

STATE OF MICHIGAN
IN THE SUPREME COURT

AFT MICHIGAN, AFT, AFL-CIO, *et al.*,

Plaintiffs-Appellants,

vs.

STATE OF MICHIGAN,

Defendant-Appellee.

Supreme Court
Case No. 148748

Court of Appeals
Docket No. 313960

Court of Claims
Case No. 12-104-MM

Mark H. Cousens (P12273)
Attorney for Plaintiffs-Appellants
26261 Evergreen Road, Suite 110
Southfield, MI 48076
(248) 355-2150

Frank J. Monticello (P36693)
Joshua O. Booth (P53847)
Patrick Fitzgerald (P69964)
Attorneys for Defendant-Appellee
Department of Attorney General
State Operations Division
P.O. Box 30754
Lansing, MI 48909
(517) 627-3789

James A. White (P22252)
Kathleen Corkin Boyle (P27671)
Timothy J. Dlugos (P57179)
White, Schneider, Young & Chiodini, P.C.
Attorneys for *Amicus Curiae* MEA
2300 Jolly Oak Road
Okemos, MI 48864
(517) 349-7744

Michael M. Shoudy (P58870)
Co-counsel for *Amicus Curiae* MEA
1216 Kendale Boulevard
P.O. Box 2573
East Lansing, MI 48826-2573
(517) 337-6551

BRIEF OF AMICUS CURIAE
MICHIGAN EDUCATION ASSOCIATION

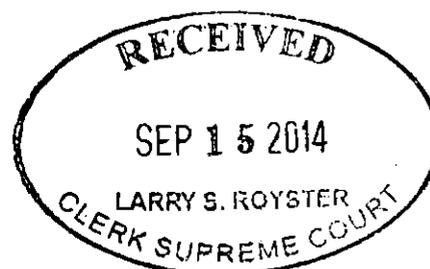


TABLE OF CONTENTS

	<u>PAGE</u>
Index of Authorities	iii
Michigan Education Association's Interest in Judgment/Order Appealed From.....	viii
Statement of Questions Presented	ix
Concise Statement of Material Proceedings and Facts	1
A. Pension changes.....	1
B. Changes to health benefits	2
Argument	
I. STANDARD OF REVIEW	6
II. THE 3% LEVY AGAINST THE EARNED WAGES FOR RETIREE HEALTH BENEFITS FOR PUBLIC SCHOOL EMPLOYEES IS AN UNCONSTITUTIONAL PHYSICAL TAKING IN VIOLATION OF ART 10, §2 OF MICH CONST 1963, AND UNITED STATES CONSTITUTION AMENDMENTS V AND XIV, AS WELL AS A VIOLATION OF SUBSTANTIVE DUE PROCESS PRINCIPLES ESTABLISHED BY THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION AND ART 1, §17 OF MICH CONST 1963	7
A. "Physical" and "regulatory" takings	8
B. Accrued salary, or earned compensation, is a protected property interest.....	10
C. Changes to Section 43e and the new Section 91a included within PA 300 do not resolve the constitutional violations	12
D. The pension and retiree health care changes imposed by PA 300 are in violation of substantive due process principles established by the Fourteenth Amendment of the U.S. Constitution and art 1, §17 of Mich Const 1963	19

III.	THE CHANGES TO PUBLIC SCHOOL EMPLOYEE PENSIONS THAT ARE ENACTED IN PA 300 VIOLATE ART 1, §10 OF MICH CONST 1963 AND ART I, §10 OF US CONST, AS WELL AS ART 9, §24 OF MICH CONST 1963.....	25
A.	The contractual nature of public employee pensions.....	25
B.	The amendments to the Retirement Act made by PA 300 are an unconstitutional impairment of MPSERS members' retirement contracts.....	30
C.	PA 300 violates Art 9, §24 of Mich Const 1963	37
	1. <i>The contributions required of MPSERS members by PA 300 will be used to pay unfunded accrued liability in violation of art 9, §24 of Mich Const 1963.....</i>	<i>37</i>
	2. <i>PA 300 results in the diminishment and impairment of MPSERS pensions.....</i>	<i>42</i>
D.	The changes to the payment for retiree health insurance premiums set forth in PA 300 violate art 9, §24 of Mich Const 1963.....	45
	1. <i>The changes to Section 91 of the Retirement Act regarding health benefits.....</i>	<i>45</i>
	2. <i>The violation of art 9, §24 of Mich Const 1963.....</i>	<i>47</i>
	Relief.....	48

INDEX OF AUTHORITIES

<u>CASES:</u>	<u>PAGE</u>
<i>AFT Michigan v State of Michigan</i> , 297 Mich App 597; 825 NW2d 595 (2012)	3, 4, 6, 10, 12, 16, 19, 20, 25, 46, 47
<i>Allen v City of Long Beach</i> , 25 Cal 2d 128; 287 P2d 765 (1955).....	30
<i>Associated Builders and Contractors v Wilbur</i> , 472 Mich 117; 693 NW2d 374 (2005)	6
<i>Association of Surrogates and Supreme Court Reporters Within the City of New York v City of New York</i> , 79 NY2d 39; 588 NE 2d 51 (1992)	15-16
<i>Association of Surrogates and Supreme Court Reporters Within the City of New York v City of New York</i> , 940 F2d 766 (2 nd Cir, 1991).....	16
<i>Bolt v City of Lansing</i> , 459 Mich 152 (1998)	15
<i>Campbell v Michigan Judges Retirement Bd</i> , 378 Mich 169; 143 NW2d 755 (1966)	26, 27, 28
<i>City of El Paso v Simmons</i> , 379 US 497; 85 S Ct 577; 13 L Ed 2d 446 (1965); <i>reh den</i> 380 US 926; 85 S Ct 879; 13 L Ed 2d 813 (1965)	31-32
<i>Connolly v Pension Benefit Guaranty Corp</i> , 475 US 211; 106 S Ct 1018; 89 L Ed 2d 166 (1986)	21
<i>Cryderman v City of Birmingham</i> , 171 Mich App 15; 429 NW2d 625 (1988).....	22
<i>Electro-Tech, Inc v H.F. Campbell Co</i> , 433 Mich 57; 445 NW2d 61 (1989).....	21-22
<i>Garnity v New Jersey</i> , 385 US 493; 87 S Ct 616; 17 L Ed 2d 562 (1967)	14
<i>Goldblatt v Town of Hempstead</i> , 369 US 590; 82 S Ct 987; 8 L Ed 2d 130 (1962)	22
<i>Hickey v Pittsburgh Pension Bd</i> , 378 Pa 300; 106 A2d 233 (1954).....	27, 28
<i>Home Building and Loan Ass'n v Blaisdell</i> , 290 US 398; 54 S Ct 231; 78 L Ed 413 (1934)	31, 32
<i>In re Pfiester</i> , 449 BR 422 (2011)	14

CASES:

PAGE

Kosa v State Treasurer, 408 Mich 356; 292 NW2d 452 (1980) 40, 41, 42

Kropf v Sterling Heights, 391 Mich 139; 215 NW2d 179 (1974) 22

Laya v Cebal Construction Co, 101 Mich App 26; 300 NW2d 439 (1980)..... 14

Loretto v Teleprompter Manhattan CATV Corp, 458 US 419; 102 S Ct 3164;
73 L Ed 2d 868 (1982) 8

Maiden v Rozwood, 461 Mich 109; 597 NW2d 817 (1999)..... 6

Marvel v Dannenman, 490 F Supp 170 (Del, 1980) 30

Meriden Trust & Safe Deposit Co v FDIC, 62 F3d 449 (CA 2, 1995)..... 9

Musselman v Engler, 448 Mich 503; 533 NW2d 237 (1995), (*On rehearing*)
450 Mich 574; 545 NW2d 346 (1996)..... 23, 37, 43, 45

Opinion of the Justices, 364 Mass 847; 303 NE2d 320 (1973)..... 30

Oregon State Police Officers Ass'n, et al. v State of Oregon, et al.,
323 Ore 356; 918 P2d 765 (1996) 28, 29

Pension Benefit Guaranty Corp v R.A. Gray & Co, 467 US 717; 104 S Ct 2709;
81 L Ed 2d 601 (1984) 21

Ramey v Michigan Public Service Comm'n, 296 Mich 449; 296 NW 323 (1941)..... 11

Sims v United States, 359 US 108; 79 S Ct 641; 3 L Ed 2d 667 (1959) 10

Singer v City Topeka, 227 Kan 356; 607 P2d 467 (1980) 30

State of Nevada Employees Ass'n v Keating, 903 F2d 1223 (1990),
cert den 498 US 999; 111 S Ct 558 (1990)..... 35, 36

Studier v MPSERS, 472 Mich 642; 698 NW2d 350 (2005)..... 12, 22, 23, 37, 42, 43, 47

Tahoe-Sierra Pres Council v Tahoe Reg'l Planning Agency, 535 US 302;
122 S Ct 1465; 152 L Ed 2d 517 (2002) 8, 9

United States v General Motors Corp, 323 US 373; 65 S Ct 357;
89 L Ed 2d 311 (1946) 8

CASES:

PAGE

United States v Vreeland, 684 F3d 653 (CA 6, 2012), *cert den*
133 S Ct 565 (2012) 14

United States Trust Co v New Jersey, 431 US 1; 97 S Ct 1505;
52 L Ed 2d 92 (1977), *reh den* 431 US 975;
97 S Ct 2942 (1977) 31, 32, 33, 34, 35, 36

Usery v Turner Elkhorn Mining Co, 428 US 1; 96 S Ct 2882;
49 L Ed 2d 752 (1976) 21

Village of Euclid v Ambler Realty Co, 272 US 365; 47 S Ct 114;
71 L Ed 303 (1926) 22

Webb's Fabulous Pharmacies, Inc v Beckwith, 449 US 155; 101 S Ct 446;
66 L Ed 2d 358 (1980) 10, 11, 16

STATUTES:

MCL 38.1343e 3, 4, 12

MCL 38.1359(2) 2

MCL 38.1359(3) 2

MCL 38.1384 17

MCL 38.1384(1) 1

MCL 38.1391(1) 2, 46

MCL 38.1391(4) 3, 46

MCL 38.1391(8) 2

MCL 38.1391a 47

MCL 38.1391a(1) 4

MCL 38.1391a(5) 5, 6

MCL 38.1391a(6) 4

MCL 38.1391a(8) 47

<u>STATUTES:</u>	<u>PAGE</u>
MCL 38.2731, <i>et seq</i>	9
MCL 38.2733	9
MCL 38.2733(2)	5
MCL 38.2734	9
MCL 38.2737	46
MCL 380.1, <i>et seq</i>	39
MCL 421.29(1)(a)	14

CONSTITUTIONAL PROVISIONS:

Mich Const 1963, art 1, §10	25
Mich Const 1963, art 1, §17	19, 25
Mich Const 1963, art 8, §2	38-39
Mich Const 1963, art 9, §24	26, 37, 39, 40, 41, 42, 43, 44, 47
Mich Const 1963, art 10, §2	7
US Const, art I, §10	25, 28, 29, 30, 31, 32, 36
US Const, Am V	7
US Const, Am X	32
US Const, Am XIV	7, 19

OTHER AUTHORITIES:

1974 PA 244	45
2007 PA 110	2
2010 PA 75	3, 12, 46
2010 PA 77	3, 5, 46

OTHER AUTHORITIES:

PAGE

2012 PA 300.....*passim*

Merriam-Webster's Collegiate Dictionary (Tenth Edition) 13

OAG, 1985-1986, No. 6294 (May 13, 1985)..... 44

Senate Bill No. 1040 of 2013.....viii

MICHIGAN EDUCATION ASSOCIATION'S INTEREST
IN JUDGMENT/ORDER APPEALED FROM

The Michigan Education Association (hereinafter "MEA") is a labor organization that represents education professionals and support personnel throughout Michigan, almost all of whom are members of the Michigan Public School Employees Retirement System ("MPSERS").

AFT Michigan, AFT, AFL-CIO, *et al.* (hereinafter "AFT Michigan") and the MEA each filed an action in the Court of Claims seeking a declaratory judgment, injunctive, monetary and other relief, and challenging the constitutionality of certain provisions of enrolled Senate Bill No. 1040 of 2012, which was signed into law as Public Act 300 of 2012 (PA 300).

On November 29, 2012, in a ruling issued from the bench, Court of Claims Judge Rosemarie Aquilina granted Defendant's Motion for Summary Disposition and dismissed all counts of Plaintiffs' Complaints. After timely appeal, the Court of Appeals issued an Order on January 14, 2014, affirming the dismissal by the Court of Claims.

Appellants AFT Michigan request this Court to: (a) reverse the Court of Appeals Opinion; (b) declare and hold that substantive provisions of 2012 PA 300 are illegal and unconstitutional and of no effect; and (c) further grant such other relief as justice and equity dictates. The MEA agrees.

