STATE OF MICHIGAN

IN THE SUPREME COURT

AFT MICHIGAN, et al,

Plaintiffs-Appellees,

v

STATE OF MICHIGAN,

Defendant-Appellant.

_____/

THIS APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID

Supreme Court No. 154117

Court Of Appeals Docket No. 303702

Court Of Claims No. 10-000091-MM

DEFENDANTS-APPELLANTS' REPLY BRIEF

ORAL ARGUMENT REQUESTED

TIMOTHY L. JOHNSON, JANET HESLET, RICKY A. MACK and DENISE ZIEJA,

Plaintiffs-Appellees/Cross-Appellants

v

PUBLIC SCHOOL EMPLOYEES RETIREMENT SYSTEM, PUBLIC SCHOOL EMPLOYEES RETIREMENT SYSTEM BOARD, TRUST FOR PUBLIC EMPLOYEE RETIREMENT HEALTH CARE and DEPARTMENT OF TECHNOLOGY, MANAGEMENT, AND BUDGET,

Defendants-Appellants/Cross-Appellees

and

DIRECTOR OF DEPARTMENT OF TECHNOLOGY MANAGEMENT AND BUDGET, DIRECTOR OF RETIREMENT

Court Of Appeals Docket No. 303704

Court Of Claims No. 10-000047-MM

SERVICES OFFICE and STATE TREASURER,

Defendants.
_____/

DEBORAH MCMILLAN, THOMAS BRENNER, THERESA DUDLEY, KATHERINE DANIELS and COREY CRAMB,

Plaintiffs-Appellees/Cross-Appellants

v

PUBLIC SCHOOL EMPLOYEES RETIREMENT SYSTEM, PUBLIC SCHOOL EMPLOYEES RETIREMENT SYSTEM BOARD, TRUST FOR PUBLIC EMPLOYEE RETIREMENT HEALTH CARE and DEPARTMENT OF TECHNOLOGY MANAGEMENT, AND BUDGET,

Defendants-Appellants/Cross-Appellees

and

DIRECTOR OF DEPARTMENT OF TECHNOLOGY MANAGEMENT AND BUDGET, DIRECTOR OF RETIREMENT SERVICES OFFICE and STATE TREASURER,

Defendants.
_____/

Court Of Appeals Docket No. 303706

Court Of Claims No. 10-000045-MM

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DEFENDANTS-APPELLANTS' REPLY BRIEF
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INTRODUCTION

In considering PA 300's constitutionality, this Court directed the Court of Appeals to "consider what issues presented in these cases **have been superseded** by the enactment of 2012 PA 300 and this Court's decision upholding that Act, and it shall only address any outstanding issues the parties may raise regarding 2010 PA 75 that were not superseded or otherwise rendered moot by that enactment and decision." *AFT Michigan v State of Michigan*, 498 Mich 851; 864 NW2d 555 (2015). Despite this Court's clear directive, however, the majority opinion in the Court of Appeals and Plaintiffs-Appellees and their members (collectively, the "Union"[1]) maintain that PA 300 did not supersede **any issue**. Instead, the Union continues to claim that PA 75 violates the Takings, Due Process, and the Contracts Clauses, and ignores that the Legislature fixed and superseded PA 75's alleged infirmities by enacting PA 300 to provide employees two options with regard to the funds contributed under PA 75: (1) opt-in and have their contributions included in the trust account such that employees are guaranteed to receive a health care benefit of at least as much as they contributed; or (2) opt-out and receive a refund of their contributions made under PA 75 and PA 300. Plaintiffs also fail to recognize that, in upholding PA 300, this Court proclaimed that the reform of public school employee retiree health care serves a legitimate governmental purpose. *AFT Michigan v State of Michigan*, 497 Mich 197, 247; 866 NW2d 782 (2015) ("*AFT II*").

