

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Saad, P.J., and K.F. Kelly and Gleicher, JJ.

AFT MICHIGAN, AFT, AFL-CIO,
ET AL,

Plaintiffs-Appellants,

v

THE STATE OF MICHIGAN,

Defendant-Appellee.

Supreme Court No. 148748

Court of Appeals No. 313960

Court of Claims No. 12-104-MM

BRIEF ON APPEAL OF APPELLEE STATE OF MICHIGAN

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

This appeal stems from the Court of Appeals' January 14, 2014 published opinion (App 67a-95a). Plaintiffs-Appellants AFT Michigan, *et al*, timely filed an application for leave to appeal, which this Court granted in an order dated May 21, 2014. Accordingly, this Court has jurisdiction over this appeal under MCR 7.301(A)(2).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. The federal and state constitutions preclude the State from “taking” private property without just compensation. 2012 PA 300 allows members to voluntarily contribute toward their own retiree health care, and those contributing members receive the value of their contributions either in the form of subsidized retiree health care coverage or a refund of contributions. Does 2012 PA 300 result in an unconstitutional taking of property?

Appellants’ answer: Yes.

Appellee’s answer: No.

Trial court’s answer: No.

Court of Appeals’ answer: No.

2. In *AFT Michigan v State*, the Court of Appeals held that members’ 3% contribution toward retiree health care was unconstitutional under 2010 PA 75 because it was compulsory and being used to fund the benefits of others. Under 2012 PA 300, the 3% contribution is now entirely voluntary and contributing members will receive the value of their contributions in the form of subsidized retiree health care or a refund. Does the voluntary nature of the health care contribution under 2012 PA 300 materially distinguish it from the contribution at issue in *AFT Michigan*?

Appellants’ answer: No.

Appellee’s answer: Yes.

Trial court’s answer: Yes.

Court of Appeals’ answer: Yes.

3. To prevail on a breach of contract claim, AFT must first establish the existence of a contract. Members of the Retirement System have no contractual right to pension benefits based on future service or to a 1.5% multiplier on such pension benefits. Did the Court of Appeals properly affirm the trial court's decision to grant summary disposition of AFT's breach of contract claim?

Appellants' answer: No.

Appellee's answer: Yes.

Trial court's answer: Yes.

Court of Appeals' answer: Yes.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 1, § 17 of the 1963 Constitution provides, in pertinent part:

No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.

Article 9, § 24 of the 1963 Constitution provides:

The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.

Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.

Article 10, § 2 of the 1963 Constitution provides, in pertinent part:

Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. . . . Compensation shall be determined in proceedings in a court of record.

“Public use” does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues. Private property otherwise may be taken for reasons of public use as that term is understood on the effective date of the amendment to this constitution that added this paragraph.

The Fifth Amendment of the U.S. Constitution provides, in pertinent part:

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment of the U.S. Constitution provides, in pertinent part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MCL 38.1343e, as amended by 2012 PA 300, provides:

Except as otherwise provided in this section or section 91a, each member who first became a member before September 4, 2012 shall contribute 3% of the member's compensation to the appropriate funding account established under the public employee retirement health care funding act, 2010 PA 77, MCL 38.2731 to 38.2747. The member contributions under this section shall be deducted by the employer and remitted as employer contributions in a manner that the retirement system shall determine. As used in this section, "funding account" means the appropriate irrevocable trust created in the public employee retirement health care funding act, 2010 PA 77, MCL 38.2731 to 38.2747, for the deposit of funds and the payment of retirement health care benefits.

MCL 38.1391a, as added by 2012 PA 300, provides:

(1) An individual who first became a member or qualified participant on or after September 4, 2012 or who made the election under subsection (5) shall not receive any health insurance coverage premium from the retirement system for any benefits under section 91 or as a result of benefits provided under section 86, 87, or 89. In lieu of any of these benefits that might have been paid by the retirement system, a member's or qualified participant's employer shall make a matching contribution up to 2% of the member's or qualified participant's compensation to Tier 2 for each member who first became a member or qualified participant on or after September 4, 2012 or who made the election under subsection (5). A matching contribution under this subsection shall not be used as the basis for a loan from an employee's Tier 2 account. If the department or retirement system offers a health expenditure account or similar account for the purpose of managing a member's health care funds under this section, as permitted by state or federal law, the department or retirement system shall issue a request for proposals before implementation of that health expenditure account or similar account.

(2) An individual who first became a member or qualified participant on or after September 4, 2012 or who made the election under subsection (5) may make a contribution up to 2% of the member's or qualified participant's compensation to a Tier 2 account. A member or qualified participant described in this subsection may make additional contributions to his or her Tier 2 account as permitted by the department and the internal revenue code.

(3) Except as otherwise provided in this subsection, a member or qualified participant is vested in contributions made to his or her Tier 2 account under subsections (1) and (2) according to the vesting provisions under section 132. A member who is eligible for the payment of health insurance coverage premiums by the retirement system as a result of benefits provided under section 90 is not vested in any employer contributions under subsection (1) and forfeits the employer contributions and earnings on those contributions.

(4) The contributions described in this section shall begin with the first payroll date after the member or qualified participant is employed or on or after the transition date for a member who makes the election under subsection (5) and end upon his or her termination of employment.

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

(6) A qualified member who does not make the election under subsection (5) continues to be eligible for the payment of health insurance coverage premiums by the retirement system under section 91 and is not eligible for the Tier 2 account provisions of this section. An individual who is not a qualified member, who is a former member on September 3, 2012, and who is reemployed by an employer on or after September 4, 2012 shall be treated in the same manner as a member described in this subsection who did not make the election under subsection (5).

