THE STATE OF NEW HAMPSHIRE
SUPREME COURT

2014 Term
January Session

No. 2013-0669

Professional Firefighters of New Hampshire *et al*

v.

State of New Hampshire *et al*

RULE 7 MANDATORY APPEAL FROM
MERRIMACK COUNTY SUPERIOR COURT

JOINT BRIEF OF THE NEW HAMPSHIRE MUNICIPAL ASSOCIATION, NEW HAMPSHIRE ASSOCIATION OF COUNTIES, AND NEW HAMPSHIRE SCHOOL BOARDS ASSOCIATION, AS *AMICI CURIAE*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

NEW HAMPSHIRE CASES

FEDERAL CASES

CASES FROM OTHER JURISDICTIONS

NEW HAMPSHIRE STATUTES

NEW HAMPSHIRE SESSION LAWS

FEDERAL STATUTES

OTHER AUTHORITIES

STATEMENT OF FACTS

I. The New Hampshire Retirement System.

The New Hampshire Retirement System ("NHRS" or "the System") was created in 1967 to unify all of the separate retirement systems covering different categories of public employees. *See* 1967 N.H. Laws ch. 134, *codified at* RSA ch. 100-A. The System includes both mandatory and elective coverage. Participation is mandatory for full-time state employees and for teachers and permanent police and firefighters employed by municipalities, counties, and school districts. *See* RSA 100-A:1, V (definition of "employee"), VI (definition of "teacher"), VII (definition of "permanent policeman"),[1] VIII (definition of "permanent fireman"), 100-A:3, I(a) ("Any person who becomes an employee, teacher, permanent policeman, or permanent fireman . . . shall become a member of the retirement system as a condition of employment."). The system also allows municipalities, counties, and school districts to *elect* to have their remaining employees – those who are not teachers, police or firefighters – participate in the System. *See* RSA 100-A:20.

The System describes two classes of employees. Group I includes teachers and state, county, municipal, and school employees *other than* police and firefighters; group II includes police and firefighters. *See* RSA 100-A:1, X. The essential difference between the groups is in the level of contributions and the amount of benefits. Group II members pay a larger percentage of their compensation into the System and are eligible for higher benefits after a shorter service period. This reflects (in part) the fact that group I members participate in the Social Security System, while group II members do not. *See* note 2, *infra*.

II. Funding of the System.

[1] County correctional officers are considered "permanent policemen" under the statute. RSA 100-A:VII(c). However, they are the one exception to the rule that police must participate in the System. County employees participate only if the county has voted to have its employees participate. *See* RSA 100-A:20, I. Correctional officers are then included in group II only if the county convention has voted to transfer them from group I to group II. *See* RSA 100-A:20, III. All ten counties have voted to do so.

Funding for the System comes from three sources: employee contributions, employer contributions, and investment earnings on the System's assets.

A. Employee Contributions.

Employee contribution levels, stated as a percentage of compensation, are established by statute. *See* RSA 100-A:16, I. Because the rates are in statute, they do not change regularly. In fact, as discussed later in the brief, the employee rates remained unchanged from 1988 until 2009.

B. Employer Contributions.

Employer contribution levels are not in statute; instead, the System's actuary prepares a valuation of the System's assets and liabilities every two years, *see* RSA 100-A:16, introductory paragraph, and this valuation is used as the basis for determining the the employers' annual contribution requirements until the next biennial valuation, *see id.* Those contribution rates are certified to the municipalities, counties, and school districts annually. *See* RSA 100-A:16, III.

Because employee contribution levels are established in statute but the System's needs change continuously, the employer contribution levels inevitably fluctuate from one biennium to the next. If the legislature increases or decreases the benefits payable to retirees but does not amend the statutorily established employee contribution rates, there is necessarily an effect on the employer contribution rates.

Beginning with the System's inception in 1967 and continuing until 2011, the state and its political subdivisions shared responsibility for the employer contributions for group II members (police and firefighters) and for teachers (but not other group I employees). The percentage of the state's contribution changed in the early years of the System, but from 1977 to 2009, the state paid 35 percent of the employer contribution for all teachers, police, and firefighters, and the municipality, school district, or county paid the remaining 65 percent. *See* RSA 100-A:16, II (Supp. 2008).

In 2009, the legislature passed Chapter 144 (HB 2), section 52, which amended RSA 100-A:16, II, to reduce the state's share of the employer contributions for teachers and group II employees to 30 percent for the state's 2010 fiscal year and 25 percent for the 2011 fiscal year--thus increasing the political subdivisions' share to 70 and then 75 percent. *See* 2009 N.H. Laws 144:52. In 2011, the legislature again amended the statute to provide that for fiscal year 2012, the state would pay a lump sum of $3.5 million toward the employer contribution for teachers and group II employees, and for subsequent years it would pay nothing. *See* 2011 N.H. Laws 224:191. As a result, political subdivisions now pay 100 percent of the employer contribution for teachers, police, and firefighters.

III. Changes in Benefits and Obligations.

Over the years the legislature has made many changes to the benefits payable to NHRS members and to the obligations of both employers and employees. In 2007 the legislature established, via House Bill 876, a special commission to make recommendations to ensure the System's viability. *See* 2007 N.H. Laws ch. 355. That commission's report chronicled the changes made to the system over the years. A partial list of those changes follows:

- 1973 -- Basis for calculating retirement benefit modified from average of highest five years of employment to average of highest three years.
- 1974 -- Group II retirement eligibility requirements changed from age 50 with 25 years of service to age 45 with 20 years of service.
- 1983 -- Special Account established to fund COLAs and other post-retirement benefits from "excess" fund earnings--*i.e.*, all investment earnings in excess of the assumed rate of return determined by the Board of Trustees.
- 1987 --
    - Early retirement reduction factors for group I members decreased (previously, pensions were reduced by 6⅔ percent per year for each year that retiring member was under 60 years of age; new reduction factors were 3 percent for 30+ years of service, 4 percent for 25-29 years, 5 percent for 20-25 years, and 6⅔ percent for under 20 years).

- Service retirement formula for group II members changed -- previously 2.5 percent of average final compensation for first 20 years and 2 percent thereafter, up to maximum of 75 percent of average final compensation; now 2.5 percent for all years, up to 40 years (100 percent).

- Group II spousal allowance created: surviving spouse automatically receives pension equal to 50 percent of the pension that the member had been receiving.

- 1988 --

  - NHRS retirees permitted to stay in their former employers' group health plans, at their own expense.

  - Group I contribution and benefit integration with Social Security eliminated. Previously, Group I pensions were reduced by as much as 50 percent at age 65. New formula reduces pensions by roughly 10 percent at age 65.

  - Group I member contribution rate increased from 4.6 percent to 5 percent.[2]

  - "Medical subsidy" established for group II members (NHRS to pay the cost of health insurance for retirees who were hired by June 30, 1988, *see* 1988 N.H. Laws 191:5).

  - Lump sum death benefit of $3,600 for group II members increased to $10,000.

- 1991 --

  - Funding method changed to "open group aggregate" to provide rate relief to employers.

  - Funds going into Special Account limited to earnings in excess of 10 percent (only for fiscal year 1992).

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[2] Prior to 1988, the applicable statute, RSA 100-16, I(a), actually provided that the employee contribution rate for teachers and other group I employees was 9.2 percent, *see* 1977 N.H. Laws 510:1, but that rate was applicable only to "that portion of earnable compensation in excess of the maximum amount of taxable wages under the Federal Insurance Contributions Act," *see id*. For compensation up to the maximum taxable amount under FICA, the employee rate was one-half of that amount, or 4.6 percent. *See id.* Thus, for most group I employees, the only applicable rate was 4.6 percent. In 1988, the statute was amended to eliminate the dual rate and establish a uniform rate of 5 percent.

The FICA reference and the significantly different rates for group I and group II members reflect the fact that group I members participate in the Social Security System, while group II members do not. Under federal law, *see* 26 U.S.C. § 3121(b)(7)(E), employees of a state and its political subdivisions are not covered by Social Security unless the state has entered into an agreement with the Commissioner of Social Security pursuant to section 218 of the Social Security Act, 42 U.S.C. § 218. New Hampshire has entered into such an agreement, *see* RSA 101:3, but it expressly excludes police and firefighters who are members of the New Hampshire Retirement System, *see* RSA 101:2, II.

    - Earnable compensation (basis for calculating retirement benefit) capped at 150 percent of second highest year.

- 1996 -- Trigger rate for transfer to the Special Account is set at ½ percent over the assumed rate of return; $139.4 million transferred to the Special Account.

- 1999 -- Medical subsidy established for teachers who retire with at least 20 years of service by July 1, 2004; existing medical subsidy program for group II members extended to those hired by June 30, 1995.

- 2000 -- Medical subsidy established for other group I employees of political subdivisions who retire with at least 20 years of service by July 1, 2004; existing medical subsidy program for group II members extended to those hired by June 30, 1997.

- 2001 -- Medical subsidy established for state employees who retire by July 1, 2004; existing medical subsidy program for teachers and other group I members extended to those who retire by June 30, 2008. (Not mentioned in the report is that the program was also extended for group II members hired by June 30, 2000. *See* 2001 N.H. Laws 275:5.)

- 2007 --

    - Funding methodology changed to "entry age normal"

    - Transfer of funds to Special Account suspended until pension trust is 85 percent funded.