In their Answers, the Union confuses the concepts of retroactivity and remedial legislation, and fail to understand that the Legislature designed PA 300 not to apply retroactively, but, instead, to correct judicially-identified flaws in PA 75. Thus, because the contributions

[1] Plaintiffs-Appellees have filed three briefs opposing the State's Application for Leave to Appeal. For ease of reference, the State refers to those briefs as follows:

- Deborah McMillan, *et al*'s brief is the McMillan Answer.
- Timothy L. Johnson, *et al*'s brief is the Johnson Answer.
- AFT Michigan's brief is the AFT Michigan Answer.

employees made under PA 75 are currently held in escrow pending this case's resolution, those contributions will be subject to the PA 300 refund mechanism when they are placed into the retiree health care fund, meaning that any employee who contributed funds under PA 75 will receive retiree health care benefits equal to, or greater than, the amount contributed, a refund, or both.

The Union also continues to cling to the idea that requiring employees to contribute to their own retiree health care benefits is a governmental taking, even though each contributing member consented to such withholdings when they chose to become, or remain, employed by a public school after July 1, 2010. Although the Union continues to argue that PA 75 violated the Takings Clause because it required members to contribute to the health care fund without guaranteeing them any benefits in return, the enactment of PA 300 ensured that all members who contributed to the fund would receive the value of their contributions through subsidized retiree health care, a refund of their contributions, or both.

Finally, the Union maintains its flawed Contracts Clause argument notwithstanding the fact that the State has no contract with employees, and that PA 75 does not impact employees' rights or benefits under their contract, but instead requires a contribution toward retiree health care benefits that the Legislature determined to be in the public interest. This Court's analysis in *AFT II* is instructive, if not determinative, with regard to the Contracts Clause analysis. Specifically, the Court in *AFT II* reaffirmed in the exact context under the same statutory framework that public school employees do not have a "contractual right" to receive retiree health care, let alone a right that insulates their future pay from duly-imposed retiree health care deductions.

The Union's arguments in response to the State's briefs in support of the constitutionality

of PA 75 fail to acknowledge the reality that public school employees' retiree health care would have disappeared but for PA 75. As the Union points out, employees have no right to retiree health care, and the Legislature could have allowed MPSERS to continue to face an unfunded liability crisis or to eliminate retiree health care altogether. When Michigan's public school employee retiree health care program reached an existential moment, however, the Legislature crafted a solution to allow the system to survive – by asking employees to contribute a mere 3% of their compensation toward their own retiree health care system. This solution was not only rationally related to a legitimate government purpose, but it was also narrowly tailored to effectuate that purpose by ensuring members would benefit from their contributions, either in the form of subsidized retiree health care, a supplemental retirement allowance, or both, in exchange for only covering a fraction of the overall cost of maintaining the retiree health care system. If the more than $550 million currently held in escrow in this case cannot be used to help fund and prefund retiree health care, the retiree health care system may again face sustainability and longevity concerns.

ARGUMENT

I. PA 75'S PRESUMPTION OF CONSTITUTIONALITY DEFINES THE STANDARD AND SCOPE OF THIS COURT'S REVIEW.

The Union contends that this Court should ignore the State's explanation of the presumption of constitutionality because the State is raising it for the first time in this Court. (Johnson Answer p 9.) The presumption of constitutionality is not a "new issue" as the Union contends and was addressed in the State's October 2, 2015 Supplemental Brief on Remand (See Supplemental Br. on Remand p 6.) Furthermore, the presumption that PA 75 is constitutional is a threshold issue concerning the applicable standard of review in evaluating a claim that a statute is unconstitutional. As this Court has explained, judicial analysis of constitutional claims begins

by reviewing certain principles which have become axiomatic, the first of which is that legislation challenged on a constitutional basis is "clothed in a presumption of constitutionality." *Cruz v Chevrolet Grey Iron Division of General Motors Corp*, 398 Mich 117, 127; 247 NW2d 764 (1976).

The State does not suggest that the Legislature can run roughshod over civil rights, but instead explains the principle underlying this Court's starting point for its constitutional analysis – namely, that "[e]very reasonable presumption or intendment must be indulged in favor of the validity of an act…" *Cady v City of Detroit*, 289 Mich 499, 505; 286 NW 805 (1939). Judicial deference to legislative enactments is a scope of review issue that is rooted in the Constitution's separation of powers amongst the three branches of state government, and limits the Judiciary's power to second-guess legislative choices. *Mich Citizens for Water Conservation v Nestle Waters N Am, Inc*, 479 Mich 280, 292; 737 NW2d 447 (2007). Thus, this scope of review issue is properly raised on appeal.