(7) The retirement system shall calculate an amount to be credited to a Tier 2 account for each member who makes the election under subsection (5). The amount described in this subsection shall be an amount equal to the contributions made by the member under section 43e. A member who makes the election under subsection (5) shall cease making contributions under section 43e as determined by the retirement system, but no later than the first payroll date after the transition date. The amount calculated under this subsection shall be deposited as an employer contribution into the member's Tier 2 account as determined by the retirement system, but no later than the first payroll date after March 1, 2013. A member is immediately 100% vested in amounts deposited to his or her Tier 2 account under this subsection.

(8) A member or former member who does not make the election under subsection (5), who is 60 years of age or older, who does not qualify for the payment of health insurance coverage premiums by the retirement system under section 91, and who files an application with the retirement system on or after termination of employment shall receive a separate retirement allowance as calculated under this subsection. Except as otherwise provided under this subsection, the separate retirement allowance under this subsection shall be paid for 60 months and shall be equal to 1/60 of the amount equal to the contributions made by the member under section 43e. The retirement system may pay out de minimus amounts as a lump sum as determined by the retirement system and as permitted by the internal revenue code. A member receiving a separate retirement allowance under this subsection shall not subsequently receive the payment of health insurance coverage premiums by the retirement system under section 91. A member who dies before qualifying for the payment of health insurance coverage premiums by the retirement system under section 91 shall have a separate retirement allowance as provided in this subsection paid to the member's beneficiary upon application to the retirement system. A member who qualifies for the payment of health insurance coverage premiums by the retirement system under section 91 but who dies before the payment of health insurance coverage premiums by the retirement system in an amount equal to or greater than the amounts contributed under section 43e shall have a separate retirement allowance as provided in this subsection paid to the member's beneficiary following the cessation of health insurance coverage premiums paid by the retirement system in an amount equal to the difference between the health insurance coverage premiums paid by the retirement system under section 91 and contributions made by the member under section 43e. The amount of the separate retirement allowance as determined under this subsection shall be

increased in a manner as determined by the retirement system by a percentage equal to 1.5% multiplied by the total number of years that member made contributions under section 43e.

(9) A member or former member who has a break in service and is reemployed retains the same election that the member made under this section before the break in service. If the member made the election under subsection (5), the member shall continue to receive the Tier 2 account contributions as provided in subsections (1) and (2). If the member did not make the election under subsection (5), the member shall continue to make the contributions as provided under section 43e and is subject to subsection (8), if applicable.

(10) In lieu of any other health insurance coverage premium that might have been paid by the retirement system under section 91, a credit to a health reimbursement account within the trust created under the public employee retirement health care funding act, 2010 PA 77, MCL 38.2731 to 38.2747, shall be made by the retirement system in the amounts and to the members or qualified participants as follows:

(a) Two thousand dollars to an individual who first became a member or qualified participant on or after September 4, 2012, who is 60 years of age or older, and who has at least 10 years of service at his or her first termination of employment.

(b) One thousand dollars to an individual who first became a member or qualified participant on or after September 4, 2012, who is less than 60 years of age, and who has at least 10 years of service at his or her first termination of employment.

(11) The retirement system shall determine a method to implement subsections (5) to (10), including a method for crediting the amounts in those subsections to comply with any restrictions imposed by the internal revenue code. Notwithstanding any provision of this act to the contrary, the Tier 2 plan provisions of this section shall be implemented by the department as soon as feasible but not later than January 1, 2013.

(12) Subsections (5) to (10) do not apply to a member who is eligible for the payment of health insurance coverage premiums by the retirement system as a result of benefits provided under section 90.

(13) On or before July 1, 2017, the retirement system shall provide a report to the chairs of the house and senate appropriations committees that provides the projected impact of subsection (10) as it applies to members first employed and entered upon the payroll of reporting units on or after July 1, 2017 with regard to the annual required contribution as used by the governmental accounting standards board and for purposes of the annual financial statements prepared under section 28(1).

(14) As used in this section:

(a) "Compensation" means that term as defined in section 122(2).

(b) "Qualified member" means a member who meets all of the following requirements:

(i) He or she first became a member before September 4, 2012.

(ii) He or she has earned service credit in the 12 months ending September 3, 2012 or was on an approved professional services or military leave of absence on September 3, 2012.

INTRODUCTION

Although the amounts at stake in this case are eye-popping (more than \$15 billion), the issues presented boil down to a simple question: whether members of the Public School Employees' Retirement System have a vested right – contractually or otherwise – that guarantees the continuing accrual of pension and retiree health care benefits on a fixed basis for *future* service. The answer is equally simple: “no.” This Court has consistently and repeatedly recognized that individuals do not have a right to the continuation of laws. This maxim rings especially true in light of the Michigan Constitution’s “Pension Clause,” which protects from diminishment only those financial benefits that have *already accrued*. Stated plainly, the benefits at issue here –pension and retiree healthcare benefits for *future* years of service – are not (and cannot) be construed as “accrued financial benefits.” Accordingly, the Legislature retains its power to change laws providing benefits for future service.

Not only do Retirement System members lack any inherent entitlement to the *future* accrual of pension and retiree healthcare benefits, the statutory provisions being challenged expressly provide members with the choice of whether to participate in –and if so, contribute to – the pension and retiree healthcare plans, respectively. Any member who chooses to increase the value of his or her anticipated retirement package by agreeing to pay the attendant cost cannot convincingly cry “foul” when the bill comes due. That voluntary choice is just like choosing to place money in an investment, a choice that accepts the inherent risk that goes with investing.

