**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**NO. 34,210**

**JOANNA BARTLETT, LENORE PARDEE, DAVID HAMILTON, and BETH LEHMAN,**

Petitioners,



**v.**

**MARY LOU CAMERON, RUSSELL GOFF, DELMAM SHIRLEY, BRADLEY DAY, HANA SKANDERA, JAMES B. LEWS, and J. THOMAS MCGUCKIN, in their official capacities as Board of Trustees of the New Mexico Educational Retirement Board, and JAN GOODWIN, in her official capacity as Executive Director of the New Mexico Education Retirement Board,**

Respondents.

## RESPONSE TO VERIFIED EMERGENCY PETITION FOR WRIT OF MANDAMUS

The Educational Retirement Board[1] has no clear legal duty not to comply with the cost of living adjustment ("COLA") reduction in SB 115, which was made to enhance the actuarial soundness of the Educational Retirement Fund ("Fund"). There being no such duty, the Petition should be denied. Petitioners' claims also fail on the merits. In denying the Petition, the Court, therefore, should find that the

[1] For simplicity, Respondents will be referred to collectively as the Educational Retirement Board (the "ERB").

COLA modification is constitutional under Article XX, § 22 of the New Mexico Constitution.

## BACKGROUND

The constitutional provision at issue is Article XX, § 22, which states in material part:

> D. Upon meeting the minimum service requirements of an applicable retirement plan created by law for employees of the state or any of its political subdivisions or institutions, a member of a plan shall acquire a vested property right with due process protections under the applicable provisions of the New Mexico and United States constitutions.
>
> E. Nothing in this section shall be construed to prohibit modifications to retirement plans that enhance or preserve the actuarial soundness of an affected trust fund or individual retirement plan.

N.M. Const., art. XX, § 22 (as added November 3, 1998).

As discussed below, Paragraph E is an integral part of § 22 virtually ignored by Petitioners and it must be given full weight. Read in its entirety, § 22 grants members of the Fund a qualified or limited property right, which is subject to modification to enhance and preserve the actuarial soundness of the Fund from which those member's retirement benefits are paid. The legislature's change to the COLA was just such a permissible modification.

SB 115, of which the COLA change became a part, was the culmination of a process to develop amendments to the Educational Retirement Act ("Act") to

enhance the Fund's actuarial soundness. Between 2001 and 2012, the funded ratio[2] of the Fund declined, in part as the result of two significant downturns in the economy and the investment market in less than ten years: 2001 and 2008-2009. The funded ratio as of June 30, 2012 was 60.7 percent. *See* Educational Retirement Board of New Mexico, Actuarial Valuation as of June 30, 2012, attached as Exhibit 1, at 10.

Initially, SB 115 included an increase in member contributions and the creation of a new membership tier with additional requirements affecting the retirement of new members beginning employment on or after July 1, 2013. The projected funded ratio based on the initial proposal was 93 percent as of June 30, 2043. *See* Gabriel, Roeder, Smith & Company ("GRS"), Projection Based on Stakeholder Proposal, dated 1/15/2013, attached as Exhibit 2.

During the legislature's deliberative process, the Senate Finance Committee amended SB 115 to modify the COLA formula when the funded ratio is less than 100 percent. After being passed in the Senate by a vote of 41 to 0, with one excused, SB 115 was considered by the House Appropriations and Finance Committee ("HAFC"). HAFC further amended the bill to provide for the two stage reduction in the COLA that is at issue here. SB 115 then passed the House

[2] The "funded ratio" is the ratio of the Fund's assets to the accrued actuarial liabilities (a/k/a "benefits") to be paid from the Fund.

on a vote of 54 to 13. The Senate concurred in the amended bill. Including the effect of the HAFC amendment, the changes made by SB 115 resulted in the projected funded ratio increasing to 100.7 percent by June 30, 2043. *See* GRS, Projection Based on Stakeholder Proposal, dated 3/13/2013, attached as Exhibit 3.

