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SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON DEPARTMENT OF RETIREMENT SYSTEMS and
THE STATE OF WASHINGTON,

Petitioners,

vs.

WASHINGTON EDUCATION ASSOCIATION, *et al.*,

Respondents.

PETITIONERS' REPLY BRIEF

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I. INTRODUCTION

Plaintiffs ask this Court to ignore clear statutory language and binding precedent to award them billions of taxpayer dollars that the Legislature never promised. They demand perpetual cost-of-living increases based on the UCOLA statute,¹ but the Legislature stated in that statute that it could be repealed in the future and that no Plan member had a contract right to increases following a repeal.² Plaintiffs try to avoid this plain language by relying on their “expectations,” but their alleged expectations are directly contrary to the statute. This Court never has found a contract right in such circumstances, and it should not do so here.

While claiming an unconstitutional impairment of contract, Plaintiffs ignore the well-settled three-part test that this Court uses to determine such impairments. *See, e.g., Retired Pub. Emps. Council of Wash. v. Charles*, 148 Wn.2d 602, 623-24, 62 P.3d 470 (2003) (applying three-part test in pension case). Plaintiffs cannot satisfy this test, and never even attempt to do so. Instead, Plaintiffs rely mainly on *Bakenhus v. City of Seattle*, 48 Wn.2d 695, 296 P.2d 536 (1956). But neither *Bakenhus* nor any of its progeny has found substantial impairment of a contract

¹ Laws of 1995, ch. 345, §§ 2, 5.

² Laws of 1995, ch. 345, §§ 2(6), 5(6).

where, as here, the Legislature created a pension enhancement and, at the same time and in the same statute, said that the enhancement created no contract rights to future benefits and could be repealed at any time.

Because no Washington appellate case has addressed legislative limits to a pension enhancement, Plaintiffs rely on *Navlet v. Port of Seattle*, 164 Wn.2d 818, 194 P.3d 221 (2008), involving private rights under a collective bargaining agreement (“CBA”). But they misstate the key fact of that opinion, claiming that the contract rights at issue were created not by the CBA, but rather by a Trust Agreement that contained the reservation of rights. That is incorrect. *Id.* at 847 (“[T]he terms of the CBA determined the extent of the Port’s obligation to provide benefits, not the Welfare Trust Agreement.”). Here, the very statute that created the UCOLA also explicitly reserved the Legislature’s right to amend or repeal it, which is precisely what the *Navlet* Court said was allowed. *Id.* at 849.

There is no dispute that the Legislature could enact a cost-of-living increase for a specific term of years, and then have it end. That is no different from what the Legislature did here, except that instead of stating a term in years for the UCOLA when it was enacted, the Legislature made it effective until repealed.

As this Court stated in *Jacoby v. Grays Harbor Chair & Mfg. Co.*, an employee’s pension rights “are limited by the terms of [the] contract” that creates the rights. 77 Wn.2d 911, 917, 468 P.2d 666 (1970). Plaintiffs ask this Court to ignore this longstanding rule, binding precedent governing Contract Clause claims, and the Legislature’s clear intent. The Court should reject that request.

II. ARGUMENT

A. Plaintiffs Misstate the Burden of Proof and Legal Standards.

Plaintiffs argue that neither the “strong presumption” in favor of a statute’s constitutionality nor the traditional three-part test for impairment of contracts applies in pension cases.³ Both assertions are incorrect.

In *Charles*, 148 Wn.2d 602, involving a constitutional challenge to a pension statute that lowered the rate of employer contributions to PERS Plan 1 and TRS Plan 1 (the same plans involved in this case), this Court applied the presumption of constitutionality, making it clear that “the party seeking to overcome that presumption must meet the heavy burden of proving unconstitutionality beyond a reasonable doubt.” *Id.* at 623. The Court then analyzed the claim using the test traditionally applied to impairment of contract claims under Article I, Section 23: “The three-part

³ See Brief of Respondents at 12-15.

test to determine if there has been an impairment of a public contract is: (1) does a contractual relationship exist, (2) does the legislation substantially impair the contractual relationship, and (3) if there is substantial impairment, is it reasonable and necessary to serve a legitimate public purpose.” *Id.* at 624. The *Charles* Court found that the plaintiffs could not satisfy the second prong of this test because the legislation they challenged did not substantially impair their right to an adequately funded pension. *Id.* at 626-27. Because there was no substantial impairment, the Court never even reached the *Bakenhus* question of whether the legislature had provided comparable replacement benefits.