II. PA 300 WAS NOT RETROACTIVE, BUT WAS REMEDIAL WITH REGARD TO THE FUNDS COLLECTED UNDER PA 75.

PA 300's plain language makes it clear that the Legislature intended PA 300's refund provisions to apply to all contributions made pursuant to MCL 38.1343e ("section 43e"), which necessarily encompasses contributions made under PA 75. The Union spends numerous pages in its briefs discussing why PA 300 cannot be applied retroactively. (Johnson Answer pp 38-41; McMillan Answer pp 3-15.) However, these arguments fundamentally misapprehend Defendants' arguments. Defendants have not, and do not, contend that PA 300 applies retroactively. Rather, the refund provisions of PA 300 apply prospectively, but to **all** contributions made under section 43e. While some of those contributions were made prior to the enactment of PA 300, this Court has long held that "[a] statute is not regarded as operating

retrospectively because it relates to an antecedent event." *Hughes v Judges' Retirement Bd*, 407 Mich 75, 86; 282 NW2d 160 (1979). See, also, *Clearwater Twp v Board of Sup'rs*, 187 Mich 516, 521; 153 NW 824 (1915) ("A law is not retrospective, in a sense forbidding it, because a part of the requisites for its action and application is drawn from a time antedating its passage.")

When the Legislature enacted PA 300, it included in MCL 38.1391a ("section 91a") an opportunity for qualified members to elect to opt-out of retiree health insurance coverage. MCL 38.1391a(5). Employees making such an election are entitled to receive a credit to their deferred compensation accounts in an amount equal to the contributions they made under section 43e. MCL 38.1391a(7). Individuals who do not make an election and stay in the retiree health care system, but who do not qualify for retiree health care will receive a separate retirement allowance that is "paid for 60 months and . . . equal to 1/60 of the amount equal to the contributions made by the member under section 43e." MCL 38.1391a(8). Similarly, the beneficiaries of a member who passes away "before the payment of health insurance coverage premiums by the retirement system in an amount equal to or greater than the amounts contributed under section 43e" receive a separate retirement allowance "in an amount equal to the difference between the health insurance coverage premiums paid by the retirement system under section 91 and contributions made by the member under section 43e." MCL 38.1391a(8). The Legislature also made section 43e subject to section 91a in PA 300. MCL 38.1343e.

In arguing that these amendments do not apply to the funds withheld pursuant to PA 75, the Union ignores the plain language of the enactment and well-settled maxims of statutory interpretation. "The cardinal principle of statutory construction is that courts must give effect to legislative intent." *Burton v Reed City Hosp Corp*, 471 Mich 745, 751; 691 NW2d 424 (2005). "When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for

itself and there is no need for judicial construction…" *In re Certified Question from the United States Court of Appeals for the Sixth Circuit*, 468 Mich 109, 113; 659 NW2d 597 (2003).

The Legislature could easily have chosen to include language in section 91a applying the refund provisions only to section 43e contributions that were made **after** the effective date of PA 300. In fact, PA 300 demonstrates that the Legislature is unquestionably capable of drafting statutory language that applies only to actions occurring or services rendered before or after certain dates. See, e.g., MCL 38.1384b(1) and (2). However, the Legislature instead chose to make section 91a applicable to **all** amounts contributed under section 43e, irrespective of when those contributions were made. The Union asks this Court to read language into section 91a that does not exist and that would circumvent the Legislature's intent in enacting PA 300. It is well settled that "[this] court cannot write into the statutes provisions that the legislature has not seen fit to enact." *Paselli v Utley*, 286 Mich 638, 643; 282 NW 849 (1938). In fact, when previously faced with similar circumstances, this Court stated:

> The statute does not limit its application to cases where workers' compensation payments are made to an employee *for injuries incurred after its effective date,* or *for injuries incurred after March 31, 1982*. Nor does it contain any language indicating that it should *not* be applied when payments are being made *for injuries that occurred prior to March 31, 1982*. The Legislature's failure to do so leaves the section generally applicable to payments made after its effective date. *Franks v White Pine Copper Div, Copper Range Co*,422 Mich 636, 651; 375 NW2d 715 (1985) (emphasis in original).

