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November 12, 2015

Mark Neary, Clerk
Supreme Court of New Jersey
Richard J. Hughes Justice Complex
25 Market Street, 8th Floor, North Wing
PO Box 970
Trenton, New Jersey 08625

Re: Berg, Ouslander and NJEA et al v. Christie et al
Supreme Court Docket No. 74,612

Dear Mr. Neary:

Enclosed please find nine copies of the Brief of Plaintiffs-Intervenors Respondents in Opposition to the State Defendants' Appeal and in Support of Plaintiff's Appeal. Also enclosed is a Certification of Service.

Thank you for your consideration.

Very truly yours,

Ira W. Mintz, Esq.
As Co-Lead Counsel for
All Plaintiffs-Intervenors Respondents

c. All counsel of record (via e-mail)

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RICHARD W. BERG, et al., Plaintiffs-Respondents/Cross-Respondents CHARLES OUSLANDER, Plaintiff-Petitioner and NEW JERSEY EDUCATION ASSOCIATION, et al., Plaintiffs-Intervenors/ Respondents v.	SUPREME COURT OF NEW JERSEY Docket No. 74,612 On Petition and Cross-Petition for Certification Granted **CERTIFICATION OF SERVICE**

Hon. CHRISTOPHER J. CHRISTIE, et al.,

Defendants/Cross-Petitioners.

IRA W. MINTZ, of full age, certifies as follows:

1. I am an attorney at law admitted to practice in State of New Jersey and am a member of Weissman & Mintz LLC.

2. On November 12, 2015, I caused two copies of the Brief of Plaintiffs-Intervenors/Respondents in Opposition to the State Defendants' Appeal and in Support of Plaintiff's Appeal to be sent via overnight mail to Jean P. Reilly, Assistant Attorney General; Charles Ouslander, Esq.; and Daniel L. Grossman, Esq.

3. On November 12, 2015, I forwarded by electronic mail a copy of the Brief of Plaintiffs-Intervenors/Respondents in Opposition to the State Defendants' Appeal and in Support of Plaintiff's Appeal to the persons named on the attached service list.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, that I am subject to punishment.

Ira W. Mintz

Dated: November 12, 2015

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SUPREME COURT OF NEW JERSEY
DOCKET NO.: 74,612

RICHARD W. BERG, et al., Plaintiffs/Respondents and CHARLES OUSLANDER Plaintiff/Petitioner v. GOVERNOR CHRIS CHRISTIE, et al., Respondents/ Cross-Petitioners.	ON CROSS-PETITIONS FOR CERTIFICATION TO THE SUPERIOR COURT, APPELLATE DIVISION (CONSOLIDATED CIVIL ACTIONS) Sat Below: Hon. Susan L. Reisner, P.J.A.D. Hon. Carmen H. Alvarez, J.A.D. Hon. Harry G. Carroll, J.S.C. t/a
NJEA et al., Plaintiffs-Intervenors/ Respondents v. STATE OF NEW JERSEY, et al., Defendants/Cross- Petitioners.	

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PRELIMINARY STATEMENT

In 1997, the Legislature declared that, upon vesting, the participants in the pension system have a "non-forfeitable right to receive benefits," which in turn "means that the benefits program, for any employee for whom the right has attached, cannot be reduced." P.L. 1997, c. 113, codified at N.J.S.A. 43:3C-9.5(a) and (b). The Legislature did not say that the non-forfeitable right applied to "base pensions," or even merely to "pensions." Rather, it chose the term "benefits program."

In 2011, a subsequent Legislature enacted Chapter 78, Section 25, which eliminated the cost-of-living adjustment ("COLA") for all retirees and vested actives. The threshold question in this case is whether the "benefits program" includes the COLA. Defendants argue the non-forfeitable right excludes the COLA.

However, the COLA is a benefit paid to retirees in, and as a part of, the pension check. The COLA is included in the calculation of the pension obligation, is expressly referred to in, and as a part of, the pension statutes for all systems, and is paid out of the pension trust funds, not the State treasury. Any notion that the COLA is foreign to a benefits program should be rejected.

The motion court dismissed Plaintiffs' complaint and Plaintiff-Intervenors' complaint in intervention, ruling that

the Appropriations and Debt Limitations Clauses of the New Jersey Constitution preclude a Legislature from binding a successor Legislature. The Appellate Division reversed, finding that neither the Appropriations Clause nor the Debt Limitation Clause is implicated where the issue is payment of COLAs to retirees from existing pension funds. The Court then ruled that the non-forfeitable rights provision, which indisputably creates a contractual right to receive payments of a benefits program, applies to COLAs.

Intervenors join with Plaintiff Ouslander in his arguments that the federal Contract Clause can be enforced in this proceeding against the State of New Jersey and that equitable principles constitute an independent basis to reinstate COLAs for all those who retired before June 28, 2011.