STATEMENT OF QUESTIONS PRESENTED

- I. **DOES THE RETENTION OF THE VALUE OF INTEREST EARNED ON CONTRIBUTIONS REFUNDED TO PUBLIC SCHOOL EMPLOYEES WHO CONTRIBUTE TO THE SCHOOL EMPLOYEES RETIREMENT SYSTEM CONSTITUTE A TAKING WITHOUT JUST COMPENSATION?**

The Court of Claims answered, "No."

The Court of Appeals answered, "No."

Plaintiffs-Appellants answer, "Yes."

Defendant-Appellee answers, "No."

Amicus Curiae MEA answers, "Yes."

- II. **DOES 2012 PA 300 CONTINUE THE DEFECT NOTED IN *AFT MICHIGAN V STATE OF MICHIGAN*, 297 MICH APP 597; 825 NW2D 595 (2012), AS PUBLIC SCHOOL EMPLOYEES WHO CONTRIBUTE TO THE SCHOOL EMPLOYEES RETIREMENT SYSTEM TO PAY FOR POST EMPLOYMENT RETIREE HEALTH CARE ARE NOT GUARANTEED SUCH HEALTH CARE AND CONTRIBUTIONS ARE REFUNDED WITHOUT ACTUAL INTEREST EARNED?**

The Court of Claims answered, "No."

The Court of Appeals answered, "No."

Plaintiffs-Appellants answer, "Yes."

Defendant-Appellee answers, "No."

Amicus Curiae MEA answers, "Yes."

III. DOES 2012 PA 300 BREACH A CONTRACT BETWEEN THE STATE OF MICHIGAN AND PUBLIC SCHOOL EMPLOYEES BY REQUIRING EMPLOYEES TO INCREASE CONTRIBUTIONS TO THE PUBLIC SCHOOL EMPLOYEES RETIREMENT SYSTEM AS A CONDITION OF MAINTAINING IN EFFECT A KEY TERM OF THEIR RETIREMENT FORMULA?

The Court of Claims answered, "No."

The Court of Appeals answered, "No."

Plaintiffs-Appellants answer, "Yes."

Defendant-Appellee answers, "No."

Amicus Curiae MEA answers, "Yes."

CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

The MEA herein incorporates the concise "Statement of Material Proceedings and Facts," set forth in Appellants' Brief filed, and supplements with the following additional information.

A. Pension Changes.

Prior to PA 300, members participating in either the Basic Plan or the Member Investment Plan worked for their public school employers under the promise of a 1.5% pension factor, or "multiplier," for purposes of calculating their monthly retirement allowances when they retired.¹ Basic Plan members received this benefit at no cost to each member. Members participating in the Member Investment Plan contributed a percentage of their wages, ranging from 3.9% to 6.4% depending on the date of their hire.

With PA 300, however, the right to a continued 1.5% multiplier for future service has been compromised. Members in the Basic Plan and the Member Investment Plan are forced to elect between four options for the continued accrual of their pension benefits. For example, in order to keep the same 1.5% multiplier, members must significantly increase their current payroll deductions. If a member would rather elect to keep his or her contribution at the same rate, the multiplier will be reduced to 1.25% for future service. PA 300 imposes increases in pension contributions without commensurate increases in benefits. Should an individual MEA member elect not to pay the increased payroll contributions, their future pension benefits will be significantly diminished. The four "choices" given to members are not

¹MCL 38.1384(1).

voluntary. Rather, they are forced ultimatums in that, if members do not make their individual choices during the election period allotted by the statute, the choice will be made for them by imposing the reduced 1.25% multiplier for future service.² None of the options imposed on members participating in either the Basic Plan or the Member Investment Plan provides members the option to maintain the status quo by retaining the current 1.5% multiplier at their current contribution rates.

PA 300 imposed a limited election period during which members must elect between the options. Once the election closed, a member's choice could not be rescinded.³

B. Changes to health benefits.

Previously, Section 91(1) of the Michigan Public School Employees Retirement Act (Retirement Act) stated, among other things:

The Retirement System shall pay the entire monthly premium or membership or subscription fee for hospital medical-surgical and sick care benefits for the benefit of a retirant or retirement allowance beneficiary who elects coverage in the plan authorized by the Retirement Board and the department.⁴

In 2007, Section 91(8) was added through 2007 PA 110, whereby the premium coverage was changed to 90%. However the change in 2007 PA 110 was *prospective* and applied *only to new hires after June 30, 2008*.⁵

As part of the amendments enacted by PA 300, Section 91 was changed to reduce the amounts which the Retirement System would pay towards premium

²PA 300, Section 59(2); MCL 38.1359(2).

³PA 300, Section 59(3); MCL 38.1359(3).

⁴MCL 38.1391(1).

⁵MCL 38.1391(8).

coverages for *all* current members and retirants, beginning January 1, 2013.⁶ The changes to premium coverage levels in Section 91 of the Retirement Act, as implemented through PA 300, will not only affect future members, but also current members and those already retired and receiving retiree health insurance, effective January 1, 2013.

In addition to the changes to the retiree premium coverage levels for health benefits, PA 300 continues to implement changes regarding the payroll deductions required of members to fund retiree health benefits. In 2010 PA 75, the Legislature amended the Retirement Act to mandate, among other things, that each member of MPSERS must pay 3% of his or her wages to the "funding account" established by 2010 PA 77. The mandated 3% contribution can now be found in MCL 38.1343e.

2010 PA 77, which established the Public Employee Retirement Health Care Funding Act, was passed by both Houses of the Michigan Legislature in May 2010, signed into law on May 19, 2010, and given immediate effect. Said Act established a separate trust fund to receive the 3% employee contributions from MPSERS members required by the 2010 PA 75 amendments to Section 43e of the Retirement Act. In a published decision dated August 16, 2012, the Michigan Court of Appeals, in consolidated cases numbers 303702, 303704, and 303706, determined that the recently enacted Section 43e, MCL 38.1343e, is unconstitutional. *See AFT Michigan v State of Michigan.*⁷

⁶See PA 300, Section 91(4); MCL 38.1391(4).

⁷*AFT Michigan v State of Michigan*, 297 Mich App 597; 825 NW2d 595 (2012) (Defendant-Appellee's Application for Leave and Plaintiff-Appellant's Cross-Application

PA 300, however, amends Section 43e to similarly provide for employee contributions of 3%:

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.⁸

This is substantially the same language as the previous version deemed unconstitutional in *AFT Michigan, supra*.

PA 300 also added the new Section 91a to the Retirement Act to declare that members who join MPSERS on or after September 4, 2012, "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."⁹ Instead, new members may participate in a defined contribution plan for retiree health benefits funded by each member with matching employer contributions of up to 2% of the member's compensation.¹⁰ This is referred to as the "Tier 2" plan.

Under the new Section 91a(5), current members may elect to "opt out of the health insurance coverage premiums that would have been paid by the

for Leave are currently held in abeyance pursuant to an Order of this Court, dated May 21, 2014 (SC No. 145926).

⁸PA 300, Section 43e; MCL 38.1343e.

⁹PA 300, Section 91a(1); MCL 38.1391a(1).

¹⁰PA 300, Section 91a and (6); MCL 1391a(1) and (6).

Retirement System under Section 91 and opt in to" the Tier 2 account provisions of Section 91a on the transition date.¹¹ Opting out of the retiree health benefits under Section 91 is the only way for current members to avoid having the 3% deducted from their compensation pursuant to Section 43e. If a member does not elect to opt out during the election period, then the 3% deduction continues.

The amounts deducted pursuant to Section 43e will be deposited into the previously-established irrevocable trust. Section 4(1) of 2010 PA 77 provides:

Except as otherwise provided in this Section 8, any Section 18 assets contributed to the irrevocable trust are irrevocable and may not be refused, refunded, or returned to the employer or employee making such contributions.

Pursuant to Section 3(2) of 2010 PA 77, the governing board of MPSERS is the "grantor" of the funds placed in the trust fund for MPSERS members and must administer that trust fund for MPSERS.¹² In addition, the members of Defendant Retirement Board ". . . shall act as the trustees of the irrevocable trust for that retirement system."¹³

As a result, PA 300 now imposes reductions in retiree health benefits for current members. First, health premiums to be paid by the Retirement System under the Retirement Act for retirees and dependents are reduced to 80%. This reduction also applies to those members already retired. Second, PA 300 continues to impose a 3% levy on members who wish to receive retiree health benefits, despite a recent holding by the Michigan Court of Appeals determining that previously-enacted provision

¹¹PA 300, Section 91a(5); MCL 38.1391a(5).

¹²MCL 38.2733(2).

¹³*Id.*

is unconstitutional.¹⁴ The only way for members to avoid paying the 3% levy is to make a decision during the election period to relinquish any possibility of receiving the health benefits set forth above in Section 91 of the Retirement Act.¹⁵ In spite of the above payment of 3% of their wages into the health care "funding account," there is absolutely no increase in the pension benefits or health care coverage provided by MPSERS to its current members upon retirement.

Overall, the pension and health benefits provided for in the Retirement Act sections are part of the total package of retirement benefits provided to retirants under the Retirement Act. However, PA 300 now changes the pension benefits for existing members participating in the Basic Plan or the Member Investment Plan without providing any increase in the retirement allowance or health benefits to which those members are entitled. In addition, PA 300 now decreases the health benefits for all members of MPSERS, both current and already retired.

ARGUMENT

I. STANDARD OF REVIEW.

The interpretation of a statute, including its constitutionality, presents a question of law which is reviewed *de novo*.¹⁶ This Court reviews the grant or denial of summary disposition *de novo* to determine if the moving party or the non-moving party was entitled to judgment as a matter of law.¹⁷

¹⁴See *AFT Michigan, supra*.

¹⁵See PA 300, Section 91a(5).

¹⁶*Associated Builders and Contractors v Wilbur*, 472 Mich 117, 123; 693 NW2d 374 (2005).

¹⁷*Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

The MEA agrees with the forceful arguments of AFT Michigan contained in its main Brief on Appeal and, in addition thereto, offers the following arguments why this Court should reverse the decision of the Court of Appeals and declare the contested provisions of PA 300 to be unconstitutional and of no effect.

II. THE 3% LEVY AGAINST THE EARNED WAGES FOR RETIREE HEALTH BENEFITS FOR PUBLIC SCHOOL EMPLOYEES IS AN UNCONSTITUTIONAL PHYSICAL TAKING IN VIOLATION OF ART 10, §2 OF MICH CONST 1963, AND UNITED STATES CONSTITUTION AMENDMENTS V AND XIV, AS WELL AS A VIOLATION OF SUBSTANTIVE DUE PROCESS PRINCIPLES ESTABLISHED BY THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION AND ART 1, §17 OF MICH CONST 1963.

The 3% levy imposed by PA 300 on the earned compensation of all public school employees is an unconstitutional taking under the applicable provisions of the Michigan and United States Constitutions. The provisions of PA 300, as applied to the health benefits MPERS members are entitled to receive under the Retirement Act, are a taking in violation of art 10, §2 of Mich Const 1963 and the Fifth Amendment to the United States Constitution. The elections the members are required to make under the new amended Act are irrevocable and cannot be rescinded.

The Fifth Amendment to the United States Constitution prohibits the taking of private property "for public use, without just compensation."¹⁸ This provision is made applicable to the states by Section 1 of the Fourteenth Amendment of the United States Constitution.¹⁹ Likewise, art 10, §2 of Mich Const 1963 provides in relevant part:

¹⁸US Const, Am V.

¹⁹"No State shall make or enforce any laws 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 laws." US Const, Am XIV.

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

The statutory imposition of a 3% levy on the wages earned by public school employees through amended Section 43e of PA 300 continues to violate these constitutional provisions.

A. “Physical” and “regulatory” takings.

The law recognizes two types of unconstitutional takings: *physical* or *per se takings*, and *regulatory takings*. Physical takings (e.g., physical invasion or appropriation cases) occur when the government physically takes possession of an interest in property for some public purpose.²⁰ The fact of a taking is fairly obvious in such cases – for example, the government might occupy or take over a leasehold interest for its own purposes,²¹ or the government might take over a part of the rooftop of an apartment building so that cable access may be brought to residences within.²²

On the other hand, when the government acts in a regulatory capacity, such as when it bans certain uses of private property, the question of whether a taking has occurred is more complex.²³ Such cases are considered *regulatory takings* because they do not involve a categorical assumption of the property in question.²⁴

²⁰*Tahoe-Sierra Pres Council v Tahoe Reg'l Planning Agency*, 535 US 302, 321-322, n 17; 122 S Ct 1465; 152 L Ed 2d 517 (2002).

²¹See *United States v General Motors Corp*, 323 US 373, 375, 380; 65 S Ct 357; 89 L Ed 2d 311 (1946).

²²See *Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419, 421; 102 S Ct 3164; 73 L Ed 2d 868 (1982).

²³*Tahoe-Sierra Pres Council*, 535 US at 323.

