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.

RESPONDENTS' SUPPLEMENTAL BRIEF

The cost of living adjustment ("COLA") Petitioners seek to protect is not part of the benefit to which they have a vested right under Article XX, § 22(D) of the New Mexico Constitution. Furthermore, as Petitioners have no cognizable property right in either a particular adjustment or the manner in which it is calculated, the COLA modification is not a "taking." The Court should find SB 115 constitutional as applied in all respects.

ARGUMENT AND AUTHORITY

Question One: For those persons who have actually retired under the ERA, whether the prospective annual cost of living adjustment (COLA) is considered to be benefits, and if so, when do the adjustments vest?

The benefit that retirees are entitled to under the Educational Retirement Act ("ERA") is legally distinct from the COLA, and Petitioners have no vested property right to it. The statutory provisions defining "retirement benefit," "annuity," and the "adjustment factor" used to calculate a COLA, as well as the provisions pursuant to which the adjustments are and have been made, demonstrate that the COLA has never been considered part of the retirement benefit. Consequently, New Mexico law does not recognize a vested right to any particular future adjustment. To the extent a retiree has any rights in connection with a COLA, it is the right to continue receiving any adjustment that has been paid. That right only accrues when the COLA is actually paid and is limited to the adjustment paid. It does not include a particular formula or percentage increase.

"Retirement benefit" is defined as "an annuity paid monthly to members whose employment has been terminated by reason of their age."[1] NMSA 1978, § 22-11-2(M) (2004). For purposes of determining the COLA, "annuity" is further defined as "any benefit payable under the Educational Retirement Act or the Public

[1] The definition reads as when enacted in 1967. Laws 1967, ch. 16, § 126.

Employees Retirement Reciprocity Act as a retirement benefit, disability benefit or survivor benefit."[2] NMSA 1978, § 22-11-31(A)(2) (2013). Finally, "adjustment factor" is defined as "a multiplicative factor computed to provide an annuity adjustment pursuant to the provisions of" NMSA 1978, § 22-11-31(B) (2013).[3] To be eligible for a "retirement benefit" under the ERA "a member must have acquired not less than five years of contributory employment." NMSA 1978, § 22-11-24(A) (1967). Eligibility requirements for retirement are found in NMSA 1978, §§ 22-11-23, -23.1, and -23.2 (2013). Depending upon when a person became a member, eligibility for a COLA does not occur until July 1 of the year in which a member attains either age 65 or age 67, or the year following retirement, whichever is later. *See* § 22-11-31(B).

As these provisions show, the ERA defines retirement benefits and COLAs separately. The COLA is not a part of the benefit. It is a separate amount that a retiree might receive, but only when there is a year over year increase in the CPI.

The provisions addressing the calculation of retirement benefits and COLAs further demonstrate that COLAs are not considered to be retirement benefits. The processes for calculating retirement benefits are set forth in NMSA 1978, § 22-11-

---

[2] This definition likewise reads as when enacted in 1979. Laws 1979, ch. 333, § 1.

[3] *Id.* Except for the limits on adjustment factors, up or down, the material portion of the definition reads as it did when enacted in 1979.

30 (2013). That section reflects the numerous changes the legislature has made to the calculation of those benefits over the years, including the most recent in 2009 and 2013. It does not refer to the section addressing the COLA or in any way indicate that it is part of the retirement benefit.

Similarly, Section 22-11-31(C) addresses the calculation of COLAs. Subsection (C)(1), dealing with adjustments when the funding ratio is 100 percent, essentially sets forth the adjustment factor that existed prior to 2013 except as addressed below regarding negative COLAs.[4] Subsections (C)(1) and (2) set forth the COLA modifications at issue in this proceeding. Again, the language of Section 22-11-31 makes it clear that COLAs are not part of the retirement benefit.

The distinction between COLAs and retirement benefits is reinforced by the fact that until 2010 the ERA provided for reductions in amounts previously paid in COLAs if there was year to year *decrease* in the CPI. As is summarized in Exhibit 1, when the annual COLA was first enacted in 1979 it provided for negative adjustments of up to 2 percent per year if the CPI decreased, down to the original amount of the annuity at retirement. Laws 1979, ch. 333, § 2. The provision for negative adjustments remained a part of the COLA until 2010. Laws 1984, ch. 19, § 6 and Laws 1987, ch. 86, § 3. The provision, which included a floor only at the

[4] *Compare* § 22-11-31 (C)(1) (2013) *and* § 22-11-31(B) (1999) and (2010).

amount of the original benefit, confirms that the COLA is not part of the retirement benefit.

The 2010 amendment eliminated the provision allowing for reductions when the CPI decreased. Laws 2010, ch. 81, § 1. Elimination of that provision, however, does not provide a basis for transforming the COLA into part of the retirement benefit. All that can be said of the 2010 amendment is that adjustments previously paid as a COLA no longer will be removed when the CPI decreases. The historic treatment of the COLA shows that an adjustment vests only once it has been paid.

Future amounts that retirees might receive under a COLA are an expectation that an event will occur, not a protected property right. *See Zucker v. United States,* 785 F. 2d 637, 640 (Fed. Cir. 1985), *aff'd* 474 U.S. 842 (1985) (until received through increased annuity, COLA portion of federal retirement benefit is no more than "government fostered expectation;" it does not rise to the level of "property" protected by takings clause) and *Swanson v. State*, No. 62-CV-10-05285 at 26 (Minn. Dist. Ct. June 29, 2011) (claimed expectation to future annuity adjustments that may have been greater under former formula is not property right protected by takings clauses under Minnesota and federal constitutions). Attempting to convert the COLA into a property right, Petitioners argue they are

entitled to a particular means of calculating a COLA. Nothing in the ERA itself or prior legislation addressing COLAs supports that argument. The existence of such a right would read Article XX, § 22(E) out of the New Mexico Constitution. New Mexico law does not recognize a property right in a specific manner of calculating a COLA. Other than determining whether a change is reasonable under Article XX, § 22, nothing prevents the legislature from changing the means by which it is calculated. Consequently, the only amounts "vested" pursuant to a COLA are those that have already been paid.

Question Two: Whether the takings at issue are to be analyzed as a regulatory taking or a taking per se?

This question assumes that the COLA modification at issue is a taking. A taking occurs when the government takes private property for public use without just compensation. *Moongate Water v. City of Las Cruces*, 2013-NMSC-018, ¶ 17, 302 P.3d 405. A predicate to any taking is a valid property interest. As addressed above, retirees do not have a valid property right in a particular COLA formula. Because the State cannot "take" a property right that does not exist, there has been no taking.

Furthermore, there has been no taking for public use. As addressed in the ERB's Response, the COLA modification is part of a larger effort to enhance the actuarial soundness of the Educational Retirement Fund. Because expenditures

can only be made from the Fund for the benefit of the members and to administer the system, N.M. CONST., art. XX, § 22(a) (1998), improving the Fund's actuarial soundness benefits active and retired members; i.e., those who now receive and those who will receive retirement benefits from the Fund. When the members, not the State, benefit, the State's action is not a taking. *See AFSCME Councils 6, 14, 65 and 96 v. Sundquist*, 338 N.W.2d 560, 575 (Minn. 1983) (increase of employee contributions enacted during financial crisis to maintain actuarial integrity of public pension funds was not a taking because the increase benefited contributors and only contributing members could be beneficiaries).

In the event the Court were to find a taking occurred, it must be analyzed as a regulatory taking. Such a taking occurs when the government regulates the use of property but does not deprive the owner of all use of it. *See Moongate Water Co.*, 2013-NMSC-018, ¶ 18 (regulatory taking occurs when government regulates use of, but does not condemn, land). There is no dispute that, depending on the movement of the CPI, retirees will receive a lower increase after SB 115. They will, however, still receive at least 80 percent of the unmodified COLA. That type of reduction is a regulatory, not a per se, taking.

A reasonable restriction on the use of private property does not constitute a taking when 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. *Temple Baptist Church, Inc. v. City of Albuquerque,* 1982-NMSC-055, 98 N.M. 138, 144–45, 646 P.2d 565, 571–72 (1982); *accord Miller v. City of Albuquerque*, 1976-NMSC-052, 89 N.M. 503, 505, 554 P.2d 665, 667 (only if regulation deprives owner of all beneficial use of property will action be unconstitutional). The COLA reduction satisfies both of these criteria. As discussed in the ERB's Response, the reduction is reasonably related to a proper purpose: enhancing the Fund's actuarial soundness. It also does not unreasonably deprive retirees of all or substantially all of the beneficial use of their property. It results at most in a 20 percent reduction in the percentage *increase* retirees would otherwise receive in a COLA. Despite Petitioners' efforts to make that reduction appear larger, the economic impact of the reduction in the COLA increase is limited and the percentage amount of the reduction decreases as the funded ratio increases. Moreover, the economic impact of the COLA reduction is shared by active and new members, who, in addition to the reduction, will also pay increased contributions.[5]

[5] New members also will bear the impact of additional conditions on the receipt of retirement benefits and COLAs.

The Court should also view an alleged taking in this instance as a regulatory taking because the concept of a per se taking does not map well onto a public pension fund. A per se taking would require compensation essentially equal to the amount of the taking itself. *See, e.g., Yates Petroleum Corp. v. Kennedy*, 1989-NMSC-039, 108 N.M. 564, 569, 775 P.2d 1281, 1286 (fair market value of property taken is measure of just compensation where there is no evidence taking diminished value of remaining property). Where, as here, the alleged taking is part of the legislature's effort to enhance the actuarial soundness of the Fund, requiring payment of compensation equal to the value of the COLA reduction would eviscerate the purpose of the modification.[6] Furthermore, it potentially would favor one group of members, those who would be eligible to receive such a payment, over others.

It would also render Article XX, § 22(E) largely meaningless, foreclosing many potential modifications to enhance or preserve the actuarial soundness of the Fund. Changes to a pension to preserve or enhance actuarial soundness will more likely than not be made in a time of fiscal urgency or crisis. At such a time, a legislature is not likely to be able to make a change requiring offsetting compensation. The legislature would either be left with less immediately effective

[6] Assuming for the sake of argument that the Fund's enhanced actuarial soundness is not of itself just compensation.

indirect measures, such as increasing the retirement age for incoming members or measures that would impose a disproportionate burden on active and incoming members, such as higher contributions or benefit limitations.[7] Requiring compensation for a per se taking disproportionately benefits retirees over other members.

