief) is also insufficient, as well as speculation unsupported by any real evidence. *E.g.*, *Brazelton v. Kansas Public Empl. Ret. Sys.*, 227 Kan. 443, 607 P.2d 510 (1980) (preventing the appearance of inequity insufficient purpose for impairing benefits with no evidence of a financial crisis); *Mascio v. Public Employees Ret. Syst. of Ohio*, 160 F.3d 310; 314 (6<sup>th</sup> Cir. 1998) (preventing "double dipping" insufficient purpose when plaintiff had a contractual right to those benefits); *Allen*, 45 Cal.2d at 133 (desire to equalize benefits among plans not a sufficient purpose for impairment). The State's pejorative label for Troopers' exercising their existing contractual rights to maximize their pension benefit should not sway the Court. *E.g.*, *Alameda County Deputy Sheriff's Assn. v. Alameda County*, 19 Cal. App.5th 61, 84 n.6, 227 Cal. Rtr.3d 787 (2018) (noting, with regard to the term "pension spiking," that "whatever labels have been

created—or moral judgments made—with respect to the pension practices at issue in this appeal, they are entirely irrelevant to our determination of the case.”).

As to the 1999 JLARC audit (Response Brief, at 32-34), that actually undermines the State’s argument. The JLARC audit stemmed from a 1997 Department of Transportation appropriations bill, ESSB 6061. The purpose of the performance audit of the Washington State Patrol was to focus on the Patrol’s “law enforcement operations, communications systems, and technology requirements.” ESSB 6061, S. 106(1); *accord* CP 474-475. It was not an audit of the Plan, but rather WSP’s operations especially in relation to the Department of Transportation. That is likely why the original version of the Overtime Exclusion excluded only overtime worked on certain transportation projects. CP 201. The audit was not commissioned because of any concern about “pension spiking,” which is not even mentioned in the audit. Instead, the audit found that “the Patrol is in compliance with statutes relating to its compensation practices . . . .” CP 352.

The audit made only two suggestions about WSP overtime, neither of which suggested excluding overtime from troopers’ pension benefit calculation; it did not recommend any legislative changes:

***Recommendation 3***

The Washington State Patrol should pursue implementing district policies relating to regular call-out overtime. These policies should provide controls in terms of rotation of call-out assignments, and address operational considerations such as how call-out policy affects response time by priority of call.

Legislation Required: None  
Fiscal Impact: None  
Completion Date: January 2000

***Recommendation 4***

The Washington State Patrol should continue to pursue consistency and compliance in its policies for operations of contract overtime. Controls prohibiting self-reassignment of overtime should be present within policies of each district.

Legislation Required: None  
Fiscal Impact: None  
Completion Date: January 2000

CP 361. Although the audit noted that troopers approaching retirement worked more overtime to maximize their pension benefit, it did not recommend eliminating that practice. This audit undermines the State's position, as the audit recommended other ways of controlling overtime that would not have impaired the Troopers' contracts. *See Carlstrom*, 103 Wn.2d at 396 (change is unconstitutional when legislative purpose could have been achieved by other means without impairment).

The State incorrectly argues that "California takes a tougher stance against pension spiking than Washington does." Response, at 34. In

doing so, the State minimizes the history and trend of the California cases on impairment, including California courts' insistence that the government show a legitimate reason for the change, which requires more than just pejorative labels.

In *Allen v. City of Long Beach*, 45 Cal.2d 128, 287 P.2d 765 (1955) (followed by our Supreme Court in *Bakenhus*), the defendant city tried to change the pension plan of currently employed workers. In finding that change an unconstitutional impairment, the California Supreme Court noted that the city failed in its burden of proof as “there [was] no evidence or claim that the changes enacted bear any material relation to the integrity or successful operation of the pension system” and that “there is no indication that the city would have difficulty in meeting its obligations to those employees [i.e., those employed before the change went into effect].” *Allen*, 45 Cal.2d at 131, 133. Indeed, in *Allen*, the California Supreme Court rejected the defendant city’s argument (similar to the State’s argument here)<sup>6</sup> that the changes were motivated by the allegedly legitimate public purpose of bringing its pension plan in line with the pension plans of other government employees:

---

<sup>6</sup> The Final Bill Report and Fiscal Note for ESB 1543 confirm that the changes were meant to bring the Plan more in line with other state employee pension plans. CP 216-224, 339-341. However, most other state retirement plans allow inclusion of all overtime when calculating the benefit. Opening Brief, at 7.

