NO. 88546-0

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SUPREME COURT OF THE STATE OF WASHINGTON

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WASHINGTON DEPARTMENT OF RETIREMENT SYSTEMS and THE STATE OF WASHINGTON,

Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION, et al.,

Respondents.

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# BRIEF OF RESPONDENTS

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## I. INTRODUCTION

This case is brought by a class of 100,000 present and former employees of the State of Washington and its political subdivisions (collectively, "the State"). These individuals are members of the Public Employees Retirement System Plan 1 (PERS 1) and the Teachers Retirement System Plan 1 (TRS 1).

The class challenges the Legislature's 2011 attempt to divest class members of valuable vested rights to pension cost-of-living adjustments (COLAs) that the Legislature provided in 1995 and earlier. The Legislature eliminated vested COLA rights in violation of long-settled constitutional principles articulated in *Bakenhus v. City of Seattle*, 48 Wn.2d 695, 296 P.2d 536 (1956).

In *Bakenhus*, this Court held that a pension is deferred compensation, the right to which vests immediately upon job commencement. Under *Bakenhus*, a pension benefit in effect while an employee is working becomes a part of the employee's pension entitlement. The Legislature cannot reduce, much less repeal, a retirement benefit after an employee has provided service unless it provides an offsetting comparable replacement benefit. There is no such offsetting benefit here.

The State claims that it effectively circumvented *Bakenhus* by inserting a "reservation of rights" into the 1995 statute. The reservation purports to allow the State to rescind the very cost-of-living adjustments it promised employees in that statute and in prior statutes.

The ineffectiveness of such reservation language was explained in *Navlet v. Port of Seattle*, 164 Wn.2d 818, 194 P.3d 221 (2008). In *Navlet*, this Court applied settled *Bakenhus* principles to strike down, on constitutional grounds, the Port of Seattle's elimination of promised medical benefit payments to certain employees. This Court did so despite the Port's clear and express reservation of the right to rescind benefits. This Court reasoned that medical benefits are equivalent to pension benefits, and that a reservation of the right to rescind pension benefits is constitutionally impermissible under *Bakenhus*.

Even were it theoretically constitutional, the reservation here at issue is inconsistent and ambiguous, thus unenforceable. The reservation language can reasonably be construed to preserve cost-of-living adjustments for substantial parts of the class. Moreover, the State provided class members with its interpretation of the 1995 enactment. The State's materials indicated that the 1995 cost-of-living adjustment was permanent and continuing. The materials made no mention of any reservation of rights.

The State has impaired the obligation of its own prior financial commitment to active and retired State employees. It has done so for the sole purpose of reducing its financial obligations. This sort of self-interested take-back, which is closely scrutinized by the courts, almost never passes constitutional muster.

For 60 years, this Court has consistently protected those relying on public pension benefits from retroactive impairments. Well before Congress adopted the Employee Retirement Income Security Act ("ERISA"), this Court recognized both the critical importance of pension rights and the need to specifically protect those rights and attendant retiree expectations. *Crabtree v. State*, 101 Wn.2d 552, 556, 681 P.2d 245 (1984) ("[D]ecades before the federal government [enacted ERISA], our courts recognized the importance of pension benefits and applied our own safeguards.").

This Court should reject, as the trial court did, the State's invitation to now undo the very protections and expectations it helped to create. *See Washington Ass'n of County Officials v. Washington Pub. Employees' Ret. Sys. Bd.*, 89 Wn.2d 729, 733, 575 P.2d 230 (1978) (to exclude certain payments from the base against which a pension is determined "would violate expectations and be contrary to the position of this court first expressed in *Bakenhus* … .").

## II. FACTUAL BACKGROUND

In 1977, the Legislature sought to save money by reducing pension payments. It knew, however, that it could not constitutionally do so at the expense of ***then-current*** State employees or retirees. Accordingly, it set up a separate plan for new hires, preserving the benefits that had been granted to existing employees and retirees.

> The Legislature was careful … to provide that [this benefit reduction] would only apply to … employees hired after the statute's effective date of October 1, 1977. By so doing, it complied with the rule against impairing state employees' pension rights first announced by this Court in *Bakenhus v. Seattle*, 48 Wn.2d 695 … (1956). In effect, the Legislature set up two retirement plans now known as [Public Employees Retirement System ("PERS") 1 and 2].

*Washington Fed'n of State Employees, AFL-CIO, Council 28 v. State*, 98 Wn.2d 677, 680-81, 658 P.2d 634 (1983).

The respondent class in this case consists of most of the participants in PERS 1 and TRS 1. Those plans will collectively be referred to as "Plan 1." Employee/retiree members will be referred to as "Plan 1 Participants." Plan 1 Participants must have commenced work for the State prior to October 1, 1977, when Plan 1 closed. *Retired Pub. Employees Council of Washington v. Charles*, 148 Wn.2d 602, 608-09, 62 P.3d 470 (2003).

Beginning in the early 1970s, the Legislature approved a series of COLAs that benefited Plan 1 Participants. COLAs were enacted in 1973,

1981, 1989, and 1993. CP 561-98. Contrary to the State's suggestion, and as this Court previously noted, benefits under the 1973 COLA were actually paid until 1980. *Retired Pub. Employees Council of Washington v. State*, 104 Wn. App. 147, 149, 16 P.3d 65 (2001). Plan 1 Participants were both intended and actual beneficiaries of COLA payments made under the 1973 enactment.

The State incorrectly asserts that the 1973 COLA was "discretionary." Petitioners' Brief ("Br."), p. 35. It is more aptly characterized as "conditional" in that COLA payments were ***required*** as long as the PERS 1 administrator determined, in its discretion, that the growth of system assets was sufficient to fund the COLA. *Retired Pub. Employees Council*, 104 Wn. App. at 148-49.

The existence of numerous and not altogether consistent COLAs created administrative difficulties and befuddled beneficiaries. In 1995, for the stated purposes of: (a) "simplify[ing] the calculation of post-retirement adjustments, so that they can be more easily communicated to Plan 1 … members …"; (b) "simplify[ing] administration" (CP 160); and (c) eliminating "confusion" (CP 186), the Legislature repealed the then-existing COLAs (including the 1973 COLA under which significant benefits had been paid, and which held the potential for additional

increases) and "replace[d]" them with a uniform COLA, or "UCOLA." CP 145, 150.

Under the UCOLA, retired Plan 1 Participants received cost-of-living increases in every year from 1995 through 2010. Those UCOLA payments were not lavish. When the UCOLA was repealed in 2011, the maximum monthly adjustment was $58.20.[1]

The 1995 UCOLA cost-of-living increases were "comparable" to the benefits forgone under the previous COLAs. As the 1995 Senate Bill Report put it, UCOLA benefits were a "trade-off [which] is worth it." CP 186. That sort of "trade-off" is what the law requires. *See Bakenhus,* 48 Wn.2d at 701-02 (any reduction in pension benefits must be offset by comparable new benefits).

