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' BRIEF ON APPEAL

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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BRIEF ON APPEAL OF DEFENDANTS-APPELLANTS

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS TO APPENDIX

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

STATEMENT OF JURISDICTION

Pursuant to MCR 7.303(B)(1) this Court has discretion to review a final decision of the Michigan Court of Appeals. On May 31, 2017, this Court granted Appellants' Application for Leave to Appeal the Court of Appeals' June 7, 2016 split decision holding that 2010 PA 75 ("PA 75"), which amended the Public School Employees Retirement Act of 1979 ("PSERA"), MCL 38.1301 *et seq*., to require public school employees to contribute 3% of their salary to a fund to help offset the costs of their retiree health benefits plan provided under PSERA, was unconstitutional under the Contracts Clauses of the state and federal Constitutions, Const 1963, art 1, § 10, and US Const, art I, § 10; the Takings Clauses of the state and federal Constitutions, Const 1963, art 10, § 2 and US Const Ams V and XIV; and the guarantees of substantive due process in the state and federal Constitutions, Const 1963, art 1, § 17, and US Const Am XIV, §1. Although this Court reversed the Court of Appeals' initial finding of unconstitutionality after 2012 PA 300 ("PA 300") amended PA 75, the Court of Appeals also found that the issue of PA 75's constitutionality was not moot. The Court further ordered the State to refund all public school employee contributions made pursuant to PA 75 (totaling approximately $550 million), even though now those employees will receive the benefit of either retiree health benefits or a refund of their contributions if they do not vest for the benefit based on PA 300.

STATEMENT OF QUESTIONS INVOLVED

1. Does 2010 PA 75, requiring public school employees to contribute to a fund to pay a portion of the cost of their own retiree health benefits fund, violate the Contract Clause's prohibition against "impairing the obligation of contracts"?

Appellants' answer: No.

Appellees' answer: Yes.

Court of Appeals' answer: Yes.

2. Does 2010 PA 75, requiring public school employees to contribute to a fund to pay a portion of the cost of their own retiree health benefits fund, constitute a taking of private property for public use without just compensation in violation of the Constitution even though every employee will be compensated by receiving a benefit equal to no less than the amount that employee contributes toward that fund?

Appellants' answer: No.

Appellees' answer: Yes.

Court of Appeals' answer: Yes.

3. Does 2010 PA 75 violate a fundamental right that is not reasonably related to a legitimate governmental interest by requiring public school employees to contribute to a fund to pay a portion of the cost of their own retiree health benefits fund and not align with the State's police power or further a public interest?

Appellants' answer: No.

Appellees' answer: Yes.

Court of Appeals' answer: Yes.

4. To the extent 2010 PA 75 was unconstitutional, did the Legislature enacting 2012 PA 300 cure any constitutional infirmities?

Appellants' answer: Yes.

Appellees' answer: No.

Court of Appeals' answer: No.

INTRODUCTION AND SUMMARY OF ARGUMENT

To the extent 2010 PA 75 ("PA 75") violated the Constitution, the Legislature cured such constitutional infirmities by enacting 2012 PA 300 ("PA 300"). This Court's reasoning in *AFT Michigan v State of Michigan*, 497 Mich 197, 247; 866 NW2d 782 (2015) ("*AFT II*") is equally applicable in this case and makes clear that, because all funds collected under PA 75 are now treated as though collected pursuant to PA 300, the Legislature cured any previous constitutional defects such that the funds collected under PA 75 were validly collected. Whether contributions came before or after PA 300, PA 300's protections now equally apply to funds contributed under PA 75. Accordingly, this Court should adopt its reasoning from *AFT II* to conclude that PA 300 constitutionally cleansed all funds collected under PA 75.

After determining that PA 300 is constitutional, 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 [to] 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) (emphasis added). Despite this Court's clear directive, however, the Court of Appeals failed to meaningfully analyze whether any issues were superseded. Instead, the Court of Appeals found that PA 75 violates the Takings, Due Process, and Contracts Clauses, and ignored 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.

Due Process Clause

The Court of Appeals' holding with regard to the Due Process Clause is flawed and is inconsistent with this Court's prior holdings. The $550 million collected under PA 75 is now controlled by PA 300 and was needed to address an existential crisis with Michigan's teacher retirement system. Indeed, the Legislature crafted a solution to allow the system to survive–by asking employees to contribute 3% of their compensation toward their own retiree health care system. This solution was not only rationally related to a legitimate government purpose, but 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. As this Court explained in *AFT II*, "[t]he state's purpose advanced by the challenged portions of 2012 PA 300—implementing a fiscally responsible system by which to fund public school employees' retiree healthcare—is unquestionably legitimate." *AFT II*, 497 Mich 197, 247; 866 NW2d 782 (2015). Because the Legislature had the same "unquestionably legitimate" objective in enacting PA 75, it is not arbitrary or capricious and the Union's due process claims are fatally flawed.

Takings Clause

The Court of Appeals found that requiring employees to contribute to the health care benefits fund is an unlawful 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. Additionally, PA 300 ensures that everyone who contributed to the fund would receive the value of their contributions through subsidized retiree health care, a refund of their contributions, or both.

Contracts Clause

Finally, the Court of Appeals found a violation of the Contracts Clause even though the State has no contract with employees and PA 75 does not impact employees' rights or benefits under a 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, of the Contracts Clause issue. Specifically, the Court in *AFT II* reaffirmed in the exact context, and 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 Court of Appeals' finding that PA 75 is unconstitutional is inconsistent with this Court's holding in *AFT II* and other applicable precedent. This Court should apply that precedent and reverse the Court of Appeals' decision with regard to the constitutionality of PA 75.

STATEMENT OF FACTS

PA 75 took effect in May 2010 and required all members of the Michigan Public School Employees Retirement System ("MPSERS") to contribute either 1.5% or 3% of their compensation to help fund the cost of health benefits for members and their dependents when they retire. **Appellants' Appendix, pp 1a-14a**. Along with PA 75, the Legislature enacted 2010 PA 77 ("PA 77"), which created a retiree healthcare trust. **Appellants' Appendix, pp 15a-18a**. PA 75 contributions are required to go into the trust and be used to fund and prefund health benefits for current and future MPSERS retirees. MCL 38.2733(6). Over $550 million has been contributed under PA 75 and is being held in an interest-bearing account pending a final determination of the constitutionality of PA 75. **Appellants' Appendix, p 269a**.

In 2010, Plaintiffs in these cases filed separate Complaints in the Court of Claims, alleging that PA 75 effected an unconstitutional taking of private property without just compensation, impairment of contract, and violation of substantive due process. Complaints included as **Appellants' Appendix, pp 19a-98a**. The Court of Claims ultimately ruled that PA 75 violated the Takings and Due Process Clauses, but did not violate the Contracts Clause. **Appellants' Appendix, pp 99a-130a.**

The Court of Appeals then ruled, in a 2-1 decision, that PA 75 violated the Takings and Due Process Clauses, and went on to hold that PA 75 also violated the Contracts Clause. *AFT Michigan v State of Michigan*, 297 Mich App 597; 825 NW2d 595 (2012) (*AFT I*). **Appellants' Appendix, pp 132a-160a**. Judge Saad dissented on each constitutional issue and would have granted summary disposition in favor of the State. *Id*. at 627.

After the State filed an application for leave to appeal *AFT I* to this Court, but before this Court could rule on the merits, PA 300 became effective. PA 300 attached as **Appellants'**

Appendix, pp 232a-251a. PA 300 was enacted, in part, as a preemptive attempt to cure any purported constitutional infirmities concerning contributions for retiree health benefits. In fact, the Legislature in PA 300 specifically recognized the need for contributions under both PA 75 and PA 300 to be deemed constitutional so that MPSERS could prefund health benefit obligations for future retirees (i.e., current public school employees). To this end, section 41 of PSERA provides, in part, as follows:

> Beginning in the 2012-2013 state fiscal year and for each subsequent fiscal year, if the contributions described in section 43e are determined by a final order of a court of competent jurisdiction for which all rights of appeal have been exhausted to be unconstitutional and the contributions are not deposited into the appropriate funding account referenced in section 43e, the contribution rate for health benefits provided under section 91 shall be computed using a cash disbursement method. MCL 38.1341(2).

Accordingly, the Legislature provided a contingency plan in which MPSERS will revert back to a cash disbursement (also known as "pay as you go") method if the Court of Appeals' decision on the contributions under PA 75 is allowed to stand, meaning the State would no longer prefund the MPSERS healthcare program. PA 300 applies to all retiree healthcare contributions remitted under section 43e—including specifically those funds required under PA 75—and permitted public school employees to opt out of retiree health benefits and, therefore, not make the 3 percent contribution. *Id.* Specifically, employees had the opportunity to opt out of the plan and instead participate in a tax-advantaged, 401(k)-style, portable health account option. MCL 38.1391a(5), (7). Under PA 300, members not opting out continue to make the contributions under section 43e and are assured of receiving the value of their contribution, either in the form of retiree health benefits, a refund, or both. MCL 38.1391(1); MCL 38.1391a(8).

Public school employees then challenged PA 300 on grounds similar to those raised against PA 75. Complaints attached as **Appellants' Appendix, pp 161a-231a**. This time, however, their challenges were denied by both the Court of Claims, **Appellants' Appendix pp 263a-267a,** and Court of Appeals, which found PA 300 constitutional, primarily because of the voluntary nature of the contributions made under section 43e, but also because of the refund mechanism provided under PA 300. *AFT Michigan v State of Michigan*, 303 Mich App 651; 846 NW2d 583 (2014) (*AFT II*). **Appellants' Appendix, pp 270a-298a**.

