

**IN THE MICHIGAN SUPREME COURT**

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

Plaintiffs-Appellants,

v.

**STATE OF MICHIGAN**

Defendant-Appellee.

Supreme Court. No. 148478

Court of Appeals No. 313960  
Court of Claims No. 12-104-MM

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**BRIEF OF *AMICUS CURIAE*  
THE JUDICIAL EDUCATION PROJECT  
IN SUPPORT OF THE STATE OF MICHIGAN**

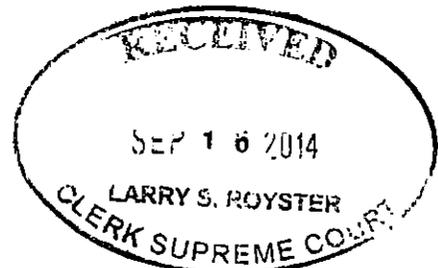
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**QUESTIONS PRESENTED FOR REVIEW**

- 1. Whether the voluntary retiree health program established by PA 300 violates the Takings Clause.**

*Amicus Curiae* JEP answers: No.

- 2. Whether PA 300 violates employees' rights of substantive due process.**

*Amicus Curiae* JEP answers: No.

- 3. Whether employees have a contractual right to accrue future pension benefits based on an old pension formula contained in an informational brochure with an express disclaimer that benefits could be changed at any time.**

*Amicus Curiae* JEP answers: No.

**STATEMENT OF INTEREST OF *AMICUS CURIAE*  
THE JUDICIAL EDUCATION PROJECT**

*Amicus Curiae* the Judicial Education Project (“JEP”) is dedicated to strengthening liberty and justice by defending the Constitution as envisioned by its Framers, which creates a federal government of defined and limited powers, respects federalism by protecting state and local communities’ rights of self-governance, and is supported by a fair and impartial judiciary dedicated to the rule of law. JEP educates citizens about these constitutional principles and focuses on issues such as judges’ role in our democracy, how they construe the federal and state constitutions, and the impact of the federal and state judiciaries on our Nation.

This case presents state and federal constitutional challenges to 2012 PA 300, an important legislative reform of public-sector employment benefits to ensure the long-term fiscal health and sustainability of the State of Michigan. The constitutional questions presented are important and directly relevant to the institutional mission of JEP, which advocates for a proper understanding of constitutional provisions in accordance with their original meaning. JEP has participated as an *amicus curiae* in other cases involving similar constitutional challenges to major public-sector pension reforms. *See San Jose Police Officers Ass’n v. City of San Jose*, No. 1-12-CV-225926 (Santa Clara, CA Superior Ct.).

No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

## INTRODUCTION

In *Studier v. Mich. Pub. Sch. Emps. Ret. Bd.*, 472 Mich. 642; 698 N.W.2d 350 (2005), this Court held that retiree health benefits offered by statute to public employees generally are not entitled to contractual protection. The Court also confirmed that contractual protection does not extend to pension benefits that have not yet “accrued”—*i.e.*, that have not yet been earned, but will be earned based on future service. As the Court explained in *Studier*, public contractual obligations must be construed narrowly to preserve the sovereignty and democratic vitality of the State of Michigan, which must remain free to adjust its statutory commitments except where it has clearly and unequivocally expressed an intent to bind itself to a contract.

Plaintiffs press a series of creative arguments in an attempt to circumvent *Studier* and force the State to continue offering levels of retiree health and pension benefits that are fiscally unsustainable. First, they contend that the State’s new voluntary retiree healthcare program constitutes a Taking because, if participating employees do not ultimately qualify for retiree healthcare benefits, their contributions are refunded over too long a period of time and at an interest rate that is not high enough. Next, they contend that the new retiree healthcare program violates substantive due process because it is arbitrary and lacks any rational basis. And finally, they contend that the State is contractually bound to continue applying an old pension formula to calculate benefits that will accrue for future service. None of these arguments has merit, and, if successful, they will block the People’s elected representatives from adopting much-needed reforms that would result in savings of billions of taxpayer dollars.