ERB COLAs are based on yearly changes in the Consumer Price Index ("CPI"). Prior to enactment of SB 115, and as will again be the case when the funded ratio is 100 percent, if the increase is less than 2 percent, the COLA is equal to the CPI change. *See* NMSA 1978, § 22-11-31 (C)(1) (1967, as amended through 2013) and § 22-11-31 (B) (as amended through 2010). If the change is 2 percent or greater, the COLA is one-half of the increase in the CPI increase, but not less than 2 percent nor more than 4 percent. Annuities are not decreased if the change in the CPI is negative. Changes to retirement benefits are made in July of each fiscal year based on the CPI change for the prior calendar year. *See* § 22-11-31 (C) (as amended through 2013) and § 22-11-31 (B) (as amended through 2010).

The COLA reduction is tied to the median adjusted annuity[3] paid to ERB retirees, excluding disability retirements, and their years of service credit at

[3] Defined as the "median value of all annuities and retirement benefits paid pursuant to Section 22-11-29 or 22-11-30 NMSA 1978, as calculated each fiscal year; provided, however, that the benefits paid to a member pursuant to Section 22-11-38 NMSA 1978 shall not be included in the median adjusted annuity calculation." NMSA 1978, § 22-11-31 (A)(6) (as amended through 2013).

retirement.[4] When the funded ratio is 90 percent or less, the COLA for retirees whose annuity is at or below the median who have 25 or more years of service credit at retirement will be reduced by 10 percent. *See* Section 22-11-31 (C)(3)(a) and (c). For retirees whose annuity is either (i) greater than the median or (ii) who have less than 25 years of service credit at retirement, the COLA will be reduced by 20 percent. *Id.*, at (3)(b) and (d). When the funded ratio exceeds 90 percent but is less than 100 percent, the COLA for retirees who had 25 or more years of service credit at retirement whose annuity is equal to or less than the median adjusted annuity will be reduced by 5 percent. *Id.* at (2)(a) and (c). For all other retirees, it will be reduced by 10 percent. *Id.* at (2)(b) and (d). When the funded ratio is 100 percent, the COLA reduction ceases. *Id.* at (c)(1).

The following illustration is based on the historical average CPI increase of 2 percent, a funded ratio of 90 percent or less, and the current $18,050.40 median adjusted annuity.[5]

> COLA for members with 25 or more years of service credit having annuities less than or equal to median adjusted annuity:

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[4] COLAs of members on disability status or who were certified by the ERB as disabled at regular retirement are not subject to the change made by SB 115. *See* Section 22-11-31 (C)(2) and (C)(3) (as amended through 2013).

[5] GRS, 2013 Cost of Living Adjustment for Retirees – Revised, April 19, 2013, p. 2 (communicating median adjusted annuity as of June 30, 2012), attached as Exhibit 4, at 2. The median is recalculated each fiscal year.

| | |
|---|---|
| Pre-SB 115 - $18,050.40 x 2% | = $361.08/year |
| Following SB 115 - $18,050.40 x 1.8% | = $324.91/year |
| Reduction per SB 115 | = $36.17/year |

COLA for members with (i) less than 25 years of service credit having annuities less than or equal to median adjusted annuity or (ii) members whose annuity is greater than median adjusted annuity, regardless of service credit:

| | |
|---|---|
| Pre-SB 115 - $18,050.40 x 2% | = $361.08/year |
| Following SB 115 - $18,050.40 x 1.6% | = $288.81/year |
| Reduction per SB 115 | = $72.27/year |

The chart attached as Exhibit 5 extends the illustration over 30 years.