Intervenors likewise join with Plaintiff Ouslander in opposing Defendants' arguments that the non-forfeitable right does not include COLAs; that Chapter 78 did not reduce COLAs; and that the Debt Limitation and Appropriations Clauses are implicated by the pension legislation at issue, which by its terms requires neither debt nor appropriation to enforce.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Intervenors adopt and incorporate Plaintiff Ouslander's Procedural History and Statement of Facts with this one material exception. Plaintiff Ouslander states that intervention was

limited solely to the legal issues raised by suspending COLA payments to those employees who retired before the effective date of Chapter 78. (Ab5).[1] Defendants describe the scope of the legal issue more broadly to include all retirees. (See Db5). Intervenors describe the scope of the legal issue to include retirees and vested active employees. The Appellate Division applied its holding to all those who retired after the enactment of the non-forfeitable right was adopted in 1997 by Chapter 113 (and codified at N.J.S.A. 43:3C-9.5) (hereinafter, "Section 9.5") and reserved for the remand the rights of employees who retired before section 9.5 was enacted and who had since July 1, 1970 been receiving COLAs. Berg v. Christie, 436 N.J. Super. 220, 259 n.19 (App. Div. 2014).

POINT I THE PLAIN LANGUAGE, STRUCTURE, AND HISTORY OF P.L. 1997, C. 113 EACH CONFIRM THAT THE LEGISLATURE INTENDED TO INCLUDE COLAs IN THE NON-FORFEITABLE RIGHT.

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[1] Ab refers to the Supreme Court brief of Plaintiff Ouslander.

Db refers to the Supreme Court brief of the State Defendants.

Dsb refers to the Appellate Division supplemental brief of the State Defendants.

Irb refers to the Appellate Divison reply brief of the Intervenors.

Ra refers to the State Defendants' appendix in the Appellate Division.

Intervenors adopt and incorporate Plaintiff Ouslander's Point I of his brief with these additional arguments.

Chapter 113 includes four sections implementing a settlement agreement between the State and the Internal Revenue Service. It also includes a wholly independent fifth section, section 5, that created the non-forfeitable right. In their supplemental brief to the Appellate Division, Defendants had agreed with Intervenors that the non-forfeitable rights statute had nothing to do with the Internal Revenue Code ("IRC"). (Dsb4).

However, Defendants now argue that the scope of the non-forfeitable rights section of Chapter 113 is directly related to the IRC sections of Chapter 113, in particular to the list of pension systems in section 1, and the statutory citations to those systems. This Court should view skeptically Defendants' attempt to change their argument to now assert that the IRC sections of Chapter 113 inform the non-forfeitable rights section. However, in any event, Intervenors will show that the IRC sections of Chapter 113 in fact support the conclusion that, in enacting the non-forfeitable rights statute, the Legislature intended to protect all aspects of the benefits program, including COLAs, except for retiree medical benefits.

Quite apart from the IRC issue, however, the plain meaning, structure, and history of Chapter 113 each show that the

Legislature consciously and unambiguously granted non-forfeitable rights in COLAs, as the Appellate Division correctly found.

A. The appeals panel rightly concluded, based on the plain language of the statute, and the history of pensions in New Jersey, that the Legislature unambiguously protected cost-of-living benefits as a non-forfeitable portion of the benefits program.

The Intervenors agree with Defendants that it is not necessary to resort to extrinsic interpretive aids to decide whether COLAs were among the pension "benefits program" that were awarded non-forfeitable status in Chapter 113. The plain meaning of the statutes, along with its place in the overall structure of pension benefit programs in state law, show Intervenors' position is correct. To the extent that an examination of legislative history is appropriate, Intervenors respectfully submit that the appeals panel has correctly presented the legislative history of cost-of-living adjustments in New Jersey, including how their amount and funding source changed over time. These materials, if necessary to consider, more than adequately show that the Legislature included COLAs in the pension benefits program awarded non-forfeitable status.

The appeals court canvassed the legislative history of New Jersey pension laws, including the periodic adjustments to base pensions that assured such pensions kept up with post-retirement increases in the cost of living. It also reviewed the competent

materials concerning Chapter 113 specifically. It also examined legal opinions of the attorney general and legislative counsel. And it examined the positions successfully argued by the State in other court cases. In so doing, the court concluded that Chapter 113 created contractual rights to a cost-of-living adjustment. The appeals panel explained that Chapter 113 stemmed from legislators' efforts to disavow or at least limit the effect of this Court's ruling in Spina v. Consol. Police & Firemen's Pension Fund, 41 N.J. 391 (1958), that promises of pension benefits did not have a contractual underpinning.

The Senator who chaired the 1996 hearing that ultimately led to Chapter 113 expressly indicated his support for legislation that would give pension benefit promises made by New Jersey to its public employees the same enforceability as the promises made to private-sector pensioners. Cf. 26 U.S.C. § 411(d)(6) and 29 U.S.C. § 1054; see also 436 N.J. Super. at 259 n.18. Namely, that once the benefits of a pension have been established, they constitute a promise to the pension payee that the payor "cannot go back retroactively and change what has been earned, what has been accrued, what has been vested in." 436 N.J. Super. at 253 (citing Public Hearing Before Senate State Management, Investment and Financial Institutions Committee (May 20, 1996), at 69). Like the sponsor's or committee statement on a bill, but unlike a private memorandum or letter, the

transcript of the hearing was duly published and became a public record. The legislation that arose from the concerns raised at that pension hearing closely hewed to the sponsor's stated objective, and was expressly intended to "provide a vested member" of a pension system the "non-forfeitable right to receive benefits" as stated under the laws that were in effect when the member obtained five years of service credit.