The Legislature did more in 1995 than simplify the calculation and administration of post-retirement adjustments. It inserted a provision into the 1995 pension statute giving itself the "right" to repeal the UCOLA it had established as a "replacement" for pre-1995 COLAs that, with one exception – the minimum retirement allowance (CP 576) – were not

[1] The initial UCOLA in 1995 was $.59 per year of service. As the State calculates, the maximum cost-of-living adjustment in 1995 for an employee with 30 years of service was $17.70 per month ($.59 x 30). Br. at 8, n.10. CP 606. It is the $.59 that increased 3% per annum to $1.94 in 2011, when the maximum monthly amount was $58.20 ($1.94 x 30). The $58.20 maximum includes gain-sharing adjustments. As the State also notes, the increase is not 3% of the total prior year's pension payment. *Id.*

subject to any purported reservations. That provision (the "Reservation Clause") reads:

> The Legislature reserves the right to amend or repeal this section in the future and no member or beneficiary has a contractual right to receive this post-retirement adjustment not granted prior to that time.

RCW 41.32.489(6); RCW 41.40.197(5).

Despite this Clause, within months of enacting the statute the State notified Plan 1 Participants that the UCOLA adjustments would continue "throughout [your] life." CP 1200. The July 1995 DRS bulletin, presumptively reflecting the State's interpretation of the 1995 enactment, was circulated to Plan 1 Participants when the UCOLA was enacted. It contained no reference to a reserved right of repeal. Instead, it indicated permanence:

> Beginning July 1, 1995, retirees of … Plan 1 will have a new annual, automatic cost of living adjustment … . ***In each following year, the COLA amount will increase by 3 percent, rounded to the nearest cent***… . [The typical Plan 1 retiree] ***will continue*** to receive the annual COLA increase ***throughout his life*** … .

CP 1200 (emphasis added).

PERS Plan 1 members also received a "PERS Plan 1 Member Handbook" (June 2005) that similarly described the UCOLA:

> Once you have qualified for the uniform COLA, ***you will receive*** your first benefit adjustment in July following your 66th birthday. ***Your benefit will be adjusted each July***

> ***thereafter*** … . The COLA can be as much as 3 percent per year … .

Supp. CP 1187; 1197 (emphasis added). Virtually the same language was found in the TRS Member Handbook distributed to TRS Plan 1 members (October 2008). Supp. CP 1189. There is no evidence that any Handbook from 1995 forward notified Plan 1 Participants about the Reservation Clause.[2]

In 2011, after making UCOLA payments under the 1995 enactment for 15 years, the Legislature enacted SHB 2021, later codified as RCW 41.32.489(1) and RCW 41.40.197(1). SHB 2021 repealed the 1995 UCOLA for all Plan 1 Participants, active and retired. The State itself estimates that "[t]his bill could affect 108,703 members of … Plan 1 through discontinued future benefits … ." Most of the affected Participants – 90,179 at the State's last count – are retired. CP 126. Twelve to 15% of Plan 1 members were still working when the UCOLA was repealed. *Id*.

Although the 2011 enactment provides a small increase in benefits to those Plan 1 Participants receiving "alternative minimum benefits"

[2] The State's descriptions of the permanence of UCOLA benefits bear directly on the proper interpretation of the 1995 enactment. While those descriptions also bear on Respondents' estoppel argument, estoppel was not before the trial court and is not an issue in this appeal.

("Alternative Benefits"), the class definition excludes those individuals. CP 454-59.

Additionally, there is no evidence that any class member will ever qualify for Alternative Benefits. CP 1087-88. The State estimates that its cost for the increase in Alternative Benefits will be "very small because members must be retired at least 20 years before they are eligible for this particular minimum." CP 133.

Finally, the modest increase in Alternative Benefits affects only about 1,000 of the nearly 99,000 affected Plan 1 Participants. CP 126. Thus, around 99% of the Plan 1 Participants do not receive Alternative Benefits or anything corresponding in value to replace the UCOLA benefits the Legislature took back. *Id.*

The State estimates that by eliminating the UCOLA, it will save about $7.6 billion over 25 years, and $870 million in the 2011-13 biennium alone. Those savings will be reflected in lower employer contributions to Plan 1, a defined benefit plan funded by a combination of employer and employee contributions. Br. at 16; CP 126-27.

In repealing the UCOLA, the State is doing more than merely "call[ing] upon public employees to share in the sacrifices required of the state citizens to preserve crucial services." Br. at 2. The State is placing an unfair and disproportionate burden on a small group of largely retired

persons. It is doing so by eliminating a benefit for which those largely retired individuals have clearly "paid" in the form of employment services rendered. "[S]acrifices required of the state citizens" should be shared by all citizens through use of general revenue mechanisms.

## III. PROCEEDINGS BELOW

Three suits challenging the constitutionality of the UCOLA repeal were commenced in Thurston County Superior Court. These suits were consolidated. CP 1144-46, 1172. Plaintiffs in the consolidated action are several individual Plan 1 members, two large public employee unions, and an association of retired public employees.

A class, certified on June 4, 2012, consists of:

> All individuals who are active, retired, or terminated members of PERS 1 and TRS 1 who, as of July 1, 2011: (a) have not yet reached age 66 or who have not yet retired or (b) are retired and are receiving the Uniform COLA or (c) would have been eligible to receive Uniform COLA payments in 2011 but who have not received Uniform COLA payments and/or will not receive such payments in the future under the terms of SHB 2021; but excluding individuals receiving the basic or alternative minimum benefit.

Order Granting Plaintiffs' Motion for Class Certification (CP 454-59).

On April 19, 2012, the class moved for summary judgment (CP 239-63) on only two issues:

> (a) Does the challenged 2011 enactment provide a "comparable benefit," as required by *Bakenhus* and its progeny, to replace the cost of living increases it

extinguished?

(b) Does the reservation-of-rights clause in the 1995 enactment allow the Legislature to eliminate pension rights that were otherwise vested under *Bakenhus* and its progeny?

On November 9, 2012, the trial court, Hon. Chris Wickham, answered "no" to both questions. He held that "[the State] did not offer a benefit in exchange for terminating the UCOLA" (CP 999), and that "the State is prohibited from reserving the right to unilaterally terminate the UCOLA" (CP 1001). The trial court thus invalidated the 1995 statutory reservation of rights and the 2011 UCOLA repealer. CP 998-1002.[3]

On February 19, 2013, the trial court entered an Order which, among other things, granted summary judgment to plaintiffs on the two issues stated above and struck down the repeal of the UCOLA as an unconstitutional impairment of the class members' vested pension rights. CP 1003-15. The court later certified that portion of the Order under CR 54(b). CP 1124-27. The State appealed.

## IV. ISSUES ON APPEAL

The issues on appeal are identical to the issues presented to the Superior Court. *See* above, p. 11.

[3] The trial court also excluded from the plaintiff class those Plan 1 Participants who rendered no service after the effective date of the 1995 UCOLA. CP 454-59. The exclusion of pre-1995 retirees from the class is not before the Court in connection with this interlocutory appeal.

