

No. 98495-6

NO. 79573-2-I

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**COURT OF APPEALS, DIVISION I  
OF THE 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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**BRIEF OF RESPONDENTS**

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## I. INTRODUCTION

Eighteen years ago, the Legislature enacted legislation to address pension spiking in the Washington State Patrol Retirement System Plan 1 (WSPRS 1). The trial court should have dismissed this action challenging that legislation based on the applicable statute of limitations because plaintiffs delayed filing suit for almost two decades.

Even if the Court does not time-bar this action, it also fails on the merits. A modification to a public pension statute is valid if it is reasonable and necessary to meet a legitimate public purpose and provides members of the pension plan with a comparable advantage to any benefit taken away. Before 2001, pension spiking resulted from troopers counting voluntary overtime as salary, which increased their WSPRS 1 retirement benefits by inflating their salaries at the end of their careers. This practice can destabilize a pension plan's funding and erode public trust because it inflates benefits beyond what the Legislature intended.

To deter this practice, in 2001 the Legislature, under Engrossed Senate Bill 5143 ("ESB 5143"), excluded voluntary overtime from WSPRS's definition of salary in return for a lowered employee contribution rate and an increased Cost-of-Living-Allowance (COLA) rate. After benefiting from reduced contributions for 18 years, a putative

Class of WSPRS 1 members filed this lawsuit claiming that the voluntary overtime exclusion was an unconstitutional impairment of contract.

The superior court correctly ruled that the exclusion was reasonable and necessary to meet a legitimate public purpose. The court rejected the Class's argument that saving WSPRS 1 from imminent financial collapse is the only legitimate purpose, which would severely limit the Legislature's ability to prevent *future* fiscal crises and public scandals. But the superior court incorrectly concluded that issues of material facts precluded a ruling on the second part of the constitutional inquiry. The Legislature provided the comparable advantages of improved contributions and COLA rates that, *when combined*, more than offset the voluntary overtime exclusion. The court missed the fact that the Class's argument was that the improved contribution rate, *by itself*, or the improved COLA, *by itself*, is not comparable to the exclusion.

Therefore, this Court should hold that, even if the Class had timely filed this case, the voluntary overtime exclusion is constitutional.

## **II. COUNTERSTATEMENT OF THE ISSUES**

On the statute of limitations:

1. Under *Noah v. State by Gardner*, 112 Wn.2d 841, 774 P.2d 516 (1989), did the Class's constitutional impairment of contract claim arise when the Legislature enacted the voluntary overtime exclusion?

2. After the Class's claim accrued, did the Class have three years to file this lawsuit under the statute of limitations for unwritten contracts?

On whether ESB 5143 met the two-part test for constitutionality under *Washington Education Association v. Washington Department of Retirement Systems*, 181 Wn.2d 212, 243, 332 P.3d 428 (2014) ("*WEA I*"): <sup>1</sup>

3. Is preventing or deterring pension spiking a legitimate public purpose, and was the voluntary overtime exclusion reasonable and necessary to meet this purpose?

4. Did the lower employee contribution rate during WPRS members' working years and the increased COLA during their retirement years provide comparable new advantages to offset the voluntary overtime exclusion?

### III. COUNTERSTATEMENT OF THE FACTS

#### A. The Washington State Patrol Retirement System, Prior to July 2001

The Legislature created WSPRS in 1947 for Washington State Patrol ("WSP") employees. Laws of 1947, ch. 250, § 1. Over the years,

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<sup>1</sup> In *WEA I*, the Washington Supreme Court determined that the repeal of gainsharing from some of the State's pension plans was not a constitutional impairment of contract. 181 Wn.2d 212. On the same day, the Court also decided that the repeal of uniform COLA was not a constitutional impairment of contract. *Washington Educ. Assn. v. Dep't of Ret. Sys.*, 181 Wn.2d 233, 236-37, 332 P.3d 439 (2014) ("*WEA II*").

the Legislature has modified WSPRS several times, mostly to increase benefits for members. By 1999, WSPRS provided the following benefits:

- At retirement, WSPRS members would receive a monthly pension calculated by the following formula: two percent x service credit years x average final salary. RCW 43.43.260(1)-(2). Average final salary is defined as “average monthly salary received by a member during the member’s last two years of service or any consecutive two-year period of service, whichever is the greater....” RCW 43.43.120(3). “Salary” was undefined.
- WSPRS retirement allowance was adjusted annually for inflation by a fixed dollar amount, representing two percent of the member’s initial benefit at retirement, commonly known as a COLA. Laws of 2001, ch. 329, § 4.

To pay for these benefits, the State set up a funding scheme whereby WSPRS members would contribute a fixed seven percent of their salary, referred to as employee contributions. These contributions go into an investment fund (the WSPRS fund) to pay for member benefits. The members’ employer, WSP, contributes the amount needed, if any, above the seven percent to keep the fund actuarially sound. *See* Laws of 2001, ch. 329, § 11; RCW 41.45.060. That is, if employee contributions are

estimated to fall short of funding the members' future retirement benefits, employer contributions make up the shortfall.<sup>2</sup>

By 2000, due to good economic conditions, the employer contribution rate had dropped to zero, as the seven percent employee rate was enough to keep WSPRS fully funded. CP 701-02. This prompted the Legislature to temporarily reduce the employee contribution rate to three percent. *Id.*; Laws of 2000, ch. 17, §§ 1-2. However, if the Legislature had not acted by June 30, 2001, the employee rate would have reverted to seven percent. Laws of 2000, ch. 17, § 2.

In contract terms, before ESB 5143, the State had a contractual obligation to provide WSP officers commissioned before July 1, 2001, with a retirement allowance calculated with a formula that included voluntary overtime pay in the definition of salary. This allowance would increase annually by a fixed COLA of two percent. To fund these retirement allowances, members had to contribute a fixed seven percent of their salary, with the State making up for any funding shortfall.

**B. 2001 Legislation Resulted in Part from Pension Spiking**

In 1999, the Joint Legislative Audit and Review Committee (JLARC) audit found that, to inflate average final salary to increase their

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<sup>2</sup> Contributions do not fund WSPRS's operation and administration. RCW 43.43.220.

monthly retirement allowance, some WSPRS members took on more voluntary overtime in their final two years of service. CP 389-93. The practice of inflating salary at the end of an employee's career to increase retirement benefits is called "pension spiking." CP 339.

Most voluntary overtime is for work on third-party contracts. CP 707. For example, professional sports teams often contract WSP for security at games. WSP would then allow troopers to sign-up to work these games for extra pay on top of the troopers' regular salary. Troopers can thus control the amount of voluntary overtime that they work.

In contrast, troopers have less control over non-voluntary ("regular") overtime because such overtime occurs when troopers have to work on assigned duties outside of their assigned work schedule. Opening Br. at 16-17, CP 707. For instance, a trooper may have a difficult case that requires the trooper to work more hours than the trooper's assigned work hours (e.g., 8 am to 5 pm). Those extra hours worked are regular overtime.

The JLARC audit found the pension spiking caused by manipulating voluntary overtime actually affected how WSP operated. For instance, supervisors disproportionately assigned voluntary overtime assignments to older officers nearing retirement. CP 392-93. There were also documented violations of collective bargaining provisions that limited how many consecutive hours an officer may work, and instances of

conflicts of interest in allocating overtime assignments. CP 395-96. Thus, JLARC not only recommended changes to WSPRS, but recommended that WSP make policy changes to curtail voluntary overtime abuse. *Id.*

Following the audit, the Joint Committee on Pension Policy (JCPP) held public hearings on how to address this problem. CP 515-16. JCPP sent a report to the Legislature recommending a bill to amend WSPRS to exclude voluntary overtime from the definition of salary. CP 525, 532-33. The State Actuary then conducted a fiscal analysis on the proposed bill. CP 559-64.