AFT attempts to sidestep this conclusion by asserting that informational brochures that described the retirement plan, as it existed prior to 2012 PA 300, created an express contract for the State of Michigan to provide – and for members to receive – retirement benefits according the formula prescribed therein. But this argument is undercut by the fact that each such brochure was prefaced by language that specifically indicated that the statutory benefits at issue are controlled by the Legislature and are subject to change.

Furthermore, contrary to AFT's suggestion, it is not unreasonable to expect members of the Retirement System to know that provisions governing the *future* accrual of pension and retiree healthcare benefits are subject to change; Michigan courts have repeatedly held that everyone “is presumed to know the law.” The circumstances of this case demand application of this well-worn principle.

More fundamentally, PA 300 embodies constitutionally sound, sensible reform measures aimed at securing the viability of the Retirement System for current and future public school retirees. Accordingly, AFT's challenge as to the constitutionality of PA 300 is without merit.

COUNTER-STATEMENT OF FACTS

The Retirement Act created the Public School Employees' Retirement System. All public school employees, including teachers, administrators, and non-instructional staff, are members of the Retirement System. Historically, members have been provided pension and health care benefits upon retirement.

Until 1986, pension benefits were financed exclusively through employer contributions levied on the payrolls of school districts. MCL 38.1341. In 1986, the Retirement Act was amended to introduce a contributory pension plan. MCL 38.1343a.

Despite the existence of a contributory pension plan, until 2010 public school employers paid the entire cost of retiree health care as a percentage of their total payroll. MCL 38.1341. It was not until 2010 that members of the Retirement System contributed toward retiree health care benefits. Specifically, in 2010, the Retirement Act was amended to require that all members contribute up to 3% of their compensation to a trust fund for retiree health care. See 2010 PA 75, MCL 38.1343e.

But a panel of the Court of Appeals held that the health-care-contribution provision of MCL 38.1343e was unconstitutional. *AFT Michigan v State*, 297 Mich App 597; 825 NW2d 595 (2012) (App 38a-55a). In particular, the panel majority concluded that the contribution amounted to a state impairment of a contract, a taking of private property by the government, and a violation of due process. *Id.* at 597-598 (App 42a). Judge Saad disagreed with the majority in a lengthy dissent, ultimately concluding:

[B]ecause the challenged [3% contribution requirement] does not even touch upon, much less impair contracts and no property is taken by the state in the sense contemplated by the Fifth Amendment and because substantive due process is not a catch-all for failed constitutional claims, it would have been prudent and in keeping with our Court's limited charge under the Constitution to uphold this legislation as constitutional because – it is. [*Id.* 616 (Saad, J, dissenting) (App 66a.)]

The State has applied for leave to appeal the Court of Appeals' decision in *AFT Michigan*, and that application remains pending in Supreme Court docket numbers 145924, 145925, and 145926.¹ But the issues raised in the instant appeal are distinct, and the decision in *AFT Michigan* is not controlling. It is not controlling because the Legislature enacted PA 300, which became effective September 4, 2012, in part as a prophylactic measure to cure the purported constitutional infirmities found by the Court of Appeals, but also to ensure the viability of the Retirement System,.

In regard to retiree health care, sections 43e and 91a(7) of PA 300, MCL 38.1343e & 38.1391a(7), now allow a member to opt out of making the contributions discussed in *AFT Michigan* if the member chooses to forego the retiree health care benefits provided in MCL 38.1391. In particular, a member can instead participate in a tax-advantaged, 401(k)-style, portable health care account option. MCL 38.1391a(5), (7). Members who choose not to opt out and thus choose to continue to make the contribution set forth by section 43e are assured to receive the value of their contribution, either in the form of retiree health care benefits or in the form of a refund with interest. MCL 38.1391(1); MCL 38.1391a(8).

In addition to providing members with options concerning retiree health care benefits, PA 300 also amends sections 59 and 84b of the Retirement Act, MCL 38.1359 and MCL 38.1384b, to provide members with a choice concerning their pension benefits. Significantly, PA 300 leaves intact the pension calculation that

¹ On May 21, 2014, this Court ordered that the application be held in abeyance pending the resolution of this appeal.

applies to all accrued service credited prior to February 1, 2013. The only pension benefits that were potentially affected, depending upon a member's election, were pension benefits for *future* service, which, by their very nature, cannot be "accrued." Specifically, section 59 of PA 300, MCL 38.1359, allows members to elect whether to continue accruing service in the defined benefit (pension) plan after February 1, 2013. Members who elect to continue accruing service beyond February 1, 2013, as provided by MCL 38.1359(1), and to receive a 1.5% pension multiplier for future years of service, must pay the attendant contributions provided under MCL 38.1343g. Alternatively, MCL 38.1359(2) provides for members to make a lesser contribution under MCL 38.1343a and to retain the 1.5% pension factor for all service already accrued, but to receive a 1.25% pension multiplier for future years of service. See MCL 38.1359(2)(a). Finally, members are given the option to "freeze" their service accrued as of February 1, 2013, and have that service calculated using the 1.5% multiplier while avoiding additional pension contributions. See MCL 38.1359(2)(b).

