STATE OF MICHIGAN
IN THE SUPREME COURT

AFT MICHIGAN, et al,

Plaintiffs-Appellees,

vs.

STATE OF MICHIGAN,

Defendant-Appellant.

Supreme Court No. 154117
Court of Appeals No. 303702
Court of Claims Docket No. 10-91-MM

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

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

Plaintiffs-Appellees/Cross-Appellants,

vs.

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.

Supreme Court No. 154118
Court of Appeals No. 303704
Court of Claims Docket No. 10-47-MM

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

Plaintiffs-Appellees/Cross-Appellants,

vs.

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.

Supreme Court No. 154119
Court of Appeals No. 303706
Court of Claims Docket No. 10-45-MM

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BRIEF ON APPEAL

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COUNTER-STATEMENT OF JURISDICTION

Defendant-Appellants are correct that this Court has jurisdiction pursuant to MCR 7.303(B)(1). On August 16, 2012, the Court of Appeals held that 2010 PA 75 unconstitutionally impaired Plaintiffs' contracts, violated the Takings Clauses, and deprived Plaintiffs' of substantive due process under both the U.S. and Michigan Constitutions. Despite Defendant-Appellants' assertion that "this Court reversed the Court of Appeals' initial finding of unconstitutionality," (Def's Brief ix) the Michigan Supreme Court vacated the earlier decision of the Court of Appeals:

> [F]or reconsideration in light of the enactment of 2012 PA 300 and this Court's decision in [AFT II]. On remand, the Court of Appeals shall consider what issues presented in these cases have been superseded by the enactment of 2012 PA 300 and this Court's decision upholding that Act, and it shall only address any outstanding issues the parties may raise regarding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 the enactment and decision.

AFT Mich v Michigan, 498 Mich 851 (2015). On June 7, 2016, the Court of Appeals did just that and, once again, held that PA 75 was unconstitutional, that PA 300 did not correct the constitutional violations of PA 75, and that the matter was not moot. (Appellants' Appx 433a-462a) The Defendant-Appellants filed their Application for Leave to Appeal, which was granted by the Court in an Order dated May 31, 2017.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether Defendants substantially impaired Plaintiffs' contracts in violation of the Contracts Clauses of the U.S. and Michigan Constitutions when the explicit terms of 2010 PA 75 directly confiscates 3% of the Plaintiffs' wages earned under collective bargaining agreements.

   Plaintiffs Answer: Yes
   Defendants Answer: No
   Court of Claims Answers: No
   Court of Appeals' Answers: Yes

2. Whether the 3% confiscation under 2010 PA 75 constitutes an unconstitutional taking in violation of the U.S. and Michigan Constitutions considering that the statute explicitly removes the funds from Plaintiffs' wages and removes those wages to fulfill government pre-existing obligations without providing any guaranteed compensation or increased benefits.

   Plaintiffs Answer: Yes
   Defendants Answer: No
   Court of Claims Answers: Yes
   Court of Appeals' Answers: Yes

3. Whether Defendants unconstitutionally deprived Plaintiffs of substantive due process by passing 2010 PA 75.

   Plaintiffs Answer: Yes
   Defendants Answer: No
   Court of Claims Answers: No
   Court of Appeals' Answers: Yes

COUNTER-STATEMENT OF QUESTIONS PRESENTED
(cont'd)

4. Whether 2012 PA 300 fails to cure the constitutional infirmities of 2010 PA 75 where PA 300 was not given retroactive effect, does nothing to correct the fact that 3% of Plaintiffs' wages remain confiscated without a commensurate return, and has not affected the $550 million in confiscated wages that remain in an escrow account.

Plaintiffs Answer: Yes

Defendants Answer: No

Court of Appeals' Answers: Yes

I. INTRODUCTION

Defendants boldly declare 2012 PA 300 ("PA 300") to be a cure-all to the constitutional infirmities of 2010 PA 75 ("PA 75"). PA 300 is no such panacea. Even Defendants acknowledged in their Reply Brief in Support of their Application for Leave to Appeal that PA 300 does not apply retroactively to cure the fact that Defendants confiscated 3% of Plaintiffs' wages without their consent under PA 75. (Appellees' Appx 198b; Defs' Reply 1) Instead, PA 300 acts only prospectively.

The truth is that, in passing PA 75, the State of Michigan confiscated from public school employees 3% of their annual wages without their consent to pay for the retirement benefits of others. Nothing in PA 300 restores these employees to the status quo that existed prior to PA 75's unconstitutional theft or refunds the money that has been in escrow since early in this lawsuit. Instead, the provisions that Defendants cite to as curative merely put into place a new set of conditions on wages that Plaintiffs already earned years ago, but still have not received. Defendants acknowledge that if this Court reverses the Court of Appeals decision, then the Defendants, **under PA 300**, will take Plaintiffs' property—over $550 million—out of the escrow fund and place those funds into the retirement account **without the permission of the true owners** to fund retirement benefits that it asserts can be changed, modified, or eliminated whenever Defendants see fit. Despite Defendants' "cure-all," Plaintiffs still have their contractual wages taken from them without any promise of a commensurate return.

What Defendants fail to comprehend is that Plaintiffs' wages and benefits are not charity nor are they a mere gratuity. Instead, public school employees in this State earned wages under contractual obligations that derived from the collective bargaining agreements freely negotiated and entered into by the public school employers and their employees. Employee services were not provided for free—these services deserve to be compensated. Now, Defendants seek to confiscate

that which was never theirs—3% of their annual wages to pay for the retirement benefits of others under 2010 PA 75, which the Court of Appeals held to be unconstitutional under the Takings, Contracts, and Due Process Clauses of the U.S. and Michigan Constitutions. In another context, such conduct would be a violation of MCL § 750.356 and such an offender would be subject to criminal penalties. In this context, it is a violation of fundamental constitutional rights to be free from government usurping its role and disregarding the rights of its citizens to order their financial affairs, bind themselves to contracts, and expect remuneration for services rendered pursuant to those agreements.

As the Court of Appeals noted, the Defendants do not dispute the existence of contracts that provide employees a rate of pay. 297 Mich App 597, 600-01 fn 4 (2012); *see also Appx 1b-183b*. In fact, those agreements have been produced at several times throughout this litigation before the lower court and the appellate court. Instead, Defendants are arguing that the 3% confiscation is not a substantial impairment, even though federal court precedent is clear that any impact on the compensation of employees under a collective bargaining agreement is per se substantial, especially when the contract is with a governmental entity or where the government is self-interested. Despite Defendants' arguments to the contrary, according to court precedent, permanent impairments to public employee wages as low as .95% are considered to be substantial.[1]

In an effort to argue against the Court of Appeal's Takings Clause analysis, Defendants ignore this case precedent attempting to re-label the 3% wage confiscation as a tax assessment or a user fee. As noted though, there is no room in the decades of federal and Michigan case law on the Takings Clause for this characterization, considering that Defendants have not just imposed an

[1] *See* Section III.B.2, discussing cases such as ***Buffalo Teachers Federation v Tobe***, 464 F3d 362 (2d Cir 2006) and ***Baltimore Teachers Union, American Federation of Teachers Local 340, AFL-CIO v Mayor and City Council of Baltimore***, 6 F3d 1012 (4th Cir 1993).

obligation on Plaintiffs, but have directly seized a specific kind of their private property for the use of others. This taking is more akin to a categorical taking than a regulatory taking because Defendants are seizing a full 3% of Plaintiffs' compensation without them receiving any economic benefit as opposed to a regulation between the rights of private parties. Defendants further argue that Plaintiffs have not lost anything—tell that to Plaintiffs who have had to make cutbacks to make up for the sudden loss of 3% of their compensation. Defendants' argument cannot be supported considering that there is over $550 million in an escrow account without any increased benefits or even a promise of continued benefits according to the explicit language of the statute. 2010 PA 77, 3(6), 7, & 8(2). Consequently, Defendants' appeal should be denied and the Court of Appeals decision affirmed.

II. COUNTER-STATEMENT OF FACTS

Plaintiffs, and others similarly-situated, are public school employees, and beneficiaries under collective bargaining agreements between various AFSCME locals and various public school entities, such as Detroit Public Schools (DPS) and Utica Community Schools (UCS). These employees include such positions as bus attendants, bus drivers, special education aides, and food services employees. These collective bargaining agreements set the wage rates or salaries of employee beneficiaries.

These employees are also entitled to various retirement benefits including retiree healthcare. The Retirement Act covers Plaintiffs, and requires that:

> "The Retirement System [MPSERS] ***shall pay the entire monthly premium or membership or subscription fee*** for hospital, medical-surgical and sick care benefits for the benefit of a retirant or retirement allowance beneficiary who elects coverage in the plan authorized by the Retirement Board and the Department."

MCL § 38.1391(1) (emphasis added). For persons who first became MPSERS members after June 30, 2008, MCL § 38.1391(8) requires MPSERS to pay up to 90% of that monthly premium or

membership or subscription fee. Additionally, the Retirement Act provides that:

> "The Retirement System ***shall pay 90% of the monthly premium or membership or subscription fee*** for dental, vision, and hearing benefits for the benefit of a retirant or retirement allowance beneficiary who elects coverage in the plan authorized by the Retirement Board and the Department. Payment shall begin under this subsection upon approval by the Retirement Board and the Department of plan coverage and a plan provider."

MCL § 38.1391(4) (emphasis added).

This case involves passage of 2010 PA 75 (codified as MCL § 38.1343e), which required public school employers to deduct either 3%, for employees who make more than $18,000 a year, or 1.5%, for employees who make less, directly from their paychecks and without their consent. The legislation mandated the transfer of these funds to the Michigan Public School Employees Retirement System (MPSERS), where the funds were to be kept in an irrevocable trust and managed by MPSERS as grantor. MPSERS was then permitted, under Section 7 of 2010 PA 77, to spend the money "***EXCLUSIVELY***" on current retirees—individuals who are no longer forced to make any contribution to MPSERS.

In fact, the Legislature explicitly provided under section 3(6) of PA 77 that the act "shall not be construed to define or otherwise assure, deny, diminish, increase, or grant right or privilege to health care benefits or other postemployment benefits." In other words, Plaintiffs are important enough to have their wages confiscated and transferred into this post-retirement fund, but not important enough to receive assurances that they will be provided some benefit for their PA 75 burden.

Unlike Defendants' description of the benefits, section 7 of PA 77 explicitly provides that that the benefits are only for "**PAST MEMBERS**":

> "The assets of the irrevocable trust shall be used ***exclusively*** for the benefit of past members and their funding account dependents and shall not be diverted for a purpose other than the payment of retirement health care benefits and the

administrative costs of providing such benefits." (emphasis added)

So, not only are Plaintiffs not entitled to assurances, they are also certainly not entitled to benefits under PA 77.

Instead, Plaintiffs receive nothing if the trust dissolves as their accumulated 3% wage deductions would revert "to one or more states, political subdivisions of states, the District of Columbia or other organization, the income of which is excluded under Section 115(l) of the [Internal Revenue] Code." 2010 PA 77, 8(2).

In summation, employees were already promised full retiree benefits without this additional 3% deduction from their wages; the deductions can only be used to benefit retirees; and the 3% deductions can be taken for the State's sole benefit at the discretion of Defendants. Literally, Plaintiffs receive nothing in return that they were not already promised for the additional burden imposed by PA 75.

A. Court of Claims Proceedings

The legislation was passed and implemented immediately in May 2010. Plaintiffs filed complaint in the Court of Claims on June 17, 2010, seeking declaratory judgment and alleging the following counts:

(1) Breach of Contract;

(2) Impairment of Contract; and

(3) Violation of the Takings Clause.

Plaintiffs' case was consolidated with two other cases alleging similar challenges to PA 75 and 77.[2] An additional count alleging a separate substantive due process violation was alleged by the plaintiffs in ***AFT***. The Court of Claims granted Plaintiffs' request for preliminary injunction and

[2] ***AFT Michigan v. State of Michigan***, Docket No. 303702, L.C. No.10-000091-MM; ***McMillan v. Public School Employees Retirement System***, Docket No. 303706, L.C. No. 10-000045-MM.

directed Defendants to place the employee deductions into a special, interest-bearing account and prohibited Defendants from spending any of the money. The Defendants filed a motion for summary disposition on August 18, 2010, and a hearing was held on August 26, 2010.

