No. CTQ 2020-00008

To be argued by:
FREDERICK A. BRODIE
15 minutes requested

State of New York
Court of Appeals

DANNY DONOHUE, as Pres. of the Civil Serv. Empl. Assoc., Inc., Local 1000, AFSCME, AFL-CIO, Civil Service Employees Association, Local 1000 AFSCME, AFL-CIO, MILO BARLOW, on behalf of himself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units, THOMAS JEFFERSON, on behalf of himself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units, CORNELIUS KENNEDY, on behalf of himself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units, JUDY RICHARDS, on behalf of herself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units, HENRY WAGONER, on behalf of himself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units,

Appellants,

v.

ANDREW M. CUOMO, in his official capacity as Governor of the State of New York, PATRICIA A. HITE, individually and in her official capacity as Acting Commissioner, New York State Civil Service Department, CAROLINE W. AHL, in her official capacity as Commissioner of the New York State Civil Service Commission, J. DENNIS HANRAHAN, in his official capacity as Commissioner of the New York State Civil Service Commission, ROBERT L. MEGNA, individually and in his official capacity as Director of the New York State Division of the Budget, THOMAS P. DINAPOLI, in his official capacity as Comptroller of the State of New York, JANET DIFIORE, in her official capacity as Chief Judge of the New York State Unified Court System,

Respondents,

The State of New York, New York State Civil Service Department, New York State and Local Retirement System, New York State Unified Court System,

Defendants.

BRIEF FOR RESPONDENTS

BARBARA D. UNDERWOOD
Solicitor General
ANDREA OSER
Deputy Solicitor General
FREDERICK A. BRODIE
Assistant Solicitor General
of Counsel

LETITIA JAMES
Attorney General
State of New York
Attorney for Respondents
The Capitol
Albany, New York 12224
(518) 776-2317
(518) 915-7723 (*f*)
Frederick.Brodie@ag.ny.gov

Dated: May 24, 2021

On Certified Questions from the United States Court of Appeals for the Second Circuit, Docket No. 18-3193

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PRELIMINARY STATEMENT

Appellants in this certified-question proceeding are Civil Service Employees Association, Inc., Local 1000 ("CSEA"), its president, and five retired State employees previously represented by that union. As plaintiffs in a federal action, they challenged a two-percentage-point reduction in the State's contributions to retirees' premiums to participate in the New York State Health Insurance Program ("NYSHIP"), arguing among other things that the reduction impaired a contractual right in violation of the U.S. Constitution's Contract Clause. Respondents are state officials who were named as defendants in the federal case.

CSEA negotiated the same reduction in contributions with the State on behalf of active employees, and the State's reduced contribution was thereafter included in CSEA's collective-bargaining agreement ("CBA"). An amendment to the New York Civil Service Law ("CSL"), adopted in 2011 to address the global financial crisis, authorized the State to extend that reduction to retirees.

Appellants contend that the percentage of the State's contributions to retirees' health-insurance premiums provided by the CBA in effect at the time of retirement "vested" and thus became unalterable. Their

position is untenable. Vesting a contribution percentage—or any other contract term—perpetually into the future is a severe and unusual constraint. The U.S. Supreme Court therefore has confirmed that a CBA's provisions regarding retiree health insurance ordinarily last only until the expiration date in the CBA's duration clause, "unless the agreement specifie[s] otherwise." *CNH Industrial N.V. v. Reese,* 138 S. Ct. 761, 766 (2018); *accord M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 441-42 (2015).

Nowhere did CSEA's CBAs specify that the State's contribution percentages for retirees' health-insurance premiums would vest. Consequently, the U.S. District Court for the Northern District of New York granted summary judgment to the defendants.