And, as the appeals panel meticulously documented, since the late 1980s, the amount the State owed to fund COLAs of each system or fund had been set forth in the body of the pension laws for each system, and computed as part of the aggregate amount the State owed to all the systems and funds as an integral part of the pension contribution calculation. Id. at 231, 235. Thus, COLAs were treated as, and were in fact, wholly bound up with, the calculations used to determine the amount owed to beneficiaries, and the amount the State had to pay to prefund those obligations. Moreover, up until the passage of Chapter 78, the several systems and funds had never defaulted on a COLA payment owed to a beneficiary.

The appellate panel's reliance on the 1996 pension hearing, and the 1997 committee statement of the resulting bill by Senator Inverso, were both eminently proper. The legislative history at issue here includes the transcript of a May 20, 1996 hearing on pensions and the background of the 1997 legislation

that became Chapter 113, as the appeals court documented. 436 N.J. Super. at 251-53. Defendants discount this history as if it were the statement merely of an "individual legislator" or something that represented the view of "two legislators." (Db41). In support, Defendants cite to three cases that are simply inapposite to the facts here. The "legislative history" at issue in In re Gov. Christie's Appointment of Martin Perez, 436 N.J. Super. 575, 590 (App. Div. 2014), was a memorandum circulated to the members of only one political party in only one house of the legislature. Cruz v. Central Jersey Landscaping Inc., 195 N.J. 33 (2008), involved the statement of a witness, not a legislator, at a public hearing. And Cont'l Gypsum v. Dir., Div. of Tax., 19 N.J. Tax 221 (Tax 2000), involved a letter written by a legislator to an executive branch official after the introduction of the relevant bill.

These private writings of legislators or staff (and in one case, the statement of a witness) are a far cry from what is at issue here, namely, statements made by a sponsoring legislator at a public hearing, and a committee statement that is published to all 120 members of the Legislature and the public with the bill as it progresses through the Legislature. The legislative history here consists of openly-available documents that would have been available to all legislators and the Governor in the bill approval process. They are, in sum, precisely the kind of

legislative history that openly reveals the thinking of sponsors and proponents of legislation, and which is, as such, cognizable in a dispute over interpretation. The remaining parts of Defendants' arguments consists of cherry-picking elements of the pension hearing or the legislative materials, but they do not alter the fundamental conclusion: The Legislature wanted to, and did, memorialize as non-forfeitable the manner in which employees' post-retirement checks would be calculated, and that calculation included COLAs.

The appeals panel, in sum, rightly determined that COLA obligations have been funded in the same way and as part of the full pension contribution obligation, and logged as liabilities of the pension systems in the same way as base pensions and other parts of the benefits program, since the late 1980s. This was just one of the many things the Legislature was "well aware" of when it chose the language in giving the pension "benefits program" non-forfeitable status in Chapter 113. 436 N.J. Super. at 258.

Moreover, the Legislature knew how to exclude employee benefits that it did not wish to endow with non-forfeitable status. This is precisely what it did with regard to post-retirement medical benefits and forfeitures of pension for misconduct, stating that "[t]he provisions of this section shall not apply to post-retirement medical benefits which are provided

pursuant to law" and that "[t]his act shall not be construed to preclude forfeiture, suspension or reduction in benefits for dishonorable service." P.L. 1997, c. 113, §5(a) and (d).

Defendants reject the Appellate Division's careful conclusions. First, Defendants say that Chapter 113 lacks a "clear indication" of an intent to bind itself contractually. Db29 (citing Nat'l R.R. Pass. Corp. v. Atchinson, Topeka & Santa Fe Ry., 470 U.S. 451, 465-66 (1985)). Alternatively, Defendants argue that the "benefits program" includes only base pensions. It is important to note, however, that the Legislature did not specifically mention base pensions in describing what is included in the benefits program, just as it did not specifically mention COLAs. Yet Defendants' do not argue that base pensions are not protected.

In choosing to exclude medical benefits from the "non-forfeitable" rights, plus reserve the power to take away a pension for "dishonorable service," the Legislature acted "unmistakably" in demarcating what was entitled to protection from forfeiture and what was not. Thus, when the Legislature used the broad and inclusive term "benefits program" to describe what was entitled to non-forfeiture protections, and then proceeded to make exclusions from that broad definition, it is immaterial that cost-of-living adjustments were not expressly named as one element of the "benefits program."

The notion that the COLA is excluded from the benefits program because it is not expressly listed as an element reverses the test. As noted, the base pension is not expressly listed as a protected non-forfeitable right any more than the COLA is. Yet the Defendants do not suggest that the benefits program excludes the base pension. If it were the Legislature's intent to protect only expressly enumerated rights, they could have and would have done so. But they did not do so with the base pension, nor with the COLA. What they did was create an inclusive and broadly written protected benefits program, and limit its content by express exclusion. And those exclusions cannot be read more broadly than the benefits to which they pertain. The exclusion of retiree medical benefits does not mean that the COLA was not intended to be included, any more than it means the base pension not included.