The Court of Claims authored its Opinion on April 1, 2011, and rendered its Order Granting In Part and Denying In Part, Defendants' Motion for Summary Disposition on April 12, 2011. The Court of Claims granted Plaintiffs' relief under the Takings Clause, but dismissed the other counts including breach of contract, impairment of pension benefits, and impairment of contract. Specifically, the Court ordered that Defendants cease and desist from deducting 3% and reimburse the Plaintiffs for all of the deductions with interest. Defendants filed a motion to stay the Order. In a stipulated agreement, the Defendants will continue to place the funds confiscated in an interest-bearing account and will not spend any of the money while on appeal.

B. Court of Appeals Proceedings

Defendants filed their Claim of Appeal on April 25, 2011. Plaintiffs filed their Cross Claim of Appeal on May 10, 2011, appealing the three counts the Court of Claims dismissed. In a Court Order dated May 3, 2011, this appeal was once again consolidated with the others mentioned above. Defendants filed their Cross Appellees Brief on Appeal on June 27, 2011, arguing amongst other things procedural issues that were not raised earlier in the proceedings. Plaintiffs filed Reply Briefs soon afterwards on July 18, 2011, and a hearing was conducted on October 19, 2011. In the Decision issued by the Court of Appeals on August 16, 2012, the Court affirmed the Court of Claims' prior holding as to the Takings Clause and breach of contract, and overturned the lower court's prior holding as to Impairment of Contract and Substantive Due Process.

C. 2012 PA 300

On September 4, 2012, 2012 PA 300 was made effective by the Michigan Legislature. PA 300 amends the legislation at issue in this case in an attempt by the Legislature to avoid the Court of Appeals' holding in this case. 2012 PA 300 required Plaintiffs to either opt-out of retiree healthcare benefits by January 9, 2013 or agree to pay 3% of their wages going forward. MCL § 38.1391a(5), (7). If a public school employee opted-out, then their contributions from the effective date of the Act and the date of their choice to opt-out would be credited to a separate 401k account. ***Id.*** A separate lawsuit was filed in the Court of Claims challenging 2012 PA 300 partially under a breach of contract theory.[3] On appeal to the Michigan Court of Appeals, the appellate court held that PA 300 was constitutional reasoning that the voluntary nature of the future contributions and the refund mechanism served to remedy the constitutional defects identified by the Michigan Court of Appeals in the above-captioned case going forward. ***AFT Mich v Michigan***, 303 Mich App 651, 673, 676-79 (2014), aff'd, 497 Mich 197, 249-50 (2015)(hereinafter, "AFT II"). AFT II was appealed to the Michigan Supreme Court, which affirmed the Court of Appeals decision, but was careful to limit the scope of its decision to PA 300. ***AFT Mich v Michigan***, 497 Mich 197 (2015).

D. The Court of Appeals 2016 Decision Regarding PA 75

After the decision in AFT II, this Court vacated the earlier decision of the Court of Appeals in the above-captioned case and remanded the matter back to the appellate court:

> [F]or reconsideration in light of the enactment of 2012 PA 300 and this Court's decision in [AFT II]. On remand, the Court of Appeals shall 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 the enactment and decision.

[3] ***AFT Michigan, et al v Michigan***, Court of Claims Docket No. 12-104-MM; ***Michigan Education Association (MEA) v Michigan Public School Retirement System, et al***, Court of Claims Docket No. 12-105-MM.

AFT Mich v Michigan, 498 Mich 851 (2015). The Court of Appeals did just that and issued a decision on June 7, 2016 finding that PA 300 did not correct the constitutional violations of PA 75. ***AFT Mich v Michigan***, Nos 303702, 303704, 303706; 2016 WL 3176812 (Mich App 2016)(Appellant's Appx 449a-462a). The Court of Appeals found that the matter was not moot reasoning that:

> It is undisputed that during the mandatory period [the period prior to the enactment of PA 300], three percent of public school employees' contracted-for wages were withheld by their employers. Those wages, totaling more than $550 million, are being held in escrow pending a final determination in this case. The parties agree that if 2010 PA 75, as it is applied during the mandatory period is found to be constitutional, then the funds held in escrow will be provided to the state, but that if it is found to be unconstitutional, then the escrowed funds will be returned to the employees who earned them. Because determination of the constitutional questions before us will have a practical legal effect on the disposition of the escrowed funds, the issues raised in these cases are not moot.

Id. at *3. The Court of Appeals went on to find that PA 300 failed to correct the constitutional infirmities that led the appellate court to its earlier ruling that PA 75 was unconstitutional. The Court of Appeals opined 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. Because retirement health care benefits are not "accrued financial benefits," the legislature has the authority to reduce or eliminate those benefits—including the refund mechanism of MCL 38.1391a(8)—at any time. While there is no constitutional prohibition against inviting employees to voluntarily participate in an unvested system, the same is not true where participation is mandated by law. The wages withheld during the mandatory period were taken without any legally enforceable guarantee that the contributors would receive the retirement health benefits provided to present retirees. That has not changed. The sums withheld during the mandatory period were taken involuntarily and the state still retains the right to reduce or eliminate retiree health benefits for those who were compelled to surrender their wages.

Id. at *4. Now, Defendants seek to appeal this decision despite the Attorney General's refusal to litigate the matter.

III. ARGUMENT

Defendants assert that PA 75 should be presumed constitutional and that it should be reviewed based on the rational basis standard. (Defs' Brief 8) However, the U.S. Supreme Court has clarified that a rational basis standard would be inappropriate where the State has a self-interest at stake:

> As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose**. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake**. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

US Trust Co of New York v New Jersey, 431 US 1, 25–26 (1977); ***Buffalo Teachers Federation v Tobe***, 464 F3d 362, 369-70 (2d Cir 2006). In such cases, the Court applies a heightened scrutiny test requiring that the State prove that the law was "both reasonable and necessary to serve the admittedly important purposes claimed by the State," even though the State claims a right to make such legislation as part of its police powers. 431 US at 29-31. Specifically, the State must prove that the law was the least restrictive alternative available. *Id.*

A. Defendants are not entitled to deference in violating Plaintiffs' Constitutional right.

Contrary to ***US Trust Co*** and its progeny, Defendants spend over seven pages of their Brief arguing that they possess plenary authority to violate the U.S. and Michigan Constitutions urging that this Court give them complete deference and just presume everything they did was constitutional. This is the first time Defendants have raised this argument, even though this matter has been litigated for six years.[4] As such, the Court should not entertain Defendants' newly raised

[4] Defendants claim that they raised this issue in their October 2, 2015 Supplemental Brief on Remand (Appellants' Appx 363a-432a). Yet, Defendants merely spent half a page misstating the standard of review—see the discussion

argument as it was raised for the first time on appeal and was not properly preserved. *See e.g.*, ***Booth Newspapers, Inc v University of Michigan Bd of Regents***, 444 Mich 211, 234 n23 (1993).

Nonetheless, Defendants' newly raised argument has no basis in law. While states have plenary power to enact legislation, those powers are limited by the rights protected by the U.S. and Michigan Constitutions. ***People v Cooper***, 236 Mich App 643, 663–64 (1999). According to Defendants' incredibly narrow interpretation of this Court's authority, once the Legislature passes a law regarding its employees' compensation or benefits, the Court should simply decline review. This position contradicts the numerous cases of courts reviewing the constitutionality of state enactments and overturning those laws as violations of the Contracts, Takings, and Substantive Due Process Clauses. *See infra* Sections III.B.3 & III.C.2 & 3. Thus, contrary to Defendants' implication, there is no flat prohibition against this Court reviewing the PA 75 confiscation to determine whether those provisions are unconstitutional.

B. The Court of Appeals Decision was not clearly erroneous regarding Plaintiffs' claims alleging a violation of the Contracts Clauses of the U.S. and Michigan Constitutions.

The Contracts Clause of the U.S. Constitution states that: "No [s]tate shall . . . pass any . . . [l]aw impairing the [o]bligation of [c]ontracts." US CONST, Art 1, §10. Likewise, the State Constitution states: "No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted." MICH CONST (1963), Art. 1, §10. "The Supreme Court has recognized

regarding ***US Trust Co*** above. At no point did Defendants make an argument that the standard that they described provided the near-irrefutable deference approaching plenary authority to pass PA 75. Nor did Defendants claim that either the trial court or the Court of Appeals erred in earlier decisions by not finding that Defendants had plenary authority to pass PA 75. Finally, at no time earlier in this case did the Defendants assert that the Separation of Powers doctrine was somehow applicable to this case. While Defendants state in their Brief that they do not "suggest that the Legislature can run roughshod over civil rights," Defendants spend over seven pages making that very argument, which was never raised in the courts below. (Defs' Brief 11) As such, the Court should hold that Defendants have waived their right to make these arguments for the first time on appeal. *See* ***McPherson v Kelsey***, 125 F3d 989, 995-96 (6th Cir 1997) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones.").

the 'high value' the Framers placed 'on the protection of private contracts.'" ***Welch v Brown***, 935 F Supp 2d 875, 881 (2013)(quoting ***Allied Structural Steel Co v Spannaus***, 438 US 234, 245 (1978)). As such, "private contracts are not subject to unlimited modification under the police power." 438 US at 244 n. 15.

In order to determine whether a law impermissibly impairs a contract, the courts look at the following: (1) is the contractual impairment substantial, and if so, (2) does the law serve a legitimate public purpose such as remedying a general social or economic problem, and if such purpose is demonstrated, (3) are the means chosen to accomplish this purpose reasonable and necessary. ***Energy Reserves Group Inc v Kan Power & Light Co***, 459 US 400, 411-13 (1983).

1. PA 75 Substantially Impaired Plaintiffs' Contractual Relationship.

An impairment does not need to be a complete repudiation of contract in order to be substantial. ***US Trust Co v New Jersey***, 431 US 1, 26-27 (1977). Instead, the courts look to whether reasonable expectations under the contract have been disrupted. ***Sanitation and Recycling Indus, Inc v City of New York***, 107 F3d 985, 993 (2d Cir 1997). Even temporary impairments may be substantial because as the Sixth Circuit recently opined:

> Defendants' argument that the plan is "temporary" and "subject to review and renewal" does not negate a finding that the modifications arguably place a severe burden on Plaintiffs' finances and access to medical care. "[T]otal destruction of contractual expectations is not necessary for a finding of substantial impairment," and even a short-lived impairment can work substantial injury to one's contractual interests.

Welch v Brown, 551 Fed Appx 804, 811 (6th Cir 2014)(a change in retiree health care benefits that increased out of pocket expenses by $2,000 was deemed substantial). Here, the 3% confiscation was indefinite and the escrow account has surpassed $550 million.

The cases interpreting whether an impairment is substantial provide that a law that affects contractual compensation levels for employees is a substantial impairment. ***Buffalo Teachers Federation v Tobe***, 464 F3d 362 (2d Cir 2006). In ***Buffalo Teachers***, the Buffalo Fiscal Authority implemented a wage freeze that, as Defendants note, translated into a 2% decrease for the plaintiff employees in that case. Just like the current matter before the Court, the government action at issue in ***Buffalo Teachers*** was not taken by a party to the CBAs, yet, directly impacted the level of employee wages. In ***Buffalo Teachers***, the Second Circuit held that this constituted an unconstitutional impairment of contract. The Second Circuit opined:

> "Contract provisions that set forth the levels at which union employees are to be compensated are the most important elements of a labor contract. ***The promise to pay a sum certain constitutes not only the primary inducement for employees to enter into a labor contract***, but also the central provision upon which it can be said they reasonably rely."

Id. at 368 (emphasis added).