In addition to COLA changes, SB 115 increased contributions for members whose annual salary is greater than $20,000 to 10.1 percent on July 1, 2013 and to 10.7 percent on July 1, 2014. NMSA 1978, § 22-11-21 (A) (as amended through 2013).[6] In addition, the benefits of new members who join beginning July 1, 2013 who retire prior to age 55 with thirty years service credit will be reduced to the actuarial equivalent of retiring at age 55. NMSA 1978, § 22-11-23.2 (as amended through 2013). COLAs for those members will not start until age 67, a delay of two years. *Id.* In addition to the above described changes, employer contributions

[6] Members whose annual salary is $20,000 or less will continue to pay contributions at the rate of 7.9 percent.

will increase beginning July 1, 2013 to 13.15 percent and to 13.9 percent on July 1, 2014. NMSA 1978, § 22-11-21(C) (as amended through 2013).[7]

## ARGUMENT AND AUTHORITY

The Petition fails for three reasons. First, mandamus does not lie where, as here, Respondents do not have a non-discretionary duty to act or refrain from acting. The Petition is, in reality, a request for a declaratory judgment that the COLA change violates Article XX, § 22. Second, Petitioners fundamentally are asking this Court to substitute its judgment for that of the legislature in formulating public policy. Finally, the Petition fails on its merits because the COLA change was made for the purpose of enhancing, and thereby protecting, the actuarial soundness of the Fund. Balancing Petitioners' property rights against maintaining the Fund's actuarial soundness weighs in favor of the COLA changes' constitutionality.

### I. RESPONDENTS DO NOT HAVE A CLEAR LEGAL DUTY TO PAY A COLA THAT VIOLATES STATUTES.

Mandamus "normally lies to compel a government official to perform a non-discretionary act." *State ex rel. Clark v. Johnson*, 120 N.M. 562, 569, 904 P.2 11, 18 (1995). More importantly, "[m]andamus lies only to force a clear legal right

[7] The legislature made funding of the increased employer contributions contingent on enactment of legislation to improve the actuarial solvency of the Fund. 2013 NM Laws, ch. 227, § 4, ¶ K (Public School Support), p. 202, lines 14-17.

against one having a clear legal duty to perform an act." *Brantley Farms v. Carlsbad Irrigation Dist.*, 1998-NMCA-023, ¶ 16, 124 N.M. 698, 954 P.2d 763 (internal citation omitted). Typically, the clear legal duty necessary for mandamus is apparent from the face of the statute, regulation, or constitutional provision at issue. Mandamus would lie only for failure to comply with that clear legal duty.

Petitioners base their case on Article XX, § 22(D) of the New Mexico Constitution. That provision contains no mandate directing the Board or its members to do anything, much less that which Petitioners request.

Article XX, § 22(D) provides that members of a State retirement system meeting the minimum service requirements of that system "shall acquire a vested property right with due process protections" under the New Mexico and United States Constitutions. Article XX, § 22(E) further provides that "[n]othing in this section shall be construed to prohibit modifications to retirement plans that enhance or preserve the actuarial soundness of an affected trust fund or individual retirement plan."

Petitioners argue that Article XX, § 22 should be read to allow modifications to plans only for employees whose benefits have not yet vested. Petition, ¶ 60. Petitioners cite to a portion of an analysis prepared by the Attorney General's Office in 1998 and attached to the Fiscal Impact Report ("FIR") prepared by the

Legislative Finance Committee, using it to support their interpretation of later changes made to the resolution which ultimately became Article XX, § 22. *Id.*, ¶¶ 58 and 59. Petitioners note that the analysis states "[w]e are informed that the proponents do not intend to permit an actual cut back for retirees, current and future." No indication is provided as to who "informed" the writers.

In *Baker v. Hedstrom*, the Court of Appeals held that the interpretation of legislation provided by an attorney who served on a joint committee of the state medical society and the state bar association which "provided guidance and policy assistance" to the legislature on the Medical Malpractice Act was not persuasive, noting that not even statements of legislators are considered competent evidence in determining legislative intent. 2012-NMCA-073, ¶ 28, 284 P.3d 400, (internal citation and quote omitted), cert. granted, 295 P.3d 600 (Table, No. 33,635) (July 20, 2012). The attorney provided policy assistance, "and therefore was at least one step removed from the legislative process." *Id.* For similar reasons, the attachment to the FIR is not persuasive. In addition to the source who "informed" the writers being unknown, it cannot be said that the source's view reflected more than that of one person, legislator or otherwise, much less the intent of the entire legislature.