See Final Report of the Commission to Make Recommendations to Ensure the Long-Term Viability of the New Hampshire Retirement System at 32-44 (2007) [hereinafter referred to as "HB 876 Commission Report"].

Not mentioned in this chronology is that in 2007, the statute was amended to require a determination each year of the amount of annual contribution necessary to discharge the System's unfunded accrued liability over 30 years, with that amount to be added to employer contributions each year--essentially an "employer surcharge." *See* 2007 N.H. Laws 268:7.

IV. Changes in Contribution Rates.

As stated above, employee contribution rates are established in statute, and except for a small increase in the group I employee rate in 1988, those rates were unchanged from 1977 to 2009. The employer rates, however, change every two years. A table compiled by NHRS and

maintained on its website, www.nhrs.org/documents/NHRS_Historical_Contribution_Rates_Since_1970.pdf, shows the rates paid by both employers and employees, as a percentage of the employee's compensation, for all categories of employees from 1970 to the present. The table is attached as Addendum A.

As the table indicates, while employer rates for group I employees (state and non-state employees and teachers) remained fairly stable in the System's early years, employer rates for group II (police and firefighters) soared from 8.3 percent in 1970 to over 21 percent for police and over 23 percent for firefighters by 1984. By 1990, concern about the increases in employer rates caused the NHRS Board of Trustees to consider changing its fund method. *See* HB 876 Commission Report at 34-35. In 1991, the legislature passed HB 51, which required use of the "open group aggregate" method for one year and created a commission to study the funding methodology and related issues. *See* 1991 N.H. Laws ch. 1. In 1992, the legislature amended the statute to require use of the open group aggregate method indefinitely. *See* 1992 N.H. Laws 55:4.

V. Funding Problems.

Adoption of the open group aggregate methodology immediately led to a reduction in employer rates, which continued through the 1990s. Unfortunately, it also contributed to significant under-funding of the System. By 2005, the NHRS trust fund was 60.3 percent funded, as compared to a median level of 86.6 percent for public pension funds. *See* HB 876 Commission Report at 44.

The change in funding methodology, however, was hardly the only contributing factor to the System's under-funding. Since 1983, the Special Account had siphoned assets from the NHRS trust fund to provide supplemental benefits to retirees. By requiring that "excess earnings"--anything above the Board of Trustees' assumed rate of return for most years through 1996, and anything over the assumed rate of return plus ½ percent after 1996--go into the Special Account

without providing for reciprocal return of funds in the event of under-performance of investments, the legislature ensured that the NHRS trust fund would suffer the consequences of poor market conditions while never benefiting from high returns. *See* HB 876 Commission Report at 41 (Ernst & Young actuarial audit for 1994 expressed concern about "including excess investment earnings into the Special Account in good years while no offsetting movement of money out of the Special Account was provided in bad years"). Consequently, the trust fund received a disproportionately small benefit from the booming stock market of the 1990s. From 1987 to 1999, over $1 billion that could have been used to fund basic pension obligations was instead put into the Special Account to pay for the new benefits. *See* HB 876 Commission Report at 69-70.

VI. Pension Reform.

To address the under-funding, the legislature adopted several reforms in 2007. First, it discarded the open group aggregate funding methodology and required the System to use the entry age normal methodology. Second, it added the "employer surcharge" mentioned above to pay off the unfunded accrued liability over 30 years. Third, it suspended transfers to the Special Account until the trust is 85 percent funded.[3] See 2007 N.H. Laws 268:5, 7, 8. The first two of these changes caused employer contribution rates, which had already risen steadily for a decade, to jump dramatically in the 2008-09 biennium and increase significantly again in 2010-11. In 2011, to provide relief to public employers (*i.e.*, taxpayers) and further stability to the System, the legislature adopted the further reforms that are the subject of this and other litigation.[4]

SUMMARY OF ARGUMENT

If the NHRS statute creates a contract, the political subdivisions are parties to the contract and have rights under it. If the increase in employee contribution rates is an unconstitutional

[3] The Special Account was eliminated in 2012. *See* 2012 N.H. Laws 261:14, III.
[4] Unfortunately, it also eliminated the state's share of the employer contribution for teachers and group II employees. *See* 2011 N.H. Laws 224:191. This change more than offset the rate relief provided by the other changes.

impairment of the contract, there also have been multiple breaches of the contract to the detriment of political subdivisions, most notably the elimination of the state's share of the employer contributions in 2011. A ruling that the NHRS statute creates contact rights will lead to endless litigation over changes to the statute.

However, federal and state Contracts Clause jurisprudence requires a careful analysis of the statute to see whether the legislature demonstrated an unmistakable intent to create contract rights. In the absence of clear legislative intent, the Contracts Clauses do not apply. There is no evidence of legislative intent to create contract rights under RSA 100-A, and the increase in contribution rates is therefore a permissible exercise of legislative authority. Federal case law strongly supports this conclusion, and there is no New Hampshire case law to the contrary.

Finally, there is no basis for distinguishing the NHRS statute from many other New Hampshire statutes. If the NHRS statute is deemed to create contract rights subject to constitutional protection, the same must be true for dozens of other state laws; such a ruling would lead to a flood of litigation and severely undermine the legislature's authority.

ARGUMENT

I. IF THE STATE MAY NOT IMPOSE NEW OBLIGATIONS ON EMPLOYEES IN THE RETIREMENT SYSTEM, NEITHER MAY IT IMPOSE NEW OBLIGATIONS ON THE POLITICAL SUBDIVISIONS THAT ARE PARTIES TO THE "CONTRACT."

Although the political subdivisions are not parties to this case and are not in a position to request a remedy, they need to make clear the implications of this case. If the Court determines that the NHRS statute constitutes a contract, it will open the door to legal challenges--not only by employee groups but by municipalities, counties, and school districts--every time there is a change to the statute, including changes that have already been made.

A. If Municipal, County, and School Employees Have a Contract Under the Retirement System Statute, the Political Subdivisions Are Parties to that Contract.

The plaintiffs insist that the NHRS statute somehow constitutes a contract, instead of being merely a statute, like every one of the hundreds of other New Hampshire statutes. This unconventional premise is addressed later in this brief. However, accepting it for the sake of argument, the plaintiffs' claim fails to consider who the parties to the "contract" are.

Throughout this litigation, the plaintiffs seem to have taken it as a given that any contract created by RSA 100-A is a simple two-party contract between the state and the employees who are members of the System. Under this view, the employees fulfill their contractual obligation by performing their jobs and contributing to the retirement system, and the state fulfills its obligation by paying retirement benefits.

That has internal logic as to the *state* employees. As to the municipal, county, and school employees, however, it overlooks a rather important point--those employees don't work for the state. The services they perform provide no benefit to the state, and the state, in turn, pays them no salary and pays nothing toward their retirement benefits. The "contract," then, is a peculiar one indeed, in which neither party provides anything of value to the other.

The explanation, of course, is that if there is a contract with respect to these employees, it is not a simple two-party contract with the state; rather, it involves the state, the employees, and the political subdivisions. The employees perform services for the political subdivisions, and the political subdivisions fund the employees' pension benefits. The state administers the retirement system, and it writes the checks to the retirees, but it contributes no funding of its own.[5]

Understanding the "contract" as a three-way agreement does not, however, cure the oddity, because it is a contract that the employees and the political subdivisions did not agree to and the terms of which they do not control. At least with respect to teachers and group II employees, the

[5] Until 2011, the state did contribute toward funding of some of the local employees' retirement benefits, *see* Statement of Facts section II.B, *supra.* Since 2011, however, the state has contributed nothing.

employees are required by law to be members of the retirement system, and the political subdivisions are required to contribute to the system on their behalf.[6] The "contract" is imposed and controlled entirely by the state. A relationship that is imposed on two parties by a third party, and whose terms are controlled by that third party, hardly seems like a contract at all; but again, that question is addressed later in the brief. For the present, it is assumed that there is some kind of contract among the employees, the political subdivisions, and the state.

B. If the Increased Employee Contributions Have Impaired the "Contract," the Same Is True of the Many Legislative Changes that Have Increased the Employer Obligations.

The plaintiffs contend, essentially, that any change to the terms of this contract that reduces their benefits or increases their obligations is an unconstitutional impairment of their contract rights. It should go without saying that if a contract exists, it is not possible that only one party has rights that are subject to protection. The political subdivisions also have rights under the "contract."

Not mentioned in this litigation, until now, is that the 2011 changes to RSA 100-A stand in contrast to a long history of legislative changes that have increased retiree benefits. Because pension benefits are funded by employee contributions, employer contributions, and investment earnings, any time there is a legislative change that either decreases employee contributions or increases benefits without an increased employee contribution, there is necessarily an increase in employer obligations.[7]

[6] *See* Statement of Facts section I, *supra*. As previously explained, teachers, police, and firefighters are required to be members of the retirement system, and the political subdivisions that employ them are required to contribute on their behalf. With respect to other employees, the political subdivisions have the option of enrolling them or not.

[7] As noted previously, *see* Statement of Facts section II, *supra*, employee contribution levels are established by statute; employer contribution levels are not. The employer contributions are set every two years by the retirement system based on an actuarial determination that considers, among other things, the levels of employee contributions and pension benefits. Thus, any decrease in employee contributions or increase in pension benefits will typically require increased employer contributions.