The Legislature passed the resulting bill, ESB 5143 on April 10, 2001. Laws of 2001, ch. 329. The bill went into effect on July 1, 2001. The 2001 legislation contains provisions governing future WSPRS members, creating WSPRS Plan 2 (“WSPRS 2”) for those who join after the effective date, and provisions governing current members. The Class consists of troopers who were members in 2001; thus, provisions governing future members are irrelevant here.

ESB 5143 changed the State’s contractual obligations to the Class in three ways.

- Added a definition of salary that excluded voluntary overtime.

Laws of 2001, ch. 329, § 3; CP 340; RCW 43.43.120(21).

- Reduced the employee contributions rate to the greater of two percent or the employer rate. Laws of 2001, ch. 329, § 3; CP 340.
- Changed the COLA from a fixed two percent to a CPI-based compounding COLA with a maximum annual increase of three percent per year. *Id.*; RCW 43.43.260(5). If the CPI exceeds 3% in any given year, the excess above 3% is “banked” for COLAs in future years. CP 725.3

The State Actuary provided a fiscal note on ESB 5143 showing that the improved COLA and contribution rates are valuable benefits that offset the voluntary overtime exclusion. CP 559-64.

WSP immediately notified its employees about ESB 5143, specifically of the voluntary overtime exclusion from the definition of salary, through an internal daily bulletin on July 1, 2001. It provided similar notices in February 2003, July 2008, August 2014, and November 2014. CP 571-72, 575-77, 582-83.

The Legislature later modified WSPRS as amended by ESB 5143. In 2007, the Legislature changed the employee contribution rate from the greater of two percent or equal to the employer rate to “one-half of the required total WSPRS contribution rate or 7 percent, whichever is less,

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<sup>3</sup> COLA banking is employed based on RCW 43.43.260(5) to ensure that members receive the same COLA, although RCW 43.43.260(5) does not specifically call it out. CP 714-5.

plus 50 percent of the contribution rate increase caused by any benefit improvements effective on or after July 1, 2007.” CP 703-4; Laws of 2007, ch. 300, §1; RCW 41.45.0631(1). That is, the employee contribution rate cannot exceed seven percent after 2007 unless the Legislature increases benefits, with the value of such benefits calculated by the State Actuary. Laws of 2007, ch. 300, §1. In addition, “[t]he employer rate shall be the contribution rate required to cover all total system costs that are not covered by the member contribution rate,” a partial return to the funding method prior to ESB 5143 where the employer makes up for funding shortfalls. *Id.*; RCW 41.45.0631(3).

In 2017, the Legislature returned limited voluntary overtime to the definition of salary. Laws of 2017, ch. 181, §1. The Legislature did not return to the definition that caused the widespread pension spiking, but limited the amount of overtime includable in salary to 70 hours per year. *Id.*; CP 707. Adding this benefit increased the employees’ maximum contribution rate by 1.10 percent, as a consequence of the 2007 statute that required members to pay 50 percent of the cost for any increase in benefits. *Id.*; Laws of 2007, ch. 300, §1; RCW 41.45.0631(1).

### **C. Procedural History**

Seventeen years after the Legislature passed ESB 5143, the Class filed this lawsuit on November 30, 2017 against the State, the Department

of Retirement Systems (DRS) and WSP (hereinafter referred together as the “State”). The State moved for summary judgment on the statute of limitations and laches in September 2018. On the same day, the Class moved for partial summary judgment on the merits, arguing that the voluntary overtime exclusion was not reasonable and necessary to meet a legitimate public purpose under *WEA I*. The State’s response included a cross-motion for summary judgment on the merits, arguing that the voluntary overtime exclusion meets both parts of the test for constitutionality under *WEA I*. Both the State and the Class provided expert declarations, including calculations, to support their motions.<sup>4</sup>

The superior court heard arguments on the summary judgment motions, and in January 2019, issued an order adopting a three-year statute of limitations, which began to run on Class members’ respective retirement dates (“Order”). CP 894-97. The court also ruled that ESB 5143 meets the first part of *WEA I* as reasonable and necessary to meet a legitimate public purpose. The court, however, found issues of material fact on whether ESB 5143 provided comparable advantages, the second

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<sup>4</sup> The Class filed a motion to certify the class on September 14, 2018. CP 28-41. The superior court has not ruled on the motion, and, currently, the Class remains putative. Also, because the court has not certified the Class, the State expert’s calculation are on whether the improved COLA and contributions rates offset the voluntary overtime exclusion for the four named Class representatives. CP 723-41. The Class expert only calculated whether increased COLA, by itself, offset the voluntary overtime exclusion for one of the Class representatives. CP 305-10, 802-06.

part of *WEA I*, to overcome the loss of including voluntary overtime in average final salary calculations. CP 894-97.

On February 4, 2019, the superior court certified the Order for discretionary review. CP 942-45. On February 20, 2019, the Class moved for review by this Court, which was granted on June 25, 2019.

#### IV. ARGUMENT

The State may unilaterally modify public pension statutes, even though public pension statutes form a contractual obligation between the State and public employees. *WEA I*, 181 Wn.2d at 243. This case is a challenge to a modification made eighteen years ago. The superior court ruled on the statute of limitations and constitutional law. This Court reviews both issues *de novo*. *Lenander v. Dep't of Ret. Sys.*, 186 Wn.2d 393, 403, 377 P.3d 199 (2016); *Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992).

The superior court correctly held that the three-year statute of limitations applies to the Class's claims, rather than the six-year statute of limitations.<sup>5</sup> The court also correctly rejected the Class's "continuous accrual" theory for when their cause of action accrued. The error in the

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<sup>5</sup> RCW 4.16.040(1) provides a six-year period to file "[a]n action upon a contract in writing, or liability express or implied arising out of a written agreement, . . ." RCW 4.16.080(8) provides a three-year period for "an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument."

Order regarding the statute of limitations was the court's ruling that the cause of action accrued at the time of each member's retirement, rather than when the voluntary overtime exclusion went into effect in 2001.

On the merits of the constitutional impairment claim, the court also correctly held that the 2001 legislation was reasonable and necessary to meet a legitimate public purpose. This Court should affirm that ruling. Additionally, this Court should rule that, as a matter of law, the 2001 legislation provided comparable financial advantages to offset the voluntary overtime exclusion.

**A. The Class Is Time-Barred Under a Three-Year Statute of Limitations That Began to Run When the Voluntary Overtime Exclusion Went Into Effect In 2001**

Statutes of limitations serve two purposes: to give potential plaintiffs a reasonable amount of time to file lawsuits, and to provide potential defendants predictability regarding whether they will be subject to suit. "A statute of limitations is designed to give an injured party a reasonable length of time in which to assert a claim, after which the statute seeks to achieve repose for the potential defendant." *N. Coast Air Services, Ltd. v. Grumman Corp.*, 111 Wn.2d 315, 759 P.2d 405 (1988). The questions behind every statute of limitations argument are: how long is the limitations period and when does the period start running?

For public pension cases, the Supreme Court has consistently held that the three-year statute of limitations for unwritten contracts applies. The Supreme Court has, however, never addressed when a cause of action accrues on a challenge to an amendment of a public pension statute. To uphold the policies underlying the purposes for statutes of limitations, the Court should hold that accrual began when the voluntary overtime exclusion went into effect.

**1. Under *Noah* and its progeny, the three-year statute of limitations for unwritten contracts applies**

Since *Noah*, 112 Wn.2d at 841, the Supreme Court has unambiguously held that the three-year statute of limitations for unwritten contracts applies in public pension cases. *WEA I*, 181 Wn.2d at 248; *Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 78, 847 P.2d 440 (1993). The *Noah* Court rejected plaintiffs' argument that public pension statutes are analogous to written contracts with a six-year statute of limitations. 112 Wn.2d at 843. The Court found that while "[t]he contract theory of public pensions in *Bakenhus* has been consistently followed since the opinion was handed down," a public pension is not a "complete contract" because "[a] contract in writing must contain all the essential elements of the contract." *Id.* at 844, 845. Specifically, public pensions differ from written contracts because, unlike written contracts, the pension statutes are "not

complete as to a public retiree's pension rights" and terms are occasionally implied by the courts. *Noah*, 112 Wn.2d at 845.