Nevertheless, the State extensively argues an issue that is not presently before the Court. It claims that the 2011 repealer was motivated by an economic emergency, thereby suggesting that it satisfied two of the requirements established in *Bakenhus* for any impairment of a vested pension benefit. *Bakenhus*, however, requires more. Not only must any impairment be warranted by compelling need, but additionally, benefits taken away must be replaced by benefits of comparable value. *Bakenhus*, 48 Wn.2d at 702.

For purposes of summary judgment and this appeal only, Respondents have conceded that the State satisfies the "emergency" requirement of the *Bakenhus* analysis.[4]

## V. STANDARD OF REVIEW

Review of the summary judgment in favor of Respondents is *de novo*. There are no disputed facts, so no inferences need be made in favor of the party opposing summary judgment.

The court does not defer to the Legislature in determining whether a statute that diminishes or repeals pension benefits meets the exacting

[4] If the trial court's summary judgment is reversed and remanded, Respondents will demonstrate that: (a) the fiscal crisis relied upon by the State in eliminating the UCOLA is resolving; and (b) Washington's pension system is nearly fully funded, making it one of the three or four more stable state systems in the country. Those issues, however, are not before this Court.

*Bakenhus* requirements. The Court independently makes such determinations. *See Carlstrom v. State*, 103 Wn.2d 391, 396, 694 P.2d 1 (1985).

The "strong presumption" in favor of the constitutionality of a statute, and the corresponding burden to prove the existence of a contract, presuppose disputes over something other than pension benefits. In almost every challenge to legislation that adversely affected employee pension benefits, burdens and presumptions were overcome with little or no discussion. The stringency of a test is not determined by how it is articulated, but by how it is applied.

## VI. ARGUMENT

### A. Contracts Clause Analysis for Pension Benefits Is Well Established in this State.

Article I, Section 23 of Washington's Constitution provides, "No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." If the State impairs a contract between private parties, the court is deferential to the Legislature. Deference is not appropriate, however, in cases such as this one because the State has altered the terms of its own financial obligation. *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 25-26, 97 S. Ct. 1505 (1977), quoted and applied in *Caritas Services v. DSHS*, 123 Wn.2d 391, 402-05, 869 P.2d 28 (1994).

When the State is retroactively changing the terms of its own contract in an area not involving pensions, the only relevant questions are: (1) Was there a contract?; (2) If so, was the contract substantially impaired?; and (3) If so, was the impairment reasonable and necessary to serve an important public purpose? *Caritas*, 123 Wn.2d at 403. An impairment was not "necessary" if there was an alternative way to achieve the State's objective without contract impairment. *Id.*

However, when pension rights are retroactively changed, Washington imposes a more stringent test. "[I]f the challenged legislation can properly be characterized as pension legislation, the principles of *Bakenhus* … will govern its constitutionality." *Washington Fed'n of State Employees*, 98 Wn.2d at 683. Under *Bakenhus*, a reduction in pension benefits is permitted only if the State can prove that: (1) the modifications were necessary to maintain the flexibility of the pension system; ***and*** (2) the modifications were necessary to preserve the integrity of the pension system; ***and*** (3) any disadvantageous changes were offset by comparable new advantages. *Id.*, 48 Wn.2d at 702.

It is not enough that a reduction in benefits strengthens the pension system. Were it otherwise, the first two *Bakenhus* elements would be the sole test. *Bakenhus*, however, requires both a showing of (1) "compelling" need (*Eagan v. Spellman*, 90 Wn.2d 248, 257, 581 P.2d

1038 (1978) (summarizing the first two *Bakenhus* tests); ***and*** (2) comparable new advantages to the pensioners on whose backs the system has been strengthened. A comparable new advantage to each burdened class member is completely missing from the 2011 repealer.[5]

## B. But for the Reservation Clause in the 1995 UCOLA Statute, This Case Would be Easily Resolved in Favor of the Respondents Under Settled *Bakenhus* Principles.

### 1. Statutes Conferring Pension Benefits Create Rights to Deferred Compensation Which Vest Immediately and Continuously.

Under *Bakenhus* and its progeny, pensions constitute deferred compensation, the right to which vests at the time the employee commences work and re-vests each day of employment thereafter.

> A pension … is not a mere gratuity … nor simply a promissory commitment … . Rather, it is a form of deferred compensation for services rendered … . [R]ights … to it commence to vest with the first day of employment … and continue to vest with each day's service thereafter [and] become a property right [that] may not be divested except for reasons of the most compelling force.

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[5] The State never directly questions *Bakenhus* or requests that it be overruled. It does, however, take a passing shot at the case, arguing that it was based on a constitutional provision "that was amended the year after the opinion was issued." Br. at 29. The amendment was to Article II, Section 25 of Washington's Constitution. It provides that increases in public employee pensions after such pensions have been granted are not prohibited. Courts have followed *Bakenhus*, reaffirming its underlying rationale and holding, despite the amendment. Most cases applying *Bakenhus* principles make no reference to the anti-gratuity provisions of the State Constitution, which were not outcome-determinative in *Bakenhus*. *See, e.g., Dailey v. Seattle,* 54 Wn.2d 733, 737-39, 344 P.2d 718 (1959); *Eagan,* 90 Wn.2d at 252; *Tembruell v. City of Seattle,* 64 Wn.2d at 506; *Noah v. State,* 112 Wn.2d 841, 774 P.2d 516 (1989); *Navlet,* 164 Wn.2d at 834-36.

*Tembruell v. City of Seattle*, 64 Wn.2d 503, 506, 392 P.2d 453 (1964), citing *Bakenhus*.

The rationale for this was explained in *Navlet*:

> The employee forgoes present wage value in exchange for a future benefit that will accrue after the employee has given up … her potential to seek a better job or … wages. … ***[A]n employee has a vested right in the pension*** of the retirement system in effect when he becomes a qualified employee, or ***which becomes effective during his employment, and that system cannot be altered to his detriment without a corresponding benefit to him.***"

*Navlet*, 164 Wn.2d at 837-38 (emphasis added). *Accord*, *Leonard v. City of Seattle*, 81 Wn.2d 479, 487, 503 P.2d 741 (1972) ("Because the rights to a public pension accrue with the performance of the public work … , ***they are to be determined as of the latest enactments applicable to the recipient in effect prior to actual retirement***.") (emphasis added).[6]

Pension rights warrant protection under the Washington Contracts Clause, which was designed to prevent: (1) the retroactive alteration of rights; and (2) upsetting general expectations. *Caritas*, 123 Wn.2d at 407. In *Bakenhus*, this Court acknowledged that contract analysis is "not