Article XX, § 22(D) on its face does not give rise to a clear legal duty. Read in conjunction with Article XX, § 22(E), which limits or qualifies the right recognized in § 22(D), it is impossible to find a clear legal duty on the part of the ERB to refrain from paying the COLA as now provided by statute. The scope of the property right provided for in Article XX, § 22 is subject to judicial determination. Mandamus cannot lie where an allegedly clear legal duty could be determined only after a close examination and careful interpretation of two constitutional provisions.

Petitioners contend that mandamus is appropriate under *Clark* because the Petition "presents a fundamental question of great public concern, the facts are undisputed, the legal issues eventually would have come before this Court, and the petitioners require an early resolution of the dispute." Petition, ¶ 6. Petitioners misapply that standard.

While Petitioners may desire an early resolution, that is not the standard established in *Clark*. Instead, the *Clark* Court noted that "an early resolution of the dispute is desirable." *Clark*, 120 N.M. at 569. Petitioners have had several months – at least since the signing of SB 115 on March 29, 2013 – to seek an appropriate remedy. They cannot manufacture urgency by waiting to file their Petition until one week before the effective date of the statute they seek to strike down.

This is particularly true because mandamus typically lies only "where there is no other plain, speedy and adequate remedy in the ordinary course of the law." *El Dorado at Santa Fe, Inc. v. Bd. of County Comm'rs*, 89 N.M. 313, 316, 551 P.2d 1360, 1363 (1976). Petitioners complain they will receive a smaller COLA; *i.e.*, less money. Money damages are the quintessential legal remedy. Should Petitioners prevail in their challenge, they will be entitled to recover the amount by which the COLA was reduced. Mandamus is not the vehicle to secure that remedy.

This is not an appropriate case for mandamus. Article XX, § 22(D) does not establish a clear legal duty on its face, especially when read in light of § 22(E). The Petition should be denied.

## II. THE COLA CHANGE IS A PUBLIC POLICY DECISION PROPERLY MADE BY THE LEGISLATURE.

Mandamus is inappropriate where, as here, the legislature has made difficult policy decisions about how best to ensure the continued viability of the Fund. As noted above, the Fund faces pressure as the result of major economic downturns in 2001 and 2008-2009, as well as from the strains that occur as the Fund matures and the number of retired members grows. Determining how best to protect the Fund for its members, both active and retired, is a decision best left to the legislature.

In examining a public policy decision such as this, the Court defers to the judgment of the legislature. *See State ex rel. Hudgins v. Public Employees*

*Retirement Bd.*, 58 N.M. 543, 548, 273 P.2d 743, 746-47 (1954) (determining that the rate of employee contributions to the State retirement plan was appropriately within the legislature's discretion). *See also, State ex rel. Taylor v. Johnson,* 1998–NMSC–015, ¶ 21, 125 N.M. 343, 961 P.2d 768 (recognizing unique position of legislature in creating and developing public policy; it is particular domain of legislature, as voice of the people, to make public policy (*quoting Torres v. State,* 119 N.M. 609, 612, 894 P.2d 386, 389 (1995))).

Mandamus is not a means by which the legislature's policy choices should be reviewed, much less nullified. For these reasons, the Petition should be denied.

## III. THE COLA REDUCTION IS PART OF A CONSTITUTIONAL CHANGE TO THE FUND MADE TO ENHANCE ITS ACTUARIAL SOUNDNESS.

Petitioners attempt to read Article XX, § 22(D) in a vacuum. They virtually ignore Article XX, § 22(E), arguing only that: (1) it would defeat the entirety of Article XX, § 22 to read § 22(E) as permitting the taking of property rights without compensation; and (2) the legislative history shows that § 22(E) was not intended to permit the lowering of benefits. Petitioners' interpretation cannot bear the weight they have given it. Article XX, § 22 requires a careful balancing of the property rights described in § 22(D) and the authority reserved to the legislature by

§ 22(E) to make changes necessary to enhance the actuarial soundness of the Fund. That balancing tips in favor of the constitutionality of the COLA change.