The Court in *Noah* concluded that there "is simply no indication in RCW 41.40 [PERS statute] or elsewhere that the Legislature intended RCW 41.40 to be a complete contract in writing." *Id.* at 846. Thus, instead of a six-year statute of limitations for written contracts, the Court adopted the three-year statute of limitations for unwritten contracts. *Id.*

Here, the Class challenges a 2001 amendment to a public pension statute. Nothing relevant to limitations periods distinguishes this case from *Noah*, or subsequent cases that followed *Noah* involving the Teachers' Retirement System (TRS) and the Law Enforcement Officers' and Fire Fighters' Retirement System (LEOFF). See *Retired Pub. Employees Council of Washington v. Charles*, 148 Wn.2d 602, 621, 62 P.3d 470 (2003); *City of Pasco v. Dep't of Ret. Sys.*, 110 Wn. App. 582, 590, 42 P.3d 992 (2002).

The Class attempts to distinguish this case from *Noah* by arguing that *Noah* was not a challenge to an amendment of a pension statute but to an "administrative interpretation of the PERS statute." Opening Br. at 46. This is factually wrong. The *Noah* plaintiffs were seeking damages from an unconstitutional amendment to a pension statute, even if they did not seek to have that amendment declared unconstitutional. "[T]he "breach"

claimed by plaintiffs is enactment of Substitute Senate Bill 5007 (SSB 5007), which the Legislature passed in 1982.” *Noah*, 112 Wn.2d at 843 (“SSB 5007 would have eliminated the practice of using accrued vacation pay as part of the compensation base for calculating retirement benefits”).

Even if the *Noah* plaintiffs had challenged an administrative interpretation, it is irrelevant to whether the WSPRS statute is a written or unwritten contract. The Class argues that it matters because “[t]he WSPRS statute provided every element that the state needs to calculate retirement benefits, and still does,” and “[u]nlike in *Noah*, the Troopers’ claims do not require the Court to look outside the WSPRS statute.” Opening Br. at 47. This is not how contracts law works.

The question is whether the Legislature intended a statute “to be a complete contract in writing.” *Noah*, 112 Wn.2d at 846. The Legislature enacted WSPRS in 1947 (the same year as PERS) with mostly the same provisions, including similar provisions on benefits calculation, as PERS, LEOFF, and TRS.<sup>6</sup> Like these other plans, WPRS members “vest contractually as of the first day of employment,” which is the court-implied contractual term that *Noah* specifically gave as an example for

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<sup>6</sup> Laws of 1947, ch. 250 (WSPRS); Laws of 1945, ch. 274 (PERS); Laws of 1969, ch. 208 (LEOFF); Laws of 1947, ch. 80.

why public pension statutes are akin to unwritten contracts.<sup>7</sup> *Noah*, 112 Wn.2d at 841; RCW 43.43.280(2). And because the WSPRS statute has essentially the same provisions as the other public pension plans, the Supreme Court applies the same body of law governing these plans to WSPRS. *Lenander*, 186 Wn.2d at 418.

Therefore, the Class has not shown how WSPRS differs from PERS, LEOFF, TRS, or any other plan, as to conclude that the Legislature intended WSPRS “to be a complete contract in writing.” The three-year statute of limitations for unwritten contracts applies here.

**2. The Court should hold that the statute of limitations began when the voluntary overtime exclusion took effect**

The Class’s lack of timeliness in filing this lawsuit violates all the underlying policies and purposes of statutes of limitations. The policy underlying limitations “is one of repose; the goals are to eliminate the fears and burdens of threatened litigation and to protect a defendant against stale claims.” *Stenberg v. Pacific Power & Light Co., Inc.*, 104 Wn.2d 710, 714, 709 P.2d 793 (1985). Statutes of limitations also protect defendants by requiring plaintiffs to litigate while pertinent evidence is still available and witnesses retain clear impressions of the occurrence. *Id.*

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<sup>7</sup> See e.g., RCW 41.40.180(1) (vesting requirement for PERS Plan 1); RCW 41.40.720 (vesting requirement for PERS Plan 2); RCW 41.32.470 (vesting requirement for TRS Plan 1), RCW 41.26.090 (vesting requirement for LEOFF Plan 1).

Here, the Legislature enacted the voluntary overtime exclusion in 2001. Seventeen years later, the Class filed this lawsuit. In theory, if the statute of limitations begins to run on the retirement date of the members challenging the statutory amendment, a challenge to the voluntary overtime exclusion could occur up to three years after the last WSPRS 1 member retires, e.g., almost indefinitely. In effect, this would mean that the Legislature cannot expect repose from the “fears and burdens of threatened litigation” on any amendments to public pension laws until three years from the date on which the very last member of the affected pension plan decides to retire.

The delay here also disadvantaged the State because many relevant records are now outside its retention schedules and are no longer available. And most of the legislators and State employees who worked on the 2001 legislation are no longer employed by the State, are difficult to locate, and are likely to have difficulties recalling what happened 18 years ago. The State is at a disadvantage—not of its own making—in obtaining witnesses and evidence to defend against the Class’s claims.

This Court should apply an accrual date that is consistent with the policies and purposes of statutes of limitations. Doing so would be consistent with *Noah*, and all other public pension cases that addressed the statutes of limitations. It would also be consistent with the discovery rule,

often utilized in contract cases, Additionally, having the statute of limitations for challenges to a legislative amendment of a pension law begin to run when the amendment went into effect prevents decades-long delays to such challenges, which would not only uphold the policies and purposes for statutes of limitations, but also reduce the harm to innocent third parties and the legislative process.

**a. The public policy to protect pension plans, its members, and taxpayers favors accrual at the effective date of amendments to pension law**

Invalidating an amendment to a pension law can negatively affect not only the parties involved, but also innocent third parties. This negative effect worsens with a longer period between an amendment's enactment and its invalidation.

When measuring and reporting pension obligations, and when calculating contribution rates under current funding policy, the State Actuary assumes all benefit provisions are legally valid. CP 605. Invalidating a benefit provision can render these prior measurements and reports obsolete, which can affect a plan's funding status and, in turn, the contribution rates for plan member employers and employees. *Id.*

Here, the State Actuary attested that invalidation could lead to "a decrease in WSPRS funded status, an unexpected increase in employer contribution rates and an unexpected increase in the percentage of existing

state resources required to fund the WSPRS.” CP 606. This can result in “higher costs and increase member contribution rates for WSPRS Plan 2 members who would receive no additional benefits from the invalidation of ESB 5143.”<sup>8</sup> *Id.*

As the State Actuary explained, “The longer the period between enactment and invalidation, the larger the impact because the unexpected change impacts more plan members and leads to more excess or deficient funding.” CP 605. By waiting so long, the Class has exacerbated the potential harm to WSP, WSPRS members (including those who did not benefit from ESB 5143), the WSPRS fund, and taxpayers. CP 606.

Additionally, allowing for a long delay between enactment and challenges to an amendment of a public pension statute leads to sweeping uncertainties for legislative management of the public retirement plans. Since 2001, the Legislature has amended the WSPRS statute six times. Some of these amendments built on ESB 5143. *See* Laws of 2007, ch. 300, §1; Laws of 2017, ch. 181, §1. If the Court invalidates part of ESB 5143, the Legislature (or the courts) may have to unwind these subsequent

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<sup>8</sup> WSPRS is supported by a single, combined trust fund, and all covered members pay the same contribution rate while in active service, regardless of the plan membership they hold. CP 604. Thus, if invalidating ESB 5143 causes the contribution rate to increase, then WSPRS 2 members would have to pay an increased rate but would not receive any benefits from ESB 5143’s invalidation because ESB 5143 only applies to WSPRS 1 members.

amendments. For larger plans like PERS, which the Legislature amends frequently, a similarly delayed challenge would create even greater havoc.