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[6] *See also Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 65, 847 P.2d 440 (1993); *Crabtree v. Dep't of Ret. Sys.*, 101 Wn.2d 552, 556, 681 P.2d 245 (1984); *Washington Fed'n of State Employees, AFL-CIO, Council 28 v. State*, 98 Wn.2d 677, 686, 608 P.2d 634 (1983); *Eagan v. Spellman*, 90 Wn.2d 248, 258, 581 P.2d 1038 (1978); *Washington Ass'n of County Officials v. Washington Pub. Employees' Ret. Sys. Bd*., 89 Wn.2d 729, 733, 575 P.2d 230 (1978); *Tembruell v. City of Seattle*, 64 Wn.2d 503, 506, 392 P.2d 453 (1964).

flawless in a purely legalistic sense," but that pension rights are sufficiently contract-based to trigger the protection of Article I, Section 23 of Washington's Constitution. *Bakenhus*, 48 Wn.2d at 701-02.[7]

All class members have a vested right to the UCOLA. Many class members worked under both the pre-1995 COLAs and continued to work under the 1995 UCOLA, which "replaced" these prior COLAs. Whether or not the class members worked under the 1995 COLA, their rights to a COLA vested under the pre-1995 COLAs to which no reservation language was attached. With the enactment of the "replacement" UCOLA in 1995, rights to benefit increases revested. Rights, once vested, cannot be divested by legislative fiat unless *Bakenhus'* strict requirements are met.[8]

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[7] The State cites *Charles*, 148 Wn.2d at 623-24, for the proposition that Plan 1 Participants have no vested contractual right to UCOLA benefits. Br. at 3. Yet in *Charles*, this Court recognized that, under *Bakenhus*, "pension provisions are part of the compensation for services and therefore become part of the employment contract." *Id.* at 624.

[8] Vesting occurs at the instant of employment and when, during the term of employment, new pension benefits are conferred. Vesting precedes and does not control the ultimate determination of whether a pension has been earned at retirement by satisfaction of time-in-service and other conditions precedent to payment of pension benefits. *See Navlet*, 164 Wn.2d at 828, n.5; *Dorward v. ILWU-PMA Pension Plan*, 75 Wn.2d 478, 483, 452 P.2d 258 (1969).

### 2. *Bakenhus* Protects Employee Expectations; Neither the State's Intent nor the Language of the Statute is Controlling.

Pension statutes do not form a "complete contract" in the strict sense, and not all of the usual rules of contract interpretation apply. *Noah v. State*, 112 Wn.2d 841, 844-46, 774 P.2d 516 (1989). Pension statutes have been characterized as (a) "contractual in nature" *(Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 65, 847 P.2d 440 (1993)); and (b) "part of the contemplated compensation … and so in a sense part of the contract of employment itself" (*Navlet*, 164 Wn.2d at 850 (Madsen, J., dissenting)). The language of pension statutes, however, does not provide the touchstone for determining the rights of pensioners. Those rights are, instead, in substantial part a function of general employee expectations (sometimes as supplemented by longstanding administrative practice). *Washington Fed'n of State Employees*, 98 Wn.2d at 687-88.

The employees' expectation of deferred compensation in the form of pension benefits induced continued employee service. The employer cannot accept the service induced by such a promise, while reserving the right to withhold any part of the compensation earned. *Navlet*, 164 Wn.2d at 848-49. Such a result, in a somewhat different context, has been characterized as "an absurdity." *Caritas*, 123 Wn.2d at 407 (quoting *U.S. Trust*, 431 U.S. at 25, n.23).

Pension rights are also predicated on considerations of fundamental fairness. *Bakenhus*, 48 Wn.2d at 699-700 (employees who were hired under a particular pension plan should not, "in reason and fairness, be deprived of its benefits."). *See generally Bowles*, 121 Wn.2d at 67-68, and *Washington Ass'n of County Officials v. Washington Pub. Employees' Ret. Sys. Bd.*, 89 Wn.2d at 733.

Thus, the State's contention that this Court should consider only the language of the 1995 statute enacting the UCOLA, and on the State's intent, is unavailing.

> The obligation [to provide a retirement benefit] arises ***independent of any required showing of the employer's express intent*** to provide retirement benefits … .

*Navlet*, 164 Wn.2d at 834-35 (emphasis added). It is the "[c]ompensatory nature of the employment relationship" and employees' expectations, rather than the "express language of the contract," that determine whether and to what extent benefits vest. *Id*.

For those reasons, the State's focus on *Robertson v. Kulongoski*, 466 F.3d 1114, 1117 (9th Cir. 2006) is misplaced. *Robertson* was decided under an Oregon pension scheme that based pension benefits solely on

statutory language and legislative intent, declining to look any further for sources of vesting.[9]

### 3. The 2011 UCOLA Repeal Substantially Impairs Vested Rights of the Class.

The State correctly posits that a statute "impairs a contract" if it "alters [contractual] terms, imposes new conditions or lessens its value." Br. at 37, citing *Charles,* 148 Wn.2d at 625. The State acknowledges that "value" has been stripped from the pensions of class members. The State itself explains that due to elimination of the UCOLA, about 100,000 pensioners will lose $870 million in pension benefits between 2011-13, and will lose $7.6 billion over 25 years. CP 130. The numerous cases in which this Court has applied *Bakenhus* to strike down pension cutbacks have all involved far smaller impairments.

The State suggests that an impairment is only "substantial" if "the complaining party relied on the supplanted part of the contract" (Br. at 37). However, the authority it cites, *Margola Assoc. v. City of Seattle*, 121 Wn.2d 625, 653, 854 P.2d 23 (1993), is a case which had nothing to do

[9] The State argues that the clear language of the statute must be honored, even if the statute involves pension impairment. Br. at 24. It cites *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 173 P.3d 885 (2007). In *Densley*, however, the question was whether the statute allowed a National Guard member who later earned a state pension to count time spent in National Guard training toward retirement service credits. *Densley* did not involve any constitutional issue, or any effort by the State to retroactively reduce pension benefits.

with pension benefits. It involved a challenge by apartment building owners to a city ordinance that required them to register and pay a registration fee. *Margola* concerned a subject matter that, unlike a vested pension, is not presumptively protected. Moreover, in *Margola*, this Court did not hold, as the State suggests, that a substantial impairment exists only if the contracting party relied on the supplanted part of the contract. This Court held that reliance was ***sufficient,*** not that it was necessary. *Id.* at 653. In *Caritas*, as well, this Court noted that substantial impairment "may" be shown by reliance, not that reliance was necessary. 123 Wn.2d at 405.

Indeed, this Court has expressly held that specific reliance is not necessary. In *Bowles*, 121 Wn.2d at 67-68, the State argued that "[t]he record contains evidence that the plaintiffs had ***no*** contractual expectation in having the [relevant] practices followed … ." This Court, however, held that *Bakenhus* and its progeny do not turn on whether individual employees had specific expectations in certain practices. *Id.*

> Rather, the cases established flat rules prohibiting the State from altering pension rights in the manner that is disadvantageous to the PERS 1 employees. ***These rules apply whether or not many of the employees knew the specifics of their pension rights or had any specific expectations in them.***

*Id.* (emphasis added).

More recently, in *Navlet*, this Court reached a similar conclusion, holding that the obligation to pay relevant vested benefits arises "even though the pensioner does not know the precise terms of the pension agreement." 164 Wn.2d at 836.