With the State's application for leave to appeal the Court of Appeals' rulings over PA 75 in *AFT I* still pending, the Plaintiffs in the PA 300 cases sought leave to appeal *AFT II* to this Court. This Court granted leave to appeal and also held in abeyance the State's application for leave to appeal the Court of Appeals' decision regarding PA 75 in *AFT I*. **Appellants' Appendix, pp 299a-302a, pp 303a-305a**. Ultimately, in *AFT II*, this Court, like the Court of Claims and Court of Appeals, upheld the constitutional validity of PA 300. In so doing, this Court concluded that PA 300 did not violate the Takings Clause, the Contracts Clause, or Plaintiffs' substantive due process rights. *AFT Michigan v State of Michigan*, 497 Mich 197; 866 NW2d 782 (2015). **Appellants' Appendix, pp 306a-358a.**

After upholding PA 300, this Court took the instant cases out of abeyance, vacated the Court of Appeals' decision in *AFT I*, and remanded the case to the Court of Appeals. *AFT Michigan v State of Michigan*, 498 Mich 851; 864 NW2d 555 (2015). **Appellants' Appendix, pp 359a-362a**. The remand order 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 [to] 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." *Id.*

On remand, the Court of Appeals in a 2-1 decision found that *AFT II* does not render the question of PA 75's constitutionality moot, and held that PA 75 violated the Contracts Clause, the Takings Clause, and the Due Process Clause, and was unreasonable, arbitrary, and capricious. *AFT Michigan v State of Michigan*, 315 Mich App 602; 893 NW2d 90 (2016). **Appellants' Appendix, pp 433a-462a.** This Court then granted the State's application for leave to appeal that decision.

ARGUMENT

PA 75 is constitutional and the Court of Appeals erred in holding otherwise. The Court of Appeals' decision rests on the premise that public school employees cannot be required to contribute to a fund in which they have no "vested" benefit. If true, this is a novel proposition that is wholly foreign to this State's jurisprudence. Not only did the Court of Appeals err in not applying a presumption of constitutionality to PA 75 and not finding that the issues before it were moot because of this Court's decision in *AFT II*, it also erred in its constitutional analysis regarding the Contracts Clause, Takings Clause, and Due Process Clause.

I. STANDARD OF REVIEW

This case involves questions of statutory construction and constitutional validity, which are both reviewed *de novo*. *People v Stewart*, 472 Mich 624, 631; 698 NW2d 340 (2005); *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004). In reviewing statutes through a lens of constitutionality, "[s]tatutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Taylor v Smithkline Beecham* Corp, 468 Mich 1, 6; 658 NW2d 127 (2003). This Court has explained that "[w]e

exercise the power to declare a law unconstitutional with extreme caution, and we never exercise it where serious doubt exists with regard to the conflict." *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004). Therefore, "the burden of proving that a statute is unconstitutional rests with the party challenging it." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11; 740 NW2d 444 (2007). If the challenge to the legislation is based on substantive due process, as here, and the legislation does not affect a fundamental right or suspect classification, the rational basis test applies, and the Court examines whether the law is "rationally related to a legitimate governmental purpose." *Conlin v Scio Twp*, 262 Mich App 379, 390; 686 NW2d 16 (2004); *Lingle v Chevron USA, Inc*, 544 US 528, 542; 125 S Ct 2074; 161 L Ed 2d 876 (2005).

II. PA 75 IS AN EXERCISE OF PLENARY LEGISLATIVE POWER, IS PRESUMED CONSTITUTIONAL, AND THE COURT OF APPEALS ERRED BY FAILING TO DEFER TO THE LEGISLATURE'S JUDGMENT.

A. The Court of Appeals Erred By Failing to Recognize That PA 75 Is Presumed Constitutional.

Like all laws enacted by the Legislature, PA 75 is entitled to a presumption of constitutionality. The Court of Appeals erred by failing to use that presumption to start its analysis of PA 75. This Court has directed that, when reviewing the constitutionality of a law, "all possible presumptions should be afforded to find constitutionality." *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 464; 208 NW2d 469 (1973). The Court of Appeals' failure to afford all possible presumptions to find PA 75 constitutional caused the Court of Appeals to reach an incorrect decision. As explained in *Gora v City of Ferndale*, 456 Mich 704, 720; 576 NW2d 141 (1998):

> One of the reasons underlying this presumption is that persons holding legislative office . . . are duty-bound to act in conformity with their oaths to support the Michigan and federal constitutions, just as are members of the judiciary. *Marbury v Madison*, 5 U.S.

> (1 Cranch) 137, 179-180, 2 L Ed 60 (1803). As Justice Holmes put it, "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, Kansas & Texas R Co v May*, 194 US 267, 270; 24 S Ct 638; 48 L Ed 971 (1904).

Under this presumption, a legislative enactment must be presumed constitutional, unless its unconstitutionality is clearly apparent. *Taylor*, 468 Mich at 6. The fact that a statute "'might operate unconstitutionally under some conceivable set of circumstances is insufficient'" to find it unconstitutional. *Council of Organizations & Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557, 568; 566 NW2d 208 (1997), quoting *United States v Salerno*, 481 US 739, 745; 107 S Ct 2095; 95 L Ed 2d 697 (1987).

Neither Appellees nor the Court of Appeals provide any reason to overcome the strong presumption of constitutionality of PA 75, let alone the requisite "clearly apparent" reasons. As this Court has explained:

> Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity. *Cady v Detroit*, 289 Mich 499, 505; 286 NW2d 805 (1939).

For instance, in *Advisory Opinion on Constitutionality of 1986 PA 281*, 430 Mich 93; 422 NW2d 186 (1988), this Court considered whether tax increment financing provisions under a state law unconstitutionally diverted tax revenue from local taxing jurisdictions in violation of limits on taxation imposed by Const 1963, art 9, § 6. The Court first stated that "[t]he statute is vested with a presumption of constitutionality, and it is not our role to second-guess the Legislature regarding the wisdom of tax increment financing from a policy perspective." *Id.* at 110 (footnote omitted). Relying upon the plain language of Const 1963, art 9, § 6, the Court held the statutory

tax financing provisions were not unconstitutional because nothing in the language of the constitutional provision restricted the use of tax revenue. *Id.* at 116.

When enacting PA 75, the Legislature decided as a matter of public policy to require public school employees to pay for a portion of the costs incurred by MPSERS in providing health benefits to retired public school employees. Like the tax increment financing statute at issue in *Advisory Opinion on Constitutionality of 1986 PA 281, supra*, PA 75 is vested with a presumption of constitutionality. This Court should not second-guess the Legislature's wisdom of requiring public school employees to pay for a portion of the costs incurred by MPSERS in providing health benefits to retired public school employees. Nothing in the plain language of the Michigan Constitution of 1963 prohibits the Legislature from doing so. Furthermore, using hypothetical scenarios that may result in theoretical harm or other conceivable circumstances under some application of PA 75 is not enough to establish a constitutional violation. PA 75 must be presumed constitutional unless its unconstitutionality is clearly and unambiguously apparent.

In response to the State's Application for Leave to Appeal (and it is anticipated that it will be repeated in opposition to the instant Brief), the Union contended 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 to Application for Leave, p 9. But the presumption of constitutionality is not a "new issue" as the Union contends. It was addressed on page 6 of the State's October 2, 2015 Supplemental Brief on Remand. **Appellants' Appendix, pp 363a-432a.** 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 notes 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*, 289 Mich at 505. 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. *People v Stephan*, 241 Mich App 482, 508, n 15; 616 NW2d 188 (2000). Thus, this scope of review issue is properly raised on appeal.

B. The Court Of Appeals Erred By Not Giving Deference To The Legislature's Enactment Of PA 75.

Courts in Michigan give deference to deliberate acts of the Legislature. As this Court has explained, every reasonable "intendment must be indulged in favor of the validity of the act." *Cady*, 289 Mich at 505. Only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution will a court refuse to sustain its validity. *Id*. The Court of Appeals' failure to give such deference to the Legislature with regard to the Legislature enacting PA 75 constitutes an error and resulted in the Court of Appeals reaching an incorrect decision.

Judicial deference to legislative enactments is rooted in the Constitution's separation of powers among the three branches of state government. Under Const 1963, art 3, § 2, "[t]he powers of government are divided into three branches: legislative, executive and judicial." As a

result, in Michigan, a House of Representatives and Senate together exercise the "legislative power" under Const 1963, art 4, § 1; the governor exercises the "executive power" under Const 1963, art 5, § 1; and the one court of justice exercises the "judicial power" under Const 1963, art 6, § 1.

The Constitution cautions that "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963 art 3, § 2. The constitutional separation of powers "rests on the notion that the accumulation of too much power in one governmental entity presents a threat to liberty." *46th Circuit Trial Court v County of Crawford*, 476 Mich 131, 141; 719 NW2d 553 (2006). As James Madison noted in *Federalist 47*, "The accumulation of all powers legislative, executive and judiciary in the same hands…may justly be pronounced the very definition of tyranny." Thus, "[b]y separating the powers of government, the framers of the Michigan Constitution sought to disperse governmental power and thereby to limit its exercise." *Nat'l Wildlife Fed'n v Cleveland Cliffs Iron Co*, 471 Mich 608, 613; 684 NW2d 800 (2004), *overruled on other grounds by Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349; 792 NW2d 686 (2010).

Just as the legislative power is vested in the Legislature, the judicial power is vested exclusively in Michigan's one court of justice. Within this structure created to "preserve separation of powers, the judiciary must confine itself to the exercise of the 'judicial power' and the 'judicial power' alone." *Mich Citizens for Water Conservation v Nestle Waters N Am, Inc*, 479 Mich 280, 292; 737 NW2d 447 (2007). "[T]he judiciary may not encroach upon the functions of the legislature." *Bartkowiak v Wayne Co*, 341 Mich 333, 343; 67 NW2d 96 (1954) (citation omitted).

Courts are "obligated to defer to legislative judgments, even when such judgments are far afield" from the judgments of the judiciary. *People v Thompson*, 477 Mich 146, 159-160; 730 NW2d 708 (2007) (Markman, J., concurring). Indeed, "courts should not substitute their judgment for that of the legislature." *Ecorse v Peoples Community Hospital Authority*, 336 Mich 490, 500; 58 NW2d 159 (1953). This is because the Legislature "possesses superior tools and means for gathering facts, data, and opinion and assessing the will of the public." *Woodman v Kera, LLC*, 486 Mich 228, 246; 785 NW2d 1 (2010).

When PA 75 was enacted, the State was just beginning to recover from an economic recession and the cost of providing health benefits to retirees was skyrocketing. If the Legislature had not made the public policy decision to enact structural reforms to MPSERS, the system could have become unsustainable, thereby depriving all retirees of healthcare benefits. Consequently, the Legislature determined that requiring public school employees to contribute a small fraction of their salary to pay for a portion of the cost of providing healthcare benefits was, in the view of the Legislature, the optimal public policy option to preserve MPSERS and its legislatively-created obligation to provide healthcare benefits to retired public school employees. While Appellees and the Court of Appeals may have made a different public policy determination, the determination was the Legislature's to make under the Constitution. Accordingly, even if this Court disagrees with the Legislature's policy choice, the doctrine of separation of powers requires deference to that choice.