²⁴*Id.*

The rationale of a regulatory taking claim is that the State regulation goes so far that it "effects a taking" of the property involved.²⁵

Because of the distinction between physical takings and regulatory takings, the United States Supreme Court has stated:

This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa. For the same reason that we do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use, we do not apply our precedent from physical takings context to regulatory takings claims.²⁶

The 3% levy imposed on the wages earned by public school employees constitutes a *physical taking*. The public school employers are mandated by Section 43e to deduct 3% from all employee wages and transmit those deductions to MPSERS. Those funds are to be "remitted as employer contributions." In turn, MPSERS is required to deposit the deductions in the irrevocable trust established by MCL 38.2731, *et seq.* The trust fund can only be used to fund the retirement health care benefits of retirees and their dependents, and the money cannot be refunded or returned, either to the employer or the employee.²⁷

Were it not for the wage deductions placed in the health care trust, the health care benefit costs of public school retirees would be solely the obligation of the State of Michigan and public school employers, to be paid out of tax dollars and other

²⁵See, e.g., *Meriden Trust & Safe Deposit Co v FDIC*, 62 F3d 449, 454 (CA 2, 1995).

²⁶*Tahoe-Sierra Pres Council*, 535 US at 323-324 (footnote omitted; emphasis added).

²⁷MCL 38.2733 and MCL 38.2734.

sources of public revenue. The seizure of the earned compensation of public school employees is anticipated to reduce the amount that school districts are required to pay for both the pension and health care benefits of current retirees.²⁸

Thus, pursuant to Section 43e of PA 300, Defendant is physically taking the earned wages from public school employees and utilizing that money for a public purpose, *i.e.*, to reduce the financial obligations of the State and of public school districts. There can be no question that contributing to the trust fund constitutes a public purpose, because the assets of the trust are to be used solely to perform an essential function of the State. Nor is there any doubt that the money taken from members' earned wages will be used for a public purpose, *i.e.*, balancing Michigan's budget by paying towards the State's unfunded accrued liabilities and reducing the cost paid by public school employers. The State's Briefs in this case, at all levels, are replete with admissions to this effect.

B. Accrued salary, or earned compensation, is a protected property interest.

Defendant argues that the seizure of money cannot support a violation of the Fifth Amendment. The prior *AFT Michigan* decision, *supra*, however, correctly cites to *Sims v United States*²⁹ for the principle that "accrued salaries are property."

In addition, Defendant's argument would disregard the decision of the United States Supreme Court in *Webb's Fabulous Pharmacies, Inc v Beckwith*.³⁰ In that case, the Court unanimously struck down a state's attempt to keep, as public property,

²⁸House Fiscal Analysis, dated August 15, 2012, at 6 (Exhibit 1); Affidavit of Phillip Stoddard (Exhibit 2).

²⁹*Sims v United States*, 359 US 108, 110; 79 S Ct 641; 3 L Ed 2d 667 (1959).

³⁰*Webb's Fabulous Pharmacies, Inc v Beckwith*, 449 US 155; 101 S Ct 446; 66 L Ed 2d 358 (1980).

the money earned as interest on a private fund deposited in the state's county courts in the course of litigation. The state statute in that case provided that any interest earned on the money deposited was to become the income of the office of county court clerk.³¹ In the present case, the State is taking not only the wages earned by members, but also the interest accruing to that money over the years in which members contribute.

In overturning the State's action, the *Webb's* Court found that an unconstitutional taking had occurred. In particular, the Supreme Court held that the principal sum of money deposited with the Court was plainly private property, and the interest derived therefrom should follow the principal and be allocated to the owner of the principal sum.³² The Supreme Court concluded:

To put it another way: a State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Takings Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.³³

The Michigan Supreme Court has also addressed the protection of earned compensation. In *Ramey v Michigan Public Service Comm'n*, the Court held that "[i]t is settled that after a salary has been earned the public employee's right thereto becomes vested and cannot be taken away by any legislation thereafter enacted."³⁴ The decisions in *Webb's* and *Ramey* are directly on point, where the property at issue in the present case is similarly wages already earned by public school employees.

³¹*Webb's, supra*, at 157-158.

³²*Webb's, supra*, at 160, 162.

³³*Webb's, supra*, at 164.

³⁴*Ramey v Michigan Public Service Comm'n*, 296 Mich 449, 462; 296 NW 323 (1941).

C. **Changes to Section 43e and the new Section 91a included within PA 300 do not resolve the constitutional violations.**

Contrary to what the Attorney General has argued previously, the new “opt out” provisions in PA 300 do not solve the statute’s constitutional infirmities. The changes to the existing Section 43e implemented by PA 300 are not substantively different than its original enactment in 2010 PA 75. What still remains are the requirements that 3% of each member’s earned compensation be appropriated to the State’s retirement health care fund, and that such amounts “shall be deducted by the employer and remitted as employer contributions.”³⁵

As to the new Section 91a, the Legislature has unsuccessfully attempted to remedy what was previously deemed unconstitutional by *AFT Michigan, supra*. Under the guise of making a “voluntary” election, Section 91a(5) permits current qualified members to opt out of the retiree health care benefits provided in Section 91. PA 300 is essentially requiring members to pay the money or quit. To avoid paying, each member would then be electing to opt into the Tier 2 account provisions applicable to new hires via Section 91a(1). This is the only way for current members to avoid paying the 3% levy of Section 43e. But, in order to garner any benefits from the Tier 2 account, members must also contribute a portion of their wages.

Not only does relinquishing the paid retiree health benefits provided in Section 91 and undertaking the Tier 2 account provisions require continuing member contributions, it also exposes members to the same uncertainties surrounding what *Studier v MPSERS*³⁶, deemed to be a “gratuity.” That is, members who opt out are

³⁵MCL 38.1343e, as compared to 2012 PA 300, Section 43e.

³⁶*Studier v MPSERS*, 472 Mich 642; 698 NW2d 350 (2005).

required to continue making contributions to Tier 2 with no promise of continued employer contributions. As it stands, members must first pay into their Tier 2 accounts in order to receive an employer matching contribution, which is capped at 2%. As demonstrated by the retirement changes made by PA 300, nothing prevents the Legislature from reducing, or even eliminating altogether, the employer contribution in the future! As a result, to avoid the mandatory 3% contribution towards retiree health care, members must select a program which provides absolutely no promise of any continued benefits from the State or its employers.

Opting out is not a "voluntary" election. That is, the only way to avoid having the 3% extracted from every dollar of compensation earned is to waive or forfeit any right to the health care benefits under Section 91. The forfeiting of all rights to paid retiree health benefits to avoid paying the 3% surcharge is not voluntary, nor does it remedy the constitutional violations created by PA 300. If members do not opt out, then they are still required to pay the 3%.

Merriam-Webster's Collegiate Dictionary (Tenth Edition) defines the word "voluntary" variously as follows:

Proceeding from the will or from one's own choice or consent; unconstrained by interference; having power of free choice; acting or done of one's own free will without valuable consideration or legal obligation.

Syn VOLUNTARY, INTENTIONAL, DELIBERATE, WILLING mean done or brought about of one's own will.

Applying these common dictionary concepts to the so-called "choices" all employees are forced to make regarding both their pension and health care benefits, it becomes crystal clear that such "choices" are anything but voluntary.

The concept of voluntariness has been dealt with by the courts in several contexts. See, for example, *United States v Vreeland*,³⁷ (in the context of police custodial interrogations, if a witness or probationer chooses to answer, his choice is considered to be voluntary since he was free to claim the privilege against self-incrimination and would suffer no penalty as the result of his decision to do so); *Laya v Cebal Construction Co*³⁸ (in the context of unemployment proceedings, the word “voluntary” under MCL 421.29(1)(a) connotes a decision based upon a choice between alternatives which ordinary men would find reasonable – not mere acquiescence to a result imposed by physical and economic facts utterly beyond the individual’s control); *In re Pfiester*³⁹ (in the context of bankruptcy proceedings, voluntary transfer occurs when a debtor, with knowledge of all essential facts and free from the persuasive influence of another, chooses of her own free will to transfer property to the creditor); *Garrity v New Jersey*⁴⁰ (in the context of compelled statements of public employees by their governmental employers, whether a violation of the right against compelled self-incrimination has occurred depends on whether the accused was deprived of his free choice to admit, to deny, or to refuse to answer, and the option to lose the means of one’s livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent). In all these situations, the question of voluntariness contemplates the actor having a reasonable and rationale free choice, and in some circumstances, the option not to choose or participate in the process. PA 300 does not

³⁷*United States v Vreeland*, 684 F3d 653, 659 (CA 6, 2012), cert den 133 S Ct 565 (2012).

³⁸*Laya v Cebal Construction Co*, 101 Mich App 26, 32; 300 NW2d 439 (1980).

³⁹*In re Pfiester*, 449 BR 422, 424 (2011).

⁴⁰*Garrity v New Jersey*, 385 US 493, 496-497, 87 S Ct 616, 17 L Ed 2d 562 (1967).

grant MPSERS members any meaningful or "voluntary" choices. It, to the contrary, places the members on the horns of an unreasonable economic dilemma. Under PA 300, MPSERS members are required to change from the status quo regarding both their pension and health care benefits, rendering their "choice" to be involuntary.⁴¹

Section 91a additionally includes a provision for members who do not qualify for the retiree health benefits under Section 91 upon termination of employment. Within Section 91a(8), PA 300 provides for a "separate retirement allowance" to those members who are 60 years or older and have "elected" to stay with the same retiree health benefits under Section 91 by paying the 3% levy, but who (for whatever reason) do not qualify to receive those benefits.

According to Section 91a(8), the so-called separate retirement allowance, the payment of which is strung out over five years, is based on the amount the employee has paid in for health insurance, multiplied by 1.5% and then multiplied by the number of years that member made contributions under Section 43e. This amounts to nothing more than repayment of a forced loan the employee is required to make to the State of Michigan, on terms very advantageous to the State.

Similar "forced loans" to the State of New York were declared to be unconstitutional by both state and federal courts in *Association of Surrogates and*

⁴¹Contrary to the Attorney General's argument, the 3% levy at issue does not meet the criteria for a "user fee." (Brief of Defendant-Appellee, at 12.) In *Bolt v City of Lansing*, 459 Mich 152, 161-162 (1998), the Court recognized three criteria to be considered in defining a user fee: (1) a user fee must serve a regulatory purpose rather than a revenue-raising purpose; (2) user fees must be proportionate to the necessary costs of the service; and (3) a user fee must be voluntary.

Supreme Court Reporters Within the City of New York v City of New York.⁴²

In *Surrogates, supra*, the Court of Appeals of New York, in striking down lag payroll legislation which permitted the court system to deduct one day's pay from court employees out of each ten-work-day pay period. The wages deferred were to be repaid to the employees in lump sums when the employees were terminated, either by retirement or death, at the basic annual salary in effect at that time. In striking down the lag payroll statute, the New York Court of Appeals stated:

The choice of which revenue-raising or revenue-saving devices should be used is for others, not the courts, but the menu of alternatives *does not include impairing contract rights to obtain forced loans to the State* from its employees. (Emphasis added.)⁴³

In the present case, the so-called repayment of the amounts taken from public school employees' pay is in no respect the "just compensation" required by the Michigan or United States Constitutions. More drastic than *Webb's, supra*, seizure of interest, the State forces the payment of wages into the account and then keeps interest earned over the time of the members' contributions. These are nothing more than "forced loans" from Michigan's public school employees.

Although Defendant argues that the separate retirement allowance solves the "taking" issues presented with the initial 3% scheme deemed unconstitutional in *AFT Michigan, supra*, that problem is not solved with Section 91a(8). There is no actuarial valuation presented by Defendant to establish what members could expect to

⁴²*Association of Surrogates and Supreme Court Reporters Within the City of New York v City of New York*, 79 NY2d 39; 588 NE 2d 51 (1992); *Association of Surrogates and Supreme Court Reporters Within the City of New York v City of New York*, 940 F2d 766 (2nd Cir, 1991).

⁴³*Id.*, 79 NY2d 39, at 47.

receive upon this unspecified date in the future for the seizure of their earned compensation today and continued use until that unspecified date.

In the absence of any sort of valuation, there is no basis for determining whether returning each member's money as a separate retirement allowance years (or possibly decades) after it was taken, with the increased amounts indicated, equates to "just compensation" as constitutionally required for a government taking. In the term during which members will have 3% deducted from their earned compensation, they will be deprived of the use of such funds, as well as any investment returns which could be garnered from that additional income.

In addition, nothing stops the Legislature from subsequently reducing the formula under which the separate retirement allowance will be calculated. Defendant argues that the reductions in pension multipliers effectuated through PA 300 are valid. Indeed, the formula for determining the separate retirement allowance under Section 91a(8) is similar to that of the defined benefit plan provided to MPSERS members, complete with a percentage multiplier (1.5%) to be applied to the amount paid and multiplied by the number of years for which it was paid. Because Defendant argues the Legislature can reduce the multiplier for the regular retirement allowance under MCL 38.1384 through the PA 300 amendments, the multiplier applied to the separate retirement allowance under Section 91a(8) will be subject to the same exposure if the courts do not otherwise halt their illegal action.