In explanation of the changes . . . , the city states that they were enacted in order to make the pension system . . . more nearly coincide with the retirement system established by contract with the state . . . thus to ameliorate “personal problems” assertedly created by differences in pension costs and benefits to the two groups of employees . . . . Such purposes, however beneficial to the city, bear no relation to the functioning and integrity of the pension system established for [plaintiffs] and constitute no justification for materially reducing the vested contractual rights earned by plaintiffs . . . .

*Allen*, 45 Cal.2d at 133.

Ever since that time, California courts have understood *Allen*’s requirement that the government show that its purpose bear “some material relation to the theory of a pension plan and its successful operation” to mean that the government must show the existence of a legitimate fiscal crisis that could not be avoided by other means in order to show a legitimate reason for tinkering with existing employee’s pensions to their potential detriment. *E.g.*, *Abbott v. City of Los Angeles*, 50 Cal.2d 438, 453, 326 P.2d 484 (1958) (summarizing previous cases). Hence, the California Court of Appeals, in its most recent case to examine the issue, criticized the approach of the *Marin* case<sup>7</sup> on which the State relies, and summarized over a half-century of California precedent on impairment as follows:

---

<sup>7</sup> *Marin Assn. of Pub. Employees v. Marin Cty. Employees’ Ret. Assn.*, 2 Cal. App.5th 674, 679, 206 Cal. Rptr.3d 365 (Ct. App. 2016). The trial court in the *Marin* case essentially decided the impairment issue on the pleadings (i.e., on a demurrer). *Marin*, 2 Cal. App.5th at 689. In the *Alameda* decision, by contrast, the trial court held a number of hearings before ultimately deciding the changes were constitutional (a conclusion with

If the justification for the changes is the financial stability of the specific CERL system, the analysis must consider whether the exemption of legacy members from the identified changes would cause that particular CERL system to have “difficulty in meeting its pension obligations” with respect to those members. In this regard, mere speculation is insufficient. Moreover, generally speaking “[r]ising costs alone will not excuse the city from meeting its contractual obligations, the consideration for which has already been received by it.” Under this analysis, and contrary to the holding in *Marin*, the fact that the modifications here at issue may be relatively modest looking at a system’s pension costs as a whole may actually argue in favor of finding impairment, as the continuation of such benefits solely for legacy members may not have a significant impact on the system, especially if such benefits have been already actuarially accounted for and treated as pensionable.

*Alameda County Deputy Sheriff’s Assn. v. Alameda County*, 19 Cal.

App.5th 61, 123, 227 Cal.Rptr.3d 787 (2018). Here, all the State relies on is such speculation; the undisputed evidence is that the Plan was overfunded at the time of the Overtime Exemption, and there is no evidence to suggest that the Plan would have trouble meeting its pension obligations with respect to these Troopers without the Overtime Exclusion.

---

which the Court of Appeals disagreed in part). *Alameda*, 19 Cal. App.5th at 87-89. Further, as found by the *Alameda* trial court, overtime pay was generally excluded from pension calculations even before the 2012 changes at issue there. *Alameda*, 19 Cal. App.5th at 87. The California Supreme Court accepted review in both cases. *Marin Assn. of Pub. Employees v. Marin Cty. Employees’ Ret. Assn.*, 383 P.3d 1105 (Cal. 2016); *Alameda Cty. Deputy Sheriff’s Assn. v. Alameda Cty. Employees’ Ret. Assn.*, 413 P.3d 1132 (Cal. 2018).

**2. The COLA and contribution rates are not “comparable” advantages to the lost overtime.**

Lowering Trooper’s contribution rates (assuming that even happened, *see* Opening Brief, at 10-12) does not constitute a “comparable” advantage. Again, the California cases are instructive. The California Supreme Court considered a similar argument half a century ago, and rejected it, finding that an increase in salary was not a “comparable advantage” to offset a diminished initial pension benefit. *Abbott*, 50 Cal.2d at 452. The more recent *Alameda County* case explained why: “As a fundamental matter, pension systems are premised on the assumption that it is more advantageous for employees to forego the current use of their total compensation in order to ensure a predictable and sufficient income stream after they retire. . . . Thus, while additional monthly income may be considered some sort of an advantage, *it can hardly be described as comparable.*” *Alameda County*, 19 Cal. App.5th at 121 n.24 (emphasis added). It is the Troopers’ contention that a reduced contribution rate while employed is not “comparable” to the lost initial benefit for the same reason (which is why their expert did not consider that element).<sup>8</sup> Part of the reason the trial court certified its order