It is precisely this compounding of damages and unpredictability that statutes of limitations were created to prevent. In *Noah* and subsequent cases on the statute of limitations in a public pension case, the courts did not have to address the potential fallout from a 17-year delay to challenging an amendment of a pension law. As a matter of public policy, the Court should recognize three years from when the amendment took effect as the reasonable timeframe for plaintiffs to make such a challenge.

**b. Having the statute of limitations run when the voluntary overtime exclusion went into effect is consistent with *Noah* and similar cases**

The Supreme Court in *Noah* used a contract law analysis to determine that the statute of limitations for public pension cases is three years. 112 Wn.2d at 845. But neither *Noah* nor any other Washington case has addressed the question of when the statute of limitations begins to run in a case challenging an amendment to a pension law.

*Noah* should not be read to mean that the time for filing suit in every pension case begins to run when a member retires. The Court's analysis in *Noah* was fact-specific, given the simultaneous occurrence of the members' retirement and the date on which the statutory amendment would have taken effect had it not been held unconstitutional. The *Noah*

plaintiffs complained of an amendment to PERS that the Supreme Court had already ruled unconstitutional before it went into effect. 112 Wn.2d at 843. The plaintiffs had retired around the time the amendment passed in an apparent attempt to avoid its effect. *Noah*, 112 Wn.2d at 843. Thus, the Court did not address how the statute of limitations applied to an amendment, but instead analyzed limitations on the members' decision to retire to avoid the effect of an amendment. *Id.*

The distinction between this case and *Noah* is that the Class is time-barred because the Class knew, or with due diligence, should have known, about the voluntary overtime exclusion. This conclusion is in line with the reasoning in *Noah*, is more practical, and creates sound policy.

Other than *Noah*, public pension cases that applied an accrual date at retirement all involved plaintiffs challenging DRS's interpretation or application of a pension statute.<sup>9</sup> Nothing about applying the effective date for accrual in this case is inconsistent with those cases.

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<sup>9</sup> *WEA I* mentioned the statute of limitations, but timeliness was not at issue in *WEA I* because the plaintiffs filed their lawsuit immediately after the Legislature enacted the amendment in question. 181 Wn.2d at 248. The Court addressed timeliness only in dicta, briefly mentioning the three-year statute of limitations simply to point out that "approximately 40 percent of the class who has not yet retired has standing to" challenge a statutory amendment to PERS Plan 1 and TRS Plan 1 cost of living allowances. *Id.* The Court addressed the statute of limitations no further and dismissed the Plaintiff's claims on substantive grounds. *Id.*

A breach by DRS of the “contract” is not a unilateral revision of the contract’s terms, unlike a statutory amendment. DRS can only administer public pension plans, and cannot amend pension law or the contractual obligations underlying those laws. RCW 41.50.020. When a plaintiff challenges a decision made by DRS, that plaintiff is not accusing DRS of changing a retirement plan’s terms, but is instead alleging that DRS misapplied those terms. A member often becomes aware of how DRS applies a pension law provision only when the member retires or is near retirement, when DRS starts applying its interpretation.<sup>10</sup>

This is the context of the challenges to DRS’s application of a public pension law. *Bowles*, 121 Wn.2d at 57 (challenging DRS’s calculation of PERS benefits); *Retired Pub. Employees Council of Washington*, 148 Wn.2d at 602 (contending that DRS collected contributions at a rate in “contravention of the statutorily required rates and methodology”). In these cases, a member generally does not “know or should have known” how DRS would apply a pension law until the member retires or nears retirement.

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<sup>10</sup> For example, a member may believe that a pension statute entitles the member to \$1,000 per month in retirement benefits, but the Department’s interpretation of the same statute is that the member is entitled to only \$500. The member will likely not learn of DRS’s differing interpretation unless the member requests a benefits estimate from DRS, which most members request near retirement, or when the member receives his or her first monthly retirement check from DRS, which is issued only after retirement.

The context is different when the Legislature amends a public pension statute. As stated above, the voluntary overtime exclusion was an unambiguous revision of the State's contractual obligations to WSPRS 1 members. As with other amendments, the Legislature enacted the exclusion openly, and publicized it to members and other stakeholders. In contrast, members are generally unaware of how DRS applies a public pension law until their retirement. The Class knew that the Legislature enacted the exclusion, and that the bill unambiguously revised the WSPRS statute, which reflected the terms of the State's contractual obligations. In fact, every Class member has taken advantage of the bill's improved contribution rate since then. Therefore, the Court should not allow the Class to wait 17 years to challenge the voluntary overtime exclusion.

**c. Having the statute of limitations run when an amendment takes effect is consistent with the discovery rule governing contract cases**

The considerations that cause courts, in other cases, to apply a discovery rule to the application of a statute of limitations supports the conclusion that in this case the limitations period commences when the statutory amendment takes effect. This is because the facts giving rise to a cause of action are apparent as soon as the statute is amended, and that knowledge does not await the decision to retire.

The discovery rule provides that “[t]he statute of limitation for contract actions begins to run when a party knows or, in the exercise of due diligence should know, of the other party’s breach.” *1000 Virginia Ltd. P’ship v. Vertecs Corp.*, 158 Wn.2d 566, 576, 146 P.3d 423 (2006). “The key consideration under the discovery rule is the factual, not the legal, basis for the cause of action. The action accrues when the plaintiff knows or should know the relevant facts, whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action.” *Allen v. State*, 118 Wn.2d at 758. Applying a discovery rule analysis is consistent with jurisdictions that analogize public pensions with contracts. *See, e.g., Bordwine v. Oklahoma Firefighters Pension & Ret. Sys.*, 99 P.3d 703, 705 (Okla. Civ. App. 2004); *Jacobson v. Bd. of Trustees of the Teachers Ret. Assn.*, 627 N.W.2d 106 (Minn. Ct. App. 2001); *Jiricek v. Woonsocket Sch. Dist. No. 55-4*, 489 N.W.2d 348, 350 (S.D. 1992). These jurisdictions often find that actions accrue, for challenges to an amendment of a public pension law, when the amendment is enacted. *See, e.g., Jacobson*, 627 N.W.2d at 111 (concluding “that any irrevocable contract rights that appellants might have had would have been breached no later than enactment of the last of the statutory amendments and that a cause of action accrued at the time of that breach”).

Here, the Class knew or should have known about the alleged breach 18 years ago because WSP notified them about the voluntary overtime exclusion immediately after the exclusion went into effect on July 1, 2001. CP 568. WSP also sent four similar notices to the Class between 2003 and 2014. CP 570-583. The Class has received the benefits of the improved employee contribution rate that the Legislature provided to offset the exclusion for the last 18 years.

Additionally, the Legislature enacted the voluntary overtime exclusion openly through the legislative process. One of the oldest legal maxims is: “All persons are presumed to know the general public laws of the state or country where they reside, and the legal effect of their acts. Persons are likewise presumed to know that laws are subject to change or repeal, and to know of changes made.” 31A C.J.S. *Evidence* § 228 (2019); *see S. Pac. Co. v. Frye & Bruhn*, 82 Wn. 9, 20, 143 P. 163 (1914). WSPRS members presumptively knew or should have known that the Legislature changed the terms of their retirement plans.

By enacting the voluntary overtime exclusion, the Legislature announced to the public that it was revising the State’s contractual obligation to WSPRS members. The open and public nature of this announcement gave all Class members notice of the change, which also

gave them three years to challenge the new voluntary overtime exclusion.

Because they did not, their claims are time-barred.