The chronology in section III of the Statement of Facts lists some twenty changes that were made over the years--and these are only the highlights. With few exceptions, the result of these changes was an increase in benefits. The money for these increases had to come from somewhere, and since there was only one small increase in employee contributions between the System's inception and 2009 (from 4.6 percent to 5 percent for group I employees in 1988), it follows that the funding for these increased benefits came from increased employer contributions—largely because "excess" earnings were put into the Special Account to pay for more benefits. The dramatic rise in employer rates for group II employees through the 1970s and 1980s bears this out, as does the equally dramatic rise in all employer rates from 1998 through the present.

Accepting the plaintiffs' characterization of the NHRS statute as creating a contract whose rights and obligations may not be impaired, one can only conclude that each of the increases in retiree benefits also constituted an impairment of the contract, to the detriment of employers. To deny this is to take the position that the "contract" is one under which the rights of one party, the employee group, can always be increased but its obligations can never be increased; meanwhile another party, the employer group, has no rights--only obligations that can be increased without limit and without recourse. What kind of contract is that?

The *amici* acknowledge the well settled proposition that government entities do not have constitutional rights and therefore are not protected by the Contracts Clauses of the federal and state constitutions. *See City of Safety Harbor v. Birchfield,* 529 F.2d 1251, 1254 (5th Cir. 1976). However, this does not leave them without a remedy. Because the many increases in employee benefits have altered the original "contract," the political subdivisions have a breach of contract claim against the state for each change that resulted in an increase in employer obligations.

When a Contracts Clause claim involves a contract to which the state is a party, the claimant's first obligation is to establish that the state has breached the contract. *See , e.g.,*

Redondo Construction Corp. v. Izquierdo, 662 F.3d 42, 48 (1st Cir. 2010) (to establish Contracts Clause claim, plaintiff must show breach of contract and that the defendant has impaired the plaintiff's ability to obtain a remedy for the demonstrated breach). Thus, the plaintiffs' claim in the present case necessarily assumes that the increase in the employee contributions constituted a breach by the state; and if the increase in the employ*ee* contributions constituted a breach by the state, it follows ineluctably that increases in the employ*er* obligations also constitute breaches by the state, for which the political subdivisions have a cause of action.

C. Under the Plaintiffs' Theory, the State Breached Its Contract with the Political Subdivisions When It Reduced and then Eliminated Its Share of the Employer Contribution for Teachers and Group II Employees.

If there is a contract, it has been breached repeatedly over the decades, almost always to the detriment of the political subdivisions. However, all of these breaches pale in comparison to the ones that occurred in 2009 and 2011. Until that time, there had been, if one accepts the plaintiffs' theory, a contract between the state and the political subdivisions for over 30 years under which the state paid 35 percent of the employer contribution for teachers and group II employees, and the political subdivisions paid 65 percent. The state breached that contract in 2009 when it amended RSA 100-A to decrease its contribution to 30 percent for fiscal year 2010 and 25 percent for 2011, and correspondingly increase the political subdivisions' required contributions to 70 and 75 percent, respectively.

In 2011 the legislature went further and ceased paying anything toward the employer share, leaving the political subdivisions to pay 100 percent. Although this increased obligation was partially offset by reductions in retiree benefits and by the increases in employee contributions that are the subject of the present litigation, the net result was a substantial increase in employer obligations--an increase that will be exacerbated if the plaintiffs are successful in this case and other pending actions challenging the changes in benefits.

In *City of Concord v. State*, 164 N.H. 130 (2012), a group of political subdivisions challenged the 2009 increases in their contribution requirements as violating the prohibition on unfunded mandates under Part 1, Article 28-a of the New Hampshire Constitution. This court held that the legislative changes did not violate the unfunded mandates provision.

However, the plaintiffs' theory provides a whole new basis to challenge those changes. If the NHRS statute is a contract that may not be amended to reduce retiree benefits or increase employee contributions, it is impossible to imagine a defense for any amendment that increases the obligations of the other parties to the contract--the political subdivisions.

Thus, if the court accepts the plaintiffs' argument and strikes down the employee contribution increases in HB 2, the *amici* will be duty-bound to advise their members to commence litigation to invalidate the 2009 and 2011 increases in the political subdivisions' obligations--as well as the many other legislative changes over the years.[8] The ultimate result would be to restore the "contract" to its status as of 1967.

II. THE NHRS STATUTE IS NOT A CONTRACT.

A. Statutes Ordinarily Are Not Treated as Contracts.

The idea that a legislative enactment creates a contract is an unusual one. As the United States Supreme Court has observed,

> [T]he principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state. . . . Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body.

[8] Admittedly, some of these claims may be barred by the statute of limitations. However, the largest breach--the 2011 elimination of the state's contribution--clearly is not, as it took effect July 1, 2011. Further, under New Hampshire law, every failure to make an installment payment under an ongoing contract constitutes a new breach, and the limitations period begins to run for each installment as it comes due. *See General Theraphysical, Inc. v. Dupuis,* 118 N.H. 277, 279 (1978). Thus, every time the state pays less than 35 percent of the employer contribution for group II employees (and such payments are due monthly under the original "contract"), there is a new breach, and the political subdivisions still have an active claim for any under-payment that is less than three years old.

National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 465-66 (1985). To conclude that the NHRS statute creates contract rights requires a finding that this legislation is somehow different.

There is nothing inherent in the nature of a pension statute that necessarily transforms it into a contract. It is certainly true, and the United State Supreme Court has so held, that if a state law establishes specific compensation for a public employee, the employee has an implied contract right, protected by the Constitution, to that compensation *once it has been earned*. *See Mississippi ex rel. Robertson v. Miller*, 276 U.S. 174, 178-79 (1928). Because a pension is a form of deferred compensation, it follows that once an employee has satisfied all of the requirements to receive the pension--*i.e.,* has worked the required number of years and has in fact retired--it cannot be taken away. "Protecting earned compensation, regardless of whether it is currently paid or deferred until a later date, is noncontroversial and does not depend on contractual statutory language." Monahan, *Statutes as Contracts? The "California Rule" and Its Impact on Public Pension Reform,* 97 Iowa L. Rev. 1029, 1044 (2012).

However, purporting to find a "contract right" to benefits yet to be earned is a different matter. Public employees are, in general, employees at will (although some of the terms of their employment may be governed by a collective bargaining agreement), whose employment can be terminated and whose salaries can be lowered prospectively. If all other terms of employment may be changed prospectively, there is no logical reason that prospective pension benefits--or contributions--cannot also be changed. *See id*. at 1077. Special treatment for pension benefits may be justified only if there is something peculiar about the statute that creates them.

B. <u>A Statute Does Not Create Contractual Rights Unless the Legislature Has Unmistakably Demonstrated an Intent that It Do So</u>.

Because a legislature's function is to make laws, not contracts, federal and state courts have repeatedly held that "absent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *National R.R. Passenger Corp.,* 470 U.S. at 465-66 (quoting *Dodge v. Board of Education,* 302 U.S. 74, 79 (1937)); *accord Parker v. Wakelin,* 123 F.3d 1, 5 (1st Cir. 1997), *cert. denied,* 523 U.S. 1106 (1998).

This presumption recognizes a common, fundamental understanding: laws change. If every legislative enactment were deemed to create a contractual obligation that is incapable of modification, governments could not function. One legislature could impose its will forever. To avoid this result, the United States Supreme Court and other federal courts have adopted the "unmistakability doctrine":

> [W]e have insisted that "n]othing can be taken against the State by presumption or inference," and that "neither the right of taxation, nor any other power of sovereignty, will be held . . . to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken." . . . A requirement that the government's obligation unmistakably appear . . . serve[s] the dual purposes of limiting contractual incursions on a State's sovereign powers and of avoiding difficult constitutional questions about the extent of state authority to limit the subsequent exercise of legislative power.

United States v. Winstar Corp., 518 U.S. 839, 874-75 (1996) (quoting *The Delaware Railroad Tax*, 18 Wall. 206, 225 (1874); *Jefferson Branch Bank v. Skelly*, 1 Black 436, 446 (1862)).

Thus, when reviewing a pension statute or any other statute in light of a Contracts Clause challenge, courts must "ask whether the . . . [l]egislature has unmistakably evinced the intention to create binding contractual rights." *Parker*, 123 F.3d at 8.

C. The Unmistakability Doctrine Applies in New Hampshire.

This Court has never been presented with the question of whether RSA 100-A creates constitutionally protected contract rights. However, it is clear that the proper approach to that

question is through the application of the unmistakability doctrine. The Court has held that the protections of the Contracts Clauses in the United States and New Hampshire Constitutions are co-extensive, and it relies on federal case law in addressing Contract Clause challenges:

> "Part I, Article 23 does not expressly reference existing contracts. However, we have held that its proscription duplicates the protections found in the contract clause of the United States Constitution." . . . [***W]e have relied upon federal contract clause cases to resolve issues raised under Part I, Article 23 when contract impairment, and not simply retroactive application of a law, was alleged.*** Accordingly, we understand Section 10 of the Federal Constitution and Part I, Article 23 of the State Constitution to afford equivalent protections where a law impairs a contract, or where a law abrogates an earlier statute that is itself a contract.