Similarly, in light of the Legislature's choice not to restrict the application of PA 300, that act's refund mechanism is generally applicable to all contributions made to the trust fund, whether made under PA 75 or PA 300.

While legislative analyses are "generally unpersuasive tool[s] of statutory construction," this Court has previously used them to discern legislative intent. See, e.g., *North Ottawa*

Community Hosp v Kieft, 457 Mich 394, 406 n 12; 578 NW2d 267 (1998). To this end, the legislative analysis of SB 1040, which became PA 300, demonstrates that the Legislature intended PA 300 to apply to all contributions under section 43e:

> Beginning in July 2010, all employees in MPSERS began contributing 3% of their compensation into an irrevocable trust for retiree health care costs. The employee contributions are currently being held in an escrow account pursuant to court order while the legality of the mandatory contributions is litigated. **The bill would continue these contributions and use them to begin prefunding retiree health care benefits. If an employee were not eligible for retiree health care upon retirement, he or she would have their contributions returned in equal monthly installments over 5 years after reaching age 60.** House Legislative Analysis, SB 1040, August 15, 2012 (emphasis added).

Based upon the legislative analysis and amendments enacted to PA 300 – see, e.g., MCL 38.1341(2)(a) – the Legislature was absolutely aware of the litigation surrounding PA 75 at the time it was considering SB 1040. The Legislature clearly intended PA 300 to not only continue protecting the solvency of MPSERS by maintaining the 3% contribution rate, but to also cure any constitutional infirmities that had been alleged with regard to PA 75. Thus, the Legislature amended MPSERS to allow any employee who opts out of retiree health care to receive a refund of any contributions that employee made pursuant to section 43e. Employees who chose not to opt out of the retiree health care system will continue to contribute 3% pursuant to section 43e, and will receive retiree health care or, if they do not receive health care benefits equivalent to their respective contributions under section 43e, a refund of the difference. To suggest that the Legislature enacted these provisions with the intent to exclude contributions made pursuant to PA 75 not only ignores the plain language of section 91a, but also strains credulity when PA 300 is considered in the context of the legal circumstances at the time SB 1040 was enacted.

This Court has previously found that prospective application of statutory changes to antecedent events does not necessarily constitute retroactive application of the statute. In *Franks*,

supra, this Court found that statutory coordination of benefits provisions could apply to workers' compensation payments stemming from injuries suffered prior to the enactment of the provisions' effective date. Similarly, in *Hughes*, *supra*, this Court found that a statutory amendment to the Judges' Retirement Act allowing judges to receive a retirement annuity after 12 years of service could be applied to "judges who fulfilled their service requirements prior to the effective date of the amendment" without "offend[ing] the rule against retrospectivity." *Id*. at 87.

Here, although the payment of the 3% contribution under PA 75 antedated the enactment of PA 300, the application of the refund mechanism applies prospectively to all funds in the irrevocable trust, including to those contributions made under PA 75, and does not require retroactive implementation of PA 300. This is particularly true given that the 3% payments are in escrow and will necessarily be placed into the health care fund after PA 300's enactment. Accordingly, there will not be any moment in time where funds collected under PA 75 are not subject to PA 300's protection.

The Union also incorrectly asserts that PA 300's striking of the reference to "July 1, 2010" in section 43e is indisputable evidence that the Legislature did not intend to have PA 300 apply to contributions made under PA 75. (Johnson Answer pp 40-41; McMillan Answer p 6.). Whether section 91a applies to all amounts contributed under section 43e or all amounts contributed under section 43e made on or after July 1, 2010, the fact remains the same: section 91a applies to **all** contributions that have been made pursuant to section 43e since that statute became effective.

Indeed, an example of remedial legislation curing a potential constitutional infirmity already occurred in *AFT II*, in which the Court of Claims initially declared PA 300

unconstitutional because the window for making an opt-out election was too short (52 days). The Legislature thereafter enacted 2012 PA 359, which remedied PA 300's constitutional infirmity by extending the election window to 127 days. *AFT II* at 220. Like PA 359 remedied infirmities in PA 300, PA 300 remedied alleged infirmities in PA 75—not retroactively, but remedially.