Ultimately, the State argues that reliance on the 1995 UCOLA was unreasonable because the enacting statute expressly reserved the right of repeal. Yet *Bowles* and *Navlet* establish that employees are neither expected nor required to read each provision of the statute. This is particularly true here, where: (1) the State indicated to employees that the UCOLA adjustments would be made annually for life; (2) the UCOLA benefits had been continuously paid and the Reservation Clause lay unused for 15 years; and (3) the language of the so-called reservation is neither a paragon of clarity nor consistent with the Contracts Clause. *See* Section IV below.

The State argues that elimination of the UCOLA is permitted because no plan member's basic pension is reduced. Br. at 28. However, the UCOLA is a pension right and is not distinct from the basic pension entitlement. The effect of SHB 2021 is to reduce the overall economic value of the pension and the size of each monthly pension payment. Class members will either: (1) receive no UCOLA at all because they were either not age 66 or still working in 2011, when SHB 2021 was passed; or

(2) receive no future adjustments to the COLA which would have been paid but for SHB 2021.

The State's position is particularly unfair to class members who in 2011 were either still working, or were retirees who had not reached age 66. They have never received a UCOLA adjustment. If the State prevails, they never will, despite their decades of contributions to the system (having started work no later than October 1977). Their numbers are not small. In 2011, approximately 18,000 Plan 1 Participants were still working, and 24,000 retired Participants were not yet age 66. CP 126. Thus, nearly 40 percent of Plan 1 Participants have never received a UCOLA adjustment.

Contrary to the State's suggestion, this Court's decisions regarding pension cutbacks do not turn on the means by which the cutback occurred, or on what part or type of benefit was withdrawn. *E.g.*, *Eagan*, 90 Wn.2d at 253 (reduction of minimum retirement age which indirectly caused reduction in pension benefits was unconstitutional); *Washington Fed'n of State Employees*, 98 Wn.2d at 687 (reduction in the accrued vacation pay available on retirement indirectly but unconstitutionally reduced retirement benefits).

In both cases, this Court held that the means (in whatever form, and whether direct or indirect) by which the government chooses to reduce

pension benefits is irrelevant. What counts is the result. In our case, the "means" is a Reservation Clause. The result, quantified by the State, is $7.6 billion in lost benefits over 25 years. CP 138.

#### 4. The Members of the Class Harmed by the UCOLA's Repeal Did Not Receive Comparable Benefits in Return.

The law is clear:

> [M]odifications reducing pension levels must be counterbalanced with [corresponding] increases in pension levels:
>
> > Although pension rights may be modified prior to retirement, such modifications must be for the sole purpose of "keeping the pension system flexible and maintaining its integrity." ***Even where permitted, the modifications must be reasonable and a disadvantageous modification must be … accompanied by a corresponding benefit. If there is no counterbalance, the disadvantageous modification will be declared unreasonable.***
>
> (Citations omitted.) *State Employees*, 98 Wn.2d at 683-84 (quoting *Bakenhus*, 48 Wn.2d at 701). Violation of these rights by the State amounts to an unconstitutional impairment of contracts. *State Employees*; Const. art. I, § 23.

*Bowles*, 121 Wn.2d at 65 (emphasis added).

The trial court here plainly and correctly held, "[The State] did not offer a benefit in exchange for terminating the UCOLA." CP 996. As a result, the termination of the UCOLA unconstitutionally impaired the contracts of class members. The State-estimated $7.6 billion in cutbacks

over 25 years is not offset by anything in the challenged legislation. The State acknowledges that the Legislature enacted SHB 2021 solely for the purpose of saving money to be spent on non-pension matters. Br. at 1-2, 12-13, 16-17.

The State incorrectly argues that the 2011 increase in Alternative Benefits offsets the elimination of the UCOLA. Br. at 43-44. However, the relatively few retirees already receiving Alternative Benefits – fewer than 1% of affected Plan 1 Participants (CP 126) – are excluded from the class. CP 454-59. Additionally, there is no evidence that any class member will ever qualify for Alternative Benefit payments, which do not become effective until a person has received pension payments for at least 20 years. CP 133.

In any event, the "corresponding benefits" must be provided to each person whose vested rights were impaired. Offsetting compensation must be individualized. *Bakenhus,* 48 Wn.2d at 702 ("other benefits were added" in the challenged statute, "but they are not benefits to which the respondent has become entitled …"); *Eagan,* 90 Wn.2d at 257-58 ("any change must be equitable to the [disadvantaged] employee …. there are no comparable new advantages to plaintiff. …); *Dailey v. City of Seattle,* 54 Wn.2d 733, 739, 742 (1959) ("corresponding benefit" must be to the employee whose pension rights were impaired; irrelevant that statute

reducing complainant's benefits raises benefits for others). Providing slightly higher Alternative Benefits to less than 1% of pensioners does not provide the individualized compensation required by the Constitution.

The two cases cited by the State do not advance its argument. Br. at 44-45. Indeed, *Vallet v. City of Seattle*, 77 Wn.2d 12, 459 P.2d 407 (1969), illustrates the proper application of the *Bakenhus* "comparable benefits" rule. The statute in effect when the employee retired entitled him to one-half his last year's salary, but no escalation in benefits. After he retired, a new ordinance slightly reduced his base pension but provided for annual escalation. The employee claimed he was entitled to both the higher base pay he originally received and the escalation provided by the new ordinance. This Court disagreed, holding that the employee was entitled only to benefits under the new plan, which were "comparable" to the old plan's benefits. Application of the amended scheme resulted in a net benefit to the employee of $2 per month. 77 Wn.2d at 19, 22. Thus, unlike our situation, the new scheme offered a comparable replacement benefit.

*McAllister v. Bellevue Firemen's Pension Bd.*, 166 Wn.2d 623, 628-30, 210 P.3d 1002 (2009), did not involve a constitutional challenge to a new pension enactment. The issue was whether retired Bellevue firemen were entitled by statute to benefits under the 1955 act that

governed when they were hired, even though that act was superseded by a 1970 act providing comparable but somewhat different benefits. The Court's analysis was essentially the same as in *Vallet*. It was not lost on this Court that the *McAllister* plaintiffs had been overpaid a total of $500,000 between their retirement and the commencement of litigation. The pension board did not seek reimbursement. It sought only to correct the error prospectively. It was in that context that the Court noted, "In the final analysis, the City is correct that the McAllisters may be trying to 'cherry pick' the best of [both acts]." 166 Wn.2d at 630. There is no similar "cherry picking" in our case.