State Employees' Association v. State, 161 N.H. 730, 735 (2011) (emphasis added) (quoting *Tuttle v. New Hampshire Medical Malpractice Joint Underwriting Ass'n,* 159 N.H. 627, 640 (2010) (citations omitted)). Thus, whether the NHRS statute creates contractual rights and obligations depends on "whether the legislature has unmistakably evinced the intention to create binding contractual rights."

D. The Superior Court Erred in Finding that the Legislature Unmistakably Demonstrated an Intent to Create Binding Contractual Rights.

The superior court in this case correctly applied the unmistakability doctrine to determine whether RSA 100-A creates a contract right in specific employee contribution rates. Unfortunately, its analysis was flawed and the result therefore incorrect.

1. The Court Reversed the Usual Presumption that a Statute Does Not Create Contract Rights.

The superior court approached the question of unmistakable intent by considering the state's argument on the issue and concluding that the evidence "does not demonstrate the absence of unmistakable intent." *See* Order at 11. Because the state failed to prove "the absence of unmistakable intent," the court concluded that RSA 100-A constitutes a contract and that the employee rates cannot be changed for "vested" NHRS members.

This was obvious error. Whether it is ever possible to prove something's non-existence is a philosophical question that need not be resolved here; suffice it to say that the law does not require it. With respect to the unmistakability doctrine, it is clear that "the presumption is that 'a law is not intended to create private contractual or vested rights.'" *National R.R. Passenger Corp.*, 470 U.S. at 465-66. To overcome this presumption requires evidence of legislative intent "in terms too plain to be mistaken." *Winstar,* 518 U.S. at 874. The superior court's insistence that the state prove absence of intent turned this presumption on its head.

2. There Is No Evidence that the Legislature Intended to Create Contract Rights.

The plaintiffs cited no evidence--indeed, did not even make the argument--of legislative intent to create contract rights under RSA 100-A. This is because there is no evidence of such intent, let alone an expression of intent "in terms too plain to be mistaken."

To support its argument that the statute does not create contractual rights to specific contribution rates, the state cited the numerous changes to employee rates in RSA 100-A since 1967, along with the absence of any legislative language suggesting an intent to create contract rights. Because the legislature had changed the rates five times before 2011, the state asserted, rather sensibly, that the legislature apparently had not intended to prevent itself from making further changes.

The court came to the opposite conclusion from the same facts. It found evidence of intent in all of the occasions when the legislature did not change the employee rates. Because the legislature went 23 years without changing group I rates and 34 years without changing group II rates, the court concluded that the legislature had intended to prevent itself from making changes. *See* Order at 11 ("This substantial duration certainly reflects legislative intent.").

The court's reasoning is perplexing. Is a legislature really required to amend a statute at regular intervals just to reaffirm its authority to do so? The *amici* are unaware of any principle that

supports such a proposition. There simply is no evidence that the legislature intended--in 1967 or at any time since then--to establish a contract right to specific contribution rates.

When the legislature amended the rates in 1974, 1977, 1979, and 1988, obviously it believed it had the authority to do so. Implicit in the superior court's ruling is a conclusion that the legislature decided sometime after 1988 to treat the statute as a contract that could not be modified (except to increase retiree benefits at taxpayer expense), but never stated that intent. Even in the extremely unlikely event that this is true, it falls far short of the *unmistakable intent* that is required.

E. Cases that Properly Apply the Unmistakability Doctrine to Pension Statutes Have Generally Found No Contract.

Because the unmistakability doctrine requires inquiry into the intent of a specific legislature about a specific statute, any attempt to define a general rule about pension statutes as contracts is fundamentally misguided. Nevertheless, it is useful to see how other courts have approached the issue.

1. Federal Cases.

Cases from other states that have considered whether pension statutes create contract rights have come to differing conclusions. *See* section II.E.2, *infra*. However, federal courts, applying federal constitutional principles--most notably the Court of Appeals for the First Circuit--have consistently answered the question in the negative. *See, e.g., Parella v. Retirement Board,* 173 F.3d 46, 59-62 (1st Cir. 1999); *National Education Ass'n-Rhode Island v. Retirement Board*, 172 F.3d 22, 27-28 (1st Cir. 1999) [hereinafter *NEA-RI*]; *Parker v. Wakelin*, 123 F.3d 1, 8-9 (1st Cir. 1997), *cert. denied*, 523 U.S. 1106 (1998); *Maine Ass'n of Retirees v. Board of Trustees,* No. 1:12-cv-59-GZS (D. Me. June 24, 2013); *see also Koster v. City of Davenport*, 183 F.3d 762, 766-67

(8th Cir. 1999) (citing *NEA-RI* and *Parker*, but "choos[ing] not to decide this complex constitutional question").[9]

This appears to be because the federal courts, unlike some state courts, have gone through the appropriate exercise of examining the legislation carefully for evidence of "unmistakable intent," rather than simply relying on a conclusory assertion that pension statutes are inherently contractual. As the First Circuit stated in *Parker*:

> [W]e eschew[] participating in abstract contract theory in favor of performing a close analysis of the statutory provision at issue. . . . [T]he unmistakability doctrine mandates that we determine whether the challenged legislative enactment evinces the clear intent of the state to be bound to particular contractual obligations. It may well be that the variety of approaches adopted by state supreme courts reflect, in part, differences in the structure of the various state pension programs, and of the intention of the different state legislatures that created them. There is a danger, however, in adopting a theory of pension rights and subsequently forcing a given program to fit under it. Any given theoretical approach will make assumptions regarding the intent of legislatures to be bound, as well as the time at which vesting should occur, which may be contradicted by particular statutory provisions such as, for example, an express reservation of the right to revoke pension benefits. When reviewing a particular enactment, therefore, we must suspend judgment and "proceed cautiously both in identifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligation."

123 F.3d at 7-8 (quoting *National R.R. Passenger Corp.*, 470 U.S. at 466).

In *NEA-RI*, the First Circuit considered whether Rhode Island's pension statute for state employees, teachers, and municipal employees established contract rights. After citing the relevant Supreme Court cases and discussing the unmistakability doctrine, the court observed, "[I]t is easy enough for a statute explicitly to authorize a contract or to say explicitly that the benefits are contractual promises, or that any changes will not apply to a specific class of beneficiaries." 172 F.3d at 27-28. The court continued:

[9] There appears to be only one United States Supreme Court case directly on point, *Dodge v. Board of Education*, 302 U.S. 74 (1937), in which the Court held that an Illinois public pension statute did not create contract rights. Although *Dodge* is an old case, the Court has relied on it in a more recent decision dealing with an analogous issue. *See National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985).

> We do not think that the Rhode Island general pension statute "clearly and unequivocally" contracts for future benefits by language or--in the circumstances of this case--through the nature of the relationship. Nowhere does the statute call the pension plan a "contract" or contain any anti-retroactivity clause as to future changes.

Id. at 28.

In *Parker*, the First Circuit considered whether the Maine State Retirement System Statute created contractual rights. The relevant facts of that case were essentially identical to those in the present case: the legislature had enacted a series of retirement reforms, some of which applied to all active members of the system, and some of which applied only to members who had not yet satisfied the service requirement (ten years of creditable service) to be "vested." *See* 123 F.3d at 2-3. Among the changes that applied to all members was an increase in the rate of employee contribution from 6.5 percent of salary to 7.65 percent. *See id*. at 3. A group of public school teachers brought suit, claiming that the changes violated the Contracts Clause of the United States Constitution. Like the superior court in the present case, the federal district court held that the changes violated the Contracts Clause as to those employees who had satisfied the ten-year service requirement. *See id*. at 2.

On appeal, the First Circuit reversed. Chief Judge Torruella wrote, "Finding no unmistakable intent on the part of the Maine legislature to create private contractual rights against the reduction of pension benefits prior to the point at which pension benefits may actually be received, we hold that the Maine amendments do not violate the Contract Clause with regard to any of the plaintiffs." *Id*.

The court discussed the unmistakability doctrine, emphasizing the importance of "performing a close analysis of the statutory provision at issue." *Id*. at 5-7. At the heart of the case was a provision of the statute, section 17801, that stated, "No amendment to this chapter shall cause any reduction in the amount of benefits which would be due to the member based on creditable service, compensation, employee contributions and the provisions of this chapter on the

date immediately preceding the effective date of such amendment." *Id*. at 3-4. The plaintiffs, just like the plaintiffs in the present case, claimed that benefits are "due" from the moment of employment, so contribution increases could not be required for any active member of the system. The state argued that section 17801 allowed the state to alter benefits (and contributions) until retirement benefits are literally due to be received--*i.e.*, the moment of retirement. *See id*. at 8. The district court, as noted above, split the difference, ruling that employees were protected against changes once they achieved the minimum service requirement.

In reversing the district court, the First Circuit agreed with the state:

> The district court reasoned that "due" should be construed as referring to the point at which a member qualifies for retirement benefits. But even if this is a *possible* reading, we do not think this language could be said to reflect the *unmistakable* intent of the Maine legislature, particularly when the legislature could very well have indicated as much. . . . [T]he language of section 17801 remains at best ambiguous, and we cannot find that the legislature as a whole unmistakably intended to create contract rights at the time that service requirements were satisfied--especially where, as here, it would have been easy to make any such intention crystal clear.

Id. at 9 (emphasis added).