C. The Court of Appeals Erred By Failing To Determine That PA 75 Is A Valid Exercise Of The Legislature's Plenary Authority To Pass Laws Regarding Retirement Healthcare Benefits.

The People of the State of Michigan have vested the legislative power in a Senate and a House of Representatives, Const 1963, art 4, § 1, and instructed the members of those legislative bodies to pass "suitable laws for the protection and promotion of public health." Const 1963, art

4, § 51. Exercising its legislative power, the Legislature created MPSERS—a retirement system for all public school employees in Michigan. MCL 38.1321. Acting in a manner consistent with the constitutional instructions from the People, the Legislature required the system to provide hospital, medical-surgical, and sick care benefits for retired public school employees. MCL 38.1391. By enacting PA 75, the Legislature required public school employees to pay for a portion of the costs of the benefits provided by the system, and did so within its broad scope of constitutional authority. The Court of Appeals' failure to recognize that the Legislature can modify statutory mechanisms that the Legislature creates resulted in an erroneous decision.

The Legislature has the power to "make, alter, amend, and repeal laws." *Harsha v Detroit*, 261 Mich 586, 590; 246 NW 849 (1933), *quoting* 1 Cooley, Constitutional Limitations (8th Ed.), p. 183. The power has also been defined as the power "'to regulate public concerns, and to make law for the benefit and welfare of the state.'" *46th Circuit Trial Court*, 476 Mich at 141, quoting Cooley, Treatise on the Constitutional Limitations (Little, Brown & Co, 1886), p 92. Unless explicitly limited by the Constitution, "the legislature's power to legislate is unlimited." *Council 23 American Federation of State, County & Municipal Employees v Civil Service Com*, 32 Mich App 243, 248; 188 NW2d 206 (1971). This Court also has noted that Const 1963, art 4, § 1 "gives the Legislature plenary power to enact laws for the benefit of Michigan citizens." *Mich United Conservation Clubs v Sec'y of State*, 464 Mich 359, 382; 630 NW2d 297 (2001). Effectively, the Legislature can do anything that it is not prohibited from doing by the Michigan or United States Constitutions. *Attorney General ex rel O'Hara v Montgomery*, 275 Mich 504, 538; 267 NW 550 (1936).

The Court of Appeals erred by failing to recognize that PA 75 is within the scope of the Legislature's authority. Providing health benefits to retired public school employees and

assuring that sufficient money is available to pay for those benefits are matters of public, not private concern. PA 75 is for the benefit and welfare of the State because it assures that public school employees performing the public function of educating public school students receive health benefits in their retirement, that a portion of the State's population receive health benefits in retirement, and that the financial obligation to pay for the benefits is funded. By enacting PA 75 to assure that a portion of the State's population receive health benefits, the Legislature also acted in a manner consistent with the direction under Const 1963, art 4, § 51 to enact suitable laws for the protection and promotion of public health.[1] PA 75, therefore, unquestionably benefits Michigan citizens and is a valid exercise of the Legislature's plenary power.

More importantly, nothing in Michigan's Constitution explicitly limits the Legislature's ability to require public school employees participating in MPSERS to pay for some of the cost of health benefits provided to retired public school employees. Appellees cite no explicit provision of the Michigan Constitution of 1963 that restricts the authority of the Legislature to enact PA 75. Additionally, the Court of Appeals ignored that all public school employees hired since 1987 have been required—with no choice as to benefit structure—to contribute to the pension fund that pays current and future retirees' retirement allowances. Notably, public school employees cannot opt out of the pension contribution (or, for that matter, the pension plan)—and any purported contractual "right" would be void for the reason that the Legislature occupies the field of public retirement benefits. Inferring that PA 75 may be unconstitutional in certain circumstances is not sufficient to strike PA 75 as unconstitutional. Rather, an explicit constitutional restriction on the exercise of the legislative power is required. *Montgomery*, 275

[1] Such a conclusion is consistent with the decision of the court in *Coen v Oakland County*, 155 Mich App 662, 666; 400 NW2d 614 (1986), in which the Michigan Court of Appeals concluded that Const 1963, art 4, § 51 and art 8, § 8 impliedly mandated the provision of mental health institutions, programs, and services.

Mich at 538. Because the Constitution does not restrict the Legislature from requiring public school employees to pay for a portion of the cost of health benefits provided to retired public school employees, PA 75 is a valid exercise of the Legislature's plenary power.

PA 75 must be presumed constitutional. This Court should defer to the public policy determinations made by the Legislature when enacting PA 75. On its face, PA 75 is a constitutional exercise of the plenary power of the Legislature to pass laws relating to retirement systems and health benefits not explicitly prohibited by any constitutional provision. Furthermore, any potential or theoretical harm caused by the payments to MPSERS under PA 75 has been resolved by the enactment of PA 300 because the money contributed under PA 75 is now controlled by PA 300, which allows public school employees who opted out to obtain a refund, and allows those who stayed in to receive a retiree healthcare benefit, additional pension benefits, or both.

III. PA 75 DOES NOT VIOLATE THE CONSTITUTION AND THE COURT OF APPEALS ERRED IN FINDING A CONSTITUTIONAL VIOLATION.

A. PA 75 Does Not Violate The Contracts Clause.

The Michigan Constitution of 1963 contains a "Contracts Clause" that provides that "[n]o bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted." Const 1963, art 1, § 10. Although the Contracts Clause, together with the parallel clause in the United States Constitution, generally prohibits the Legislature from passing laws impairing contract obligations, that prohibition is not absolute and is subject to the state's inherent police power to safeguard the vital interests of the people. *Health Care Ass'n Workers Comp Fund v Director of Bureau of Worker's Compensation*, 265 Mich App 236, 240-241; 694 NW2d 761 (2005). In *Health Care Association*, the Court of Appeals explained that a three-pronged test is used to analyze Contracts Clause issues, inquiring whether:

1. state law has impaired a contractual relationship;

2. disrupting contractual expectancies is necessary to the public good; and

3. the Legislature's means used to address the public purpose was reasonable. *Id*. at 241.

Accordingly, to establish a Contracts Clause violation, the Union would need to demonstrate that: (1) a contract exists between the State and public school employees; (2) PA 75 impairs those contracts; and (3) the impairment is not a reasonable method to serve a public purpose. As discussed below, the Court of Appeals erred in applying that standard to find that PA 75 violates the Contracts Clause.

1. There is no contract between the State and public school employees.

The threshold question under the first prong of the analysis is whether there is a contractual relationship. *Gen Motors Corp v Romein*, 503 US 181, 186; 112 S Ct 1105; 117 L Ed 2d 328 (1992). Under the Michigan Supreme Court's ruling in *Studier v Mich Pub Sch Employees' Ret Bd*, 472 Mich 642, 663; 698 NW2d 350 (2005), public school employees have no contractual right to retiree health benefits.[2] In *Studier*, this Court held that MCL 38.1391(1) does not create a contract with public school retirees such that the State is obligated to provide retiree health benefits. *Id.* In so holding, this Court explained that, absent a clear indication that the Legislature intended to bind itself contractually, a law is presumed not to create contractual or vested rights and that, absent an expression of such intent, "courts should not construe laws declaring a scheme of public regulation as also creating private contracts to which the state is a party." *Id*. at 662.

[2] Although public school employees have no contract right to retiree health benefits, the Public Employee Retirement Healthcare Funding Act, 2010 PA 77, creates an aggregate contract right in the fund created under PA 77. In other words, public school employees have no right to healthcare benefits, generally, but do have a right to the money in the fund.

The State's public school employee retiree health benefits provisions of PSERA do not explicitly or implicitly create a contract right to retiree health benefits. No contracts exist entitling public school employees to receive retiree healthcare benefits and, therefore, no contract could be impaired by PA 75.

2. PA 75 does not impair the contracts between the public school employees and their respective school districts.

The State is not a party to contracts between public school employees and their respective school districts and PA 75 does not impact the parties' respective rights or benefits under those contracts. The Court of Appeals improperly applied *Baltimore Teachers Union, American Federation of Teachers Local 340, AFL-CIO v Baltimore Mayor & City Council*, 6 F3d 1012, 1018 (CA 4, 1993), to find that PA 75 impairs public school employee contracts because the contribution to the healthcare fund constitutes a "reduction" in compensation. *Baltimore Teachers Union* is not analogous to the instant case, because PA 75 does not reduce salaries, but instead requires employees to contribute part of their salaries to the fund for retiree health benefits.

Baltimore Teachers Union involved a state-mandated involuntary furlough program that reduced the hours of work and the amount of employees' salaries from the amount contemplated by the contract between the union and the school district. *Id.* at 1014. There is no such reduction in either the hours of work or in the rate of compensation here. After fulfilling the contract between the school district and school employees, public school employees contribute money to help defray the cost of retiree health benefits. As Judge Saad pointed out in his opinion below:

> If, for example, a school district has contracted with a teacher to pay him or her $80,000 a year, the state's mandate that the employee contribute three percent under MCL 38.1343e does not alter the school district's contractual obligation. Indeed, the state Legislature could change the mandate to four percent or one percent, and the school district would nevertheless be required by

> contract (CBA) to pay the teacher $80,000 a year. *AFT I*, 297 Mich App at 633 (Saad, J., concurring in part and dissenting in part).

Requiring employers to deduct part of employees' wages to go toward the fund for retiree health benefits is identical to the State requiring employers to deduct monies for certain mandatory pension contributions, as has been the case for nearly 30 years; or for a variety of other government-sanctioned taxes, garnishments, and fees. See, e.g., *Brown v Highland Park*, 320 Mich 108; 30 NW2d 798 (1948) (firefighter pensions); and *Van Coppenolle v Detroit*, 313 Mich 580; 21 NW2d 903 (1946). Those assessments, like the deduction at issue, do not affect the wages that an employer is contractually obligated to pay an employee; and state laws requiring an employer to deduct such assessments do not magically transform the assessment into a contractual impairment. The Court of Appeals erred by analogizing the change in compensation in *Baltimore Teachers Union* to the charge assessed under PA 75 after employees receive their full compensation.