Defendants argue alternatively that if the Court finds the failure to specifically exclude COLAs from the non-forfeitable right as an ambiguity, then that ambiguity must be resolved in the State's favor. However, this argument is not only wrong, it is in fact backwards. The Legislature is presumed to know the law, and it is presumed to know the judicial construction given to its laws. David v. Gov't Employees Ins. Co., 360 N.J. Super. 127, 143 (App. Div. 2003) (quoting Ayres v. Dauchert, 130 N.J. Super. 522, 528 (App. Div. 1974) and citing Brewer v. Porch, 53

N.J. 167 (1969)). By 1997, it was already clear that pension benefits statutes were to be "liberally construed and administered in favor of the persons intended to be benefited thereby." Geller v. Dep't of Treasury, Div. of Pensions & Annuity Fund, 53 N.J. 591, 597-98 (1969). Given the Legislature's presumed knowledge of the long-standing liberal construction of statutes in favor of a retiree's benefits, any ambiguity must be resolved in favor of the retiree, not the State.

B. The pension statutes listed in sections 1 and 2 of Chapter 113 each specifically reference the Pension Adjustment Act, and required the payment of COLAs prior to their suspension in Chapter 78.

Defendants stress as a core point of their argument that the Legislature did not expressly name COLAs as among the "benefits program" that it was endowing with non-forfeitable status. In arguing this point, Defendants tell the Court that the sole substantive source of the COLA benefits is the Pension Adjustment Act, N.J.S.A. 43:3B-1 et seq., which is allegedly "separate" from the laws governing pensions. See Db36-37. This "textual" argument is both textually and legally wrong, substantially for the reasons given by the appeals panel. See also Irb11-21. But worse, the argument is factually wrong, because every one of the five open retirement systems enumerated

in Section 1 of Chapter 113 expressly references COLA protections within its four corners.

For example, Section 1 of Chapter 113 refers to the Teachers' Pension and Annuity Fund, established pursuant to N.J.S.A. 18A:66-1 et seq. N.J.S.A. 18A:66 runs from section 1 to section 192.

On June 5, 1997, the same day that Chapter 113, the non-forfeitable rights law, was passed, the Legislature adopted P.L. 2007, c. 115. One of its sections was codified at N.J.S.A. 18A:66-18.1, clearly part of N.J.S.A. "18A:66-1 et seq." That provision adopted the cost-of-living adjustment law into what Defendants assert as the 'base' teacher pension law, stating:

> Pension adjustment benefits for members and beneficiaries of the Teachers' Pension and Annuity Fund as provided by the "Pension Adjustment Act," P.L.1958, c. 143 (C.43:3B-1 et seq.) shall be paid by the retirement system and shall be funded as employer obligations by the same method provided by law for the funding of employer obligations for the basic retirement benefits provided by the retirement system.
>
> [N.J.S.A. 18A:66-18.1]

Section 1 of Chapter 113 likewise refers to the Public Employees' Retirement System, N.J.S.A. 43:15A-1 et seq., the State Police Retirement System, N.J.S.A. 53:5A-1 et seq., the Judicial Retirement System, N.J.S.A. 43:6A-1 et seq., and the Police and Firemen's Retirement System, N.J.S.A. 43:16A-1 et seq. Each of those retirement systems likewise references and

incorporates the cost-of-living law, and that reference either predated or was contemporaneous with Chapter 113. N.J.S.A. 43:15A-24.1; 53:5A-34.2; 43:6A-33.1; and 43:16A-15.6 respectively.

In sum, the right to a cost-of-living adjustment was made part of each and every one of the statutes that Defendants call the base pension laws. "It is assumed that the Legislature is 'thoroughly conversant with its own legislation and the judicial construction of its statutes.'". David v. Gov't Employees Ins. Co., 360 N.J. Super. at 143. To the extent that the Legislature was protecting what was in the pension laws listed in Section 1, the Legislature was clearly and unambiguously including cost-of-living increases.

C. The Legislature adopted Sections 1 and 2 of Chapter 113, to comply with the Internal Revenue Code, so as to bar diversions from the corpus of the pension funds, including appropriations for COLAs intended for the exclusive use of pension beneficiaries, and established maximum income limits on aggregate pension payments, including COLAs.

Section 401(a)(2) of the IRC protects the corpus and income of the trust of a qualified pension plan from any diversion of assets for purposes other than for the exclusive benefit of the employees or their beneficiaries. 26 U.S.C. § 401(a)(2). The corpus of the New Jersey pension funds includes all assets of the funds and is made up of employer and employee contributions for both base pensions and COLAs. See, e.g., Buck Consultants,

Public Employees Retirement System of New Jersey, Fifty-Sixth Annual Report of the Actuary (Revised) (July 1, 2010) (Ra392-Ra531). Prior to Chapter 78, the calculation of the State's contribution obligation included appropriations to fund COLAs of both current and future retirees. Once those appropriations to the respective pension funds were made, those funds became part of the corpus that the Legislature agreed through section 1 of Chapter 113 that it would not invade. Thus, in enacting section 1 of Chapter 113, the Legislature was treating base pensions and COLAs identically for purposes of aggregating assets and agreeing not to divert assets from the listed pension funds.