---

<sup>8</sup> The State mistakenly claims that Troopers are arguing that the State had a contractual obligation to reduce the Troopers’ contribution rate. Response at 41-42. The Troopers are not making any such argument. Rather, the Troopers are pointing out the undisputed fact that ESB 5143 put in a contribution “floor” for Troopers of two percent of their

was to answer the question of whether such contribution rates should be considered at all in determining comparable advantages here. CP 944.

Similarly, the change from a fixed annual COLA to a variable COLA was not a “comparable” advantage sufficient to excuse the impairment. That is shown three ways. First, from the Troopers’ own testimony:

I understand that the State is arguing that the change to our Cost of Living Adjustment (“COLA”) in 2001 will make up for excluding voluntary and other overtime from the calculation of our Average Final Salary. For myself and most troopers, we’d rather have the full amount of our pension benefit (including all overtime) start immediately when we retire. 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, *accord* CP 46, 52 (same).

Second, from the testimony of Peter Nickerson, the plaintiffs’ damages expert, who opines that Troopers may be dead before the variable COLA makes up for the lost initial benefit. In doing so, he uses the

---

salary that does not exist for any other state employees, and codified the State’s abandonment of its historical 2:1 funding ratio, which ultimately led to Troopers contributing more and the State contributing less than had historically been the case. In the context of a half-century of prior practice, the change to contribution rates can hardly be described as a “benefit,” much less a comparable one.

State's expert's own values. CP 803-804. The difference between their calculations rests in Dr. Nickerson's accounting for the increased probability with each passing year that a trooper will die: "Instead of using an average life expectancy value for the present value calculation, which hides the probability of death in the years before that value, I use the probability of life (and death) for each year starting with the first year of Hester's retirement." CP 803. As noted by Mr. Nickerson, the State's expert instead makes "the implicit assumption that someone like Hester would be alive with one hundred percent certainty until" the time that actuarial tables show that person would die.

As the old proverb goes, "a bird in the hand is worth two in the bush." In other words, congruent with the Troopers' own testimony, money earlier in retirement is more valuable than money later in retirement. The State essentially argues that it can take away troopers' benefits in the short run, because troopers might eventually get those benefits back in the long run. But as the economist John Maynard Keynes adroitly observed, "in the long run, we are all dead." As explained in the Opening Brief (at 37-38), the State projected an almost \$2 million per year savings to itself by reducing troopers' initial pension benefit. The Legislature evidently did not care, as warned by the State Actuary, that it

did “not have the data to estimate the average effect of eliminating voluntary overtime.” CP 217.

But finally, the operative word is “comparable.” The uncertainty described by the Troopers’ testimony, and confirmed by Mr. Nickerson’s analysis, shows that the variable COLA is not a “comparable” advantage. That uncertainty is contrary to the theory of a pension plan, which is supposed to allow Troopers to know and manage what they will receive in retirement. *See Tyrpak*, 124 Wn.2d at 146 (adding an unpredictable element to the contract is not an offsetting advantage).

### **3. The Overtime Exclusion Is Severable.**

The State acknowledges that the Legislature included a severability clause when it enacted the Overtime Exclusion, but argues that the Court should disregard that clause. *But see, e.g., Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 103 P.3d 753 (2004) (when contract has severability clause, court should excise unenforceable provisions but enforce remainder). Similarly, when a statute is enacted with a severability clause, courts can be “assured that the remaining provisions would have been enacted without the portions which are contrary to the constitution.” *State v. Abrams*, 163 Wn.2d 277, 285-86, 178 P.3d 1021 (2008). Such a clause favors concluding that the Legislature still would have passed the remainder of the act without the

Overtime Exclusion. *El Centro De La Raza v. State*, 192 Wn.2d 103, 133, 428 P.3d 1143 (2018).