The State takes another stab at showing that Respondents will receive "comparable new benefits" in exchange for elimination of the UCOLA, arguing that Respondents are benefited by the increased financial viability of the pension system. However, the State's analysis improperly conflates the *Bakenhus* tests when it argues that improving fiscal stability and integrity (two parts of the *Bakenhus* test) constitutes compensation to class members for their loss (another distinct part of the *Bakenhus* test). If the State is correct, the latter test will always be satisfied if the former test is met, rendering the "corresponding benefit"

*Bakenhus* test superfluous.[10]

## C. The Reservation Clause in the 1995 UCOLA Legislation Does Not Allow for Retroactive Repeal of Benefits.

### 1. Overview

Because *Bakenhus* is otherwise controlling, the central issue in this case is whether this Court should give effect to the Reservation Clause that purports to permit the State's termination of class members' vested pension rights. However, the Reservation Clause does not authorize repeal of the UCOLA.

That conclusion necessarily follows from this Court's recent decision in *Navlet*, which applied the holding in *Leonard v. City of Seattle*, 81 Wn.2d 479, 503 P.2d 741(1972), and relied on the reasoning of *Jacoby v. Grays Harbor Chair and Mfg.*, 77 Wn.2d 911, 468 P.2d 666 (1970). Those cases make it crystal clear that once employee benefits have been

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[10] In an effort to avoid the strictures of *Bakenhus*, the State argues for adoption of the ostensibly more forgiving three-part constitutional test (above at 14) used when the State impairs its own non-pension contracts. Br. at 22. *U.S. Trust*, 431 U.S. at 29. That test renders a state's impairment of its own financial obligation unconstitutional unless, among other things, the state has no alternate way of achieving its objective short of contract impairment. *U.S. Trust*, 431 U.S. at 29. Where, as here, the State's only goal is to save money, the test cannot be met. The State can ***always*** save money by other means, and can always raise money by taxation. *See id.* at 28-31. Thus, if applicable, this less restrictive alternative test would be just as fatal to the 2011 repeal as is *Bakenhus*.

We are aware of no Washington Supreme Court case in the last 60 years that applied the least restrictive alternative test to the State's impairment of its own contract and found it constitutional. *See Pierce County v. State of Washington*, 159 Wn.2d 16, 29, 148 P.3d 1002 (2006) (initiative that jeopardized the security of government bonds was unconstitutional; "government entities have rarely been able to justify impairing contractual obligations entered into in financial markets").

created, they cannot be revoked by invoking a putative right under a clause set forth in the statute that provided the benefit. The State cannot escape constitutional strictures by legislative fiat. That is particularly true when highly protected rights to deferred compensation such as pensions are involved.

The question is not whether there is a reservation clause in a statute that obligates the State to provide pension benefits to employees. The question is whether the State has any power to limit vested pension rights, once granted, to deferred compensation after it has received the employees' services. Under *Bakenhus* and its progeny, discussed above, the answer is clearly "no," unless the *Bakenhus* test is met. *Navlet*, along with *Caritas* and *Carlstrom*, discussed in the next subsections, make this even more clear.

The Reservation Clause relied on by the State is fatally defective for another reason. Any ambiguity in a reservation clause will be construed against the state actor that is trying to divest its employees of previously vested financial consideration. There is ambiguity aplenty in the 1995 Reservation Clause. Moreover, the materials provided by the State to describe the 1995 enactment suggest that the new UCOLA benefits are permanent, and neglect to mention the possibility of repeal.

### 2. The State Cannot Constitutionally Reserve the Right to Impair its Own Pension Plans.

This Court has refused to give effect to statutory reservations purporting to allow elimination of a vested benefit where the State attempted to: (a) enforce a statute requiring forfeiture of a retiree's pension payments; (b) eliminate previously granted non-pension employee benefits; and (c) impair other of its own financial obligations.

#### *a. The pension forfeiture cases*

*Leonard v. City of Seattle*, 81 Wn.2d 479, 503 P.2d 741 (1972), was brought by a retired police officer who, after retirement, was convicted of a felony. The then-existing pension statute, RCW 41.20.110, required that pension payments cease upon felony conviction.

As the State does here, the City in *Leonard* argued that the statutory forfeiture provision was part of the contract that created the pension benefits. In both cases, the employer argued that an employee's statutorily created pension benefits are subject to the lawmaker's ability to take back the benefits, as long as the enabling statute so provides. This Court held, however, that once vested, pension benefits become the employee's property. Regardless of putative statutory take-back rights, pension benefits cannot be divested unless the *Bakenhus* test is satisfied. This Court held that the statute purporting to defeat the retiree's pension rights was unconstitutional. *Id.* at 488.

The same principle applies in this case. All class members had vested rights when the Legislature enacted SHB 2021 repealing the UCOLA in 2011. Furthermore, most class members, like the plaintiff in *Leonard*, long ago fully satisfied time-in-service and age conditions required for payment of pension benefits. Over 90,000 were already retired when SHB 2021 was enacted. CP 126. Thus, most class members, like the plaintiff in *Leonard*, have been receiving pension payments including the UCOLA for years prior to the State's termination of those benefits. *Leonard* is controlling.[11]

*Jacoby v. Grays Harbor Chair & Mfg. Co.*, 77 Wn.2d 911, 468 P.2d 666 (1970) was, as the State points out, a decision in favor of the employer. It does not, however, support the State's position. Br. at 31. In *Jacoby*, this Court held that a private sector employee who does not fulfill the plan's age and tenure requirement was not entitled to receive pension payments. This holding has nothing to do with our case, in which age and tenure requirements are not at issue.

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[11] The *Leonard* Court was also persuaded that removal of the plaintiff's pension benefits would "work a forfeiture of estate prohibited by Const. art. I, § 15, for conviction of a crime." *Id.* at 490. It only reached that conclusion, however, through a careful analysis of the *Bakenhus* line of cases, which caused it to determine that the plaintiff had vested rights in his pension benefits. Thus, the holding of *Leonard* should not be narrowly construed.

However, the private employer-funded plan at issue in *Jacoby* contained a reservation clause which provided that the "employer reserved the right to cease making payments under the plan at any time." 77 Wn.2d at 912. The following language, although *dicta*, was relied on in *Navlet* and is applicable here:

> ***[E]ven though the employer has reserved the right to amend or terminate the plan***, once an employee, who has accepted employment under such plan, has complied with all the conditions entitling him to participate in such plan, his rights become vested and ***the employer cannot divest the employee of his rights thereunder.***

*Id.* (emphasis added). Similarly, despite the Reservation Clause here at issue, the State cannot divest class members of their vested rights to cost-of-living adjustments.

### *b. The non-pension employee benefits cases*

In *Navlet*, 164 Wn.2d at 818, this Court declined to give effect to language purporting to allow the elimination of retirement benefits previously offered to employees. It did not matter that the employer clearly intended to reserve termination rights.

*Navlet* involved an employer's attempt to terminate – at the end of a three-year collective bargaining agreement ("CBA") – retiree health benefits. When the CBA expired, the Port stopped contributing to the welfare plan, and all coverage ceased. The issue was whether employees who retired or could have retired with medical benefits during the CBA's

term had a vested right to those benefits after the plan's expiration, notwithstanding the purported reservation.

This Court held that the reservation language was ineffective to divest what were, in the absence of such language, vested rights to employment benefits.