## ARGUMENT

### I. PA 300'S CREATION OF A VOLUNTARY RETIREE HEALTH PROGRAM DOES NOT VIOLATE THE TAKINGS CLAUSE

Under the recently enacted PA 300, members of the Michigan Public School Employees' Retirement System (MPSERS) are given the choice to participate in a retiree health benefits program. If employees choose to participate, they must contribute three percent of their salary each year. If they choose not to participate, they pay nothing. Members who choose to participate but ultimately do not qualify for retiree health benefits (if, for example, they do not work for the requisite number of years), will receive a refund in the full amount of their contributions plus interest of 1.5 percent, paid out over five years, when they reach the age of 60.

Plaintiffs contend that this program violates the Takings Clauses of the state and federal constitutions because the interest rate on the refund is not high enough. According to them, the State will likely earn more than 1.5 percent interest on contributions it receives, and thus "[t]he refund, when ultimately made, provides the public school employee with a fraction of the actual interest that has accrued." Appellants' Br. at 8. Plaintiffs assert that employees continue to own their contributions even after they pay them to the government, and that employees are thus entitled to the "[i]nterest earned on [the] contributions" since they are "the owner[s] of the principal." *Id.* at 11. Based on that premise, Plaintiffs contend that the failure to provide a higher interest rate on the refund amounts to an unconstitutional Taking of employees' "private property . . . for public use, without just compensation." U.S. Const. amend. V; Mich. Const. Art. X, § 2. That argument is mistaken for no less than three reasons.

#### A. The Retiree Health Program Is Purely Voluntary

The retiree health program established by PA 300 does not violate the Takings Clause because the contributions and the terms of the refund are entirely voluntary. The most basic

element of a Takings claim is the *involuntary* deprivation of private property—the transfer of property must be “compelled.” *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992). “[W]here a property owner voluntarily participates in a regulated program, there can be no unconstitutional taking.” *Franklin Mem. Hosp. v. Harvey*, 575 F.3d 121, 129 (1st Cir. 2009). And “where a service provider voluntarily participates in a price-regulated program or activity, there is no legal compulsion . . . and thus there can be no taking.” *Garelick v. Sullivan*, 987 F.2d 913, 916 (2d Cir. 1993); *see also Kimball Laundry Co. v. United States*, 338 U.S. 1, 6 (1949) (“[A] transfer brought about by eminent domain is not a voluntary exchange.”); *United States v. Fox*, 94 U.S. 315, 320 (1877) (when “property cannot be acquired by voluntary arrangement with its owners, it may be taken *against their will* . . . in the exercise of [the] power of eminent domain”). The requirement of involuntary deprivation is especially salient where, as here, the government offers benefits in exchange for payment. As the Supreme Court has explained, the “voluntary” giving of property “in exchange for [] economic advantages” offered by the government “can hardly be called a taking.” *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984).

Here, the purely voluntary nature of employee contributions is fatal to plaintiffs’ Takings claim. Contrary to plaintiffs’ assertions, there is no “forced contribution” under PA 300, Appellants’ Br. at 11. Nothing is “taken” from anyone. Instead, employees pay into the program only if they freely choose to do so based on terms that are fully and fairly disclosed—including the terms of the refund they may receive if they ultimately do not qualify for coverage. If employees believe the interest rate of the refund is too low, or that the refund is not paid out quickly enough, they are free to opt out of the program altogether.

The cases cited by plaintiffs only confirm the point. For example, plaintiffs quote *Armstrong v. United States*, 364 U.S. 40, 49 (1960), for the proposition that the purpose of the

Takings Clause is to “bar [the] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” Appellants’ Br. at 11. That concern does not apply here because PA 300 does not “forc[e]” employees to do anything. Instead, it simply gives them the option to pay into a retiree health program based on terms that are purely voluntary, including the terms of the refund they may eventually receive.