For the reasons set forth here and in the ERB's Response, any taking allegedly occurring in this instance must be analyzed as a regulatory taking. Applying that analysis, SB 115 is constitutional.

Question Three: If the COLA is a taking per se, whether improving the actuarial soundness is just compensation?

From the standpoint of the Petitioners, it can readily be argued that the answer should be "no." Each of the Petitioners is reasonably certain to receive a retirement benefit for the rest of their lives. This highlights the problem with treating the COLA modification as a per se taking. It looks at the impact of the modification as it affects one group of members, rather than the impact on the Fund from which all members, retired and active, do and will receive their benefits.

---

[7] It is worth noting that such measures would be necessary to pay for the benefits of others, particularly retirees whose contributions had not been adequate to fund their benefits.

The soundness of the Fund is as vital to those who have long since retired as it is to new retirees, active members who will retire shortly, and those who will not retire for many years. All members look to the Fund for secure retirement benefits. Because the Fund must remain nearly 100 percent invested to generate income to pay those benefits, it always will be subject to the effects of financial crises and severe market downturns such as those of 2001 and 2007 – 2008, as well as to normal market fluctuations. A funded ratio such as the July 1, 2012 ratio of 60.7 percent makes it more susceptible to adverse market forces. The higher funded ratio that will result from the changes made by SB 115, of which the COLA modification is a necessary part, will better enable the Fund to weather adverse conditions and continue paying benefits for years to come. Viewed in terms of the entire membership, the increased actuarial soundness of the Fund is just compensation for any taking alleged to have occurred in this instance.

Applying a contract theory of public pension benefits, some courts in other states have held that changes in a plan that result in disadvantages to vested employees or retirees must be accompanied by offsetting or counterbalancing advantages. *See, e.g., Singer v. City of Topeka*, 607 P.2d 467 (Kan. 1980) and *Teachers' Retirement Bd. v. Genest*, 65 Cal.Rptr.3d 326 (Cal. Ct. App. 2007) (quotations and citations omitted). Courts have stated that reasonable

modifications can be made to a plan prior to a member's retirement to strengthen it or if actuarially necessary. *See, e.g., Singer,* 607 P.2d at 475; *Peterson v. Fire and Police Pension Ass'n*, 759 P.2d 720, 724 (Col. 1988) (quotations and citations omitted).

The inherent weakness in this view is that it overlooks the fact that a pension such as the educational retirement system is designed to operate for an indefinite future. As such, it must be based on predictions about anticipated economic conditions which can never be entirely accurate. *National Ass'n of Retired Federal Employees v. Horner,* 633 F. Supp 511, 516 (D.D.C. 1986), *aff'd* 479 U.S. 878 (1986) (addressing suspension of federal retirement COLA; quoting *Flemming v. Nestor,* 363 U.S. 603, 610 (1960) (discussing social security program)). Of necessity, the legislature must have latitude to make reasonable changes such as the COLA modification at issue here to insure the long term viability of the Fund. For this reason alone, the principles underlying the holdings described above should not be adopted in New Mexico.

Treating the COLA modification as a per se taking so far as it affects retirees would result in their being treated differently than other members. The Fund had total accrued actuarial liability of $15.8 billion as of July 1, 2012, of which 52.65 percent is associated with retirees and beneficiaries, an increase from 50.52 percent

the prior July 1. ERB Response, Exhibit 1 at 000019. If something other than improved actuarial soundness is required to compensate retirees they would not be subject to the COLA modification as SB 115 stands, placing them in more advantageous position than other members in terms of contributing to improving the actuarial status of the Fund from which their benefits come. The COLA modification is both limited and reasonable.

The Court should find that the improved actuarial soundness and continued viability of the Fund adequately compensates all members, retired and active, for any taking that might result from this COLA modification.[8] The Court also should recognize that the modification benefits members by making less likely the need for further changes such as additional contribution increases, increased retirement eligibility requirements, greater retirement age-based benefit reductions, or further postponements of the age when COLAs would start.

Question Four: If the COLA does not vest until the following "year," whether the taking, if any, is regulatory or per se?

Any taking that results from a COLA modification should be analyzed as a regulatory taking regardless of when any right to receive a COLA "vests." If the right "vests" when a retiree meets the age requirements in Section 22-11-31, or

---

[8] As set forth above, the Court would more directly avoid this question by finding that the COLA change is not a taking because Petitioners have no property right in the formula used to calculate adjustments.

alternatively at retirement, one could argue that a regulatory takings analysis is inappropriate because at either point a retiree does not have as many options to offset the effect of a COLA change. Nevertheless, the concerns that underlie the need for improved actuarial soundness and the benefit such improvement provides to all members, retired and active, remain the same.

A regulatory takings analysis is the appropriate analysis for economic legislation. It allows the Court to determine whether any taking resulting from the modification is (1) reasonably related to a proper purpose and (2) unreasonably deprives the retirees a portion their property. As part of such an analysis the Court can consider matters such as the funded ratio and the role of the COLA modification in the effort to improve actuarial soundness. This analysis still provides substantial protection for retirees from an unwarranted or unreasonable COLA change while permitting a more reasoned approach to determining where there has been a taking than would a per se analysis.

For the reasons set forth in the response to Question Two, the "either/or" nature of a per se takings analysis is not appropriate in determining whether there has been a taking in the context of a public pension. It does not fit well in such a complex environment and neither the fact that any right to a COLA attaches at a

later date nor that the member is now retired alters this. To the extent there is any cognizable taking here, the Court should analyze it as a regulatory taking.

Question Five: If the COLA adjustments have varied from time to time during the years between an employee's date of meeting the minimum service requirements and date of retirement, which COLA adjustment percentage, if any, is the retiree guaranteed to receive every year after retirement and why is that particular adjustment guaranteed?

The legislature has changed COLAs several times. When it has done so, it has neither addressed minimum service requirements nor guaranteed that employees will receive a particular adjustment percentage every year after retirement.[9] Accordingly, Petitioners are not entitled to any particular adjustment percentage.

The best example of this is the 1984 amendment of the COLA enacted in 1979. The 1979 enactment provided, among other things, that a retiree would begin receiving a COLA beginning four years after retirement without reference to the member's age at retirement.[10] The 1984 amendment provided payment of a COLA beginning on the later of July 1 of the year that a member reached age 65 or the year following a member's retirement.

---

[9] As noted in the response to Question One, the minimum service required to be eligible for benefits is five years. Eligibility requirements for retirement are separate. *See* Sections 22-11-24, 22-11-23, -23.1, and -23.2.

[10] The 1979 enactment is more completely summarized in Exhibit 1, which describes the history of COLAs and of *ad hoc* cost of living increases under the ERA and the PERA.

As the 1984 amendment would affect those who were receiving a COLA before attaining age 65 pursuant to the 1979 legislation, the amendment provided that a "*retired member* whose benefit is subject to adjustment under the provisions of the [ERA] in effect prior to July 1, 1984" (i.e., pursuant to the 1979 legislation) would continue to be adjusted under those provisions until July 1 of the year in which the member attained age 65. At that time, they would begin to be adjusted pursuant to the 1984 amendment. Laws 1984, ch. 19, § 6 (*emphasis added*).[11] The 1984 amendment ensured that those retirees would continue receiving the COLA they were already getting until July 1 of the year they turned 65, but after that date, those retirees would receive COLAs calculated pursuant to the 1984 amendment.

This provision of the 1984 amendment spoke only in terms of retired members. It did not address employees who met the minimum service requirements while under the 1979 legislation but were still active when the 1984 amendment became effective. As a result, those employees were subject to the COLA provisions enacted in 1984, not those in the 1979 legislation.

This change does not support the concept that upon meeting minimum service requirements, employees are guaranteed to receive a particular adjustment

---

[11] Other than amendments to place the relevant sentence in the 1984 amendment in a separate subparagraph and make it gender neutral, the sentence reads as originally enacted. *See* Laws 1991, ch. 9, § 1 *and* Laws 2010, ch. 81, § 1.

percentage when they retire. It indicates the opposite: that employees have no such guarantee, and there is no basis for this Court to find one. The COLA modification made by SB 115 is constitutional as applied to members who had not retired before July 1, 2013.

Question Six: Please research and describe the history of the COLA for the ERA and the PERA as it has evolved over the years. Assuming it has changed over time, what is the authority that entitles a government retiree to the same COLA in perpetuity without any further "adjustments" over time as the name implies? Cite and discuss all case law on point pro and con, including recent opinions, in jurisdictions across the country regarding government retirement plans.

The history of annual COLAs, as well of *ad hoc* increases, under the ERA and the PERA since the mid-1960s is summarized in Exhibit 1. That history does not provide authority for the concept that a retiree under the ERA or the PERA is entitled to receive the same COLA in perpetuity without further changes.

The legislature first enacted a COLA containing an adjustment factor or formula for annual adjustments in 1979. Initially, the benefits of retirees under the ERA and the PERA were adjusted pursuant to the same formula. The ERA COLA was subsequently amended in 1984 and 1987, while the PERA's was amended in 1982 and 1992, resulting in different COLA structures.

Under the 1979 formula, adjustments were equal to the percentage change in the CPI, up or down, over a two year period, with a 2 percent cap. Pursuant to the

1984 amendment, adjustments were one-half of that percentage change, up or down, capped at 4 percent. In addition, the interval after which adjustments began was changed from the July 1 following four full calendar years after the date of retirement to July 1 of the year in which a member attained age 65 or the year following a member's retirement, whichever is later. Laws 1984, ch. 19, § 6.

The 1984 amendment included a provision that the benefits of retired members subject to adjustment under provisions of the ERA in effect prior to July 1, 1984 would be adjusted under those provisions until July 1 of the year in which the member attained age sixty-five. The benefits would then be readjusted annually and cumulatively pursuant to the 1984 amendment. *Id.* That adjustment could be lower than the adjustment retirees otherwise would have received under the 1979 formula. By way of example, under the 1979 amendment, if the percentage change in the CPI resulted in a 2 percent increase in the adjustment factor, a retiree's benefit would increase by 2 percent. Pursuant to the 1984 amendment, however, a 2 percent increase in the CPI would result in a 1 percent benefit increase.