> The invalidity of reservation clauses is consistent with the compensatory nature of the retirement benefits. An employer cannot expect to accept the benefit of continued service from its employees while reserving the right not to compensate those employees once it has received the full benefit of their service.

*Navlet,* 164 Wn.2d at 848.[12]

The State fails to distinguish the *Navlet* reservation from the Reservation Clause at issue in this case. Br. at 30-31. The *Navlet* reservation was included in the Trust Agreement and Summary Plan Description (164 Wn.2d at 825-26, 847-48), which, like the statute in our case, created the retirement benefits. In *Navlet,* this Court refused to give effect to a reservation located only in source documents, and should do so here, as well.

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[12] The *Navlet* court also found this reservation language insufficient because the CBA did not specifically incorporate the terms of the Welfare Trust Agreement and the Summary Plan Description. The significance of this alternate holding is discussed below at pp. 39-40.

The State argues that the *Navlet* reservation might have been effective if the parties had negotiated CBA language limiting the duration of retiree medical benefits. Our case cannot be distinguished from *Navlet* on that basis. Like the employees in *Navlet*, Plan 1 Participants did not negotiate the terms of the Reservation Clause. Rather, the 1995 UCOLA – including the Reservation Clause – was unilaterally imposed by the Legislature as a replacement for existing COLAs. CP 898-99, 901-06.[13]

The State cites *Carlstrom v. State*, 103 Wn.2d 391, 694 P.2d 1 (1985), for the proposition that a clearly drafted reservation clause in state pension legislation is enforceable. Br. at 32. *Carlstrom*, however, is not a pension case. It involved impairment of a salary contract. Moreover, even in the context of non-deferred benefits, this Court declined to honor the State's reservation because that language was not sufficiently specific and clear.

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[13] The *Navlet* dissent agreed that *Bakenhus* and *Jacoby* protect pension rights and forbid the use of a reservation to reduce or eliminate ***pension*** benefits. *Navlet*, 164 Wn.2d at 867. *Navlet*, however, was about health benefits, not pensions. What the dissent objected to was ***extending,*** to health benefits, protection historically afforded to pension benefits. The dissent observed that unlike pensions, health benefits are unpredictable due to changes in medical practice and technology and increased costs of treatment independent of inflation. 164 Wn.2d at 855-56. Additionally, health plans are administratively more complicated than pension plans. *Id.* at n.3. Moreover, health benefits are payable immediately upon vesting and throughout the term of employment. They are not, therefore, purely deferred compensation. *Id.* at 851. Our case, of course, deals strictly with pension benefits.

Critically, this Court made it clear that had it been called upon to enforce an explicit reservation clause, it may very well have declined to do so. It quoted *Continental Illinois Nat'l Bank & Trust Co. v. Washington*, 696 F.2d 692, 699 (9th Cir. 1983):

> [T]o interpret [the relevant statute] as a broad reservation of power is not permissible when the statute is viewed in light of the contract clause. … [The statute] therefore cannot be applied as broadly and retrospectively as its literal language may suggest.

*Id.* This Court concluded:

> [H]ad the Legislature intended to impair contracts and had it acted on its presumed [reserved statutory] authority, the action would still be subject to the [*United States Trust Company*] reasonable and necessary test … .

*Carlstrom*, 103 Wn.2d at 399.

Similarly, in *Washington Fed'n of State Employees v. State*, 127 Wn.2d 544, 563, 901 P.2d 1028 (1995), this Court did not hold that an unambiguous reservation clause would be constitutional. It merely held that reservation language in a statute authorizing voluntary state employee payroll deductions was too ambiguous to allow a retroactive elimination of those deductions.

***c. The non-employee benefit case***

In *Caritas Services v. DSHS*, 123 Wn.2d 391, 869 P.2d 28 (1994), the State retroactively reduced the contractual base on which nursing homes were reimbursed under Medicaid. That base had been established

by provider agreements between the State and nursing homes. This Court rejected the State's argument that there was no impairment due to a reservation clause in the agreements. The language was insufficiently clear and specific. 123 Wn.2d at 406-07.

However, the so-called reservation clause would have been unconstitutional even had it been clear and explicit. This Court characterized a reservation clause as:

> … antithetical to the intent of the contract clause. A promise in a contract that gives one party the power "to deny or change the effect of the promise, is an absurdity." ("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.").

*Caritas,* 123 Wn.2d at 407-08 (citations omitted).

In *Caritas,* as in *Carlstrom,* this Court approvingly cited *Continental Illinois,* 696 F.2d 692 (9th Cir. 1983). There, the court struck down a Washington State initiative that retroactively reduced the ability of bondholders to collect what they were owed. The reservation in the statute enabling bond issuance was construed against the State because the State was altering the terms of its own financial agreement, just as it is attempting to do in our case. The Constitution trumps state efforts to reserve rights to retroactively impair its own contracts. *Id.* at 696.

* * * * *

Pension rights command ***greater*** protection than other employee benefits (*see Navlet*, 164 Wn.2d at 850 (Madsen, J., dissenting)) or general financial obligations of the State. If the State cannot effectively reserve the right to impair non-pension benefits, it *a fortiori* cannot reserve the right to impair pension benefits.

#### *d. The State's appeal to its own police power is unavailing.*

The State objects to what it calls "drastically" limiting the essential powers of the legislative body. Br. at 28. In the pension area, however, the Legislature's powers are particularly and uniquely curtailed. *Leonard,* 81 Wn.2d at 487; *Vallet,* 77 Wn.2d at 20-21; *Dailey*, 54 Wn.2d at 738.

> Under *Bakenhus* and its progeny the ***pension statutes*** are, at the least, contractual in nature – they ***are not subject to full legislative control***.

*Noah,* 112 Wn.2d at 844 (emphasis added).

Cases cited by the State merely stand for the unremarkable proposition that the Legislature has the authority, as an initial matter, to structure and confer pension benefits. *See Washington State Pub. Employees Bd. v. Cook*, 88 Wn.2d 200, 559 P.2d 991 (1977) and other cases cited at Br. at 25-26. We do not quarrel with that proposition. The issue here, however, is whether the Legislature, having granted pension benefits and induced work in reliance on them, can eliminate those

benefits if they later prove politically or fiscally inconvenient by the simple expedient of inserting a reservation clause.

No case cited by the State holds that pension benefits, once vested, can be taken away. To the contrary:

> [T]he State … argues that an exercise of police power is entitled to deference. However, ***the mere assertion of the police power as a basis for enacting [retrospective] legislation is not sufficient to shield it from scrutiny when constitutional considerations are at stake.*** … Since the state only relied on financial considerations to justify [the challenged enactment], its assertion of police power does not save the measure.

*Carlstrom*, 103 Wn.2d at 396-97 (emphasis added). *Accord, Caritas,* 123 Wn.2d at 405 ("police power" an insufficient justification, especially when government is impairing its own obligation).

Ultimately, the State seeks this Court's imprimatur on a method for eliminating any financial obligation it finds expedient to break. If effective, this approach will reduce State financial obligations to the status of nullities and stand the Contracts Clause on its head. Particularly since it

involves constitutionally protected vested pension rights, this case should not be the vehicle for that result.[14]

### 3. The Reservation Clause Cannot Be Enforced Because It Is Ambiguous.

#### *a. The summary benefits descriptions do not reflect the statutory reservation of rights.*

The State provided Plan 1 Participants with materials suggesting that the 1995 UCOLA was permanent and continuous. Those materials made no mention of a reservation of rights or the prospect of future repeal. Supp. CP 1178-79, 1200.

It was precisely this type of omission that led the court, in *Navlet*, to its alternate holding. In *Navlet*, the summary plan description contained a specific reservation of the employer's purported right to terminate medical benefits. However, the collective bargaining agreement did not. The Court held that the bargaining agreement did not incorporate the summary plan description. The reservation language in the summary material circulated to the plan participants was insufficient, even though it clearly reserved the right to extinguish the plan. *Navlet*, 164 Wn.2d at

[14] At minimum, the State's claims regarding the Reservation Clause sweep too broadly. In our case, the State relies upon that Clause to do more than repeal the 1995 UCOLA. The UCOLA was a replacement for prior COLAs, all but one of which contained no reservation. The State cannot exercise the 1995 Reservation Clause to undo pre-1995 COLAs – which would have remained in effect but for the 1995 enactment. Such a reduction in a pension benefit is the essence of unconstitutional retroactive contract impairment.

845, n.15.

The technical exactitude with which this Court read the relevant documents is even more appropriate in our case than in *Navlet*. In *Navlet*, the employees were warned of possible termination in a summary plan description that was actually circulated. In our case, the descriptions actually circulated to Plan 1 Participants failed to mention a possibility of termination. Instead, they suggested that the UCOLA benefit was permanent (for life). *See* pp. 7-8, above. The case for finding the reservation insufficient is stronger here than it was in *Navlet*.[15]

***b. The reservation of rights is ambiguous.***

Where a statute is subject to two interpretations, one rendering it constitutional and the other unconstitutional, the Legislature is presumed to have intended the constitutional meaning. *Martin v. Aleinikoff*, 63 Wn.2d 842, 850, 389 P.2d 422 (1964). The ambiguities present in the Reservation Clause prevent it from satisfying the requirement that, even in the non-pension area, reservations are enforceable only if they are clear and explicit.

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[15] Washington courts have recognized that as a practical matter, employees rely on summary plan descriptions to ascertain their rights. *See Samuelson v. Community College Dist. No. 2,* 75 Wn. App. 340, 347, 877 P.2d 734 (1994), *rev. denied,* 125 Wn.2d 1023 (1995) (state employee not required to read the Washington Administrative Code to learn rules of eligibility; "[I]t is common for employees to rely on their employers for information regarding their benefits.").

The Reservation Clause states:

> The Legislature reserves the right to amend or repeal this section [the UCOLA legislation] in the future, and ***no*** member or ***beneficiary has a contractual right to receive this post-retirement adjustment not granted prior to that time.***

RCW 41.32.489(6); RCW 41.40.197(5) (emphasis added).

This Reservation is ambiguous in several respects. ***First,*** the phrase "that time" refers to the time at which the Legislature repeals the UCOLA legislation. But to what does the phrase "contractual right to receive this post-retirement adjustment" refer? It could reasonably be interpreted to mean the right to actually receive the UCOLA. That right could be said to accrue when conditions precedent, such as tenure and age, have been fulfilled.[16] The second phase (highlighted above) of the Reservation Clause would read: "No … beneficiary has a contractual right to receive this post-retirement adjustment if the right to UCOLA payments have not vested and accrued, and payments received, prior to the date of repeal." Thus, the 2011 repealer would not apply to anyone who began receiving UCOLA payments prior to the repealer's effective date.

[16] Vesting, as explained above at 18, n.8, is a different matter. Pension rights are vested when the employee starts work or when pension benefits are granted during the employee's tenure. The right to actually receive payment, however, is not earned until conditions precedent to that right are satisfied.

***Second,*** the Reservation Clause could and should have been more clear. Had the Legislature desired, it could have said:

> The 3 percent UCOLA created in this enactment is not an earned benefit in which member or beneficiary rights have ever been or ever will be vested. That benefit may be reduced or eliminated by the Legislature at any time hereafter, in its sole discretion, and regardless of whether UCOLA payments have been made to members or beneficiaries.

***Third,*** the Reservation Clause language states that no beneficiary "has a ***contractual right*** to receive this post-retirement adjustment." (Emphasis added.) Strictly speaking, pension rights are not based solely on the four corners of a contract. Rather, pension rights are only "in the nature of" contract rights. They are ultimately founded upon constitutional considerations, as well as considerations of public policy, fundamental fairness, and general reliance interests that do not form the basis of a contract in the classical sense. *See* above at 17-19. By using the term "contract," the Legislature simply chose the wrong language in its effort to reserve the right to repeal rights that have vested under constitutional principles.

Lack of clarity has been fatal in almost every Contracts Clause case in which the State has urged the applicability of a reservation clause.[17] The outcome should be no different here.

It will be argued that the readings of the Reservation Clause put forth in this section do not comport with the Legislature's actual intent. As we have seen, however, legislative intent is not determinative and often ignored when the Legislature is impairing the State's own financial (particularly pension) obligations. The whole point of the Contracts Clause is to place boundaries on the Legislature's ability to impair contracts, especially its own.

## VII. CONCLUSION

The State "may reserve power to change ***some*** aspects of existing contracts (*Caritas*, 103 Wn.2d at 398, *quoting Continental Illinois*, 696 F.2d at 699) (emphasis added). Under *Bakenhus*, however, it may not do so at the expense of constitutionally protected vested pension rights.

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[17] *See, e.g., Carlstrom*, 103 Wn.2d at 393 (salary increase could not be impaired even though it was "subject to all present and future acts of the legislature"; reservation not sufficiently explicit); *Continental Illinois Nat'l Bank & Trust Co. v. Washington*, 696 F.2d 692, 699 (9th Cir. 1983) (bond obligations could not be impaired even though they were subject to "all the provisions of law as now or hereafter in effect relating to bonds …"; reservation to be construed narrowly and only given prospective application); *Caritas*, 123 Wn.2d at 404 (Medicaid reimbursement could not be retroactively reduced even though original reimbursement formula was subject to laws "now existing or hereafter adopted …"; Court will not construe reservation clause so as to run afoul of the Contracts Clause) (emphasis omitted).

This Court should affirm the trial court's Order of Summary Judgment invalidating the 2011 repeal of the UCOLA because: (a) the State provided no offsetting benefits to the class; and (b) the Reservation Clause is constitutionally unenforceable.

DATED: September 6, 2013.

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## CERTIFICATE OF SERVICE

I certify, under penalty of perjury pursuant to the laws of the United States and the State of Washington, that on September 6, 2013, a true copy of the foregoing BRIEF OF RESPONDENTS was served upon appellant's counsel as indicated below:

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