Defendants argue that it is somehow relevant that there was no contract in existence between Plaintiffs and Defendants for the provision of certain employee benefits; however, such a distinction ignores the holding in ***Buffalo Teachers*** that a governmental entity does not have to be a party to the contract, but must merely impair contract on behalf of a governmental entity or be self-interested. 464 F3d at 370. Furthermore, and most importantly, Plaintiffs do have a contract—they have a contract to be paid wages at a set rate that is being substantially impaired by Defendants' 3% confiscation.

Defendants' argument that there exists no contract being impaired is disingenuous and contrary to law. Defendants argue that 2010 PA 75 does not impair contractual rights that set employee compensation—an argument in direct contradiction to the explicit language in the statute. Specifically, section 43e of PA 75 required that "[E]ach member shall contribute ***3% of***

the member's compensation . . . ." (emphasis added) Compensation is defined by the statute as "the remuneration earned by a member for service ***performed***." MCL 38.1303a(1) (emphasis added). In other words, by the statute's clear language, the statute diminishes the total amount of remuneration that employees were owed for services **already rendered** by 3%.

Plaintiffs' terms of employment, found within the collective bargaining agreements attached to Plaintiffs' supplemental brief before the lower court and Plaintiffs' appellate Reply Brief, dictate compensation, which, regardless of the initial rate or amount, is being impaired by 3%.[5] Regardless of the actual provisions of the CBAs, there is no question as to the interpretation of the collective bargaining agreements because a 3% wage cut is just that—a cut. Nor has the existence of these contractual obligations ever been challenged by Defendants. As the Court of Appeals noted, the **Defendants do not deny the existence of such contractual obligations**. 297 Mich App 597, 600-01 fn 4 (2012). Defendants continued to admit their existence in their most recent Application for Leave to Appeal.

Instead, Defendants argue that the employers are still paying the contractually mandated wage, but if that were the case, there would not be a dime in the escrow account—instead, there is over $550 million. Plaintiffs are making 3% less involuntarily.[6]

To support this argument, Defendants attempt to distinguish ***Baltimore Teachers Union, American Federal of Teachers Local 340, AFL-CIO v Mayor and City Council of Baltimore***

[5] The collective bargaining agreements are not even necessary to show that Plaintiffs have lost 3% of their wages. Employment contracts are unilateral in nature—performance equates to acceptance and obligates the employer to pay wages in consideration. ***Hainline v General Motors Corp***, 444 F2d 1250 (6th Cir 1971); ***Holland v Earl G. Graves Publishing Co***, 46 F Supp 2d 681 (ED Mich 1998); ***Sniecinski v Blue Cross and Blue Shield of Michigan***, 469 Mich 124, 138-39 (2003); ***Clark v Coats & Suits Unlimited***, 135 Mich App 87, 98 (1984).

[6] Defendants largely ignore the non-consensual nature of section 43e. Defendants cite to MCL § 38.1343a(1) that provides public school employees a voluntary choice to further invest their wages by citing for the proposition that there is no difference between sections 43a(1) and 43e. Defendants argue that section 43a(1) has been around for a long time and never challenged. Yet, 43a(1) only applies to voluntary contributions to the Member Investment Plan—a retirement plan that employees could chose in lieu of the basic plan, which provided more generous pension benefit options. Unlike section 43a(1), Plaintiff employees had no choice to contribute under 43e.

arguing that Plaintiffs are still receiving their contractually promised wages. (Def's Brief 15)(citing 6 F3d 1012 (4th Cir 1993)). If anything, ***Baltimore Teachers***, only further supports Plaintiffs' position. In ***Baltimore Teachers***, the City instituted a temporary furlough program. Yet, the employee wage rate did not change in ***Baltimore Teachers***; instead, they simply made less per pay period. Similarly, Plaintiffs are making less per pay period. As pointed out by the Court of Appeals, ***Baltimore Teachers*** actually involved less extreme facts than the ones present in this case. Unlike the permanent 3% confiscation in this case, the furlough days in ***Baltimore Teachers*** lost .95 percent for only one year. Consequently, Defendants highlight the absurd result that it is requesting from the Court by attempting to distinguish ***Baltimore Teachers***; namely, Defendants seem to advocate that it is constitutional to impair the contractual right to make a certain amount of money per week if the impairment is to the wage rate, but it is unconstitutional to impair the contractual right to make a certain amount of money per week if the impairment is to the hours worked. This makes no sense.

This absurd result was rejected in another Second Circuit case where the court held that a salary deferral program passed by the state of New York was a substantial impairment because effected employees only received nine-tenths of their salary for each bi-weekly period. ***Condell v Bress***, 983 F2d 415 (2d Cir 1993). The deferral program would have withheld those wages until the employee's death, retirement, or separation from employment. ***Id.*** The court noted that withholding even a small amount of wages could prevent a public employee from making short-term financial obligations like mortgage and credit card payments. ***Id.*** at 419. Defendants' argument that Plaintiffs are still being paid the same amount by their employers is directly contradicted by ***Condell***; after all, the employees in ***Condell*** were still making the same amount, just later.

The Court of Appeals cited to ***Univ of Hawaii Prof Assembly v Cayetano***, 83 F3d 1096 (9th Cir 1999), a case even further on point. In that case, the state only delayed paydays for a few days. ***Id.*** at 1104-06. Even though the state action did not reduce the actual amount that those employees were paid, the Ninth Circuit held that this constituted a substantial impairment of contract because the timing of the payments was part of the collective bargaining agreement. ***Id.*** The court noted that:

> Plaintiffs are wage earners, not volunteers. They have bills, child support obligations mortgage payments, insurance premiums, and other responsibilities. Plaintiffs have the right to rely on the timely receipt of their paychecks. Even a brief delay in getting paid can cause financial embarrassment and displacement of varying degrees of magnitude.

Id. at 1106. Defendants' argument that there has been no substantial impairment has no basis in law.

The Michigan Court of Appeals likewise agrees that Defendants' analysis is off-base; the Court of Appeals held that a statute that revoked a clause in a collective bargaining agreement obligating the public sector employer to contribute to a private retirement fund was an unconstitutional impairment. ***Washtenaw Community College Educ Assoc v Bd of Trustees***, 50 Mich App 467 (1974). The appellate court held that the statute that prohibited the public employer from contributing 5% of employee pay to a retirement fund completely "obliterated the benefit." ***Id.*** at 476. As a result, the Court of Appeals held that the CBAs had been substantially impaired. ***Id.*** at 475-76.

Defendants also attempt to misconstrue the contractual relationship that is being impaired by relying on ***Studier v Mich Pub Sch Employees' Ret Bd***, 472 Mich 642 (2005). The contractual relationship in this case is based on independent contracts between public school employers, unions, and employees that dictate that Plaintiffs would be paid a set wage for the services that

they provide. The Court in ***Studier*** did not deal with a statute that expressly and specifically confiscated the earned wages of a particular class of public employees. Instead, ***Studier*** merely dealt with changes to the State-created public school retiree health care plan; namely, an increase in copays and deductibles. The ***Studier*** plaintiffs challenged those changes asserting that the retirement statute created a contract right pursuant to Article 9, section 24 of the Michigan Constitution, which provides that "The **accrued financial benefits** of each pension plan and retirement system of the state and its political subdivisions **shall be a contractual obligation** thereof which shall not be diminished or impaired thereby." (emphasis added) ***Studier*** did not deal with a separate contractual right to retiree healthcare benefits—instead, ***Studier*** dealt with whether retiree health care benefits constituted an "accrued financial benefit" for purposes of the Michigan Constitution so as to create a contractual right to retiree health care benefits. The Court held that retiree health care benefits do not constitute an "accrued financial benefit" and that the plaintiffs had no contractual right to retiree healthcare benefits. ***Id.***

The ***Studier*** Court merely held that the State could amend or modify public school retiree healthcare benefits. The ***Studier*** Court was never called on to decide the issues present in this case. Unlike ***Studier***, the State is not just changing retiree healthcare benefits, but is requiring public school employers to use wages that were contractually promised to employees to cover the retirement obligations of the employers and the Defendants.

In fact, the ***Studier*** Court notably distinguished such a confiscation from the changes to retiree healthcare benefits that were present in that case. Specifically, the Court notably anchored its decision to the definition of "compensation." The Michigan Supreme Court held that the copays and deductibles were not an "accrued financial benefit" of the pension plan because they were explicitly excluded by the Retirement Act from the definition of "compensation." MCL §

38.1303a(1); ***Studier***, 472 Mich at 666-67. "Compensation" requires the performance of services. ***Id.*** at 668. The Legislature defined "compensation" to be "remuneration earned by a member for service performed as a public school employee." ***Id.*** The Michigan Supreme Court noted that "when the Legislature enters into a contract, subsequent legislature cannot repudiate that contract." ***Id.*** at 669-70. In reaching this decision, the Court implicitly noted that there is a difference between changing the benefit levels of a retiree health care plan and affecting a contractual wage rate.

Unlike the plaintiffs in ***Studier*** who could choose to avoid the higher costs altogether, our Plaintiffs were forced to surrender money for work they have already performed in order to maintain retirement benefits for others. The amendments to the Retirement Act are quite clear—all the money confiscated goes toward the **EXCLUSIVE** benefit of past members and the current members are promised **NOTHING** pursuant to PA 77. MCL § 38.2737. This seems more akin to a common street mugging than a benefit of employment.[7]

Defendants also disingenuously cite to ***Brown v City of Highland Park***, 320 Mich 108 (1948) and ***Van Coppenolle v City of Detroit***, 313 Mich 580 (1946) implying that those cases stand for the proposition that:

Requiring employers to deduct part of employees' wages to go toward the fund for retiree

[7] Arguably, unlike the scope of retiree healthcare benefits at issue in ***Studier***, the Defendants are expressly diminishing the value of the retirement benefits in this case. Essentially, Defendants have increased the cost without providing any additional benefits. Instead, Plaintiffs must now pay more for benefits that they are already entitled, and that Defendants have a pre-existing obligation to provide. Clearly, this diminishes value as Plaintiffs are receiving **NOTHING** for their mandated additional 3%. In a remarkably similar set of circumstances involving the imposition of a 5% contribution for MPSERS members, the Attorney General relied on the fact that MPSERS members were receiving **NOTHING** for their additional deductions. OAG, 1985-86, No 6294, p 67 (May 13, 1985). The Attorney General reached the conclusion that such a mandated contribution constituted an impairment under §24. As noted by the Court of Appeals in its most recent Decision, many courts have held that such an impairment of a government employee contracts imposed for an indefinite duration constitutes an unconstitutional impairment of contract. ***Opinion of the Justices***, 364 Mass 847, 864; 303 NE2d 320 (Mass 1973)(the Massachusetts Supreme Court struck down legislation that increased active employee contributions for retiree benefits without increasing the active employees' own retirement benefits); ***Singer v City of Topeka***, 227 Kan 356, 369; 607 P2d 467 (Kansas 1980)(the Kansas Supreme Court held that it was unconstitutional for the state to require public employees to pay an increase in their contributions to the retirement system without a commensurate increase in benefits); ***Marvel v Dannemann***, 490 F Supp 170 (D Del 1980); ***Hickey v Pittsburgh Pension Bd***, 378 Pa 300; 106 A2d 233 (Penn 1954); ***Allen v City of Long Beach***, 45 Cal 2d 128; 287 P2d 765 (Cal 1955).

> 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.

(Defs' Brief 19) Yet, neither case has anything to do with deducting employee wages to go toward the fund for retiree health benefits. In fact, neither case even deals with retiree health care. Both deal with the cessation of pension benefits provided solely by statute prior to the passage of Article IX, section 24 of the Michigan Constitution. ***In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38***, 490 Mich 295, 311 fn. 14 (2011)(noting that ***Brown*** was superseded by constitutional amendment). Unlike ***Brown*** and ***Van Coppenolle***, Plaintiffs have a contract right to be paid their hourly wages for time that they already worked for their employers. Despite Defendants' assertion to the contrary, there were contracts in effect that described Plaintiffs' pay that were made part of the record. (Appellees' Appx 1b-183b) PA 75 diminishes that pay by 3%. It is irrelevant whether retiree health care was a contractual right because the wage rate that Plaintiffs' were entitled to pursuant to their negotiated CBAs were most certainly a contractual right. Those contracts were impaired by the State in an effort to balance its obligations on the backs of Plaintiffs' contracts.