Following the federal cases--as has been this Court's practice, *see State Employees' Association v. State*, 161 N.H. 730, 735 (2011)--can lead to only one conclusion: the NHRS statute does not create contract rights. This conclusion follows not because the federal courts have found no contract in other cases, but because they have insisted that a court examine the statute carefully for clear evidence of intent to create a contract. This Court can search all day for evidence of such intent in RSA 100-A; it is not there. Not only is there no explicit indication of intent, as the First Circuit has required, there is no language that could even plausibly be interpreted to create contract rights. Any suggestion that the statute demonstrates unmistakable intent to create contract rights is simply not serious.

2. State Cases.

As mentioned above, state court decisions in this area have been mixed. A number of state supreme court decisions, including several very recent ones, have held that public pension statutes did not create contract rights that prohibited changes, so long as those changes did not affect employees who had already retired. *See, e.g., Pineman v. Oechslin,* 488 A.2d 803, 806-10 (Conn. 1985); *Scott v. Williams,* 107 So. 3d 379, 386-89 (Fla. 2013); *Budge v. Town of Millinocket,* 55 A.3d 484, 489-90 (Me. 2012)[10]; *Spina v. Consolidated Police & Firemen's Pension Fund Comm'n,* 197 A.2d 169, 172-75 (N.J. 1964), *cited with approval in New Jersey Association of School Administrators v. Schundler,* 49 A.3d 860, 874-75 (N.J. 2012); *Horvath v. State Teachers Retirement Board,* 697 N.E.2d 644, 653-55 (Ohio 1998).

A number of other state courts have followed the so-called "California rule," holding that a pension statute creates contractual rights that vest from the date the employee begins employment. *See generally* Monahan, *Statutes as Contracts? The "California Rule" and Its Impact on Public Pension Reform,* 97 Iowa L. Rev. 1029, 1046-75 (2012) (discussing development of California rule and adoption by other states).

Those cases are collected and discussed in the Monahan article, and will not be discussed individually here. As Professor Monahan explains, the California rule has a tortuous (and torturous) history, including several instances of *dicta* being taken out of context and applied far beyond their original intent. *See id*. at 1051-69. Amazingly, the California cases never actually cited the state or federal Contracts Clauses and engaged in no serious effort to discover legislative intent. *See id.* at 1069. The other state courts that adopted the California rule similarly ignored

[10] *Budge* actually involved a claim that amendments to a town personnel policy constituted a breach of contract, rather than a Contracts Clause challenge under a pension statute, but the Supreme Judicial Court of Maine followed the same analysis as for a Contracts Clause claim, and expressly reaffirmed its earlier decision in *Spiller v. State,* 627 A.2d 513, 516-17 (Me. 1993), that a pension statute does not create contract rights in the absence of unmistakable legislative intent.

legislative intent and simply decided that pension statutes necessarily create contract rights. *See id.* at 1071.

3. This Court Should Apply the Unmistakability Doctrine.

This case presents the Court with the opportunity to side with the federal and state courts that take Contracts Clause jurisprudence seriously. The unmistakability doctrine is an unquestioned and broadly applicable principle that is used to examine any state law that is claimed to create contract rights. Courts that have discovered contract rights in pension statutes have done so not by applying general principles of constitutional law, but by ignoring them and carving out a special rule for pension statutes. Such an approach disdains the ideal of principled decision making and threatens the legitimate authority of the legislature. The *amici* urge the Court to adhere to its own practice of following federal law and applying legitimate constitutional principles.

F. Other New Hampshire Cases Cited by the Plaintiffs Do Not Support their Position.

The plaintiffs are expected to rely heavily on several cases decided by this Court. None of those cases, however, are relevant to this case.

1. Cloutier v. State.

In *Cloutier v. State,* 163 N.H. 445 (2012), this Court held that changes to New Hampshire's judicial retirement plan statute violated the federal and state Contracts Clauses.

(a) Cloutier Involved a Different Statute and Is Therefore Irrelevant.

As explained above, resolving a Contracts Clause challenge to a state statute requires "performing a close analysis of the statutory provision at issue," rather than "adopting a theory of pension rights and subsequently forcing a given program to fit under it." *Parker v. Wakelin,* 123 F.3d at 7-8. Thus, whether a given statute is interpreted to create contract rights has no bearing on whether a *different* statute should be interpreted in the same way.

Cloutier involved the state's judicial retirement plan, codified in RSA 100-C. Aside from creating a defined benefit pension plan, that statute has nothing in common with RSA 100-A. The two statutes were enacted at different times, are administered by different entities, are funded differently, establish very different eligibility requirements, and provide significantly different benefits. Thus, what the legislature intended with respect to one statute provides no guidance on what it intended with respect to the other. This Court's decision must be based solely on an examination of the NHRS statute; *Cloutier* is not relevant, as the superior court noted, *see* Order at 4-5.

(b) Cloutier Is Questionable Precedent.

Beyond being irrelevant, *Cloutier's* analysis and holding are subject to question. The opinion in that case never mentioned the unmistakability doctrine and did not cite a single federal case, notwithstanding this Court's statement just a year earlier that "we have relied upon federal contract clause cases to resolve issues raised under Part I, Article 23 when contract impairment . . . was alleged," *State Employees' Association v. State*, 161 N.H. 730, 735 (2011). Instead, it relied on decisions from other state courts that have done exactly what the First Circuit has said a court should not do--adopt a general rule that pension statutes create contract rights, without carefully examining the statute in question for evidence of "unmistakable intent." *See Cloutier,* 163 N.H. at 453-57.

The *Cloutier* court's analysis of the statute in question consisted of a single sentence: "In the case before us, the prior retirement statutes stated unequivocally that judicial retirement pay was 'additional compensation for services rendered and to be rendered.'" *Id.* at 454. The Court did not explain how those words evinced an unmistakable intent to create binding contract rights.

(c) Cloutier Is Distinguishable.

Nevertheless, if this Court feels a need to reconcile *Cloutier* with a correct decision in the present case, it can be done. To the extent that the *Cloutier* court found meaning in the judicial retirement statute's statement that the pensions were "additional compensation for services rendered and to be rendered," the NHRS statute does not contain that language. Since that apparently was the basis for the decision in *Cloutier*, the absence of such language in the NHRS statute means *Cloutier* has no bearing on this case.

2. *Jeannont* and *Belknap County*.

Two other New Hampshire cases cited by the plaintiffs are also irrelevant, as the superior court observed, *see* Order at 4-6. These cases dealt with the mere vesting of a right to participate in the retirement system, and did not consider whether the statute creates any kind of contract rights with respect to future contributions or benefits.

(a) *Jeannont v. New Hampshire Personnel Commission*.

This case, at 118 N.H. 597 (1978), involved a state employee who had been wrongfully terminated. The personnel commission awarded him damages for lost salary, but denied his claim for life insurance, retirement benefits, medical expenses, and annual leave benefits. The Supreme Court ruled that the commission had wrongfully denied these benefits, because they were part of his compensation:

> The commission's award of damages may not arbitrarily deny the plaintiff recovery for the full compensation that he would have received had he not been wrongfully terminated. An employee's compensation is not necessarily limited to his salary, but will include other benefits that are an integral part of the employee's contemplated compensation. These benefits may include annual leave, sick leave, insurance, retirement, or death benefits. Such benefits are a means by which the State can attract qualified persons to enter and remain in State employment, and an employee accepts an offer of employment or continues in employment with the State in reliance on the State's representations that it will provide such benefits. These benefits are an integral part of the contemplated compensation and become vested at the time one becomes a permanent State employee or continues in such employment, and therefore should be considered by the commission when it determines that an award of lost compensation is just.

Id. at 601-02.

The plaintiffs in this case seized upon the statement that "[t]hese benefits . . . become vested at the time one becomes a permanent State employee" to support their argument that NHRS members acquire a vested right to a specific level of benefits as soon as they become employees, and that level can never be reduced. The *Jeannont* opinion says nothing of the sort. It merely states that an employee acquires a vested right to compensation upon becoming an employee, and that compensation includes whatever insurance, retirement, and other benefits may come with the job. *See id.* at 602 ("The commission should . . . have included . . . retirement benefits, ***if any,*** that the employee would have received but for his discharge.") (emphasis added). It did not purport to establish a right to benefits not yet earned or protection against future changes, and the mere use of the word "vested" cannot be viewed as answering a question that was not raised. The question of statutory changes in retirement benefits was not an issue in the case, and the decision cannot plausibly be read to have any relevance on this subject.

(b) State Employees' Association v. Belknap County.

This case, at 122 N.H. 614 (1982), involved Belknap County's failure, over a period of more than thirty years, to enroll its employees in the New Hampshire Retirement System, despite having adopted a resolution in 1946 requiring it to do so. Employees sued the county in 1980, seeking to have all of the eligible employees enrolled in the System, with full credit for past service, and to require the county to pay both its share and the employees' share of the contributions that should have made during the period of non-compliance. *See id.* at 619-20.