The Court of Appeals' decision seemed to rest on the (unstated) insinuation that public school employees had an employment contract in the first place that insulated employees' wages from duly-imposed retiree healthcare obligations, but that was not the case. At best—and we have no record of the actual contracts or collective bargaining agreements at issue—the contracts and agreements were silent on the matter of retiree healthcare contributions. Even so, had Appellees pointed to any contracts or agreements that were to have allegedly prohibited retiree healthcare deductions, such provisions would be illegal because only the Legislature controls the terms and conditions of retiree healthcare (and pensions) provided by MPSERS.

Indeed, taken to its logical conclusion, every state law rationally related to a legitimate governmental purpose that results in a new or increased withholding from an employees paycheck could be considered a contractual impairment. That cannot be the case.

3. The retiree healthcare contribution obligation imposed by PA 75 is insubstantial and serves a public purpose.

Even if Plaintiffs were to have identified a *valid* contractual right that PA 75 breached or impaired, which they have not, the Contracts Clause is not absolute and not all impairments of contracts are improper. "One whose rights, such as they are, are subject to state restriction, cannot remove from them the power of the State by making a contract about them." *Hudson County Water Co v McCarter*, 209 US 349, 357; 28 S Ct 529; 52 L Ed 828 (1908). The United States Supreme Court has explained that "[t]he States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result." *United States Trust Co v New Jersey*, 431 US 1, 22; 97 S Ct 1505, 1517; 52 L Ed 2d 92 (1977).

The degree to which a state may impair the obligations of contract varies with the public need for that impairment. *Allied Structural Steel v Spannaus*, 438 US 234, 241-242; 98 S Ct 2716; 57 L Ed 2d 727 (1978). Courts apply a sliding scale approach such that, if the contract impairment is only minimal, there is no unconstitutional impairment of a contract. However, if the legislative contract impairment is severe, then the government must show that: (1) there is a significant and legitimate public purpose for the regulation; and (2) the means adopted to implement the legislation are reasonably related to the public purpose. *Health Care Ass'n*, 265 Mich App at 241.

An insignificant impairment does not need the extensive justification that otherwise might be necessary. *Allied Structural Steel Co*, 438 US at 245. Moreover, the United States Supreme Court has recognized that it should defer to a state legislature's determination of the public need whenever possible. *United States Trust*, 431 US at 22-23. However, an impairment that is severe, permanent, irrevocable and retroactive and which serves no broad, generalized

economic or social purpose violates the Contracts Clause. See *Allied Structural Steel Co*, 438 US at 250. Here, because any impairment is not severe and serves a valid social purpose, there is no Contracts Clause violation.

a. The alleged contractual impairment is insubstantial.

As noted, PA 75 required that public school employees pay between 1.5% and 3% of their compensation, depending on their salary, to fund retiree health benefits. Certainly retiree healthcare coverage constitutes a valuable benefit. This Court appears to have recognized that conclusion in *AFT II*. 497 Mich at 230-231. Even if requiring employees to pay a small percentage toward their own retiree healthcare fund impaired a contract, any impairment would be insubstantial. PA 75 was not retroactive (it was effective May 19, 2010, but did not require contributions until July 1, 2010). MCL 38.1343e. PA 75 also was not irrevocable or permanent, as evidenced by the PA 300 amendments. In addition, because PA 300 provides that employees will receive the equivalent of the funds contributed back at some point, either by receiving retiree health benefits, or a refund, PA 75's impairment is not only insubstantial, it is now nonexistent.

b. PA 75 is for a public purpose.

Not only is the claimed impairment insignificant, but the creation of the retiree healthcare fund, and the amendment of that fund as needed to implement public health goals falls squarely within the Legislature's authority to enact laws that advance a public purpose. In fact, Article 4, Section 51 of the Michigan Constitution of 1963 recognizes the importance of public health and requires the Legislature to pass laws to protect and promote public health, stating:

> The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health. Const 1963, art IV, § 51.

Not only is the Legislature authorized to adopt laws like PA 75 to promote the health of public employees, but the Constitution explicitly mandates the Legislature to pass such laws. This Court has noted that Article 4, § 51 gives the Legislature "plenary power over all matters dealing with public health and welfare." *Kent County Prosecutor v Kent County Sheriff*, 428 Mich 314, 320; 409 NW2d 202 (1987).

Additionally, this Court in *AFT II* quoted with approval the Court of Appeals' observation that public school employee retirement health benefits reform serves a legitimate governmental purpose:

> The state, in enacting 2012 PA 300, has set forth a legitimate governmental purpose: to help fund retiree healthcare benefits while ensuring the continued financial stability of public schools. It is undisputed that in recent years public schools have been required to pay higher fees for the healthcare of retirees and their dependents. Healthcare costs are expected to continue to rise in the future. By seeking voluntary participation from members, the statute rationally relates to the legitimate governmental purpose of maintaining healthcare benefits for retirees while easing financial pressures on public schools. *AFT II*, 497 Mich at 246, quoting *AFT Mich II*, 303 Mich App at 676.

Given that PA 75 and PA 300 amended the same law to accomplish the same legitimate governmental purpose, the Court's rationale in *AFT II* in that regard applies equally to PA 75's changes to retiree health benefits.

In addition, it has long been recognized that a state exercising its police power frequently affects private contracts without implicating the Contracts Clause. See *Manigault v Springs,* 199 US 473, 480; 26 S Ct. 127; 50 L Ed 274 (1905) (noting that it is "settled law" that "the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such [police] powers as are vested in it"); *Morseburg v Baylon*, 621 F2d 972, 979 (CA 9, 1980) ("The exercise of the police power of states . . . raises no Contracts Clause issue.").

In *Morseburg*, the court considered whether a state statute requiring a 5% royalty for reselling art unconstitutionally impaired contract rights with respect to sales prior to the enactment of the act. Although the court recognized that the "inescapable effect of the Act is to burden such a buyer of a work of fine art with an unbargained-for obligation to pay a royalty to the creator of that work"—and, thus, merited review under the Contracts Clause—such scrutiny revealed no unconstitutional impairment of contract. *Id.* at 979. The court, relying on a long line of United States Supreme Court decisions, explained that the rights of sellers (and buyers) of art work are subject to state restriction—and those individuals cannot contractually insulate themselves from the state's authority. *Id*. The court also recognized that the 5% royalty "serves a public purpose and is not severe" and, thus, concluded that the statute was constitutional. *Id.* So too, here. Even if imposing mandatory retiree healthcare contribution affected public school employee contracts (which it does not), the claimed impairment does not offend the Contracts Clause.

4. If public school employees had contracts that blocked them from contributing toward their own retirement healthcare, such contracts would be void.

It is well-established that contract claims against the State are valid only if the promisor is legally authorized to bind the State. *AFT II*, 497 Mich at 242; *Roxborough v Michigan Unemployment Compensation Commission*, 309 Mich 505, 510; 15 NW2d 724 (1944). "Public officers have and can exercise only such powers as are conferred on them by law, and a State is not bound by contracts made on its behalf by its officers or agents without previous authority conferred by statute or the Constitution." *Roxborough*, 309 Mich at 510 (quotation marks and citation omitted). The extent of such authority "is measured by the statute from which [the state agents or officials] derive their authority, not by their own acts and assumption of authority." *Lake Twp v Millar*, 257 Mich 135, 142; 241 NW 237 (1932). This Court should reach the same

conclusion it did in *Roxborough*. Public school districts lack authority to enter into contracts to insulate the payment of employee wages from legislatively imposed deductions. Such contracts would surely be void for lack of authority. *AFT II*, 497 Mich at 242-243.

B. PA 75 Does Not Violate The Takings Clause.

The required public school employee contribution under PA 75 was neither a taking nor unconstitutional and, in any event, was superseded by PA 300 which now governs the funds. The Michigan and United States Constitutions both prohibit the taking of private property for public use without paying just compensation. Const 1963, art 10, §2; US Const, Am V; see also *Adams Advertising v East Lansing*, 463 Mich 17, 23; 614 NW2d 634 (2000). Given that each public school employee either receives subsidized health care or a refund of the amount withheld, PA 75 does not violate the Takings Clause and the Court of Appeals erred in finding otherwise.

1. A statutory requirement to pay money is not a "taking."

State taxpayers shoulder the vast majority of the fiscal responsibility for providing retirement health care to public school employees and their dependents. PA 75 merely asked public school employees to pay a small portion of their compensation in order to help fund and prefund a fraction of the current and future retiree healthcare benefits that they are eligible to receive. Requiring such a contribution is not a taking. For a compensable taking to occur, a claimant must establish "a property interest." *Members of the Peanut Quota Holders Ass'n v United States*, 421 F3d 1323, 1330 (CA Fed, 2005). "The term 'property' encompasses everything over which a person 'may have exclusive control or dominion.'" *AFT II*, 497 Mich at 216, quoting *Rassner v Federal Collateral Society, Inc*, 299 Mich 206, 213-214; 300 NW 45 (1941) (alterations in original). The term "taking" can encompass governmental interference with rights to both tangible and intangible property. *Id.* at 218, quoting *Ruckelshaus v Monsanto*

Co, 467 US 986, 1003–1004; 104 S Ct 2862; 81 L Ed 2d 815 (1984). However, governmental action creating general burdens or liabilities typically will not form the basis for a cognizable taking claim. *Id*.

The United States Supreme Court has held that a person "challenging governmental action as an unconstitutional taking bears a substantial burden." *Eastern Enterprises v Apfel*, 524 US 498, 523; 118 S Ct 2131; 141 L Ed 2d 451 (1998). The Supreme Court has also held that the Fifth Amendment's takings clause:

> [D]oes not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking. *First English Evangelical Lutheran Church of Glendale v County of Los Angeles*, 482 US 304, 314-315; 107 S Ct 2378; 96 L Ed 2d 250 (1987) (internal citations omitted)

The Fifth Amendment's provisions are applicable to Michigan through the due process clause of the Fourteenth Amendment. *Electro-Tech, Inc v HF Campbell Co*, 433 Mich 57, 67 n 11; 445 NW 2d 61 (1989); *Webb's Fabulous Pharmacies v Beckwith*, 449 US 155, 160; 101 S Ct 446; 66 L Ed 2d 358 (1980). As a result, Michigan Courts have relied on federal precedent when interpreting Article 10, § 2. *Adams Outdoor Advertising*, 463 Mich at 23.