While it might be argued that the transitional provision now codified at § 22-11-31(D) supports the concept that a retiree would receive adjustments under a particular COLA formula in perpetuity, it does not. Rather, the amendment only

permitted those retirees under age 65 as of July 1, 1984 who had been receiving an adjustment pursuant to the 1979 amendment to continue receiving an annual adjustment until they attained age 65. At age 65, however, those retirees would start receiving an adjustment based on the 1984 amendment. That adjustment could be lower than they would otherwise have received under the 1979 formula. The 1984 amendment, as well as the passage of SB 115 in 2013, demonstrates that the legislature does not consider retirement to be a basis on which a retiree under the ERA would be entitled to the same COLA in perpetuity.

Section 22-11-31 was amended in 1987 to, *inter alia,* again modify the COLA adjustment factor such that if the percentage change in the CPI was (i) greater than 2 percent in absolute value, the adjustment would be one-half of that increase or decrease, except that it would not exceed 4 percent or be less than 2 percent in absolute value; or, (ii) less than 2 percent in absolute value, the adjustment would be equal to that percentage increase or decrease. While the amendment was effective July 1, 1987, the revised adjustment factors were effective retroactively as of July 1, 1984. NMSA 1978, § 22-11-31 (B) (1987), enacted by Laws 1987, ch. 86, § 3.[12]

[12] The legislature did not address retroactive adjustments to COLAs paid beginning in July 1, 1984 and the following two years due to differences in the annual adjustments that would result from changing the formula.

Although it could be argued that the 1987 amendment was an effort to ensure that retirees would receive a particular adjustment to benefits every year after retirement, it cannot be clearly said that such was the legislature's intent. In the 1970s and the first half of the 1980s there was substantial volatility in the CPI. *See*, Consumer Price Index – All Urban Consumers, U.S. Department of Labor, Bureau of Labor Statistics, ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt (columns labeled "Percentage Change - December to December and Average to Average"), accessed September 30, 2013, attached as Exhibit 2. Although the year over year percentage change in the CPI decreased to 1.9 percent from 1985 to 1986, this could not be taken as indication that year to year changes would remain low. For example, in 1987 the change went up to 3.6 percent. Creating an adjustment factor or formula that might be more responsive changes in the CPI, rather than attempting to guarantee use of a particular adjustment percentage or formula in perpetuity was at least equally, if not more, likely to have been the concern underlying the 1987 amendment.

As noted, Exhibit 1 summarizes the PERA COLA and the *ad hoc* increases granted retirees under the PERA. Nothing in the PERA legislation provide authority or support for the concept that a PERA retiree is entitled to the same

COLA in perpetuity without any further "adjustments" by the legislature to the COLA formula.

Respondents found thirteen decisions in federal and state courts concerning the legality of COLA changes. In eight of those cases – all five of the federal decisions and cases from Florida, Minnesota, and South Dakota – the courts upheld the COLA change in question. In five of those cases – one each from California, Nebraska, and Rhode Island and two from Colorado – the courts struck down the changes.

In *Maryland State Teachers Ass'n, Inc. v. Hughes*, 594 F. Supp. 1353 (D. Md. 1984), the plaintiffs challenged a Maryland COLA reduction on the ground that it impaired a contract right created by a 1979 pension act. The court assumed without deciding that the pension act had created a contract, but held that the reduction did not unconstitutionally impair any contractual right because it did not retroactively deny vested benefits and did not change benefits that were being paid as of the date of the reduction. *Id.* at 1363.

In *Zucker v. United States,* 785 F. 2d 637 (Fed. Cir. 1985), *aff'd* 474 U.S. 842 (1985), the court considered a reduction to the COLA paid to federal employees under the Civil Service Retirement Act. The court upheld the reduction, deciding that the COLA was not a "benefit," and that the entitlement to a COLA

stemmed from "the independent source that creates and defines [the plaintiffs'] property interest in same, *i.e.*, the COLA provisions of the Civil Service Retirement Act." *Id.* at 639. The court ultimately found that the COLA was a "government fostered expectation" of protection against inflationary pressure, but that the expectation "did not rise to the level of 'property' protected by the takings clause." *Id.*

In *National Association of Retired Federal Employees v. Horner,* 633 F. Supp 511 (D.D.C. 1986), the court considered another challenge to a COLA reduction on the basis that it violated the Civil Service Retirement Act. Holding that Congress could reduce the core benefit "at any time," the court held that Congress could also constitutionally reduce the COLA. *Id.* at 515. The court found it significant that the government have "flexibility in financial matters," *id.* at 516, relying on the Supreme Court's description of the Social Security system in *Flemming v. Nestor*, 363 U.S. 603, 610 (1960):

> That program was designed to function into the indefinite future, and its specific provisions rest on predictions as to expected economic conditions which must inevitably prove less than wholly accurate, and on judgments and preferences as to the proper allocation of the Nation's resources which evolving economic and social conditions will of necessity in some degree modify.

In *National Treasury Employees Union v. Devine,* 591 F. Supp. 1143, 1147 (D.D.C. 1984), the court upheld a COLA reduction for federal civil service retirees

after finding no protected property interest in the COLA. Because there was no such property interest, the court concluded that there had been no taking.

In *Howell v. Anne Arundel County*, 14 F. Supp. 2d 752 (D. Md. 1998) the court considered a COLA reduction to a police retirement plan. The court upheld the reduction on the basis that it operated prospectively because it only affected future service. *Id.* at 755, 757.

In *Scott v. Williams,* 107 So.3d 379 (Fla. 2013), the Florida Supreme Court upheld a legislative enactment that entirely eliminated a COLA for all service credit earned after July 1, 2011. Rejecting the argument that nothing in Florida law was intended to prohibit the legislature from prospectively altering benefits, the court held that there had been neither a contractual impairment nor an unconstitutional taking. *Id.* at 389. The court was concerned with the idea that the legislature could not ever alter benefits except to make them larger, noting that such an approach invited fiscal irresponsibility. *Id.* at 388.

In *Swanson v. State*, No. 62-CV-10-05285 (Minn. Dist. Ct. June 29, 2011), the court considered an amendment that changed the formula by which COLAs were to be calculated. In upholding the reduction, the court held that the legislation creating the pension fund was not a promise to refrain from amending the statutory formula used to determine the COLA for employees who had already

retired. The court further held that the COLA reduction was not a taking, finding instead that it was a reasonable reaction to a fiscal threat jeopardizing the long-term interests of the plan members. The court was cautious about intruding into the legislature's province of setting state retirement policy and rejected the plaintiffs' claims as a fundamental disagreement with the legislature's policy choices.

In *Tice v. State*, Civ. No. 10-225 (S.D. Cir. Ct., Apr. 11, 2012), the court upheld a COLA reduction against challenges that it impaired a contract and was an unconstitutional taking. The court found no basis in South Dakota law for an entitlement to a particular COLA and found nothing that operated as a written employment contract.

In *United Firefighters of Los Angeles City v. City of Los Angeles*, 259 Cal.Rptr. 65 (CA Ct. App. 1989), the court struck down a COLA change on the basis that California pension law was to be liberally construed to protect pensioners and that the COLA reduction was a disadvantage for which the employees were not compensated with a corresponding advantage. *Id.* at 67. The court found it significant that the evidence failed to establish that an uncapped COLA was the cause of fiscal pressure that the pension faced. *Id.* at 73-74.

Police Pension & Relief Board v. McPhail, 338 P.2d 694 (CO 1959) addressed a COLA reduction for police officers. The court determined that the officers were employed under an employment contract, the terms of which were set forth in city charter and ordinances, that included the COLA and that the reduction interfered with that contract. *Id.* at 700.

Police Pension & Relief Board. v. Bills, 366 P.2d 581 (CO 1961) concerned the same COLA reduction at issue in *McPhail*, but for different groups of plaintiffs, including employees who were eligible to retire but had not yet done so. The court held that the reduction interfered with that group of employees' contractual rights under city ordinances. *Id.* at 584. For a second group of plaintiffs who were close to being eligible to retire, the court held that the reduction was an adverse change for which the group was not given a corresponding beneficial change. *Id.* at 585.

Neither case addressed the actuarial status of the Denver police pension plan. As discussed in the ERB's briefing, the COLA reduction at issue is an important part of the changes made by SB 115 to enhance the actuarial soundness of the Fund. Additionally, Colorado has no analogue to Article XX, § 22(E), which contemplates reasonable changes like the COLA reduction that are designed to preserve or enhance the actuarial soundness of the fund.

The court in *Calabro v. City of Omaha*, 531 N.W.2d. 541 (NE 2007), considered the elimination of a COLA for municipal employees retiring after the effective date of the change. The court held that the COLA was part of the pension rather than a gratuity, and that its elimination was not reasonable and necessary to serve an important public interest. *Id.* at 551.

Finally, in *Arena v. City of Providence*, 919 A.2d 379 (R.I. 2007), the court struck down a COLA reduction for police and firefighters who had retired before the effective date of the ordinances enacting the reduction. The court held that while the city could make prospective changes to the COLAs of employees who had not retired, those who had retired had a vested right to the unchanged COLA under a prior ordinance.

CONCLUSION

For the reasons set forth in the ERB's Response and herein, Respondents respectfully the Court to find that the COLA modification is constitutional. Alternatively, Respondents request the Court enter an Order denying the Petition.

Respectfully submitted,

GARY K. KING
NEW MEXICO ATTORNEY GENERAL

Scott Fuqua
Assistant Attorney General
408 Galisteo Street
Santa Fe, NM 87501
(505)827-6920 – Telephone
(505)827-6036 – Facsimile

and

Christopher G. Schatzman
General Counsel
Anita X. Tellez
Assistant General Counsel
New Mexico Educational Retirement Board
701 Camino de los Marquez
Santa Fe, NM 87502
(505)827-3030 – Telephone
(505)827-1855 – Facsimile

Attorneys for Respondents

CERTIFICATE OF COMPLIANCE

As required by Rule 12-504(H) NMRA, I certify that this brief is proportionally spaced and the body contains 5,980 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 October 1, 2013.

Scott Fuqua

EXHIBIT 1
to
RESPONDENTS' SUPPLEMENTAL BRIEF
QUESTION 6
History ERB and PERA COLAs
and
Case History

As directed by the Supreme Court, this addendum describes the history of legislation enacting both annual cost of living allowances ("COLAs") and *ad hoc* cost of living increases under the Educational Retirement Act (the "ERA") and the Public Employees Retirement Act (the "PERA"). It also addresses case law on point pro and con, including recent opinions, in jurisdictions across the country regarding COLAs in government retirement plans.