### A. The Interplay of Article XX, §§ 22(D) and 22(E) Require a Balancing of Members' Property Rights and State Power.

Petitioners proceed as though Article XX, § 22(D) bars the State from taking any action that would modify or reduce the COLA that retirees receive based on increases in the CPI. It does not.[8] Instead, the provision guarantees to vested members, including retirees, "due process protections under applicable provisions of the New Mexico and United States Constitutions." Article XX, § 22(D). Those due process protections require a balancing of a member's rights against the action which enhances or preserves the Fund's actuarial soundness. In this respect, Petitioner's claim is no different from any other due process challenge levied against a statute. The Court must apply the appropriate level of scrutiny to determine whether the statute is constitutional.

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[8] Petitioners suggest that Article XX, § 22(E) does not permit a change to a "benefit," but only to a "plan," and even then only for members who have not yet vested. Petition, ¶ 60. Article XX, § 22(E) does not bear such a construction. A "plan", being a much broader concept than a benefit, necessarily includes the level of benefit paid out under that plan. It also includes things such as how the plan is invested. Giving the word "plan" its plain and ordinary meaning in construing Article XX, § 22(E) leads inexorably to the conclusion that the provision contemplates this kind of change.

Three levels of scrutiny are available to analyze an alleged due process violation: strict scrutiny, intermediate scrutiny, and rational basis review. The COLA change is entitled to rational basis review. The rational basis test is applicable when, as here, the challenged law or regulation "does not affect a fundamental right or create a suspect classification, nor impinge upon an important individual interest." *Mieras v. Dyncorp*, 1996-NMCA-095, ¶ 27, 122 N.M. 401, 925 P.2d 518 (Ct. App. 1996). Economic rights, such as those which might exist in connection with the COLA, are not 'fundamental' rights. *Cf. West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392, (1937) (freedom of contract is qualified and not absolute right). Social and economic legislation, such as the COLA change, is typically subjected to rational basis review. *Breen v. Carlsbad Mun. Schools*, 2005-NMSC-028, ¶ 17, 138 N.M. 331, 120 P.3d 413.

Under rational basis review there is a presumption of constitutionality. The "party attacking the constitutionality of the statute has the burden of proving the statute is unconstitutional beyond all reasonable doubt." *ACLU of N.M. v. City of Albuquerque*, 2006-NMCA-078, ¶ 10, 139 N.M. 761, 137 P.3d 1215 (Ct. App. 2006) (citation omitted). In *Trujillo v. City of Albuquerque*, 1998-NMSC-031, 125 N.M. 721, 965 P.2d 305, this Court articulated a rational basis test that subsumed the test applied by the Court of Appeals in *Alvarez v. Chavez*, 118 N.M. 732, ¶ 32,

737-39, 886 P.2d 461, 466-68 (Ct. App. 1994), and *Corn v. N.M. Educ. Fed. Credit Union*, 119 N.M. 199, 202-04, 889 P.2d 234, 237-39 (Ct. App. 1994) (overruling *Alvarez* and *Corn* to extent they adopted fourth tier of statutory review, while stating "heightened" rational basis analysis articulated therein was subsumed in rational basis analysis). Thus, New Mexico's rational basis test requires "either a factual foundation in the record to support the basis [for the challenged law] or a firm legal rational to support the basis." *Corn*, 119 N.M. at 203.

### B. Balancing Member's Property Rights and the State's Interest in Preserving the Fund Shows that the COLA Change Is Constitutional.

The right at issue in this case is that of retirees to receive a COLA unchanged by SB 115. That is weighed against the State's interest in enhancing the actuarial soundness of the Fund, thereby insuring viability of the Fund from which all retirees, current and future, receive retirement benefits. There is both factual support and a firm legal basis for the COLA change.

The goal of SB 115 is to raise the funded ratio of the Fund. During its deliberative process, the legislature chose to amend the bill to provide for a reduction in the COLA until a 100 percent funded ratio is attained. By doing so, the legislature decided as a matter of public policy that retirees, as well as current

active members and future members, should share the burden of raising the funded ratio.