Along with plaintiffs in 10 similar lawsuits where the Northern District had granted defendants summary judgment, appellants appealed to the U.S. Court of Appeals for the Second Circuit, which considered the appeals together. After briefing and oral argument, the Second Circuit certified two questions of state law to this Court: first, whether CSEA's CBAs vested a right to the same contribution levels in perpetuity or created ambiguity sufficient to warrant consideration of

extrinsic evidence on the point; and second, if the CBAs vested such a right, whether CSL § 167(8) foreclosed any state-law remedy for breach of contract. (Appellants' Appendix ["AA"] 95-96.)[1] Ultimately, to succeed on their federal impairment claim, appellants must establish that the answer to both of these questions is "yes." They cannot do so as to either question.

On the question of vesting, each of CSEA's CBAs was an integrated contract that contained the parties' "entire agreement." (*See, e.g.*, Respondents' Appendix ["RA"] 709.) Each CBA was negotiated by sophisticated parties—repeat players at the bargaining table advised by experienced legal counsel. Yet as the Second Circuit acknowledged, the CBAs do not expressly vest the percentage of premiums paid by the State. Nor, as shown below, do the CBAs contain ambiguous language that could be interpreted to vest premium contributions. Those points are dispositive. To imply vesting, as appellants urge, would impermissibly add a material term to the CBAs that was not included by the parties,

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[1] The Second Circuit certified only questions concerning CSEA's contracts; a determination on the appeals regarding the other unions' CBAs will await this Court's action.

negotiators, and counsel who haggled over CSEA's contracts with the State regularly for three decades.

In short, "[i]f the parties meant to vest [the percentage contributed by the State to retirees'] health care benefits for life, they easily could have said so in the text" of their CBAs. *Reese,* 138 S. Ct. at 766. "But they did not." *Id.*

This Court should therefore decline appellants' invitation to add a material term to the parties' contracts. Instead, the Court should hold that the various clauses listed in the first certified question neither vested the percentage contributed by the State toward retirees' health-insurance premiums, nor created an ambiguity that would permit consideration of extrinsic evidence on the point.

That holding would render academic the second question certified to this Court, namely, in the event that the CBAs did vest with retirees a right to receive a fixed percentage contribution from the State toward health-insurance premiums, whether CSL § 167(8) negates that right so as to preclude a remedy under state law for breach of contract. Should the Court reach the second question, however, it should answer it in the negative. The Legislature had no reason to think it was negating a

contractual right and thus took no action to foreclose a state-court remedy for the violation of any such right.

QUESTIONS PRESENTED

The Second Circuit certified two questions (AA95-96):

1. Under New York state law, and in light of *Kolbe v. Tibbetts*, 22 N.Y.3d 344 (2013), *M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427 (2015), and *CNH Indus. N.V. v. Reese*, 138 S. Ct. 761 (2018), do §§ 9.13 (setting forth contribution rates of 90% and 75%), 9.23(a) (concerning contribution rates for surviving dependents of deceased retirees), 9.24(a) (specifying that retirees may retain NYSHIP coverage in retirement), 9.24(b) (permitting retirees to use sick-leave credit to defray premium costs), and 9.25 (allowing for the indefinite delay or suspension of coverage or sick-leave credits) of the 2007-2011 collective bargaining agreement between the Civil Service Employees Association, Inc. and the Executive Branch of the State of New York ("the CBA"), singly or in combination, (1) create a vested right in retired employees to have the State's rates of contribution to health-insurance premiums remain unchanged during their lifetimes, notwithstanding the duration of the CBA, or (2) if they do not, create sufficient ambiguity on that issue to

permit the consideration of extrinsic evidence as to whether they create such a vested right?

2. If the CBA, on its face, or as interpreted at trial upon consideration of extrinsic evidence, creates a vested right in retired employees to have the State's rates of contribution to health-insurance premiums remain unchanged during their lives, notwithstanding the duration of the CBA, does New York's statutory and regulatory reduction of its contribution rates for retirees' premiums negate such a vested right so as to preclude a remedy under state law for breach of contract?

STATEMENT OF THE CASE

A. Statutory Premium Contribution Provisions Before 2011

NYSHIP is an optional health-benefit plan for current and retired state employees and other public employees throughout the State. *See* CSL §§ 160–170. Over the years, the State has contributed varying amounts to the cost of health-insurance premiums for its current and retired employees.