Plaintiffs point to *Webb’s Fabulous Pharms v. Beckwith*, 449 U.S. 155, 160-61 (1980), which involved a Taking because the government confiscated interest that accrued on privately owned funds. But as the Supreme Court emphasized there, “[t]he principal sum deposited . . . plainly was private property, and was not the property of’ the government, noting that the government did not even “contend otherwise so far as the fund’s principal is concerned.” *Id.* Likewise, in *Phillips v. Wash. Legal Foundation*, 524 U.S. 156, 172 (1998), the Supreme Court held that interest earned on privately owned funds held in lawyer trust accounts could not be seized without just compensation because the interest was “the ‘private property’ of the owner of the principal.” And in *Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 235 (2003), the Court held that the government could not seize interest earned on privately owned “escrow deposits.” These cases simply stand for the proposition that the Takings Clause applies when the government seizes interest accrued on privately owned deposit accounts. As the Seventh Circuit has explained: “If you own an apple tree, you own the apples; and if you own a deposit account that pays interest, you own the interest, whether or not state law calls interest property.” *Cerajeski v. Zoeller*, 735 F.3d 577, 580 (7th Cir. 2013) (citations omitted).

In this case, there is no “deposit account” at all, much less one that is “own[ed]” by employees who have opted to participate in PA 300’s retiree health program. Once employees choose to pay into the program, the funds are owned by the State, and so is any interest that

accrues on it. Unlike the plaintiffs in *Webb's*, *Phillips*, and *Brown*, employees are not depositing their money into any discrete “account” over which they retain ownership. Instead, they are making voluntary payments to the State in exchange for the benefit of participating in a retiree health program, while agreeing to a refund on certain terms in the event they do not qualify for future benefits. The voluntary payments are thus nothing more than a “user fee” to participate in the program. And as the Supreme Court recently reaffirmed, “[i]t is beyond dispute that . . . user fees . . . are not takings.” *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013) (citation and internal quotation marks omitted); *see also, Archunde v. Public Employees Ret. Assn.*, No. CIV 07-484 BB/RLP, 2008 BL 203752 at \*4 (D.N.M. Sept. 10, 2008) (holding that *Brown* and *Phillips* are “inapposite” to employee retirement contributions because those cases “did not involve voluntary payments to the government,” and “did not involve a situation in which an individual paid a fee to the government in exchange for a benefit”).

**B. “Just Compensation” In Exchange For Employee Contributions Would Entail Nothing Other Than the State’s Adherence To The Terms Of PA 300**

Plaintiffs ignore not only the voluntary nature of employee contributions under PA 300, but also the valuable benefit that employees receive in exchange for their contributions—namely, the opportunity to participate in a program that may eventually entitle them to retiree health coverage. Indeed, the obvious value of this benefit explains why so many retirees have opted into the program despite the risk that they ultimately might not qualify for coverage. Under PA 300’s retiree-health program, the State is not simply offering to accept employees’ contributions and pay back them years later at a low interest rate—even though that would itself be perfectly constitutional as the functional equivalent of a low-risk, low-interest government bond. Instead, the State is allowing them to participate in a highly desirable retiree-health program. When employees decide to contribute, it is only because they *themselves* determine that participating in

the program is worth the cost, even factoring in the risk that they may never qualify for retiree benefits—a risk over which they have substantial control (by, for example, deciding whether they will work the requisite number of years).

Accordingly, even if PA 300 did involve a Taking, the only “just compensation” employees would be entitled to would be for the State to honor the terms of PA 300—namely, for the State to provide them with retiree benefits if they meet the eligibility requirements, or else to provide them with a refund at 1.5 percent interest. As plaintiffs point out, the measure of just compensation is “the property owner’s loss rather than the government’s gain.” Appellants’ Br. at 14 (quoting *Brown*, 538 U.S. at 236). Plaintiffs claim that employees who receive a refund at 1.5 percent interest will have “lost . . . the opportunity to invest [their] money at reasonable rates of return.” Appellants’ Br. at 14. But it would be more accurate to say that they have voluntarily *exchanged* that investment opportunity for the opportunity to participate in the retiree health program established by PA 300. If the State honors the terms of PA 300, then the employees have “lost” nothing. They have received exactly what they bargained for.

As Plaintiffs recognize, “just compensation must be calculated on the basis of the market value of [] property on the date of the taking.” *Michigan Dept. of Transp. v. Haggerty Corridor Partners Ltd.*, 473 Mich. 124, 136; 700 N.W.2d 380 (2005). Here, there is no need to speculate about the “market value” of employees’ contributions. The market value is exactly what the employees agreed to receive in exchange—namely, for the State to honor the express terms of PA 300.