The reduced COLA will decrease outflows from the Fund. In Fiscal Year 2014, which began July 1, 2013, the modified COLA will reduce outflows by approximately $2,067,000. Cost of Living Adjustment Information, New Mexico Educational Retirement Board, attached as Exhibit 6, at 3. Over time, the benefit of reduced outflows accrues and helps achieve the goal of improving the funded ratio. They are a material part of achieving the projected 100 percent funded ratio by 2043, a ratio higher than would be attained without the COLA change.

A higher funded ratio is in the members', as well as the State's, interest as it better cushions the Fund against the type of economic downturns seen in 2001 and 2008-2009. That in turn mitigates the need for other, potentially more drastic, changes in the future, which could include changes to members' benefits or service requirements, as well as further changes to the COLA. If such changes had to be made in the context of a lower funded ratio, they could be far more drastic than those made by SB 115 and more deeply affect active and retired members.

A greater increase in the funded ratio also mitigates future steps that the State might have to take to increase cash flows to the Fund through member and employer contributions higher than those provided for by SB 115. During a

downturn, any such increases would more than likely come at the expense of other state programs, such as education itself, or require employee layoffs.

This Court should not take on the task of deciding whether, as a matter of public policy, a funded ratio of 93 percent rather than 100 percent is satisfactory or whether the legislature could have chosen another means to achieve its goal. *See Williamson v. Lee Optical of Oklahoma.,* at 488 (day is gone when the court uses the due process clause . . . to strike down state laws . . . because they may be unwise, improvident, or out of harmony with a particular school of thought).

Nothing in the Petition demonstrates that the COLA change fails to satisfy the rational basis analytical framework. Because the State's interest, supported by the record, justifies the COLA reduction, that reduction is constitutional and the Court should deny the Petition.

### C. The COLA Change Does Not Violate Petitioners' Procedural Due Process Rights.

Petitioners allege they were deprived of their procedural due process rights, relying on *Pierce v. State,* 1996-NMSC-001, 121 N.M. 212, 910 P.2d 288 (1995), for the proposition that before enacting the COLA change the legislature was required to provide the members with notice of the proposed reduction and the opportunity to respond. *See* Petition, ¶ 63.

*Pierce* considered the constitutionality of the legislature's repeal of a long-standing tax exemption for the retirement benefits paid from four New Mexico public employee pension funds. Relevant to the issues raised in the Petition, the plaintiffs in *Pierce* argued that the legislature violated their due process rights by giving them insufficient notice of, and inadequate opportunity to respond to, the repeal. This Court disagreed. After determining that the tax exemption was not a vested right, and thus not a "constitutionally protected private interest," the Court held that publicity in local papers about the exemption repeal coupled with the fact that legislative committee meetings discussing the bill were open to the public satisfied any due process requirements. *Pierce*, 1996-NMSC-001, ¶ 60.

The Court went on say that "[w]hen the legislature attempts to impair a vested property right . . . the notice and opportunity to respond must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id.*, ¶ 55 (quote and citation omitted). It is upon this language that Petitioners rely.

Such reliance is misplaced. First, that language is dicta. It was neither central to, nor necessary for, the Court's holding on the due process issue before it. Second, if literally applied, this language would represent a significant and unwarranted judicial intrusion into the legislative process. Separation of power

principles, as well as principles of inter-branch comity, counsel against taking such steps.

The legislative history that Petitioners provide of SB 115 provides an excellent example of why. Legislation is often amended several times before final passage. The legislature has, consistent with its exclusive constitutional powers, established its own process by which a bill makes its way to the Governor's desk for signing (or veto). That process permits amendments in committee and on the floor of a chamber. If Petitioners' reading of *Pierce* is correct, the legislature would be forced to halt its normal process when considering any measure that might reduce vested pension benefits in some way and follow a process very similar to notice and comment rulemaking. To the extent *Pierce* actually requires such an action, it should be reconsidered. Such a requirement could become a means to bring much legislative action involving pensions to a halt, preventing the state's public policy-making body from performing its function.