Among other defenses, the county claimed that the suit was barred by sovereign immunity and the statute of limitations. *See id.* at 620. In addressing the sovereign immunity defense, the Court stated that immunity is waived when the legislature has expressly or implicitly provided for waiver, and that a statute that gives individuals specific rights implicitly permits those individuals to sue the state for infringement of those rights. *See id.* at 621. The Court then stated that RSA

100-A "entitles certain governmental employees to receive retirement and other related benefits, [which] constitute a substantial part of an employee's compensation and become vested upon commencement of permanent employee status." *Id*. (citing *Jeannont*). The right to benefits implied the existence of a remedy to recover those benefits, and thus "the retirement system statute contains an implicit waiver of sovereign immunity." *Id*. at 621-22. The Court also held that "[a]lthough employees obtain a vested right to benefits upon the commencement of their permanent employee status, the statute of limitations does not begin to run until the time that the payments become due--the time of death or retirement." *Id*. at 622.

The question of rights under RSA 100-A was discussed only for the very narrow purpose of ruling on the sovereign immunity and statute of limitations defenses. There was no examination--nor was there any reason for examination--of whether the legislature intended to bind itself to a specific level of benefits or protect employees from changes.

(c) *Jeannont* and *Belknap County* Are Irrelevant.

Any suggestion that *Jeannont* and *Belknap County* establish a contract right to a specific level of future benefits at the time of employment is flatly wrong. Both cases merely recognize the undisputed proposition that an employee who performs services immediately acquires a vested right to the compensation that has been prescribed *for the services performed*. If an employee becomes a member of the retirement system and a year later the entire statute is repealed, that employee would have a vested right to receive the same benefits that would have been payable if he or she had resigned after a year--namely, a return of any contributions, with interest, and nothing more, *see* RSA 100-A:11--just as he or she would have a vested right to salary and other benefits for the services performed. There obviously is no guarantee about what pension benefits the employee might receive in thirty or forty years, just as there is no guarantee about what his or her salary might be at that time.

Beyond the matter of a vested right to compensation already earned, the statute is very clear about when a member of the System achieves "vested" status. The term applies only to a member who has ten years of creditable service *and has left the system for reasons other than death or retirement.* These *former* employees "shall be deemed in vested status" and may receive a pension upon attaining the age prescribed in the statute (age 50 for group I employees and age 45 for group II employees, with increased age requirements for those who begin employment on or after July 1, 2011). *See* RSA 100-A:10. It is quite clear that nothing "vests" under any other circumstances, except for the basic right to be a member of the System and thus receive whatever benefits attach at any given time, under the law as it exists at the time. Other than that basic right, there is no vesting for *active* employees, whether they have served one year or thirty.

Employees have long understood this. Employee unions provide a handbook to new employees that describes the System's benefits in detail. That handbook clearly indicates that the only "vesting" that occurs under the statute is as described above.

> After you have been a contributing member of NHRS for 10 years, you are ***vested***, which gives you the right to a future pension. You can quit your job and file to start your pension at a future date . . . . That's why it's called "vested deferred retirement"—you are vested and you are deferring the collection of the pension.

See New Hampshire Retired State Troopers Ass'n, *A User's Guide for the New Hampshire Retirement System* 26-27 (2010), attached as Addendum B. Nothing in *Jeannont* or *Belknap County* is inconsistent with this understanding. It is thus clear that neither the legislature *nor* the employees ever understood the NHRS statute to create rights that could not be modified.

G. Any Impairment of the "Contract" Is Not Substantial.

Even the courts that have arbitrarily turned pension statutes into contracts have recognized that impairment of the "contract" is not substantial, and therefore not unconstitutional, if the detriment to the employees/retirees is offset by compensating benefits, including "keeping the pension system flexible and maintaining its integrity"). *See Cloutier,* 163 N.H. at 456-57 (citing

cases). The whole point of the 2011 changes was to compensate for the many additional benefits that had been granted to retirees over the preceding forty years and shore up a system which by that point had amassed a $4.7 billion unfunded liability. *See* 2011 N.H. Laws 224:160, I(g), (h).

The increase in benefits had been dramatic. Information generated by NHRS in 2011 and provided last year to the House Executive Departments and Administration Committee showed that in 2010, the average annual pension benefit for a newly retired police officer was almost $50,000, while the average for a newly retired firefighter was almost $60,000--in addition to a subsidy for health insurance. *See* Addendum C. Pensions of over $90,000 for police and firefighters—often beginning at age 45—were not uncommon. In 2009 alone, fifteen NHRS members retired on pensions over $90,000. *See* "*List NHRS Fought to Keep Secret Reveals Six-Figure Pensions for Police, Firefighters," New Hampshire Union Leader,* November 8, 2011.

These increased benefits had been funded largely by increased employer contributions, meaning increased property taxes. Employer contribution rates had approximately tripled, and still the System was in desperate financial condition. Meanwhile, group I employee rates had experienced one tiny increase in over forty years, and group II rates had never budged. The 2011 reforms were an effort, finally, to have employees pay something for the ever-increasing benefits they were receiving.

III. THE PLAINTIFFS' THEORY WOULD TRANSFORM AN ENDLESS NUMBER OF STATUTES INTO CONTRACTS, ELIMINATING THE LEGISLATURE'S ABILITY TO ACT.

Before the Court accepts the plaintiffs' request to label RSA 100-A a contract that may not be modified, it should consider how many other statutes might be similarly contorted and jammed into the same procrustean bed. The *amici* submit that the number is virtually endless. The following are just a few examples. In each of these cases--and probably hundreds more--someone performs a service or pays money in exchange for some consideration established by the state.

Medicaid enhancement tax. As enacted in 1991, this law imposed an eight percent tax on the "gross patient services revenue" of every hospital. The tax revenue was put into a fund, 50 percent of which was to be returned to the hospitals (along with a full federal match) as Medicaid disproportionate share allocations, with most of the remainder going to the state's general fund. *See* 1991 N.H. Laws ch. 299. This certainly sounds as much like a contract as the NHRS statute: the hospitals "agree" to make payments to the state (with the same degree of volition that public employees exercise when they join NHRS), in exchange for a promised future return. If the state subsequently diverts money from that fund for other uses, leaving less to be returned to the hospitals--as it did in 2011, *see* 2011 N.H. Laws 224:36--is this not an unconstitutional impairment of the contract?

Meals and rooms tax. RSA ch. 78-A imposes a nine percent tax on hotel occupancies and restaurant meals, with the tax to be collected and remitted to the state by the hotel or restaurant operator. Each operator is required to keep books and records in a form acceptable to the state. RSA 78-A:7, III states, "To compensate operators for keeping the prescribed records and the proper account and remitting of taxes by them, operators are allowed to retain 3 percent of the taxes due . . . ."

Under the plaintiffs' theory, this clearly is a contract: the operator is compensated for services performed. If the legislature reduces the three percent allowance to one or two percent, or eliminates it entirely--as has been proposed, *see* HB 1329, N.H. General Court, 2006 Session--would that not be a clear Contracts Clause violation? For that matter, if the legislature reduces the rate of the tax itself to seven or eight percent, would that not be a violation, as the operator would now be paid less for the same services?

Minimum wage law. This is analogous--perhaps perfectly so--to the "contract" that teachers, police, firefighters, and other employees have with the political subdivisions under RSA

100-A. For services performed by an employee, the employer is required to pay a minimum wage, just as retirement system employers are required to pay a certain contribution for each employee. A minimum-wage employee accepts a job with the knowledge that he or she will be paid a certain wage, no less. If the legislature reduces the minimum wage, has it not impaired the "contract"?

But wait! If the legislature *increases* the minimum wage, surely it has impaired the contract to the detriment of employers. It appears, then, that the minimum wage can never be changed. Maybe this is why courts are generally reluctant to treat statutes as contracts.

Pollution control exemption. RSA 72:12-a provides that any person or entity that installs a treatment facility or other equipment for the purpose of reducing air or water pollution is entitled to have the value of that equipment excluded from local property taxes for as long as it is in operation. Under the plaintiffs' theory, this certainly constitutes a contract: a manufacturing company installs pollution control equipment on the explicit understanding that the state will grant it a tax exemption (at the municipality's expense, of course). If the legislature repeals or reduces this exemption, how is this not a Contracts Clause violation?

This list could go on for as long as anyone can keep naming statutes. Insurance companies pay a premium tax for the right to do business in New Hampshire. *See* RSA 400-A:32. If that tax is increased, there is a Contracts Clause claim. Town clerks are entitled to charge and keep certain fees for the performance of their duties (unless the town votes otherwise). *See, e.g.*, RSA 41:25; RSA 5-C:10. If the legislature reduces the amounts of the fees allowed, there is a Contracts Clause claim. Businesses are entitled to a credit under the business profits tax for certain research and development expenditures. *See* RSA 77-A:5, XIII. If that credit is repealed or reduced, there is a Contracts Clause claim.

There is no principled distinction between these arrangements and the NHRS statute. Further, the same claims may be raised any time the state--or any political subdivision--changes

the compensation, benefits, working conditions, or other terms of employment of any at-will employee. To suggest that pension statutes are different because they're pension statutes is an exercise in circular reasoning, not constitutional analysis. If the Court concludes that the NHRS statute creates constitutionally protected contract rights, it is difficult to imagine how the judicial system would handle the resulting torrent of litigation.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully join in the state's request for relief.

Dated: January 7, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed two copies of this brief to each of Richard Head, Esq., Counsel for the State of New Hampshire and Glenn Milner, Esq., William Payne, Esq., David Gottesman, Esq., and Andru Volinsky, Esq., counsel for the plaintiffs.