Similarly, Section 415 of the IRC sets specific dollar limits on the amount of annual benefits a retiree can receive under a qualified pension benefit plan. 26 U.S.C. § 415. Those maximum annual benefit amounts include both base benefit and COLA benefits. Immediately prior to Chapter 78, the maximum annual benefit amount was $195,000. In their Supplemental Brief to the Appellate Division, Defendants responded to Plaintiffs' pointing out that retirement benefits subject to the dollar limits in section 415(b) include cost-of-living increases. Defendants argued below that federal limits on benefits that can be paid have no relation to a policy decision by the State legislature to provide a non-forfeitable right to pension benefits. (Dsb 6). Defendants now argue that the statutory

references to the pension systems in section 1, repeated in section 2, somehow indicate the Legislature's intent to exclude COLAs from the non-forfeitable right established in section 5. The Defendants have transitioned from a position that the two were wholly unrelated to the position that the Legislature intentionally decided to exclude COLAs.

To the contrary, in enacting section 2 of Chapter 113, the effect was to treat base benefits and COLAs identically for purposes of complying with the benefit limitations provided under section 415 of the IRC. Therefore, to the extent, if any, that the Legislature was referring to sections 1 and 2 for definitional purposes when enacting the non-forfeitable right in section 5 of Chapter 113, the Legislature must be deemed to have understood that all of the listed pension benefit programs included both base pensions and COLAs.

POINT II COLAS ARE NOT BASED ON COMPLETELY EXTRANEOUS FACTORS SUCH AS THE COST OF FOOD IN URBAN AREAS, BUT ARE CALCULATED BY APPLYING A PERCENTAGE INCREASE TO THE BASE PENSION FORMULAS BASED ON YEARS OF SERVICE AND ANNUAL SALARY, AND INEXTRICABLY TIED TO THOSE FACTORS

Defendants persist in a professed inability to understand "from both a financial and philosophical standpoint" how COLAs qualify as earned and deferred compensation under the non-forfeitable rights statute, N.J.S.A. 43:3C-9.5, and challenge Plaintiffs to address how retirees can be said to have earned

COLAs when "the Pension Adjustment Act provides for the possibility of a negative COLA." Db51 (citing N.J.S.A. 43:3B-7).

Defendants' conceptual struggles stem from their refusal to acknowledge that the unique function of the COLA is to provide protection to the real dollar value and purchasing power of each retiree's original base pension from the ravages of inflation over time. The COLA is not some alien feature unrelated to a pension; it is an integral part of the pension itself, protecting it against erosion leading to poverty, as expressed by the Legislature in creating the COLA in the 1950s. While Defendants pay lip service to that fact, they proceed to discuss the COLA as though it exists merely as an independent form of largesse, "[u]ntethered from any consideration of either length or merit of the retiree's service, . . . [and] based on completely extraneous factors such as the cost of food in urban areas, housing sales, and other consumer patterns that the federal bureau of Labor samples when calculating the CPI." Db49.

Defendants' operating premise is false: The annual dollar increase each retiree receives in COLA is calculated by applying the percentage increase based on the CPI, as determined by the Director of the Division of Pension and Benefits, to the individual retiree's base pension benefit based on his or her

final annual salary, years of service, and class of service. In no way can the annual increases received in COLA be characterized as "untethered from any consideration of either length or merit of the retiree's service" as Defendants contend: The dollar increase each retiree receives in COLA is inextricably tied to those factors, and will vary from retiree to retiree, depending on the retiree's compensation and service. The reference to what Defendants label extraneous factors is solely to determine the percent of the increase in the protections against reduction in the value of the pension afforded by the COLA; the actual amount of the increase is predicated upon the pension of each retiree.

Precisely because the COLA functions to help preserve the real dollar value of a retiree's original base pension over time, the amount of any COLA received will always be conditioned on the value of that base pension in current dollars. In recent decades, this has meant COLA increases to help maintain the value of the original base pension -- which even Defendants concede is earned deferred compensation for services rendered -- against the eroding effects of inflation. But the fact that the Pension Adjustment Act also provides for the possibility of negative COLAs avails Defendants nothing.

Although the corrosive economic effects of significant deflation may strike some today as a concern of the distant

past, the ravages of steep deflation were of vivid memory to the generation of legislators who originally drafted the Pension Adjustment Act in 1958. Where the dollar value of goods and commodities are plunging, and the value and purchasing power of money grows, it may well be that a negative COLA becomes necessary to maintain the current dollar value of a retiree's original base pension and prevent an unearned windfall in real terms.[2] However remote may appear the likelihood of such an eventuality today, the fact that the Pension Adjustment Act envisions the possibility of a negative COLA is entirely in keeping with the purpose and function of a COLA: to help maintain and preserve the real value of the base pension in current dollars over time, and underscores the fact that the COLA is not "untethered" from the base pension allowance as Defendants contend.