Furthermore, the separate retirement allowance provided by Section 91a(8) of PA 300 does not provide just compensation for those who do not receive that benefit. Rather, the remaining members who qualify for health care

benefits under Section 91 *do not* receive the separate retirement allowance. Instead, they will only get whatever health care remains; yet, there is no promise as to what level of benefits that may be. As the Attorney General writes in its response brief, "Simply put, members who elect to participate in the retiree health care plan do so at their own risk." (Brief of Defendant-Appellee, at 11.)

Indeed, in addition to the 3% issue, PA 300 also includes reductions in premium sharing provided to *all* existing retirees. Using the Legislature's recent history of chipping away retiree health care benefits under the Retirement Act, what might remain for those members who qualify under Section 91 may be nothing more than a mere nominal benefit. If that is the case, then existing members who qualify for that significantly-reduced benefit would not otherwise receive the separate retirement allowance provided by Section 91a(8) to other members who do not qualify for health care under Section 91. This is not the "just compensation" contemplated by the Constitutions of the United States and Michigan.

From the above, it is evident that a taking has occurred in the present case. The State of Michigan, through its public school employers, is taking 3% of each public school employee's earned compensation. Constitutionally, any taking must be accompanied by "just compensation." No just compensation is given to MPSERS members in return for the 3% levy against their wages imposed by Section 43e. In fact, the statute is clear and express that retiree health care benefits are not guaranteed by the Retirement Act and that Section 43e does not effect any change in retirement for public school employees. The repayment provisions of Section 91a(8) do not provide "just compensation" for the loan members are otherwise forced to give the State for the

use of their income. As a result, there has been a physical taking of the members' wages for which they have not received just compensation in return. This taking violates both the Michigan and United States Constitutions.

D. The pension and retiree health care changes imposed by PA 300 are in violation of substantive due process principles established by the Fourteenth Amendment of the U.S. Constitution and art 1, §17 of Mich Const 1963.

In addition to an unconstitutional taking, the changes to retiree health care found in PA 300 are unconstitutional under substantive due process principles derived from the Fourteenth Amendment of the United States Constitution; US Const, Am XIV, as well as art 1, §17 of Mich Const 1963. Additionally, substantive due process principles are also violated by the pension changes imposed by PA 300.

The recent *AFT Michigan* decision found the 3% levy for retiree health care to violate principles of substantive due process. In reaching that conclusion, *AFT Michigan* held:

The mandatory contributions imposed on current public school employees, do not go to fund their own retirement benefits, but instead to pay for retiree healthcare for already-retired public school employees.

While present employees and retired employees share a common employer, that does not mean that their interests as individuals (or even as groups of employees) are identical. Defendants have offered no legal basis for the conclusion that it comports with due process to require present school employees to transfer three percent of their incomes in order to fund retirement benefits of others. Rather, it is a mandatory, direct transfer of funds from one discrete group, present school employees, for the benefit of another, retired school employees. The fact that these groups share employers does not render the scheme outside the constitutional protection of substantive due process.⁴⁴

⁴⁴*AFT Michigan, supra*, at 623.

The *AFT Michigan* decision further concluded:

Rather, it is a question of the government meeting a particular set of its own fiscal obligations. Here, the government seeks to do so by requiring a small subset of Michigan's population to surrender 3 percent of their wages, above and beyond that which they pay in taxation, with no guarantee of anything in return, to meet the government's obligation to other individuals. Defendant posits no evidence or even argument to suggest that the funding of these retirement benefits cannot be satisfied by measures that do not raise due process concerns.⁴⁵

According to the *AFT Michigan* decision, the 3% levy was not a "mechanism that requires individuals to fund benefits they themselves have a vested right to receive."⁴⁶

Concluding that the statutory change permitted the government to "confiscate the income of one discrete group in order to fund a specific government obligation to another discrete group," the *AFT Michigan* Court found the 3% imposition of Section 43e was "unreasonable, arbitrary and capricious, and violates the Due Process Clause."⁴⁷

The analysis from *AFT Michigan* applies equally to both the retiree health care changes and the pension changes imposed by PA 300. The pension changes require the current members to essentially pay for the unfunded accrued liabilities of the State and its public school employers. In order to receive the same pension benefits, members must agree to pay higher contribution rates. If members do not elect to pay the heightened contribution rates (depending on their applicable category), they will be forced into a reduced set of future pension benefits. To require members to pay more

⁴⁵ *AFT Michigan, supra*, at 626; footnote omitted.

⁴⁶ *AFT Michigan, supra*, at 627.

⁴⁷ *AFT Michigan, supra*, at 627.

to get the same benefits in the future, or otherwise suffer reduced benefits, is arbitrary and capricious under substantive due process principles.

The United States Supreme Court has previously applied substantive due process analysis to legislation imposing economic burdens on parties. For instance, in *Usery v Turner Elkhorn Mining Co*,⁴⁸ the Supreme Court applied due process principles to consider a statutory provision which required coal mine operators to compensate former employees disabled by pneumoconiosis. In addition, in *Pension Benefit Guaranty Corp v R.A. Gray & Co*,⁴⁹ the Supreme Court similarly applied principles of substantive due process to consider the legislative imposition of withdrawal liability on employers who withdrew from pension plans before the effective date of such amendatory enactments. These cases were later cited in *Connolly v Pension Benefit Guaranty Corp*,⁵⁰ where the Supreme Court mentioned both cases in a "takings" context, thereby acknowledging the correlation between claims under the Takings Clause and claims based on substantive due process violations.⁵¹

This Court has similarly acknowledged the possibility of bringing both "takings" claims and substantive due process claims. In *Electro-Tech, Inc v H.F. Campbell Co*, the Court stated:

We are not suggesting, however, that Electro-Tech was foreclosed from asserting a substantive due process claim in the instant case. In fact, we agree with Justice Brickley that both the United States Supreme Court and this Court have

⁴⁸*Usery v Turner Elkhorn Mining Co*, 428 US 1; 96 S Ct 2882; 49 L Ed 2d 752 (1976).

⁴⁹*Pension Benefit Guaranty Corp v R.A. Gray & Co*, 467 US 717; 104 S Ct 2709; 81 L Ed 2d 601 (1984).

⁵⁰*Connolly v Pension Benefit Guaranty Corp*, 475 US 211; 106 S Ct 1018; 89 L Ed 2d 166 (1986).

⁵¹*Connolly*, 475 US at 223.

acknowledged the possibility of substantive due process claims in response to governmental regulation of property.⁵²

This language from *Electro-Tech, supra*, is contrary to any assertion by Defendant that the constitutionality of a statute may not be analyzed under both a substantive due process standard and a "takings" analysis.

In support of PA 300, Defendant maintained that as long as the retiree health care provisions of the Act remain in effect, retiring members from MPERS will have their health care subsidy paid. Yet, since *Studier, supra*, members may continue to receive health care in retirement only as a "gratuity," and only so long as the Legislature does not repeal the law. Further, PA 300 includes a reduction of the health care subsidy in Section 91 from 90% to 80% for not just prospective new hires and future retirees, but for all existing retirees as well. Should members make the irrevocable "election" to receive the retiree health care subsidy under Section 91 and continue paying the 3%, the premium subsidy percentage could be reduced further before they qualify for the subsidy, and continue to decline *after* they retire. On this basis, the cut in the retiree health care subsidy imposed by PA 300 is likewise arbitrary and capricious.

With the continued imposition of the 3% levy, however, no new benefits or assurances were given to members by PA 300. Nor is there any assurance of continued employer matching if they opt out under Section 91a(5). While Section 91a(8) provides a separate retirement allowance to those who do not

⁵²*Electro-Tech, Inc v H.F. Campbell Co*, 433 Mich 57, 76-77; 445 NW2d 61, 69-70 (1989), citing *Village of Euclid v Ambler Realty Co*, 272 US 365; 47 S Ct 114; 71 L Ed 303 (1926); *Goldblatt v Town of Hempstead*, 369 US 590; 82 S Ct 987; 8 L Ed 2d 130 (1962); *Kropf v Sterling Heights*, 391 Mich 139; 215 NW2d 179 (1974); *Cryderman v City of Birmingham*, 171 Mich App 15; 429 NW2d 625 (1988).

qualify for retiree health care, there is no proper valuation comparing the lost income to members for the years of contributing versus the value of the separate retirement allowance. The mere fact that Section 91a(8) gives something back to those who do not otherwise qualify for retiree health care does not pass constitutional muster. Those who will qualify to receive the health care subsidy under Section 91 have no assurance as demonstrated by this Court's decisions in *Musselman v Engler*⁵³ and *Studier v MPERS*⁵⁴ that it will continue at the level it once was.

Thus, for members to receive the same bundle of benefits as before, PA 300 continues to impose a levy of 3% on compensation. In this context, any claim by Defendant that the 3% levy was imposed to require members of MPERS to contribute toward the cost of the health care they will receive when they retire is illusory. There is simply no assurance as to what that benefit will be, if any. This is arbitrary and capricious by any standard.

PA 300 also continues to mandate that costs which are otherwise to be borne by the individual school districts (which, in fact, are funded by the State) are to now be paid by the employees of those districts who are members of MPERS. The 3% is not otherwise spread across taxpayers. Instead, a portion of every dollar of salary earned only by MPERS members is required by Section 43e to be surrendered to the State to help balance its budget in the area of school funding by paying for its unfunded accrued liabilities.

⁵³*Musselman v Engler*, 448 Mich 503; 533 NW2d 237 (1995), (*On rehearing*) 450 Mich 574; 545 NW2d 346 (1996).

⁵⁴*Studier, supra*.

In return for the extraction of these wages, members have garnered no vested, or even improved, benefits. Nor do those members who opt out have a vested right to continued employer matching. Yet, the State and those school districts which it funds extract \$300 million per year to lessen their own burdens – *i.e.*, to balance Michigan's budget and ease the financial burden on public schools. As a result, the objective of Section 43e is not to benefit existing members of MPERS. Rather, the objective is to benefit the State government and its school districts.

Although Defendant asserts a portion of the 3% levy is used to pre-fund future health care benefits for existing members when they retire, no guarantee has been made that the health care benefits which members are supposedly pre-funding will be there waiting for them. In addition, at what point will their contributions fully-fund their anticipated health care costs in retirement? There is no answer to this question, as Defendant has made no actuarial correlation between the 3% levy (or even that portion which is to be attributed to the pre-funding of existing members' health care in retirement) and what is necessary. Inescapably, a portion of the 3% seized from current members will be used to fund the benefits, or unfunded accrued liabilities, for the current retirees.

If allowed to remain in place, nothing prevents the Legislature from increasing the 3% levy in Section 43e to 4% the next year, or even 9% in years thereafter, in order to balance the State's annual budget. This demonstrates not only the arbitrariness, but also the capriciousness, in which Section 43e was enacted and can be applied.

Accordingly, the principles of substantive due process, derived from the Fourteenth Amendment and art 1, §17 of Mich Const 1963, render the terms of PA 300 unconstitutional as the Court of Appeals held in the 2010 *AFT Michigan* case previously cited.

III. THE CHANGES TO PUBLIC SCHOOL EMPLOYEE PENSIONS THAT ARE ENACTED IN PA 300 VIOLATE ART 1, §10 OF MICH CONST 1963 AND ART I, §10 OF US CONST, AS WELL AS ART 9, §24 OF MICH CONST 1963.

A. The contractual nature of public employee pensions.

The pension benefits granted to MPSERS members are contractual. PA 300 amounts to an impairment of the contractual rights of Retirement System members that violates art 1, §10 of Mich Const 1963, and art I, §10 of US Const, as well as the common law of the State of Michigan.

Art 1, §10 of Mich Const 1963 states:

No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be enacted.

In addition, art I, §10 of US Const states, *inter alia*:

No State shall . . . pass any Bill of Attainder, ex post facto Law or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

These provisions in the Michigan and U.S. Constitutions prohibit any changes that impair the contract established by a public employee pension. The courts in many jurisdictions have recognized that the pensions of public employees are contractual in nature.

The Michigan Supreme Court has long held that retirement benefits due to public employees under government pension plans are contractual. *See Campbell v*

*Michigan Judges Retirement Bd.*⁵⁵ Writing for the majority of the Supreme Court in *Campbell, supra*, Justice Dethmers discussed the contractual nature of the statutory retirement plan for judges:

In *Johnson v Douglas*, 281 Mich 247, 256; 274 NW 780, 784, this Court said:

The essential elements of a contract are parties competent to contract, a proper subject-matter, a legal consideration, mutuality of agreement, and mutuality of obligation.