Finally, Defendants argue that PA 300 has "cured" PA 75's constitutional issues. This is not true as discussed in Section III.E & F of this Brief.

2. <u>The 3% Confiscation is Not Reasonable or Necessary to Serve a Legitimate Public Interest.</u>

If the Court determines that Defendants substantially impaired Plaintiffs' contractual relationships, then the issue becomes whether the impairment was necessary and reasonable to serve a legitimate public interest. Defendants argue that this Court must respect its plenary authority and provide Defendants with complete deference as to their assessment of reasonableness, necessity, as well as the appropriateness of their confiscation of public school

employee wages. Defendants' argument is contrary to decades of precedent providing that such deference is inappropriate as to government's determination of a legitimate public purpose and reasonability when the government is either a party to the contract or self-interested. *See e.g.*, ***US Trust Co of NY v New Jersey***, 431 US 1, 25-26 (1977). As noted by the Supreme Court in ***US Trust Co***:

> [C]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's interest is at stake. A government entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

Id. at 25-26; *see also* ***Buffalo Teachers Federation v Tobe***, 464 F3d 362, 370 (2d Cir. 2006).[8] An impairment of a contract is not necessary if "a less drastic modification would have permitted" the contract to remain in place. 431 US at 29-30. "[A] State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives. Similarly, a State is not free to impose a drastic impairment when an evidence and more moderate course would serve its purpose equally well." ***Id.*** at 30-31. Nor may a State "refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors." ***Id.*** at 29. Being a party to the contract is not necessary to trigger this less deferential standard; all that is required is that the government's impairment was self-serving. ***Id.*** (In ***Buffalo Teachers***, even though not a party to a contract, the State of New York received less deference because it had an interest in Buffalo's financial stability). As

[8]This principle has existed since the ratification of the Constitution: "The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. ***They come down to the level of ordinary individuals***. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of there being in the undertaking of a State or city to pay, a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity." ***Murray v Charleston***, 96 US 432, 445 (1887)(emphasis added).

Plaintiffs' employers are governmental entities and creatures of the State that benefit as a result of the impairment, the Court should employ heightened scrutiny in reviewing PA 75. ***Id.*** at 370-71; *see also* ***Smith v Scio Twp***, 173 Mich App 381, 388 (1989)("Municipal corporations, including townships, are creatures of the state and derive their powers from the state constitution and statutes.").

In Defendants' initial briefings, Defendants argued that PA 75 was necessary asserting that financial calamity would result if PA 75 was found unconstitutional. After Defendants' voluminous attempts to claim financial hardship in the past, PA 75 is clearly self-serving. This argument did not work for Defendants, so now Defendants assert that the 3% confiscation was necessary to prevent a public health[9] catastrophe—retirees losing their healthcare benefits. Yet, there is no evidence in the record of such a catastrophe likely because Defendants' rationale has changed over the course of seven years. It is unclear how the solvency of the retiree healthcare system is in jeopardy considering that the $550 million that is at issue in this case has been frozen in escrow since the beginning—over six years ago—and the retiree healthcare system is yet to be declared insolvent.

Regardless, at no time have Defendants described a substantial change in circumstances that

[9] Defendant attempts to ignore the Federal Constitution in favor of Article 4, section 51 of the State Constitution providing that the "public health and general welfare of the people of the state are hereby declared to be matters of primary public concern." However, if there is a conflict between general and specific provisions in a constitution, the more specific provision must control in a case relating to its subject matter. ***Advisory Opinion on Constitutionality of 1978 Pa. 426***, 403 Mich. 631, 639-640 (1978). The general provision cited to initially by Defendant does not provide Defendant shelter against more specific and explicit constitutional prohibitions involving the impairment of contracts with public entities. Nonetheless, Defendant cites to cases that do not involve an impairment of contract with a governmental entity for the proposition that it has plenary authority to confiscate active public school employee wages set by contracts with governmental entities for the exclusive benefit of current retirees. *See e.g.*, ***Manigault v Springs***, 199 US 473 (1905)(statute impaired a contract regarding riparian rights between private, non-governmental parties); ***Kent County Prosecutor v Kent County Sheriff***, 428 Mich 314 (1987)(involved a dispute between the executive and legislative branch over jail overcrowding); ***Morseburg v Balyon***, 621 F2d 972 (9th Cir 1980)(involved a state statute regulating the resale of art, which impaired private contracts—not contracts with a governmental entity). These cases are distinguishable based on these facts and fall outside cases like ***Buffalo Teachers*** that limit the deference provided to the government regarding impairments of contracts with a governmental entity.

have left its finances in a precarious state. ***United States Trust Co v New Jersey***, 431 US 1 (1977). In fact, the Court may take judicial notice over the fact that the State of Michigan has a budget surplus and has maintained that surplus since 2012. (Appellees' Appx 190b-197b) Furthermore, if the State of Michigan was so concerned over public school retirees losing their retiree healthcare, Defendants have a funny way of showing it. Part of Defendants' most recent amendments—PA 300—significantly reduced benefits to those who elected to remain in the retiree health care system and completely eliminated retiree healthcare benefits for those who are hired after September 4, 2012. MCL §§38.1391 & 38.1391a(1).

Instead, PA 75 was an attempt to save Defendants' money. Defendants admit as much in their Brief on Appeal admitting that the 3% "will also be used to meet the government's obligation to other individuals . . . ." (Defs' Brief 40) Public school employers receive their funding from the State of Michigan pursuant to the School Aid Act, MCL § 388.1601 *et seq.*. These funds are then used to fund MPSERS, which is directly administered by the State also pursuant to the School Aid Act. Defendants stand to benefit greatly from this imposition: over 30% of costs under MCL § 38.1391 will be covered by the employees themselves, as opposed to tax revenue. (Appellees' Appx 184b-185b) The statute in question even acknowledges that the funds collected under PA 75 "are to be used to perform [an] essential function of the State." 2010 PA 77, Section 2.4(d). Yet, Plaintiffs were entitled to 100% of their wages and, at minimum, a 90% contribution to retiree healthcare benefits pre-2010 PA 75; now they are entitled to less and imposed upon by the State. The Defendants, on the other hand, have decreased their burden to retirees, local government, and the public by balancing its budget on the backs of Plaintiffs and diminishing their already existing obligations. Instead of facing the legal challenge of sharing financial burden, Defendants have unlawfully authorized themselves to take a short-cut.

Defendants are requiring Plaintiffs to give up wages and sacrifice constitutional rights, under the Contract Clauses, to receive retiree healthcare benefits that the State has the discretion to dissolve, causing those funds to revert back to the State. 2010 PA 77, sections 3(6), (7), and (8)(2). Under Section 7 of PA 77, those funds do not have to be spent on the benefits of those whose wages have been confiscated, but instead may be spent **EXCLUSIVELY** on current retirees. These retiree healthcare benefits are entirely separate and apart from the wages Plaintiffs are owed—they have no relationship at all considering the clear obligation of the Employers to pay for retirement benefits under the Retirement Act. In addition, Plaintiffs have a right to be paid compensation for work performed the last pay period **NOW**, not ten or twenty years from now, if then. Therefore, the Defendants have violated Plaintiffs' constitutional rights.

In return, Plaintiffs receive **NOTHING** for the money that has been confiscated from them—a pickpocketing targeted at public school employees. Plaintiffs are provided an illusory benefit that can be eliminated at any moment. As the Court of Claims put it, "[W]hat the plaintiffs are receiving from the legislature for the currently extracted 3% or 1.5%, is a naked, unenforceable and revocable promise." (Appellants' Appx 108a) Further, and even more audacious, this was a benefit Plaintiffs were already owed. The benefits are exactly the same, except now the benefits are discretionary. Hence, this legislation is entirely self-serving and the Defendants should receive little deference.

A legitimate public purpose remedying a general social or economic problem, by its very definition, excludes benefits to only special interests. Here, the primary beneficiaries are current retirees who constitute a small portion of a state whose population exceeds nine million. Perhaps Defendants could argue financial crisis like the City of Buffalo in ***Buffalo Teachers*** or ***Condell***, but it is unclear whether the 3% wage deduction is necessary to fix the economic crisis. The wage

freeze in ***Buffalo Teachers*** was the legislature's "last resort" to fix the fiscal emergency that Buffalo faced—an emergency that no one expected to be urgent until the state comptroller office issued its report. ***Id.*** at 365-66, 371. In 2010, the state of Michigan had been facing a looming budget deficit for at least a decade; yet, the most recent legislative approach to fixing this deficit has been to cut taxes. Certainly, PA 75 or 77 cannot be described as the "last resort."

In ***AFSCME, Local 2957 v City of Benton***, the city unilaterally decreased its contribution to retiree health care premiums. 513 F3d 874 (8th Cir 2008). The Eighth Circuit held that this was unconstitutional, even considering the economic difficulties that the city was facing. ***Id.*** at 882. According to the court:

> Although economic concerns can give rise to the City's legitimate use of the police power, such concerns must be related to "unprecedented emergencies" such as mass foreclosures caused by the Great Depression. Further, to survive a challenge under the Contract Clause, any law addressing such concerns must deal with a broad, generalized economic or social problem."

Id. at 882. Great Depression this is not; emergency this is not—everyone has known about Michigan's economic issues, including those who negotiated the applicable collective bargaining agreements. As for generalized economic or social problem, deducting 3% from wages earned to pay for retiree health benefits is not a broad economic or social problem affecting all. Instead, this is a narrow problem that could be solved through a narrower approach.

Arguendo: assuming that the second question is answered affirmatively, just because there exists a legitimate public purpose or a financial emergency does not mean that any impairment is appropriate. Instead, the impairment must be tailored to the social problem. ***Buffalo Teachers***, 464 F3d at 369. Here, the State is self-interested in the collective bargaining agreements and pension benefits sought to be impaired; therefore, less deference and discretion is provided to Defendants. ***Energy Reserves***, 459 US at 412-13. In order to determine whether a government contract

impairment is reasonable, the court looks at the following: (1) whether the state considered other policy alternatives, or (2) imposed a drastic impairment even when more moderate alternatives existed and could have served its purpose just as well, nor (3) act unreasonably in light of surrounding circumstances. ***US Trust Co v New Jersey***, 431 US 1, 30-31 (1977).

In ***Buffalo Teachers***, the city had implemented a wage freeze in violation of its collective bargaining agreement with its employees. While the Second Circuit held that this was a reasonable impairment considering the financial crisis that the city was facing, the court rested its decision on the basis that the wage freeze operated prospectively. ***Buffalo Teachers***, 464 F3d at 372. The Contracts Clause was designed to protect "those who invested money, time and effort against loss of their investment through explicit repudiation." ***Local Div 589, Amalgamated Transit Union v Massachusetts***, 666 F2d 618, 642 (1rst Cir 1981) (discussing *US Trust Co*). Unlike ***Buffalo Teachers***, the impairment here actually affects "past salary due for labor already rendered or money invested" and is not simply a wage freeze, but a significant wage cut. 464 F3d at 372.

In addition, there are other solutions for fixing the State's financial hardship or maintaining retiree healthcare benefits. For example, the State could have requested re-negotiation of the collective bargaining agreement. The State could have changed its healthcare policy to include higher co-pays and deductibles. The Legislature could have approved a tax increase, so that the brunt of the sacrifice was spread across many more. *See e.g.*, ***Condell***, 983 F2d at 418 (the court mentioned that increasing taxes or shifting the savings from some other governmental program were reasonable alternatives). Instead, the State regretfully chose to bully its public school employees to the benefit of all others. Right after PA 75 was passed, the political debate shifted to the Michigan Business Tax, while the Legislature targeted retirees and public employees. Therefore, this impairment of a government contract far exceeds reasonability.

C. The Mandated Deduction Under 2010 PA 75 Constitutes an Unconstitutional Taking Under Both the Michigan and United States Constitutions.