III. PA 75 IS NOT AN UNCONSTITUTIONAL TAKING AND, EVEN IF IT WERE, THE REMEDY WOULD BE JUST COMPENSATION, WHICH MEMBERS RECEIVED.

The Union continues to incorrectly assert that PA 75 was an unconstitutional taking. As the Union appropriately states in brief, "[t]he purpose of the Takings Clause is to prevent 'Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (Johnson Answer p 23 (internal citations omitted).) Here, State taxpayers shoulder the vast majority of the fiscal responsibility for providing retirement health care to public school employees and their dependents. While the Union seemingly believes that "fairness and justice" require the public to continue shouldering the entire burden, PA 75 merely asked public school employees to pay a small portion of their compensation in order to help pay for a fraction of the benefit that they will receive. Requiring such a contribution is not a taking.

The Union falsely asserts that "[f]or the first time in the six years that this matter has been litigated, Defendants argue that 3% of Plaintiffs' remuneration for services rendered under contracts with public school employers was never Plaintiffs' property, but, instead public property." (Johnson Answer p 24). Without question, Defendants have raised this claim previously. See, e.g., Defendants-Appellants' Supplemental Br. on Remand p 19-20. Moreover, the Union's attempts to distinguish the case at bar from longstanding precedent in this State are unconvincing. The Union has presented nothing to support its argument that this case is distinguishable from *Brucker v Chisholm*, 245 Mich 285; 222 NW 761 (1929) and *Attorney*

General v Connolly, 193 Mich 499; 160 NW 581 (1916) based upon the fact that those decisions applied to "contributions taken with the 'consent of the teacher.'" (Johnson Answer p 25). Furthermore, this argument also ignores the impact of this Court's explanation of the Teachers' Pension Act in *Connolly*, 193 Mich at 500 ("After the act becomes effective, every teacher contracting to teach in a public school is conclusively presumed, by the act of contracting to teach, to agree to pay and to authorize the deduction from salary necessary to pay [assessments to the Teachers' Pension Act]"). This argument also ignores the fact that, for more than 30 years, the Legislature has required new MPSERS members to participate in, and contribute to, the Member Investment Plan. And for approximately 70 years, the Legislature has made participation in MPSERS compulsory for public school employees. Just as the teachers' contributions under the Teachers' Pension Act were the appropriation of public funds, as opposed to the expenditure of private monies, so too were the 3% contributions under PA 75 not funds belonging to public school employees.

The Union seeks to distinguish cases cited by Defendant by incorrectly arguing that PA 75 was a physical or categorical taking. (Johnson Answer p 32; McMillan Answer pp 31-33.) A physical taking occurs when "the government directly appropriates private property for its own use." *Horne v Dep't of Agriculture*, 569 US ___; 135 S Ct 2419, 2425; 192 L Ed 2d 388 (2015). On the other hand, a regulatory taking tends to occur when government interference with property rights arises "from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central Transp Co v New York City*, 438 US 104, 124; 98 S Ct 2646; 57 L Ed 2d 631 (1978).

Here, the State did not take any property. Rather, employees earned their "property," i.e., compensation, subject to the condition that they contribute to the retiree health care fund.

Furthermore, Defendants are undeniably not taking property for their own use (Johnson Answer p 32). As has been noted throughout this litigation, the MPSERS retiree health care fund faced massive unfunded liabilities when PA 75 was enacted, and PA 75 was not passed for any purposes other than ensuring MPSERS's sustainability of retirement health care benefits for current and future public school retirees. To this end, section 43e requires that the contributions be placed in the irrevocable trust created by PA 77. MCL 38.1343e. The assets in that account may only be used to pay for retiree health care. MCL 38.2735 and MCL 38.2737.