### **C. PA 300 Imposes No Unconstitutional Condition**

Plaintiffs argue that giving employees the choice to participate in PA 300’s retiree health program violates the doctrine of “unconstitutional conditions,” because it “require[s]” them “to waive rights available under the Constitution as a condition of receipt of a state provided

benefit.” Appellants’ Br. at 15. That is incorrect. In fact, employees who freely choose to participate in PA 300 are not waiving their constitutional right to be protected against the *involuntary* deprivation of property. Instead they are making a *voluntary* payment to the State in order to participate in the State’s retiree health program.

Plaintiffs cite numerous cases standing for the proposition that “the government may not deny a benefit to a person because he exercises a constitutional right.” Appellants’ Br. at 17 (quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 40, 545 (1983)). But that principle is inapposite here, where plaintiffs are not being deprived of any benefit for “exercis[ing] a constitutional right.” As pointed out in the very language plaintiffs quote, the purpose of the unconstitutional-conditions doctrine is to “vindicate[] the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.” *Id.* (quoting *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013)). For example, the Supreme Court has recognized that withholding government benefits on account of protected speech may have a “deterrent, or ‘chilling,’ effect” on “the exercise of First Amendment rights.” *Id.* (quoting *Laird v. Tatum*, 408 U.S. 1, 11 (1972)). The Court has also recognized that imposing restrictions on a property owner’s use of land unless the property owner surrenders a portion of his property rights can “impermissibly burden the right not to have property taken without just compensation.” *Koontz*, 133 S.Ct. at 2596.

Here, by contrast, giving employees the option to participate in PA 300’s retiree health program does not impose any pressure on them to surrender their property rights. Unlike in *Koontz*, where the state imposed involuntary land-use restrictions that it would lift only if the plaintiffs surrendered a portion of their property rights, here the State is not imposing any involuntary restrictions on employees’ property whatsoever. On the contrary, participation in PA

300's retiree health program is purely voluntary. If employees opt out, the State will not impose any burden on their property rights whatsoever.

## **II. PA 300 DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS**

Plaintiffs argue that the retiree health program established by PA 300 violates employees' rights of "substantive due process" under both the Michigan and the Federal constitutions.<sup>1</sup> That is incorrect. PA 300 does not violate substantive due process because it neither infringes on any fundamental right nor is arbitrary. On the contrary, giving employees the choice to participate in a voluntary retiree health program partially funded by the employees is entirely rational.

### **A. PA 300 Is Not Arbitrary**

Both the United States Supreme Court and this Court have made clear that plaintiffs who bring substantive-due-process claims face a high bar. The challenged law is entitled to a "presumption of constitutionality," which it is the plaintiff's burden to overcome. *Bonner v. City of Brighton*, 495 Mich. 209, 234; 848 N.W.2d 380 (2014). Moreover, where no "fundamental" right is at stake, the State must show "no more than a reasonable relationship between the governmental purpose and the means chosen to advance that purpose." *Id.* at 230. Plaintiffs here do not, and could not, contend that PA 300 infringes on any fundamental right. Accordingly, this Court's task is simply to "determine 'whether the legislation bears a reasonable relation to a permissible legislative objective.'" *Phillips v. Mirac, Inc.*, 470 Mich. 415, 436; 685 N.W.2d 174 (2004) (quoting *Detroit v. Quails*, 434 Mich 340, 366-367 n. 49; 454 N.W.2d 374 (1990)). This type of "[r]ational-basis review" is the most deferential form of constitutional

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<sup>1</sup> The Fourteenth Amendment of the United States Constitution provides that no State may "deprive any person of life, liberty, or property, without due process of law." Similarly, the Michigan Constitution of 1963, art. 1, § 17, provides that "No person shall be . . . deprived of life, liberty or property, without due process of law." This Court has interpreted these provisions to be generally "coextensive." *People v. Sierb*, 456 Mich. 519, 523 (1998).

scrutiny. *Crego v. Coleman*, 463 Mich. 248, 260; 615 N.W.2d 218 (2000). It “does not test the wisdom, need, or appropriateness of the legislation, . . . or even whether it results in some inequity when put into practice.” *Id.* Instead, “[t]he underlying purpose of substantive due process is to secure the individual from the *arbitrary* exercise of governmental power.” *People v. Sierb*, 456 Mich. 519, 523; 581 N.W.2d 219 (1998) (emphasis added).