Other courts addressing the question of the notice due when a general statutory change will affect a statutory benefit have found that procedural due process does not require individual notice and an opportunity to be heard. *See Atkins v. Parker,* 472 U.S. 115, 129-30 (1985) (amendment to Food Stamp Act, 7 U.S.C. § 2014(e), altering eligibility requirements did not violate due process

clause or require notice and opportunity to be heard; legislative process provides all process that is due); *McInerney v. Public Employees' Retirement Association*, 976 P.2d 348, 352-53 (Colo. Ct. App. 1998), *cert. denied* (failure to provide notice of legislative changes to retirement benefits and opportunity to elect benefits under old plan did not violate right to procedural due process; when statute does not require or prohibit specific conduct, but merely adjusts statutory benefit level, procedural due process does not require notice and an opportunity to avoid the impact of new law); *and Rea v. Matteucci,* 121 F.3d 483, 485 (9th Cir. 1997) (general statutory change which also converted positions from classified to unclassified service did not violate due process; when state alters state-conferred property right through legislative process, legislative determination provides all process that is due). As the Supreme Court has noted, where a rule "applies to more than a few people, it is impracticable that every one[9] should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole." *Rea,* 121 F.3d at 485 (quoting *Bi-Metallic Investment Co. v. State Bd. of Equalization,* 239 U.S. 441, 445 (1915)). The COLA change is not directed against particular individuals' interest in property or liberty. It also does not require individuals to either engage in or not

[9] As in original.

engage in specific conduct. *McInerney* 976 P.2d at 353. Due process greater than that afforded by normal legislative processes should not be required.

Here, the stakeholders, including opponents, had notice of various proposals to change the COLA and the legislative process by which SB 115 was amended to include such a change. Petitioners provide an abbreviated recitation of the process by which SB 115 was developed and enacted by the legislature.[10] *See* Petition, ¶¶ 34-44. Petitioners note that the amendments were made in legislative committees, but fail to note those meetings were open to the public with testimony being received by both those opposing as well as supporting the COLA change. Also not noted, the ERB and stakeholders remained involved throughout the process during which proposed changes to the COLA were considered. As demonstrated by Exhibit 7 attached hereto, e-mails were circulated throughout the process among representatives of retired and active member/employee groups, educational professional groups, and employers, informing them of the status of SB 115, including proposals to amend the bill, and when legislative committee meetings were scheduled to address the bill and proposed amendments. *See,* Exhibit 7, at 84, 90, 107, 108, 123, 125, 134, and 135. Alternate COLA proposals

[10] Petitioners note "there is no indication that the ERB officially endorsed the COLA reduction." Petition, ¶ 44. Respondents have not located any constitutional, statutory, or legislative rule that requires a particular agency, group or individual to endorse proposed legislation or amendments to it.

were developed and circulated for consideration by the stakeholders. *Id.* at 2-6, 7-9, 11, 14-21, 22-23. 44-48, 134, and 136. Recipients of the e-mails included opponents of the COLA change such as representatives of the UNM Retiree Association. *Id.* at 33, 49, 53, 82-83, 103-04, 121-22, 128-31, and 132-33. It can hardly be said that opponents, as well as proponents, of a COLA change did not receive notice and an opportunity to be heard in this case.

If the Court elects to apply *Pierce* as Petitioners urge, the Court must consider the limitation the Court established on such a potentially sweeping intrusion into legislative affairs. At the beginning of its discussion on the topic, the Court stated that "[b]efore the legislature may *substantially* alter the level of retirement benefits, it must provide employees and retirees with adequate notice and an opportunity to respond." *Pierce,* 1996-NMSC-001, ¶ 65 (emphasis added). In light of the discussion above, Respondents submit that the COLA modification does not substantially alter the level of Petitioners' retirement benefits.