PA 75 is not a physical, regulatory, categorical, or any other type of taking, because section 43e is merely an obligation to pay, which courts have uniformly held does not impact a property right that is subject to a takings claim. See, e.g., *Adams v United States*, 391 F3d 1212, 1225 (Fed Cir, 2004); *Commonwealth Edison Co v United States*, 271 F3d 1327, 1339-1340 (Fed Cir, 2001) (en banc), cert den 546 US 811; 126 S Ct 330; 163 L Ed 2d 43 (2005); *McCarthy v City of Cleveland*, 626 F3d 280, 285 (CA 6, 2010). In fact, a majority of the Supreme Court has also found that the mere obligation to pay money does not violate the Takings Clause. *Eastern Enterprises v Apfel*, 524 US 498, 539-541 (Kennedy, J, concurring in the judgment) and 554-556 (Breyer, J, dissenting, joined by Stevens, J, Souter, J, and Ginsburg, J); 118 S Ct 2131; 141 L Ed 2d 451 (1998). Despite the Union's arguments to the contrary, PA 75 simply does not implicate a property interest that is subject to the Takings Clause.

In an attempt to establish a protected property interest, the Union incorrectly and misleadingly argues that "the deductions at issue occurred after the compensation was already earned by employees." (Johnson Answer p 36; McMillan Answer p 34.) This argument ignores the fact that PA 75 became effective on May 19, 2010, but the 3% withholding requirement did not commence until July 1, 2010. Thus, all compensation earned after July 1, 2010 was subject to

the contribution requirement, and, even if employees were paid in arrears, PA 75 did not impact any compensation that had already been "earned." Moreover, the passage of PA 75 gave notice that anyone who chose to become or continue to be a public school employee on or after July 1, 2010 would be subject to the obligations imposed by the statute. As such, any individuals who chose to become, or remain, employed by a public school after the effective date of PA 75 did so knowing that their future compensation would be subject to a 3% withholding and, therefore, voluntarily chose to participate in the contribution system. As this Court noted in *AFT II*, an unconstitutional taking claim cannot be sustained where the claimants knowingly and voluntarily submitted themselves to the law's application. *AFT Michigan v State of Michigan*, 497 Mich 197, 218-221; 866 NW2d 782 (2015).

The Union also attempts to use *Webb's Fabulous Pharmacies, Inc v Beckwith*, 449 US 155; 101 S Ct 446; 66 L Ed 2d 358 (1980) to bolster their arguments. (Johnson Answer p 33; McMillan Answer pp 35-36.) However, this reliance is misplaced, as *Webb's Fabulous Pharmacies* is clearly distinguishable. In *Webb's Fabulous Pharmacies*, the plaintiff was purchasing the assets of another company whose debts appeared to be greater than the purchase price. Consequently, the plaintiff placed the purchase amount in an account with the court and interplead the seller and debtors into the action. A state statute provided that any interest accruing on the amount held by the court was income to the court. The U.S. Supreme Court found that any interest accruing on the money belonged to the owner, as it was private money. Here, there is no interest earned on private money, as there is no private money, and the government is not seeking to use the money for its own purposes, but to place the funds in a separate health care trust to assure MPSERS's sustainability and solvency for the benefit of those employees and future retirees paying into the fund.

The Union also asserts that employee contributions cannot be viewed as a user fee. (Johnson Answer pp 29-30; McMillan Answer p 40.) The Union correctly states that "[t]here are three criteria to be considered in defining a 'user fee': (1) a user fee must serve a regulatory purpose rather than a revenue-raising purpose; (2) user fees must be proportionate to the necessary costs of the service; and (3) a user fee must be voluntary." (McMillan Answer p 40.) Here, the 3% contribution requirement satisfies all three criteria. The contributions are not being used to generate revenue, as the State is not using them for its own purposes. Rather, the contributions are being used to fund and prefund employees' retiree health care benefits. Moreover, the fees are actually far below the costs of providing retiree health care entitlements. As the Union has noted, the 3% contribution accounts for only 30% of the costs of MPSERS. (Johnson Answer p 20.) Finally, as discussed above, individuals who chose to be public school employees after May 19, 2010, did so knowing that 3% of their salary would be withheld beginning on July 1, 2010. Consequently, every individual who had a portion of his or her salary withheld consented to such withholding. As the U.S. Supreme Court has long held, it is constitutional for the government to require those who specifically benefit from government-provided services to pay some or all of the cost of conferring the benefit. *Massachusetts v United States*, 435 US 444, 462; 98 S Ct 1153; 55 L Ed 2d 403 (1978).