Further, eliminating the Overtime Exclusion as to troopers commissioned before its enactment will not undermine the purpose of the legislation. *El Centro*, 192 Wn.2d at 133. The primary purpose of ESB 5143 was to create a different “Plan 2” for troopers commissioned after the 2001 enactment. CP 339-341 (bill report); CP 183 (showing separate “salary” definition for members commissioned after July 1, 2001). Only those troopers who were commissioned prior that date are contractually-entitled to have all overtime included in their pension benefit calculation.

Moreover, the Overtime Exclusion is grammatically, functionally, and volitionally separate from the rest of the ESB 5143. The Overtime Exclusion challenged here, contained in the “salary” definition added in Section 3, by its terms applied only to “members commissioned prior to July 1, 2001.” Laws of 2001, Ch. 329, § 3 (CP 183). Eliminating that definition, which applies only to these Troopers and those similarly situated, will not otherwise alter the statute. The Plan operated in a completely solvent manner for over half a century without any definition of “salary.” Opening Brief, at 7-8. It can continue to operate identically in all other respects with the definition of “salary” eliminated for troopers commissioned before July 1, 2001.

### III. 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 4th day of March, 2020.

*s/ Brian W. Esler*

---

Brian W. Esler, WSBA No. 22168  
Clemens H. Barnes, WSBA No. 4905  
Kellen Andrew Hade, WSBA No. 44535  
Katie Loberstein, WSBA No. 51091  
MILLER NASH GRAHAM & DUNN LLP  
Pier 70, 2801 Alaskan Way, Suite 300  
Seattle, Washington 98121  
Telephone: (206) 624-8300  
Email: brian.esler@millernash.com  
clem.barnes@millernash.com  
kellen.hade@millernash.com  
katie.loberstein@millernash.com

*Attorneys for Appellants*

**DECLARATION OF SERVICE**

The undersigned declares as follows: on the 4th day of March, 2020, I served the foregoing document on counsel for Respondents in the manner indicated.

Eric A. Mentzer, Senior Counsel	<input type="checkbox"/> via Hand Delivery
Kathryn Wyatt, Assistant Attorney General	<input type="checkbox"/> via U.S. Mail
Nam Nguyen, Assistant Attorney General	<input type="checkbox"/> via Facsimile
Sharon English, Assistant Attorney General	<input checked="" type="checkbox"/> via E-mail
ATTORNEY GENERAL OF	<input checked="" type="checkbox"/> via E-Service
WASHINGTON	
Complex Litigation Division	
7141 Cleanwater Drive SW	
PO Box 40111	
Olympia, WA 98504-0111	
Email: EricM@atg.wa.gov	
Email: KathrynW@atg.wa.gov	
Email: NamN@atg.wa.gov	
Email: sharon.english@atg.wa.gov	
<i>Attorneys for Respondents</i>	

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at Seattle, Washington this 4th day of March, 2020.

*s/ Brian W. Esler*  
Brian W. Esler

4836-7340-3574.7

**MILLER NASH GRAHAM & DUNN**

**March 04, 2020 - 2:50 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division I  
**Appellate Court Case Number:** 79573-2  
**Appellate Court Case Title:** Gailin Hester, et al, Petitioners v. State of Washington, et al, Respondents

**The following documents have been uploaded:**

- 795732\_Briefs\_20200304144828D1674865\_6138.pdf  
This File Contains:  
Briefs - Appellants Reply  
*The Original File Name was Appellants Reply Brief.pdf*

**A copy of the uploaded files will be sent to:**

- ComCEC@atg.wa.gov
- ELLRSeaSupport@millernash.com
- LPDarbitration@atg.wa.gov
- SeaLitSupport@millernash.com
- clem.barnes@millernash.com
- ericm@atg.wa.gov
- kathrynw@atg.wa.gov
- katie.loberstein@millernash.com
- kellen.hade@millernash.com
- lae@ylclaw.com
- nam.nguyen@atg.wa.gov
- nicole.beck-thorne@atg.wa.gov
- revolyef@atg.wa.gov
- sharon.english@atg.wa.gov

**Comments:**

---

Sender Name: Emily O'Neill - Email: emily.oneill@millernash.com

**Filing on Behalf of:** Brian William Esler - Email: brian.esler@millernash.com (Alternate Email: )

Address:  
Pier 70  
2801 Alaskan Way, Suite 300  
Seattle, WA, 98121  
Phone: (206) 777-7542

**Note: The Filing Id is 20200304144828D1674865**