When it established NYSHIP in 1956, the Legislature required that the State withhold from the salary of each participating employee "such portion of the premium or subscription charges under the terms of any

contract or contracts issued in accordance with this article as may be established by the board for the salary period." L. 1956, ch. 461, § 1 (*codified at* CSL former § 127). The "board" referred to the temporary health-insurance board, which was empowered to administer the plan. *Id.* (*codified at* CSL former § 120). The Legislature authorized coverage for retirees "on such terms as the board may deem appropriate." *Id.* (*codified* at CSL former § 123[2]). The plan's provisions were intended to be "subject to change, not only in the initial negotiations, but thereafter as experience justifies." Governor's Message to the Legislature (Feb. 16, 1956), *reprinted in* Bill Jacket for L. 1956, ch. 461 at 5, *and in Public Papers of Averell Harriman* (hereinafter "*Harriman Papers*") 203 (1956).

Governor Harriman informed the Legislature that "the cost of insurance [would] be shared by the State and participating employees, but the proportion of the respective contributions would be left for determination by the [administrative] Board." *Id.* at 4, *reprinted in Harriman Papers* at 202. The Governor further observed that "[l]egislative control over the extent of the State's commitment would be exercised through the annual appropriation processes." *Id.* at 3, *reprinted in Harriman Papers* at 202.

In 1960, the Legislature moved the power to determine the proportion of respective contributions from the administrative board to the president of the Civil Service Commission. *See* L. 1960, ch. 329, § 1 (*codified at* former CSL § 160[1]) & n.*. As amended, the statute provided that the Commission's president could "change the proportion of premium or subscription charges paid by the state" upon "the prior approval of the director of the budget." *Id.* § 3 (*codified at* CSL former § 162[7]).

In 1967, the Legislature amended the statute to provide that the State would pay 100% of employees' and retirees' premiums for individual coverage and 50% of premiums for dependent coverage. L. 1967, ch. 617, § 6 (*codified at* CSL former § 167[1]). The 1967 amendment also eliminated the provision requiring approval from the budget director before the Commission's president could change contribution percentages, a provision that became unnecessary because those percentages were now codified in the statute. *Id.*, § 1 (*codified at* CSL former § 162[7]).

In 1970, the Legislature increased from 50% to 75% the State's contributions to dependent coverage for employees and retirees, effective April 1, 1971. L. 1970, ch. 458, § 6 (*codified at* CSL former § 167[1]).

By 1983, a Governor's Program Bill memorandum observed that the "burgeoning cost" of premiums was "severely strain[ing] the financial resources of the State." (RA870.) To address the issue, the State and unions negotiated a reduction in the State's contribution percentage for active employees from 100% to 90%. (*See* RA868, 870-871.) To implement the reduction, the Legislature amended CSL § 167(1) and codified the newly reduced contribution percentage. L. 1983, ch. 14 (*reproduced at* RA867-869).

The 1983 amendment did not change the State's contribution percentages for employees who had retired before January 1, 1983, or for dependent coverage. (*See* RA868-869, 871.) For those who retired on or after January 1, 1983, however, the 1983 amendment reduced the State's contribution percentage from 100% to 90%. (RA868, 870-871.) Thus, after the measure became law on March 28, 1983, retirees who left service on or after January 1, 1983 would receive the same, reduced percentage of premium contributions that had been negotiated for active employees.

In 1999, the Legislature added a new provision to the CSL expressly authorizing the State to increase its contribution to health insurance for active employees, but not retirees. The subject provision stated that, when the State and a union are parties to a CBA, "the state cost of premium or subscription charges for eligible employees covered by such agreement may be increased pursuant to the terms of such agreement and for a duration provided by such agreement." L. 1999, ch. 442, § 1 (*codified at* CSL former § 167[8]). The amendment stated that the increased contributions "shall not be applied during retirement." *Id.*

B. The CBAs

CSEA's CBAs resulted from negotiations between the State and CSEA, which represented active employees in its bargaining units. There are CBAs covering employees in the executive and judicial branches of state government. CSEA's executive-branch CBAs—the subject of the Second Circuit's certification order[2]—are negotiated on behalf of the

[2] Because the certification order limits its scope to CSEA's executive-branch CBAs, we do not address CSEA's judicial-branch CBAs or the CBAs of other unions.