Finally, assuming *arguendo*, that PA 75 was a taking of private property, any affected individual undoubtedly received "just compensation" for that taking. As this Court has previously stated, "[t]he purpose of just compensation is to put property owners in as good a position as they would have been had their property not been taken from them. The public must not be enriched at the property owner's expense, but neither should the property owner be enriched at the public's expense." *Dep't of Transportation v VanElslander*, 460 Mich 127, 129;

594 NW2d 841 (1999). As the U.S. Supreme Court has also noted, "the 'just compensation' required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain." *Brown v Legal Foundation of Washington*, 538 US 216, 235-236; 123 S Ct 1406; 155 L Ed 2d 376 (2003).

When PA 75 was enacted, the State was only beginning to recover from the "Great Recession" and the cost of providing health benefits to retirees was rising steeply, leading the MPSERS retiree health care fund to the brink of unsustainability. PA 75 was not enacted simply to pay the costs of retirees currently receiving health care benefits, but also to ensure the solvency of the system so that current and future public school retirees, and their dependents, could also receive health care benefits. As such, PA 75 merely required public school employees to pay a small percentage of their compensation toward the cost of providing lifetime employee health care entitlements.

The Union ignores the tremendous benefit that public school employees receive with regard to retiree health care under MPSERS, particularly considering the immense and ever-increasing costs associated with health care. Instead, the Union focuses on speculative arguments about a hypothetical repeal of MPSERS retiree health care. This Court should not base its decision on speculation and conjecture. Rather, the focus should be on the fact that, in exchange for a modest percentage of their compensation, employees maintain the option to receive lifetime health care retirement benefits for themselves and their dependents, which is more than a fair trade for those employees.

IV. PA 75 DOES NOT VIOLATE THE CONTRACTS CLAUSE.

A. There is no contractual right and it is impossible to impair something that does not exist.

The Union has no contractual right to health care benefits and no right under its employment contracts to be free of fees or charges for that health care. The Union argues that PA 75 "impaired the personal services contracts between public school employees and their employer by compelling the employer to reduce compensation by 3% and pay the extraction to MPSERS." (AFT Michigan Answer p 46.) That statement demonstrates the fundamental flaw in the Union's Contracts Clause argument—PA 75 does not modify the contracts between school employees and their respective districts and does not reduce the "wage rate" contemplated by those contracts.

The Union continues to join the Court of Appeals in misconstruing *Baltimore Teachers Union, American Federation of Teachers Local 340, AFL-CIO v Baltimore Mayor and City Council*, 6 F3d 1012, 1018 (CA 4, 1993) as being analogous to the instant case. (AFT Michigan Answer pp 15-16; Johnson Answer p 13.) The furlough considered in *Baltimore Teachers Union* required employees to work less hours each week. Because employees worked fewer hours, the city expended a lesser amount and paid those employees lower salaries. Here, employees still work the same number of hours and their respective school districts compensate them at the same rate, subject to a subsequent requirement to contribute part of that compensation to the fund for their retirement health benefits.

The Union's reliance on cases like *Condell v Bress*, 983 F2d 415 (2d Cir, 1993) and *University of Hawaii Professional Assembly v Cayetano*, 183 F3d 1096 (9th Cir, 1999) is similarly misplaced. (Johnson Answer p 14.) *Condell* addressed a legislatively imposed salary

deferral program upon state employees, which actually modified contractual compensation terms, unlike this case which imposes a fee upon wages earned under an employee's contract. Additionally, the *Condell* court explained that courts are less deferential when the alleged Contracts Clause violation involves the government modifying its own contracts, which has not occurred in this case. *Condell*, 983 F2d at 418. In *Cayetano*, Hawaii modified its contract with state employees by postponing the date on which Hawaii would pay its employees. 183 F3d at 1099. As with *Condell*, Hawaii in *Cayetano* changed the actual terms of employees' contracts by reducing wage rates and changing pay dates. Thus, it would be improper for the Legislature to invade the province of public school bargaining by reducing negotiated pay rates, but the Legislature can surely condition membership in the legislatively-enacted retirement plan by prescribing the terms of participation. In that vein, for years, the Legislature has mandated the participation of all public school employees in MPSERS (regardless of any collective bargaining agreement provision providing differently). Likewise, in the 1980s, the Legislature mandated that new public school employees participate in the Member Investment Plan, and contribute the cost of the same, regardless of any collective bargaining agreement that may have otherwise covered such employees.