PROCEEDINGS BELOW

AFT filed a Court of Claims action on August 31, 2012, seeking declaratory, injunctive, and monetary relief. Generally, AFT raised constitutional challenges that are similar to those raised and discussed by the Court of Appeals in *AFT Michigan*, a case in which, as already noted, the State has a pending application for leave to appeal. More specifically, AFT's complaint alleged that PA 300 breached

contracts regarding pension benefits, resulted in a “taking” of property without just compensation, and deprived members of property rights without due process.

The Defendant-Appellant State of Michigan and AFT filed cross-motions for summary disposition. Ultimately, Court of Claims concluded that AFT’s breach-of-contract and constitutional claims were without merit because PA 300 gave members choices regarding their retirement benefits and was not “touching anything that is vested.” (11/29/12 Hr’g Tr, pp 80-83) (App 33a-34a.) On December 12, 2012, the Court of Claims issued a final order granting summary disposition in favor of the State as to the claims germane to this appeal.

On appeal, the Court of Appeals affirmed the constitutionality of PA 300. In so doing, the Court rejected AFT’s arguments that PA 300 allegedly breached a contract or violated the takings or due-process clauses of the State and United States constitutions. In pertinent part, the Court rejected AFT’s claim that the various pamphlets, handbooks, and informative brochures published by the State evidence a contract between the State and Retirement System members, whereby the State specifically indicated that a 1.5% multiplier would be used to calculate pension benefits. Rather, the Court held that the pamphlets and brochures were simply an informational explanation of the then-existing formula; but that the State was not bound, in perpetuity, by its contents. *AFT Michigan v Michigan*, 303 Mich App 651, 662, 846 NW2d 583, 591 (2014) (App 77a). Furthermore, the Court recognized that disclaiming language contained within each of the documents

plainly demonstrated that the State did not intend to be bound, nor could it be bound, by such informational brochures. *Id.*

The Court likewise rejected AFT's claim that the retention by the State of voluntarily paid retiree health care contributions violated members' rights under either the takings or due-process clauses of the federal and state constitutions. The Court observed that there is no "taking" under PA 300 because participation in the retiree health care plan is voluntary. *Id.* at 673 (App 83a). Furthermore, due to the voluntary nature of the member contributions, the Court rejected as unfounded AFT's claim that members are somehow deprived of the time-value of their contributions. *Id.* The Court pointed out that members who elected to participate in the retiree health care plan and pay the attendant contribution will either receive health care premium subsidy payments upon retirement (if eligible), or a refund of their contributions, with interest, in the form of a supplemental retirement allowance. This appeal followed.

STANDARD OF REVIEW

This Court reviews de novo all of the issues in this case, including the trial court's decision on a motion for summary disposition as well as issues concerning contractual and statutory interpretation. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999); *Archambo v Lawyers Title Ins Corp*, 466 Mich. 402, 408; 646 NW2d 170 (2002); *Oakland Co Bd of Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998).

ARGUMENT

I. The retiree health care contribution, retention, and refund provisions of PA 300 do not result in an unconstitutional taking of property.

AFT claims that the retiree health care contribution provision set forth in section 43e of PA 300 is unconstitutional because “it allows the State of Michigan to keep monies deposited with MPERS by public school employees who choose to opt into MPERS post employment retiree health care but, for myriad reasons, are never eligible to receive that benefit.” (AFT Br, p 8.) Although AFT acknowledges that section 91a(8) of PA 300 expressly provides for such members to eventually receive a refund, it nevertheless complains that “[t]he refund, when ultimately made, provides the public school employee with a fraction of the actual interest that has accrued.” AFT goes on to assert that “[t]his is a *per se* Taking without just compensation” in violation of Michigan and United States Constitutions. (AFT Br, 8.) But AFT’s claim is both factually and legally incorrect. The health care contributions at issue are entirely voluntary—in other words, they are given, not taken—and contributing members receive the value of their contributions in the form of subsidized health care or a refund of any contributions, plus interest. See MCL 38.1391a(8).

A. The retiree health care contribution provisions of PA 300 do not result in an unconstitutional taking of property.

Under the United States and the Michigan Constitutions, private property may not be taken for public use without just compensation. US Const, Am V; Const

1963, art 10, § 2; *City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 248; 701 NW2d 144 (2005). "The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Ligon v City of Detroit*, 276 Mich App 120, 132; 739 NW2d 90 (2007), quoting *Lingle v Chevron USA, Inc*, 544 US 528, 537; 125 S Ct 2074; 161 L Ed 2d 876 (2005). The restriction against the taking of property for public use without just compensation applies only to a taking against the will of the owner by authority of some statute; it has no application to the decision of a court on the relative rights of parties in property, which have been voluntarily created by contract. *Kunhardt & Co v US*, 266 US 537; 45 S Ct 158; 69 L Ed 428 (1925).

MCL 38.1391a governs the retiree health care plan and gives members the freedom to opt out of participating in—and paying for—the retiree health care:

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

(7) The retirement system shall calculate an amount to be credited to a Tier 2 account for each member who makes the election under subsection (5). The amount described in this subsection shall be an amount equal to the contributions made by the member under section 43e. A member *who makes the election* under subsection (5) shall cease

making contributions under section 43e as determined by the retirement system, but no later than the first payroll date after the transition date. The amount calculated under this subsection shall be deposited as an employer contribution into the member's Tier 2 account as determined by the retirement system, but no later than the first payroll date after March 1, 2013. A member is immediately 100% vested in amounts deposited to his or her Tier 2 account under this subsection. [Emphasis added.]