**3. The Class's continuous accrual theory is contrary to all Washington precedents**

The Class urges this Court to contradict all existing Washington precedents on the statute of limitations in public pension cases and adopt continuous accrual theory. The Class relies on a California case, *Abbott v. City of Los Angeles*, 50 Cal. 2d 438, 326 P.2d 484 (1958). Under this theory, public pension plans are akin to installment contracts with a new impairment claim accruing “every time that the state makes a payment less than what it promised when it hired the employee.” Opening Br. at 41. In practice, it means that plaintiffs would have a new cause of action each time the State issues a monthly retirement check, and could challenge any amendments to WSPRS up to their deaths. They would only be barred from seeking recovery from any retirement check older than three years.

Most jurisdictions reject applying the statute of limitations for installment contracts to pension cases because “it undermines the purposes of a statute of limitations” by creating an “indefinite limitation period.” *Bouchard v. State Employees Ret. Comm'n*, 328 Conn. 345, 373, 178 A.3d 1023 (2018) (citing *Miller v. Fortis Benefits Ins. Co.*, 475 F.3d 516, 522 (3d Cir. 2007) and *Lang v. Aetna Life Ins. Co.*, 196 F.3d 1102, 1105 (10th

Cir. 1999)). It also “runs counter to the well settled proposition that a single decision that results in lasting negative effects is not a continuing violation.” *Bouchard*, 328 Conn. at 373. Without question, the voluntary overtime exclusion was a single decision with long lasting effect.

Even California law does not support applying continuous accrual in this case. In *Abbott*, the California Supreme Court found that the City of Los Angeles failed to pay plaintiffs a pension calculated by the required “fluctuating basis (i.e., based upon salaries currently being paid from time to time).” 50 Cal. 2d at 445. The Court also reversed the trial court’s dismissal of the case under a three-year statute of limitations and held that the “right to sue for each pension instalment commences to run from the time when that instalment actually falls due.” *Id.* at 462.

But far more recently, the California Court of Appeals declined to apply *Abbott* in an unpublished decision that time-barred a lawsuit challenging a city’s discontinuance of counting employer contributions as compensation. *Cooke v. City of Culver City*, No. B196716, 2008 WL 683928, at \*11 (Cal. Ct. App. 2008). The court found that *Abbott* applies to cases “to recover a due and owing installment of retirement benefit,” but not to cases “to establish the right to the claimed benefit.” *Id.* at \*11-12 (describing *Abbott* as holding “that the action was not an action to establish a right to the fluctuating pension payment, but instead an action

to recover installments which were due and owing”). Here, the Class is attempting to establish an identical right, to have a payment count as compensation, and California law does not support the application of continuous accrual in such a case.<sup>11</sup>

Our Supreme Court has likewise rejected continuous accrual. The plaintiffs in prior Washington cases were all retired and receiving monthly retirement payments, and the Court dismissed their claims as untimely. *See Martin v. City of Spokane*, 55 Wn.2d 52, 345 P. 2d 1113 (1959); *Noah*, 112 Wn.2d 841. For instance, in *Noah*, the Supreme Court dismissed plaintiffs’ (all retired and receiving monthly retirement checks) entire case against the State and not just the claims on checks that had fallen outside the limitations period. *Noah*, 112 Wn.2d 841. Applying continuous-accrual theory here would overturn these cases. As a matter of law, the superior court correctly rejected this theory.

Therefore, the Court should hold that the Class’ claims are time-barred under a three-year statute of limitations that began running when the voluntary overtime exclusion went into effect.

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<sup>11</sup> None of the other cases cited by the Class to support continuous accrual theory involved a legislative modification to a public pension statute. Opening Br. at 42 (citing *Bishop v. State, Division of Retirement*, 413 So.2d 776 (Fla. App. 1982), and *Harris v. Allen Park*, 483 N.W.2d 434 (Mich. App. 1992)).

**B. The Voluntary Overtime Exclusion Is Not Unconstitutional – It Is Reasonable and Necessary To Meet a Legitimate Public Purpose, and It Provided Comparable Advantages**

If the Court reaches the merits in this case, it should rule that, as a matter of law, the voluntary overtime exclusion does not unconstitutionally impair the State’s contractual obligations to the Class.

Most states’ constitutions contain a provision prohibiting the state from impairing contracts. To determine whether a modification to a public pension plan is an unconstitutional impairment to a contract, states generally adopt either the Pennsylvania or California rule. The Pennsylvania rule “permits reasonable modifications when necessary to protect or enhance actuarial soundness of the plan, provided that no such modification can adversely affect an employee who has complied with all conditions necessary to be eligible for a retirement allowance.” *Blackwell v. Quarterly Cty. Court of Shelby Cty.*, 622 S.W.2d 535, 543 (Tenn. 1981) (citing *Harvey v. Retirement Board of Allegheny County*, 141 A.2d 197, 203 (Pa.1958)). In contrast, the California rule provides greater flexibility by permitting “modifications which are reasonable, provided they are materially related to the soundness of the pension system and also provided that any disadvantages to employees are accompanied by ‘comparable new advantages.’” *Blackwell*, 622 S.W.2d at 543 (quoting *Allen v. City of Long Beach*, 45 Cal.2d 128, 287 P.2d 765 (Cal.1955)).

In 1956, the Washington Supreme Court adopted the California rule in *Bakenhus v. City of Seattle*, 48 Wn.2d 695, 702, 296 P.2d 536 (1956) (citing *Allen*, 45 Cal.2d 128). The court held that a modification is valid if it was reasonable. *Id.* “To be sustained as reasonable, alterations of employees’ pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employee should be accompanied by comparable new advantages.” *Bakenhus*, 48 Wn.2d at 702. The Court further emphasized that the State may modify a plan to keep “the pension system flexible and maintain its integrity.” *Id.* at 701.

The Supreme Court elaborated on the California rule in *WEA I* by combining *Bakenhus* with the cases following *Carlstrom v. State*, 103 Wn.2d 391, 399, 694 P.2d 1 (1985). *Carlstrom* held that “legislation will unconstitutionally impair a public contract only if it substantially impairs an existing contractual relationship and is not reasonable and necessary to serve a legitimate public purpose.” *WEA I*, 181 Wn.2d at 243. Recently, the Court further clarified that while *WEA I*’s three-part test “forms the backbone of the analysis pension cases,” the analysis of substantial impairment is guided by the principles set forth in *Bakenhus* and its progeny.” *Lenander*, 186 Wn.2d at 415.

Therefore, to determine whether ESB 5143 is constitutional, while keeping in mind *Bakenhus*' allowance for modifications to maintain a plan's flexibility and integrity, this Court must answer two questions: 1) was the voluntary overtime exclusion reasonable and necessary to serve a legitimate public purpose of reducing pension spiking; and 2) did the improvement to COLA and contribution rates provide equivalent or greater advantages? *WEA I*, 181 Wn.2d at 243. The answer to both questions is "yes."

**1. The voluntary overtime exclusion legitimately addressed pension spiking, and it was reasonable and necessary to serve that purpose**

The Legislature explicitly stated that the purpose for the voluntary overtime exclusion was to prevent pension spiking. CP 339 (Final Bill Report stating that the voluntary overtime exclusion was to address "pension spiking" or "ballooning" caused by counting voluntary overtime as salary). "The practice known as 'pension spiking,' by which public employees use various stratagems and ploys to inflate their income and retirement benefits, has long drawn public ire and legislative chagrin." *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). While not illegal, pension spiking is considered abusive and financially destabilizing because it can overturn the actuarial assumptions underlining a plan's

funding. CP 717-18. Spiking can also “result in some members receiving very large increases in pension benefits... [T]he public could perceive such an outcome as an abuse of the retirement system and that outcome could weaken public confidence in the retirement system.” *Id.* For these reasons, legislatures nationwide have enacted laws to prevent pension spiking.<sup>12</sup> *See, e.g., Pisani v. City of Springfield*, 73 N.E.3d 129 (Ill. App. Ct. 2017); *City of Villa Hills v. Kentucky Ret. Sys.*, No. 2018-CA-000809-MR, 2019 WL 2896454, at \*1 (Ky. Ct. App. 2019) (unpublished); CP 712-713 (list of Washington State legislation to prevent pension spiking by addressing how employers report excess compensation).