I. EDUCATIONAL RETIREMENT ACT. Based on the information available, it does not appear that prior statutes governing the educational retirement system provided for adjustment of benefits on an annual or regular basis. From 1967 through 1974, such increases were *ad hoc*, or one-time, increases. The legislature enacted a COLA that provided for annual adjustments in 1979. The COLA was subsequently amended in 1984 and 1987 as described below. Additional *ad hoc* increases also were granted in 1987, 1991 and 1999.

1967. The 1967 enactment of the Educational Retirement Act (the "Act") included a one-time increase in benefits for members who retired under either the

ERA or any law repealed by the ERA on or before June 30, 1967 that was effective July 1, 1967. Monthly benefits, excluding any additional retirement benefits that had otherwise been provided by law, were increased based on a ratio of (i) the sum of the monthly CPI for the five-year period ending June 30, 1967 to (ii) the sum of the monthly CPI for the five-year period ending the last day of the month in which the member last commenced receiving monthly retirement benefits, with a minimum increase of $5.00. Benefits were not to be decreased through application of the formula. Laws 1967, ch. 16, § 154.

1971. Effective July 1, 1971, the amendment granted a one-time increase in benefits for members retired pursuant to the ERA or any law repealed by the ERA on or before June 30, 1971 based on a ratio of (i) the sum of the monthly CPI for the five-year period ending June 30, 1971 to (ii) the sum of the monthly CPI for the five-year period ending on the last day of the month in which the member last commenced receiving monthly retirement benefits or for the five-year period ending June 30, 1967, whichever was later. Again, the minimum increase was $5.00 and benefits were not to be decrease by application of the formula. Laws 1971, ch. 12, § 5.

1974. The legislature provided a one-time increase in monthly retirement benefits, inclusive of any cost of living increase previously granted, of four percent

effective July 1, 1974 to members or their surviving beneficiaries who were retired on or before June 30, 1974. Laws 1974, ch. 5, § 5.

1979. The legislature amended the ERA and the PERA to establish annual COLAs beginning July 1, 1979.[1] Annuities were to be adjusted annually and cumulatively beginning the July 1 following the fourth full calendar year after payment of the annuity began. The adjustment factor was calculated by dividing (i) the CPI for the full calendar year preceding the July 1 on which the benefit was to be adjusted (the "preceding calendar year") by (ii) the CPI for the full calendar year prior to that preceding calendar year (the "next preceding calendar year"). The adjustment factor was not more than 1.020 nor less than .980 in any year, in effect limiting to two percent the adjustments up or down in any year. Laws 1979, ch. 333, § 2. Annuities being paid as of June 30, 1979 were to be adjusted "excluding all increases provided by law after the beginning of the annuity." *Id.* at (C). Annuities were not be decreased below their original amount. *Id.* at (C) and (D). Member contributions were increased by one percent of salary to fund the COLA. *Id.* at (E).

1984. The amendment provided that beginning July 1, 1984, annuities would be annually and cumulatively adjusted on July 1 of the year that a member

[1] The 1979 amendment apparently was the first time the term "cost of living adjustment" was included in legislation amending the ERA.

attained age sixty-five or the year following a member's retirement, whichever was later. Laws 1984, ch. 19, § 6. The adjustment formula was changed to equal one-half of the percentage increase or decrease of the CPI between the next preceding calendar year and the preceding calendar year, with adjustments capped at four percent in absolute value. Negative adjustments would not reduce the benefit below the amount received at retirement. *Id.* at (B). The annuities of retired members whose benefits were subject to adjustment under provisions of the ERA in effect prior to July 1, 1984 (i.e., the 1979 amendment) would be adjusted under those provisions until July 1 of the year in which the member attained age sixty-five, at which time the annuity would be readjusted annually and cumulatively pursuant to the 1984 amendment. *Id.*

1987. The ERA was amended to modify the COLA adjustment factor and to provide an *ad hoc* COLA. Pursuant to the amendment, if the percentage change in the CPI was greater than two percent in absolute value, the adjustment would be one-half of the CPI percentage increase or decrease between the next preceding calendar year and the preceding calendar year, except that it would not exceed four percent or be less than two percent in absolute value. If the CPI percentage change was less than two percent in absolute value, the adjustment would be equal to CPI percentage increase or decrease. Negative adjustments would not reduce the

benefit below that received at retirement. Although the amendment was effective July 1, 1987, the revised adjustment factors were retroactively effective as of July 1, 1984. Laws 1987, ch. 86, § 3. Although the change in the COLA was effective as of July 1, 1984, the 1987 amendment did not expressly address retroactive adjustments to COLAs paid each July 1 beginning in 1984.[2] Except as modified by the 2013 amendment now before the Court, this formula for calculating the adjustment remains in place.

The legislature also granted an *ad hoc* adjustment for each person receiving an annuity as June 30, 1987. Effective July 1, 1987, those persons' benefits were increased by $3.50 per month for each year since the member's last retirement plus $1.50 per month for each year of credited service at the time of retirement. *Id.* at (C).

1991. The legislature granted an *ad hoc* adjustment to benefits effective July 1, 1991, increasing the benefits of persons receiving an annuity as of June 30, 1991 by $2.00 per month for each year since the member's last retirement plus $1.00 per month for each year of credited service at the time of retirement. Laws 1991, ch. 140, § 2. The amendment also shortened the interval before adjustments were

---

[2] Except as modified by the 2013 amendment now before the Court, this formula for calculating the adjustment remains in place.

made to the benefits of members on disability status or whom the ERB certified as disabled at regular retirement.

1999. The legislature granted an *ad hoc* increase in the benefits of those persons receiving an annuity as of June 30, 1999. Similar to 1991, they were increased by $2.00 per month for each year since the member's last retirement plus $1.00 per month for each year of credited service at retirement, effective July 1, 1999. Laws 1999, ch. 9, § 1.

2010. After a decrease in the CPI from 2008 to 2009, the ERA was amended effective July 1, 2010 to provide that annuities would no longer be decreased in the event that there was a decrease in the CPI. NMSA 1978, § 22-11-31(C)(4) (2013), enacted by Laws 2010, ch. 81, § 1.

2013. The 2013 amendment added the modifications to the COLA that are at issue in this proceeding. While revising the language describing the adjustment when the funded ratio is 100 percent, the amendment kept in place the formula for the COLA that was enacted in 1987. NMSA 1978, § 22-11-31 (C)(1) (2013), *see* ERB COLA 1987 for description. When the funded ratio is less that 100 percent, the amount of the adjustment is reduced, resulting in a lower increase. The COLA reduction is tied to the median adjusted annuity[3] paid to ERB retirees, excluding

[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

disability retirements, and their years of service credit at 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. 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).

II. PUBLIC EMPLOYEES RETIREMENT ACT. The following summarizes cost of living adjustments or increases enacted since 1965. From 1965 through

---

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." § 22-11-31 (A)(6) (2013).

[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. Section 22-11-31 (C)(2) and (C)(3) (as amended through 2013).

1978, and again in 1981, *ad hoc* increases were granted to members who had retired prior to the date that the increases became effective. The legislature enacted a COLA providing for an annual adjustment in 1979 and later amended the COLA in 1982 and 1992.

1965. A new section of the PERA effective July 1, 1965 granted ten annual increases of two percent per year beginning July 1, 1965 for annuities that began prior to July 1, 1964 and July 1, 1966 for annuities that began from June 30, 1964 to July 1, 1965. The legislation did not include a means by which benefits would be increased after that ten year period or for those who began receiving annuities after July 1, 1965. Laws 1965, ch. 284, § 9.

1971. Annuities that began prior to July 1, 1970 were to be 'redetermined' effective July 1, 1971. The new amount was to be the greater of (i) the "annuity payable without regard to the provisions of these sections", or (ii) a percentage of the amount of the annuity payable without regard to the provisions of either § 5-5-16.1 or § 5-5-16.2, which was enacted by the 1971 amendment. That "percentage" was 100 percent, plus 2.3 percent for each full calendar year in the period from the beginning of the annuity to July 1, 1971. Laws 1971, ch. 292, § 3.[5] This increase in effect netted out the two percent increases granted by the 1965 amendment.

[5] The 1971 amendment used the term "cost-of-living" adjustment, apparently for the first time in the PERA.

Annuitants or beneficiaries had to pay a lump-sum equal to one percent of their final average salary to receive the increase. *Id.* at (C).

1973. Effective July 1, 1973, annuities that began prior to July 1, 1973 were to be increased between 0.25 percent and six percent depending on the member's date of retirement, with those retired prior to July 1971 receiving the six percent adjustment. The minimum increase was $5.00 per month. The amendment replaced and superseded any increases previously scheduled for July 1 of 1973, 1974, and 1975. Laws 1971, ch. 334, § 1.

1975. The PERA was amended to provide a six percent increase for all annuities that began prior to July 1, 1975, with a minimum monthly increase of $10.00 and a maximum of $25.00. Laws 1975, ch. 151, § 1.

1978. The legislature authorized *ad hoc* COLAs for those receiving annuities as of July 1, 1978 of: (i) ten percent for members who retired prior to July 1, 1975, with a minimum adjustment of $15.00 per month and a maximum of $25.00 per month; (ii) six percent for members who retired between July 1, 1975 and July 1, 1976, with a minimum adjustment of $10.00 per month and a maximum of $25.00; and, (iii) a three percent increase for members who retired

between July 2, 1976 and July 1, 1977, with a minimum adjustment of $10.00 and a maximum of $25.00 per month. Laws 1978, Special Session, ch. 4, § 5.[6]

1979. As with the ERA, the PERA was amended effective July 1, 1979 to include a permanent COLA tied to changes in the CPI. *See* ERB COLA, 1979, *supra*, for description. Except for municipal police and fire members, adjustments were to begin the July 1 following the fourth full calendar year after the annuity began. Municipal police and fire members, whose voluntary retirement age by law was the age at which the member attained twenty years of total service credit, the last five of which was as a state or municipal police or fire member, or any combination thereof, would have their annuities adjusted beginning the July 1 following the ninth calendar year after the annuity began. Member and employer contributions were increased to fund the COLA. Laws 1979, ch. 333, § 1.

1981. The legislature passed an *ad hoc* COLA for members receiving an annuity as of July 1, 1980, increasing annuities by $1.00 per month for every year of service credit at retirement and $1.00 per month for each year of retirement, effective July 1, 1981. Laws 1981, ch. 139, § 1.[7]

---

[6] The 1978 *ad hoc* increase was made through an appropriation and does not appear to have been codified.