Here, sections 91a (5) and (7) of the Retirement Act, as added by PA 300, give members a choice: either choose to remain eligible for Retirement System-subsidized retiree health care and make the 3% contribution associated with such benefit, or choose to opt out of subsidized retiree health care altogether and instead participate in a tax-advantaged, 401(k)-style, portable health account. MCL 38.1343e; MCL 38.1391a (5), (7). Therefore, under PA 300, the Retirement System is not seizing or confiscating wages, but is simply collecting willing, un-compelled, contributions made by members to fund their own retiree health care. The voluntary nature of the 3% contribution necessarily undermines any claim of a government appropriation, physical invasion, or any other type of compelled deprivation necessary to establish an unconstitutional taking of property.

In addition, under section 91a(8) of the Retirement Act, as added by PA 300, if a member chooses to remain eligible for retiree health care and make the 3% contribution, but for any reason does not ultimately qualify for the payment of retiree health care, the member "shall receive a separate retirement allowance" equal to the amount of his or her contributions. Furthermore, section 91a(8) also provides that if a member chooses to remain eligible for retiree health care and make the 3% contribution, but dies before receiving health care benefits equal in

value to the amount of their contributions, his or her beneficiary will receive a separate retirement allowance equal to the balance. MCL 38.1391a(8). In both cases, a member who chooses to make the 3% health care contribution will receive interest on his or her contributions because the separate retirement allowance is increased “by a percentage equal to 1.5% multiplied by the total number of years that the member made the contributions.” MCL 38.1391a(8).

B. The retention of members’ retiree health care contributions (and any interest thereon) is not a taking.

AFT asserts that in the absence of a guarantee that members will receive the “value of the interest earned” on their accumulated contributions, the Retirement System’s retention of those contributions amounts to an unconstitutional taking. (AFT Br, 11.) AFT’s argument is akin to a purchaser of an insurance policy lamenting that the cost might not justify the benefits he or she actually receives, or to someone who invests in a 401(k) plan complaining that there is a risk the investment will decrease rather than increase. But, as is the case here, whether the risks might conceivably outweigh the rewards is of no moment. Simply put, members who elect to participate in the retiree health care plan do so at their own risk.

In arguing to the contrary, AFT relies on *Webb’s Fabulous Pharmacies, Inc v Beckwith*, 449 US 155, 164-165; 101 S Ct 446, 452-453; 66 L Ed 2d 358 (1980), and *Brown v Legal Foundation of Washington*, 538 US 216; 123 S Ct 1406; 155 L Ed 2d 376 (2003), which stand for the proposition that the act of separating interest from

the principal that earned it, when done by a government entity against the individual's wishes, may constitute a taking of property for constitutional purposes. But here, unlike the monies at issue in *Webb's Fabulous Pharmacies* and *Brown*, the Retirement System has not seized or confiscated any private property because the contributions are voluntary. It is beyond dispute that "[t]axes and user fees . . . are not 'takings.'" *Id.* at 243, n. 2 (quoted with approval by *Koontz v St. Johns River Water Management District*, 133 S Ct 2568, 2600-01; 186 L Ed 2d 697 (2013)). The 3% contributions at issue are indistinguishable from user fees paid as a condition of participating in, and receiving benefits from, the retiree health care plan.

Moreover, the State is not "retaining the value" of members' retiree health care contributions. In essence, under PA 300, the Retirement System is accepting voluntary contributions from members and placing those contributions in a trust fund to subsidize those contributing members' retiree health care. In all cases, those contributing members receive the value of their contributions, either in the form of subsidized health care coverage or a refund of contributions with interest. Under such circumstances, there is simply no "taking" of property by the Retirement System.

C. The retiree health care contribution refund provision does not result in an unconstitutional taking of property.

AFT contends that refunding retiree health care contributions *without adequate interest* is inequitable and results in the taking of members' property.

AFT also takes issue with the fact that the refunding of contributions takes place

over a period of five years after the member reaches the age of 60 (AFT Br, pp 25-27).

First of all, as discussed, since the retiree health care contributions are entirely voluntary, those contributions do not constitute a “taking.” Therefore, from the standpoint of simple logic, it is difficult to discern how the *refund* of a voluntary contribution, even without interest and over a period of time after a member reaches a certain age, somehow amounts to a “taking” of property.

That said, a member who chooses to make the 3% health care contribution, but for any reason does not ultimately qualify for subsidized retiree health care, will indeed receive interest on his or her contributions. In particular, the “separate retirement allowance,” which is paid for 60 months after the member or former member is 60 years of age or older, is increased “by a percentage equal to 1.5% multiplied by the total number of years that the member made the contributions.” MCL 38.1391a(8).

While AFT argues that this amount of interest and the time period for repayment provide members are so unreasonable that they amount to an unconstitutional “taking” (AFT Br, pp 14-15), the fact remains that the refund provision can be completely, and voluntarily, avoided. If a member believes that because of his or her age, the potential duration of their membership in the system, or some other factor personal to their individual situation, the refund provision may not be fiscally prudent, that member can elect to opt out of making the 3% contribution for subsidized retiree health care option and instead participate in the

tax-advantaged portable health account option. MCL 38.1391a(5), (7). In light of the voluntary elections available to members under PA 300, the refund and repayment provisions simply do not result in a taking of property.

AFT also asserts that the State is requiring an individual to waive his or her constitutional rights as a condition of receiving a State-provided benefit. (AFT Br, pp 16-17.) This assertion is not factually or legally correct. First of all, one who asserts an uncompensated taking claim must first establish that a vested property right is affected. *Attorney General v Michigan Public Service Commission*, 249 Mich App 424; 642 NW2d 691 (2002). Under article V of the U.S. Constitution and article 10, § 2, of the Michigan Constitution, an individual's right to "just compensation" arises only if the government *takes* an individual's property. The State is not required—by statute, contract or otherwise—to offer retiree health care. *Studier*, 472 Mich at 658-659. Consequently, members do not have a vested property right in retiree health care.