Here, the judge voluntarily agrees to enter the system and pay the contributions, he does pay, and the State agrees to pay certain retirement benefits. There is, then, legal consideration, mutuality of agreement and mutuality of obligation. *A contract is made*. Accordingly, a problem of impairment of contract is involved here, as contrasted with the above cited Michigan cases relied on by the defendant.⁵⁶

Justice Dethmers went on to conclude:

Vested rights acquired under contract may not be destroyed by subsequent state legislation or even by an amendment of the State Constitution.⁵⁷

At the time the *Campbell* case was commenced, the specific pension protection set forth in art 9, §24 of Mich Const 1963 had not yet become part of the Michigan Constitution. Accordingly, the Supreme Court's decision in that case rested squarely upon the general non-impairment clauses found in the Michigan and U.S. Constitutions. The Court held that the necessary elements of a contract, *i.e.*, legal consideration, mutuality of agreement, and mutuality of obligation, were all present in

⁵⁵*Campbell v Michigan Judges Retirement Bd*, 378 Mich 169; 143 NW2d 755 (1966).

⁵⁶*Id.* at 180 (emphasis added).

⁵⁷*Id.*

the case of judicial pensions and that those pensions are, in fact, contracts protected from unconstitutional impairment.

The Michigan Supreme Court's decision in *Campbell* is consistent with the many reported cases throughout the United States which hold that retirement benefits of "public employees" after retirement are contractual. Typical of these cases is *Hickey v Pittsburgh Pension Bd.*⁵⁸ Mr. Hickey completed 20 years of service and had attained age 60, which permitted him to retire, when the Pennsylvania Legislature amended the retirement statute to authorize the withholding of a pension from a retired employee who secured new public employment. The trial court dismissed Mr. Hickey's complaint. In reversing and remanding the case to the trial court, the Pennsylvania Supreme Court, quoting from several other Pennsylvania cases, held that retirement pay is delayed compensation for services rendered in the past and that an employee's participation in a public retirement system fulfilled the elements of a contract.⁵⁹ The *Hickey* Court then stated:

If Hickey is party to a contract the Legislature may not impair that contract. Hickey agreed to work for the City 20 years and to pay certain sums into the Pension Fund. He has fulfilled those conditions. The City agreed, in its turn, to pay Hickey a pension or *compensation* for the remainder of his life when he reached his 60th year. Shutting off the pension because he obtained employment elsewhere is refusal on the part of the Pension Fund to abide by its contract. If this contract had been entered into between a private individual and a private corporation it is unquestioned that the Legislature could not impose an additional condition for its fulfillment. The law does not change because one of the parties is a governmental agency.

* * *

⁵⁸*Hickey v Pittsburgh Pension Bd*, 378 Pa 300; 106 A2d 233 (1954).

⁵⁹*Id.* at 305-306.

The Legislature may from time to time, within the confines of the established relation, alter, change, amend and render intact the actuarial soundness of the system so as to strengthen its fibers in any way it sees fit.

The Legislature may strengthen the actuarial fibers but cannot break the bonds of contractual obligations. The permissible changes, amendments and alterations provided for by the Legislature can apply only to conditions in the future, and never to the past.⁶⁰

We quote extensively from *Hickey* because it so clearly sets forth the legal, contractual, and moral basis for public employee pension benefits and is entirely consistent with the decision of the Michigan Supreme Court in *Campbell, supra*, and with decisions of numerous other state supreme courts holding that vested public employee pension benefits are contractual and cannot be reduced.

For example, the Oregon Supreme Court, in *Oregon Police Officers Ass'n, et al. v State of Oregon, et al.*, declared certain amendments to the Oregon Constitution unconstitutional because, the Court held, the amendments violated art I, §10 of US Const.⁶¹ The people of the State of Oregon, by public referendum, adopted several constitutional amendments that impacted the pensions of public employees. One of these amendments required public employees to pay 6% of their wages to the Public Employees Retirement System ("PERS") and prohibited public employers from either picking up that payment on behalf of employees or granting pay increases to offset those employee contributions. Nothing in the constitutional amendments provided for any increase in retirement benefits to the employees.

⁶⁰*Hickey, supra*, at 306-308 (italics in original; citation omitted).

⁶¹*Oregon State Police Officers Ass'n, et al. v State of Oregon, et al.*, 323 Ore 356; 918 P2d 765 (1996).

The Oregon Supreme Court ruled that the amendment violated art I, §10 of US Const (the Contracts Clause). In the course of its opinion, the Oregon Supreme Court discussed a long series of cases from that state holding the rights secured under the State's public employment statutes are contractual. In concluding, the Court stated:

In *Hughes*, this Court reaffirmed that PERS is a contract between the state and its employees, and that public employment gives rise to certain contractual obligations that are protected by the state and federal constitutions. *Id.* at 17-21, 838 P2d 1018. The *Hughes* court also recognized the state may obligate itself contractually to private individuals and that, normally, general principles of contract law govern the inquiry. *Id.* at 14, 838 P2d 1018. Importantly, *Hughes* recognized, albeit in dictum, that the state could undertake binding contractual obligations with its employees to include benefits that may accrue in the future *for work not yet performed*. *Id.* at 28, 838 P2d 1018.

The common thread running through the Oregon cases cited above is that the state may undertake binding contractual obligations with its employees, including benefits that may accrue in the future *for work not yet performed*. Moreover, the cases recognize that the PERS pension plan is an offer for a unilateral contract that can be accepted by the tender of part performance by the employee. The Oregon line of cases is consistent with the majority of jurisdictions that have considered the issue and also is consistent with the modern view of the nature of pensions. **Most jurisdictions adhering to a contract theory of pensions construe pension rights to vest on acceptance of employment or after a probationary period, with vesting encompassing not only work performed but also work that has not yet begun.**⁶²

It is significant to note that the Court in *Oregon State Police Officers Ass'n* was talking about pension benefits.⁶³ It found the 6% increase in employee contributions provided for in the constitutional amendment adopted by the voters was

⁶²*Id.* at 370-371 (italics in original; boldface added; footnote omitted).

⁶³*Id.*

violative of the non-impairment clause in the U.S. Constitution. Further, it is important to note that the 6% increase, like the increased employee contributions provided for in PA 300, applied only to future service. The increase in employee contributions required under PA 300 is precisely the type of increase deemed in violation of art I, §10 of US Const by the Oregon Supreme Court.

To like effect are numerous decisions from other jurisdictions holding that increases in employee contributions are an impairment of contractual rights. See *Allen v City of Long Beach*,⁶⁴ *Singer v City Topeka*,⁶⁵ *Opinion of the Justices*,⁶⁶ and *Marvel v Dannenman*.⁶⁷ In all those cases the increases in employee contributions applied only to future work, not past work, but was deemed contrary to the non-impairment clauses in the U.S. or State Constitutions.

B. The amendments to the Retirement Act made by PA 300 are an unconstitutional impairment of MPSERS members' retirement contracts.

Of course, not every change to a contract that results from legislative action rises to the level of an unconstitutional impairment. As to that issue, the U.S. Supreme Court's pronouncements when enforcing the non-impairment provision of the federal constitution, particularly where they were considering the financial obligations of a state, are relevant to the issues in the present case.

⁶⁴*Allen v City of Long Beach*, 25 Cal 2d 128; 287 P2d 765 (1955).

⁶⁵*Singer v City Topeka*, 227 Kan 356; 607 P2d 467 (1980).

⁶⁶*Opinion of the Justices*, 364 Mass 847; 303 NE2d 320 (1973).

⁶⁷*Marvel v Dannenman*, 490 F Supp 170 (Del, 1980).

See *United States Trust Co v New Jersey*.⁶⁸ Like the present case, *US Trust Co* involved an impairment of a financial obligation of the state to private citizens.

In *US Trust Co, supra*, the states of New York and New Jersey had enacted statutory covenants in 1962 which limited the Joint Port Authority of New York and New Jersey from subsidizing rail passenger transportation from certain revenues and reserves pledged as security for consolidated bonds issued by the port authority. In 1974, in response to what both states perceived to be a crisis involving mass transportation, energy conservation, and environmental protection, the Legislatures of both New York and New Jersey repealed those 1962 statutory covenants. The United States Trust Company, as trustee for and holders of certain Port Authority bonds, brought a declaratory judgment action in the New Jersey Superior Court alleging New Jersey's repeal of the statutory covenant was a violation of the bond holders' rights under art I, §10, the non-impairment of contracts clause of the U.S. Constitution.⁶⁹

The Superior Court of New Jersey held that New Jersey's repeal of the covenant represented an impairment of the contractual obligations of the state to the bond holders, but dismissed the complaint. The trial court held that the impairment was permissible under *Home Building and Loan Ass'n v Blaisdell*⁷⁰ and *City of El Paso v*

⁶⁸*United States Trust Co v New Jersey*, 431 US 1; 97 S Ct 1505; 52 L Ed 2d 92 (1977), *reh den* 431 US 975; 97 S Ct 2942 (1977).

⁶⁹A similar action was brought in New York's state courts, but was held in abeyance pending the outcome of the New Jersey lawsuit before the U.S. Supreme Court.

⁷⁰*Home Building and Loan Ass'n v Blaisdell*, 290 US 398; 54 S Ct 231; 78 L Ed 413 (1934).

Simmons.⁷¹ On similar grounds, the Supreme Court of New Jersey upheld the trial court's decision to dismiss.

On direct appeal, the U.S. Supreme Court reversed the decisions of the trial court and the New Jersey Supreme Court, and held that the repeal of the 1962 statutory covenant violated art I, §10 of US Const. Because the Court's reasoning for its reversal of the New Jersey courts is so relevant to the issues in the present case, and because the decision in *US Trust Co* amounted to a significant change in the manner courts view a state's impairment of its own contractual obligations, substantial analysis of that decision is warranted.

One of the chief arguments of the State of New Jersey was that under *Blaisdell, supra* and *City of El Paso, supra*, a state has great latitude to impair contractual obligations under the "reserved powers clause" of the U.S. Constitution. The Tenth Amendment to the U.S. Constitution is called the "reserved powers clause," and states:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.⁷²

The Court extensively analyzed a state's ability under the "reserved powers clause," and that clause's applicability to the facts of that case. In the course of its analysis, the Supreme Court stated, *inter alia*:

A State could not "adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them." Legislation adjusting the rights and responsibilities of contracting parties must be upon

⁷¹*City of El Paso v Simmons*, 379 US 497; 85 S Ct 577; 13 L Ed 2d 446 (1965), *reh den* 380 US 926; 85 S Ct 879; 13 L Ed 2d 813 (1965).

⁷²US Const, Am X.

reasonable conditions and of a character appropriate to the public purpose justifying the adoption

When a State **impairs** the obligation of **its own contract**, the **reserved-powers doctrine has a different basis**. The initial inquiry concerns the ability of the State to enter into an agreement that limits its power to act in the future.⁷³

The Court recognized long-established law that a state cannot contract away or surrender the essential attributes of its sovereignty. It went on to say, however:

Whatever the propriety of a State's binding itself to a future course of conduct in other contexts, the power to enter into effective financial contracts cannot be questioned. Any financial obligation could be regarded in theory as a relinquishment of the State's spending power, since money spent to repay debts is not available for other purposes. **Similarly, the taxing power may have to be exercised if debts are to be repaid. Notwithstanding these effects, the Court has regularly held that the States are bound by their debt contracts.**²²

The instant case involves a financial obligation and thus as a threshold matter may not be said automatically to fall within the reserved powers that cannot be contracted away.²³

Footnotes 22 and 23, included in the above quote, are part of the decision itself.

Footnote 22 stated, *inter alia*:

State laws authorizing the impairment of municipal bond contracts have been held unconstitutional. . . .

A number of cases have held that a State may not authorize a municipality to borrow money and then restrict its taxing power so that the debt cannot be repaid.

Footnote 23 stated, *inter alia*:

The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons.

⁷³*US Trust, supra*, at 22-23 (emphasis added; citations and footnote omitted).

Hence, instead of there being in the undertaking of a State or city to pay, a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. **A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity.** *Murray v Charleston*, 96 US at 445; 24 L Ed 760.⁷⁴

The Court in *US Trust Co* then entered the next phase of the non-impairment analysis to discuss situations in which the state may modify its own contractual obligations. The Court stated:

As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is **reasonable and necessary to serve an important public purpose.** In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. **If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.**⁷⁵

The Court then applied the "reasonable and necessary test" to the facts of that case. The Court acknowledged, "Mass transportation, energy conservation, and environmental protection are goals that are important and of legitimate public concern."⁷⁶ It also recognized the State of New Jersey had contended these goals were so important that any harm to bond holders from repeal of the 1962 covenant was greatly outweighed by the public benefit. In response to those arguments, the Supreme Court stated:

⁷⁴*Id.* at 24-25 (emphasis added; citations omitted).

⁷⁵*Id.* at 25-26 (emphasis added; footnote omitted).

⁷⁶*Id.* at 28.