The retiree health program established by PA 300 is far from arbitrary. It simply requires employees who participate in the program to help cover some of the program’s costs. Moreover, employees who choose to contribute, but ultimately do not qualify for benefits, will receive a full refund when they reach retirement age, plus an agreed-upon interest rate, paid out over an agreed-upon set of installments. This is an entirely fair and rational way of providing retiree health benefits. Moreover, the contribution requirement will result in considerable savings for the State, which is directly related to its legitimate interest in fiscal discipline. *See, e.g., McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 50 (1990) (“States have a legitimate interest in sound fiscal planning”). Regardless of whether PA 300 represents the best or wisest policy choice, it is plainly not unconstitutionally arbitrary.

#### **B. Plaintiffs’ Contrary Arguments Lack Merit**

In support of their substantive-due-process argument, Plaintiffs rely entirely on *AFT Mich. v. State*, 297 Mich. App. 597, 621-27; 825 N.W.2d 595 (Mich. Ct. App. 2012), which is not binding on this Court, wrongly decided, and in any event distinguishable.

In *AFT Michigan*, the Court of Appeals struck down a previous version of PA 300 that made participation in the State’s retiree health program mandatory, and “compelled contributions” from active employees to fund the program on an ongoing basis. *Id.* at 622. The court reasoned that the law was arbitrary because “mandatory contributions imposed on current public school employees do not go to fund their *own* retirement benefits but, instead, to pay for

retiree health care for already-retired public school employees.” *Id.* (emphasis added). The Court further noted that, under *Studier*, “the state has no contractual obligation to provide present state employees with [future retiree health] benefits,” which means that employees forced to make contributions have “no promise at all” that they will receive future health benefits in return.

*AFT Michigan*, 297 Mich. App. at 624. The Court then stated:

We cannot envision a court approving as constitutional a statute that requires certain individuals to turn a portion of their wages over to the government in return for a ‘promise’ that the government will return the monies, with interest, in 20 years when the government retains the unilateral right to ‘cancel’ the ‘promise’ at any time and does not even agree that, if they do so, the monies taken will be returned.

*Id.* at 625. Amazingly enough, what the court of appeals could not envision being upheld is Social Security, which has been upheld. For decades, that leading federal program has required employees nationwide to make contributions to fund a retiree-benefit program on an ongoing basis, without providing any contractual right to future benefits in return. *See Flemming v. Nestor*, 363 U.S. 603, 611 (1960) (holding that Social Security benefits are not contractual).

As the Supreme Court explained in *Nestor*, the proper constitutional question is not whether mandatory contributions into a retiree-benefit program are *unfair* or *unwise*, but only whether they are *minimally rational*. “[T]he Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.” *Id.* Under that deferential test, a public employer may readily require its employees to pay into a retiree-health program from which they may eventually benefit. To be sure, some individual contributors may never benefit, some may benefit less than they contribute, and some may benefit more. But such an imperfect distribution of burdens and benefits among the group of contributors is an inherent feature of *any* social-insurance scheme, and rational-basis review does not require the “fit” to be perfect. On the contrary, “courts are compelled under

rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller v. Doe*, 509 U.S. 312, 321 (1993).

In any event, even if the Court of Appeals were correct to strike down the *mandatory* retiree-benefit program at issue in *AFT Michigan*, the new program established under PA 300 must be upheld because it is entirely voluntary, as the court below recognized. Because employees are free to choose whether to participate, the program cannot possibly violate substantive due process. Plaintiffs advance three contrary arguments, but none has merit.