Moreover, the State is not compelling members to participate in—and pay for—coverage in the retiree health care plan. Instead, it offers this benefit *if* members are willing to contribute toward the cost. A member who chooses to contribute does so with the knowledge that he or she will receive retiree health care or a refund of contributions plus interest based upon the formula in MCL 38.1391a(8). In any event, the State is not *taking* anything and, thus, does not need to "justly compensate" anyone.

II. The Court of Appeals' decision in *AFT Michigan* has no relevance to the examination of the constitutionality of PA 300.

AFT asserts that the constitutional infirmities found by the Court of Appeals in *AFT Michigan* regarding section 43e of 2010 PA 75 “have not been repaired.” (AFT Br, p 30.) Not only is that decision pending review in this Court, it is quite different from this case in several material respects and does not, in any event, support AFT’s assertion that PA 300 is unconstitutional.

A. The retiree health care provision being challenged is materially different from that at issue in 2010 PA 75.

As an initial matter, AFT is incorrect that PA 300 “concedes the validity” of *AFT Michigan* because it “eliminates the mandatory nature of the 3% contribution and allows individuals to opt out of post employment retiree health care completely.” (AFT Br, p 18.) The Legislature’s action in that regard—and whatever its motivation—does not signal a concession that the retiree health care contributions remitted under 2010 PA 75 are unconstitutional. Nevertheless, AFT’s attempt to liken the voluntary retiree contributions at issue to the mandatory contributions examined by the Court of Appeals in *AFT Michigan* is misguided because the respective statutes operate in fundamentally different ways.

B. Under PA 300, participation in the retiree health care plan is voluntary.

As discussed, the fact that members elect whether to participate in—and contribute to—the retiree health care plan negates any collateral attacks as to the terms or conditions of that plan. Moreover, members were given from September 4,

2012, until January 9, 2013, a total of *127 days*, to decide whether to opt out of making the 3% contribution. See MCL 38.1391a(5). Simply put, any member who felt that participating in the retiree health care plan would not be personally advantageous was free to opt out, and had plenty of time to do so.

C. Under PA 300, members receive the value of their own contributions.

Despite its acknowledgment that PA 300 “eliminates the mandatory nature of the 3% contribution and allows individuals to opt out of post employment retiree health care completely,” AFT suggests that the retiree health plan itself is unconstitutional because it lacks “certainty” that participating members will receive retiree health care. (AFT Br, p 18.) Although the Retirement Act does not guarantee retiree health care, section 91 of PA 300 *requires* the Retirement System to pay the premium subsidies provided therein. In other words, it is certain that they will receive either health care or a refund of their contributions. And in any event, the absence of absolute certainty as to an investment in future health care does not render it unconstitutional. Regardless, members are given the option of contributing to and participating in the retiree health care plan. Members who, for whatever reason, were uncomfortable with any risk of a change to the retiree health care plan were free to opt out of the 3% contribution.

D. PA 300 does not violate substantive due process.

Furthermore, contrary to AFT’s suggestion, the provision for a refund of contributions to members who elect to participate but who do not meet the

eligibility criteria for receiving retiree health care does not violate the members' "right to substantive due process." (AFT Br, pp 20-21.) AFT fails to explain, let alone brief, its conclusory statement that PA 300 allegedly violates substantive due process. Failure to brief an issue on appeal constitutes abandonment of the question. *Mitcham v Detroit*, 355 Mich 182; 94 NW2d 388 (1959); *Owendale-Gagetown School District v State Board of Education*, 413 Mich. 1, 11; 317 NW2d 529, 532 (1982). Nevertheless, and for the sake of completeness, it bears emphasizing that AFT's substantive-due-process claim is without merit.

Under the Due Process Clauses of both the United States and Michigan Constitutions, no one may be deprived of property without due process of law. US Const, Am XIV; Const 1963, art 1, § 17. The underlying purpose of substantive due process is to secure the individual from the arbitrary exercise of governmental power. *Electronic Data Systems Corp v Township of Flint*, 253 Mich App 538, 549; 656 NW2d (2002). The test for substantive due process is whether the law is rationally related to a legitimate governmental purpose. *Id.* Given the Legislature's unquestioned power where, as here, a statute involves neither a suspect classification nor a deprivation of a fundamental right, the standard is whether the legislation bears a reasonable relation to a permissible legislative objective. *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 404; 738 NW2d (2007).

To prevail under this highly deferential standard of review, AFT would need to show that PA 300 is arbitrary and wholly unrelated in a rational way to the objective of the statute. *The Cadle Co v City of Kentwood*, 285 Mich App 240, 256;

776 NW2d 145 (2009). Rational-basis review does not test the wisdom, need, or appropriateness of the legislation, or even whether it results in some inequity when put into practice. Instead, the statute is presumed constitutional, and the party challenging it bears a heavy burden of rebutting that presumption. *Id.*

In *AFT Michigan*, the Court of Appeals held that the retiree health care contribution set forth in section 43e of 2010 PA 75 violated substantive due process because members were being “compelled” to make “mandatory contributions” that were used to pay for the health care of already-retired public school employees. *AFT Michigan*, 297 Mich App at 607. But in this case, those concerns no longer exist because the 3% contribution required by section 43e of PA 300 is now entirely voluntary. On this basis alone the due-process claim must fail as there is no “mandatory” or “compelled” “deprivation” of property.