Date: _____ _____

Cordell A. Johnston

ADDENDA

CONTENTS

Addendum A

NHRS
New Hampshire Retirement System

NHRS Employer and Member Contribution Rates since 1970

FY*	Employer Rates**					Member Rates***	
Fiscal Year	Non-State Employees	State Employees	Teachers	Police	Fire	Group I	Group II
1970-71	2.85%	2.85%	3.10%	8.30%	8.30%	Variable	Variable
1971-72	2.61%	2.61%	3.55%	8.49%	8.86%	Variable	Variable
1972-73	2.96%	2.96%	3.88%	8.80%	9.05%	Variable	Variable
1973-74	2.77%	2.77%	4.30%	8.82%	8.31%	Variable	Variable
1974-75	1.90%	1.90%	2.61%	7.31%	6.76%	Variable	Variable
1975-76	1.59%	1.59%	1.79%	9.69%	9.52%	Variable	Variable
1976-77	2.43%	2.43%	3.89%	10.89%	18.44%	Variable	Variable
1977-78	3.03%	3.03%	2.88%	11.98%	19.05%	4.60%/9.20%	9.30%
1978-79	3.01%	3.01%	2.88%	11.98%	18.61%	4.60%/9.20%	9.30%
1979	3.15%	3.15%	2.88%	11.21%	14.26%	4.60%/9.20%	9.30%
1980	3.00%	3.00%	2.96%	11.77%	13.14%	4.60%/9.20%	9.30%
1981	2.74%	2.74%	2.96%	11.71%	12.86%	4.60%/9.20%	9.30%
1982	2.55%	2.55%	1.80%	21.69%	17.29%	4.60%/9.20%	9.30%
1983	2.56%	2.56%	2.20%	21.40%	17.83%	4.60%/9.20%	9.30%
1984	2.39%	2.39%	0.88%	21.51%	23.12%	4.60%/9.20%	9.30%
1985	2.07%	2.07%	0.92%	21.71%	22.80%	4.60%/9.20%	9.30%
1986	1.27%	1.27%	0.88%	13.00%	15.54%	4.60%/9.20%	9.30%
1987	1.01%	1.01%	0.88%	11.60%	14.70%	4.60%/9.20%	9.30%
1988	2.74%	2.74%	0.65%	7.07%	13.99%	4.60%/9.20%	9.30%
1989	2.47%	2.47%	0.79%	8.20%	13.98%	5.00%	9.30%
1990	2.30%	2.30%	1.37%	9.31%	12.23%	5.00%	9.30%
1991	2.02%	2.02%	1.37%	10.22%	12.65%	5.00%	9.30%
1992	2.33%	2.33%	2.09%	7.97%	7.95%	5.00%	9.30%
1993	2.65%	2.65%	2.79%	5.07%	10.20%	5.00%	9.30%
1994	2.65%	2.65%	2.79%	5.07%	10.20%	5.00%	9.30%
1995	2.65%	2.65%	2.79%	5.07%	10.20%	5.00%	9.30%
1996	3.14%	3.14%	3.35%	3.81%	7.49%	5.00%	9.30%
1997	3.14%	3.14%	3.35%	3.81%	7.49%	5.00%	9.30%
1998	3.86%	3.86%	4.05%	5.22%	8.30%	5.00%	9.30%
1999	3.86%	3.86%	4.05%	5.22%	8.30%	5.00%	9.30%
2000	3.94%	3.94%	4.11%	7.13%	8.30%	5.00%	9.30%
2001	3.94%	3.94%	4.11%	7.13%	8.30%	5.00%	9.30%
2002	4.14%	4.14%	3.97%	8.20%	10.17%	5.00%	9.30%
2003	4.14%	4.14%	3.97%	8.20%	10.17%	5.00%	9.30%
2004	5.90%	5.90%	4.06%	12.11%	20.68%	5.00%	9.30%
2005	5.90%	5.90%	4.06%	12.11%	20.68%	5.00%	9.30%
2006	6.81%	6.81%	5.70%	14.90%	22.09%	5.00%	9.30%
2007	6.81%	6.81%	5.70%	14.90%	22.09%	5.00%	9.30%
2008	8.74%	8.74%	8.93%	18.21%	24.49%	5.00%	9.30%
2009	8.74%	8.74%	8.93%	18.21%	24.49%	5.00%	9.30%
2010	9.16%	11.05%	10.70%	19.51%	24.69%	5.00%****	9.30%
2011	9.16%	11.05%	10.70%	19.51%	24.69%	5.00%****	9.30%
2012	11.09%/8.80%^	12.31%/10.08%^	13.95%/11.30%^	25.57%/19.95%^	30.90%/22.89%^	7.00%~	11.55%/11.80%~
2013	8.80%	10.08%	11.30%	19.95%	22.89%	7.00%	11.55%/11.80%

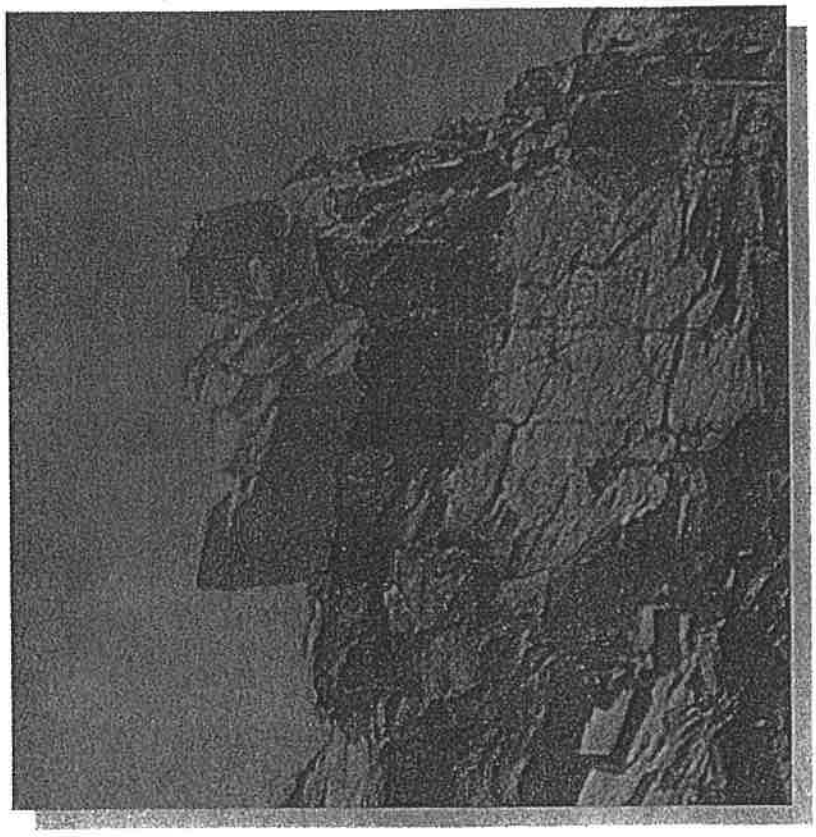
* Fiscal Year: Rate changes took effect on Jan. 1 until 1979, when the effective date was changed to July 1 to coincide with the fiscal year.
** Employer Rates: The rates listed above are the total employer contribution rates. In 2008, legislation was passed to include both a pension and a Medical Subsidy portion as part of the total employer contribution rate, which may result in a difference in the employer rates for state and non-state employees. Visit the NHRS website at http://www.nhrs.org/Employers/Rates.aspx to view a breakdown of the pension and Medical Subsidy percentages. Note: Group II employers do not pay the Social Security tax, currently 6.2% on earnings up to $110,100.
*** Member Rates: Group I includes Employee and Teacher members; Group II includes Police and Fire members. Member rates are set by the New Hampshire Legislature. Prior to 1977, employee contribution rates were assessed on a sliding scale based on age, and, for Group I only, gender. Prior to 1989, Group I members contributed 4.60% up to the Social Security taxable wage limit and 9.20% on any excess.
**** The member contribution rate for state employees whose employment began on or after July 1, 2009, is 7.0%.
^ Employer rates were recertified effective Aug. 1, 2011, to reflect 2011 legislative changes.
~ Effective July 1, 2011, the member contribution rates increase to 7.0% for all Group I members, 11.55% for Group II Police members, and 11.80% for Group II Fire members.

Sources: NHRS Comprehensive Annual Financial Reports; NHRS Reports to the New Hampshire Legislature; NH RSA 100-A.

Revised 7/2012

A User's Guide for the

NEW HAMPSHIRE RETIREMENT SYSTEM



2010
Second Edition
Produced by the New Hampshire Retired State Troopers Association

Public employees may participate in the **NH Federal Credit Union**, which offers savings accounts, CD's and other savings programs. As a Credit Union's brochure advises, "save more: the 10% savings objective that was the standard years ago might leave you short...These days a savings goal of 20% of gross income is a better target..."

Tips: Check out the savings programs offered by your employer. Be a wise consumer – if you shop around, you may find something that works better for you. Or, you may find that your employer sponsored plan offers several good investment choices, as well as the convenience of saving by payroll deduction. Are you a disciplined saver? One of the major advantages of saving through payroll deduction is that it takes away the temptation to spend that money.

Understanding Your Pension with NHRS

Retire - The most important term

In NHRS terminology, you are **retired** if you are *drawing a pension from NHRS*. Since most people think of their retirement date as the day they leave their jobs, this semantic distinction creates some confusion. If you quit your job without filing to draw your pension, NHRS considers you ***terminated***, but ***not*** retired.