This Court’s unanimous decision in *Charles* is no outlier. Both state and federal courts consistently have applied the three-part test in evaluating claimed impairments of public or private pension plans. *See, e.g., Parker v. Wakelin*, 123 F.3d 1, 4-5 (1st Cir. 1997); *Robertson v. Kulongoski*, 466 F.3d 1114, 1117 (9th Cir. 2006); *Strunk v. Public Emps. Ret. Bd.*, 108 P.3d 1058 (Or. 2005). Plaintiffs suggest that cases applying the federal Contracts Clause are irrelevant, but they never acknowledge that “[i]t is well-settled that these state and federal constitutional provisions are coextensive and are given the same effect.” *Pierce Cnty. v.*

State of Wash., 159 Wn.2d 16, 28, 148 P.3d 1002 (2006). Plaintiffs also suggest that these cases are inapposite because, they claim, in Washington “[t]he language of pension statutes . . . does not provide the touchstone for determining the rights of pensioners.”⁴ But even in pension cases, this Court repeatedly has said that it “cannot delete language from an unambiguous statute.” *McAllister v. City of Bellevue Firemen's Pension Bd.*, 166 Wn.2d 623, 630-31, 210 P.3d 1002 (2009); *Densley v. Department of Ret. Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007) (“Where ‘a statute is clear on its face, its meaning [should] be derived from the language of the statute alone.’”) (citation omitted).

Plaintiffs also argue that the Court should not defer to legislative decisions related to pension benefits, and that the Court should “independently” decide the issues here, citing *Carlstrom v. State of Wash.*, 103 Wn.2d 391, 396, 694 P.2d 1 (1985).⁵ However, the “independent” determination in *Carlstrom* was whether the State’s impairment of its own contract was “reasonable and necessary,” *i.e.*, whether it met the third prong of the Contracts Clause test. The State satisfied that standard, as conceded by Plaintiffs when they agreed that the UCOLA repeal was

⁴ Brief of Respondents at 18.

⁵ Brief of Respondents at 12-13.

necessary to maintain the integrity of the pension funds.⁶

B. Plaintiffs Cannot Satisfy the Three-Part Test for Impairment of Contract.

By failing to address the three-part test for impairment of contract, Plaintiffs sidestep the central questions in this case: the existence, scope, and claimed impairment of any contract right.

Under the first prong, Plaintiffs must prove beyond a reasonable doubt that the rights they claim “to have been impaired are in fact terms of the employment contract.” *Charles*, 148 Wash. 2d at 624. In other words, Plaintiffs must prove that the 1995 UCOLA statute created a right to annual UCOLAs in perpetuity. The Legislature, however, expressly stated that it “reserve[d] the right to amend or repeal [the UCOLA statute] in the future and no member or beneficiary has a contractual right to receive” UCOLA increases after that time. Laws of 1995, ch. 345, §§ 2(6), 5(6); RCW 41.32.489(6); RCW 41.40.197(5) (emphasis added). This language is crystal clear in rejecting a contractual right to perpetual UCOLAs.

This Court has held that only “[u]nder very limited circumstances a statute may be treated as a contract: when the statutory language and the circumstances establish a legislative intent to create rights contractual in

⁶ See Brief of Respondents at 12.

nature.” *Noah v. State of Wash.*, 112 Wn.2d 841, 843, 744 P.2d 516 (1989). Similarly, the United States Supreme Court has held that “to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body.” *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466, 105 S. Ct. 1441, 84 L. Ed. 2d 432 (1985). Here, the Legislature, by explicitly disclaiming any contract right to future UCOLAs, unequivocally expressed its intent to preclude any perpetual contract right to annual increases.