Petitioners would no doubt disagree, noting that the COLA will be as much as 20 percent less than the COLA they would otherwise receive beginning July 2013 and the compounding effect of that reduction over time. *See* Petition, ¶¶ 9, 11, 12. Phrased in the alternative, however, SB 115 provides that ERB retirees will receive *at least* 80 percent of the COLA increase they would receive had SB 115

not included the modification. In order words, when there is an increase in the CPI, a COLA will be paid, albeit at a lower rate. It is important also to note that the COLA change does not reduce the annuity retirees currently receive. This reduction in the amount by which annuities would otherwise be increased by a COLA does not rise to the level of "substantially altering the level of retirement benefits." Accordingly, even if the Court were to apply *Pierce* in the manner requested, it does not mandate the result Petitioners seek.

**D. The COLA Change is not a Compensable "Taking."**

Petitioners allege the COLA change is a taking, for which they are entitled to compensation. Petition, ¶ 48. As discussed above, Article XX, § 22 contains, *inter alia*, both a recognition of a property right and a qualification of that right. A balancing of both paragraphs must be undertaken to determine whether there has been a compensable taking.

The question here is whether there has been a 'regulatory' taking. Such an analysis would involve reviewing three factors: (1) the economic impact of the COLA change on Petitioners; (2) the extent to which the COLA change interfered with Petitioners' distinct investment-backed expectations; and (3) the character of the legislature's action. *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986) (applying regulatory analysis to find constitutional congressional

imposition of employer liability for withdrawal from multiemployer pension plan). A reasonable restriction on the use of private property, or here, a reduction in the rate of increase resulting from a COLA, will not constitute a "taking" if it (1) is reasonably related to a proper purpose and (2) does not unreasonably deprive property owners of *all, or substantially all,* of the beneficial use of their property. *New Mexicans for Free Enterprise v. City of Santa Fe*, 2006 -NMCA- 007, ¶ 53, 138 N.M. 785, 126 P.3d 1149 (finding constitutional ordinance requiring certain business to pay minimum wage higher than state and federal minimum wage) (emphasis added) (quoting *Temple Baptist Church, Inc. v. City of Albuquerque,* 98 N.M. 138, 144–45, 646 P.2d 565, 571–72 (1982)).

The economic impact of the change is limited in that the COLA will be at most 20 percent less than if not reduced. The economic impact of the plan changes also are being shared by active members through higher contributions and additional conditions on receipt of benefits by new members. Sharing the burden reduces the impact on any one group, whether retired, active or new members. The economic impact on Petitioners' in this instance does not support finding a taking.

Balanced against the argument that the COLA change impacted Petitioners' investment-backed expectations[11] is the fact that the legislature properly applied

[11] For sake of argument only, Respondents assume that member contributions and service are sufficient to provide a basis for a "distinct investment-backed

the power reserved in Article XX, § 22(E) to include the COLA change in SB 115. The legislature's choice helps to enhance the actuarial soundness of the Fund, thereby benefiting all members, including Petitioners. *See Connolly*, 475 U.S. at 226 (those in a regulated field cannot object if legislative scheme is buttressed by subsequent amendments to achieve legislative end). By spreading the burden of improving the actuarial soundness across all members, active and retired, as well as the State itself through increased employer contributions, the legislature insured no single group carried a disproportionate burden. When considered in context of the other changes made by SB 115, it cannot be said that the impact on Petitioners' investment-backed expectations provides part of the basis to find an unconstitutional taking occurred. Finally, the COLA change is not only is reasonably related to a proper public purpose, it did not deprive the Petitioners of substantially all, much less all, of the COLA. As such, the COLA would not constitute a 'taking.' *New Mexicans for Free Enterprise,* at ¶ 53.

## CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court enter an Order denying the Petition. Alternatively, should the Court chose to exercise its inherent discretion to address the issue underlying the Petition, as

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expectation."

demonstrated above the Court should find on the merits that the COLA change is constitutional.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

As required by Rule 12-504(H) NMRA, I certify that this brief is proportionally spaced and the body contains 5,860 words. The brief was prepared using OpenOffice 3.2.1.

Scott Fuqua

## CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing on counsel for Petitioners via First Class Mail on July 17, 2013.

Scott Fuqua