We do not accept this invitation to engage in a utilitarian comparison of public benefit and private loss. Contrary to Mr. Justice Black's fear expressed in sole dissent in *El Paso v Simmons*, 379 US, at 517, 85 S Ct, at 588, the Court has not "balanced away" the limitation on state action imposed by the Contract Clause. **Thus a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors.** We can only sustain the repeal of the 1962 covenant if that impairment was both reasonable and necessary to serve the admittedly important purposes claimed by the State.

The more specific justification offered for the repeal of the 1962 covenant was the State's plan for encouraging users of private automobiles to shift to public transportation. The States intended to discourage private automobile use by raising bridge and tunnel tolls and to use the extra revenue from those tolls to subsidize improved commuter railroad service. Appellees contend that repeal of the 1962 covenant was necessary to implement this plan because the new mass transit facilities could not possibly be self-supporting and the covenant's "permitted deficits" level had already been exceeded. We reject this justification because the repeal was neither necessary to achievement of the plan nor reasonable in light of the circumstances.⁷⁷

The decision of the U.S. Supreme Court in *US Trust Co, supra*, has been followed by numerous state and federal courts to hold that various impairments of contractual rights, particularly those in the retirement area, are violative of the non-impairment clause of the U.S. Constitution. Typical of these cases is the federal Ninth Circuit Court of Appeals decision in *State of Nevada Employees Ass'n v Keating*.⁷⁸ The facts in *Keating, supra*, are strikingly similar to what the Michigan Legislature did by enacting PA 300.

⁷⁷*Id.* at 29 (emphasis added; footnote omitted).

⁷⁸*State of Nevada Employees Ass'n v Keating*, 903 F2d 1223 (1990), *cert den* 498 US 999; 111 S Ct 558 (1990).

In 1983, the Nevada Legislature decided to increase pension benefits paid to employees who had retired. To defray the costs of the post-retirement benefits increase, the Legislature made the participation in employer-paid plans mandatory for all police officers and firefighters as of July 1, 1983, and for all other state employees effective July 1, 1985. Prior to the Legislature's action, current employees could withdraw their contributions from the plan at any time and without any penalty. The legislation prohibited any such withdrawal of contributions. In declaring the Nevada Legislature's enactments violative of art I, §10 of US Const, the Ninth Circuit stated:

... the loss of the right to withdraw pension contributions cannot be offset by the increase in post-retirement benefits. **The State cannot justify impairing its contractual obligations to public employees by pointing to advantages accrued by former employees.**⁷⁹

Applying the standards set forth in *US Trust Co, supra*, the Ninth Circuit found that this substantial impairment of the state's contractual obligations was neither reasonable nor necessary.

Applying these teachings of *US Trust Co, supra*, and *Keating, supra*, to the facts in the present case, it is clear that the provisions of PA 300 dealing with pension benefits violate MPSERS members' rights under the general non-impairment clauses in the U.S. and Michigan Constitutions.

⁷⁹ *Id.* at 1227 (emphasis added; citation omitted).

C. PA 300 violates art 9, §24 of Mich Const 1963.

- 1. *The contributions required of MPSERS members by PA 300 will be used to pay unfunded accrued liability in violation of art 9, §24 of Mich Const 1963.***

The 1963 Michigan Constitution provides specific protections to public employee pensions. Art 9, §24 of Mich Const 1963 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.

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.

Pension benefits are, as the Michigan Supreme Court has consistently stated, protected from diminishment or impairment pursuant to art 9, §24. The Michigan Supreme Court's decisions in *Musselman v Engler*⁸⁰ and *Studier v MPSERS*⁸¹ expressly support Plaintiff's claims that art 9, §24 of Mich Const 1963 protects their pension rights. Of particular note regarding PA 300 is the second sentence of art 9, §24, which requires all public bodies, including the State, to fund during each fiscal year, the financial benefits arising out of service rendered in that fiscal year, and which prohibits the use of current service money to finance unfunded accrued liabilities. PA 300 uses the newly required MPSERS member contributions to pay for MPSERS existing unfunded accrued liabilities.

⁸⁰*Musselman, supra.*

⁸¹*Studier, supra.*

As set forth in the Legislative Analysis attached hereto as Exhibit 1, one purpose of PA 300 is to require current MPSERS members to pay for this State's existing debt to current and future MPSERS retirees:

The bill will decrease the UAL [i.e., the unfunded accrued liability of MPSERS] by a total of \$15.6 billion, reducing it from \$45.2 billion to \$29.6 billion (based on the September 30, 2010 valuation).⁸²

The use of the money generated by the contributions required of MPSERS members by PA 300 is further illustrated in the Affidavit of Phillip Stoddard (a copy of which is attached hereto as Exhibit 2 and was attached to the Attorney General's Brief in the Court of Appeals in an attempt to reverse the issuance of the Temporary Restraining Order in Court of Claims No. 12-105-MM), the Director of the Office of Retirement Services ("ORS"), an office within the Michigan Department of Technology, Management and Budget that administers the Retirement Act. The Affidavit stated that unless 2012 PA 300 is fully implemented, the State and/or local school districts will be required to pay more toward the current unfunded accrued liability.⁸³

When this Court carefully scrutinizes the legislative actions challenged herein, it will see that the Legislature passed the provisions to pay what is clearly the State's own pension debt. MPSERS was established as a state retirement system to pay the State's educational employees' pensions upon retirement. The education of Michigan's children is a State function, the financing of which is a State responsibility. Art 8, §2 of Mich Const 1963 provides, *inter alia*:

⁸²Legislative Analysis issued by the Michigan House Fiscal Agency dated August 15, 2012. (Exhibit 1.)

⁸³Stoddard Affidavit, ¶¶ 3, 5, and 7. (Exhibit 2.)

The legislature shall **maintain and support** a system of free public elementary and secondary schools as defined by law. (Emphasis added.)

Every local school district in the State exists solely as the result of the Michigan Legislature passing the Revised Michigan School Code, MCL 380.1, *et seq.*, and other laws. Further, the Michigan Public School Employees Retirement Act was passed by the Legislature. Accordingly, any debts or accrued liability of MPSERS is the result of State legislative enactments and the State's failure to properly fund its financial responsibilities under the Retirement Act. It is clear from the operative provisions of PA 300 and the statements made at the time the legislation was being enacted that it is the State's own financial interests that are at stake.

PA 300 violates the second sentence of art 9, §24 of Mich Const 1963 in at least two respects. First, it shifts payment for the accrued financial benefits of MPSERS members from the State of Michigan to the members of MPSERS. Second, it uses current service contributions levied against the members to finance the unfunded accrued liabilities of MPSERS, *i.e.*, \$15.6 billion of the State's unfunded accrued liability that accrued to MPSERS members in the past.

The State will attempt to convince the Court that there is no contract impairment or diminishment because the increased contributions levied to keep the 1.5% multiplier attaches only to future work performed. That argument is ludicrous because the unfunded accrued liability of MPSERS or any retirement system in Michigan can only be created as the result of members of a retirement system working and gaining "accrued financial benefits" under the Retirement Act. All the past service of MPSERS members created "accrued financial benefits," and resulted in the unfunded

accrued liability at this time. All the accrued financial benefits were accrued before the passage of PA 300. Therefore, the \$15.6 billion reduction in the unfunded accrued liability referred to in the House Fiscal Agency Analysis and ORS Director Stoddard's Affidavit is an attempt to make the members of MPSERS pay for a large portion of the pension benefits which had already accrued to them prior to the passage of PA 300. The State is, accordingly, using current service contributions to fund benefits that accrued to members prior to the passage of PA 300. That is precisely what the second sentence of art 9, §24 of Mich Const 1963 prohibits.

The Michigan Supreme Court firmly established in *Kosa v State Treasurer*⁸⁴ that MPSERS may not use current service contributions to pay for the unfunded accrued liabilities of that retirement system. In *Kosa*, MPSERS was using current service contributions to pay for the unfunded portion of retirees' pensions that had accrued prior to the passage of the 1963 Constitution. The Supreme Court held that doing this was contrary to the second sentence of art 9, §24, which prohibits the use of current service monies for payment of the unfunded accrued liabilities of the retirement system, because that retirement system was using post-constitutional-amendment reserves to pay for pre-constitutional-amendment unfunded accrued liabilities. The Legislature took care of some of that problem, but not all of it, by retroactively substituting the "entry age normal" system of accounting for the previous "attained age" system.

The Supreme Court in *Kosa* held that the Court of Appeals properly issued a Writ of Mandamus ordering MPSERS to stop using post-art 9, §24 reserves

⁸⁴*Kosa v State Treasurer*, 408 Mich 356; 292 NW2d 452 (1980).

(i.e., current service contributions) to pay for pre-art 9, §24 unfunded accrued liabilities. The Court further held that part of the problem had been taken care of by the subsequently passed legislation substituting the entry age normal system of accounting for the previous attained age system. The Supreme Court, however, remanded the *Kosa* case to the Court of Appeals to determine whether, as alleged by the plaintiffs, there was still an actuarial shortfall in constitutional funding. In the "Conclusion" portion of the *Kosa* opinion, the Court stated, *inter alia*:

... this opinion reminds the Legislature that the constitutional provision adopted by the people of this state [art 9, §24] is indeed a solemn contractual obligation between public employees and the Legislature guaranteeing that pension benefit payments cannot be constitutionally impaired. This opinion also sets forth that neither the Legislature nor the Executive can apply funded reserves to meet unfunded retirement obligations

As regards the Executive, this opinion indicates that courts can and will issue mandamus to enforce rights conferred by the 1963 Constitution.⁸⁵

Because the records before the Supreme Court did not disclose the data necessary to determine whether the required funds were appropriated or whether there was still an actual shortfall, the Supreme Court remanded the case to the Michigan Court of Appeals directing it to ". . . make such findings as necessary and to make such determinations and provide such relief as appropriate, consonant with those findings and holdings of this opinion."⁸⁶

The facts in *Kosa, supra*, are very similar to those in the present case. Here, the Legislature has expressly stated that the extra money it will be collecting from

⁸⁵*Kosa*, 408 Mich at 382-383.

⁸⁶*Id.* at 383.

the State's educational employees pursuant to PA 300 will be used to pay the past unfunded accrued liabilities of MPSERS. Art 9, §24, as interpreted by the Michigan Supreme Court in *Kosa, supra*, expressly prohibits the Legislature from doing that.

PA 300 has one overriding purpose: To reduce the unfunded accrued debt of the State of Michigan for pension benefits granted to public school employees by the Michigan Legislature. The State, armed with unlimited taxing power, could very easily satisfy its debt requirements under the Retirement Act. The answer to any perceived problem is not to shift the State's debt responsibilities to MPSERS members by making them finance the State's pension obligations and by using the members' contributions to pay for the unfunded accrued liabilities of MPSERS.

2. PA 300 results in the diminishment and impairment of MPSERS pensions.

As noted above, art, 9 §24 of Mich Const 1963 not only explicitly recognizes the contractual nature of public pensions, but protects pension benefits from diminishment or impairment. Justice Taylor noted in *Studier, supra*, the difference between the protection provided by art 9, §24 to "pension benefits" as opposed to "health care benefits."

Thus, according to these definitions, the ratifiers of our Constitution would have commonly understood "accrued" benefits to be benefits of the type that increase or grow over time – such as a **pension payment or a retirement allowance** that increases in amount along with the number of years of service a public school employee has completed. Health care benefits, however, are not benefits of the sort. Simply stated, they are not accrued.⁸⁷

⁸⁷*Studier, supra*, at 654 (emphasis added; footnote omitted).

Further, Justice Riley, in the dissenting portion of her initial opinion in *Musselman, supra*, stated:

Through this provision, the constitution establishes a contractual obligation requiring the state to fund financial benefits in a given year as they arise. If the aforementioned health benefits are financial benefits, then they have to be funded and the Governor's acts preventing such funding were unconstitutional. However, if these health benefits do not fall under the penumbra of financial benefits, then they are not constitutionally dedicated and the Governor's failure to prefund them is not unconstitutional, provided that he had the power to cut the budget in this manner.⁸⁸

Justice Riley's opinion then went on to demonstrate why, in her judgment, health benefits, unlike regular pension benefits, were not financial benefits within the meaning of art 9, §24 of Mich Const 1963. One thing is clear from the above, both the majority and dissenting opinions (*i.e.*, all of the Justices of the Michigan Supreme Court who decided *Musselman* and *Studier*) came to the conclusion that pension benefits are financial benefits and, as such, are clearly subject to the protections of art 9, §24.

The amendments to the Retirement Act found in Section 59(1) of PA 300 clearly diminish and impair the contractual pension rights of MPSERS members. Now, in order to continue applying the 1.5% multiplier in calculating their pension benefits, members must increase their contributions to the Retirement System by up to 4% of their compensation. This is an additional requirement not required by any previous Retirement Act. There is no corresponding increase in benefits given for those required increased contributions.