Here, the JLARC audit documented pension spiking in WSPRS caused by counting voluntary overtime as salary for purposes of determining a member’s average final salary. CP 389-93. This not only affected WSPRS, but also led to abuses of WSP’s policies. CP 395-96. After a thorough legislative process, including public hearings, published reports, and input from WSP and the union, the Legislature enacted ESB 5143, which directly addressed spiking by adding a definition of salary to the WSPRS statute that excluded voluntary overtime pay. Laws of 2001, ch. 329, § 3. This took away the incentive for members to “spike” their

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<sup>12</sup> *See also* Jacob N. Elghanayan, *Curbing the Incentive for Pension Padding: Correcting the Employer Contribution Mismatch*, 77 Alb. L. Rev. 149, 167 (2014) (describing legislation to decrease pension spiking in New Hampshire and Georgia).

pension by working (and in some cases, violating WSP's policies) more overtime at the end of their career as opposed to working voluntary overtime evenly throughout their career.

The Class argues that there was no reason for the State to exclude voluntary overtime but not regular overtime. Opening Br. at 32. This ignores the difference between regular versus voluntary overtime. As the name indicates, troopers can sign up, or not, for voluntary overtime. In contrast, troopers have less flexibility with regular overtime because such overtime is related to the time a trooper needs to complete assigned duties, and thus is difficult to manipulate in order to spike their pensions. In addition, because regular overtime involves assigned duties, legislative changes to regular overtime policy would affect WSP's operations.<sup>13</sup>

The Class also misreads the JLARC audit by citing an appendix showing the top ten "most common purposes of overtime worked by persons approaching retirement" to claim that troopers approaching retirement did not work a significant amount of voluntary overtime hours. Opening Br. at 32. In fact, voluntary overtime is listed as "contract" on the appendix because it derived from third-party contracts. CP 391. Most important, the appendix is not of the top ten "most common purposes of

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<sup>13</sup> Collective bargaining agreements partially govern WSP overtime policy, making it difficult, if not impossible, to change overtime policy. CP 395-6.

overtime” but the most common types of overtime worked as reported by troopers or as coded by WSP administrators. *Id.* WSP admits to possible miscoding, and the audit actually found that “contract overtime (overtime primarily for DOT master contracts) represented 35 percent of the overtime worked.” *Id.* This makes voluntary overtime the most common type of overtime worked by troopers approaching retirement in 1999. The miscoding and misreporting of overtime, even if by accident, could have also raised suspicion among the public that WSP was attempting to hide pension spiking abuses caused by voluntary overtime.

In addition to addressing a legitimate public purpose, the voluntary overtime exclusion was reasonable and necessary to address the problem of pension spiking. In this regard, it is telling that no court in any state has invalidated an amendment to a public pension statute enacted to prevent spiking, unless that amendment did not include comparable advantages.

While the Class points to California as a state this Court should emulate, California takes a tougher stance against pension spiking than Washington does. Opening Br. at 28, ft. 11. In *Marin*, the California Court of Appeals upheld the constitutionality of the California Public Employees' Pension Reform Act of 2013, which (like ESB 5143) excludes certain pay from the definition of compensation. 2 Cal. App. 5th at 683. Although the court upheld the Act because it addressed pension spiking

and a fiscal crisis, the court made it clear that spiking is a pernicious practice that the state should prevent. *Id.* at 684 (finding that “[t]here is no dispute that the purpose of this change was to curtail pension spiking”). The court cited a report that found that spiking makes plan funding unpredictable and generates “public ire” and “outrage.” *Id.* at 679, 681. The court’s stance against pension spiking is unsurprising considering California’s history of journalists filing public disclosure lawsuits to uncover spiking in public plans. *See, e.g., Sacramento Cty. Employees’ Ret. Sys. v. Superior Court*, 195 Cal. App. 4th 440, 448–49, 125 Cal. Rptr. 3d 655 (2011); *San Diego Cty. Employees Ret. Assn. v. Superior Court*, 196 Cal. App. 4th 1228, 1243, 127 Cal. Rptr. 3d 479 (2011).

As a result, the *Marin* court went further than any Washington court has by ruling that the California Act need not provide comparable benefits in return for excluding these payments, because the plan members still had a “reasonable pension” after the exclusion. *Marin*, 2 Cal. App. 5th at 696–97. This holding, and not whether the California legislature may enact legislation to curtail pension spiking, is currently under review by the California Supreme Court.<sup>14</sup>

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<sup>14</sup> In *Alameda Cty. Deputy Sheriff’s Assn. v. Alameda Cty. Employees’ Ret. Assn.*, 19 Cal.App.5th 61, 122, 227 Cal.Rptr.3d 787 (2018), the California Court of Appeals chose not to follow *Marin* on whether the California legislature must provide comparable benefits, but did not disagree with *Marin*’s holding that it was proper to remove certain pay from the definition of compensation to combat pension spiking. Both

The State is not asking this Court to follow *Marin* and rule that the Legislature did not need to provide comparable advantages to offset the voluntary overtime exclusion. But *Marin* shows that the Class’s argument that the State can only modify a public pension plan when the plan is “on the brink of insolvency” misinterprets the California rule. Opening Br. at 30. The cases the Class cites are cases where, as in *Marin*, the government sought to cut benefits *without* providing any comparable advantages in return. *Id.* (citing *United Firefighters of L.A. City v. City of Los Angeles*, 259 Cal. Rptr. 65, 74 (Ct. App. 1989) and *Assn. of Blue Collar Workers v. Wills*, 232 Cal. Rptr. 174, 182-83 (Ct. App. 1986)).

Under the California rule, as adopted by Washington, a modification to a public pension plan must relate “to the theory of a pension system and its successful operation” and to keep the pension system “flexible and maintaining its integrity.” *Bakenhus*, 48 Wn.2d at 702. The voluntary overtime exclusion directly relates to curtailing a common problem in public pensions, i.e., spiking, which could destabilize a plan financially and erode the public trust in the public pension systems.

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*Alameda Cty. Deputy Sheriff's Assn.* and *Marin* are currently before the California Supreme Court, with the Court deferring briefing in *Marin* pending the resolution of the Alameda County case. *Marin Assn. of Pub. Employees v. Marin Cty. Employees' Ret. Assn. (State of California)*, 383 P.3d 1105, 1105 (Cal. 2016); *Alameda Cty. Deputy Sheriff's Assn v. Alameda Cty. Employees' Ret. Assn.*, 413 P.3d 1132 (Cal. 2018).

The Class argues that the 2017 return of voluntary overtime to the definition of salary, under SB 5274, shows that excluding voluntary overtime in 2001 was not reasonable and necessary to meet a legitimate public purpose. Opening Br. at 33. The simple answer is that 2017 is not 2001. The 2001 Legislature enacted the voluntary overtime exclusion in response to an audit that found widespread pension spiking in WSPRS caused by counting voluntary overtime as salary, and acted before the spiking destabilized plan funding or caused a scandal. The 2017 Legislature did not face such an audit, and decided to allow WSPRS members to count up to 70 hours of voluntary overtime pay in salary. By then, because of the intervening 2007 legislation, members had to pay for half the cost of this added benefit. This cost sharing and restriction on includable hours reduced the potential financial harm from spiking.

The Class also argues that the voluntary overtime exclusion was not reasonable and necessary because WSPRS was fully solvent in 2001. Opening Br. at 32-33. This misses the point of why it is necessary to reduce pension spiking. Although pension spiking can cause an immediate financial strain to pension plans, the primary concern about spiking is that it can lead to *future* financial and public integrity problems. CP 718.

This Court should reject the Class's arguments. What the Class seeks is for the Court to take away from the Legislature a tool to reduce

the likelihood of future public pension crises. Unlike California and some other states, Washington's public plans have never faced a fiscal crisis or a major scandal. This is no doubt due to careful legislative management and oversight. The Court should not take away a necessary tool for safeguarding the State's public pension plans.