As to the second prong, even if Plaintiffs could show a contractual right, they would still need to prove beyond a reasonable doubt that the Legislature’s cancellation of future UCOLA increases “substantially impairs the contractual relationship.” *Charles*, 148 Wn.2d at 625. Impairment occurs when a statute “alters [the] terms [of], imposes new conditions [on], or lessens [the] value” of a contract right. *Id.* Because the Legislature expressly stated, in the very statute creating the UCOLA, that it could be amended or repealed at any time, the Legislature’s exercise of that reserved right did not modify any contract right.

Likewise, Plaintiffs cannot (and do not) prove that any alleged

impairment is “substantial.” Two factors must be considered on “substantiality”: (1) the degree to which the repealed provisions induced Plaintiffs to enter into the alleged contract in the first place, and (2) the degree to which Plaintiffs reasonably expected the repealed part of the contract to continue. *See Tyrpak v. Daniels*, 124 Wn.2d 146, 155, 874 P.2d 1374 (1994). Here, of course, no Plaintiff joined Plan 1 based on the existence of the UCOLA, because the Legislature enacted it 18 years after Plan 1 closed. Moreover, Plaintiffs cannot reasonably have expected the UCOLA to continue forever, because the plain language of the statute made clear that the Legislature could amend or repeal it at any time. *See, e.g., Charles*, 148 Wn.2d at 622 (plaintiffs cannot claim ignorance of “readily available” statutory pension provisions).

With regard to the third prong of the impairment-of-contract test – whether repeal was reasonable and necessary to serve a legitimate public purpose – Plaintiffs conceded this when they agreed, for purposes of their summary judgment motion, that the “economic emergency” confronting the State required the repeal.⁷ This was a necessary concession given the grave crisis facing both the state budget and Plan 1’s long-term health, as

⁷ *See* Brief of Respondents at 12.

detailed in the State's opening brief.

C. Plaintiffs' Alleged "Expectations" Cannot Create Contract Rights Contrary to the Statute.

Plaintiffs contend that "[t]he language of pension statutes . . . does not provide the touchstone for determining the rights of pensioners," and that those rights instead are "a function of general employee expectations."⁸ That is not and cannot be the law.

This Court never has held that "general employee expectations" can create contract rights when the Legislature has expressly foreclosed them in clear statutory language. Rather, this Court has repeatedly held that statutory language controls, even in pension cases. *See, e.g., McAllister*, 166 Wn.2d at 630-32; *Densley*, 162 Wn.2d at 220-21; *Vallet v. City of Seattle*, 77 Wn.2d 12, 19, 459 P.2d 407 (1969) ("To permit respondent to receive the most beneficial parts of the 1915 and 1961 acts to the exclusion of any detriments contained therein would result in absurd consequences to the whole pension plan system.").

The reason for this longstanding rule is, of course, that if pension rights could not be limited in advance by statutory language, then the Legislature would have no way of controlling the cost or scope of pension

⁸ Brief of Respondents at 18.

benefits, thus discouraging the Legislature from enacting such benefits at all. *See, e.g., Jacoby*, 77 Wn.2d at 920-21 (holding that “the extent of [pension] compensation is limited by the terms of the contract” because the alternative rule “would severely limit the adoption of purely voluntary pension plans”). The trial judge himself expressed this concern with Plaintiffs’ argument, saying that it “seems like a tough position, because you’re telling the Legislature that they either have to provide nothing or they have to provide a defined [permanent] benefit.”⁹

Indeed, the Attorney General stated in 2005 Wash. Att’y Gen. Op. No. 16 that the Legislature had the authority to amend or repeal gainsharing provisions of the public employee pension statutes, and that in light of the explicit reservation of rights and disclaimer of contract rights in the enacting statute, Plan members could not claim a “reasonable expectation” of receiving a continuous and unending right to the benefit. The same reasoning applies to the UCOLA. Although AGOs are not controlling, they are entitled to “considerable weight.” *Bowles v. Department of Ret. Sys.*, 121 Wn.2d 52, 63, 847 P.2d 440 (1993).