The Court of Appeals held that PA 75 resulted in an unconstitutional taking because it required public school employees to pay a percentage of their compensation without any accrued or vested right to retirement healthcare, but that conclusion is not supported by applicable case law and is further contravened by the enactment of PA 300. 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 established by PA 77. MCL 38.1343e; MCL 38.2733. The assets in that account may only be used to pay for retiree health care. MCL 38.2735 and MCL 38.2737. This is exclusively for the benefit of current and former public school employees.

Public school employees have no "property interest" in their future compensation. Public school employees do not have a contractual right that insulates them from taxes or fees the Legislature assesses against their compensation, and have no right or property interest to that portion of their salary that was contributed under PA 75, or to continued employment or retiree healthcare. The obligation to contribute money toward their own retiree health benefits is not a "taking." Further, even if a taking of property did occur, Plaintiffs are justly compensated either with healthcare in retirement, a refund, or both, and invalidation of PA 75 is not an available remedy.

a. Public school employees have no property right that has been invaded or property interest at stake.

(1) Public funds are public property.

This Court has long recognized that Legislatively-imposed employee contributions to *public school* retirement funds are "not contributions by the teachers of their money, but are appropriations of public money[.]" *Attorney General v Chisholm*, 245 Mich 285, 288; 222 NW 761 (1929), citing *Attorney General v Connolly*, 193 Mich 499; 160 NW 581 (1916). This is true regardless of whether participation in the plan is mandatory, or whether employee contributions are compulsory. Finally, public school employees do not have an unconditional right to receive publicly subsidized retiree healthcare. *Studier*, 472 Mich at 659. Accordingly, the contributions at issue are not the private property of public school employees; rather, the contributions are public property used for a legitimate government purpose.

When such public property is *earned* by public school employees and becomes their *own* property, it is subject to whatever conditions the public authority may impose, subject only to the restrictions against unconstitutional conditions, e.g., requiring a public school employee to pay $1,000 to receive her paycheck; or requiring a public school employee to vote for a certain party/candidate as a condition of remaining employed. The bottom line is, unless the conditions lack any nexus or proportionality, the Court should uphold them.

(2) Public school employees have no right to continuing wages.

The Court of Appeals in this case contends that public school employees have a "contract-based property right in their own wages." *AFT I*, 297 Mich App at 620. As this Court previously explained, however, there is no fundamental right to government benefits, let alone public employment. *AFT II*, 497 Mich at 225-226. Public school employees' "contract-based property right in their own wages" are subject to whatever duly-enacted conditions the Legislature might impose. This reasoning extends to other duly-enacted financial obligations that may be imposed by the Legislature (or a court)—e.g., child support, tax levies, etc.

Public school employees have merely an expectancy of continued employment; not a right. This Court explained that distinction in *AFT II* when it observed that conditioning participation in the retiree health benefits plan upon contributing under PA 300 did not constitute an unconstitutional condition, stating:

> The state here is not coercing public school employees into giving up their rights under Const 1963, art 10, § 2 and US Const Ams V and XIV, but is merely seeking, as a condition for receiving access to retiree healthcare benefits, the assistance of public school employees in paying for these benefits. Plaintiffs have not demonstrated that the terms controlling MCL 38.1343e contributions (the allegedly unconstitutional condition) are unrelated to the state's purpose furthered by the contributions or that the relationship between the condition and the benefit is so compelling or disproportionate that public school employees are

> effectively coerced into relinquishing their constitutional rights. *AFT II*, 497 Mich at 229.

This Court's observations are equally applicable to the terms controlling PA 75. Even if PA 75 were liberally viewed as conditioning public school employees' employment on paying a retiree health benefits contribution, any individual who chooses to remain so employed did so subject to applicable regulations, including the retiree healthcare obligation at issue.

Furthermore, this Court in *AFT II* already decided that PA 75 bears both a nexus and a roughly proportionate relationship to the State's interest advanced by imposing the obligation to share in the cost of providing retiree healthcare, stating that "[t]he MCL 38.1343e contributions directly fund the MPSERS's retiree healthcare program, advancing the state's strong interest in providing retiree healthcare for its public school employees." *AFT II*, 497 Mich at 229. For the same reasons articulated in *AFT II*, the retiree healthcare contribution under PA 75 "clearly implicates a strong and direct connection, or nexus, between the conditional burden placed on public school employees and the state's interest." *Id*. at 230. The Court of Appeals clearly erred because PA 75 is constitutional.

b. Requiring a contribution toward retiree healthcare does not impair property interests.

Even if Plaintiffs were to establish that public school employees have a property interest in the public funds that have been appropriated to pay their future salaries and retirement benefits, imposing a financial obligation does not, by itself, implicate—let alone violate—the Takings Clauses.

Rather than apply directly analogous cases, the Court of Appeals instead appears to conclude that PA 75 "asserts ownership of a specific and identifiable 'parcel' of money." *AFT I*, 297 Mich App at 618. The Court of Appeals' reasoning in this regard is not linear and it is unclear how requiring public school employees to contribute part of their potential future

compensation is akin to seizing a lawyer trust account in *Brown v Legal Foundation of Washington*, 538 US 216, 235; 123 S Ct 1406; 155 L Ed 2d 376 (2003) or taking funds from a child support fund in *Butler v Mich State Disbursement Unit*, 275 Mich App 309; 738 NW2d 269 (2007). The Court of Appeals ignored the fact that the "parcel of money" at issue was earned subject to the healthcare contribution requirement. Under the Court of Appeals' logic, state income taxes would be an unconstitutional taking because they are aimed at citizens' compensation. This Court's ruling in *AFT II* directly contradicts the Court of Appeals' holding, explaining that "merely requiring citizens to expend monies for valid public purposes and expenditures, typically will not form the basis for a cognizable taking claim," which is why taxes and user fees are not "within the realm of compensable takings." *AFT II*, 497 Mich at 218.

In many cases analyzing this issue under Michigan and federal law, courts have held that taxes and user fees are not unconstitutional takings. For instance, in *United States v Sperry*, 493 US 52; 110 S Ct 387; 107 LEd 2d 290 (1989), the Court rejected the claim that imposing a 2% administrative fee, as applied to a settlement adjudicated by an administrative tribunal, amounted to a prohibited "taking," explaining that the fee was not a physical appropriation of property because:

> Unlike real or personal property, money is fungible. . . . If the deduction in this case were a physical occupation requiring just compensation, so would be any fee for services . . . . *Id* at 62 n 9.

In *Commonwealth Edison Co v United States*, 271 F3d 1327, 1339 (CA Fed, 2001) (en banc), *cert den* 535 US 1096; 122 S Ct 2293; 152 L Ed 2d 1051 (2002), the Court held that "regulatory actions requiring payment of money are not takings." The Court went on to hold that "the mere imposition of an obligation to pay money . . . does not give rise to a claim under the Takings Clause of the Fifth Amendment." *Id*. at 1340. *Commonwealth Edison's* holding is

directly applicable here because imposing an obligation for public school employees to pay money toward their healthcare benefits similarly does not implicate the Takings Clause.

Similarly, the United States Supreme Court has held that a law requiring payment of a tax "did not constitute a taking of the amount of the tax…." *Kitt v United States*, 277 F3d 1330, 1337 (CA Fed, 2002). The Court of Appeals cursorily dismissed *Kitt's* application in this case even though it is directly analogous to the present facts. In *Kitt*, "the government did not seize or take any property of the Kitts. All it did was to subject them to a particular tax to which they had not been subject." *Id*. at 1337. That is precisely what PA 75 does here—require public school employees to contribute a small fraction of their salary to fund their own retirement healthcare fund. There is no specific property taken, but instead a general obligation for public school employees to pay a portion of their compensation to fund their own retiree healthcare plan.

The Court of Appeals also refused to apply *Adams v United States*, 391 F3d 1212 (CA Fed, 2004), in which the Court rejected plaintiffs' claim that the government's refusal to pay overtime compensation amounts to a taking. The Court held instead that the statutory right to be paid money was not a legally recognized property interest like real property, physical property, or intellectual property. *Id*. at 1225. The Court went on to state that "no statutory obligation to pay money…can create a property interest within the meaning of the Takings Clause." *Id*. The Court of Appeals concluded that *Adams* "put the cart before the horse by arguing that failure to pay overtime constituted a taking before any right to that overtime was determined to exist," which the Court reasoned was "not the case here because plaintiff employees[] had a contract-based property right in their own wages." *AFT I*, 297 Mich App at 620.

Here, PA 75 required public school employees to pay a small percentage of their compensation toward the cost of their statutory retiree health benefits plan. The contribution is

not an invasion of employees' property that is subject to an analysis under the Takings Clauses because it is not a physical occupation, but rather in the nature of a user fee. *Sperry*, 493 US at 62, n 9. Since the legislation merely involves the imposition of an obligation to expend money for an unquestionably valid public purpose (implementing and maintaining a fiscally responsible retiree healthcare system for the benefit of public school employees), it does not violate the Takings Clauses. Moreover, employees who were subject to the contribution were entitled to enjoy the associated benefits.[3]

c. If PA 75 resulted in the "taking" of private property, there is no violation of the Takings Clause because the property was not appropriated to a use for which compensation is required.

Alternatively, assuming for the sake of argument that PA 75 is not akin to a tax or user fee for a legitimate public purpose, the statutory provision must then be construed as an appropriation of public school employees' property *for their own current and future benefit,* which also would not amount to a taking that requires compensation. The Legislature has plenary authority to enact—and thereafter prescribe the terms of—a retiree healthcare system because doing so serves a public purpose of which those employees are the primary beneficiaries.

Importantly, the claimed property interest at stake here is materially distinguishable from that at issue in *Webb's Fabulous Pharmacies*, 449 US at 155, which considered whether a statute providing for the appropriation to the government of interest that accrued on funds that were held

[3] It should be noted that public school employees who were subject to the retiree healthcare contribution under PA 75 enjoyed retiree healthcare coverage (e.g., in the event of disability or death) notwithstanding the fact that they were not yet enrolled in subsidized retiree health benefits. Accordingly, public school employees received a real, tangible benefit for the entire time they were subject to the PA 75 contribution. In this sense, the benefits of membership in the retiree healthcare plan are no different than the benefits realized by one who has purchased and holds any other type of insurance policy, e.g., life insurance.

in a county court's litigation fund constituted an unconstitutional taking. Whereas the government in *Webb's* appropriated funds for the **government's use**, the retiree healthcare contributions at issue here were assessed and collected for the purpose of funding **employees' own** retiree healthcare benefits fund.[4]

Similarly, in *Concrete Pipe & Prods, Inc v Construction Laborers Pension Trust*, 508 US 602; 113 S Ct 2264; 124 L Ed 2d 539 (1993), an employer was assessed a fee under federal law when it attempted to withdraw from a multiemployer pension plan. The Court rejected the employer's argument that the fee violated the Takings Clause because the purpose of the plan was to spread the risk for paying pensions. *Id.* at 638-639. Specifically, the Court held that the governmental action that required payment was proper under the Takings Clause because it promoted the common good. *Id.* at 643. Moreover, the Court refused to find a Takings Clause violation because the government did not take anything for its own use, but simply imposed an obligation that Congress had the authority to enact to fund a pension for the benefit of employees. *Id.* at 644.