In addition to the applicability of the Contract Clauses, the 3% confiscation also represents an unconstitutional taking. Both the Fifth Amendment, as applied to the states under the Fourteenth Amendment, and Article 10, §2 of the Michigan Constitution, prohibit the taking of private property for public use without just compensation. The purpose of the Takings Clause is to prevent "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." ***American Pelagic Fishing Co v United States***, 379 F3d 1363, 1371 (Fed Cir 2004)(quoting ***Penn. Cent. Transp Co v City of New York***, 438 US 104, 123 (1978)).

1. Plaintiffs had a property interest in their wages and benefits under contract.

The threshold question is whether there is a protected property interest. Defendants use semantics and tortured logic in an effort to turn a 3% confiscation into a 3% assessment and refute the existence of a property interest. However, this strained logic cannot defeat the abundance of case law that provides otherwise.

Despite Defendants' insistence to the contrary, a contract may create a property right, so long as the contract does not deal with matters that are within the dominant constitutional control of Congress. ***Connolly v PBGC***, 475 US 211, 223 (1986); ***Lynch v United States***, 292 US 571, 579 (1934) (valid contracts are property regardless whether the other party is a private or public entity). A contractual right, such as one found in a collective bargaining agreement, is a property right under the Takings Clause. ***United States Trust***, 431 US at 11 n16. Plaintiffs unquestionably had a property interest in their earnings for work already performed. ***Ramey v Public Service Comm'n***, 296 Mich 449, 461 (1941) (vested rights may not be impaired by legislative action). Retirement benefits are just a form of deferred compensation—once vested, an employee cannot

be deprived of those benefits. ***Maurer v Joy Technologies, Inc***, 212 F3d 907, 918 (6th Cir 2000). Plaintiffs had an absolute right to receive, transfer or assign, spend, save, or exclude others from such compensation—all the "most essential sticks in the bundle of rights that are commonly characterized as property." ***Dolan v City of Tigard***, 512 US 374, 384 (1994)(*quoting* ***Kaiser Aetna v United States***, 444 US 164, 176 (1979). Here, Plaintiffs are being deprived of 3% of their remuneration for services rendered under contract.

For the first time in the six years that this matter has been litigated, Defendants argue that 3% of Plaintiffs' remuneration for services rendered under contracts with public school employers was never Plaintiffs' property, but, instead public property. (Def's Brief 22) This Court should not entertain Defendants' newly raised argument as it was raised for the first time on appeal and was not properly preserved. *See e.g.*, ***Booth Newspapers, Inc v University of Michigan Bd of Regents***, 444 Mich 211, 234 n23 (1993).

Furthermore, Defendants are in error. The cases that Defendants rely on for their assertion that public employee wages constitute public property do not say that. None of those cases dealt with the State directly deducting public school employee contributions involuntarily from their paychecks for retiree healthcare benefits that they may never receive. ***Brucker v Chisholm***, 245 Mich 285, 288 (1929); ***Attorney General v Connolly***, 193 Mich 499, 500 (1916)("The act, by its very terms, affects all teachers in the public schools of the state except those who, being under contract when the act takes effect, do not elect to come under its provisions."). Instead, both cases dealt with contributions taken with the "consent of the teacher." 193 Mich at 504. Defendant misinterprets those cases to suggest that contributions to the retirement system are not the property of the teachers—instead, all that those cases determined is that the proceeds, after having been contributed to the retirement system, were public funds. What are not public funds are Plaintiffs'

wages.[10]

In the alternative, Defendants assert that this is some form of monetary assessment or appropriation. In developing this characterization, Defendants cite to cases dealing with taxes or fees. However, this is a false analogy. The 3% confiscation cannot be derived from the State's taxation power because the 3% only applies to the wages earned by public school employees. In effect, the State is attempting to dress up its clear intent to usurp their constitutional authority. Yet, assuming that this Court is persuaded by Defendants' characterization as a form of tax, these laws are still unconstitutional. **Under Article 9, section 7 of the Michigan Constitution, the Defendants are prohibited from imposing a graduated income tax**. The State must apply a flat income tax. Yet, the Defendants argued in the Court of Appeals and allude to in their Brief that the 3% confiscation is more akin to a tax on the income of only public school employees. Regardless of which article of the Michigan Constitution this confiscation falls under, this imposition is clearly unconstitutional. Therefore, this right cannot originate from the Legislature's power to tax.

If branded as any kind of assessment, the Court of Appeals best articulated the law on this matter: "The law is, however, equally clear that where the government does not merely impose an assessment or require payment of an amount of money without consideration, but instead asserts ownership of a specific and identifiable 'parcel' of money, it does implicate the Takings Clause."

[10] Furthermore, it should also be noted that both cases deal with the predecessor to the current public school employee pensions statute that was repealed in 1929 prior to the passage of Article IX, section 24 of the 1963 Michigan Constitution. In fact, Article IX, section 24 was specifically passed to invalidate as a matter of constitutional law the progeny of these two cases and the doctrine that these two cases stand for that there is no contractual right to pension benefits that the employees contributed to throughout their tenure. 1 Official Record, Constitutional Convention 1961, 770—771. Again, Article IX, section 24 provides that accrued financial benefits of the state retirement system are contractual rights, in which case employees receive a contractual right in exchange for their continued contribution to the retirement system. In this case, there is no contractual right to retiree healthcare benefits according to Defendants' reading of ***Studier***, so there is no benefit being exchanged for the mandatory, involuntary confiscation of Plaintiffs' wages under PA 75. Hence, there is only a taking for which there has been no just compensation.

2016 WL 3176812, at *7.

In support of this statement, the Court of Appeals cited to ***Brown v Legal Foundation of Washington***, a case that dealt with interest being confiscated from lawyer trust accounts by a state defendant. 538 US 216 (2003). The U.S. Supreme Court held that this qualified as a "per se" taking because the "private property" of one was "transferred" to the ownership of another without consent. ***Id.*** at 235.[11] Likewise, earned wages—the "private property" of the employees—was transferred to Defendants for the benefit of others without Plaintiffs' consent. Section 43e even identifies the property for the Court—"***require[s] members to contribute a portion of their 'compensation.'"*** Hence, the 3% confiscation is a "per se" taking. To overturn the decision of the Court of Appeals would directly conflict with the underpinning of ***Brown***.

While Defendants are correct that a mere obligation to pay money is not a taking of "private property," Defendants are incorrect in their mischaracterization of the 3% confiscation as a mere obligation or an "assessment." ***Commonwealth Edison Co v United States***, 271 F3d 1327 (Fed Cir 2001). An "assessment" would be just that—"the mere imposition of an obligation to pay money"—not the physical transfer of a specific fund without the consent of the owner.

This distinction was described in ***Eastern Enterprises v Apfel***, 524 US 498 (1998) (it should further be noted that Defendants have cited to Kennedy's Concurrence). Unlike the current situation, the plaintiff-employers in ***Eastern Enterprises*** filed suit alleging that a federal law was unconstitutional because it forced them to pay premiums into a fund for the retirees of other companies unrelated to the government. ***Id.*** Yet, that statute was still held to be an unconstitutional deprivation of due process. According to Justice Kennedy's concurrence, the reason he did not agree that there was a Takings Clause violation was because the statute was "indifferent as to how

[11] As noted by the Court of Appeals, the appellate court had rendered a decision relying on ***Brown*** in 2007. (Ct App 13) (citing ***Butler v State Disbursement Unit***, 275 Mich App 309 (2007)).

the regulated entity elects to comply or the property it uses to do so." ***Id.*** at 540. The Court of Appeals noted this language from Justice Kennedy's concurrence in a footnote in its Opinion:

> The Coal Act does not appropriate, transfer, or encumber an estate in land . . . a valuable interest in an intangible . . . ***or even a bank account or accrued interest***. The law simply imposes an obligation to perform an act, the payment of benefits.

2016 WL 3176812, at *7 n.10. (quoting ***Eastern Enterprises***, 524 US at 540 (J. Kennedy, concurring)(emphasis added). Therefore, instead of an assessment, the 3% confiscation amounts to a taking because section 43e does target a specific "bank account or accrued interest."

Likewise, the Sixth Circuit distinguished between two kinds of legislation: those that do not affect a "specific interest in property" and those that "seize a sum of money from a specific fund." ***McCarthy v City of Cleveland***, 626 F3d 280, 284-85 (6th Cir 2010). In ***McCarthy***, the court held that the city's enforcement of automatic traffic cameras against vehicle leasees was not an unlawful taking because it was a mere imposition of an obligation as opposed to a state law that "operated to seize a sum of money from a specific fund." ***Id.*** at 284. Here, the deduction from Plaintiffs' wages was a seizure of a sum certain from a specific fund—not a mere imposition of an obligation.

This distinction between a promise to pay versus property was also highlighted in another case cited by Defendants: ***Members of the Peanut Quota Holders Ass'n v United States***, 421 F3d 1323, 1330-31 (Fed Cir 2005). The court went on to analyze whether the peanut quota was a property interest under the Fifth Amendment by citing "crucial indicia of a property right." ***Id.*** (quoting ***Conti v United States***, 291 F.3d 1334, 1342 (Fed Cir 2002)). Those characteristics of property included the right to transfer, the right to exclude, and whether the government retained a right to revoke, suspend, or modify. ***Id.*** Here, Plaintiffs have a right to exclude others from using their earned compensation easily and have the right to transfer it—that is what money is for, and

the State possessed no right to withdraw, revoke, suspend, or modify once Plaintiffs had completed their work.

In fact, one of the primary cases that Defendants cite to for the proposition that the 3% confiscation was akin to a tax further supports the distinction between a tax and the seizure of a specific fund. ***Kitt v United States***, 277 F3d 1330, 1337 (Fed Cir 2002). In ***Kitt***, the plaintiffs challenged the government's assessment of a tax on proceeds from a rolled-over IRA. ***Id.*** The court noted that the government did not actually take any particular property—the government merely increased the taxes that were assessed. As such, the court held that this was not an unconstitutional taking expressly distinguishing this form of assessment from the sort of taking alleged in this case:

> In some situations money itself may be subject of a taking, for example, the government's seizure of currency or its levy upon a bank account. . . . In the present case, however, 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 previously had not been subject. The government action did not constitute a taking of the amount of the tax they had to pay.

Id. at 1337. Despite Defendants' best characterization, Defendants seized Plaintiffs' wages for work already performed by requiring Plaintiffs' employers to automatically deduct and relinquish the 3% confiscation to Defendants without receiving consent from Plaintiffs. Defendants did not simply bill Plaintiffs for the 3%--it literally took ownership over Plaintiffs' wages without any commensurate promise of return.

Defendants seemingly argue that the 3% confiscation is like a "user fee." However, a "user fee" implies an elected service, not a mandatory retirement system provided as an employment benefit to public school employees. By definition, Plaintiff employees are **NOT** using retirement healthcare; otherwise, they would be retired and not employees. By the explicit terms of the retirement amendments, however, Plaintiffs have no guarantee that they will ever receive benefits

under the system. Here today, gone tomorrow. 2010 PA 77, sections 3(6), 7, and 8(2). In other words, there are no services being provided, just a confiscation of 3% of their annual wages.

Defendants cite to ***United States v Sperry*** for the distinction between a "user fee" and "physical occupation;" yet, once again, Defendants' cases support the Court of Appeals Decision and Plaintiffs' analysis. 493 US 52 (1989). In ***Sperry***, it is true that the United States government deducted a percentage of a monetary award received through litigation to cover the cost of the tribunal that heard the case, which was upheld by the Court. However, what Defendants failed to mention in their brief was that the tribunal was created by the federal government to protect US companies during the Iranian hostage crisis. Without the creation of the tribunal, those companies would have lost all their assets in Tehran; hence, the Court held that the plaintiffs had no property rights outside those protected by the tribunal.[12]

The real issue raised by the Court in ***Sperry*** is whether Plaintiffs had a property interest in the money prior to the taking. Unlike ***Sperry***, Plaintiffs had a right to the property separate and apart from special government involvement—they traded their hours of labor in consideration for wages and other compensation, and were denied what was promised in their contract as well as MCL § 38.1391(1).