If you want to start drawing your pension, check the eligibility requirements for your Group in Part III of this booklet. If you are eligible for retirement, you have are two possibilities:

Service retirement is when you file while you are still at your job ("in service")

Vested deferred retirement is when you quit your job ("terminate") and then apply later to start drawing your pension ("retire"). You must leave your money in NHRS in order to retain your eligibility for vested deferred retirement.

Note: Disability retirement is available for those who meet specific criteria – contact NHRS if you become disabled.

Vesting: A very important term

After you have been a contributing member of NHRS for 10 years, you are ***vested***, which gives you the right to a future pension. You can quit your job and file to start your pension at a

future date, as long as you leave your money in NHRS. That's why it's called "vested deferred retirement" – you are vested and you are deferring the collection of the pension.

Accumulated Contributions

Your contributions toward your pension, plus your credited interest are reported on your Annual Statement. If you are an Employee or Teacher, you are contributing 5% of your gross pay (except State Employees hired on or after 7/1/09, who contribute 7% of their pay). If you're a Police Officer or Firefighter, you are contributing 9.3% of your gross pay.

Refunds

If you leave your job, you may take your contributions plus your interest as a refund. Refunds are subject to a withholding tax of 20%. And, there is a penalty of 10%, if you are younger than 59 ½ when you take the refund.

You can defer the taxes by rolling your money into another tax sheltered account, but few other accounts earn the 8.5% rate of return that NHRS credits member accounts for vested members. (The rate is subject to change by the Board of Trustees.)

The interest rate credited for non-vested members is adjusted annually. It is 2% less than the assumed rate (currently 8.5%) ***or*** the trust fund's actual rate of return, which ever is lower. (If the trust fund loses money, the accounts of non-vested inactive members are credited with zero interest that year.)

Important: if you take your money out of NHRS, you are forfeiting any benefits that you had earned, including the right to a future pension.

FAQ's

Can I borrow from my NHRS account? No, borrowing is not permitted.

Do I get my employer's money, too? No, the employer's share is intended to help you build a pension. If you chose a refund instead of a pension, your employer's share stays in NHRS to help fund other pensions.

If I return to my job or another job as an NHRS member, can I get credit for that time?
If you repay what you withdrew, plus interest, you can have that time reinstated toward your pension. You will owe interest to NHRS from the time you took the refund, until you re-pay it.

Glossary

Source: NHRS website

Accumulated Contributions — The sum of all mandatory NHRS contributions deducted from a member's compensation, any additional contributions and any contributions made by a member for purchases of service credit, plus credited interest.

Active Member — An individual who is actively contributing to NHRS on earnable compensation.

Average final compensation (AFC) - is the average of the member's annual compensation for the three highest paid years of membership service. Certain limitations may apply.

Creditable service - (also referred to as "service credit") includes membership service earned as a contributing NHRS member, plus service credit purchases. Service credit purchases may include employer enrollment oversight service, military service for military duty served prior to NHRS membership, modifications service, nonqualified service, out-of-state service, probationary/temporary service and previously withdrawn service. There are also provisions relating to service credit for members called to active military duty and for members who receive Workers' Compensation.

Defined benefit plan: NHRS is a defined benefit plan which offers its eligible members a lifetime pension. Retirement benefits are determined by a formula which considers two variables: a member's salary credit ("average final compensation") and a member's service credit ("creditable service"). Although members and their employers make regular contributions to NHRS, those contributions are not variables in determining the actual defined benefit.

Preselection - allows an eligible member to elect a maximum Survivorship Option for a beneficiary(ies) in the event of the member's death while in service and before filing an application for Service Retirement. The maximum Survivorship Option provides a lifetime pension equal to the amount the member would have received under the 100% Survivor Option, calculated as if Service Retirement had occurred on the day before the member's date of death. If a member dies while a pre-selection is in effect and if the beneficiary named is the same as the beneficiary named under the Designation of Death Beneficiary(ies) (Pre-retirement) form, then the member's designated beneficiary(ies) may choose to receive either the 100% Survivorship Option or the lump sum payment under the Ordinary Death Benefit or Accidental Death Benefit, whichever applies to the member. Eligibility for Pre-selection:

- Group I members age 60 or older regardless of service
- Group II members age 45 or older with at least 20 years of creditable service, and Group II members age 60 or older regardless of service

Service Retirement:

- Group I: A lifetime pension commencing at age 60 or older, regardless of the number of years of creditable service.
- Group II: A lifetime pension commencing at age 45 or older with at least 20 years of Group II creditable service, or at age 60 or older regardless of the number of years of creditable service.

Early service retirement - Group I members (employees and teachers) may be eligible to receive an Early Service Retirement pension prior to age 60. Early Service Retirement does not apply to Group II members (firefighters and police officers). Different provisions apply to members with Split Benefits.

Split benefits - Members with creditable service in both Group I (employee and teacher members) and Group II (firefighter and police officer members) may be eligible for a Split Benefit Retirement pension. Because Split Benefit Retirement pensions are based on members' creditable service in each group classification, NHRS will determine members' unreduced annual benefits in two "parts". The Group I part will be based on the Group I formula for Service Retirement the Group II part will be based on the Group II formula for Service Retirement. The parts will be added together to give members their total annual pension amount.

Survivorship option - At retirement, a member may select a reduced allowance under one of the Survivorship Options to provide a lifetime allowance to a beneficiary(ies). Beneficiaries under a Survivorship Option may include any one person or any number of the member's children and/or the member's spouse. Multiple beneficiaries under a Survivorship Option may not include anyone other than the member's children and spouse. The amount of the reduction in the member's retirement allowance will depend on which option was selected, the member's age at the time of retirement, and the age of each primary beneficiary.

Vesting - Members who have at least 10 years of creditable service are vested and have earned their right to a pension. This means that they may leave their NHRS-covered employment before they are eligible to retire but are still entitled to a pension in the future, when the eligibility requirements for a Vested Deferred Retirement benefit have been met. Vested members must not withdraw their funds from NHRS if they wish to receive pension benefits.

NHRS
1/22/13

House ED&A Request
Annual Pension Data for New Retirees
Computation of Mean & Median Retirement Benefits
FY 2008 to 2012

FY 2008 - New Service Retirements

	Mean	Median	#	Avg. Age
Employees	$14,811	$11,786	543	63.4
Teachers	$26,470	$25,480	334	61.7
Police	$50,832	$47,948	119	50.3
Fire	$52,221	$51,314	45	52.3

FY 2008-Service retirements only **1,041**

NHRS System-Wide Total **22,870**
FY % of Total 4.6%
Average Annual Benefit **$17,509**

FY 2009 - New Service Retirements

	Mean	Median	#	Avg. Age
Employees	$13,821	$11,191	499	63.5
Teachers	$27,795	$26,722	400	61.8
Police	$50,397	$49,867	118	51.0
Fire	$48,985	$48,037	38	51.3

FY 2009-Service retirements only **1,055**

NHRS System-Wide Total **24,501**
FY % of Total 4.3%
Average Annual Benefit **$18,096**

FY 2010 - New Service Retirements

	Mean	Median	#	Avg. Age
Employees	$15,645	$12,474	489	63.8
Teachers	$27,474	$26,144	329	62.4
Police	$49,665	$46,458	108	52.0
Fire	$59,089	$55,804	27	51.0

FY 2010-Service retirements only **953**

NHRS System-Wide Total **25,845**
FY % of Total **3.7%**
Average Annual Benefit **$18,652**

FY 2011 - New Service Retirements

	Mean	Median	#	Avg. Age
Employees	$15,524	$12,531	609	63.7
Teachers	$23,830	$21,388	213	63.0
Police	$51,745	$47,791	174	52.5
Fire	$55,600	$55,270	78	51.7

FY 2011-Service retirements only **1,074**

NHRS System-Wide Total **27,130**
FY % of Total **4.0%**
Average Annual Benefit **$18,959**

FY 2012 - New Service Retirements

	Mean	Median	#	Avg. Age
Employees	$13,603	$9,623	614	64.1
Teachers	$25,882	$25,113	357	62.8
Police	$52,910	$51,061	98	50.6
Fire	$58,126	$59,289	43	51.0

FY 2012-Service retirements only **1,112**

NHRS System-Wide Total **28,454**
FY % of Total 3.9%
Average Annual Benefit **$19,119**

This table shows by fiscal year, by member group, the Mean (arithmetic average) and Median (midpoint in the distribution
for New Service Retirees only--disability, beneficiary, death, deferred vested, and early retirement retirees were not included
The NHRS system-wide total & average annual benefits are computed using all retirees & beneficiaries, all group retirement data

Additional background:

- Police & Fire (Group II) members in New Hampshire do not contribute and are not covered by Social Security.
- The relatively small number of Police & Fire retirees makes those numbers volatile and possibly skewed in some years.
- Employees & Teachers (Group I) retirement numbers are reduced by 10% at age 65 per statute.
  The numbers shown above are a mix of pre & post age 65 retirements
- HB 2 changes increased all member contributions and reduced benefits for new hires (after 7/1/11 & non-vested after 12/31/11).
  Those changes will not be reflected in retiree numbers for several years

Addendum C