Further, the contributions under section 43e of PA 300 will be used to “prefund” future retiree health care costs. MCL 38.1341(2); see also MCL 38.2731. And, as discussed, all members who voluntarily choose to contribute will now receive the value of his or her contributions, either in the form of subsidized health care coverage or a refund of contributions. See MCL 38.1391a(8). Consequently, the members are not being “deprived” of property.

It bears mentioning that the Court of Appeals in *AFT Michigan* recognized that it is “self-evident” that “it is only fair for those who receive a health care benefit to help pay for it.” *AFT Michigan*, 297 Mich App at 607-608. What the Court of Appeals perceived to be “unfair” was that the contributing members were

being compelled to pay, not for their own health care benefits, but for the health care benefits of retired members. In other words, while the retiree health care contributions provided under section 43e of 2010 PA 75 furthered a permissible legislative objective, the Court of Appeals concluded that the contribution provision was arbitrary and did not bear a reasonable relation to that objective.

Here, PA 300 furthers that same permissible legislative objective, i.e., requiring those who will receive retiree health care benefits to help pay for it. And since the contributions are now entirely voluntary and will be used to fund the contributing members' *own* retiree health care (or be refunded to the contributing members or his or her beneficiaries), PA 300 cures any perceived "unfairness," is not arbitrary, and bears a reasonable relation to that objective.

III. AFT's breach-of-contract claim is without merit since members have no contractual right to the future accrual of pension benefits, including accruing them under a 1.5% pension multiplier.

"A party claiming a breach of contract must establish by a preponderance of the evidence (1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach." *Miller-Davis Co v Ahrens Const, Inc (On Remand)*, 296 Mich App 56, 71; 817 NW2d 609 (2012). A valid contract has five elements: "(1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Calhoun Co v Blue Cross & Blue Shield of Mich*, 297 Mich App 1, 13; 824 NW2d 202 (2012). Here, the Court of Appeals properly determined that AFT's breach-of-contract claim fails because

AFT cannot establish that members of the Retirement System had a valid contract to accrue future pension benefits or to accrue those future benefits under a 1.5% pension multiplier.

A. The retirement handbooks and brochures do not—and cannot—create a contract.

In support of the breach-of-contract claim, AFT relies heavily on alleged promises made in handbooks and brochures that were published by the Office of Retirement Services (the division of the Department of Technology, Management, and Budget that administers the Retirement System) and provided to members of the Retirement System. According to AFT, these publications created a contract in regard to the terms of members' pensions. (AFT Br, pp 21-24.) But AFT's reliance on the handbooks and brochures is misplaced.

As an initial matter, public school employees' retirement benefits are governed exclusively by the provisions of the Retirement Act. Importantly, nothing in the Retirement Act confers upon the Office of Retirement Services the power to bind the State, impliedly or expressly, to a contract for any retirement benefits, let alone retirement benefits that differ from those specifically set forth in the Retirement Act itself.

“Public officers have and can exercise only such powers as are conferred on them by law, and a State is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or the Constitution.”

Roxborough v Michigan Unemployment Compensation Commission, 309 Mich 505,

510; 15 NW2d 724 (1944) (quotation marks and citation omitted). And members of the Retirement System are charged with knowledge of the limited authority of the agents producing the handbooks and brochures, and they proceeded at their own peril in relying exclusively upon the information contained in those handbooks and brochures. *Id.* at 511. Consequently, AFT's breach-of-contract claim fails as a matter of law because no entity or individual in the Office of Retirement Services is authorized to contract with Retirement System members as to any benefits payable under the Retirement Act.

AFT argues that an employer may create a unilateral contract by issuing promises in handbooks and brochures. (AFT Br, pp 28-30.) But the State was not the employer of the members of the Retirement System. Contrary to AFT's argument (AFT Br, p 28), any offer of employment is made by a local school district, not the State. Consequently, the State could not have created a unilateral employment contract with members.

That said, even if the State, through its Office of Retirement Services (or any other state agent), were authorized to make enforceable "promises" regarding the accrual and payment of not-yet-earned pension payments, the aforementioned brochures and booklets contain no such promises. Courts should review handbook provisions in their contexts. *Lytte v Malady (On Rehearing)*, 458 Mich 153, 171 n 17; 579 NW2d 906 (1998). Language that "demonstrates that the [employer] did not intend to be bound to any provision contained in the handbook," renders the provisions therein unenforceable under principles of contract. *Heurtebise v Reliable*

Business Computers, 452 Mich 405, 414; 550 NW2d 243 (1996). Where such disclaiming language exists, a plaintiff cannot claim to have had a legitimate expectation that a contractual obligation was established. See *Lytle*, 458 Mich at 170-171; accord, *Witmer v Acument Global Technologies, Inc*, 694 F3d 774, 775 (CA 6 2012) (“Because the company expressly reserved the right to modify or terminate benefits, we agree with the district court that no such promise was made.”).

Here, AFT selectively quotes language from several handbooks and brochures that state that the pension benefit is based on a 1.5% multiplier. (AFT Br, pp 22-23.) Importantly, however, none of the booklets purport to describe the multiplier as being inalterable. Nor do the booklets guarantee that members will accrue pension benefits in the future under the same terms and conditions that applied in the past. To the contrary, as the Court of Appeals recognized, all of the publications provided by AFT also contain specific, disclaiming language that expressly and unambiguously states that the benefit information provided is governed by the Retirement Act and is subject to change:

[This booklet] is designed to answer commonly asked questions in a simple and easy to understand style. However, information in this booklet is not a substitute for the law. If differences of interpretation occur, the law governs. *The law may change at any time altering information in this booklet.* [AFT Exhibit 1, p 3 (emphasis added).]