State by the Governor's Office of Employee Relations (GOER). Those CBAs included the following clauses at issue in this appeal.

1. Duration clauses

Every CBA contained a duration clause, which limited the time the contract would have effect. For example, CSEA's 2007-2011 CBA provided: "The term of this Agreement shall be from April 2, 2007 to April 1, 2011." (RA710; *accord* RA652, 728, 759, 783, 805, 823, 840, 853, 991; AA417, 458, 493.)

2. Integration clauses

The CBAs were integrated agreements that superseded all prior agreements and negotiations. For example, CSEA's 2007-2011 CBA stated: "This Agreement is the entire agreement between the State and CSEA, terminates all prior agreements and understandings and concludes all collective negotiations during its term." (RA709; *accord* RA652, 757, 968, 971, 974, 977, 980-981, 984-985, 988, 991; AA438.)

3. Continued-Coverage Clause for Retirees

The CBAs provided for continued health-insurance coverage after retirement. For example, CSEA's 2007-2011 CBA stated: "Employees covered by the State Health Insurance Plan have the right to retain

health insurance after retirement upon completion of ten years of service" (the "continued-coverage clause"). (RA702; *accord* RA648, 725, 751, 776, 797, 817, 834, 848.)

Whether the CBAs' assurance of continued health-insurance coverage vested a right for retirees to maintain participation in NYSHIP indefinitely is not at issue here. For argument's sake, we assume it did. The continued-coverage clause expressly stated that "health insurance" would continue "after retirement." But "health insurance," *i.e.* coverage, is different from the premiums paid for insurance and, in turn, the State's contributions to those premiums. As shown *infra* at 43, the clause establishing premium contributions spoke only in the present tense, stating that the State "agrees to pay" the specified percentages of coverage. (*E.g.,* RA697.) Absent a promise that such agreement extended beyond the CBA's term, it ended when that term concluded. *See infra* at 29-31, 43. Thus, any assurance of ongoing coverage for retirees did not guarantee that the State would never change its contributions toward the premiums charged for coverage.

4. The 90/75 clause

The CBAs set forth the State's proportionate share of employees' health-insurance premiums. The 2007-2011 CBA stated that "[t]he State agrees to pay 90 percent of the cost of individual coverage and 75 percent of the cost of dependent coverage" provided under the Empire Plan (the "90/75 clause"). (RA697; *accord* RA644, 722, 745, 772, 793, 813.)

As shown *supra* at 6-10, the State's contributions to premiums had changed over time. In particular, for 1982-1985, CSEA's CBA provided that the State would pay 100% of premiums for individual coverage and 75% of premiums for dependent coverage. (RA845-846.) In 1982, the State and CSEA entered into a memorandum of understanding ("MOU") in which the parties agreed, among other things, to reduce from 100% to 90% the State's contribution to premiums for active employees' individual coverage. (AA591.) The MOU did not reference premiums or contributions for retirees.[3]

Consistent with the MOU, the State reduced to 90% its contribution toward premiums for active employees' individual coverage. The

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[3] The full text of the CSEA MOU may be found at RA1051-1061.

negotiated change in active employees' individual premium contributions was written into a statute, CSL § 167(1). It was reflected in CSEA's CBAs beginning with the 1985-1988 CBA (RA830) and continuing through the 2007-2011 CBA (*see* RA909-910).

In the same statutory amendment, the State on its own provided that it would contribute 90% of the premium cost for retirees who retired after January 1, 1983, and 75% of the premium cost for retirees' dependents. *See* CSL § 167(1)(a). That grant reflected "a policy determination regarding the state's contribution rate towards retiree health insurance premiums that is subject to later change at the will of the Legislature." *Matter of Retired Public Employees Ass'n v. Cuomo,* 123 A.D.3d 92, 97 (3d Dep't 2014).