Indeed, contrary to Defendants' representations, a retiree's COLA cannot be determined or paid without reference to the base pension an employee has earned. The COLA serves only to help preserve the value of that deferred compensation by adjusting it for the real present value of the dollar. Hayden v. Hayden, 284 N.J. Super. 418, 423 (App. Div. 1995) (observing that "[p]ost-retirement increases [COLAs] are as much part of

[2] A negative COLA may not reduce a retiree's pension benefit below the amount "originally granted and payable," however. N.J.S.A. 43:3B-7(a).

the pension as the amounts initially established by the pension system on retirement and merely adjust the pension payment for the real current value of the dollar").

As argued by Defendants, nothing is protected from reduction under Section 9.5 - N.J.S.A. 43:3C-9.5 - but a retiree's original base pension. Although Defendants assert that COLAs received by retirees prior to the enactment of Chapter 78 are protected from reduction, they also make clear that they believe that this is only true because Section 25 of Chapter 78 held COLAs to 2011 levels. Stripped of the protection against forfeiture afforded by Section 9.5, and by extension of Defendants' logic, nothing but the Legislature's sufferance prevents enactment of legislation eliminating all COLAs and reducing retiree pension benefits to the base pension allowance originally granted. However artfully Defendants' might parse and equivocate, only the non-forfeitable right to receive benefits, which contractually guarantees that a retiree's "benefits program" will not be reduced, precludes the forfeiture of retirees' COLAs.

Defendants' reliance on out-of-state cases, such as Am. Fed'n of Teachers - New Hampshire v. New Hampshire, 111 A.3d 63 (N.H. 2015); Justus v. State, 336 P.3d 202 (Colo. 2014); Washington Educ. Ass'n v. Dep't of Ret. Sys., 332 P.3d 439 (Wash. 2014); and Bartlett v. Cameron, 316 P.3d 889 (N.M. 2013),

is misplaced. None of those cases addresses a statutory arrangement even remotely similar to New Jersey's non-forfeitable rights statute protecting a benefits program. And Defendants point to no case applying either the unequivocal intent standard or the unmistakability doctrine to analogous statutory language. Moreover, none of the cases cited by Defendants holds that a valid, enforceable contract right to maintain the value of a base pension in current dollars cannot be created, but only that such a contract was not made in those cases.

Similarly of little moment is the fact that the Legislature has amended the COLA statutes at various times prior to the enactment of the non-forfeitable rights statute. Amendments that serve to protect, enhance, and expand the benefit does not render it "contingent" and certainly does not run afoul of the non-forfeitable rights law. Indeed, the statute has always recognized "the right of the State to alter, modify or amend" the retirement systems or funds so long as there is no diminishment of "the contractual rights of employees" established by subsections a. and b. of N.J.S.A. 43:3C-9.5.

For all the foregoing reasons, Defendants' contention that COLAs are merely an independent benefit enhancement and State largesse, "[u]ntethered from any consideration of either length or merit of the retiree's service," Db49, is demonstrably false.

The COLA is a vital, integral, and recognized part of the "pension benefits program" protected from reduction by the non-forfeitable rights statute.

POINT III PAYMENT OF COLAS FROM CURRENT PENSION TRUST FUNDS DOES NOT IMPLICATE THE DEBT LIMITATION OR APPROPRIATIONS CLAUSES AS NO APPROPRIATION IS REQUIRED.

A. Debt Limitation Clause

There is no law to support the notion that payment of the COLA benefit from the assets in the dedicated pension funds violates the Debt Limitation Clause. Payment from the retirement system is exactly what the assets in those funds are for. Those assets were already contributed by employees and appropriated by the Legislature, and cannot be touched by the State for any purposes other than paying benefits. There is no need for the Court to direct the Legislature to appropriate money to pay the COLAs to the retirees, and invalidation of the disputed sections of Chapter 78 will not require it.

Defendants now argue that a non-forfeitable right to COLAs runs afoul of the Debt Limitation Clause because it compels an annual appropriation by holding the monies for base pensions "hostage." Db65. First, Defendants assert that any funds the Legislature appropriates to shore up the reserve for base pensions will have to be paid out to retirees as COLAs. Db66. Defendants then assert that this is so because COLA payments

will become due before the eventual payment of base pensions to active employees. Db66-67. This argument defies logic and understanding.

COLAs do not become due before base pensions. COLAs are paid to retirees who are already receiving base pensions as a part of the pension benefit. Because the non-forfeitable right protects against reductions in COLAs as well as reductions in base benefits, future pension appropriations, based on annual actuarial calculations, will be used by the respective pension systems to continue to pay both base benefits and COLAs.

It appears that Defendants' argument is based on their distinction between what Defendants' self-describe as earned base pensions and unearned COLAs. Db65-66. That, however, is a distinction not based in fact or law. Both base pensions and COLAs are a form of deferred compensation protected by the non-forfeitable right. See Point II supra.