Remember, this book is a summary of the main features of the plan and not a complete description. The operation of the plan is controlled by the Michigan Public School Employees Retirement Act (Public Act 300 of 1980, as amended). *If the provisions of the Act conflict with this summary, the Act controls.* [AFT Exhibit 2, p 3 (emphasis added).]

The intent of this publication is to summarize basic plan provisions under Michigan's Public Act 300 of 1980, as amended. *Current laws, rates, and factors are subject to change.* Should there be discrepancies between this publication and the actual law, the provisions of the law govern. [AFT Exhibits 3 and 4 (emphasis added).]

Therefore, in context, members of the Retirement System were unambiguously informed that the Retirement Act, not the handbooks and brochures, established the terms of their pension. Such language clearly demonstrates that the retirement plan terms were subject to change and that the Retirement System did not intend to be bound to any provision contained in the handbooks or brochures. Consequently, those handbooks and brochures did not establish a contract, and could not have even instilled a legitimate expectation that a contractual obligation existed. Therefore, while members may have had an expectancy that the pre-PA 300 provisions of the Retirement Act would continue, they also assumed the risk that those provisions would change:

Like all other citizens who make their arrangements in reliance upon the continued existence of the laws as they are, he takes upon himself the risk of their being changed, and the State incurs no responsibility in consequence of the change proving injurious to his private interests. [*East Saginaw Mfg Co v City of East Saginaw*, 19 Mich 259 (1869).]

Since the brochures are merely an expression of policy, and not a contract, any perceived injury to Retirement System members' private interests resulting from a legislative change to the legislatively-enacted retirement plan, particularly as it relates to the *future* accrual of pension benefits, is a consequence for which the Retirement System bears no responsibility.

B. The Michigan Constitution does not create a contract.

AFT contends that “[s]ince the adoption of the 1963 Constitution, the law has recognized that public pensions are contractual obligations and not mere gratuities” (AFT Br, 24). In particular, AFT cites article 9, § 24, of the Constitution, which states:

The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby. [Emphasis added.]

In *Studier v Michigan Public School Employees' Retirement Board*, 472 Mich 642; 698 NW2d 350 (2005), this Court interpreted the phrase “accrued financial benefits” according to the plain meaning of the words at the time the constitution was ratified. Ultimately, the Court concluded that “the ratifiers would have commonly understood the phrase ‘accrued financial benefits’ to be one of limitation that would restrict the scope of protection provided by art 9, § 24 to monetary payments *for past services*” performed as a member of the Retirement System established by the Retirement Act. *Id.* at 657-658 (emphasis added).

The conclusion that the benefits protected are those related to past service, and not future service, is consistent with this Court’s opinion in *Advisory Opinion re Constitutionality of 1972 PA 258*, 389 Mich 659; 209 NW2d 200 (1973), where the Court addressed whether a mandatory increase in public school employees’ future pension contributions, without an increase in benefits, resulted in a violation of article 9, § 24. The Court opined that “the legislature cannot diminish or impair accrued financial benefits, but we think *it may properly attach new conditions for*

earning financial benefits which have not yet accrued.” *Id.* at 663 (emphasis added); see also *Kosa v Treasurer*, 408 Mich 356, 370-371; 292 NW2d 452 (1980); *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 311; 806 NW2d 683 (2011) (“The obvious intent of § 24, however, was to ensure that public pensions be treated as contractual obligations that, *once earned*, could not be diminished.”) (emphasis added); *Seitz v Probate Judges Retirement System*, 189 Mich App 445, 455–456; 474 NW2d 125 (1991) (“[W]hile the Legislature may change public pension plans from time to time, including adding restrictions on benefits, the state may not reduce the pension benefit of any state employee or official, or local employee or official, once a pension right has been granted.”).

As intended by the ratifiers, the “accrued financial benefits” that are entitled to constitutional protection, and that may not be diminished, are those payments related to past service. Therefore, as the Court of Appeals properly recognized, it is constitutionally permissible for the Legislature to impose new conditions on benefit payments related to future service. *AFT*, 303 Mich App at 667 (App 80a).

Here, PA 300 potentially impacted only pension benefits for *future* service (i.e., those benefits based on “credited service” earned after the February 1, 2013 transition date), while leaving intact all pension benefits attributable to work performed prior to the transition date. Pension benefits for such future service are not an “accrued financial benefit.” Since the pension benefits potentially impacted by PA 300 are not accrued financial benefits, they are not subject to the protections of article 9, § 24.

CONCLUSION AND RELIEF REQUESTED

Members of the Retirement System have no contractual right to future pension benefits or a 1.5% multiplier for such benefits. And, since the retiree health care contribution is now entirely voluntary, and the voluntary contributions will be used to prefund a contributing member's own benefits or will be refunded to the member, with interest, PA 300 does not result in a "taking" of property without just compensation or violate due process.

AFT asks this Court to ignore decades of established law and create an entirely new rule of law that says public school employees have an inalterable right to future retirement benefits under terms and conditions that are equal to or greater than those that existed upon their hire. This Court should, instead, find that PA 300 is constitutional because it relates to a permissible objective and does not affect, let alone impair, any vested rights.

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