The facts of the situation currently before this Court are the complete opposite of ***Sperry***, ***Eastern Enterprises***, and ***Edison***.[13] Here, Plaintiffs were owed for services they rendered through their labor and a duty to pay for retiree healthcare benefits. Essentially, Defendants seem to be

[12] While the US Supreme Court stated in dicta that money is "fungible," (***Id.*** at 62 fn 9) application of that term to this case ignores the point that Plaintiffs had a pre-existing, earned property right to their wages prior to government interference. ***Id.*** at 59 (the Court clearly found that the plaintiffs in ***Sperry*** "had no property interest in [their] attachments."). The Court's use of the term "fungible" was only used to demonstrate that the character of the property is what makes a taking unconstitutional—not whether the obligation is paid by deducting a percentage or direct payment. ***Id.***

[13] All of these cases dealt with regulatory cases, where the government was the intermediary between plaintiff and a third party without benefiting itself. Also, all of these cases dealt with the imposition of an obligation, not the direct taking of vested property.

illogically arguing that confiscation of Plaintiffs' wallets full of cash would be an unlawful taking; however, Defendants' confiscation of just the money within the wallets is completely lawful.

Defendants also assert that Plaintiffs have no property right to continuing wages. Yet, this case has nothing to do with whether Plaintiffs had a right to continuing wages—instead, this matter deals with work that was already performed under a contracted wage rate that was not paid. Section 43e of 2010 PA 75 required members to contribute a portion of their "compensation" toward the cost of retiree health care. MCL § 38.1303a(1) defined compensation to mean "the **remuneration earned by a member for service performed**." (emphasis added) PA 75 specifically targeted compensation already earned by Plaintiffs. Unlike the reasoning that the Defendants cite to from the Court's AFT II decision, in passing PA 75, Defendants were not "merely seeking, as a condition for receiving access to retiree healthcare benefits, the assistance of public school employees in paying for these benefits . . . ." (Def's Brief 23)(quoting 497 Mich 197, 229 (2015)).[14] There was no choice provided to Plaintiffs; instead, Defendants simply confiscated wages that Plaintiffs had already earned without their consent.[15] The fact that there is an escrow account with

[14] Defendants assert that this Court's analysis of PA 300 is equally applicable to PA 75. (Def's Brief 23) Notably, this Court declined to render a decision on PA 75 as part of its AFT II decision. Yet, as noted by the Court in AFT II, the PA 300 contributions were voluntary and Plaintiffs could opt out of continued contributions. 497 Mich at 228. As the Court noted, there could be no unconstitutional taking where the property was voluntarily given. ***Id.*** In this case, Plaintiffs had no choice and no property was voluntarily given—3% of their wages were simply confiscated and deducted without their consent.

[15] Defendants have modified their theory of the nature of the confiscation. They argue in their Reply in Support of their Application for Leave to Appeal that Plaintiffs provided their consent under PA 75 by remaining employed as public school employees after July 1, 2010 when the 3% confiscation went into effect. (Appellees' Appx 199b; Reply Brief 2) Yet, it is long-standing precedent that a public employer may not compel an employee to relinquish a constitutional right as a condition of public employment. *See e.g.*, ***Koontz v St Johns River Water Management Dist***, 133 S Ct 2586, 2595 (2013)("[T]he unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them.")(applied a form of heightened scrutiny to a Takings Clause claim, namely, there must be a "nexus" and "rough proportionally" between the taking and the government's legitimate interest); ***Dolan v City of Tigard***, 512 US 374, 385 (1994); ***Connick v Myers***, 461 U.S. 138, 143-45 (1983). This Court noted this precedent in its earlier decision on PA 300, but held that PA 300 provided employees with a voluntary, uncoerced choice whether to opt-out of retiree healthcare benefits or pay the 3%. ***AFT Michigan v. State of Michigan***, 497 Mich 197, 249 (Mich 2015). Unlike that case, however, Plaintiffs were never provided such a choice—under PA 75, money was simply confiscated from their paychecks and held without their consent to pay for the benefits of others without any guarantee or promise of a return on that confiscation. The Defendants' characterization of PA 75 would coerce public school employees into giving up their rights under the

over $550 million of wages that were provided by public school employers representing 3% of Plaintiffs' compensation should be sufficient for the Court to determine that this is not some hypothetical right to continuing wages, but instead a right to wages that were already earned.

Defendants' "continued wages" argument ignores case law indicating that similar legislation targeting wages have been deemed to constitute unconstitutional takings of property without just compensation. For instance, Defendants ignore that no interest existed in the ***Eastern Enterprises***' IOLTA accounts until money was placed in those accounts, and no contribution of interest was required until money was first placed in those IOLTA accounts. Yet, that taking was held unconstitutional taking. Hence, ***Eastern Enterprises*** is relevant to the current matter—the statutory imposition date of July 1, 2010 is what is irrelevant.

While the court has held "that a statutory right to be paid money, at least in the context of federal employee compensation and benefit entitlement statutes, is not a property interest for purposes of the Takings Clause," Plaintiffs are not complaining over a "right to be paid money," but money being taken from Plaintiffs that was already earned—vested contractual rights. ***Adams v United States***, 391 F3d 1212 (Fed Cir 2004). Unlike the disputed overtime claim litigated in ***Adams***, the property interest here involves a sum certain. ***Id.*** at 1225. In addition, the court in ***Adams*** distinguished federal and state employment numerous times noting that federal employees are appointed and cannot contract. ***Id.*** at 1221. State employees can contract, and did contract in this case, to be paid according to the wage rates established in the assorted collective bargaining

Contracts and Takings Clauses or their jobs. Unlike PA 300 that makes the 3% payment a condition to receive retiree healthcare benefits, here, Defendants' characterization of PA 75 would make the 3% confiscation a condition of continued employment. This putative condition is unrelated to the proffered purpose behind PA 75 and the relationship between either giving up 3% of their earned compensation or losing one's job and, with it, all of their future compensation, is so disproportionately one-sided that public school employees would of course be coerced. Defendants even implicitly acknowledged the difference in that same brief noting: "it would be improper for the Legislature to invade the province of public school bargaining by reducing negotiated pay rates . . . ." (Appellees' Appx 201; Reply Brief 16)

agreements. Unlike a party to a contract having buyer's remorse prior to the other party performing, here, the State pulled money out of Plaintiffs' pockets after Plaintiffs had already performed.

2. Under the authority of 2010 PA 75 and 77, Defendants engaged in an unlawful taking.

The issue of whether a governmental taking is unconstitutional depends partially upon whether the private property was taken through a categorical physical invasion or regulation. A categorical taking is one where the owner is deprived of all economic benefit. ***Adams Outdoor Advertising v City of East Lansing***, 463 Mich 17, 23-24 (2000). If categorical, the reviewing court does not have to analyze the specific case—the owner is automatically entitled to recover for the taking. ***Id.*** A regulatory taking limits the use of private property, without possessing it, to the extent that a taking occurs. ***American Pelagic***, 379 F3d at 1371. In addition, a regulatory taking "regulates" the rights between private parties, not the rights between government and a private party. ***Connolly***, 475 US at 223-24 ("the Government does not physically invade or permanently appropriate any employer assets for its own use"); ***Concrete Pipe and Products of California, Inc v Construction Laborers Pension Trust***, 508 US 602, 604 (1993).

Yet, that is what Defendants are doing—permanently appropriating assets for their own use. 2010 PA 77, Section 2.4(d) states that "the assets of the Trust are to be used to perform this essential function of the State." Yet, the statutorily defined "essential function" belies the actual purpose. Defendants admitted on page 15 of the June 28, 2010 Preliminary Injunction Transcript that the mandatory 3% deductions were not intended to pay for or finance pensions. (Appellees' Appx 186b-189b) Instead, these deductions are being transferred to the trust to be used to pay current costs for providing healthcare benefits to retirees. Unlike the cases cited by Defendants, the 3% deduction does not constitute a regulatory taking. Instead, the State Legislature passed

2010 PA 75 and 77 to fund its own pre-existing obligation.

In ***Connolly***, the Court upheld a congressional mandate that forced an employer to pay a withdrawal fee for removing itself from a multiemployer pension plan; the Court reasoned that such a law was a lawful regulation of an area of law—pension plans—that Congress has exercised dominant constitutional authority over. 475 US at 223 (1986). However, the Court noted that the result would have been different had the regulation taken private property for the government's own use. ***Id.*** at 223-24; *see also* ***Concrete Pipe***, 508 US at 644 (1993) (the Court, once again, based its decision on the government and taking nothing for its own use).

This case has more in common with ***Webb's Fabulous Pharmacies v Seminole County***, 449 US 155 (1980). In ***Webb's Fabulous Pharmacies***, a local court appropriated interest on a principal purchase amount held by the court on behalf of creditors and involving the sale of a corporation whose debt was greater than the purchase amount. The Supreme Court held that the court's appropriation of the interest was an unlawful taking. ***Id.*** The Court reasoned that the taking was more than just an "adjust[ment of] the benefits and burdens of economic life to promote a common good." ***Id.*** at 163 (quoting ***Penn Central Transportation Co v New York City***, 438 US 104, 124 (1978)). Instead it was a "forced contribution to general governmental revenues, and it [was] not reasonably related to the costs of using the courts." ***Id.*** The Court further noted that a state ***"may not transform private property into public property without compensation, even for the limited duration of the deposit in court." Id.*** at 164 (emphasis added).

Like ***Webb's Fabulous Pharmacies***, the Defendants appropriated Plaintiffs' property for the benefit of others and to balance the State's budget. Defendants argue that this appropriation is for Plaintiffs' benefit because they will be eligible for retiree health care benefits when they vest and retire. However, the legislation is clear that these funds are meant to provide current retirees

with healthcare benefits. There are no such guarantees for Plaintiffs. Additionally, the State is not just holding onto Plaintiffs' compensation for a "limited duration" until those retiree benefits vest and Plaintiffs retire. Instead, Plaintiffs receive nothing from the State in exchange for the State holding on to their property to benefits others including itself.

Unlike ***Connolly*** and ***Concrete Pipe***, the State has permanently appropriated 3% of Plaintiffs' wages to meet its own pre-existing obligation to its retirees and meet its burden to balance the budget. ***Connolly***, 475 US at 1026; ***Concrete Pipe***, 508 US at 604. Instead of regulating rights between private parties, the State is attempting to benefit itself.

Defendants admit that the State is considering lowering the contribution rate imposed on public education employers to pay for post-retirement health care benefits. (Appellees' Appx 186b-189b) This attempt at shirking responsibility for its pre-existing obligations is only possible due to the mandated 3% confiscation of Plaintiffs' wages who have already contractually and statutorily earned their benefits. Practically, Plaintiffs are paying the State's obligations to retirees. Furthermore, if the politics of tomorrow necessitate dissolution of the Trust, the funds would be transferred to the State for its sole and exclusive use. Obviously, this perverse result is unjust and repugnant to the United States and Michigan constitutions.

Hence, Defendants' attempt to shoehorn PA 75 and 77 into precedent regarding government regulating the behavior between private actors should fail because the government is an actor in this case. Instead, PA 75 and 77 more closely resembles a categorical taking, which is a ***per se*** unlawful taking absent just compensation. ***Lingle v Chevron***, 554 US 528, 538 (2005). Here, Defendants have physically invaded Plaintiffs' rights to their wages by deducting 3% without consent. This act was not in regulation of the behavior between private parties, but an effort to fix the financial crisis on the backs of an interest group—a burden that is more appropriate

for the public to bear as a whole.

3. Even if the Court finds that PA 75 and 77 authorize regulatory takings, these public acts are still unconstitutional.

In the alternative, if this Court finds that PA 75 and 77 authorize a regulatory taking, the taking is still unlawful. In a case involving a regulatory taking, the court reviews the facts and centers its analysis on the following three factors: (1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations. ***Penn Central***, 438 US at 124.

First, the government action is an attempt to balance its own budget and cover its own pre-existing obligations. As described above, the State government, including Defendants, stand to benefit greatly from this imposition: over 30% of costs under MCL § 38.1391 will be covered by the employees themselves, as opposed to tax revenue. (Appellees' Appx 184b-185b) That is a rather attractive deal considering that the Plaintiffs were entitled to 100% of their wages and, at minimum, a 90% contribution to retiree healthcare benefits pre-2010 PA 75. Instead of facing the legal challenge of sharing financial burden, Defendants have unlawfully authorized themselves to take a short-cut—take Plaintiffs' property without just compensation.