The holding in *Concrete Pipe* should apply with equal, if not greater, force to the instant scenario which, as described above, involves requiring members to fund a fraction of the cost of their **own** healthcare plan. PA 75 does not violate the Takings Clause because it does not force individuals to bear a public burden that, in fairness, should be borne by the public as a whole. *Maine National Bank v United States*, 69 F3d 1571, 1581 (CA Fed, 1995). Instead, public

[4] In this sense, the retiree health benefits contribution provided under PA 75 is no different than the mandatory pension contribution paid by public school employees who participate in the pension plan under MCL 38.1343a. See also 26 USC 3101 *et seq*. (Federal Insurance Contribution Act requiring workers to contribute toward the cost of Medicare); and MCL 38.2108 (provision of the Judges Retirement Act that requires eligible members to contribute 2% of their compensation toward the funding of retiree healthcare coverage).

school employees are only being required to fund a mere fraction of the cost of providing their **own** retiree healthcare plan; the balance of which is still borne by the public as a whole.

2. Even if PA 75 constituted a "taking," the compensation was just.

Even if PA 75 was an unconstitutional taking, the remedy is not to invalidate the statute, but instead to ensure compensation for the taking is just. Michigan and federal precedent makes clear that the Takings Clause does not prohibit the government from taking private property, but requires the government to *justly compensate* property owners when a taking occurs. *First English Evangelical Lutheran Church of Glendale v Los Angeles Cnty*, 482 US 304, 314; 107 S Ct 2378; 96 L Ed 2d 250 (1987); *Chelsea Investment Group LLC v City of Chelsea*, 288 Mich App 239, 261; 792 NW2d 781 (2010). The United States Supreme Court has explained that "[t]his basic understanding of the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." *First English*, 482 US at 315. Thus, even if the contribution provided under PA 75 were found to be a "taking," the remedy would be to ensure "just compensation," **not** to invalidate the statute.

Plaintiffs have been "justly" compensated because PA 300 ensures that public school employees will receive the value of the contributions remitted under PA 75. This is true regardless of whether the employee ever qualifies for retiree healthcare; or even if the employee left public school employment prior to the enactment of PA 300. Consequently, public school employees who contributed toward retiree healthcare under section 43e of PA 75 will receive just compensation, either in the form of the retiree health care benefit or a refund.

C. PA 75 Does Not Violate Substantive Due Process.

PA 75 does not deprive public school employees of property without due process of law. No property right has been allegedly infringed upon and, even if one were to assume a property

interest exists, courts have made it clear that not every such right is entitled to the protections of substantive due process, specifically when enumerated constitutional rights form the basis of a challenge. PA 75 violates no fundamental right, so there cannot be a substantive due process violation.

1. The Due Process claims are inapplicable because any alleged taking of property must be analyzed under the Takings Clause.

As an initial matter, because Plaintiffs' substantive due process claims, are, in essence, takings claims, relief is not available under the Due Process Clause. Both the Michigan and the United States Constitutions prohibit the State from depriving a person of property without due process. US Const Am XIV and Const 1963, art 1, § 17. This Court interprets the state provision as coextensive with the federal provision. *People v Sierb*, 456 Mich 519, 523; 581 NW2d 219 (1998). The United States Supreme Court has held that:

> Where a particular Amendment "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, "that Amendment, not the more generalized notion of 'substantive due process' must be the guide for analyzing" such a claim. *Albright v Oliver*, 510 US 266, 273; 114 S Ct 807; 127 L Ed 2d 114 (1994) (four-Justice plurality Opinion), quoting from *Graham v Connor*, 490 US 386, 395; 109 S Ct 1865; 104 L Ed 2d 443 (1989); see also *United States v Lanier*, 520 US 259, 272 n 7; 117 S Ct 1219; 137 L Ed 2d 432 (1997)

Similarly, in *Montgomery v Carter County*, 226 F3d 758, 769 (CA 6, 2000), the Sixth Circuit held:

> The takings clause [US Const, Am V] itself addresses whether and under what circumstances the government may take an individual's private property, which is why a number of circuits have concluded that no room is left for the concept of substantive due process.

Michigan Courts recognize the same principle. For example, in *Cummins v Robinson Twp*, 283 Mich App 677, 704; 770 NW2d 421 (2009), the Court of Appeals held that one could

not raise a substantive due process claim when the claim is really a Takings Clause claim. Similarly, because the underlying claims in this case are explicitly under the Takings and Contracts Clauses as set forth in the underlying complaint, substantive due process principles cannot possibly apply. It is inexplicable how the Court of Appeals could ignore applicable precedent on this issue to find a substantive due process violation. As Judge Saad expressed in his opinion below, "[t]hat the majority holds otherwise is clearly contrary to our constitutional jurisprudence." *AFT I*, 297 Mich App at 639 (Saad, J., concurring in part and dissenting in part).

2. The Court of Appeals erred by failing to properly apply the rational basis standard of review in analyzing PA 75.

The Court of Appeals' decision that PA 75 violates the Due Process Clause is clearly erroneous because the Court did not adopt or apply the correct standard for reviewing PA 75. Due process claims may be procedural or substantive. Procedural due process involves the fairness of procedures used by the State that result in the deprivation of life, liberty, or property. *In re Parole of Hill*, 298 Mich App 404, 412; 827 NW2d 407 (2012). The right to substantive due process bars "certain government actions regardless of the fairness of the procedures used to implement them." *Cnty of Sacramento v Lewis*, 523 US 833, 840; 118 S Ct 1708, 140 L Ed 2d 1043 (1998) (quotation marks and citation omitted); see also *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 197; 761 NW2d 293 (2008). The Court of Appeals did not analyze which level of judicial scrutiny applies. Once, however, the rational basis standard is applied, it is clear that PA 75 does not violate substantive due process because PA 75 represents a valid exercise of the police power and bears a reasonable relationship to a legitimate government interest.

a. PA 75 must be analyzed under the rational basis standard.

When reviewing a substantive due process claim, courts "must first craft a 'careful description of the asserted right,' and then determine whether that right is 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,' such that it can be considered a 'fundamental right.'" *Doe v Mich Dep't of State Police*, 490 F3d 491, 499 (CA 6, 2007), quoting *Reno v Flores*, 507 US 292, 302; 113 S Ct 1439; 123 L Ed 2d 1 (1993) and *Washington v Glucksberg*, 521 US 702, 721; 117 S Ct 2258; 138 L Ed 2d 772 (1997). "The question whether challenged legislation violates principles of substantive due process depends on the nature of the right affected." *Brinkley v Brinkley*, 277 Mich App 23, 30; 742 NW2d 629 (2007). If the challenged legislation affects a fundamental right or involves a suspect classification, "strict scrutiny applies and a compelling state interest is required to uphold it." *Id.* If not, the rational basis test applies and the Court "examines whether the law is rationally related to a legitimate governmental purpose." *Id.*; see also *Lingle*, 544 US at 542; *Conlin*, 262 Mich App at 390.

b. PA 75 is rationally related to a legitimate government purpose.

By properly applying the rational basis test, the Court of Appeals would have concluded that PA 75 was rationally related to the legitimate government purpose of lessening the financial burden on public schools because PA 75's purpose was to lower public schools' costs by lowering the percentage of total payroll public schools must contribute to MPSERS for retiree healthcare. MCL 38.1341; MCL 38.1342. In addition, PA 75 allowed Michigan's public school employee retiree healthcare plan to survive an existential threat to the system's financial viability. This Court recognized in *AFT II* the Legislature's legitimate government objective to enacting PA 300, stating "[t]he state's purpose advanced by the challenged portions of 2012 PA 300—implementing a fiscally responsible system by which to fund public school employees'

retiree healthcare—is unquestionably legitimate." *AFT II*, 497 Mich at 247. Of course, the Legislature had the same "unquestionably legitimate" objective in enacting PA 75.

Regarding rational basis review, Michigan courts have explained that:

> Under the traditional or rational basis test, a classification will stand unless it is shown to be essentially arbitrary. Stated differently, one who attacks an enactment must show that it is arbitrary and wholly unrelated in a rational way to the objective of the statute. Few statutes have been found so wanting in "rationality" as to fail to satisfy the "essentially arbitrary" test. Stated positively, the test is that courts must uphold a statutory classification where it is rationally related to a legitimate government purpose. The rational basis test reflects the judiciary's awareness that it is up to legislatures, not courts, to decide the wisdom and utility of legislation. *People v Bosca*, 310 Mich App 1, 78; 871 NW2d 307 (2015) quoting *Wysocki v Kivi*, 248 Mich App 346, 367; 639 NW2d 572 (2001).

PA 75 is neither arbitrary nor wholly unrelated in a rational way to the statutory objective of ensuring retiree healthcare by ensuring the retiree healthcare system is viable. Although the Court of Appeals thinly concluded that PA 75 is arbitrary and capricious, there is no analysis of that issue and no basis for the Court's conclusion. Accordingly, the Court of Appeals erred in so finding. As the United States Supreme Court has explained, to have legislation stricken, a challenger must show that the legislation is based "solely on reasons totally unrelated to the pursuit of the State's goals[.]" *Clements v Fashing*, 457 US 957, 963; 102 S Ct 2836; 73 L Ed 2d 508 (1982).

To analyze whether PA 75 violates Plaintiffs' substantive due process rights, this Court must determine whether the statute "bears a reasonable relation to a permissible legislative objective." *Phillips*, 470 Mich at 436. This test is in essence "the same test employed in the equal protection analysis," which applies a rational basis test to social and economic legislation. *Id*. The rational basis test considers whether the classification is rationally related to a legitimate governmental interest. *Id.* The fact that the legislation "may have profound and far-reaching

consequences … provides all the more reason … to defer to the congressional judgment unless it is demonstrably arbitrary or irrational." *Id*. at 435.