[7] The 1981 *ad hoc* increase does not appear to have been codified.

1982. In 1981 the legislature modified the PERA COLA enacted in 1979, effective July 1, 1982. The amendment authorized adjustments to begin the July 1 following two full calendar years after retirement and changed the adjustment factor to be not more than 1.030 nor less than .970 for any year. Adjustments were to be based on the annuity as increased by previous adjustments. The nine full calendar year interval before COLAs began for municipal police and fire members enacted in 1979 was eliminated, bringing those members under the same two full calendar year interval as other members. Member and employer contributions each were increased by one-half percent to fund the COLA changes. Laws 1981, ch. 228, §1, §§ 2, 3 and 5.

1985. Effective July 1, 1985, the PERA was amended to provide that COLAs would begin on July 1 following one full calendar year after retirement for those who were disabled or age 65 or older at retirement. NMSA 1978, § 10-11-29 (D) (1985), Laws 1985, ch. 162, § 1.

1992. The COLA was amended to be fixed at three percent annually, eliminating the CPI-based adjustment. NMSA 1978, § 10-11-118 (1992), enacted by Laws 1987, ch. 253, ch. 116, § 8.

2013. Effective July 1, 2013, the COLA was reduced to a fixed two percent annually for members whose annual benefit, including all previous COLAs, is

greater than $20,000 and two and one-half percent for those whose benefit, including all previous COLAs, is $20,000 or less or who are disabled. Members who retired on or before June 30, 2014 would receive a COLA beginning July 1 two full calendar years after retirement. Members who retire after that date would receive a COLA beginning on July 1 after the following intervals: (i) July 1, 2014 through June 30, 2015 – three full calendar years after retirement; (ii) July 1, 2015 through June 30, 2016 – four full calendar years after retirement; and, (iv) on or after July 1, 2016 – seven full calendar years after retirement. Member retiring after attaining age 65 or due to a disability will continue to receive a COLA on July 1 one full calendar year after retirement. NMSA 1978, § 10-11-118 (2013).

III. CASE HISTORY. The section addresses case law located that is on point, pro and con, including recent opinions, in jurisdictions across the country regarding COLAs in government retirement plans. The summary does not include decisions that are on appeal.

A. Federal Courts

1. *Maryland State Teachers Ass'n, Inc. v. Hughes*, 594 F. Supp. 1353 (D. Md. 1984). The plaintiffs, representing a class consisting of teachers and state employees who were members of the state's teacher and public employees retirements systems, alleged that the Maryland 1984 pension reform law violated

the contract clause of the U.S. Constitution and the due process clause of the Fourteenth Amendment because it unjustifiably impaired a contract they argued was created by a 1979 pension act. *Id.* 1356-57, 1358. In 1979, Maryland modified its original retirement system, creating a retirement system with two options. Employees could either remain in the existing system, which provided a fully indexed COLA, and required contributions equal to five percent of salary, or transfer to a new system, which capped COLAs at three percent, without being required to make any contributions except to the extent their salary exceeded the Social Security wage base. The 1984 law required employees to transfer to one of four different options. If employees chose to remain in the pre-1979 system, retaining the uncapped COLA, their contributions would increase from five percent to seven percent of salary. *Id.* at 1357-58. One of the options (the "bifurcated option") also allowed members to keep service credits accumulated before July 1, 1984 under the 1979 Act, subject to uncapped COLAs, while COLAs for service accrued after that date would be subject to the three percent COLA. Under that option employee contributions were not required unless salary was in excess of the Social Security maximum. *Id.* at 1358. This option allowed employees to protect all pension benefits earned under the 1979 Act before July 1, 1984. *Id.* at 1363. Assuming without deciding that the 1979 Act created a contract between the state

and the state employees and teachers, *id.* at 1362, the court held that the 1984 act did not impair contractual rights because it did not retroactively deny vested or earned pension rights or change pension benefits that were being paid as of the Act's effective date. *Id.* at 1363. In addition, it found that the 1984 Act did not impair any contractual rights plaintiffs had because under Maryland law the plaintiffs' could not have legitimate expectations of an immutable, alterable pension plan as to future benefits to be earned prorate by future service. *Id.* at 1364 (citations omitted).

The court reviewed the financial problems the systems has undergone in the late 1970s and early 1980s resulting from the unlimited COLA and found that the 1984 Act was a reasonable response to an important public concern and that the Act addressed the perceived cause of the problem with minimal impairment to the teachers or state employees. *Id.* at 1370. The court also found that the changes were necessary and that a more moderate course of action was not clearly evident. *Id.* at 1370, 1371. Finally the court found that 1984 Act did not violate the Fourteenth Amendment because it was justified by a rational legislative purpose. *Id.* at 1372.

2. *Zucker v. United States,* 785 F. 2d 637, 640 (Fed. Cir. 1985), *aff'd* 474 U.S. 842 (1985). The plaintiff retirees who received benefits under the federal

civil service retirement act challenged the constitutionality of statute that modified their COLAs. Congress amended the Civil Service Retirement Act in 1962 to provide for an automatic COLA, and again amended it in 1969 to provide for a "one percent add-on" on top of the COLA. In October 1976, Congress rescinded the one percent add-on and decreased the frequency of the COLA calculation. *Id.* at 638. The court addressed the challenge in terms of two groups: those who retired after the 1976 amendment ("potential retirees"); and those who had retired prior to its adoption. Regarding the potential retirees, the court stated that it was "well settled that they have no protected property interest in any particular level of retirement benefits as they have no legitimate claim of entitlement to benefits which are subject to lawful change." *Id.* at 638 (citations omitted). Addressing the second group, the court found while the retirees may have had a protected property interest payment of an annuity upon retirement, entitlement to post-retirement increases of the annuity stemmed from "the independent source that creates and defines their property interest in same, *i.e.,* the COLA provision of the Civil Service Retirement Act, 5 U.S.C. § 8340." *Id.* at 639. "Until a retiree becomes eligible to receive a particular COLA, his or her right to that adjustment is subject to any lawful changes made to the section from which the claim to entitlement arises." *Id.* Noting that legislation adjusting the benefits and burdens of economic

life have a presumption of constitutionality and the burden is on those complaining of a due process violation to establish that "the legislature has acted in an arbitrary and irrational way," the court found that the potential retirees had not demonstrated the legislation at issue was arbitrary or irrational. *Id.* (quoting *Usery v. Turner Elkhorn Mining. Co.*, 428 U.S. 1, 15 (1976). The court said that until the COLA portion of the retirement benefit was received by way of an increased annuity, it was nothing more than a "government fostered expectation" that retirees would have annuities which would not be "ravaged by inflation." "Such an 'expectation' [did] not rise to the level of 'property' protected by the takings clause." *Id.*

3. *National Association of Retired Federal Employees v. Horner,* 633 F. Supp 511 (D.D.C. 1986). The plaintiffs sought a declaratory judgment that the Balanced Budget and Emergency Deficit Control Act (popularly known as the "Gramm-Rudman-Hollings Act") effected an unconstitutional taking of property without just compensation under the Fifth Amendment of the U.S. Constitution by suspending scheduled COLA increases for retired federal employees receiving annuities under the Civil Service Retirement Act. *Id.* at 512-13. The COLA statute at issue was the same statute at issue in *Zucker*. The court noted that the COLA had been altered many times since first enacted, most recently in 1984 when Congress altered the formula and delayed the payment date to reduce costs because

annual benefit payments and administrative expenses vastly exceed annual employee contributions. Expenses in excess of employee contributions had to be made up out of general revenues. *Id.* at 513. Plaintiffs argued that the plain meaning of the COLA statute established their property right. They conceded that the U.S. Constitution did not establish such a right and that no legislative history indicated anything one way or the other regarding congressional intent to create such a right. *Id.* at 514. The court noted that under federal law, a retirement benefit that had become effective could be cancelled at any time. Because the COLA was not distinct from the underlying annuity, the court found no reason why the Congress could not alter the rate at which it was paid. *Id.* at 514-15 (citing *Stouper v. Jones*, 284 F.2d 240, 242 (D.C. Cir. 1960). Noting the strong presumption against reading a statute to preclude Congress from decreasing or eliminating benefits because of the flexibility required in financial matters, the court quoted the Supreme Court statement regarding the social security program:

> That program was designed to function into the indefinite future, and its specific provisions rest on predictions as to expected economic conditions which must inevitably prove less than wholly accurate, and on judgments and preferences as to the proper allocation of the Nation's resources which evolving economic and social conditions will of necessity in some degree modify.

Id. at 516 (quoting *Flemming v. Nestor,* 363 U.S. 603, 610 (1960)).

4. *National Treasury Employees Union v. Devine,* 591 F. Supp. 1143 (D.D.C. 1984). The plaintiffs challenged three amendments to the COLA for federal civil service retirees: (1) a change in the COLA for the first-year of retirement so retirees received a pro rata share of the first six months' adjustment based upon the month in which they retired, rather than full amount of the twice-yearly adjustment; (2) the elimination of the twice-yearly COLA in favor substituting a single annual adjustment, again calculated as a pro rata share of the yearly increase based upon the month of retirement; and, (3) decreased COLAs for persons who retired before age 62 from fiscal year 1981 through fiscal year 1985. After an extensive discussion of the parties' arguments regarding the COLAs at issue, the court found that the plaintiffs did not have protected property interest in them. *Id.* at 1147. The court also rejected the plaintiffs claim there had been a taking. *Id.* at 1148 (legitimate claim of entitlement to benefit creating due process guarantee does not necessarily rise to level of property protected by takings clause; citing *Kizas v. Webster,* 707 F.2d 524, 539 (D.C. Cir. 1983), *cert. denied* (1984)). Regarding the claim of age based discrimination, the court held that Congress could have logically assumed that persons age sixty two or younger would be able to supplement their benefits through other work; therefore the distinction made at

age sixty-two was rational and necessary to conserve federal retirement funds. *Id.* at 1150.

5. *Howell v. Anne Arundel County*, 14 F. Supp. 2d 752 (D. Md. 1998). The plaintiffs and their union sought injunctive and declaratory relief against the defendants as a result of the county's modifications of its police retirement plan, including, *inter alia*, to the formula used to calculate COLAs. That change prospectively reduced the maximum annual increases by limiting the increase to the lesser of sixty percent of the CPI increase or 2.5 percent. Officers who earned service before and after the effective date would have their COLAs calculated under a bifurcated formula. *Id.* at 753. Those officers were the only ones who had standing to challenge the change. *Id.* at 754.