That requirement is similar to the factual situation presented to Michigan's Attorney General under legislation proposed in 1985 that would have

⁸⁸*Musselman, supra*, at 525.

required employees to contribute 3% of their annual salary during the first year and 5% of their annual salary for each year thereafter.⁸⁹ This requirement would have applied to all members of MPSERS and the State Employees Retirement System. There would have been no additional retirement benefits given to the members of those retirement systems as a result of the mandatory increased contributions. Further, the \$1,200 per year increased contribution would have applied only to future work of MPSERS members, not to past work. Nevertheless, Attorney General Kelly opined in OAG No. 6294 that such proposed legislation would be unconstitutional under art 9, §24 of Mich Const 1963. In so holding, the Attorney General stated:

It is my opinion, therefore, that the imposition by the Legislature of a new condition upon current members of the State Employees' Retirement System and the Public School Employees' Retirement System in the form of mandatory employee contributions in the average amount of \$1,200.00 without any commensurate advantage to the employee members would be **unreasonable** and, hence, **subversive of the rights** of the present employee members protected by Const 1963, art 9, §24, as interpreted in *Advisory Opinion re Constitutionality of 1972 PA 258, supra*.⁹⁰

The Attorney General's conclusion is applicable to the amendments included in PA 300. The new conditions imposed on MPSERS members by PA 300 are unreasonable and are subversive of the rights of present employee members of MPSERS. Art 9, §24 was intended to shield the pension benefits of public employees from divestment. The Attorney General, in the present case is, to the contrary, attempting to use the protective constitutional provision as a sword with which to divest those employees of their benefits.

⁸⁹OAG, 1985-1986, No. 6294, at 67 (May 13, 1985) (hereinafter "OAG No. 6294").

⁹⁰*Id.*, at 71 (emphasis added).

D. **The changes to the payment for retiree health insurance premiums set forth in PA 300 violate art 9, §24 of Mich Const 1963.**

1. ***The changes to Section 91 of the Retirement Act regarding health benefits.***

The payment of health insurance premiums for retired public school employees was first funded by the State of Michigan in 1975, pursuant to 1974 PA 244, Section 27e.⁹¹ The Retirement Act was amended several times over the following years, with each amendment increasing the amount of premium that the State would pay.⁹² In 1985, the statutes governing the payment of premiums for the health care of public school retirees were amended, and MPSERS was required to pay the entire monthly premium for retirees' health benefits. The amended statute further required the State of Michigan to fund the benefits being earned by current employees and, pursuant to that statute, the State pre-funded retirement health care benefits until fiscal year 1990-1991.⁹³

Beginning with the 1990-1991 fiscal year, the State ceased to fund the future retirement health care benefits of current employees, and instead funding was provided only for the benefits currently owed to retired public school employees.⁹⁴ Despite this change in funding, the Retirement Act continued to provide for the payment of retiree health insurance premiums by MPSERS, and no payment or contribution was required from current public school employees. Prior to PA 300, Section 91(1) of the Retirement Act provided as follows:

⁹¹ *Musselman v Engler*, 448 Mich 503, 505; 533 NW2d 237 (1995).

⁹² *Musselman, supra*, at 505.

⁹³ *Musselman, supra*, at 505-506.

⁹⁴ *Musselman, supra*, at 509.

The Retirement System shall pay the entire monthly premium or membership or subscription fee for hospital, medical-surgical and sick care benefits for the benefit of a retirant or retirement allowance beneficiary who elects coverage in the plan authorized by the Retirement Board and the Department.⁹⁵

Section 91(4) of the Retirement Act further provided that MPSERS shall pay 90% of the monthly fees for retiree dental, vision, and hearing benefits.⁹⁶

In May 2010, the Legislature enacted 2010 PA 75, which amended the Retirement Act to require public schools to deduct either 1.5% or 3% from the compensation earned by public school employees and to transmit that money to MPSERS. At the same time, 2010 PA 77, the Public Employee Health Care Funding Act, established an "irrevocable trust" fund into which those deductions from public school employee wages were to be placed by MPSERS as employer contributions. Section 3 of the Public Employee Health Care Funding Act makes the MPSERS governing board the "grantor" of the funds placed in the trust fund, and the governing board is designated in Section 3(2) as the trustee of the trust fund established for the contributions of MPSERS members. Pursuant to the provisions of 2010 PA 77, the assets of the trust are irrevocable and can only be used for the benefit of past MPSERS members and their funding account dependents.⁹⁷

In *AFT Michigan v State of Michigan*, the Court of Appeals determined that the 3% levy on MPSERS members who wished to receive retiree health benefits is unconstitutional.⁹⁸ The Attorney General, on or about September 27, 2012, filed its

⁹⁵MCL 38.1391(1).

⁹⁶MCL 38.1391(4).

⁹⁷MCL 38.2737.

⁹⁸*AFT Michigan, supra*.

Application for Leave to Appeal that decision of the Court of Appeals. This Court has neither granted nor denied the State's Application.

2. The violation of art 9, §24 of Mich Const 1963.

PA 300 is an attempt to cure the constitutional infirmities found by the Court of Appeals in *AFT Michigan*. Pursuant to Section 91a of PA 300, a MPSERS member can opt out of contributing the 3% for retiree health care *if the member agrees to relinquish the health insurance premium coverage provided in Section 91.*⁹⁹ In addition, if a MPSERS member has not accumulated sufficient credit to receive the retiree health care premium subsidy upon retirement, or if the member dies before receiving a premium subsidy equal to the amount the member contributed, the member or the member's beneficiary is "repaid" the contributions deducted through the payment of a supplemental retirement allowance paid monthly over a five-year period.¹⁰⁰

The revisions to the Retirement Act made by PA 300 impose a forced "choice" on all MPSERS members to "elect" between (1) accepting the previously enacted 3% payroll deduction, or (2) foregoing MPSERS payment of retiree health insurance premiums entirely. Those changes violate art 9, §24 of Mich Const 1963, because they impose a significant contribution requirement on all MPSERS members, including those who have been members of the retirement system for many years and whose rights to retiree health premium payments have vested. In making this argument, MEA recognizes that a majority of the Court in *Studier, supra*, determined that retiree health insurance premiums are not "financial benefits" that come within the protections of art, 9 §24; however, MEA believes that the opinion of Justice Cavanagh

⁹⁹MCL 38.1391a.

¹⁰⁰MCL 38.1391a(8).

in *Studier*¹⁰¹ is the correct interpretation of Michigan law and should be followed in the present case.

RELIEF

For the reasons set forth herein, the Michigan Education Association requests this Court to declare the contested provisions of PA 300 to be unconstitutional and of no effect including, but not limited to Sections 43e, 59, 91, and 91a.

Respectfully submitted,

WHITE, SCHNEIDER, YOUNG
& CHIODINI, P.C.
Attorneys for Amicus Curiae MEA

Dated: September 29, 2014

By James A. White
James A. White (P22252)
Kathleen Corkin Boyle (P27671)
Timothy J. Dlugos (P57179)

Dated: September 29, 2014

By Michael M. Shoudy, by James A. White
Michael M. Shoudy (P58870)
Co-counsel for Amicus Curiae MEA

¹⁰¹ *Studier, supra*, at 368-374.

EXHIBIT 1

Legislative Analysis



MICHIGAN PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM (MPSERS) REVISIONS

Mary Ann Cleary, Director
Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

Senate Bill 1040 (H-3) as Passed by the House and Amended by the Senate
Sponsor: Sen. Roger Kahn

House Committee: Appropriations
Senate Committee: Appropriations
Complete to 8-15-12

A SUMMARY OF SENATE BILL 1040 (H-3) AS PASSED THE HOUSE AND AMENDED BY THE SENATE:

The bill would amend the Michigan Public School Employees' Retirement System (MPSERS) Act to make the following changes to pension and retiree health care benefits:

- Require all employees (except those in the Hybrid - Pension Plus plan) to choose one of the following options by October 26, 2012 to take effect in December 2012:
 - Increase contributions to 4% for the Basic Plan and 7% for the Member Investment Plan (MIP) and maintain a 1.5% pension multiplier.
 - Maintain current contribution rates but freeze existing benefits at a 1.5% multiplier and receive a 1.25% pension multiplier for future years of service.
 - Freeze existing pension benefits and move into a defined contribution (DC), 401(k)-style, plan with a flat 4% employer contribution for future service.
- Offer new employees, hired after September 4, 2012, the option of choosing between the existing Hybrid plan or a defined contribution plan which would provide employees a 50% matching employer contribution for an employee's contribution of up to 6% of his or her salary.
- Require an independent third-party study of several potential plan changes including:
 - The short-term and long-term costs of closing the defined benefit plan for new employees and replacing it with a new defined contribution plan identical to the one offered to state employees.
 - The costs/benefits of prefunding retiree health care benefits.
 - An analysis of comparable retirement plans for school employees in other states and comparable private plans.
 - The suitability of charging employer contribution rates for unfunded accrued liability costs based on current operating expenditures (COE) rather than payroll.
- Increase the retiree health insurance premium contribution of both existing and future retirees to at least 20%, capping the retirement system's premium share at 80%



beginning January 1, 2013. For retirees who are receiving a benefit and who are age 65 or older on January 1, 2013, the cap on the maximum employer contribution for medical, dental, and vision benefits would be 90%.

- Eliminate retiree health insurance for employees hired on or after September 4, 2012, and replace it with a 401(k) or 457 plan with an employer match of up to 2% of compensation plus a lump sum deposit of either \$1,000 or \$2,000 into a Health Reimbursement Account (HRA) upon termination of employment.
- Continue the 3% employee contribution for retiree health but guarantee an employee's individual contributions. Use the 3% contributions toward prefunding future retiree health benefits. Allow existing employees to opt out of retiree health insurance and instead choose the 2% matching contribution into a DC plan in lieu of retiree health benefits.
- Shift from paying for retiree health care benefits on a pay-as-you-go method to prefunding with a combination of employee contributions, employer contributions, and state funding. (If the employee 3% contributions were ruled unconstitutional, the method would revert to a cash basis.)
- Cap the local employer rate for the unfunded accrued liability at 20.96%, for a total rate equal to approximately 24.46% of payroll (the maximum FY 2011-12 rate) and provide for state School Aid Fund contributions to pay the amount of annual required contribution that exceeds the employer maximum rate.

Pension Changes: Basic and Member Investment Plan (MIP)

Currently, employees hired prior to 1990 who never transferred into the MIP are in a noncontributory plan called the Basic Plan and contribute 0% for their pension benefits. Employees hired since January 1990 but prior to July 2010 (or former Basic members who transferred into the MIP plan) contribute between 3% and 6.4%, depending on their level of compensation and their hire date, in return for an enhanced pension benefit compared to the original Basic Plan.

The bill would require that employees currently in either the Basic or MIP pension plan choose (by October 26, 2012) among the following options, which would take effect in December, 2012:

1. Increase their contribution to 4% for the Basic Plan and 7% for the Member Investment Plan (MIP) and maintain the current 1.5% pension multiplier. Currently MIP contributions are graduated based on income, but Senate Bill 1040 (H-3) would require a flat 7% on all compensation. The bill specifies that the employee contributions could not exceed the normal cost of the pension benefit.

Employees who chose to pay an increased contribution could choose to contribute either until their retirement or until they reach 30 years of service, at which point their contributions would decrease to current levels and their pension multiplier for years of service that exceed 30 would decrease to 1.25%.

2. Maintain current contribution rates, freeze existing benefits at the 1.5% multiplier, and receive a 1.25% pension multiplier for future years of service.
3. Freeze existing pension benefits and move into a defined contribution (DC), 401(k)-style, plan with a flat 4% employer contribution for future service.

Pension Changes: New Employees

The bill would offer new employees, hired after September 4, 2012, a choice between either a defined contribution plan or the current hybrid plan, which has been in place for new employees hired since July, 2010. Employees would have 75 days after beginning employment to choose which of the two plans they want to participate in. The DC plan would provide employees a 50% matching employer contribution for an employee's contribution of up to 6% of his or her salary. If an employee chose the DC option, he or she would be automatically enrolled at the 6% contribution level, but could opt to contribute something less or nothing at all. The maximum employer contribution would equal 3% of the employee's salary.

Increased Employee Health Care Premium Contributions

Currently, retirees hired prior to July 2008 pay between 0% and 10% of their monthly medical care premiums plus an amount equal to the Medicare Part B plan, depending on whether they are Medicare-eligible and whether they have dependents. They also pay 10% of their monthly dental and vision benefits. The MPSERS system pays for the balance of costs. Employees hired since July 2008 earn a graded health care premium based on the number of years of service they earn: 30% after 10 years and an additional 4% per year capped at 90%.

The bill would cap the maximum employer contribution for medical, dental and vision benefits at 80% and would require that retirees pay at least 20% of their premium for most existing and future retirees. For retirees, who are receiving a benefit and who are older than age 65 on January 1, 2013, the cap on the maximum employer contribution for medical, dental, and vision benefits would be 90%.