Although the Court of Appeals refused to apply it, *Michigan Manufacturers Assoc v Director of Workers' Disability Compensation Bureau*, 134 Mich App 723; 352 NW2d 712 (1984), is the most analogous case to the instant matter. In that case, the Legislature amended chapter 5 of the Workers' Disability Compensation Act, MCL 418.501 *et seq*., to require all manufacturers to contribute to the Logging Industry Compensation Fund. The Logging Fund's purpose was to reimburse logging employers or their insurance carriers for all weekly benefits paid to eligible injured workers in excess of $12,500. *Michigan Manufacturers Assoc*, 134 Mich App at 727-728. The Court of Appeals rejected a challenge that the Logging Fund was an unconstitutional taking and relied on *Stottlemeyer v General Motors Corp*, 399 Mich 605, 616; 250 NW2d 486 (1977), which held that a similar fund was not "as arbitrary or unreasonable as to be an unconstitutional taking of money." It then found that because the fund had a valid purpose and was administered pursuant to rational distinctions and policy judgments, it did not violate due process. *Michigan Manufacturers Assoc*, 134 Mich App at 734-736.

Similarly here, PA 75 has valid purposes of promoting public school employees' health and welfare and lowering the financial burden on public schools to allow schools to retain more revenue for educational purposes. This concept furthers the public policy of maintaining healthcare for public school retirees while educating school children in a manner that is consistent with Article 4, Section 51 of the Michigan Constitution of 1963. Accordingly, PA 75 did not violate substantive due process.

c. Enacting PA 75 represents a valid exercise of police power.

If the Legislature properly exercises its police power, then the constitutional prohibition on seizing property without due process is not applicable. *Wyant v Director of Agriculture*, 340 Mich 602, 608; 66 NW2d 240 (1954). Courts have defined the State's police power as the power to promote health, safety, morals, and general welfare, and a statute is valid under this power if it protects a substantial part of the public. *Grayson v Michigan State Board of Accounting*, 27 Mich App 26, 31; 183 NW2d 424 (1970).

Here, the Legislature's enactment of PA 75 was a proper use of the police power because it promotes the health and general welfare of public school retirees. In addition, it promotes the general welfare of school children by relieving some of the financial burden on school districts, thereby leaving school districts more revenue for educational purposes. Thus, the constitutional prohibition on the seizure of property without substantive due process is not applicable to PA 75.

IV. EVEN IF PA 75 WAS UNCONSTITUTIONAL, ANY CONSTITUTIONAL INFIRMITY WAS CURED BY PA 300 AND THE ISSUES RENDERED MOOT.

A. PA 300 Cured Any Constitutional Deficiency.

To the extent PA 75 had any constitutional deficiencies, PA 300 cured any such infirmities by subjecting all contributions made pursuant to MCL 38.1343e (including those made under PA 75) to the provisions of PA 300. Once those contributions are deposited into the retiree healthcare trust in the manner contemplated by PA 75, the application and use of those funds will be subject to PA 300. PA 300 added real, tangible protections that did not previously exist under PA 75, the most important being that PSERA now ensures that public school employees who contributed to the healthcare trust will receive the value of that contribution

either in retiree healthcare coverage, as a refund of the amounts paid thereunder, or both.[5] As a result, funds deposited pursuant to PA 75 will not only be used to benefit those who made the contributions, but will also be used to meet the government's obligation to other individuals, thereby ensuring the solvency of the MPSERS retiree healthcare program, which was the Legislature's intent in enacting PA 300 (and PA 75).

In *AFT II*, this Court ordered 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. 498 Mich at 851.

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[5] Less obviously, but equally as important, PA 300 provided for retiree health benefits to be prefunded (instead of funded on a cash, or pay-as-you-go, method). The significance of this development cannot be overstated, as it was aimed at addressing the more than $10 billion in unfunded liabilities for the retiree healthcare plan (See Senate Fiscal Agency Analysis of PA 300, **Appellants' Appendix pp 252a-262a**) and, in so doing, helped ensure the plan's continuation and viability for the hundreds of thousands of current and future retirees that it covers. This solution did not come without cost; in fact, the Legislature specifically conditioned the commitment to prefund retiree healthcare (the added cost of which was then estimated to be more than $150 million) on a final determination that the employees' share of the cost—as provided under section 43e—is constitutional. In fact, PA 300 specifically recognized the need for all employee 3% contributions to be deemed constitutional in order for MPSERS to be able to engage in prefunding of healthcare contributions for future retirees (i.e., current employees). Section 41 of PSERA provides, in part, as follows:

> Beginning in the 2012-2013 state fiscal year and for each subsequent fiscal year, if the contributions described in section 43e are determined by a final order of a court of competent jurisdiction for which all rights of appeal have been exhausted to be unconstitutional and the contributions are not deposited into the appropriate funding account referenced in section 43e, the contribution rate for health benefits provided under section 91 shall be computed using a cash disbursement method. MCL 38.1341(2).

Accordingly, a finding that PA 75 is unconstitutional would jeopardize the Legislature's conditional guarantee to prefund retiree health benefits.

Had the Court of Appeals thoroughly undertaken this analysis, it would have found that, to the extent PA 75 had any constitutional deficiencies, PA 300 has now cured any such infirmities. Thus, any issues raised by Plaintiffs have been "superseded or otherwise rendered moot" by the enactment of PA 300.

PA 300 is a remedial statute "designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good." *Western Mich Univ Bd of Control v State*, 455 Mich 531, 545; 565 NW2d 828 (1997). PA 300's enactment was clearly intended to "correct an existing law" by amending PA 75 to assure MPSERS's solvency by, in part, addressing potential constitutional infirmities the Court of Appeals identified in *AFT I*. Here, the timeline upon which PA 300 became law is inextricably linked with the Court of Appeals' decision to invalidate PA 75, and not merely by coincidence. The Court of Appeals' first decision holding PA 75 unconstitutional was issued on August 16, 2012, and PA 300 was signed into law by Governor Snyder on September 11, 2012. As PA 300 is a remedial act, it should be "liberally construed to achieve its intended goal." *Empire Iron Mining P'ship v Orhanen*, 455 Mich 410, 417; 565 NW2d 844 (1997).

In PA 300, the Legislature amended section 43e to be subject to a newly-created section 91a of the PSERA, which states:

> Except as otherwise provided in this section of section 91a, each member who first became a member before September 4, 2012 shall contribute 3% of the member's compensation to the appropriate funding account established under the public employee retirement health care funding act… MCL 38.1343e.

Section 91a allows public school employees to opt out of health insurance coverage and to, therefore, cease making contributions under section 43e. MCL 38.1391a. Moreover, section 91a also allows an individual who does not qualify for health insurance coverage to receive a refund of the amount of contributions made under section 43e. *Id.*

Here, the Legislature clearly intended that the PA 300 amendments apply to **all** contributions made under section 43e, including those made prior to the enactment of PA 300. The Legislature could have included language within PA 300 specifying that the amendments applied only to contributions made on or after the effective date of the act. However, the Legislature deliberately chose not to do so, as its intent was to cure PA 75's potential constitutional defects, not to refund the collected contributions and start from scratch with regard to funding public school employee retiree healthcare benefits. It is well settled that courts are "obligated to defer to legislative judgments." *Thompson*, 477 Mich at 159 (Markman, J., concurring). Thus, as the Legislature passed PA 300 as a remedial statute that was specifically designed to apply to all public school employee retiree healthcare contributions, including those made under PA 75, this Court should abide by the Legislature's prerogative and interpret PA 300 accordingly.

Reading PA 300 in this way solves any constitutional issues related to PA 75. In fact, because of the order resulting in the escrow of funds in this case, no funds have yet been contributed to the irrevocable healthcare trust established under PA 77. As a result, when such funds are transferred to the trust, all of them will be subject to the refund mechanism imposed by PA 300. Accordingly, even if there was some speculation by Plaintiffs that an employee might have made contributions during the PA 75 time period and then terminated employment or died without receiving any benefit during that period, the delay in the transfer of those funds until after the PA 300 refund mechanism was put in place independently renders moot any consideration of the constitutional questions in this case.

No scenario, under any set of facts for PA 75 or PA 300, results in any employee who made contributions under section 43e not receiving a benefit from such contributions. All

employees subject to the contributions under section 43e benefit from the Legislature's choice to maintain the statutory retiree healthcare plan for them if they qualify under the normal vesting or disability vesting provisions, when the Legislature could have discontinued the plan as it did for employees hired after September 4, 2012 under PA 300. Whether employees ultimately qualify for retiree healthcare is based, in part, on individual choices as to whether to remain employed, the length of employment, etc. In addition to the general benefits of the continued statute providing retiree healthcare, each employee, regardless of employment history, who made a contribution as part of the retiree healthcare program under section 43e enjoys an additional benefit–either a refund, retiree healthcare benefits, an additional pension benefit, or a combination of these benefits. MCL 38.1391a.

These benefits apply to all employees in all scenarios. Such scenarios can range from an employee who worked for one day during the PA 75 time period to an employee who works for fifty years spanning the PA 75 and PA 300 time periods. They also apply to those who opt out under the PA 300 law, those who may die or otherwise terminate employment, and those who receive only a portion of the value of his or her contributions in retiree healthcare benefits. The various subsections in Section 91a provide for all scenarios. MCL 38.1391a.

Thus, under the "liberal interpretation" that this Court must give to PA 300 in order to effectuate its purpose, and the well-settled doctrine that this Court must defer to the Legislature's policy choices, it is clear that PA 300's refund mechanism should be applied to all contributions, including those made under PA 75. As such, the enactment of PA 300 remedied any constitutional deficiencies that may have existed under PA 75, thereby rendering Plaintiff's constitutional arguments moot.