The court held that because the amendment operated prospectively (to future service) rather than retrospectively, there was no impairment. *Id.* at 755, *see also* 757 (no constitutionally cognizable impairment because there had been no retroactive diminution of benefits or other infringement of vested rights or entitlements). Noting that the plaintiffs' claims rested on an unarticulated premise that there was a constitutional barrier to any prospective modifications to the plan, rather than a state law "reasonableness" requirement, the court held that constitutional protection did not extend that far in Maryland. *Id.* at 756 (citing

Parker v. Wakelin, 123 F.3d 1, 7–8 (1st Cir. 1997) (regarding discussion of various states' approaches to public pension vesting rights and recognizing difference between state law concepts of "vesting" and constitutional concepts of "vested rights" subject to impairment).

B. California

United Firefighters of Los Angeles City v. City of Los Angeles, 259 Cal.Rptr. 65 (CA Ct. App. 1989). The plaintiffs alleged that a city charter amendment which placed three percent cap on police and fire fighter COLAs was unconstitutional as applied to police and fire fighters who were employed before enactment of charter amendment in June 1982. From 1971 until the 1982 amendment, COLAs had fully reflected changes in the CPI. *Id.* at 66. The court affirmed the trials court's finding that the change unconstitutionally impaired the vested contract rights of police and firefighters hired prior to amendment of the charter. The court noted that under California law, pension laws were to be liberally construed to protect pensioners and their dependents from economic insecurity and that pension rights were protected by the federal and state constitutional contract clauses. *Id.* (citations omitted). On accepting public employment, employees acquired a vested right to a pension based on the system in effect at that time, subject to reasonable modifications that bore a material relation to the theory of a pension system and its

successful operation; changes that were disadvantageous to employees should be accompanied by comparable new advantages. *Id.* (quoting *Miller v. State of California*, 557 P.2d 970 (CA 1977). The court found that the COLA cap was a disadvantage and did not confer any new advantage on the employees. *Id.* at 67. The court discussed the evidence presented below which indicated that the fund had not been managed or funded on an actuarially sound basis and realistic assumptions had not been made regarding CPI increases, supporting the trial court's conclusion that the uncapped COLA was not the cause of the problem. *Id.* at 73-74. The court determined that the charter amendment did not effectuate the theory of a pension system by affording retirees a degree of economic security or enhance the funds' integrity or soundness because it did not require maintenance of the same or similar level of funding. *Id.* at 74.

C. Colorado

1. *Police Pension & Relief Board v. McPhail*, 338 P.2d 694 (CO 1959). *McPhail* addressed the effect of the April 1, 1956 repeal of a provision in the charter for the City and County of Denver that had granted retired members of the police pension plan an increase in their pensions equal to one-half of any pay raises granted to police officers who held the same rank that a retiree held at the time of retirement (an "escalator clause"). *Id.* at 695-96. The plaintiffs represented a class

consisting of all retired members of the police department who had served 25 or more years, satisfied the other requirements of the pension system prior to April 1, 1956, and retired before the repeal took effect. *Id.* at 695, 697. The pension plan required contributions from members. *Id.* at 697. Plaintiffs argued that the escalator clause induced them to retire by promising they would be protected against inflation, that they changed their positions relying on continuation of the clause, and grave injustice would result if the repeal was effective as to them. They also argued that the repeal violated the Colorado constitutional clause protecting vested contract rights from impairment. *Id.* Defendants argued that estoppel was inapplicable under the gratuity concept of pensions previously recognized in Colorado and that consequently the escalator clause was subject to legislative change.

The court concluded that because the pension required member contributions, it could not be described as a gift. Instead, it found that the plaintiffs were employed under a written contract, the terms of which were set forth in the charter and ordinance of the City and County of Denver and which specifically provided that plaintiffs would receive a pension that would be subject to increase or decrease based upon the salary of the rank they occupied at retirement if they fulfilled all conditions. It also concluded that the contacts clause of the Colorado

Constitution applied and prevented enforcement of the escalator clause repeal as to the plaintiffs. The court found that language used by the Pennsylvania Supreme Court was applicable to the conditions present in *McPhail*:

> Until an employee had earned his retirement pay, or until the time arrives when he may retire, retirement pay is but an inchoate right; but when the conditions are satisfied, at that time retirement pay becomes a vested right of which the person entitled thereto cannot be deprived; it has ripened into a full contractual obligation.

Id. at 700 (quoting *Ret. Bd. of Allegheny County v. McGovern*, 174 A. 400, 404-05 (PA 1934)).

2. *Police Pension & Relief Board. v. Bills*, 366 P.2d 581 (CO 1961). *Bills* addressed the same repealed escalator clause at issue in *McPhail*. *Id.* at 582. The *Bills* plaintiffs were police officers who retired after April 1, 1956 and prior to the July 1, 1958 effective date of another charter amendment that provided, *inter alia*, a raise for police department members. They consisted of: (1) members eligible to retire April 1, 1956 but who had not actually retired; (2) members who were not eligible to retire as of April 1, 1956 but who completed more than 24, but less than 25, years of active service; and (3) members deemed to have completed 25 years of service because of a provision in the 1956 charter amendment allowing inclusion of military service in computing their service in the police department. *Id.* at 584. Applying its holding in *McPhail*, the court held that the plaintiffs in the

first group, those eligible to retire prior to April 1, 1956 but who had not retired, were not subject to the repeal of the escalator clause. *Id.* 584. Regarding the second and third groups, the court held that prior to both actual retirement as well as to eligibility to retire, the plaintiffs had a limited vesting of pension rights such that prior to eligibility to retire the pension plan could be changed but not abolished nor could there be a substantial adverse change without a corresponding beneficial change. *Id.* at 584. Prior to eligibility for retirement, changes could be made if they strengthen or bettered the plan or if they are actuarially necessary. *Id.* In the case of the second and third group of the *Bills* plaintiffs, the court found that the repeal was an adverse change that deprived plaintiffs of a substantial right and that it was not accompanied by a corresponding change of a beneficial nature, shown to be actuarially necessary, or shown that it strengthened or bettered the plan. *Id.* at 585-85.

D. Florida

Scott v. Williams, 107 So.3d 379 (Fla. 2013). Prior to its amendment effective July 1, 2011, the Florida Retirement System ("FRS") was funded by employer contributions; most employee members did not make contributions. In addition, every year retirees received a COLA equal to three percent of the total monthly benefit. The plaintiffs (appellees on appeal) had filed suit challenging the

legislature's amendments requiring all employees to contribute three percent of their salaries and eliminating COLAs for any service credit earned after July 1, 2011. *Id.* at 382. The COLA remained effective for those who retired prior to July 1, 2011. *Id.,* fn 3. The court found that the amendments did not violate the "preservation of rights" statutory section which provided that members' rights in the system were enforceable as contract rights, because the section was not intended to bind future legislatures from prospectively altering benefits for future service performed by all members of the FRS. *Id.* at 389. It also found that the amendments requiring a three percent employee contribution beginning July 1, 2011 and the elimination of the COLA for service performed after that date were prospective changes within the legislature's authority. *Id.* It held that the "preservation of rights" statute did not create binding contract rights for existing employees to future retirement benefits based upon the pension plan in place prior to July 1, 2011. *Id.* The court found that the legislature's actions had not impaired any statutorily created contract rights there had not been unconstitutional taking under the state constitution. Finally, the court found that the amendment did not remove the subject of retirement benefits from collective bargaining in violation of the state constitution. *Id.* at 390.

In discussing the "preservation of rights" section, the court stated it was not intended to bind future legislatures from prospectively altering benefits which accrue for future state service. The court noted holding otherwise would mean a legislature could not alter the benefits employees earned for future services, except in a manner that favored the employee. "*This view would, in effect, impose on the state the permanent responsibility for maintaining a retirement plan which could never be amended or repealed irrespective of the fiscal condition of this state*" and could lead to fiscal irresponsibility. *Id.* at 388 (emphasis in original).

E. Minnesota

Swanson v. State, No. 62-CV-10-05285 (Minn. Dist. Ct. June 29, 2011).[8] The issue before the court was whether the legislature had the authority to amend the statutory formula used to calculate the availability and amount of future adjustments to retirees' pensions. *Id.* at 2. The changes were among amendments made to contribution rates, vesting periods, annuity formulas, interest rates to all three of Minnesota's public retirement plans, though the changes varied based on each plan's economic and demographic circumstances. *Id.* at 12. The legislature enacted the changes after its actuary determined that there had been significant declines in the each of the plans' funding ratios and it was not likely that future

[8] So far as can be determined, the Minnesota district court's decision was not appealed.

investment returns would be sufficient to overcome the deficit. *Id.* at 11. The plans also had concluded that relying on investment returns risked possible further deterioration of their funded status, in turn raising the cost of possible future solutions. *Id.*

The court granted the state's motion for summary judgment in its entirety, concluding that the plaintiffs had not met their burden to show unconstitutionality beyond a reasonable doubt. It found that the relevant statutory language did not encompass a legislative contract or promise to refrain from amending the statutory formula governing post-retirement increases for employees who had retired. The court said holding that statutes were contracts absent plain and unambiguous terms showing an intent to contract risked a serious intrusion into the legislature's policy making authority. The court also stated that the balance between the interests of all plan members and the risks posed by unprecedented financial deterioration in the plans' assets fully preserved the retirees' annuities, provided for annual adjustments to them, and stabilized the financial deterioration that threatened the plans. *Id.* at 3-4, 18 (rejecting claimed contract right is consistent with legislative intent to amend, revise, and if necessary repeal, pension statutes when consistent with maintaining those plans for benefit of all members). Holding that the challenged amendments were neither an impairment nor taking of constitutional proportions,

the Court said that the amendments were a minimal alteration in the calculation of future adjustments to retirees' annuities and a reasonable response to a fiscal threat jeopardizing the long term interests of plan members. It noted the legislature prudently spread the burden of the fiscal crisis through contribution increases, changes in eligibility requirements, and formulas for annuities and future adjustments. *Id.* at 4, 22 ("technical" or minimal contract alteration is not a constitutional violation). The court also that the plaintiffs' claims rested on a fundamental disagreement with the legislature's policy choices but the legislature was charged with setting state retirement policy and the court's intrusion would threaten the balance of powers between the legislative and judicial branches by second-guessing this legislative wisdom. *Id.*