Second, the legislation deprives Plaintiffs of 3% of their wages that they have already labored for.[16] While the court found that the peanut quotas were a property interest in ***Members of the Peanut Quota Holders Ass'n v United States***, the court did not believe that the property interest was compensable because the quota arose entirely from statute. 421 F3d at 1334. Unlike

[16] Defendants outrageously compares ***Maine Nat'l Bank v United States***, 69 F3d 1571 (Fed Cir 1995) to the case currently before this Court. In ***Maine National Bank***, the court rationalized that a statute authorizing Federal Deposit Insurance Corporation to seize assets of a bank that had become insolvent was constitutional because it was a "rational attempt to impose costs inherent in a certain type of business activity on 'those who have profited from the fruits' of the business." ***Id.*** at 1580. This analogy is utterly outrageous because Plaintiffs already had the costs imposed upon them—it's called a job. Plaintiffs' labor was the cost of receiving the wages they were owed, and Defendants took from them that very benefit without diminishing their costs. Hence, Plaintiffs were denied profit.

the peanut quota, Plaintiffs' wages arose from their contractual performance of labor as well, so the court's rationale is inapplicable to this case. Instead, these wages are a cognizable property interest that the Plaintiffs could have expected an economic benefit from. For Plaintiffs who largely fill low-paid and physically demanding jobs, this 3% deduction represents a substantial cut that impacts their livelihood. Plaintiffs receive no expansion of their healthcare benefits from this 3% deduction or identifiable special benefit. Additionally, the legislation makes it less likely that Plaintiffs can count on receiving retiree benefits due to the inclusion of language that explicitly denies such an obligation. This makes for a very good deal for Defendants, indeed.

Third, Defendants have violated Plaintiffs' investment-backed expectations. Defendants wrongly analyze this case under ***Studier v MPSERS***, 472 Mich 642 (2005). ***Studier*** dealt with whether retirement benefits prescribed by statute created a contract. ***Id.*** Plaintiffs allege that the property that was taken from them was 3% of their wages for work they have already performed. The CBAs set the rate of that wage, which is decreased retroactively every pay period by Defendants' 3% confiscation. These employees had every right to expect that they would be compensated for the time that they worked under contract.

Furthermore, Defendants seek to have their cake and eat it too arguing on one hand that being forced to contribute "a small sum" of 3% of their compensation in return for lifetime health care upon retirement is a good deal. Yet, on the other hand, Defendants are careful to re-state their position that Plaintiffs have no contractual rights under MCL § 38.1391 to maintaining the current status of retiree healthcare benefits for the life or active employees and retirees. So Defendants' message for public school employees is that they should be thankful for receiving full lifetime benefits at a mere 3% of their pay per year, but they should also realize that those benefits may or may not be there when it comes time for them to retire. This generous mandate is the very opposite

of investment-backed expectations.

4. No just compensation was provided for Defendants' unlawful taking.

The amount of just compensation to be paid is measured by the owner's loss, not the government's gain. ***Brown v Legal Foundation of Washington***, 538 US 216, 235-36 (2003). Here, Plaintiffs are losing 3% of their wages that they would have been entitled to under contract. In exchange, Plaintiffs received no new benefits that they were not already provided to under the retirement statute. Of course, that even assumes that Defendants do not simply dissolve the trust fund and misappropriate the $550 million in another couple of election cycles.

The government cannot require someone to give up a constitutional right in exchange for a discretionary benefit conferred by the government, when that discretionary benefit has no relationship to the property. ***Dolan v City of Tigard***, 512 US 374, 385 (1994); ***Bragg v Weaver***, 231 US 57 (1919) (Plaintiffs are entitled to "certain payment" of reasonable compensation without unreasonable delay). Here, Defendants are required Plaintiffs to give up wages and sacrifice constitutional rights under the Contract and Takings Clauses allegedly in exchange for retiree healthcare benefits that the State has the discretion to dissolve, causing those funds to revert back to the State. These retiree healthcare benefits are entirely separate and apart from the wages Plaintiffs are owed—they have no relationship at all considering the clear obligation of the employers to pay for retirement benefits under the Retirement Act. In addition, Plaintiffs have a right to be paid compensation for work performed the last pay period **NOW**, not ten or twenty years from now, if then. Therefore, no just compensation has been provided and Defendants have engaged in an unconstitutional taking.

Defendants argue that PA 300 ensures that Plaintiffs will receive the value of the contributions remitted under PA 75. While this is untrue as argued in greater detail in Sections

III.E & F of this Brief, this argument also ignores the case law that Defendants cite to in their brief. As noted by the U.S. Supreme Court, just compensation is not necessarily provided just because a governmental entity withdraws a regulation that was found to be an unconstitutional taking. ***First English Evangelical Lutheran Church of Glendale v Los Angeles Co***, 482 US 304, 322 (1987). Instead, where a party has been denied all use of its property for a considerable period of years, the invalidation of the statute is not constitutionally sufficient without payment of fair value for the use of the property during that period of time. ***Id.*** In this case, Plaintiffs have been deprived all use of the wages that were confiscated for about six years. To the degree that PA 300 represents Defendants attempting to withdraw any unconstitutional taking (a highly dubious proposition discussed later), merely amending the statute does little to correct the unconstitutional taking without giving Plaintiffs back the money that Defendants stole.

D. Plaintiffs support AFT's substantive due process argument.

Plaintiffs rely on the Brief on Appeal that will be filed by the AFT.

E. 2012 PA 300 is inapplicable to this case because that statute does not have retroactive effect.

Defendants assert in error that the constitutional infirmities identified by the Court of Appeals were retroactively corrected by the passage of 2012 PA 300.[17] As the Court of Appeals held, that interpretation has no basis in PA 300:

> The language of 2012 PA 300, as the state concedes contains no retroactivity provision and makes no reference to the funds collected during the mandatory period. "Nothing will be read into a clear statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself." *Thomason v WCAC Contour Fabricators, Inc*, 255 Mich App 121, 124-25; 662 NW2d 51 (2003). Accordingly, we may not read the 2012 amendments as retroactive nor as governing funds collected prior to its application.

[17] Even Defendants acknowledge that PA 300 did not have retroactive effect – only prospective. (Appellees' Appx 200b; Reply Brief 12) Nevertheless, in an argument based solely on semantics, Defendants argue that PA 300 had remedial effect instead. Nonetheless, PA 300 could not have remedied the unconstitutional confiscation because Plaintiffs were deprived of 3% of their wages for years prior to PA 300.

AFT Michigan v State, Nos. 303702, 303704, 303706; 2016 WL 3176812, at *3 (Mich App 2016)(Appellants' Appx 439a).

The Court of Appeals was right. A law is retroactive if it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability, in respect of transactions or considerations already past." ***Barber v Barber***, 327 Mich 5, 11 (1950)(quoting 50 Am Juris at page 492). Retroactive laws are disfavored because "every law that takes away or impairs vested rights under existing laws, is generally reprehensible, unjust, oppressive, and dangerous." ***Id.*** (quoting 50 Am Juris at page 493). Under Michigan law, "it is a settled rule of statutory construction that statutes ordinarily are prospective in application unless 'the contrary clearly appears from the context of the statute itself.'" ***McQueen v Great Markwestern Packing Co***, 402 Mich 321, 329 (1978)(quoting ***Briggs v Campbell, Wyant & Cannon Foundry Co***, 379 Mich 160, 164 (1967)). The language of the statute itself must clearly, directly, and unequivocally express that the statute will have retroactive effect. *See e.g.*, ***Brewer v AD Transport Exp, Inc***, 486 Mich 50, 56 (2010)(where a statute contained a specific effective date but failed to reference retroactivity, the statute must be interpreted to be prospective only); ***Davis v State Employee' Retirement Bd***, 272 Mich App 151, 155 (2006); ***Frank W Lynch & Co v Flex Technologies, Inc***, 463 Mich 578, 583 (2001)(court held that the Sales Representatives' Commissions Act was not retroactive where "it would have been impossible for defendants to 'comply' with its provisions" at the time of the dispute). "Even if the Legislature acts to invalidate a prior decision of this Court, the amendment is limited to prospective application if it enacts a substantive change in the law." ***Brewer***, 272 Mich App at 155(citing ***Hurd v. Ford Motor Co.***, 423 Mich. 531, 533 (1985)).

Here, Defendants claim that the funds confiscated under PA 75 that were placed in an escrow account pending the resolution of this litigation are part of the retiree healthcare account under PA 77 and that individual employees can retroactively choose to opt-out and receive a full refund for those earlier unconstitutional contributions pursuant to the language in PA 300. Yet, like the statute in ***Brewer***, PA 300 has a specific effective date—September 4, 2012—but failed to include any express language referencing retroactivity. *See also*, ***Johnson v Pastoriza***, 491 Mich 417, 430-32 (2012)("The Legislature was cognizant of the operative language necessary to apply any particular provision in the amendatory act retroactively but did not include such language . . . ."); ***Frank W Lynch***, 463 Mich at 584 (the Court noted that "the Legislature has shown on several occasions that it knows how to make clear its intention that a statute apply retroactively" listing several statutes where the Legislature expressly stated that the changes were "to be applied retroactively).

The provision that Defendants chiefly rely on to show retroactive effect merely states:

> Except as otherwise provided in this section or 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. Nothing in this provision, or elsewhere in PA 300 for that matter, clearly indicates that the funds that were confiscated under PA 75 would be retroactively subject to the opt-out provision that Defendants claim cure all constitutional infirmities. Instead, the above-referenced language only provides that contributions going forward will be subject to the opt-out language—there is no reference to the 3% mandatory confiscation. In fact, 2010 PA 75 specifically provided that members would contribute 3% of their compensation "beginning July 1, 2010." Yet, in 2012 PA 300, the Legislature decided to delete "beginning July 1, 2010" from section 43e. If

the Legislature had actually intended that PA 300 be given retroactive effect, then this language would not have been deleted.

Even if there was such a reference, like ***Frank W Lynch & Co***, it would have been impossible for the Plaintiffs to have complied with the provisions of PA 300 at the time of the dispute—when the 3% was confiscated. Per the explicit language in PA 300, Plaintiffs were precluded from opting-out until beginning September 4, 2012, two years after the 3% was confiscated. MCL § 1391a(5).

The Defendants also cite to MCL § 38.1341(2), which operates as a retaliatory threat that if the PA 300 contributions are deemed unconstitutional, the Defendants would change the method of computing benefits to a cash disbursement method. Defendants assert in their brief that this provision includes both PA 75 and PA 300 contributions. (Def's Brief 35 n.6) Yet, nowhere in MCL § 38.1341(2) does it say that. Instead, that provision is specifically limited to "Beginning in the 2012-2013 state fiscal year and for each subsequent fiscal year . . . ." In other words, after the 3% confiscation under PA 75. Hence, not only is there no language that clearly, directly, or unequivocally expresses an intent that PA 300 apply retroactively to those confiscated funds—the language actually suggests the opposite.

F. 2012 PA 300 Failed to Refund the 3% Contributions that Were Unconstitutionally Confiscated from Public School Employees, so the Matter is Not Moot.

Defendants assert that the Court of Appeals erred in finding that the matter is not moot after the passage of 2012 PA 300. Defendants argue that the appellate court should have found that PA 300 retroactively makes Defendants' unconstitutional confiscation constitutional years after the Defendants started deducting the 3% asserting that each Plaintiff could individually seek a refund of their portion of the $550 million escrow fund under PA 300.

Yet, an issue is moot if a decision on the matter would have "no practical legal effect" on the case. ***City of Detroit v Ambassador Bridge Co***, 481 Mich 29, 50 (2008)(quoting ***Federated Publications, Inc v City of Lansing***, 467 Mich 98, 112 (2002)); ***City of Detroit v Detroit Police Officers Ass'n***, 174 Mich App 388, 392 (1989) (A case becomes moot "when an event occurs which renders it impossible for this Court to fashion a remedy."). The Court of Appeals rightly decided that PA 300 is no such event and that a decision on the matter would have a "practical legal effect" on where the funds in the escrow fund would go.