In sum, preventing pension spiking is a legitimate purpose, and a common subject of legislation. As the superior court correctly held, the voluntary overtime exclusion is a reasonable and necessary modification to meet that purpose.

**2. The improved COLA and employee contribution rates are comparable advantages that more than offset the voluntary overtime exclusion**

Having established that the voluntary overtime exclusion meets the first part of *WEA I*, the second is met by the Legislature providing improved contributions and COLA rates that, when combined, more than offset the exclusion. The State Actuary's fiscal note attests to this, as well as calculations and analyses provided by the current Actuary and Shane Thompson, Ph.D.<sup>15</sup> CP 562, 602-08, 717-22, 723-41. In fact, Dr.

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<sup>15</sup> The State has designated additional Clerk's Papers to include the Declaration of Shane Thompson, Ph.D., in Support of Defendants' Supplemental Opposition to Plaintiff's Motion to Certify and Grant Approval of Notice to Class. The declaration includes Dr. Thompson's initial calculation on whether the improved COLA and contribution rates are more valuable than including voluntary overtime as salary. This calculation is partially incorrect because the Class had misled Dr. Thompson by stating that the employee contributions rate was three, not seven, percent when the voluntary

Thompson's calculation shows that the improved COLA alone is *more valuable* than counting voluntary overtime as salary. CP 728-31.

The Class relies solely on Peter Nickerson, Ph.D. CP 305. Dr. Nickerson only calculated the value of the improved COLA for one Class member, Gailin Hester. CP 305-10, 802-06. He did confirm that Dr. Thompson's calculations are mathematically correct. *Id.* His criticisms of Dr. Thompson's work relate to whether "contributions made to a pension plan should be included in a pension value calculation," and he opined that the improved COLA alone would not provide Mr. Hester more money than counting voluntary overtime as salary until one year after his life expectancy. *Id.* Because Dr. Nickerson did not include the improved contribution rate in his calculations, it appears that he would likely conclude that, within Mr. Hester's expected lifetime, the combined improved contributions and COLA rates are more valuable than counting voluntary overtime as salary.

Under Dr. Thompson's calculations, the only complete calculations in the record, the combined improved contributions and COLA rates are *more valuable* for all Class members at the very start of their retirement. CP 728-31. Therefore, the superior court erred by

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overtime exclusion went into effect. Dr. Thompson updated his calculation in his second declaration. CP 723-41.

concluding that issues of material facts precluded a ruling on the second part of *WEA I*.

a. **Changing the employee contribution rate from seven percent to the greater of two percent or the employer rate saved each Class member at least \$10,000**

The first advantage that accompanied the voluntary overtime exclusion is the reduction of the employee contribution rate from a fixed seven percent to the greater of two percent or the employer contribution rate. As a matter of logic, paying less in contributions is certainly an advantage over paying more for the same benefits.<sup>16</sup>

The Class argues that lowering the contribution rate was not an additional advantage at all because, in the year prior, the Legislature had already lowered the rate to three percent. Opening Br. at 37-38. The Class conveniently neglects to mention that this rate reduction expired after one

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<sup>16</sup> The Class cites a footnote in *Alameda Cty.*, 227 Cal. Rptr. 3d at 831 n.24, to argue that lower contribution rates are not considered “comparable benefits.” In the footnote, the *Alameda* court criticized *Marin*, 2 Cal.App.5th at 699-705, for, *in dicta*, speculating that removing certain pay from the definition of compensation created the comparable advantage of not having to make employee contributions on that pay. The court stated that while “additional monthly income may be considered some sort of an advantage, it can hardly be described as comparable.” 227 Cal. Rptr. 3d at 831 n.24. Here, as in *Marin*, the Class does not have to make contributions on voluntary overtime pay, and will take home additional monthly income. This extra pay, which the *Alameda* Court stated was “some sort of advantage,” was not in the State expert’s calculations. Unlike *Marin*, the Class is also getting an improved contribution rate. Thus, it appears that *Alameda* not only supports the fact that improved contributions rates are advantages, but that the State expert’s calculation did not account for all of ESB 5143’s advantages.

year. Laws of 2000, ch. 17, § 2. In other words, if the Legislature had not enacted ESB 5143, the rate would have returned to a fixed seven percent.

The Class further argues that the Class did not have to make contribution at all in 1999 because WSPRS had a surplus, going as far as accusing the State of “raiding” WSPRS. Opening Br. at 34-37. WSPRS had a surplus in 1999 because investment returns on employee and employer contributions were high in the midst of the Dotcom bubble, but also mainly because the State had contributed to WSPRS at a rate of at least 11%, and as high as 24%, from 1947 to 1997. CP 709. Regardless, this argument is irrelevant to the second part of *WEA I*, which asks only whether the Legislature provided equivalent advantages. 181 Wn. 2d at 224. The undisputed facts show that lowering employee contributions from a fixed seven percent to the greater of two percent or the employer rate provided the Class with more than 18 years of savings. CP 96-97.

Implicit in the Class’ argument is the claim that, because the WSPRS fund had a temporary surplus at the time, the State had a contractual obligation to reduce the employee contribution rate. No such obligation exists. By law, the State is only required to keep the fund actuarially sound, and the State is fulfilling this obligation. See Laws of 2001, ch. 329, § 11; RCW 41.45.060. In fact, *WEA I* rejected the argument that the State must share a public pension plan’s surplus (known as

“gainsharing”) with plan members. *WEA I*, 181 Wn. 2d at 227; *see also* *Washington Fed'n of State Employees v. State*, 107 Wn. App. 241, 246, 26 P.3d 1003 (2001) (the question of whether “the statutory contribution rate for PERS I members results in ‘disproportionate employee contribution requirements’ ... belongs in the Legislature, not the courts”).

Because there is no contractual obligation to lower the employee contribution rate, the State could have kept the rate at seven percent in perpetuity. Because the State had lowered the rate to the greater of two percent or the employer rate, each named Class member has paid at least \$10,000 less in contributions.<sup>17</sup> CP 728-29. Paying less for something is certainly preferable, and the hallmark of an “advantage.”

**b. It is undisputed that Class members have benefitted or will benefit from the improved COLA**

The second advantage provided by the 2001 legislation is changing the COLA rate from a fixed two percent to a CPI-based compounding COLA with a maximum annual increase of three percent. A fixed COLA provides the same dollar amount of adjustment each year. CP 720-21. With an indexed COLA based on annual changes in CPI, the adjustment rate can vary. *Id.* If the rate goes above three percent, then the excess is

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<sup>17</sup> Dr. Thompson took a conservative approach by not adding on interest or expected investment returns to Class members’ savings from the improved contribution rate. CP 728-29.

“banked” for COLAs in future years, when the CPI might be lower. CP-725. Thus, an indexed compounding COLA has a higher value over the expected lifetime of retirees. CP 720.

In practice, this bears out in higher COLA adjustments for WSPRS retirees since 2001. CP 709. “Using a 3.0% banked COLA, which is the average annual Seattle CPI rate from the last 30 years, *all* Troopers have higher benefits under the Updated [post-ESB 5143] plan.” CP 725. In fact, each named Class member is at least \$65,000 better off. *Id.*

In arguing that the COLA improvement *alone* is not a comparable advantage, the Class misrepresents aspects of the improved COLA. First, the Class quotes Dr. Nickerson’s assessment that the COLA rate would be “in the 2% range anyway.” Opening Br. at 37. This is because Dr. Nickerson used a lower-than-average CPI growth in the last 10 years to argue that Dr. Thompson’s 2.4% COLA assumption is too high. The Class neglects to mention that the last 10 years included the Great Recession, and “economic forecasters use longer durations (usually 30 years) of historical data to make forecasts.” CP 726. In advising the Legislature, the State Actuary assumes an even higher CPI of 2.75%. CP 720.