F. Nebraska

Calabro v. City of Omaha, 531 N.W.2d. 541 (NE 2007). The city amended an ordinance providing for COLA supplemental benefit to eliminate payments from the plan to employees who retired after the June 21, 1989 effective date of the amendment. *Id.* at 546-47. As support for the elimination, the city argued that it faced potential bankruptcy if the COLA remained in place. *Id.* at 552. The plaintiffs, active and retired firefighters, brought a class action alleging that the COLA elimination violated the contracts clause of United States Constitution. The

court held that the COLA was a pension rather than a gratuity, even though it did satisfy the city charter's actuarial financing requirements because the COLA ordinances tied eligibility to receive it to eligibility to receive regular pension payments and nothing in the charter or ordinances put the plaintiffs on notice that it was a gratuity. *Id.* 548-49. Based primarily on policy grounds recognizing the pension plan, including the COLA, might draw employees into government service, the court also held that public employees' constitutionally protected right in their pensions vested upon acceptance and commencement of employment, subject to reasonable or equitable unilateral changes by the Legislature. *Id.* at 551. Employees who accepted employment after June 21, 1989, however, would not have any such expectation and would not be entitled to the COLA. *Id.* Holding that city did not act in a legitimate, permissible manner, the court found that elimination of the plaintiffs' COLA was not reasonable and necessary to serve an important public interest. *Id.* at 551 (citations and quotations omitted). The court stated that while the financial reports recommended the City evaluate options for fund and use actuarial sound methods to quantify the plan's present and future obligations, they did not mention discontinuing it, leaving the court unconvinced that terminating the plan was the only viable alternative. *Id.* 553. The court also

stated that record was devoid of any evidence that conferred any benefit on the plaintiffs and the class in exchange for eliminating the COLA. *Id.*

G. Rhode Island

Arena v. City of Providence, 919 A.2d 379 (R.I. 2007). Retired firefighters and police officers brought an action challenging the application of COLA calculations contained in ordinances adopted in 1995 and 1996 to police and fire department employees who retired before the effective dates of those ordinances, resulting in a substantial reductions from the five percent compounded COLA the plaintiffs had been receiving under a 1991 ordinance. *Id.* at 382-84. The parties subsequently agreed that the 1991 ordinance governed the COLA benefits at the time of the plaintiffs' retirement, however, the plaintiffs characterized the COLA as a vested benefit that could not be reduced after retirement, while the city believed it was a gratuitous benefit subject to reduction under the 1995 and 1996 ordinances.

The court held that the plaintiffs had a vested interest in the COLA under the 1991 ordinance. *Id.* at 392. In contrast to the 1995 and 1996 ordinances which including provisions describing COLAs as voluntary gratuities that could be reduced or suspended upon specified findings by the city council, under the 1991 ordinance the COLAs could not be reduced. The earlier ordinance provided that

COLAs were to be determined in accordance with the provisions of the ordinance in effect on the last day of a member's employment and it did not contain language stating that the COLA was a gratuity. *Id.* at 393-94. The court noted that the pension plan could be changed prospectively by ordinance for police and firefighters who had not retired. *Id.* at 393. Because of plaintiffs waited until 2001 to file their action, the court applied the doctrine of latches to hold that the plaintiffs would receive COLA consistent with the 1991 ordinance from the date of filing of the action only, without interest. *Id.* at 396.

H. South Dakota

Tice v. State, Civ. No. 10-225 (S.D. Cir. Ct., Apr. 11, 2012) Memorandum Decision.[9] The plaintiff challenged a reduction in the COLA (the "improvement factor") for current and future retirees as a violation of the state and federal contracts clauses and the federal takings clause. Prior to its amendment effective July 1, 2010, the COLA had been tied to the percentage change in the CPI and had been set at was 3.1 percent in 1993. *Id.* at 6. The court found there was no written contract between plaintiff and state that set forth the terms, responsibilities or respective contract rights between the parties and not indication that the legislature intended to create one. *Id.* at 11. In addition, the South Dakota constitution did not

[9] The circuit court's decision does not appear to have been appealed.

have a provision that would have created a constitutional entitlement to any particular COLA. *Id.* The court also found that there because the plaintiff could not establish a contract or property right to the COLA, there was no taking under the federal or state constitutions. *Id.* at 16-17. The state was granted summary judgment on all claims. *Id.* at 18.

EXHIBIT 2
to
RESPONDENTS' SUPPLEMENTAL BRIEF

U.S. Department Of Labor
Bureau of Labor Statistics
Washington, D.C. 20212
Consumer Price Index
All Urban Consumers - (CPI-U)
U.S. city average
All items

U.S. Department Of Labor
Bureau of Labor Statistics
Washington, D.C. 20212

Consumer Price Index

All Urban Consumers - (CPI-U)

U.S. city average

All items

1982-84=100

Year	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sep.	Oct.	Nov.	Dec.	Annual Avg.	Percent change Dec-Dec	Avg-Avg
1913	9.8	9.8	9.8	9.8	9.7	9.8	9.9	9.9	10.0	10.0	10.1	10.0	9.9		
1914	10.0	9.9	9.9	9.8	9.9	9.9	10.0	10.2	10.2	10.1	10.2	10.1	10.0	1.0	1.0
1915	10.1	10.0	9.9	10.0	10.1	10.1	10.1	10.1	10.1	10.2	10.3	10.3	10.1	2.0	1.0
1916	10.4	10.4	10.5	10.6	10.7	10.8	10.8	10.9	11.1	11.3	11.5	11.6	10.9	12.6	7.9
1917	11.7	12.0	12.0	12.6	12.8	13.0	12.8	13.0	13.3	13.5	13.5	13.7	12.8	18.1	17.4
1918	14.0	14.1	14.0	14.2	14.5	14.7	15.1	15.4	15.7	16.0	16.3	16.5	15.1	20.4	18.0
1919	16.5	16.2	16.4	16.7	16.9	16.9	17.4	17.7	17.8	18.1	18.5	18.9	17.3	14.5	14.6
1920	19.3	19.5	19.7	20.3	20.6	20.9	20.8	20.3	20.0	19.9	19.8	19.4	20.0	2.6	15.6
1921	19.0	18.4	18.3	18.1	17.7	17.6	17.7	17.7	17.5	17.5	17.4	17.3	17.9	-10.8	-10.5
1922	16.9	16.9	16.7	16.7	16.7	16.7	16.8	16.6	16.6	16.7	16.8	16.9	16.8	-2.3	-6.1
1923	16.8	16.8	16.8	16.9	16.9	17.0	17.2	17.1	17.2	17.3	17.3	17.3	17.1	2.4	1.8
1924	17.3	17.2	17.1	17.0	17.0	17.0	17.1	17.0	17.1	17.2	17.2	17.3	17.1	0.0	0.0
1925	17.3	17.2	17.3	17.2	17.3	17.5	17.7	17.7	17.7	17.7	18.0	17.9	17.5	3.5	2.3
1926	17.9	17.9	17.8	17.9	17.8	17.7	17.5	17.4	17.5	17.6	17.7	17.7	17.7	-1.1	1.1
1927	17.5	17.4	17.3	17.3	17.4	17.6	17.3	17.2	17.3	17.4	17.3	17.3	17.4	-2.3	-1.7
1928	17.3	17.1	17.1	17.1	17.2	17.1	17.1	17.1	17.3	17.2	17.2	17.1	17.1	-1.2	-1.7
1929	17.1	17.1	17.0	16.9	17.0	17.1	17.3	17.3	17.3	17.3	17.3	17.2	17.1	0.6	0.0
1930	17.1	17.0	16.9	17.0	16.9	16.8	16.6	16.5	16.6	16.5	16.4	16.1	16.7	-6.4	-2.3
1931	15.9	15.7	15.6	15.5	15.3	15.1	15.1	15.1	15.0	14.9	14.7	14.6	15.2	-9.3	-9.0
1932	14.3	14.1	14.0	13.9	13.7	13.6	13.6	13.5	13.4	13.3	13.2	13.1	13.7	-10.3	-9.9
1933	12.9	12.7	12.6	12.6	12.6	12.7	13.1	13.2	13.2	13.2	13.2	13.2	13.0	0.8	-5.1
1934	13.2	13.3	13.3	13.3	13.3	13.4	13.4	13.4	13.6	13.5	13.5	13.4	13.4	1.5	3.1