Indeed, the United States Supreme Court has, in the past, upheld a legislative body's enactment of a subsequent law to cure an identified defect in order to ratify and uphold actions undertaken pursuant to the deficient law. For example, the United States Supreme Court's decision in *United States v Heinszen & Company*, 206 US 370; 27 S Ct 742; 51 L Ed 1098 (1907), is analogous to this matter. In *Heinszen*, President William McKinley imposed a tariff on goods coming into the Philippines while the archipelago was under American military control during the Spanish-American War. Although a peace treaty was signed with Spain in 1899 ending the war and extinguishing the President's ability to impose the tariff, the government continued to impose the tariff on goods imported into the Philippines. Congress subsequently enacted a law prospectively authorizing the tariff in 1902, leading vendors whose goods had been subject to the tariff between 1899 and 1901 to file suit seeking a refund. After the Supreme Court found that there was no authority to implement the tariff during those years, Congress passed an act ratifying and retroactively confirming the President's ability to impose the collection of the tariff between 1899 and 1902. The United States Supreme Court upheld Congress' curative act as not violating the Constitution, stating that Congress had the authority to "cure irregularities, and confirm proceedings which without the confirmation would be void, because unauthorized, provided such confirmation does not interfere with intervening rights." *Heinszen* at 384, quoting *Mattingly v District of Columbia*, 97 US 687; 24 L Ed 1098 (1878).

Even if there is some concern that PA 75 may arguably have been a constitutionally defective act, it is indisputable that the Legislature had plenary power pursuant to Article 4, §§ 1 and 51 to enact laws relating to public employee retirement healthcare, just as it did with PA 300. As with Congress' act to cure executive imposition of the tariff that had been collected without authority in *Heinszen*, PA 300 was also a remedial act to address perceived deficiencies

in collecting retirement healthcare contributions pursuant to PA 75. Moreover, the subsequent ratification can be applied without injustice, as all such contributions are now subject to the refund mechanism under PA 300. Therefore, PA 300 should be applied to all funds obtained under section 43e, and, just as in *Heinszen*, this application should be considered a constitutional exercise of the Legislature's ability to "cure irregularities" with legislation.

B. The Court Of Appeals Lacked Subject Matter Jurisdiction Because AFT II Rendered The Constitutional Claims Moot.

Notwithstanding the discussion above, the Court need not wade into any constitutional analysis because review of PA 75's constitutionality is moot. An issue is moot when it presents only an abstract question of law, or "when an event occurs that renders it impossible for a reviewing court to grant relief." *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). PA 300 and this Court's ruling in *AFT II* rendered it impossible to grant the relief requested. As one court explained, mootness reflects "a policy of judicial self-restraint which prevents the litigation of issues whose outcome has ceased to be of any importance." *Woodson v Dep't of Social Services*, 27 Mich App 239, 246 n 9; 183 NW2d 465 (1970). The Court of Appeals should have exercised that judicial self-restraint and dismissed this case. This Court should reverse the Court of Appeals' failure to do so.

This Court's Order of Remand specifically directed the Court of Appeals to "consider what issues presented in [*AFT I*] have been superseded by the enactment of 2012 PA 300 and this Court's decision upholding that Act [*AFT II*] 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 enact and decision." 498 Mich at 851. The Court of Appeals failed to follow this clear mandate.

Without significant analysis or explanation, the Court of Appeals concluded that the enactment of PA 300 and this Court's decision in *AFT II* do not render moot the issues raised in the present cases. The majority engaged in a brief (and erroneous) statement of the issues it wished to address, then proceeded to repeat a great deal of its analysis in *AFT I* while ignoring both this Court's decision and PA 300's impact.

The primary argument against considering the impact of this Court's decision and PA 300 is the majority's position that PA 300 is not to be given "retroactive" effect. But the Court of Appeals actually concludes that PA 300 should not be given **current** effect. Indeed, PA 300 applies to current and former employees, to funds held in trust for those employees, and to the funds held in escrow for those employees. Irrespective of whether the contributions came before or after PA 300, PA 300's protections now equally apply to funds contributed under PA 75. The Court of Appeals' concerns regarding PA 75 no longer exist. The Court of Appeals' decision is erroneously based on a review of PA 75 in a vacuum, as if PA 300 does not exist and has no impact on PA 75.

Specifically, the Court of Appeals' decision reflects two clear errors as it relates to this analysis. The first is that the decision ignores that there are certain vested rights to the contributions made in furtherance of preserving the retiree health fund, and the second is that the refund mechanism under PA 300 fixes, and therefore renders moot, any PA 75 defects that may have existed.

First, the Court of Appeals reiterated their earlier conclusion "that mandated confiscation of employee wages as employer contributions to a system in which a right to benefits could never vest violated constitutional guarantees." *AFT I* (on remand), 315 Mich App 602; 893 NW2d 90, 95 (2016). The Court of Appeals cites PA 77 in its footnote for this statement, but

overlooks the provision in PA 77 that states that "[f]or each retirement system, past members shall have contractual rights only in the aggregate to the payment of retirement healthcare benefits provided by the applicable retirement act to the extent the assets exist in the funding account for that retirement system." MCL 38.2733(6). Although that provision does not indicate a contractual right to retiree healthcare generally, or guarantee full retiree benefits until the end of time, it certainly manifests the legislative mandate that there is a vested contractual right in the aggregate (i.e., the amount contributed by the entire group of employees who have made these contributions) that all contributions be used for the retiree healthcare benefits. This is particularly important in light of the Court of Appeals' conclusion that the "constitutional problem was, and is, that the mandated employee contributions were to a system *in which the employee contributors have no vested rights.* *AFT I* (on remand), 893 NW2d at 95 (emphasis in original). In fact, employees can control both their continued employment as well as when they become past members who have a vested right as specified in PA 77.

The Court of Appeals misinterpreted and selectively quoted *Studier* to conclude that "no employee was or could be legally compelled to financially invest in a system where the intended fruits were not 'accrued financial benefits.'" *Id.* at 101, citing *Studier* at 658-659. Although *Studier* did discuss accrued financial benefits, the Court's holding was that healthcare benefits are not protected by the Constitution because they are neither "accrued" benefits nor "financial" benefits. The Court said nothing about whether an employee could be required to contribute money toward a fund like the one created under PA 77. Additionally, healthcare benefits, generally, are not protected as accrued financial benefits, but public school employees making contributions under PA 75 (and PA 300) do have a vested aggregate right in the fund pursuant to PA 77's plain language.

Second, the Court of Appeals framed the question on remand as follows: "[t]he question before us now is whether the change from mandatory to voluntary contributions set forth in 2012 PA 300 retroactively rendered constitutional the reduction of wages during the mandatory period. *AFT I* (on remand), 893 NW2d at 95. But, as the Court of Appeals and this Court affirmed in *AFT II*, PA 300's "voluntary nature of the contributions **and the refund mechanism served to remedy the constitutional defects identified in *AFT Mich I***. *Id.* at 93.

The Court of Appeals sets forth the correct statutory interpretation that the analysis begins and ends with the statutory language, but then ignores PA 300's language subjecting all amounts collected under PA 75 to PA 300's refund mechanism. The Court of Appeals itself concluded that "it can be argued that so long as MCL 38.1391a(8) remains unaltered and in effect, those employees who do not opt out of the new system but do not ultimately qualify for benefits will not suffer a constitutional deprivation because they will receive back what they put in, **including the sums withheld during the mandatory period**. *AFT I* (on remand), 893 NW2d at 95 (emphasis added). This conclusion is inconsistent with the Court of Appeals' conclusion that "we may not read the 2012 amendments as retroactive nor as governing funds collected prior to its application." *Id.*

CONCLUSION AND RELIEF REQUESTED

PA 75 did not violate the Constitution and, to the extent it did, the Legislature cured any constitutional infirmities and rendered this case moot by enacting PA 300. The Court of Appeals clearly erred in its conclusions that PA 75 violated the Contracts, Takings, and Due Process Clauses. Its decision ignores PA 300's and PA 75's plain language, contradicts prior Supreme Court precedent, and improperly interferes with the Legislature's plenary authority to pass laws designed to fulfill a valid public purpose of providing healthcare to public school employee

retirees. Moreover, it ignored this Court's clear instruction on remand. This Court should reverse the Court of Appeals decision with regard to the constitutionality of PA 75, or in the alternative, find that PA 300 cured any alleged constitutional infirmities by requiring that the 3% contribution and any refund must only be undertaken pursuant to the specific provisions of PA 300.

Respectfully submitted,

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Dated: July 26, 2017

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TABLE OF CONTENTS TO APPENDIX

AFT MICHIGAN, et al. v STATE OF MICHIGAN
(Docket No. 154117)
JOHNSON, et al. v PUBLIC SCHOOL EMPLOYEES RETIREMENT SYSTEM, et al.
(Docket No. 154118)
McMILLAN, et al. v PUBLIC SCHOOL EMPLOYEES RETIREMENT SYSTEM, et al.
(Docket No. 154119)

Date	Document Description	Appendix Pages
May 3, 2011	Court of Appeals' Order Consolidating Appeals	131a
August 16, 2012	Court of Appeals Opinion (Docket Nos. 303702; 303704; 303706)	132a-160a
August 30, 2012	MEA's Court of Claims Complaint (Case No. 12-105-MM)	161a-220a
August 31, 2012	AFT's Court of Claims Complaint (Case No. 12-104-MM)	221a-231a
September 4, 2012	2012 PA 300	232a-251a
October 8, 2012	Senate Fiscal Agency Analysis of 2012 PA 300	252a-262a
December 12, 2012	Order on Parties' Cross-Motions for Summary Disposition (Case No. 12-104-MM)	263a-264a
December 12, 2012	Order Granting Defendants' Motion for Summary Disposition Against MEA (Case No. 12-105-MM)	265a-267a
January 9, 2013	Court of Appeals Order Consolidating Appeals (Docket Nos. 313960; 314065)	268a
July 8, 2013	Proof of Interest Bearing Account	269a
January 14, 2014	Court of Appeals Opinion (Docket Nos. 313960; 314065)	270a-298a
May 21, 2014	Supreme Court Order Holding Leave App in Abeyance (Docket Nos. 303702; 303704; 303706)	299a-302a

Date	Document Description	Appendix Pages
May 21, 2014	Supreme Court Order Granting Leave (Docket No.148748)	303a-305a
April 8, 2015	Supreme Court Opinion (Docket No. 148748)	306a-358a
June 30, 2015	Supreme Court Order Vacating and Remanding (Docket No. 145924; 145925)	359a-362a
October 2, 2015	Defendant-Appellants' Supplemental Brief on Remand (Docket Nos. 145924; 145925)	363a-432a
June 7, 2016	Court of Appeals Opinion on Remand (Docket Nos. 30372; 303704; 303706)	433a-462a