In arguing that their “general expectations” define their contract

⁹ RP (9/7/12) at 59.

rights, Plaintiffs cite to four cases: *Washington Ass'n of Cnty. Officials v. Washington Pub. Emps' Ret. Sys. Bd.*, 89 Wn.2d 729, 575 P.2d 230 (1978); *Washington Fed'n of State Emps. AFL-CIO v. State of Wash.*, 98 Wn.2d 677, 658 P.2d 634 (1983); *Bowles v. Department of Ret. Sys.*, 121 Wn.2d 52, 847 P.2d 440 (1993); and *Navlet*, 164 Wn.2d at 834-35.¹⁰ None supports their argument.

In *Washington Ass'n of Cnty. Officials*, 89 Wn.2d 729, counties challenged the State's longstanding practice of including accrued vacation time in calculating public employees' "average final compensation." The Court rejected their argument, finding "clear legislative intent to allow termination payments to be included in 'average final compensation.'" *Id.* at 733. Thus, the Court deferred to legislative intent, rather than overriding the statute with some vague notion of plaintiffs' "expectations."

Washington Fed'n also addressed the State's longstanding practice of allowing employees to include accrued vacation time in calculating their average final compensation, which was "a known and planned legislative authorization." 98 Wn.2d at 680. When the Legislature amended the public employee vacation statutes to prohibit this practice, *id.*

¹⁰ Brief of Respondents at 18-19.

at 681, plaintiffs challenged the amendment, claiming that it was unconstitutional under *Bakenhus*. The State argued that *Bakenhus* did not apply because the amendments were to vacation statutes, rather than “direct amendments to pension statutes.” *Id.* at 685. The Court disagreed, reasoning that “there is no difference in principle between a law which directly and in terms impairs the obligation of a contract and one which produces the same effect in its plain construction and practical operation.” *Id.* at 687. Thus, *Washington Fed'n* did not involve “employee expectations,” and does not stand for the proposition that such expectations create contractual rights. Rather, it simply holds that the Legislature cannot do indirectly (via the vacation statutes) what it could not do directly (through pension statutes).

Plaintiffs also cite to *Bowles*, 121 Wn.2d 52, , but that case involved an ambiguous statute, a “long-standing” administrative practice allowing inclusion of “leave cashouts” in pension calculations, and a change that “reduced the pension rights of PERS 1 employees.”

Plaintiffs’ final citation for their “employee expectation” argument is *Navlet*, 164 Wn.2d at 834-35, but the Court there “appl[ie]d contract law to the interpretation and construction of collective bargaining

agreements,” and “search[ed] for intent through the objective manifest language of the contract itself.” *Id.* at 842. Thus, “the terms of the CBA determined the extent of the Port’s obligation to provide benefits.” *Id.* at 847. It was those terms that gave rise to employee expectations, not the other way around.¹¹

Plaintiffs also base their “expectation” argument on certain materials prepared by the Department of Retirement Systems (“DRS”) that supposedly made no mention of a reservation of the right to repeal. But the two DRS Handbooks on which Plaintiffs rely state that “[t]he actual rules governing your benefits are contained in state retirement laws”; that the materials were intended only as “a summary written in less legalistic terms”; and that “[i]f there are any conflicts between what is written in this handbook and what is contained in the law, the current law will govern.”¹² And even if the materials had not included this language, it is well-settled that an agency like DRS, by preparing and disseminating materials, cannot trump statutory language. *See Caritas Servs. Inc. v. Department of Soc. &*

¹¹ Moreover, *Navlet*’s statement about focusing on the “expectations of the employee at the time the retirement benefits are conferred, rather than the express language of the contract,” 164 Wn.2d at 834-35, is immediately preceded by discussion of the employer’s “promise on which the employee relies.” Employee expectations must be reasonably based on the employer’s “promise,” which here was a repealable grant of rights.

¹² CP 895, 898 (“Summary Descriptions”) (emphasis added).

Health Servs., 123 Wn.2d 391, 415, 869 P.2d 28 (1994) (“[A]gencies do not have the power to amend unambiguous statutory language.”); *McGuire v. State*, 58 Wn. App. 195, 198-99, 791 P.2d 209 (1990) (agency attempt to confer rights on employee despite statutory exemption was “ultra vires and void as a matter of law”).

Finally, even if reasonable employee expectations could create contract rights, any reasonable expectation here would lead to the same result as the statutory language. Both as a matter of law and fact, Plaintiffs cannot claim they had a reasonable expectation that UCOLA increases would continue forever. As to the law, the UCOLA statute made plain that UCOLA increases could end at any time. Any contrary expectation would depend on ignorance of the statutory language, and this Court has made clear that such ignorance cannot form the basis for a successful claim. *See, e.g., Retired Pub. Emps. Council of Wash. v. State of Wash.*, 104 Wn. App. 147, 151-52, 163 P.3d 65 (2001) (“[A] reasonable person is deemed to know the law, or, as the old cliché puts it, ‘ignorance of the law is no excuse.’”); *see also Charles*, 148 Wn.2d at 622 (holding that plaintiffs cannot claim ignorance of statutory pension provisions because they are “readily available to Retirees and Employees”). And as a

matter of fact, the only evidence in this case is that the individual Plaintiffs, when deposed on the subject, admitted they never received any representations about the UCOLA and were largely ignorant of it.¹³

D. The UCOLA Statute is Unambiguous.

The UCOLA statute unambiguously disclaims any contract right to perpetual cost-of-living increases:

The legislature reserves the right to amend or repeal this section in the future and no member or beneficiary has a contractual right to receive this postretirement adjustment not granted prior to that time.¹⁴

Plaintiffs claim that the Legislature could have written this statute more explicitly,¹⁵ but the test for ambiguity is not whether Plaintiffs can invent another formulation that allegedly would have been clearer. Rather, a plaintiff must show that the actual words used are subject to differing, reasonable interpretations. *See, e.g., Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005) (“A statute is not ambiguous merely because different interpretations are conceivable;” it must be “susceptible to two or more reasonable interpretations.”). Plaintiffs have made no such showing,

¹³ *See, e.g.*, CP 947-51, 955-58, 975-76, 981-82, 991.

¹⁴ Laws of 1995, ch. 345, §§ 2(6), 5(6); RCW 41.32.489(6); RCW 41.40.197(5). Plaintiffs agree that “that time” means the date of the UCOLA repeal. Brief of Respondents at 41.

¹⁵ Brief of Respondents at 41-42.

and indeed never even bothered to argue ambiguity in the trial court.

The only ambiguity Plaintiffs allege is that the phrase “not granted prior to that time” might refer to the “contractual right” rather than to “this post-retirement adjustment.”¹⁶ That reading suffers from two fatal flaws.

First, reading the provision as Plaintiffs suggest would render it superfluous. The Legislature always has authority to alter the pension system as to employees who have not yet attained contractual rights in it. *See, e.g., Washington State Pub. Emps. Bd. v. Cook*, 88 Wn.2d 200, 206, 559 P.2d 991 (1977). The Legislature need not limit contractual rights conferred nor reserve the right to amend to retain this authority. *Id.* Thus, reading the provision as Plaintiffs suggest gives it no effect at all, contrary to this Court’s rule of construing statutes to give effect to all the language. *G-P Gypsum Corp. v. Department of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010).

Second, Plaintiffs’ argument turns on reading the phrase “not granted prior to that time” as modifying “contractual right,” rather than “postretirement adjustment.”¹⁷ But the last antecedent rule of statutory construction provides that, unless contrary intent appears in the statute,

¹⁶ Brief of Respondents at 41.

¹⁷ Brief of Respondents at 41.

“relative and qualifying words and phrases, both grammatically and legally, refer to the last antecedent.” *Boeing Co. v. State of Wash.*, 103 Wn.2d 581, 587, 693 P.2d 104 (1985) (citation omitted). The phrase “not granted prior to that time” modifies its last antecedent: “this postretirement adjustment.” It does not modify the earlier noun “contractual right.”

Even if the language were ambiguous, the Court would turn to the question of legislative intent. *See Washington Fed’n*, 98 Wn.2d at 684 (“Where ambiguity exists, resort may be had to a statute’s legislative history to ascertain its intended impact.”). The Legislature’s intent here could not have been clearer in both the 1995 and 2011 statutes:

[T]he intention of the legislature in section 5, chapter 345, Laws of 1995 and this act is to not create any contractual rights to the annual increase on the part of the public employee’s retirement system, plan 1 and the teachers’ retirement system, plan 1 members or retirees. Having reserved the right to amend or repeal these provisions in RCW 41.32.489(6) and 41.40.197(5), the legislature is now exercising that right through this act.

Laws of 2011, ch. 362, § 1.¹⁸

¹⁸ Post-enactment statements can demonstrate legislative intent. *See, e.g., Rozner v. Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991) (“[W]hile the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to significant weight”); *State v. Moses*, 145 Wn.2d 370, 375-76, 37 P.3d 1216 (2002) (in determining the legislative intent of a statute, a court may consider the Legislature’s actions or inaction regarding the statute in the years following its enactment); *Moen v. Spokane City Police Dep’t*, 110 Wn. App. 714, 719, 42 P.3d 456 (2002) (“[L]ater amendments to a statute may be strong evidence of what the legislature intended in the original statute.”).

E. The 2011 UCOLA Repeal was not “Retroactive.”

Plaintiffs base their arguments on the mistaken premise that the UCOLA repeal was “retroactive.”¹⁹ But the 2011 statute canceling future UCOLA increases was not retroactive. The Legislature repealed only future increases, leaving 15 years of annual increases embedded in pensions of those who had received increases before the repeal.²⁰ The repeal would be retroactive only if it took away a vested, existing right. No employee had a vested right to future annual UCOLAs in perpetuity, because the enacting statute specifically said the opposite. Plaintiffs can claim no right broader than the grant that the Legislature conferred. *See Jacoby*, 77 Wn.2d at 917 (pension rights of an employee are “limited by the terms of that contract”).

Plaintiffs complain particularly about class members “who in 2011 were either still working, or were retirees who had not reached age 66,” and who have never received a UCOLA adjustment “despite their decades of contribution to the system.”²¹ First, no class member ever made any additional “contribution” towards the UCOLA; the Legislature statutorily

¹⁹ Brief of Respondents at 14, 16, 28.

²⁰ Laws of 2011, ch. 362, §§ 3(1)(a), 6(1)(a) (“This subsection shall not reduce retirement allowances below the amounts in effect on the effective date of this section.”).

²¹ Brief of Respondents at 23.

fixed employee contributions to the Plans long ago at six percent of compensation, and did not increase them after the Legislature enacted the UCOLA – only employer contributions increased.²² Moreover, employees who still were working in 2011 continued to accrue increased pension benefits through additional years of service, and in many cases received salary increases. In short, the “unfairness” Plaintiffs allege is illusory. But even if it did “seem unfair,” “the extent of [pension] compensation is limited by the terms of the contract” because “the alternative would be to hold that the adoption of a pension plan of any type creates an immediate enforceable monetary right in employees, irrespective of the terms of the contract.” *Jacoby*, 77 Wn.2d at 920-21 (emphasis added).

F. Contrary to Plaintiffs’ Claim, Precedent Makes Clear that the Legislature’s Reservation of Rights Should be Given Effect.

Plaintiffs argue that this Court’s past decisions require invalidating the reservation of rights the Legislature included when it enacted the UCOLA pension enhancement. Their argument fails.

In arguing that the State cannot reserve the right to eliminate a pension enhancement, Plaintiffs first claim that *Leonard v. City of Seattle*,

²² RCW 41.32.350; RCW 41.40.330; Laws of 1973, 1st Ex. Sess., ch. 189, § 6; Laws of 1972, 1st Ex. Sess., ch. 151, § 13.

81 Wn.2d 479, 503 P.2d 741 (1972), “is controlling.”²³ In fact, *Leonard* is inapposite. That case did not involve the Contracts Clause at all. Rather, the Court held that under Article I, Section 15 (“No conviction shall work corruption of blood, nor forfeiture of estate”), the State could not deny a retiree his pension based on a felony conviction that occurred after he retired. Also, in *Leonard*, the retiree’s entire pension was eliminated, not just future cost-of-living increases. Finally, the Court in *Leonard* noted:

The issue here does not arise from a general change in pension benefits made necessary by a deep and general economic crisis threatening the survival of the whole pension system, but rather from a statute which provides for a total defeat of one man’s pension occurring long after it had finally vested.

Id. at 487. This case involves exactly what *Leonard* did not: “a deep and general economic crisis” threatening the survival of Plan 1.²⁴

Plaintiffs next cite *Navlet*, but they misstate the central fact in that case. Plaintiffs claim that this Court in *Navlet* found a reservation of rights ineffective even though it was “included in the Trust Agreement and Summary Plan Description, which, like the statute in our case, created the

²³ Brief of Respondents at 30-31.

²⁴ See CP 607-09, 622-29.

retirement benefits.”²⁵ This is simply incorrect. This Court in *Navlet* explicitly held that the Trust Agreement and Summary Plan Description (“SPD”) did not create rights to the welfare benefits; rather, those rights were created by the parties’ Collective Bargaining Agreement (“CBA”). 164 Wn.2d at 842 (“The CBA created the obligation to provide retirement welfare benefits.”). The Court specifically stated:

[T]he Port’s argument ultimately fails because it incorrectly assumes that the terms of the Trust Agreement and SPD could define the Port’s underlying obligation to provide welfare benefits conferred in the CBA. . . . [T]he terms of the CBA determined the extent of the Port’s obligation to provide benefits, not the Welfare Trust Agreement.

Id. at 846-47. It was precisely because the Plan Description and Trust Agreement did not create the right to benefits that they “could not limit the vested rights conferred in the CBA.” *Id.* at 847. The Court made clear that “[i]f the Port wanted to limit its obligation to provide welfare benefits, then it could have insisted on limiting the right to retirement welfare benefits in the CBA itself.” *Id.* at 849. What this Court required in *Navlet* is exactly what the Legislature did in this case: the statute that created the UCOLA expressly included the reservation of rights and a disclaimer of contract rights to future UCOLAs. *See* Laws of 1995, ch. 345, §§ 2, 5.

²⁵ Brief of Respondents at 33.

Plaintiffs also rely on *Carlstrom*, 103 Wn.2d 391, and *Caritas*, 123 Wn.2d 391, for the alleged invalidity of a reservation-of-rights clause. In each case, the Court recognized that reservations of rights would be given effect if sufficiently explicit, but held that the clauses at issue were not specific enough to retroactively modify the contracts. *See Caritas*, 123 Wn.2d at 406-07 & n.9 (holding that “states or agencies may put potential contractors explicitly on notice that the terms of a public contract are subject to retroactive adjustment,” but that the contract at issue was not sufficiently explicit); *Carlstrom*, 103 Wn.2d at 393 (same).

In contrast, in the UCOLA statute, the Legislature specifically “reserve[d] the right to amend or repeal this section in the future” – an explicit, prospective reservation that affected only future adjustments. *Carlstrom* indicated that such a reservation of rights is enforceable:

The Legislature knows how to use plain English to make existing contracts subject to future modification. It could have written [the statute at issue in that case] expressly to provide: These agreements shall be subject to subsequent modification by the Legislature.

103 Wn.2d at 398.

G. The Pre-1995 Cost-of-Living Statutes Do Not Preclude Repeal of the UCOLA.

Plaintiffs argue that the Legislature could not repeal the UCOLA

because the UCOLA “replaced” certain earlier, temporary COLAs. But as explained in the State’s opening brief, Plaintiffs did not meet their burden of demonstrating they had vested contract rights in the pre-1995 COLAs, either individually or on a class basis. The earlier COLAs were limited in time, limited to particular beneficiaries, and subject to different eligibility requirements.²⁶ For example, to receive the “Age 65 COLA,” a plaintiff had to be 65 or older in 1993, at least 84 years old today. None of the named plaintiffs is over 84. Likewise, none of them qualified for the “Age 70 COLA.”²⁷ To the extent any class member did qualify for these prior COLAs, they remain embedded in the retirement allowance.²⁸ Plaintiffs cannot now bootstrap an entitlement to the UCOLA.

Even if the 1995 UCOLA impaired Plaintiffs’ pre-existing rights, their remedy was to bring suit within three years of the 1995 enactment. The statute of limitations now bars Plaintiffs from challenging the repeal of the prior COLAs as unconstitutional on the grounds that the UCOLA was not a “comparable benefit.” *See, e.g., Retired Pub. Emps. Council*, 104 Wn. App. 147 (“*RPEC*”) (statute of limitations barred lawsuit to

²⁶ *See* CP 541-47.

²⁷ *See* Brief of Petitioners at 33-36; CP 546.

²⁸ *See, e.g.,* CP 546; 900-04.

compel State to pay COLAs to PERS Plan 1 members, filed by one of the Plaintiffs herein).²⁹ If Plaintiffs believed that UCOLA enactment and its reservation of rights impaired pension rights they had earned, they clearly knew of that potential claim by 2000, when the *RPEC* action was filed.

H. Plaintiffs Were Not Entitled to Summary Judgment under the “Comparable Benefit” Test of *Bakenhus*.

Even if the Court were to find that Plaintiffs have proven beyond a reasonable doubt the substantial impairment of a contractual right, summary judgment still would be inappropriate. Under the “comparable benefit” test in *Bakenhus*, the State presented evidence of comparable offsetting benefits in the form of an increase in the Alternative Minimum Benefit and a more secure, well-funded Plan 1, with an increased ability to pay basic pension benefits well into the future.³⁰

The Legislature is required to ensure an actuarially-sound pension system, *Charles*, 148 Wn.2d at 625 (citation omitted), and cannot be

²⁹ That case involved one of the same pre-UCOLA statutes, former RCW 41.40.195, that Plaintiffs rely on here. The court noted there that “RPEC sued to compel DRS to pay COLAs for the years 1981 through 1995” and argued that “former 41.40.195 was a written contract between the State and each PRS 1 employee.” *Id.* at 149-50. The Court of Appeals rejected the argument that the PERS Plan 1 statutes were a written contract for purposes of the six-year statute of limitations. *Id.* Likewise, the court relied on the statute of limitations to reject a similar challenge in *Retired Pub. Emps. Council of Wash. v. State of Wash.*, 2003 Wash. App. LEXIS 1233 (Wash. Ct. App. June 24, 2003).

³⁰ See Brief of Petitioners at 43-45; CP 611, 631.

precluded from taking prospective actions to save it in times of economic crisis. Indeed, the undisputed record is that the UCOLA repeal was undertaken to ensure “a retirement system actuarially designed . . . to meet present and future pension liabilities.” *Id.* Plaintiffs concede that the repeal was necessary to the flexibility and integrity of Plans 1, and they cannot now deny those improvements as a comparable benefit.

III. CONCLUSION

Plaintiffs ask this Court to issue an unprecedented ruling overriding statutory language and legislative intent. In contrast, the State seeks a narrow ruling that when the Legislature enacts a law creating a pension enhancement, and says in the law that there is no contractual right to future enhancements and the increases can be prospectively revoked at any time, members have no permanent constitutional right to receive them. The State respectfully asks that the Court adopt this narrow ruling.

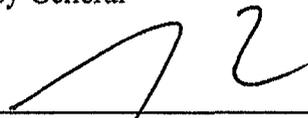
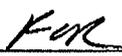
DATED this 23rd day of September, 2013.

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Subject: Case No. 88546-0; Washington Education Ass'n, et al. v. State of Washington, et al.

Clerk of the Court:

Attached please find the Petitioners' Reply Brief for the above-referenced matter.

Thank you.

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