Defined Contribution (DC) Health Care Revisions

The bill would eliminate retiree health insurance coverage for employees hired after September 4, 2012 and would replace it with an employer matching contribution of up to 2% of compensation into either a 401(k) or 457 plan.

In addition, these employees would receive a lump sum deposited into a Health Reimbursement Account (HRA) upon termination of employment. The lump sum would equal \$1,000 for an employee who terminates employment prior to reaching age 60 with ten years of service or \$2,000 for an employee who terminates employment after reaching age 60 with ten years of service.

Employer matching contributions provided in lieu of retiree health care could not be used as a basis for a loan from an employee's tax-deferred account.

Continuation of Mandatory 3% Employee Contribution for Retiree Health Care

Beginning in July 2010, all employees in MPSERS began contributing 3% of their compensation into an irrevocable trust for retiree health care costs. The employee contributions are currently being held in an escrow account pursuant to court order while the legality of the mandatory contributions is litigated. The bill would continue these contributions and use them to begin prefunding retiree health care benefits. If an employee were not eligible for retiree health care upon retirement, he or she would have their contributions returned in equal monthly installments over 5 years after reaching age 60.

The bill would allow existing employees to opt out of the 3% contribution if they agree to forego all retiree health care benefits and take the 2% DC matching contribution in lieu of health care benefits, as described above, for new employees.

Prefunding of Retiree Health Care Obligations

Currently, retiree health care benefits are paid on a cash or pay-as-you-go basis. The bill would instead require that retiree health care benefits be prefunded. Prefunding retiree health care benefits requires a significant increase in current contributions but saves the system in the long term because of the benefit from investment returns on prefunding contributions. The bill would include employee 3% contributions and increased retiree premium share contributions, as well as employer and state contributions, to pay for prefunding. Prefunding triggers a change in the accounting method used to calculate future unfunded liabilities, allowing MPSERS to use an 8% discount rate rather than a 4% discount rate. This would reduce the UAL, currently calculated at \$27.6 billion, by \$10.8 billion. However, the bill provides that if the 3% employee contributions were found to be unconstitutional, then payments for retiree health care benefits would revert to a cash basis.

University Health Care Study

The bill would require a study of the health care costs for retirees of the seven public universities with employees in MPSERS (all of whom were hired prior to 1996). The MPSERS would have to provide the universities with 5 years of historical data on the cost of providing health care to the universities' retirees and provide a comparison of that data with the aggregate cost of health care for retirees from all reporting units over the last 5 years.

Other Employer Rate Changes

The bill would also include two significant changes to the employer contribution rates:

First, the bill would reamortize the cost of the early retirement program of 2010 from 5 years to 10 years in order to create short-term savings and allow additional funding in the short term to be redirected to prefunding retiree health care for greater long-term savings.

Second, the bill would cap the employer rate for the unfunded accrued liability at 20.96% of payroll, with intent to provide School Aid Fund contributions to pay the amount of annual required contribution that exceeds the employer maximum rate.

Third Party Study

The bill also would require that the Director of the Department of Management, Budget, and Technology (DTMB), with the Senate Majority Leader and the Speaker of the House of Representatives, commission an independent third party to, at a cost of up to \$150,000, conduct a study and prepare a report by November 15, 2012. The report would study and provide recommendations regarding the following:

- Defined contribution, hybrid defined contribution and other plan options including the additional costs related to implementing a 401(k) plan identical to the one offered to state employees (which provides an automatic match equal to 4 percent of salary with an additional match of up to 3 percent based on employee contributions).
- Plan design, funding methods, benefits provided, and other features of other public state school employee plans and private retirement plans covering comparable employees.
- Funding or not funding the annual required contributions for unfunded liabilities.
- Changing member contributions, vesting requirements, service credit purchases, pension formulas, cost of living increases, rates of investment returns, mortality rates, and longevity.
- Prefunding retire health care costs rather than paying on a cash basis.
- The degree to which current operating expenditures (COE) are a stable, growing, and equitable base for charging unfunded accrued liabilities as compared to payroll or alternative methods.

Administrative Requirements

The bill would require that the DTMB include additional information in the annual summary provided to the Governor, the Legislature, retirees and members. The bill would expand the summary to include the following: the market-value discount rate used to determine liabilities, the funded status of the system based on the market value of assets with no smoothing, a 5-year projection of the annual level percentage of payroll contribution required for MPERS employers, and the normal cost contribution rate using the market-value discount rate. The bill would also require the department to post the summary and all its required disclosures on its website by April 15 of each year. Finally, the bill would require that DTMB collect and maintain an email address for all members and retirees and email the annual summary to all members and retirees.

FISCAL IMPACT:

The bill would create both quantifiable short-term savings and long-term savings that cannot be precisely quantified. The fiscal impacts of the various provisions of the bill are summarized in the table below. For FY 2012-13, the bill would cap employer contributions at the equivalent of the FY 2011-12 rate of 24.46%, which would require an estimated \$150 million in School Aid funding to meet the full annual required contribution. The cost to the School Aid Fund would rise as the unfunded liability costs are expected to increase for the next few years, offsetting contributions that would otherwise be made by local employers

EXHIBIT 2

Defendant-Appellant

MICHIGAN EDUCATION ASSOCIATION,

Plaintiff-Appellee,

Court of Claims No. 12-105-MM

v

MICHIGAN PUBLIC SCHOOL
EMPLOYEES RETIREMENT SYSTEM,
MICHIGAN PUBLIC SCHOOL EMPLOYEES
RETIREMENT SYSTEM BOARD, TRUST FOR
PUBLIC EMPLOYEE RETIREMENT
HEALTH CARE FUNDING FOR MEMBERS
OF THE MICHIGAN PUBLIC SCHOOL
EMPLOYEES RETIREMENT SYSTEM,
MICHIGAN DEPARTMENT OF TECHNOLOGY,
MANAGEMENT & BUDGET, JOHN E. NIXON,
as the Director of the Michigan Department of
Technology, Management & Budget,
PHIL STODDARD, as the Director of the Office
of Retirement Services of the Michigan
Department of Technology, Management &
Budget, and ANDY DILLON, as the Treasurer
of the State of Michigan,

Defendants-Appellants.

AFFIDAVIT OF PHILLIP STODDARD

1. My name is Phillip Stoddard. I make this affidavit based upon my personal knowledge. If called upon as a witness, I can testify competently to the contents of this affidavit.

2. I am the Director of the Office of Retirement Services (ORS) which is an agency within the Michigan Department of Technology, Management & Budget

(DTMB). ORS is the State agency that administers the Michigan State Employees' Retirement System (SERS) and the Michigan Public School Employees' Retirement System (MPERS). I have worked for ORS since 1988 and have been its Director since 2006.

3. Assuming that 2012 PA 300 was fully implemented, pursuant to MCL 38.1341, for the fiscal year beginning October 1, 2012, public schools were going to be charged 24.32% of their total payroll to fund the normal cost of pensions and retiree health care and to cover the unfunded accrued liability. Included in this percentage is 20.96% for unfunded accrued liability which is the maximum allowed under MCL 38.134(2).

4. As a result of the two temporary restraining orders issued by the Court of Claims, the requirement in section 59(3) of 2012 PA 300 (PA 300) that members make their elections by October 26, 2012, cannot be enforced. Moreover, any elections that are made are subject to rescission or change if any provision in PA 300 is declared illegal or unconstitutional. Thus, any member contributions that would be required beginning on the first pay day after December 1, 2012 (section 8(7) of PA 300) will not be made.

5. If contributions do not begin on or about December 1, 2012, as contemplated by PA 300 MPERS will be underfunded by over \$200 million for the remainder of the fiscal year.

6. As a result, beginning October 1, 2012, ORS will be required to increase the normal cost rate for pensions and retiree health care 1.04% so the contribution rate that schools will have to pay on their total payroll will increase

from 24.32% to 25.36%. Thus, school districts will be required to pay about \$100 million more which will be equivalent to about \$65.00 for each student in each school district.

7. In addition to the 1.04% increase to the school district's contribution rate, the Legislature will be required to fund the remaining \$100 million deficiency. The Legislature can amend the statute to increase the 20.96% cap for unfunded accrued liability, thus increasing the total paid by the school district to over 25.36% of total payroll. As an alternative, the Legislature could amend the State Aid Act to use state school aid funds to pay the \$100 million deficiency in accrued liabilities. Either method will result in less money available to school districts.

8. At the present time, according to the Michigan Department of Education, www.michigan.gov/documents/mde/DEPO7leg_224982_7.pdf, there are three school districts who have emergency managers. In addition, as of June 30, 2012, there are over 30 other school districts with projected deficits with no fund balances to cover those deficits.

9. Section 81b of 2010 PA 75, MCL 38.1381b, Section 19j(8) of 2010 PA 185, MCL 38.19j(8); and Section 50a of 2011 PA 264, MCL 38.50a are other recent Legislature amendments that provided members with elections. The time periods for making those elections was less than or about equal to the 52 day election period

in Section 59(3) of PA 300. ORS worked with members and successfully completed those elections.

Phillip Stoddard
Phillip Stoddard

Subscribed and sworn to before me
September 7, 2012.

Chanda S. Donnan

Chanda S. Donnan
Print name exactly as it appears on application for commission as a notary public

Notary Public, State of Michigan, County of Clinton
My Commission Expires June 23, 2013
Acting in the County of Eaton

STATE OF MICHIGAN
IN THE SUPREME COURT

AFT MICHIGAN, AFT, AFL-CIO, *et al.*,

Plaintiffs-Appellants,

vs.

STATE OF MICHIGAN,

Defendant-Appellee.

Supreme Court
Case No. 148748

Court of Appeals
Docket No. 313960

Court of Claims
Case No. 12-104-MM

Mark H. Cousens (P12273)
Attorney for Plaintiffs-Appellants
26261 Evergreen Road, Suite 110
Southfield, MI 48076
(248) 355-2150

Frank J. Monticello (P36693)
Joshua O. Booth (P53847)
Patrick Fitzgerald (P69964)
Attorneys for Defendant-Appellee
Department of Attorney General
State Operations Division
P.O. Box 30754
Lansing, MI 48909
(517) 627-3789

James A. White (P22252)
Kathleen Corkin Boyle (P27671)
Timothy J. Dlugos (P57179)
White, Schneider, Young & Chiodini, P.C.
Attorneys for proposed Amicus Curiae MEA
2300 Jolly Oak Road
Okemos, MI 48864
(517) 349-7744

Michael M. Shoudy (P58870)
Co-counsel for proposed Amicus Curiae MEA
1216 Kendale Boulevard
P.O. Box 2573
East Lansing, MI 48826-2573
(517) 337-6551

CERTIFICATE OF SERVICE

I, Kimberly A. Gibbs, hereby certify that on September 15, 2014, a copy of Brief of *Amicus Curiae* Michigan Education Association was served on Mark H. Cousens, Attorneys for Plaintiffs-Appellants AFT, 26261 Evergreen Road, Suite 110, Southfield, MI 48076, Frank J. Monticello and Joshua O. Booth, Department of Attorney General, Attorneys for Defendants-Appellees, P.O. Box 30754, Lansing, MI

48909, by first class mail, depositing same in the United States mails at Lansing,
Michigan.

Kimberly A. Gibbs

Kimberly A. Gibbs



White, Schneider, Young & Chiodini, PC
Attorneys at Law

Karen Bush Schneider
William F. Young
James J. Chiodini
Shirlee M. Bobryk
Jeffrey S. Donahue
Timothy J. Dlugos
Erlin M. Hopper
William C. Camp
Catherine E. Tucker
Lin-Chi Wang

Of Counsel:
James A. White
Kathleen Corkin Boyle
Deborah G. Adams
Jennipher Martinez-Caltrider
Antoinette G. Prazho

September 15, 2014

Clerk of the Court
Michigan Supreme Court
Michigan Hall of Justice, 4th Floor
925 West Ottawa Street
P.O. Box 30052
Lansing, MI 48909

BY HAND DELIVERY

Re: *AFT Michigan, AFT, AFL-CIO, et al v State of Michigan*
Supreme Court Case No. 148748
Court of Appeals Docket No. 313960
Court of Claims Case No. 12-104-MM

Dear Sir/Madam:

Enclosed please find the original and 24 copies of the Brief of *Amicus Curiae* Michigan Education Association regarding the above matter. Also enclosed is the Certificate of Service indicating copies of the same have been sent to counsel of record.

Thank you for your assistance in this regard. Should you have any questions, please do not hesitate to contact the undersigned.

Sincerely,

WHITE, SCHNEIDER, YOUNG
& CHIODINI, P.C.

James A. White
Direct Dial Number: 517/347-7208
E-Mail: jwhite@whiteschneider.com



kag
Enclosures
cc w/enc

Mark H. Cousens, Esq.
Frank J. Monticello, Esq.
Joshua O. Booth, Esq.
Michael M. Shoudy, Esq. (#ARP00651Z *e)