For its finding, the Court of Appeals reasoned as follows:

> It is undisputed that during the mandatory period [the period prior to the enactment of PA 300], three percent of public school employees' contracted-for wages were withheld by their employers. Those wages, totaling more than $550 million, are being held in escrow pending a final determination in this case. The parties agree that if 2010 PA 75, as it is applied during the mandatory period is found to be constitutional, then the funds held in escrow will be provided to the state, but that if it is found to be unconstitutional, then the escrowed funds will be returned to the employees who earned them. Because determination of the constitutional questions before us will have a practical legal effect on the disposition of the escrowed funds, the issues raised in these cases are not moot.

AFT Michigan v State, Nos. 303702, 303704, 303706; 2016 WL 3176812, at *3 (Mich App 2016)(Appellants' Appx 439a).

The Court of Appeals was correct. It is undisputed that 3% of Plaintiffs' compensation was withheld and that those deductions were placed in an escrow fund awaiting a final determination in this matter. It remains undisputed that if PA 75 remains constitutional, the funds would be placed into the retiree healthcare account; if PA 75 is found to be unconstitutional as it already has been, then those funds would be returned to Plaintiffs. Defendants admitted as much in their Brief:

> 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.

(Defs' Brief 42)(emphasis added) So the matter is certainly not moot because the decision of the Court will, as a practical legal matter, determine whether the funds are returned to Plaintiffs or transferred to the trust.

Despite Defendants' assertion to the contrary, PA 300 did nothing to correct the constitutional infirmities of PA 75. Not only was PA 300 not given retroactive effect by the Legislature as discussed above, but PA 300 did nothing to fix the problem identified by the Court of Appeals. Namely, the Court of Appeals held that the constitutional infirmity was that Defendants "mandated employee contribution to a system in which the employee contributors have no vested rights." 2016 WL 3176812, at *4 (Appellants' Appx 440a). As noted by the Court of Appeals:

> Because retirement health care benefits are not "accrued financial benefits," the legislature has the authority to reduce or eliminate those benefits—including the refund mechanism of MCL § 38.1391a(8)—at any time. While there is no constitutional prohibition against inviting employees to voluntarily participate in an unvested system, the same is not true where participation is mandated by law. The wages withheld during the mandatory period were taken without any legally enforceable guarantee that the contributors would receive the retirement health benefits provided to present retirees. That has not changed. The sums withheld during the mandatory period were taken involuntarily and the state still retains the right to reduce or eliminate retiree health benefits for those who were compelled to surrender their wages.

Id. The Court of Appeals is correct—nothing has changed.

First, Defendants even assert in their Brief that there is no contractual or constitutional right to retirement health care benefits and that such benefits are unvested citing to ***Studier v Mich Pub Sch Employees' Ret Bd***, 472 Mich 642 (2005). (Defs' Brief 17, 26, 47) There is a constitutional right not to have contractual rights impaired or property taken without just compensation though. Nothing in PA 300 changes the fact that 3% of Plaintiffs' compensation was taken involuntarily in contradiction to their contractual rights to those wages—in exchange for retiree healthcare

benefits that can be changed unilaterally by Defendants. The amendments under PA 300 did not alter the language pointed to by the Court of Appeals in 2010 PA 77. Under PA 77, the State has the discretion to dissolve the fund entirely causing those funds to revert back to the State. 2010 PA 77, sections 3(6), (7), and MCL §§ 38.2733(6), 38.2737, & 38.2738(2).

One of the provisions that Defendants cite to as authority that PA 300 corrects the constitutional infirmities of PA 75 and 77 is the provision providing that "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). Yet, that provision was in PA 77 prior to PA 300 being passed. As acknowledged in Defendants' Brief, that provision only provides that members have a contractual right to the aggregate of payments—that does not mean that they have a right to receive a refund of the mandatory contributions under PA 75. In fact, the statute explicitly limits such a right not only by referencing the aggregate, but in limiting such a right to the terms of the retirement act, which Defendants assert can be changed by the Legislature at any time. If this was not bad enough, this provision that Defendants use to support their argument that Plaintiffs will receive compensation for their mandatory 3% confiscation expressly states that any rights are further limited to "the extent the assets exist in the funding account." Yet, Defendants are allowed to dissolve the account entirely under MCL § 38.2738(2), so what protection this provides to employees who had 3% of their wages taken from them is dubious to say the least.

Second, there is no dispute that the initial taking of the 3% was involuntary and remains involuntary. While Defendants assert that contributions made **after PA 300** became voluntary, there is no question that the $550 million at issue in this case was deducted from Plaintiffs' paychecks without their consent **before PA 300** and that Defendants have failed to refund the $550

million that it required Plaintiffs to contribute. Defendants argue that PA 300 fixes this problem because, those funds will be immediately transferred into the PA 77 fund and subject to PA 300's refund provisions if this Court finds that the PA 75 confiscation was constitutional. Defendants miss the point entirely—the $550 million was never Defendants' money to confiscate, let alone transfer to the PA 77 fund. Since that time, instead of refunding Plaintiffs' wages, these funds were kept in an escrow account with Defendants' intent that these funds be transferred into the retirement system. If the Court finds that Defendants violated the U.S. and Michigan Constitutions in confiscating the 3%, then those funds will never be transferred—they will be returned to their rightful owners—and there will be no need for a refund mechanism.

PA 300 does not fix the constitutional violation—Plaintiffs' money was still involuntarily taken substantially impairing their contract rights. Not only did Defendants not have a right to do anything with those funds because they were part of an escrow fund placed in dispute as part of this lawsuit, but additionally, the $550 million escrow account represents funds that were promised to Plaintiffs in exchange for services they provided years ago. The contract was that Plaintiffs would perform their job functions for a wage. They did so. Yet, the wage they received was 3% less than what they agreed to. What if Plaintiffs' do not want their money transferred into the retiree healthcare account? This is their earned income—Defendants' suggestion that PA 300 corrects the constitutional infirmities for its past unconstitutional confiscation ignores the fact that Defendants' interpretation of PA 300 would still continue to deprive Plaintiffs' of control over 3% of their compensation.

Nothing changed by PA 300 corrects the fact that Plaintiffs have been involuntarily deprived of $550 million for half a decade for work they performed years ago. The initial taking—the initial contract impairment—was itself unconstitutional and Defendants' violations of

Plaintiffs' constitutional rights will not be remedied without those funds being handed over without Defendants' strings attached.

Third, the Court of Appeals is right to question the sufficiency of the PA 300 "refund" considering that Defendants assert that they can change the retirement statute and the benefits provided under that statute whenever and however they see fit. More so, despite Defendants' assurances, the PA 300 "refund" that Defendants cite to does not actually refund the mandatory 3% confiscation. While Defendants claim that Plaintiffs can simply withdraw the 3% confiscation that was unlawfully taken from them under section 91a of PA 300, Defendants cite to section 91a without actually referencing the language in that statute. It is no wonder Defendants do not reference the language—Defendants' interpretation directly contradicts the express language in PA 300. Specifically, section 91a(5) provides:

> Except as otherwise provided in this section, beginning September 4, 2012 and ending at **5 p.m. eastern standard time on January 9, 2013**, the retirement system shall permit each qualified member to make an election to opt out of health insurance coverage premiums that would have been paid by the retirement system under section 91 and **opt into the Tier 2 account provisions** of this section effective on the transition date. A qualified member who makes the election under this subsection shall cease accruing years of service credit for purposes of calculating a portion of the health insurance coverage premiums that would have been paid by the retirement system under section 91 as if that section continued to apply.

MCL § 1391a(5) (emphasis added). In other words, any choice Plaintiffs were allowed to make to opt out expired by **January 9, 2013 at 5p.m. EST**, years before the matter is resolved and the funds in the escrow account are disbursed. Only if employees opted out would any funds that they contributed be transferred to the Tier 2 account, which is a 401(k). ***Id.*** Even if Plaintiffs were still entitled to request to opt-out despite the January 9, 2013 deadline, Plaintiffs would not simply receive a refund of their PA 75 confiscated wages upon request under PA 300. Instead, only their PA 300 contributions deducted from their compensation after September 4, 2012 would be placed

in a 401(k) pursuant to section 8(6) of PA 300. Once again, despite their consent or lack thereof, Plaintiffs' property would be confiscated by Defendants and involuntarily placed in a 401(k). Under federal tax law, if Plaintiffs decided to withdraw the funds from these 401(k) accounts, these withdrawals would constitute premature distributions and would be subject to a 10% excise tax, thus, further reducing any such purported "refund" of the funds placed in the 401(k) accounts. 26 USC § 72(t).

Additionally, anyone who does not make the decision to opt-out per section 91a(5) may only receive a return of their contributions if they do not earn enough service credit to be eligible for retiree healthcare or if they die before receiving health care that was equivalent to the amount of their contributions. MCL § 38.1391a(8). There is no choice to simply receive a refund. Even if members are ineligible or die before receiving retiree health care benefits, these individuals may still not be eligible for a full and immediate refund—instead, the statute could be interpreted to mean that employees who opt-out after January 9, 2013, who are ineligible to receive retiree health insurance may only receive "1/60 of the amount equal to the contributions made by the member under section 43e." ***Id.***

Not only does Defendants' claim that PA 300 solves all constitutional infirmities ignore the express language of section 91a(8), but it also ignores the very important condition that Defendants placed on refunding the 3% confiscation—that Plaintiffs would lose all rights to retiree health care benefits in the future. In other words, any choice that Defendants assert that Plaintiffs were presented with was a Hobson's Choice; namely, they may either voluntarily remove themselves from retiree healthcare benefits or risk losing the money that the State of Michigan unlawfully stole from them to begin with. Defendants' argument is akin to a mugger getting caught red-handed by the police stealing a wallet and, who only after getting caught, proposes to give the

wallet back to its rightful owner if the wallet's owner just gives him the keys to his house in exchange. Defendants' interpretation of PA 300 in and of itself impairs Plaintiff's contracts and takes Plaintiffs' property by imposing a condition on Plaintiffs' receipt of wages for services that Plaintiffs had already provided. This result is the exact opposite of mootness in that there is a remedy that this Court can award and a decision by the Michigan Supreme Court would have a practical legal effect. Namely, a decision affirming the Court of Appeals is the only way Plaintiffs will be fully restored for Defendants' unconstitutional deductions.

IV. CONCLUSION

In conclusion, the U.S. and Michigan Constitutions clearly limit Defendants' authority to confiscate 3% of Plaintiffs' contractually-promised wages because such a confiscation acts as a substantial impairment of contract and as an unconstitutional taking of their private property without just compensation. Nor was PA 75 and 77 amended to correct these constitutional infirmities—not only was PA 300 not granted retroactive effect, nothing in PA 300 actually corrects the constitutional infirmities identified by Plaintiffs and the Court of Appeals.

Respectfully submitted,

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Dated: August 29, 2017

STATE OF MICHIGAN
IN THE SUPREME COURT

AFT MICHIGAN, et al,

Plaintiffs-Appellees,

vs.

STATE OF MICHIGAN,

Defendant-Appellant.

Supreme Court No. 154117
Court of Appeals No. 303702
Court of Claims Docket No. 10-91-MM

CERTIFICATE OF SERVICE

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

Plaintiffs-Appellees/Cross-Appellants,

vs.

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.

Supreme Court No. 154118
Court of Appeals No. 303704
Court of Claims Docket No. 10-47-MM

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

Plaintiffs-Appellees/Cross-Appellants,

vs.

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.

Supreme Court No. 154119
Court of Appeals No. 303706
Court of Claims Docket No. 10-45-MM

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2017, the foregoing documents (*Plaintiffs/Appellees/Cross-Appellants'Brief on Appeal (Oral Argument Requested)* and *Appellees' Appendix*) were electronically filed by the undersigned's authorized representative, using the ECF system, which will send notification of such filing to all parties of record.

Respectfully submitted,

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