*First*, Plaintiffs contend that the program is not entirely voluntary because employees have a "single, time limited, opportunity" to opt out, and thus some employees are continuing to pay into the program solely "because they did not act in time." Appellants' Br. at 19. Plaintiffs cite no authority for their remarkable claim that an employee's failure to opt out of a program in a timely manner somehow renders it involuntary. Employees have a free choice and a fair opportunity to opt out, *see* MCL 38.1391a(5), and if they choose not to then the decision to participate is fairly attributable to them.

*Second*, Plaintiffs claim that even a voluntary retiree health program violates substantive due process if the benefits are not contractually guaranteed. Appellants' Br. at 19-20. But the Supreme Court has upheld even *mandatory* participation in retiree-benefit programs where benefits are not contractually guaranteed. *See Nestor*, 363 U.S. at 611. Appellants argue that the program seeks to "have it both ways" because "participation is voluntary" but "there is no contract created." Appellants' Br. at 21. In fact those two features are perfectly consistent: Employees are given the choice to participate in a retiree-benefit program that they know is subject to change as the public need may dictate. It is up to them to decide whether the prospective benefits are worth the risk. Giving them this choice is hardly arbitrary.

Finally, Plaintiffs seem to contend that PA 300's refund provision is unconstitutionally arbitrary because the interest rate on the refund is not high enough. *Id.* at 20-21. This is just a reprise of their meritless Takings argument, re-packaged under the heading of substantive due process. But Plaintiffs cannot properly use substantive due process as a vague catch-all to remedy defects in their other constitutional arguments. "Where a particular [constitutional provision] 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that [provision], not the more generalized notion of 'substantive due process,' must be the guide for analyzing [Appellants'] claims.'" *Albright v. Oliver*, 510 U.S. 266 273 (1994) (four-Justice plurality op.) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)); *see also id.* at 281 (Kennedy, J., concurring in judgment) (agreeing on this point).

### **III. EMPLOYEES HAVE NO CONTRACTUAL RIGHT TO ACCRUE FUTURE PENSION BENEFITS BASED ON AN OLD PENSION FORMULA**

As both parties have explained, pensions for public-school employees in Michigan are calculated based on a formula that takes into account an employee's years of service, his or her final average annual compensation, and a particular "pension multiplier." Until PA 300 was enacted, the pension multiplier was 1.5 percent. PA 300 has no effect on that multiplier for years of service that employees have already accrued. But for future years of service, employees must make another choice: they can either (a) begin paying 4 percent of their salary and retain a pension multiplier of 1.5 percent; or (b) pay nothing and have the pension multiplier reduced to 1.25 percent for future years.

Plaintiffs argue that employees have a perpetual contractual right to retain a pension multiplier of 1.5 percent, even for years of service they have not yet accrued. Plaintiffs invoke (a) the Pensions Clause of the Michigan Constitution, art. IX, § 24, which affords contractual protection to "accrued" pension benefits, and (b) various promises purportedly made by the State

in brochures distributed over the years to explain the old pension formula. Neither argument has merit.

**A. The Pensions Clause Does Not Protect Benefits That Have Not Yet Accrued**

The Pensions Clause of the Michigan Constitution provides as follows:

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.

Mich. Const. art. IX, § 24. The question presented here is whether pension benefits based on *future* service qualify as “accrued” benefits entitled to contractual protection under the Pensions Clause. The answer is clearly no.

In *Studier*, this Court held that “‘accrued’ financial benefits consist only of those ‘[f]inancial benefits arising on account of service rendered in each fiscal year.’” 472 Mich. at 655. Based on that holding, pension benefits that will arise on account of service rendered in *future* years cannot be considered “accrued” benefits. If an employee has not yet worked in a given year, is impossible for any pension benefits to have “aris[en] on account of service rendered in [that] year.” *Id.* Accordingly, pension benefits for future years of service, including the pension multiplier that will be used to calculate the amount of benefits “arising on account of service” in those years, are not “accrued” benefits. Indeed, to confer contractual status on pension benefits that will accrue in *future* years would be to read out of the Constitution the explicit textual limitation that only “accrued” benefits are entitled to contractual protection.