B. Appropriations Clause

Defendants first argue that the change to pre-funding of COLAs did not change the essential character of the COLAs or create a right where none previously existed. (Db68). However, the change to pre-funding is critical to understanding this litigation because it means that there is currently money in the various pension funds to continue to pay COLAs. As the State represented to the Appellate Division in NJEA v. State, 412 N.J.

Super. 192, 215 n.14 (App. Div. 2010), at a time when the State was paying COLAs, the funds will be able to pay benefits for 30 years. Just five years later, Defendants appear to argue instead that the pension systems and funds are about to collapse and cannot afford to pay COLAs, and therefore the COLA cannot be considered a part of the pension. But the failure of the State to properly fund the pension system over the years does not convert the right to a COLA into the loss of that right.

In any event, as the Appellate Division found below, no further appropriation is currently needed and thus the Appropriations Clause is not implicated. The Appellate Division below did not hold that pre-funding created a contractual right to COLA benefits. The non-forfeitable right statute created the contractual right to the COLA benefits. The pre-funding created the assets in the pension funds to pay the COLAs out of fund assets. [3]

Second, Defendants suggest that the court found that a past practice of paying COLAs without an appropriation authorized such payment contrary to a specific legislative directive that such payments cease. (Db69). However, payments from existing fund assets and future appropriations are factually and legally

[3] The Comprehensive Annual Report cited at page 53 of Defendants' brief shows that the POPF and CPFPF have our $10 million and $7 million in assets, respectively, from which to pay benefits and COLAs.

distinct. Past payments of COLAs from the pension funds in years in which there was no legislative appropriation confirms that such payments can be made without a current appropriation and without implicating the Appropriations Clause.

Third, Defendants argue that over the past five years, the State has had to bear the prolonged impact of the Great Recession and overcome an unprecedented revenue shortfall. (Db69-70). But, as noted above, contractual rights are never dependent upon the amount of money in a fund, the rate of return in a given year, or the failure to contribute to the fund. The key fact is that there is money to pay the COLAs in the fund assets, and if the State makes an effort to fund the pension systems going forward, the money will be there for the 30 years they had represented to the Appellate Division in 2010. Any argument about inability to pay COLAs can be made on remand as part of the reasonable and necessary prong of the impairment of contracts test. It cannot be the basis for a wholesale denial of a right.

Fourth, Defendants argue that in ordering a remand, the court presented the State with three choices, each of which inevitably implicates the Appropriations Clause. (Db70-71). That is simply not so. A remand affords the State the opportunity to try and prove that the suspension of COLAs was reasonable and necessary given the financial condition of the

State. Nothing in the remand order suggests that the reasonable and necessary test would have to be revisited annually. Nothing in the remand requires the State to appropriate any funds for either COLAs or base pension.

POINT IV THE FEDERAL CONTRACT CLAUSE IS ENFORCEABLE IN STATE COURT.

Intervenors adopt and incorporate Plaintiff Ouslander's Point III and support his argument with this additional discussion.

The Appellate Division misapplied Howlett v. Rose, 496 U.S. 356 (1990), Alden v. Maine, 527 U.S. 706 (1999), and Allen v. Fauver, 167 N.J. 69 (2001), and erroneously concluded that the State has sovereign immunity with respect to Plaintiffs' and Intervenors' federal Contract Clause claims.

The federal Contract Clause specifically provides that:

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . . U.S. CONST. art. I, §10.

Unlike other constitutional rights, the Contract Clause specifically protects against certain actions engaged in by the state itself. If not enforceable against a state, it is meaningless. Not surprisingly, the notion that the federal Contract Clause is rendered nugatory as to the state in state courts has been uniformly rejected by other state courts, and

Intervenors have found no cases in which a state court declined to do so.[4]

Sovereign immunity arises in different contexts, in both federal and state court. The District Court dismissed the federal challenges to Chapter 78 in federal court on Eleventh Amendment grounds, not broad sovereign immunity grounds. NJEA v. State of New Jersey, Civ. No. 11-5024 (D.N.J. March 5, 2011). The District Court properly did not address whether a comparable challenge could proceed in State court.

The Appellate Division's reliance on Howlett is misplaced. In Howlett, the United States Supreme Court reaffirmed its decision in Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989), that the state and arms of the state, which have traditionally enjoyed Eleventh Amendment immunity, are not

[4] By way of examples only: Dadisman v. Moore, 384 S.E.2d 816 (W. Va. 1989); Professional Firefighters Ass'n of N.H. v. State of New Hampshire, 2012 WL 4766937 (N.H. Superior Ct. 2012) (permitting adjudication in state court of federal and state Contract Clause claims, and applying United States v. Winstar, Corp., 518 U.S. 839 (1996) to address validity of changes in state pension systems; Bd. of Adm. of PERS v. Wilson, 52 Cal. App. 4th 1109, 61 Cal.Rptr.2d 207 (Cal. 3 Dist. App. 1997); Strunk v. Public Employees Retirement Bd., 108 P.3d 1058 (Or. 2005); Carlstrom v. State, 694 P.2d 1 (Wash. 1985). In fact, in the seminal Contract Clause case ultimately decided by the Supreme Court of the United States, U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1 (1977), the action began in the Law Division in New Jersey, which heard the claim under the federal Contract Clause. U.S. Trust Co. of N.Y. v. State, 134 N.J. Super. 124 (Law Div. 1975). And, throughout the litigation in NJEA v. State, 412 N.J. Super. 192 (App. Div. 2010), from 2003 to 2010, the State, despite making two motions to dismiss, never moved to dismiss the federal Contract Clause claim.

subject to suit under 42 U.S.C. § 1983 in either federal court or state court. Neither Howlett nor Will was addressing Contract Clause cases which involve challenges to State action that is specifically prohibited by the United States constitution. Cases like Howlett and Will address whether Congress can create a cause of action against a state through 42 U.S.C. § 1983, not whether the federal Constitution's Contract Clause is enforceable against a state.