1935	13.6	13.7	13.7	13.8	13.8	13.7	13.7	13.7	13.7	13.7	13.8	13.8	13.7	3.0	2.2
1936	13.8	13.8	13.7	13.7	13.7	13.8	13.9	14.0	14.0	14.0	14.0	14.0	13.9	1.4	1.5
1937	14.1	14.1	14.2	14.3	14.4	14.4	14.5	14.5	14.6	14.6	14.5	14.4	14.4	2.9	3.6
1938	14.2	14.1	14.1	14.2	14.1	14.1	14.1	14.1	14.1	14.0	14.0	14.0	14.1	-2.8	-2.1
1939	14.0	13.9	13.9	13.8	13.8	13.8	13.8	13.8	14.1	14.0	14.0	14.0	13.9	0.0	-1.4
1940	13.9	14.0	14.0	14.0	14.0	14.1	14.0	14.0	14.0	14.0	14.0	14.1	14.0	0.7	0.7
1941	14.1	14.1	14.2	14.3	14.4	14.7	14.7	14.9	15.1	15.3	15.4	15.5	14.7	9.9	5.0
1942	15.7	15.8	16.0	16.1	16.3	16.3	16.4	16.5	16.5	16.7	16.8	16.9	16.3	9.0	10.9
1943	16.9	16.9	17.2	17.4	17.5	17.5	17.4	17.3	17.4	17.4	17.4	17.4	17.3	3.0	6.1
1944	17.4	17.4	17.4	17.5	17.5	17.6	17.7	17.7	17.7	17.7	17.7	17.8	17.6	2.3	1.7
1945	17.8	17.8	17.8	17.8	17.9	18.1	18.1	18.1	18.1	18.1	18.1	18.2	18.0	2.2	2.3
1946	18.2	18.1	18.3	18.4	18.5	18.7	19.8	20.2	20.4	20.8	21.3	21.5	19.5	18.1	8.3
1947	21.5	21.5	21.9	21.9	21.9	22.0	22.2	22.5	23.0	23.0	23.1	23.4	22.3	8.8	14.4
1948	23.7	23.5	23.4	23.8	23.9	24.1	24.4	24.5	24.5	24.4	24.2	24.1	24.1	3.0	8.1
1949	24.0	23.8	23.8	23.9	23.8	23.9	23.7	23.8	23.9	23.7	23.8	23.6	23.8	-2.1	-1.2
1950	23.5	23.5	23.6	23.6	23.7	23.8	24.1	24.3	24.4	24.6	24.7	25.0	24.1	5.9	1.3
1951	25.4	25.7	25.8	25.8	25.9	25.9	25.9	25.9	26.1	26.2	26.4	26.5	26.0	6.0	7.9
1952	26.5	26.3	26.3	26.4	26.4	26.5	26.7	26.7	26.7	26.7	26.7	26.7	26.5	0.8	1.9
1953	26.6	26.5	26.6	26.6	26.7	26.8	26.8	26.9	26.9	27.0	26.9	26.9	26.7	0.7	0.8
1954	26.9	26.9	26.9	26.8	26.9	26.9	26.9	26.9	26.8	26.8	26.8	26.7	26.9	-0.7	0.7
1955	26.7	26.7	26.7	26.7	26.7	26.7	26.8	26.8	26.9	26.9	26.9	26.8	26.8	0.4	-0.4
1956	26.8	26.8	26.8	26.9	27.0	27.2	27.4	27.3	27.4	27.5	27.5	27.6	27.2	3.0	1.5
1957	27.6	27.7	27.8	27.9	28.0	28.1	28.3	28.3	28.3	28.3	28.4	28.4	28.1	2.9	3.3
1958	28.6	28.6	28.8	28.9	28.9	28.9	29.0	28.9	28.9	28.9	29.0	28.9	28.9	1.8	2.8
1959	29.0	28.9	28.9	29.0	29.0	29.1	29.2	29.2	29.3	29.4	29.4	29.4	29.1	1.7	0.7
1960	29.3	29.4	29.4	29.5	29.5	29.6	29.6	29.6	29.6	29.8	29.8	29.8	29.6	1.4	1.7
1961	29.8	29.8	29.8	29.8	29.8	29.8	30.0	29.9	30.0	30.0	30.0	30.0	29.9	0.7	1.0
1962	30.0	30.1	30.1	30.2	30.2	30.2	30.3	30.3	30.4	30.4	30.4	30.4	30.2	1.3	1.0
1963	30.4	30.4	30.5	30.5	30.5	30.6	30.7	30.7	30.7	30.8	30.8	30.9	30.6	1.6	1.3
1964	30.9	30.9	30.9	30.9	30.9	31.0	31.1	31.0	31.1	31.1	31.2	31.2	31.0	1.0	1.3
1965	31.2	31.2	31.3	31.4	31.4	31.6	31.6	31.6	31.6	31.7	31.7	31.8	31.5	1.9	1.6
1966	31.8	32.0	32.1	32.3	32.3	32.4	32.5	32.7	32.7	32.9	32.9	32.9	32.4	3.5	2.9
1967	32.9	32.9	33.0	33.1	33.2	33.3	33.4	33.5	33.6	33.7	33.8	33.9	33.4	3.0	3.1
1968	34.1	34.2	34.3	34.4	34.5	34.7	34.9	35.0	35.1	35.3	35.4	35.5	34.8	4.7	4.2
1969	35.6	35.8	36.1	36.3	36.4	36.6	36.8	37.0	37.1	37.3	37.5	37.7	36.7	6.2	5.5
1970	37.8	38.0	38.2	38.5	38.6	38.8	39.0	39.0	39.2	39.4	39.6	39.8	38.8	5.6	5.7

1971	39.8	39.9	40.0	40.1	40.3	40.6	40.7	40.8	40.8	40.9	40.9	41.1	40.5	3.3	4.4
1972	41.1	41.3	41.4	41.5	41.6	41.7	41.9	42.0	42.1	42.3	42.4	42.5	41.8	3.4	3.2
1973	42.6	42.9	43.3	43.6	43.9	44.2	44.3	45.1	45.2	45.6	45.9	46.2	44.4	8.7	6.2
1974	46.6	47.2	47.8	48.0	48.6	49.0	49.4	50.0	50.6	51.1	51.5	51.9	49.3	12.3	11.0
1975	52.1	52.5	52.7	52.9	53.2	53.6	54.2	54.3	54.6	54.9	55.3	55.5	53.8	6.9	9.1
1976	55.6	55.8	55.9	56.1	56.5	56.8	57.1	57.4	57.6	57.9	58.0	58.2	56.9	4.9	5.8
1977	58.5	59.1	59.5	60.0	60.3	60.7	61.0	61.2	61.4	61.6	61.9	62.1	60.6	6.7	6.5
1978	62.5	62.9	63.4	63.9	64.5	65.2	65.7	66.0	66.5	67.1	67.4	67.7	65.2	9.0	7.6
1979	68.3	69.1	69.8	70.6	71.5	72.3	73.1	73.8	74.6	75.2	75.9	76.7	72.6	13.3	11.3
1980	77.8	78.9	80.1	81.0	81.8	82.7	82.7	83.3	84.0	84.8	85.5	86.3	82.4	12.5	13.5
1981	87.0	87.9	88.5	89.1	89.8	90.6	91.6	92.3	93.2	93.4	93.7	94.0	90.9	8.9	10.3
1982	94.3	94.6	94.5	94.9	95.8	97.0	97.5	97.7	97.9	98.2	98.0	97.6	96.5	3.8	6.2
1983	97.8	97.9	97.9	98.6	99.2	99.5	99.9	100.2	100.7	101.0	101.2	101.3	99.6	3.8	3.2
1984	101.9	102.4	102.6	103.1	103.4	103.7	104.1	104.5	105.0	105.3	105.3	105.3	103.9	3.9	4.3
1985	105.5	106.0	106.4	106.9	107.3	107.6	107.8	108.0	108.3	108.7	109.0	109.3	107.6	3.8	3.6
1986	109.6	109.3	108.8	108.6	108.9	109.5	109.5	109.7	110.2	110.3	110.4	110.5	109.6	1.1	1.9
1987	111.2	111.6	112.1	112.7	113.1	113.5	113.8	114.4	115.0	115.3	115.4	115.4	113.6	4.4	3.6
1988	115.7	116.0	116.5	117.1	117.5	118.0	118.5	119.0	119.8	120.2	120.3	120.5	118.3	4.4	4.1
1989	121.1	121.6	122.3	123.1	123.8	124.1	124.4	124.6	125.0	125.6	125.9	126.1	124.0	4.6	4.8
1990	127.4	128.0	128.7	128.9	129.2	129.9	130.4	131.6	132.7	133.5	133.8	133.8	130.7	6.1	5.4
1991	134.6	134.8	135.0	135.2	135.6	136.0	136.2	136.6	137.2	137.4	137.8	137.9	136.2	3.1	4.2
1992	138.1	138.6	139.3	139.5	139.7	140.2	140.5	140.9	141.3	141.8	142.0	141.9	140.3	2.9	3.0
1993	142.6	143.1	143.6	144.0	144.2	144.4	144.4	144.8	145.1	145.7	145.8	145.8	144.5	2.7	3.0
1994	146.2	146.7	147.2	147.4	147.5	148.0	148.4	149.0	149.4	149.5	149.7	149.7	148.2	2.7	2.6
1995	150.3	150.9	151.4	151.9	152.2	152.5	152.5	152.9	153.2	153.7	153.6	153.5	152.4	2.5	2.8
1996	154.4	154.9	155.7	156.3	156.6	156.7	157.0	157.3	157.8	158.3	158.6	158.6	156.9	3.3	3.0
1997	159.1	159.6	160.0	160.2	160.1	160.3	160.5	160.8	161.2	161.6	161.5	161.3	160.5	1.7	2.3
1998	161.6	161.9	162.2	162.5	162.8	163.0	163.2	163.4	163.6	164.0	164.0	163.9	163.0	1.6	1.6
1999	164.3	164.5	165.0	166.2	166.2	166.2	166.7	167.1	167.9	168.2	168.3	168.3	166.6	2.7	2.2
2000	168.8	169.8	171.2	171.3	171.5	172.4	172.8	172.8	173.7	174.0	174.1	174.0	172.2	3.4	3.4
2001	175.1	175.8	176.2	176.9	177.7	178.0	177.5	177.5	178.3	177.7	177.4	176.7	177.1	1.6	2.8
2002	177.1	177.8	178.8	179.8	179.8	179.9	180.1	180.7	181.0	181.3	181.3	180.9	179.9	2.4	1.6
2003	181.7	183.1	184.2	183.8	183.5	183.7	183.9	184.6	185.2	185.0	184.5	184.3	184.0	1.9	2.3
2004	185.2	186.2	187.4	188.0	189.1	189.7	189.4	189.5	189.9	190.9	191.0	190.3	188.9	3.3	2.7
2005	190.7	191.8	193.3	194.6	194.4	194.5	195.4	196.4	198.8	199.2	197.6	196.8	195.3	3.4	3.4
2006	198.3	198.7	199.8	201.5	202.5	202.9	203.5	203.9	202.9	201.8	201.5	201.8	201.6	2.5	3.2
2007	202.416	203.499	205.352	206.686	207.949	208.352	208.299	207.917	208.490	208.936	210.177	210.036	207.342	4.1	2.8

2008	211.080	211.693	213.528	214.823	216.632	218.815	219.964	219.086	218.783	216.573	212.425	210.228	215.303	0.1	3.8
2009	211.143	212.193	212.709	213.240	213.856	215.693	215.351	215.834	215.969	216.177	216.330	215.949	214.537	2.7	-0.4
2010	216.687	216.741	217.631	218.009	218.178	217.965	218.011	218.312	218.439	218.711	218.803	219.179	218.056	1.5	1.6
2011	220.223	221.309	223.467	224.906	225.964	225.722	225.922	226.545	226.889	226.421	226.230	225.672	224.939	3.0	3.2
2012	226.665	227.663	229.392	230.085	229.815	229.478	229.104	230.379	231.407	231.317	230.221	229.601	229.594	1.7	2.1
2013	230.280	232.166	232.773	232.531	232.945	233.504	233.596	233.877							

ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt