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STATE OF MICHIGAN
IN THE SUPREME COURT

CONSOLIDATED CASES

AFT MICHIGAN, AFT, AFL-CIO v State of Michigan **Supreme Court No.: 154117**
Court of Appeals No.: 303702
Court of Claims No.: 10-91-MM

MARK H. COUSENS (P12273)
Attorney for Plaintiffs-Appellees
26261 Evergreen Road, Ste. 110
Southfield, Michigan 48076
(248) 355-2150

GARY P. GORDON (P26290)
STEVEN C. LIEDEL (P58852)
W. ALAN WILK (P54059)
JASON T. HANSELMAN (P61813)
DOUGLAS E. MAINS (P75351)
DYKEMA GOSSET PLLC
Special Asst Attorneys General
for the Defendant-Appellant in all matters
201 Townsend Street, Suite 900
Lansing, Michigan 48933
(517) 373-1162

Timothy L. Johnson, et al. v
Public School Employees Retirement System et al. Court of Appeals No.: 303704
Court of Claims No.: 10-47 MM

ROBERT D. FETTER (P68816)
BRUCE MILLER (P17746)
MILLER COHEN, P.L.C.
Attorneys for Plaintiffs-Appellees
600 W. Lafayette Blvd., 4th Floor
Detroit, Michigan 48226
(313) 964-4454

Deborah McMillan, et al. v
Public School Employees Retirement System et al. Court of Appeals No.: 303706
Court of Claims No.: 10-45-MM

JAMES A. WHITE (P22252)
KATHLEEN CORKIN BOYLE (27671)
TIMOTHY J. DLUGOS (P57179)
White, Schneider, Young & Chiodini, P. C.
Attorneys for Plaintiffs-Appellees/
Cross Appellants
2300 Jolly Oak Road
Okemos, Michigan 48864
(517) 349-7744

MICHAEL M SHOUDY (P58870)
Co-Counsel for Plaintiffs-Appellees/
Cross Appellants
1216 Kendale Boulevard
P. O. Box 2573
East Lansing, Michigan 48826-2573
(517) 337-6551

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

ORAL ARGUMENT REQUESTED

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

PLAINTIFFS'-APPELLEES' BRIEF IN NO. 154117

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MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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Health Care Ass'n Workers Comp Fund v Dir of Bureau of Worker's Comp, 265 Mich App 236; 694 NW2d 761 (2005) 32

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MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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COUNTER STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the Court of Appeals per MCR 7.303 (B)(1) and Article VI § 4 of the Constitution of the State of Michigan of 1963.

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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COUNTER STATEMENT OF QUESTIONS INVOLVED

1. Does 2010 PA 75 violate the substantive due process provisions of the Fourteenth Amendment to the Constitution of the United States by involuntarily extracting three percent of the wages of then public school employees to pay for the post employment retiree health care of then current retirees?

   The Court of Appeals held yes.

   Plaintiffs say yes.

   Defendants say no.

2. Does 2010 PA 75 unconstitutionally impair the personal service contracts of the public school employees by involuntarily reducing their earned wages by three percent?

   The Court of Appeals held yes

   Plaintiffs say yes.

   Defendant says no.

3. Has this matter been rendered moot by the adoption of 2012 PA 300?

   The Court of Appeals unanimously held no.

   Plaintiffs say no.

   Defendant says yes.

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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Introduction

1.

The decision of the Court of Appeals should be affirmed because it properly concludes that 2010 PA 75 violated the fundamental rights of more than 200,000 then current public school employees who were involuntarily required to surrender 3% of their earned compensation to pay for post employment retiree health care benefits for then current retired employees although those paying were guaranteed nothing. After considerable litigation challenging PA 75, [see *AFT Mich v State*, 297 Mich App 597, 603; 825 NW2d 595 (2012) ("*AFT I*")] the Legislature recognized that PA 75 was indefensible and replaced the provisions which the Legislature must have understood violated the Constitution of the State of Michigan and that of the United States. The fix came about in 2012 PA 300, effective September 4, 2012. As noted by this Court in *AFT Mich v State*, 497 Mich 197, 220; 866 NW2d 782 (2015) ("*AFT II*"), PA 300 changed the extraction for retiree health care from involuntary to voluntary and created a system for refund of contributions made pursuant to PA 300 in the event that a public school employee failed, for any reason, to actually receive post employment retiree health care benefits themselves. MCL 38.1391(a)(8). (Plaintiffs argued unsuccessfully to this Court that the refund mechanism was itself improper). However, PA 300 did not resolve the status of involuntary extractions made during the short and unhappy life of PA 75.

2.

PA 300 required public school employees to make a decision to participate in or refuse to participate in post employment retiree health care. The decision window opened September 4, 2012 and closed January 9, 2013. MCL 38.1391(a)(5). A person could

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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consent to the extraction of 3% of their earned compensation to pay for post employment retiree health care of current retirees. If so, they were given a statutory promise that they would be eligible for post employment retiree health care themselves or would receive a refund of their contributions. In the alternative, the employee could reject the extraction and permanently waive their right to post employment retiree health care. MCL 38.1391(a)(5). Many public school employees did agree to the extraction. But some did not. And others did not have the opportunity as they died, retired or left public school employment before January 9, 2013.

PA 300 was not retroactive. Nothing in the statute suggests that it applies to events occurring prior to its effective date. Therefore, the consent to participate was prospective; the consent did not apply to the involuntary PA 75 extractions. Further, because PA 300 itself was not retroactive, the refund mechanism contained in section 91(a)(8) does not apply to the PA 75 involuntary extractions. Therefore, no public school employee ever consented to the PA 75 extractions.

3.

The adoption of PA 300 left outstanding the status of extractions from employees between July 1, 2010 and as late as January 9, 2013 as those extractions were always involuntary. The Legislature left unanswered the question which this Court now faces; the involuntary taking of 3% of pay from one class of individuals for the sole benefit of another class of individuals with no concomitant benefit provided to those paying. This Court should recognize the fundamental impropriety which PA 75 visited on a discrete group of employees of school districts everywhere in the State.

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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4.

PA 75 was a mistake. The Legislature acknowledged that by adopting PA 300. But the Legislature left to this Court the task of protecting the more than 200,000 public school employees whose pay was reduced under circumstances unique in the history of the State. The statute was wrong from a policy perspective. But it is also wrong from a Constitutional perspective. This Court should conclude that the Court of Appeals was right to reject PA 75. The decision should be affirmed.

Facts and Proceedings Below

A. *AFT I*

Shortly after passage of PA 75, AFT Michigan, the Michigan Education Association and Council 25 of the American Federation of State, County and Municipal Employees separately brought suit in the Michigan Court of Claims challenging the validity of the Act. That Court issued a decision in April, 2011 finding the statute to be unconstitutional. The Defendant appealed to the Court of Appeals. That Court issued a decision in August, 2012.

The Court of Appeals affirmed the Court of Claims. *AFT Mich v State*, 297 Mich App 597, 603; 825 NW2d 595 (2012). The Court concluded that PA 75 impaired public school employees' contracts with their employers; that it amounted to an uncompensated taking in violation of the Fifth Amendment to the U.S. Constitution and Article 10§ 2 of the Michigan Constitution; that the legislation was so unreasonable that it violated the Due Process clause of the Fourteenth Amendment to the U.S. Constitution and Article 1§ 17 of the Michigan Constitution. The Defendant submitted an application for leave to appeal to this Court. That application was held in abeyance while this Court considered a challenge to 2012 PA 300.

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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B. *AFT II*

1.

2012 House Bill 1040 was introduced in the Legislature while the Court of Appeals considered the Plaintiffs' challenges to PA 75. As conceded by the Defendant, the proposal was clearly addressed at the defects which the Court of Claims found in PA 75. The Bill was adopted and became 2012 PA 300 effective September 4, 2012.

AFT Michigan Plaintiffs mounted a challenge to 2012 PA 300 in the Court of Claims asserting that the substantial modifications to the Retirement Act (a) breached an express promise made to public school employees regarding the terms of their retirement; (b) continued the arbitrary extraction of the 3% and (c) provided a refund on terms so unreasonable as to be an unconstitutional taking of the value of the interest earned on the deposits.

AFT Michigan also asserted that the decision period originally provided by the statute was so unreasonably short as to violate the substantive due process rights of all public school employees. The Court of Claims agreed and enjoined the State of Michigan from enforcing the time limit. The State of Michigan did not appeal from that decision of the Court of Claims. Instead, the Legislature amended the statute and extended the decision period to January 9, 2013. 2012 PA 359.

The Court of Claims rejected Plaintiffs' other arguments. Plaintiffs appealed to the Court of Appeals which affirmed the Court of Claims. *AFT Michigan v Michigan*, 303 Mich App 651, 846 NW2d 583 (2014), aff'd sub nom. *AFT Michigan v State of Michigan*, 497 Mich 197, 866 NW2d 782 (2015). Plaintiffs then appealed to this Court which granted leave to appeal.

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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2.

On review, this Court rejected Plaintiffs' arguments regarding 2012 PA 300. *AFT Mich v State*, 497 Mich 197, 866 NW2d 782 (2015) (*AFT II*). First, the Court rejected Plaintiffs' contention that the change in retirement terms breached an express promise to public school employees. Then the Court found that the extraction of the 3% was permissible because it was now voluntary. Indeed, the decision was bottomed on the newly granted right of public school employees to opt out of post employment retiree health care and, thereby, avoid the 3% extraction altogether:

> Voluntary healthcare contributions do not violate Const 1963, art 10, § 2 and US Const, Ams V and XIV because, as a general proposition, the government does not, for constitutional purposes, "take" property that has been voluntary given.

Id.,220

The retention of the value of the interest earned on the contributions was permissible because:

> Plaintiffs here are attempting to create a distinction where none exists. The terms of the separate retirement allowance under MCL 38.1391a(8) are part and parcel of the choice offered to the public school employees under MCL 38.1391a(5). Any employee who chooses to participate in the retiree healthcare program does so with full notice that if he or she fails to qualify for retiree healthcare, he or she will receive the separate retirement allowance as described in MCL 38.1391a(8). It is unreasonable to suggest that the employees who opt into the retiree healthcare program consent to the state's receiving 3% of their salaries, but do not consent to the subsequent terms of MCL 38.1391a(8) if they fail eventually to qualify for retiree healthcare benefits. The 3% contributions and the separate retirement allowance are two sides of the same coin, and if public school employees voluntarily consent to one, they necessarily consent to the other.

AFT Mich v State, 497 Mich, at 223-24.

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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In other words, public school employees who *opted into* the post employment retiree health care plan agreed to accept the terms of the refund no matter how unreasonable they might be.

3.

This Court expressly avoided consideration of the issues raised by Plaintiffs regarding 2010 PA 75. The Court repeated that it was not deciding issues relating to that statute: "However, we emphasize that we address in this case only 2012 PA 300 and do not decide whether the Court of Appeals correctly held that 2010 PA 75 violated those same provisions." *AFT Mich II, supra* , 497 Mich at 216. And "Without offering any pronouncements regarding the constitutionality of 2010 PA 75, we conclude that 2012 PA 300 does not infringe any 'substantive' due process rights that public school employees may possess." *Id.*, 244.

The basis of this Court's decision, then, was that PA 300 was valid because participation in the post employment retiree health care plan was now fully voluntary. A public school employee could opt out of the plan entirely and avoid the extraction imposed by section 43e. And those who opted in were promised a refund if they did not qualify. However, those options exist only under PA 300. They did not exist under PA 75. The PA 75 extractions were entirely involuntary.

C. The Remand

This Court remanded the PA 75 litigation to the Court of Appeals for reconsideration of its opinion in *AFT I* in light of this Court's decision in *AFT II.* The Court of Appeals issued an opinion on June 7, 2016. *AFT Michigan v State of Michigan* (On Remand), 315 Mich App 602; 893 NW2d 90 (2016), appeal granted sub nom. *AFT Michigan v State*, 895 NW2d 539 (2017). This application for leave to appeal followed.

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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Argument

Introduction to Argument

PA 75 is the unreasonable exercise of legislative power because it took money which public school employees had earned and used it to provide a benefit to retirees while assuring nothing of value to the persons paying. The selection of current employees to bear this burden was entirely arbitrary; there is no nexus between the employees and the retirees. No public school employee consented to this extraction which impaired the collective bargaining agreements which protect them. Between July 1, 2010 and as late as January 9, 2013 the money was just taken. This Court should recognize that there are some things the Legislature cannot do and that PA 75 was so arbitrary as to be unconstitutional.

PA 75 Violates the Fourteenth Amendment

I. The Statute Described

A. Not Paying for Their Own Benefits

1.

The Legislature adopted 2010 PA 75 in May, 2010, to be effective July 1, 2010, for the purpose of generating revenue to pay for post employment retiree health care of persons then currently retired. PA 75 made several major changes to the Michigan Public School Employees Retirement Act, MCL 38.1301 et seq. Some of these were not contested by Plaintiffs (a one-time incentive for early retirement; a restriction on the ability to work for a reporting unit after retirement). But section 43(e)(1), MCL 38.1343(e)(1), made a radical modification to the law.

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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The new provision stated that "...beginning July 1, 2010, each member shall contribute 3% of the member's compensation to the appropriate funding account established under the Public Employee Retirement Health Care Funding Act....". The State of Michigan began collecting money on July 1, 2010. Virtually all of the money extracted from then current public school employees was used to provide and pay for post employment retiree health care benefits provided to then current retirees.

2.

2010 PA 77, effective at the same time as PA 75, created four trusts. One was established for each of the four retirement systems administered by the Office of Retirement Services (public schools, judges, State Police, state employees). The trusts were designed to collect the money extracted from public employees including public school employees. The Act authorizes the trusts to "...receive state appropriations, employer contributions, employee contributions, investment earnings, refunds and reimbursements, and other permitted deposits, and shall make distributions for the payment of retirement health care benefits authorized by the trustees for the administration of such trust...".

It is clear that the money generated by PA 75, and passed to the appropriate trust, is used for post employment retiree health care virtually exclusively. PA 77 states, in pertinent part:

> The trust shall only provide retirement health care benefits as provided under this act and pay fees and expenses for the administrative costs in carrying out this essential governmental function.

MCL 38.2735

And:

> The governing board of each retirement system shall be the grantor and shall administer the irrevocable trust created for that retirement system in order to pay retirement health care benefits to its past members and their funding

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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> account dependents and reimburse medical expenses to its past members and their health reimbursement account dependents. The members of the retirement system board shall act as the trustees of the irrevocable trust for that retirement system. The trustees shall adopt a written trust agreement that meets all of the requirements set forth in section 9.1 The trustees of the irrevocable trust may establish and adopt policies and procedures for administering the irrevocable trust.

MCL 38.2733

Therefore, the money extracted from then current public school employees did not benefit those paying even abstractly. The money was used on a current basis for the benefit of then current retirees. Public school employees were not paying for their own benefits. Nor were they supporting the retirement system, generally. They were funding health care for others.

3.

No part of the PA 75 extractions provided or paid for benefits to be offered to those who were paying. Nevertheless, in its application for leave to appeal, the Defendant said otherwise at four different points in its brief (claiming variously that the PA 75 extractions were contributing "...a small part of their salary toward their own retirement health benefits..". Brief, page 1). Following Plaintiffs' correction of this fallacy in their reply brief, Defendant softened this contention in its present argument. However, Defendant continues to engage in some intellectual slight-of-hand by suggesting that the Legislature has simply asked public school employees to pay toward "their own retiree health care system." Brief, 3. This contention is false. None of the monies extracted by PA 75 provide any benefit to the employees paying. They are not supporting "their" health care system because the money is used to provide benefits to persons currently retired. Current public school employees are not granted benefits under the School Employees Retirement Act; those benefits are provided only after retirement. Therefore, PA 75 revenue was used for

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170
P223

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the exclusive benefit of others without any promise of similar benefits provided to the persons paying.

B. No Guarantee of a Benefit

Public school employees who paid for the retiree health care of others under PA 75 are themselves guaranteed nothing. Post employment retiree health care benefits are not guaranteed to any current or future public school employee. The obligation to provide retiree health care is established by statute. MCL 38.1391. But this Court has held that there is no constitutional or contractual guarantee of such benefits.

In *Studier v Michigan Public School Employees' Retirement Board*, 472 Mich 642, 659; 698 NW2d 350 (2005) this Court held that Article IX Section 24 of the Constitution of 1963, which protects pension contributions, does not apply to health care benefits. In short, the Michigan Constitution does not guarantee post employment retiree health care and the Legislature is free to change or eliminate the benefit at any time.

2010 PA 77 reinforces *Studier* by expressly disclaiming any promise or assurance that health care benefits will be offered to retirees in the future. Section 3(6) states, in part:

> This act shall not be construed to define or otherwise assure, deny, diminish, increase, or grant any right or privilege to health care benefits or other postemployment benefits to any person or to assure, deny, diminish, increase, or grant health care benefits or other postemployment benefits, rights, and privileges previously or already granted to members or past members and their dependents by the applicable retirement act.

The state of the law is clear. There is absolutely no promise or guarantee that public school employees paying into the PA 77 trust will themselves be entitled to or will actually receive post-employment retiree health care benefits. These benefits are seen as an act of grace and not a mandate; the benefits that are presently provided may be stopped at any

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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time. The persons paying into the PA 77 trust now have no certainty that other employees will support their health care benefits when the time comes.

C. The PA 75 Extractions Are Not Protected by section 91(a)(8)

Because PA 300 is not retrospective, the refund mechanism created by section 91(a)(8) does not apply to the PA 75 extractions.

1. Retrospective Statutes

A statute is given retrospective effect only when the Legislature has intended that result. Without clear direction from the Legislature, a statute applies prospectively only. That is particularly true where existing rights are modified.

This Court articulated the basic principles of retrospective application of statutes in *LaFontaine Saline, Inc v Chrysler Grp, LLC*, 496 Mich 26; 852 NW2d 78 (2014). There, the Court considered amendments to the Motor Vehicle Dealer Act and whether geographic expansion of the "relevant market area" from six to nine miles impacted existing agreements. If the statute was retrospective the amended law would have prohibited the Defendant Chrysler Group from granting a vehicle sales franchise within an area inside the nine mile market area adjacent to the Plaintiff's sales facility. The Court held that the amended law did not apply to existing contracts because the Legislature had not intended retrospective effect:

> Retroactive application of legislation " 'presents problems of unfairness ... because it can deprive citizens of legitimate expectations and upset settled transactions.' "We have therefore required that the Legislature make its intentions clear when it seeks to pass a law with retroactive effect. In determining whether a law has retroactive effect, we keep four principles in mind. First, we consider whether there is specific language providing for retroactive application. Second, in some situations, a statute is not regarded as operating retroactively merely because it relates to an antecedent event. Third, in determining retroactivity, we must keep in mind that retroactive laws impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions or considerations already

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170
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> past. Finally, a remedial or procedural act not affecting vested rights may be given retroactive effect where the injury or claim is antecedent to the enactment of the statute.

LaFontaine Saline, 496 Mich at 39.

The Court adopted the reasoning of the United States Court of Appeals for the Sixth Circuit in *Kia Motors Am, Inc v Glassman Oldsmobile Saab Hyundai, Inc*, 706 F3d 733 (CA6, 2013) where that Court noted that:

> In Michigan, the question of whether a statute should be applied retroactively or only prospectively is a question of legislative intent. *Frank W. Lynch & Co. v. Flex Technologies, Inc.*, 463 Mich. 578, 624 N.W.2d 180, 182 (2001). But there is a presumption that statutes operate only prospectively "unless the contrary intent is clearly manifested." Id. (quotation omitted). This presumption holds "especially true if retroactive application of a statute would impair vested rights, create a new obligation and impose a new duty, or attach a disability with respect to past transactions." Id. The Michigan Supreme Court has repeatedly observed that the Michigan Legislature "knows how to make clear its intention that a statute apply retroactively," so the absence of express retroactive language is a strong indication that the Legislature did not intend a statute to apply retroactively.

Kia Motors, 706 F3d at 739.

This analysis has been adopted in published opinions of the Court of Appeals. *Arabo v Michigan Gaming Control Bd,* 310 Mich App 370, 374 n 1; 872 NW2d 223 (2015) ("Nothing about the amendatory act leads us to believe the Legislature intended the amendments to operate retroactively. We presume a statute operates prospectively unless the Legislature clearly intended retroactive application; this is "especially true if retroactive application of a statute would ... attach a disability with respect to past transactions.").

In short, the intention of the Legislature will determine whether a statute is retrospective. And there must be clear direction from that body; mere conjecture is insufficient.

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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2.

No part of PA 300 suggests that the Legislature intended it to apply retrospectively. The statute was given immediate effect by the Legislature and an effective date of September 4, 2012. The Legislature might have said that the statute applied to events prior to its effective date but it did not.

Section 91(a)(8) creates the refund mechanism for persons who do not receive post employment retiree health care. That process provides for a "separate retirement allowance" which "...shall be paid for 60 months and shall be equal to 1/60 of the ...amount equal to the contributions made by the member under section 43e." The Court of Appeals noted in dicta that this clause meant that the refund mechanism applied to the PA 75 extractions:

> The state correctly points out that if the escrowed funds are turned over to the state, the funds would be subject to the refund mechanism of 2012 PA 300 for those employees who ultimately do not qualify for retirement healthcare benefits.

AFT Michigan v State of Michigan (On Remand), 315 Mich App 602, 614; 893 NW2d 90 (2016), appeal granted sub nom. *AFT Michigan v State*, 895 NW2d 539 (2017).

With respect, however, the issue was not fully before the Court and had not been briefed. And the Court did not consider or apply this Court's guidance with respect to the retrospectivity of statutes. PA 300 is not retrospective. Therefore the refund mechanism cannot apply to monies extracted under PA 75; that mechanism did not exist when the money was seized. Accordingly, not only did PA 75 not guarantee public school employees any benefit, PA 300 does not provide them any protection.

D. PA 75 Is Unique

Plaintiffs have not found, and Defendant has not cited to, any statutory analogue to 2010 PA 75 in the history of the State. PA 75 is unique. It is the sole instance in which the

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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Michigan Legislature has imposed a burden on a discrete group of persons to provide a benefit for another group of persons.

1. PA 75 is Not A Tax

(a)

PA 75 did not impose a tax. "Revenue from taxes, therefore, must inure to the benefit of all, as opposed to exactions from a few for benefits that will inure to the persons or group assessed." *Dukesherer Farms, Inc v Ball*, 405 Mich 1, 16; 273 NW2d 877 (1979). In *Dukesherer Farms* the Court considered a claim by cherry producers who objected to a charge imposed on each ton of cherries produced. The assessment was not imposed on taxpayers, generally; to the contrary it was restricted to Michigan cherry producers. The assessment was to fund the Michigan Cherry Promotion and Development Program instituted pursuant to the Agricultural Commodities Marketing Act, MCL 290.651 et seq. Plaintiffs asserted that the assessment violated Const 1963, art 4, § 32 which states that "Every law which imposes, continues or revives a tax shall distinctly state the tax." This Court rejected the claim because the charge was not a tax. The reason was that "Revenue from taxes, therefore, must inure to the benefit of all, as opposed to exactions from a few for benefits that will inure to the persons or group assessed." *Id.*,16. Instead the charge was an assessment in which cherry producers paid to maintain an advertising program intended to boost the sale of Michigan cherries. Those paying received something for their money; the advertising of their product. The charge was balanced by the benefit.

(b)

The PA 75 extraction is not a tax because 2010 PA 75 does not "distinctly state the tax." The monies extracted by definition do not benefit the public at large. PA 77 makes clear that the funds are paid into a trust to pay the cost of post employment retiree health

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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care of current retirees. None of the public school employees paying receives any benefit. Neither does the public at large.

2. PA 75 Is Not a User Fee

Defendants suggest that the PA 75 extraction is in the nature of a "user fee." The contention is specious. User fees are an exchange of money for a service; they do not exist to raise revenue:

> Generally, a 'fee' is 'exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit.'" *Bolt v Lansing*, 459 Mich 152, 161; 587 NW2d 264 (1998), quoting *Saginaw Co v John Sexton Corp of Mich*, 232 Mich App 202, 210; 591 NW2d 52 (1998). "A 'tax,' on the other hand, is designed to raise revenue." *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 665; 697 NW2d 180 (2005) (quotation marks and citation omitted). Fees charged by a government entity must be reasonably proportionate to the direct and indirect costs of providing the services for which the fee is charged. *Kircher v Ypsilanti*, 269 Mich App 224, 231-232; 712 NW2d 738 (2005). A fee is presumed reasonable unless it is facially or evidently so "'wholly out of proportion to the expense involved'" that it "'must be held to be a mere guise or subterfuge to obtain the increased revenue.'" *Merrelli v St Clair Shores*, 355 Mich 575, 584; 96 NW2d 144 (1959), quoting *Vernor v Secretary of State*, 179 Mich 157, 168, 170; 146 NW 338 (1914).

Trantham v State Disbursement Unit, 313 Mich App 157, 169-70; 882 NW2d 170 (2015).

PA 75 is not a user fee. There is no evidence that the Legislature chose 3% based on the actual cost of providing post employment retiree health care to anyone including those paying. The extraction cannot be justified as a user fee. Moreover, the money taken is not in exchange for a service. Those paying receive nothing.

E. PA 75 Extractions Were Involuntary

1.

PA 75 is entirely different from 2012 PA 300. The basis of this Court's decision in AFT II was the voluntary nature of the extractions.

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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> Unlike the 3% retiree healthcare contribution in 2010 PA 75, which the Court of Appeals held to be a taking in AFT Mich. I, the same contribution arising from 2012 PA 300 is not mandatory. Instead, public school employees may entirely opt out of the retiree healthcare program and thereby avoid making the 3% salary contributions:

AFT II, supra, 497 Mich at 220.

and:

> In AFT Mich. II, the Court of Appeals held that 2012 PA 300 did not give rise to an uncompensated taking because the retiree healthcare contributions are now completely voluntary:[T]here is no taking under 2012 PA 300 because participation in the retiree healthcare system is now voluntary. Unlike in [AFT Mich. I], in which the retiree healthcare contributions were mandatory and involuntary, members under the new legislation now have a choice. Thus, it cannot be argued that members' wages have been seized or confiscated.... [AFT Mich. II, 303 Mich.App. at 678, 846 N.W.2d 583.]We agree with this analysis. Voluntary healthcare contributions do not violate Const. 1963, art. 10, § 2 and U.S. Const. Ams. V and XIV because, as a general proposition, the government does not, for constitutional purposes, take property that has been voluntary given.

AFT II, 497 Mich at 220, 221.

None of this is true with regard to the PA 75 extractions. Every dollar taken under PA 75 was extracted without the consent of the person paying because the public school employees were not asked for their consent.

2.

PA 300 did not address the involuntary extractions from employee pay required by PA 75. The key provision, section 43(e), MCL 38.1343(e), was not amended. The result is that the PA 75 extractions remained involuntary. The text of section 43(e) could not be more clear. Read together, PA 75 extractions remain involuntary; PA 300 extractions are voluntary.

Some public school employees consented to the extraction when given the opportunity to do so. However, the consent was prospective and applies only to PA 300

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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extractions. Public school employees were not asked to retroactively consent to the PA 75 extractions. The consent given applies only to events occurring after the date of consent and not before.

Some public school employees refused to consent to the extraction and waived their right to post employment retiree health care. These persons never agreed to any form of extraction ever. Nor did they agree to accept the refund mechanism provided by PA 300. But the circumstances of these individuals are ignored by PA 300. So, too, are the circumstances of persons who died, retired or left public school employment prior to January 9, 2013. The extraction from these persons was always involuntary as they were never offered the opportunity to consent or they outright refused consent. PA 300 ignores these employees.

(c)

The Court should conclude that all PA 75 extractions were involuntary. Extending the logic of the Court's decision in *AFT II*, involuntary extractions are unreasonable and an abuse of the power of the Michigan Legislature. In dicta, this Court's decision in *AFT II* noted that it might be reasonable for the Legislature to ask public school employees to support their retirement fund through the PA 300 extractions.

> Moreover, because the Legislature has deemed it fiscally untenable for the state to place the entire burden of providing these benefits on the taxpayer, it is also reasonable that the state would choose to have current public school employees assist in contributing to the costs of this program

AFT II, supra, 497 Mich at 247.

However, this statement should be read together with this one:

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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> It is therefore entirely reasonable for the state to request in turn that any eligible employee who *desires access to this benefit* should help to pay for it.

AFT Michigan II, at 221.

Plaintiffs here respectfully suggest that this Court was commenting on the choice which was created by PA 300; that is was reasonable to ask persons who want a benefit to pay for it. However, the Court's observations do not reflect the very different approaches taken by PA 75 and PA 300. It is one thing to ask public school employees to pay more to keep what they have (as required by PA 300). It is something else entirely to require public school employees to pay more to get nothing (as mandated by PA 75). Reviewed in this light, 2010 PA 75 is utterly unreasonable. The money taken under PA 75 should be refunded to the persons from whom it was taken without their consent.

II. PA 75 Violates the Fourteenth Amendment

PA 75 violates the Substantive Due Process protections of the Fourteenth Amendment to the United States Constitution because it arbitrarily deprives public school employees of their fundamental right to control their own property.

A. Substantive Due Process as a Constitutional Doctrine

1.

For more than a century, the United States Supreme Court has recognized that the Fourteenth Amendment to the United States Constitution guarantees two different rights; a right to fair procedure and a right to fair treatment by government.

> The Due Process Clause guarantees more than fair process, and the liberty it protects includes more than the absence of physical restraint...(citations omitted). The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests (citations omitted).

Washington v Glucksberg, 521 US 702, 719-720; 117 S Ct 2258; 138 L Ed 2d 772 (1997).

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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And:

> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, *id.*, at 503, 97 S.Ct., at 1938 (plurality opinion); *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934) (so rooted in the traditions and conscience of our people as to be ranked as fundamental), and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed. *Palko v. Connecticut,* 302 U.S. 319, 325, 326, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). Second, we have required in substantive-due-process cases a careful description of the asserted fundamental liberty interest. (Citations omitted) Our Nation's history, legal traditions, and practices thus provide the crucial guideposts for responsible decisionmaking. (Citation omitted) that direct and restrain our exposition of the Due Process Clause.

Washington v Glucksberg, Id. at 720-721.

2.

It is certainly true that the doctrine of substantive due process has something of a checkered history. See *Dred Scott v Sandord*, 60 US 393; 19 How 393; 15 LEd 691 (1857) (holding that slaves could not be citizens); *Lochner v New York*, 198 US 45; 198 S Ct 539; 49 L Ed 937 (1905) (invalidating a limit on the duration of the work day of bakery employees). The concept was largely abandoned during the New Deal when extensive and necessary social welfare legislation was enacted which the Supreme Court frequently approved. See e.g. *West Coast Hotel Co v Parrish*, 300 US 379; 57 S Ct 587; 81 L Ed 703 (1937) (approving minimum wage legislation). However, the principle has been revived to recognize that there are certain fundamental rights which a legislature may not restrict or diminish:

> In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the liberty specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170
223

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> (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); to use contraception, ibid.; *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), and to abortion, Casey, Supra (*Planned Parenthood of Se. Pennsylvania v. Casey,* 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)]. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan*, 497 U.S., at 278, 279, 110 *S.Ct., at 2851, 2852 [Cruzan* by Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990)].

Washington v Glucksberg, supra, 521 US at 720.

See also *Obergefell v Hodges*, 576 US ___; 135 S Ct 2584; 192 L Ed 2d 609 (2015) (The right to marry is a fundamental right inherent in the liberty of the person); *Lawrence v Texas*, 539 US 558, 571; 123 S Ct 2472; 156 L Ed 2d 508 (2003) (privacy).

3.

The Circuit Courts have recognized the validity of this concept.

> As we have previously explained, the doctrine that governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed has come to be known as substantive due process. *Bowers v. City of Flint*, 325 F.3d 758, 763 (6th Cir.2003) (quoting *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1216 (6th Cir.1992) (citation omitted)). These limitations are meant to provide heightened protection against government interference with certain fundamental rights and liberty interests. *Seal v. Morgan*, 229 F.3d 567, 574 (6th Cir.2000) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997)). As a result, government actions that burden the exercise of those fundamental rights or liberty interests are subject to strict scrutiny, and will be upheld only when they are narrowly tailored to a compelling governmental interest. Id. at 574 (citing *United States v. Brandon*, 158 F.3d 947, 956 (6th Cir.1998)); see also *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 393 (6th Cir.2005).345 However, identifying a new fundamental right subject to the protections of substantive due process is often an uphill battle, *Blau*, 401 F.3d at 393, as the list of fundamental rights is short.. *Seal*, 229 F.3d at 575. Thus, when reviewing a substantive due process claim, we must first craft a careful description of the asserted right. *Doe XIV v. Mich. Dep't of State Police,* 490 F.3d 491, 500

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170
223

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> (6th Cir.2007) (*citing Reno v. Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993)). To qualify, such rights must be deeply rooted in this Nation's history and tradition, *Moore v. City of East Cleveland*, 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977), or implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed. *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (internal quotation marks omitted); see also *Doe XIV*, 490 F.3d at 500; *Blau*, 401 F.3d at 394.

Does v Munoz, 507 F3d 961, 964 (CA6, 2007)

4.

> This Court has recognized the doctrine.
>
> The Fourteenth Amendment to the United States Constitution and the Const. 1963, art. 1 § 17 guarantee that no state shall deprive any person of life, liberty or property, without due process of law. Textually, only procedural due process is guaranteed by the Fourteenth Amendment; however, under the aegis of substantive due process, individual liberty interests likewise have been protected against certain government actions regardless of the fairness of the procedures used to implement them. *Collins v. City of Harker Heights*, 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992), quoting *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). The underlying purpose of substantive due process is to secure the individual from the arbitrary exercise of governmental power. The defendant has failed to distinguish between the Michigan and federal due process provisions and has not argued that the Michigan provision should be interpreted differently from its federal counterpart. We interpret the state provision as coextensive with the federal provision for purposes of this appeal. Absent definitive differences in the text of the state and federal provision, common-law history that dictates different treatment, or other matters of particular state or local interest, courts should reject the unprincipled creation of state constitutional rights that exceed their federal counterparts. *Sitz v. State Police*, 443 Mich. 744, 763, 506 N.W.2d 209 (1993).

People v Sierb, 456 Mich 519, 522, 524; 581 NW2d 219 (1998).

See also *Bonner v City of Brighton*, 495 Mich 209, 224; 848 NW2d 380 (2014) cert den __ US __; 135 S Ct 230; 190 L Ed 2d 134 (2014) (While the touchstone of due process, generally, is protection of the individual against arbitrary action of government, the substantive component protects against the arbitrary exercise of governmental power...").

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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> The Court of Appeals has also recognized the concept:
>
> > The essence of due process is fundamental fairness. *In re Adams Estate*, 257 Mich.App. 230, 233; 234, 667 N.W.2d 904 (2003) (citation omitted). There are two types of due process: procedural and substantive. *By Lo Oil Co. v. Dep't. of Treasury*, 267 Mich.. App. 19, 32-33; 703 N.W.2d 822 (2005)... *Mettler Walloon, LLC v. Melrose Twp.*, 281 Mich.App. 184, 213-214, 761 N.W.2d 293 (2008). T]he essence of a substantive due process claim is the arbitrary deprivation of liberty or property interests. Id. at 201, 761 N.W.2d 293 (emphasis omitted).

In re Beck, 287 Mich App 400, 401- 402; 788 NW2d 697, 698, aff'd on other grounds, 488 Mich 6; 793 NW2d 562 (2010).

B. Fundamental Rights Are Protected

The rights protected by the Fourteenth Amendment are "...those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Washington v Glucksberg, supra*, 721. But the objective is the "...protection of the individual against arbitrary action of government." *Dias v City & Cty of Denver*, 567 F3d 1169, 1181 (10th Cir, 2009) citing *County of Sacramento v Lewis*, 523 US 833, 845; 118 S Ct 1708; 140 L Ed 2d 1043 (1998). The Court, then, must first determine the nature of the right at issue.

1.

> The right to control one's property is fundamental:
>
> > The Public Use Clause, in short, embodied the Framers' understanding that property is a natural, fundamental right, prohibiting the government from tak[ing] property from A. and 1 giv[ing] it to B. *Calder v. Bull*, 3 Dall. 386, 388, 1 L.Ed. 648 (1798); see also *Wilkinson v. Leland*, 2 Pet. 627, 658, 7 L.Ed. 542 (1829); *Vanhorne's Lessee v. Dorrance*, 2 Dall. 304, 311, 1 L.Ed. 391 (C.C.D.Pa.1795).

Kelo v City of New London, Conn, 545 US 469, 510–11; 125 S Ct 2655, 2680; 162 L Ed 2d 439 (2005).

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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2.

(a)

Since the beginning of the Republic, government has been very limited in its right to seize property of one person for the benefit of another person:

> An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. . . . A few instances will suffice to explain what I mean. . . [A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them.

Calder v Bull, 3 US 386, 388; 3 Dall 386; 1 L Ed 648 (1798).

(b)

This principle was considered in *Eastern Enterprises v Apfel*, 524 US 498; 118 S Ct 2131; 141 L Ed 2d 451 (1998). There the Supreme Court, in a plurality decision, held unconstitutional the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 USC §§ 9701-9722. This statute had a complicated origin which reflected a half century of collective bargaining regarding health care benefits for coal miners. The trust funds established to provide health care benefits were severely underfunded. And many mine operators had either withdrawn from joint contracts or had ceased operations. Consequently, in 1988, a commission was created to recommend legislation.

The statute which resulted was intended to spread the liability for health care over both present and past parties to collective bargaining agreements; parties which may have stopped the mining of coal and which may not have had mine employees for many years. The Court noted that: "Any signatory operator who 'conducts or derives revenue from any business activity, whether or not in the coal industry,' may be liable for those premiums. §

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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9706(a); § 9701(c)(7). Where a signatory is no longer involved in any business activity, premiums may be levied against 'related persons,' including successors in interest and businesses or corporations under common control. § 9706(a); § 9701(c)(2)(A)." *Id.*, 514

The Court stated that "This case does not present the 'classic taking' in which the government directly appropriates private property for its own use." *Id.*, 522. But the matter was a "taking" nonetheless ("economic regulation such as the Coal Act may nonetheless effect a taking..."). *Id.*, 523. This taking, however, was unique:

> Finally, the nature of the governmental action in this case is quite unusual. That Congress sought a legislative remedy for what it perceived to be a grave problem in the funding of retired coal miners' health benefits is understandable; complex problems of that sort typically call for a legislative solution. When, however, that solution singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause. Eastern cannot be forced to bear the expense of lifetime health benefits for miners based on its activities decades before those benefits were promised. Accordingly, in the specific circumstances of this case, we conclude that the Coal Act's application to Eastern effects an unconstitutional taking. *Id.*, 537

This opinion, by Justice O'Connor, was joined in substantial part by Justice Kennedy and became the plurality decision. The differences between the plurality and the concurrences related to the application of the Ex Post Facto clause of the Constitution; Justice Kennedy would have relied on that concept to a greater degree. But his concurrence did not differ substantially with Justice O'Connor's view.

Eastern Coal rejects a legislative approach which imposes on a party liability which it did not contemplate for events which occur subsequent to its participation in an activity. Eastern Coal Company could not be liable for future cost of health care for individuals whom it did not employ. That is exactly what has occurred in PA 75.

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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3.

(i)

PA 75 interferes with a right so fundamental that it is expressly referenced in the Fourteenth Amendment (protecting life, liberty and property) and Michigan law. The right to freely use one's property is fundamental:

> Examining the situation in Wood, [*Wood v. Blancke*, 304 Mich. 283, 8 N.W.2d 67 (1943)] this Court emphasized that all doubts are resolved in favor of the free use of property. *Id.* at 287, 8 N.W.2d 67. This principle is fundamental, and elsewhere we have refused to infer restrictions that are not expressly provided in the controlling documents.

O'Connor v Resort Custom Builders, Inc, 459 Mich 335, 341; 591 NW2d 216 (1999) reh den 459 Mich 1251; 595 NW2d 843 (1999).

(ii)

PA 75 takes money which public school employees have already earned. Defendant attempts to suggest that wages already earned are not actually the property of the employee. Brief at 26. Public school employees are paid a wage which is paid after it is earned. Some employees are paid hourly; most are salaried. But all must work for their compensation. Their income is protected by law. MCL 408.471. No third party could take income in the manner in which it is seized by PA 75.

The Defendant argues that the money extracted under PA 75 was never, actually, the property of the public school employees whose wages were reduced. Citing century old authority, the Defendant says at brief, p. 22, "...our courts have long recognized, and particularly with regard to the legislative imposition of employee contributions to public school retirement funds, that such amounts are "not contributions by the teachers of their money, but are appropriations of public money[.]" citing *Brucker v Chisholm*, 245 Mich 285, 288; 222 NW 761 (1929) and *Attorney General v Connolly*, 193 Mich 499; 160 NW

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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581 (1916). However, these cases were legislatively reversed by the adoption of Article 9 § 24 of the Constitution of 1963.

Brucker considered the validity of a statute which repealed an earlier teacher pension statute. The Supreme Court then held that the funds paid into the then existing retirement fund did not belong to the individual teacher. Therefore, there was no basis to find that a contract existed between the State of Michigan and individual teachers regarding retirement. The premise of this decision has been made obsolete by the Constitution which provides that accrued financial benefits are protected as contracts and may not be diminished or impaired.

Further, since the adoption of the 1963 Constitution, the law has recognized that public pensions are contractual obligations and not mere gratuities. Article 9 § 24 of the Constitution now states:

> The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.

Brucker and *Connolly* were reversed by the 1963 Constitution and are not relevant for any purpose.

PA 75 interfered with the right of public school employees to decide what to do with their money. That right is fundamental. As such, PA 75 has to be objectively reasonable. It is not.

C. The 5th Amendment Is Not a Barrier Here

1.

Plaintiffs may pursue a claim under the substantive due process provisions of the 14th Amendment and are not restricted by the provisions of the 5th Amendment. The Defendant argues to the contrary, see brief at 29. However, there is no binding authority for

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170
P223

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that proposition. The case cited by Defendant does not consider substantive due process nor does it say that such claims are ousted by other provisions of the Constitution:

> Third, contrary to respondent's claim, *Graham v. Connor*, 490 U.S. 386, 394, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989), does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments; rather, *Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.

United States v Lanier, 520 US 259, 272 n7; 117 S Ct 1219; 137 L Ed 2d 432 (1997).

2.

Plaintiffs acknowledge the comments of the Dissenting Judge who observed that "The (Due Process) clause should not be invoked to "do the work" of other constitutional provisions, even when they offer a plaintiff no relief." *AFT Mich v State*, 297 Mich App 597, 639; 825 NW2d 595 (2012). Respectfully, the authority cited for this conclusion has not been adopted by the Supreme Court. The case cited by the dissenting judge, *Stop the Beach Renourishment, Inc v Fla Dep't of Envtl Prot,* 560 US 702, 721; 130 SCt 2592; 177 L Ed 2d 184 (2010), was (as noted) a plurality opinion. The provision on which the dissent relied was contained in Part II. There Justice Scalia wrote:

> The first problem with using substantive due process to do the work of the Takings Clause is that we have held it cannot be done. "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'

Stop the Beach Renourishment, supra, 560 US at 721.

But this view was not adopted by a majority of the Court. The case does not represent a majority view that the 14th Amendment "...should not be invoked to "do the work" of other constitutional provisions, even when they offer a plaintiff no relief."

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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3.

This Court has recognized that governmental taking of property may be challenged under either the Fifth Amendment (as a "taking") or under the Fourteenth Amendment.

> As previously noted, a taking claim may be framed as a violation of the Just Compensation Clause of the Fifth Amendment or the Due Process Clause of the Fourteenth Amendment. Alternatively, as Justice Brickley, dissenting, explained in *Electro-Tech, supra* at 94, [(*Electro-Tech, Inc. v. H F Campbell Co.*, 433 Mich. 57, 60, 445 N.W.2d 61, 62 (1989)] a claim may be based on a denial of substantive due process where a plaintiff is deprived of property rights 'by irrational or arbitrary governmental action'

Bevan v Brandon Township, 438 Mich 385, 391; 475 NW2d 37 (1991)

And

> As Justice Brickley explained in *Electro-Tech* at 94-95, In contrast to regulatory taking due process claims, . . . [a] substantive due process claim, . . . 'does not require proof that all use of the property has been denied. . . .' Rather, 'the deliberate and arbitrary abuse of government power violates an individual's right to substantive due process.' [Citations omitted. See also *Id.* at 76, n 21.]

Id. at 391 n6.

Therefore this Court has concluded that the 5th Amendment is not a bar to a claim under the 14th Amendment.

III. PA 75 Violates the Fourteenth Amendment

PA 75 is the arbitrary exercise of legislative power. The involuntary extractions of money required by the statute take money from one discreet group for the sole benefit of another discreet group. There is no nexus of any sort between the two other than current or former employment by a public school. The Legislature did not explain why it targeted this group of public school employees; no explanation was offered nor is one apparent.

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

RECEIVED by MSC 8/29/2017 1:45:49 PM

A. PA 75 Is Not Rational

PA 75 cannot be explained in any rational manner. Indeed, Defendant makes no effort to rationalize the selection of this group of citizens. Rather, Defendant relies on the presumption that legislation is constitutional without offering a scintilla of support for this statute.

The Legislature's selection of current public school employees to pay to support current retirees was arbitrary. The selection might be justifiable if current employees were promised retiree health care themselves. But PA 77 could not have been more clear in adopting this Court's decision in *Studier, supra*.

The Court of Appeals was right. PA 75 imposes an obligation on unwilling employees without any reason for doing so. The statute is arbitrary and unconstitutional.

B. Objective Reasonableness

The standard to be employed in applying the doctrine against legislative action is objective reasonableness. Executive action, such as abuse of prisoners, is subject to a standard described as "shocks the conscience." But legislative action is not subject to that standard:

> Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action:
>
> > The principal and true meaning of the phrase has never been more tersely or accurately stated than by Mr. Justice Johnson, in *Bank of Columbia v. Okely*, 17 U.S. 235, 4 Wheat. 235, 244, 4 L.Ed. 559 [(1819)]: As to the words from Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. *Hurtado v. California*, 110 U.S. 516, 527, 4 S.Ct., at 117 (1884).

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170
P223

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> We have emphasized time and again that [t]he touchstone of due process is protection of the individual against arbitrary action of government, *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 2976, 41 L.Ed.2d 935 (1974), whether the fault lies in a denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82, 92 S.Ct. 1983, 1995, 32 L.Ed.2d 556 (1972) (the procedural due process guarantee protects against arbitrary takings), or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective, see, e.g., *Daniels v. Williams*, 474 U.S., at 331, 106 S.Ct., at 664 (the substantive due process guarantee protects against government power arbitrarily and oppressively exercised). While due process protection in the substantive sense limits what the government may do in both its legislative, see, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and its executive capacities, see, e.g., *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue.

Cty of Sacramento v Lewis, 523 US 833, 845-846; 118 S Ct 1708; 140 L Ed 2d 1043 (1998).

C. PA 75 is Unreasonable

At no time during the seven year duration of this litigation has Defendant explained why current public school employees were selected to be burdened by the 3% reduction of their wages. There is no explanation or justification for the legislative selection of this group. They do not secure any benefit of any sort. They are not guaranteed a refund. The taking was involuntary. This is, therefore, the classic "taking from A to give to B." PA 75 fails the test of objective reasonableness. The statute is unfair; it is arbitrary; it is unconstitutional. It should be rejected.

The Michigan Legislature decided it had to raise money to offset the costs of post employment retiree health care offered to current retirees. It decided, without explanation, to impose that burden on unwilling current public school employees. Yet the only connection between current employees and current retirees is that they both worked in the public schools. The Legislature never justified its actions. And Defendant is unable to

MARK H. COUSENS
ATTORNEY
26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170
223

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explain them now. The reality is that there is no valid explanation for imposing this obligation on current employees who themselves are guaranteed nothing and who never agreed to be charged.

There are boundaries that the Legislature cannot cross. This is one of them. The arbitrary designation of a discreet group to pay for benefits offered to another discreet group is unreasonable. It violates the Constitution.

Contracts Are Impaired

2010 PA 75 impaired the personal services contracts between public school employees and their employer by compelling the employer to reduce compensation by 3% and pay the extraction to MPSERS.

A. There Is an Impairment

1.

Public school employees are employed under both express and implied in fact individual personal services agreements. For most public school employees these contracts are required by statute. MCL 380.1231 (Teachers); MCL 380.1229 (administrators). Many of the terms of these contracts, including wage rates, are established by a collective bargaining agreement applicable to the employee. However, the individual contracts customarily set out both the term of employment (to a maximum of three years for administrators) and insert the applicable wage rate. Non certified employees who are not considered "administrators" are subject to implied in fact agreements.

PA 75 impairs these agreements by compelling the public school employer to reduce the wage rate by 3%. This impairment is not "insubstantial" and it is outrageous for the Defendant to make that argument. That the contract is impaired should be obvious on its

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170
223

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face; these agreements state one wage rate and PA 75 prohibits the employer from honoring that promise.

The Defendant attempts to justify the impairment by asserting that this extraction is not a wage reduction; rather, it funds retiree health care. Yet it does not fund the *employee's* retiree health care; it funds the health care of a retiree. Moreover, even accepting the Defendant's contention on its face, the impairment is purportedly for a public purpose.

The personal service contracts of thousands of public school employees are impaired by PA 75 because a public school employer is prohibited from paying the face amount of the contract. That impairment is not justified and violates both the Michigan and United States Constitutions.

B. The Impairment Is Not Justified

> A three-pronged test is used to analyze Contract Clause issues. The first prong considers whether the state law has operated as a substantial impairment of a contractual relationship. The second prong requires that legislative disruption of contractual expectancies be necessary to the public good. The third prong requires that the means chosen by the Legislature to address the public need be reasonable. *In re Certified Question (Fun 'N Sun RV, Inc v Michigan)*, 447 Mich. 765, 777; 527 N.W.2d 468 (1994). In other words, if the impairment of a contract is only minimal, there is no unconstitutional impairment of contract. However, if the legislative impairment of a contract is severe, then to be upheld it must be affirmatively shown that (1) there is a significant and legitimate public purpose for the regulation and (2) that the means adopted to implement the legislation are reasonably related to the public purpose. *Wayne Co Bd of Comm'rs v Wayne Co Airport Auth,* 253 Mich. App. 144, 163-164; 658 N.W.2d 804 (2002), citing *Blue Cross & Blue Shield of Michigan v Governor*, 422 Mich. 1, 23; 367 N.W.2d 1 (1985).

Health Care Ass'n Workers Comp Fund v Dir of Bureau of Worker's Comp, 265 Mich App 236, 241; 694 NW2d 761 (2005).

PA 75 fails the test. First, there is a "substantial impairment" because a 3% wage reduction is neither minimal or lightly regarded. It is a lot of money; few, if any, public school employees have seen a wage increase of 3% for nearly a decade. Second, the

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170
223

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extraction of the 3% is akin to a sanction on current public school employees to benefit current retirees. Finally, the extraction of 3% from this discrete group of persons is simply the worst way to fund post employment retiree health care. It may be that retirement system needed additional funding. However, there has never been an explanation from the Legislature as to why it selected this discrete group of people to provide it. The analog is that the State might tax those driving on Eight Mile Road for repairs on Seven Mile Road because the drivers might, themselves, drive on Seven Mile Road at some unstated time in the future. The means chosen here are arbitrary and unreasonable and the contract impairment significant. PA 75 is unconstitutional.

The Matter is Not Moot

The Court of Appeals correctly determined that this matter was not rendered moot by the adoption of 2012 PA 300. The evident reason is that 200,000 public school employees contend, rightly, that they did not consent to the extraction of three percent of their earned compensation to pay for the post employment retiree health care of persons already retired. These individuals assert that they were never given the opportunity to approve the extraction; that their contributions are not subject to the refund provisions of section 91(a)(8) of PA 300, MCL 38.1291(a)(8).

Additionally, a substantial number of public school employees were not provided the opportunity to consent to the extraction required by PA 75; did not consent to the refund process created by PA 300 because they opted out of post employment retiree health care (as permitted by PA 300), left public school employment, retired or died before given access to the options created by PA 300.

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170

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This action is not moot because all of these employees continue to assert, with considerable validity, that they are owed substantial sums of money. They look to this Court to remedy this wrong.

Conclusion

In *Lockwood v Nims*, 357 Mich 517, 557, 558: 98 NW2d 753 (1959), this Court considered legislative adoption of a 1% use tax to be added to sales in addition to the existing 3% sales tax. Plaintiffs contended that the additional tax exceeded the maximum permitted by 1908 Mich. Const. art. 10, 23. Holding that a literal application of the terms of the constitution would not be proper, this Court concluded that the use tax was unconstitutional as it did exceed the 3% cap then permitted by our basic law. In reaching that conclusion Justice Smith wrote passionately about the purpose for a constitution:

> We come face to face, then, with what has been termed "the most pressing rule for constitutional construction," namely, that "the provisions for the protection of life, liberty and property are to be largely and liberally construed in favor of the citizen."
>
> The reasons behind this most pressing rule are clear if we will but bear in mind, with Marshall, that it is a Constitution we are construing, our basic charter of government. Here the people have erected their safeguards, not only against tyranny and brutality, but against the oppression of temporary majorities, and the repacious demands of government itself. Here are found words that are beyond words, principles for which men have died and reckoned not the cost. It is a charter heavy with history, pregnant with the pride of a free people. In it they have said to the government itself, in clause after clause: Thus far you may go, but you shall not cross the line we draw. In our country their prohibition is ironclad. It may refer to encroachment on the citizen's person, on his property, or on his purse. That this is merely a tax limitation and not one on freedom of speech, or worship, is immaterial. There are no differences in degrees of protection afforded in the constitutional safeguards. With equal alacrity we halt in his tracks, once his foot crosses the line, the inquisitor, the policeman, the tax collector, the legislator, or the executive. Our question is not how far he has passed over the forbidden line, how serious his encroachment, or how aggravated the arrogance. Our duty arises with the trespass itself.

MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170
223

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> The presumption of constitutionality cloaking all the acts of our co-ordinate branch of government cannot prevail where the statute is prohibited by the express language of the Constitution or by necessary implication.

Lockwood v Nims, 357 Mich 517, 557-58; 98 NW2d 753 (1959).

The holding in *Lockwood* is valuable today as the Court considers what is a broad legislative overreach. A fundamental right has been abridged–the right of each person to control their own property. Money has been seized from unwilling citizens to benefit others. This is not a tax. It is the arbitrary selection of a discrete group of persons to pay to benefit others where the sole nexus between the two groups is that both worked for the public schools. No amount of window dressing or contentions that the end justifies the means can make this look like something other than it is.

The Court of Appeals was correct and should be affirmed.

/s/ Mark H. Cousens
MARK H. COUSENS (P12273)
Attorney for Plaintiffs-Appellees
26261 Evergreen Road, Ste. 110
Southfield, MI 48076
(248) 355-2150

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MARK H. COUSENS
ATTORNEY

26261 EVERGREEN ROAD
SUITE 110
SOUTHFIELD, MICHIGAN 48076
PHONE (248) 355-2150
FAX (248) 355-2170