Similarly, Alden did not address Contract Clause cases brought in state court. Alden stated that Congress lacks the Article I power to subject the States to private suits seeking to enforce federal statutes in their own courts, not whether the states have a right to immunize themselves from their obligations under the United States Constitution's Contract Clause. 527 U.S. at 748. Alden also recognized that many states have enacted statutes consenting to a wide variety of suits, just as New Jersey has enacted the Contractual Liability Act, N.J.S.A. 59:13-1 et seq., which provides an additional ground for this suit to enforce the non-forfeitable contractual right to benefits under the pension program, including COLAs.

Defendants' reliance below on Duffy v. Armstrong, 2010 N.J. Super. Unpub. LEXIS 734, at *18, *41-42 (App. Div. 2010)(Ra278) and Embrey v. State, 2009 N.J. Super. Unpub. LEXIS 2097, at *28, *34-35 (App. Div. 2009)(Ra295), is likewise misplaced. Duffy

dismissed numerous claims against the State. None of those claims involved the federal Contract Clause. The unpublished decision in Duffy in turn relied on Alden in referencing the jurisdiction of state courts. (Ra293). As explained above, Alden did not address Contract Clause cases brought in state court.

Similarly, Embrey involved claims of violations of federal and State statutes. The sovereign immunity defense was raised in response to allegations under 42 U.S.C. § 1983, used to enforce the statutory rights. Relying on Alden and Allen v. Fauver, 327 N.J. Super. 14, 17-18 (App. Div. 1999), aff'd 167 N.J. 69 (2001), Embrey found that the State and state officials acting in their official capacity were immune from a § 1983 suit. Allen had reiterated Alden's holding that states are immune from statutory suits (FLSA) brought in state court by individuals. 327 N.J. Super. at 18. As with Duffy, Embrey did not address a constitutional claim brought under the Contract Clause against the State or state officials.

Defendants asserted below that Judge Jacobson, relying on Alden, dismissed Intervenors' non-COLA federal claims on grounds of sovereign immunity. New Jersey Educ. Ass'n v. State, Docket No. L-771-12, Slip Op. at 13-20 (Law Div. 2013). (Ra82). However, Judge Jacobson stated that New Jersey courts have not addressed the applicability of sovereign immunity to Contract

Clause claims. (Ra100). She then referred to Alden and Allen, but noted that those cases involved the State's immunity from federal statutory claims, not claims under the federal constitution. (Ra100).

Although Judge Jacobson observed that Intervenors relied on § 1983 for relief such as damages, she appears to have mistakenly concluded that all of Intervenors' federal claims, including the Contract Clause claims, were brought pursuant to § 1983 and were barred by sovereign immunity. However, not all of Intervenors' federal Contract Clause claims were brought pursuant to § 1983. The complaint in the suit before Judge Jacobson and the instant Complaint in Intervention separately allege violations of the Contract Clause and of § 1983. The attempted application of sovereign immunity regarding a claim for prospective injunctive relief arising under the United States Contract Clause does not implicate or enmesh this Court in a § 1983 analysis. The Contract Clause claim permits the relief sought here: invalidation of a law impairing a contractual obligation of the State.

Although dismissal of the federal Contract Clause claim might not have an analytical impact on a contract clause analysis since the federal and State contract clauses are applied coextensively and provide the same protections, this issue is of critical importance as it materially affects

Plaintiffs' and Plaintiff-Intervenor Respondents' right to appeal any adverse action to the United States Supreme Court. See NJEA v. State, 412 N.J. Super. 192, 205 (App. Div. 2010) (discussing coextensive reach of the two Contract Clauses).

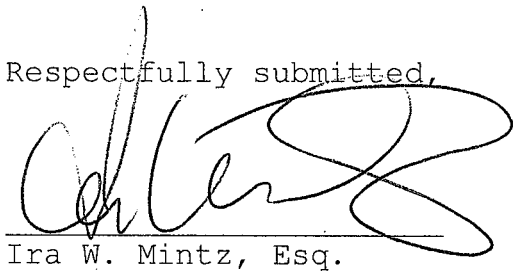
POINT V EQUITABLE PRINCIPLES PROVIDE AN INDEPENDENT BASIS FOR RELIEF.

Intervenors adopt and incorporate Plaintiff Ouslander's Points II of his brief.

CONCLUSION

For all these reasons, the judgment of the Appellate Division should be affirmed.

Respectfully submitted,



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