Perhaps the analysis in this case would be different if the Union had proffered contracts that specifically prohibited the assessment of retiree health care contributions or that included provisions that required any payroll deductions to be pre-authorized by the Union. Even if that were the case (which it is not, as the Union has not shown any such contracts exist), the analysis would turn on whether such provision is permissible in the first place. Put simply, neither the Union nor its members are authorized to negotiate terms that would frustrate the implementation of duly-enacted legislation in the field of retirement benefits. By the same token, the Union

cannot negotiate terms that would place false restraints on the Legislature's enactment of laws in that area.

In this case, nothing in PA 75 alters the school district's obligation to pay employees pursuant to their collective bargaining agreements. Simply because employees' "take home" pay is reduced as a result of their contribution to the retirement health care fund does not indicate a contract impairment any more than FICA taxes, child support garnishments, tax levies, pension contributions, and the like do.

B. The retiree health care contribution serves a public purpose.

The irony of the Union now claiming that there is no legitimate public purpose to providing the Union members with retiree health care benefits should not go unnoticed by this Court, particularly in light of this Court's statements acknowledging that public school employee retirement health benefits reform serves a legitimate governmental purpose. See *AFT II* at 246 (quoting *AFT Mich v Michigan*, 303 Mich App 651, 676; 846 NW2d 583 (2014)).

The Union seems to imply that the State has an obligation to provide retiree health care and that PA 75 was merely an attempt to save money. (Johnson Answer pp 19-20; McMillan Answer p 27.) Nothing could be further from the truth. PA 75 was not an attempt to save money; it was an attempt to save retiree health care. The Union analyzes *United States Trust Co v New Jersey*'s statements that it is not reasonable or necessary for the State to refuse to meet its financial obligations, but fails to acknowledge that, unlike *United States Trust*, the State has no obligation here. Legislative policy choices to provide retiree health care do not create an obligation and asking employees to contribute toward their own benefits is not an impairment. Indeed, if the State's interest truly was just to save money, it would have—and could have—simply eliminated retiree health care benefits entirely.

The Union cites *Nevada Employees Association, Inc v Keating*, 903 F2d 1223 (9th Cir, 1990), as being "strikingly similar" to this case (McMillan Answer p 29), but again ignores the distinction that *Keating* involved a state actually modifying its own employees' contracts. The court's finding that modifying its own employees' contracts legislatively was unreasonable and unnecessary was premised significantly on the fact that Nevada was legislatively modifying its own contracts with employees. In this case, employees do not have a contractual right like that in *Keating* and PA 75 does not modify any contract.

The Union refers to PA 75 as a "pickpocketing" and claims employees receive nothing for the funds contributed, but ignore that the funds are being used to keep the retiree health care program alive for their collective benefit. (Johnson Answer p 20.) The Union bafflingly questions why "this discreet group of persons" must contribute to retiree health care, appearing to not recognize that this discreet group is receiving the very benefit for which they are being asked to contribute. (AFT Michigan Answer p 14.) The Union's characterization that money employees contributed under PA 75 is being used to fund current retirees' health care is not possible because the funds contributed under PA 75 are currently held in escrow. Upon release from escrow, the funds will be subject to PA 300's treatment, which ensures employees will either receive a refund or a benefit equivalent at least to the amount an employee pays.

CONCLUSION

PA 75 did not violate the Constitution and, to the extent it did, the Legislature cured any infirmities by enacting PA 300. This Court should grant the State of Michigan's Application for Leave to Appeal and reverse the Court of Appeals decision with regard to the constitutionality of PA 75.

Respectfully submitted,

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