The same conclusion follows from this Court’s statement in *Studier* that pension benefits do not “accrue” until they “become a present and enforceable right or demand.” *Id.* at 653-54

(quoting Random House American College Dictionary (1964) at p. 9). Pension benefits that will arise based on *future* years of service plainly do not yet have the status of “a *present* and enforceable right or demand” (emphasis added). If an employee stops working, he will never have any “enforceable right or demand” to pension benefits for work performed in future years.

Appellants themselves tacitly concede that the pension multiplier for future years of service is not entitled to contractual protection under the Pensions Clause. Appellants write that “[p]ension benefits which have already accrued are, unquestionably, contractual. But promises were *also* repeatedly made regarding a future benefit.” Appellants’ Br. at 25 (emphasis added). The real thrust of Appellants’ argument, then, is not that the pension multiplier for future years of service is entitled to constitutional protection under the Pensions Clause, but rather that it is entitled to contractual protection because of contractual “promises” purportedly made to employees in employee-benefit literature. We now address that argument.

**B. Appellants Have No Contractual Right to Future Pension Benefits Without “Clear and Unequivocal Language Showing An Intent to Contract”**

In *Studier*, this Court reaffirmed the principle that governmental bodies are not contractually bound to provide benefits unless they have unmistakably promised to do so through “clear and unequivocal language.” 472 Mich. at 655. This principle recognizes that “the ability of elected representatives to act on behalf of the people through the exercise of their power to enact, amend, or repeal legislation” is “[o]f primary importance to the viability of our republican system of government.” *Id.* at 660. For that reason, “surrenders of legislative power are subject to strict limitations that have developed in order to protect the sovereign prerogatives of state governments.” *Id.* at 661 (citing *United States v. Winstar Corp.*, 518 U.S. 839, 874-75 (1996) (opinion of Souter, J.)). “Indeed, ‘[t]he continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to

accomplish the ends of its creation.” *Id.* at 662 (quoting *Keefe v. Clark*, 322 U.S. 393, 397 (1944)). Accordingly, there is a “strong presumption” that government benefits are not “contractual rights” that must be continued indefinitely into the future. *Id.* at 661.<sup>2</sup>

Here, that “strong presumption” is dispositive. Plaintiffs point to four informational brochures that informed employees of the basic terms of the pension plan in place prior to PA 300. But none of the brochures contained anything resembling a promise of how the State would calculate benefits to be accrued in *future* years. Much less did they contain the type of “clear and unequivocal” promise necessary to create a binding contractual right against the government. *Studier*, 472 Mich. at 655. In fact, each and every one of the brochures cited contained an express disclaimer stating that future benefits were subject to change by the legislature.

Appellants do not cite any case, in Michigan or anywhere else, where any court has found a contractual right to government benefits based on informational brochures like the ones at issue here. Instead they cite cases involving *private* parties, whose contractual obligations can be created by mere “implication.” See Appellants Br. at 29 (quoting *Rood v. General Dynamics Corp.*, 444 Mich. 107, 117 n.17; 507 N.W.2d 591 (1993)); *id.* at 31 (quoting *Rood*, 444 Mich. at 119). Such cases are inapposite here, where the alleged contract involves the State, which cannot

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<sup>2</sup> The strong presumption against government contracts applies regardless of whether the contract is alleged to arise from legislative or executive action. See *Winstar Corp.*, 518 U.S. at 872-76 (opinion of Souter, J.) (discussing limited power of “a legislature, under certain circumstances, to place effective limits on its successors, or to authorize executive action resulting in such a limitation”); *id.* at 921 (opinion of Scalia, J.) (broadly stating the presumption that “*Governments* do not ordinarily agree to curtail their sovereign or legislative powers, and contracts must be interpreted in a commonsense way against that background understanding.” (emphasis added)). Although *Winstar* itself involved contractual rights allegedly created by a federal statute, its concerns about tying the hands of future legislatures are vastly heightened when the contractual right is alleged to have arisen from unilateral, informal, possibly unauthorized executive action. If the Michigan legislature itself cannot lightly bind future legislatures, then neither can the Michigan Governor, much less the low-level functionaries who published the employee-benefit brochures that Plaintiffs seek to put at issue.

be “disarmed of [its] powers” and bound to a contract by mere “implications and presumptions.”  
*Studier*, 472 Mich. at 662.

While Plaintiffs allege the existence of a contractual promise based on four informational booklets, none of them contains anything resembling a “clear and unequivocal” promise to maintain the same pension formula for benefits that have not yet accrued. The booklet Plaintiffs rely on most heavily is a publication from 1990, which, by Plaintiffs’ own description, was “an effort to explain the retirement plan” to employees. Appellants’ Br. at 22. To illustrate the supposed “clarity” of the alleged contractual promise contained in the booklet, Plaintiffs point to the following language:

Your Retirement Plan provides a benefit that is determined by a formula. The formula is your final average salary times 1.5% (.015) times your total years of service credit.”

*Id.* at 31 (citing Appellants’ Exhibit 1, p. 7). This language simply gives an accurate description of the pension formula that was in place at that time. It does not say anything about whether that formula would be maintained to calculate benefits that had not yet accrued, as they arose on account of service in future years. Plaintiffs argue that there was a clear promise to maintain the pension formula because “[r]etirement is, by definition, paid at a point in the future.” *Id.* at 32. But this is a red herring: While it is obvious that retirement benefits will be paid in the future, it is *not* obvious that the formula will remain the same to determine the amount of benefits that will accrue based on future years of service—the question at issue here.

Finally, even if the language cited by Plaintiffs somehow *could* be read as a promise not to change the rules governing future accrual of benefits, the language is at the very least ambiguous. It is not a “clear and unequivocal” promise of future benefits, because it can be read (indeed, is most naturally read) as a mere “effort to explain the retirement plan” as it then existed. Appellants’ Br. at 22. Indeed, if this type of language were considered a “clear and

unequivocal” promise of future benefits, then public employers who merely described the terms of their pension plans would become bound to continue their terms in perpetuity.

The lack of a clear and unequivocal promise is even more glaring in light of the explicit disclaimers contained in each of the publication cited by Plaintiffs. For example, as they acknowledge, the disclaimer in the 1990 publication states: “[I]nformation in this booklet is not a substitute for the law. If differences in interpretation arise, the law governs. The law may change at any time altering information in this booklet.” *Id.* at 33 (citing Appellants’ Exhibit 1, p. 3). Plaintiffs argue that this and similar disclaimers are “inadequate” because they are “neither explicit nor clear.” *Id.* at 33. But this turns the presumption against public contractual obligations on its head. Under *Studier* and the venerable doctrine of unmistakability, it is Plaintiffs who bear the burden of demonstrating a contractual obligation based on a “clear and unequivocal” promise by the State. 472 Mich. at 655. The State does not bear the burden of showing that its disclaimers are clear. On the contrary, even if the disclaimers merely created ambiguity, that would be sufficient to defeat Plaintiffs’ claim of a contractual right.

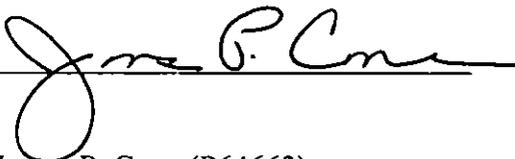
### CONCLUSION

At bottom, Plaintiffs’ arguments in this case are an attempted end-run around the explicit limitations of the Michigan Constitution as recognized in *Studier*. By limiting its contractual protection to “accrued financial benefits,” the Pensions Clause itself makes clear that there is no constitutional protection for either (1) non-“accrued” pension benefits or (2) non-“financial” benefits like the retiree health benefits at issue here. Plaintiffs should not be allowed to circumvent these limits based on contrived Takings and substantive-due-process theories, or based on the flimsy evidence of contractual promises supposedly contained not even in statutes, but in pamphlets with express disclaimers.

For the foregoing reasons, the Court should affirm the decision below.

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Respectfully submitted,

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## PROOF OF SERVICE

The undersigned hereby certifies that on September 17, 2014, two true and correct copies of the foregoing *Brief of Amicus Curiae The Judicial Education Project In Support of the State of Michigan* was served via first-class mail on the following:

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