Second, the Class misreads the State Actuary’s fiscal note to state that the combined voluntary overtime exclusion and improved COLA and contribution rates “save about \$1,758,734 a year.” But the fiscal note

estimated the cost of the changes to WSPRS 1 (voluntary overtime exclusion and improved COLA and contribution rates) and the creation of WSPRS 2. The State saved money by creating WSPRS 2, but did not save money from the changes to WSPRS 1. It is also irrelevant whether the State saved money, as the question is whether the Legislature provided equivalent or greater advantages to WSPRS I members. The fiscal note found that the advantages are greater, and updated calculations and analysis verify this fact. CP 559-64.

The Class's main argument on why the improved COLA alone is not "a comparable advantage" is because "troopers are likely to be dead before they realize any purported benefit from the CPI adjustment." Opening Br. at 39. Put differently, the Class agrees that the improved COLA is more valuable than the prior COLA, but argues that the gain from the improved COLA will not equal the loss from the voluntary overtime exclusion until near the end of the members' life expectancy.

What the Class is seeking here is for the Court to somehow discount Dr. Thompson's valuation of the improved COLA because it is tied to life expectancy, but the Class fails to state by how much the Court should discount or the discounting method. This inability to provide an alternative valuation is because pension plans are designed to fund members' entire retirement, not just the first few years of retirement. CP

603, 719-720, 729; RCW 40.44.440; RCW 41.45 (governing the actuarial funding of the State retirement systems). By necessity, this means using actuarial science to allocate benefits over members' expected lifetimes. Under this method, while a Class member who dies prematurely may not receive all of the calculated value of the improved COLA, the difference between improved COLA versus the pre-ESB 5143 COLA increases as the member ages. In other words, if a member lives past life expectancy, that member will earn more from the improved COLA than what Dr. Thompson had calculated. Looking ahead at the time the Legislature enacted the voluntary overtime exclusion, the only relevant consideration should be the actuarial projection for the effect on all plan members. This, and not looking through the rear view mirror decades later or focusing on the application of the law to a single individual, is the standard by which the adequacy of the voluntary overtime exclusion should be measured.

Additionally, because Dr. Thompson used actuarial science to determine the value of the improved COLA and contribution rates, he did not include in his calculation the non-actuarial benefits. The most obvious is that troopers had to work voluntary overtime to increase their retirement

benefits. In contrast, the improved rates provide advantages that Class members do not have to do any additional work to obtain.<sup>18</sup>

If the Class is arguing for a valuation of the improved rates without incorporating the actuarial science that governs every pension plan, then its alternative valuation should include these non-actuarial benefits. As it is, the Class has failed to provide a method to calculate the value of these improved rates without actuarial science. Here, Dr. Thompson, using accepted actuarial methods, calculated that Class members are at least \$65,000 better off from the improved COLA alone.

**3. Overall, the improved contribution and COLA rates provided the Class with greater advantages**

The Class is not arguing that, when combined, the improved COLA and contribution rates are not comparable advantages to offset the voluntary overtime exclusion. Opening Br. at 34-38. The Class is only arguing that the improved contribution rate, by itself, and the improved COLA, by itself, are not “a comparable advantage.”

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<sup>18</sup> In addition, these improved rates are fairer because troopers do not have equal access to voluntary overtime. Some cannot work voluntary overtime for various reasons, such as family obligations or health limitations. Voluntary overtime is also work for third-party contractors, mostly security for professional sports and on transportation projects. Opening Br. at 15-16. These events and projects tend to be located in urban counties, reducing access to voluntary overtime for troopers in rural counties, and, thus, less opportunity to spike their pensions. In contrast, every Class member benefits equally from the improved contributions and COLA rates.

If the Class were arguing that the combined improved COLA and contribution rates are not comparable advantages, the Class did not provide any calculation to support this claim. No such calculation exists. What Dr. Nickerson actually said is that the improved COLA alone will not provide more money than including voluntary overtime as salary for one person, Mr. Hester, until a year after his life expectancy. CP 802-803. Dr. Thompson disputes this conclusion, as his calculation shows that the improved COLA alone provides more money for Class members well within their expected lifetime. CP 728-31. But even under Dr. Nickerson's analysis, including the reduced contribution rate would mean that Mr. Hester will benefit more from the improved contribution and COLA rates than including voluntary overtime well within his expected lifetime.

Under Dr. Thompson's analysis, the combined improved COLA and contribution rates are more valuable to all Class members immediately when they retire. Each named Class member saved at least \$10,000 from paying the reduced employee contribution rate and is at least \$65,000 better off because of the improved COLA. CP 725-26. Combined, each Class member is better off by \$65,000 to \$250,000. *Id.*

On the other hand, the Class did not provide a calculation for the value of the improved contribution rate and only provided a calculation for the value of the improved COLA for one Class member, let alone provide

any calculation for the combined value of these improved rates. Their argument here depends entirely on the Court either ignoring the fact that the Class saved money for 18 years from having paid a lower contribution rate or ignoring the fact that, even under the Class's expert analysis, Class members will benefit from having the improved COLA.

Therefore, because the Class failed to provide a calculation for the combined value of the improved contributions and COLA rates, there is no genuine issue of material facts that when these advantages are combined, over their expected lifetime, each Class member is better off because of ESB 5143. *Id.* The Court should reverse the superior court's ruling on the second part of *WEA I*.

**C. The Voluntary Overtime Exclusion and Improved COLA and Contribution Rates Are Not Severable From Each Other**

The Class points out that RCW 43.43 contains a severability clause, and has argued that if the exclusion of voluntary overtime is invalidated, the Class should get to keep the improved COLA and contribution rates. Opening Br. at 14; CP 796. While severability clauses indicate a legislative intent that "provisions would have been enacted without the portions which are contrary to the constitution," the Court must also ask whether "[t]he part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the

purposes of the legislature.” *Davis v. Cox*, 183 Wn.2d 269, 295, 351 P.3d 862 (2015). Thus, even if an act or statute contains a severability clause, a provision is non-severable if severing would render the rest of the act “useless to accomplish the purposes of the legislature.” *Id.*

The Legislature enacted the voluntary overtime exclusion to prevent and reduce pension spiking by excluding voluntary overtime from the definition of salary. To comply with *Bakenhus*, 48 Wn.2d at 702, the Legislature improved the Class’s contributions and COLA rates.

The Class does not, and cannot, deny that the Legislature improved these rates as a bargain for the voluntary overtime exclusion. By arguing that the voluntary overtime exclusion and the improved rates provisions are severable, in contractual terms, the Class is seeking to take back the consideration given and keep the considerations received. But as a bargain, invalidating the consideration that the Class gave up would render the considerations received “useless to accomplish the purposes of the legislature.” In other words, the Legislature would not have improved these rates if it was unable to enact the voluntary overtime exclusion.

Therefore, if the Court invalidates the exclusion of voluntary overtime, the Court should likewise invalidate the improved COLA and contribution rates.<sup>19</sup>

## V. CONCLUSION

For the foregoing reasons, the Department asks this Court to rule that the Class is time-barred for having filed this case past the three-year statute of limitations, which began to run when the Legislature enacted the voluntary overtime exclusion. The Court should also rule that, even if the Class had timely filed, the exclusion is constitutional under *WEA I*.

RESPECTFULLY SUBMITTED this 3rd day of February, 2020.

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<sup>19</sup> The Legislature did not tie the voluntary overtime exclusion to the second part of ESB 5143, the creation of WSPRS 2. The part relating to WSPRS 2 is, therefore, severable from the voluntary overtime exclusion.

**DECLARATION OF SERVICE**

I certify that on this day, I electronically filed this document with the Clerk of the Court using the Washington State Appellate Courts' e-file portal, which will send notification of such filing to all counsel of record at the following:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 3rd day of February, 2020, at Tumwater,  
Washington.

  
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Jamie Falter, Legal Assistant

**ATTORNEY GENERAL'S OFFICE - REVENUE & FINANCE DIVISION**

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