Alongside the Empire Plan, NYSHIP offered alternative coverage through a health maintenance organization (HMO) option. CSEA's CBAs for 1988-1991 and 1991-1995 contained a 90/75 clause for the HMO option, providing that the State "agrees to pay 90 percent of the cost of individual coverage and 75 percent of the cost of dependent coverage under each participating HMO." (RA813, 793.) Subsequent CBAs, however, modified the State's contribution to certain HMO premiums by

capping it, after a phase-in for the 1995-1999 CBA (*see* RA772-773), at the dollar amount of the State's contribution to premiums for the Empire Plan. (*See* RA697, 722, 745.) And in 1995, the Legislature implemented that cap for *all* NYSHIP participants, including non-union members and retirees. *See* L. 1995, ch. 317 (*codified at* CSL § 167[1][b].) Thus, when HMO premiums exceeded premiums under the Empire Plan, the State's premium contributions for HMO participants, including retirees, dropped below 90% for individual coverage and 75% for dependent coverage.

5. The Dependent-Survivor Clause

The CBAs included a provision that afforded ongoing health-insurance coverage to the unremarried spouse and dependent children (together, "dependent survivors") of a deceased retiree who had ten or more years of active State service "at the same contribution rates as required of active employees for the same coverage" (the "dependent-survivor clause"). (RA702; *accord* RA648, 725, 750. 776, 796-797, 817, 834, 847.)

6. The Sick-Leave Credit

Under the 2007-2011 CBA, if an employee was "eligible to continue health insurance coverage upon retirement," that employee was "entitled to a sick leave credit to be used to defray any employee contribution toward the cost of the premium" (the "sick-leave credit"). (RA702-703.) Employees may use the sick-leave credit to "defray[] the required contribution to the monthly premium during their own lifetime," after which their dependents "may continue to be covered, but must pay the applicable dependent survivor share of the premium." (RA703.)

CSEA's CBAs have included a similar clause since the 1988-1991 CBA (*see* RA648, 725, 751-752, 776-777, 797-798, 817-818.) The 1982-1985 and 1985-1988 CBAs contained no such clause.

7. The Suspension Clause

Under CSEA's 2007-2011 CBA, an employee retiring from State service with proof of continued coverage may "delay commencement or suspend his/her retiree health coverage and the use of the employee's sick leave conversion credits indefinitely" (the "suspension clause'). (RA703.) Similar suspension clauses appear in CSEA's CBAs for 1995-1999 through 2003-2007 (RA725, 752, 777-778).

C. The Great Recession and the State's Response

New York law requires the Governor to submit and the Legislature to enact a balanced budget each year. (RA603, 914.) As a result of the Great Recession that began in 2007, the State faced budget gaps for fiscal years 2009-2010, 2010-2011, and 2011-2012 of $17.9 billion, $9.2 billion, and $10 billion, respectively. (RA603, 913-914, 926.)

In those three fiscal years, the State adopted a range of measures to close those gaps and balance the budgets. (RA603-604, 914.) For 2011-2012, the State addressed the $10 billion budget gap with a gap-closing plan that allocated savings across a variety of activities. (RA604-605, 914-917, 926.) The gap-closing plan included spending reductions of $1.5 billion from the State's agency operations. (RA604, 915, 917, 926.) Of those $1.5 billion in cuts, $450 million was to come from workforce-related cost reductions. (RA926.)

To avoid laying off nearly 9,800 employees (RA926), the Governor's office asked all state agencies, including the Department of Civil Service ("Civil Service") for proposals. (RA625.) Many proposals were discussed, including changes to NYSHIP. (RA625, 918.) One such proposal was to decrease the State's proportionate share of NYSHIP premiums. (RA625-

626, 927.) Reducing that share would lower the State's NYSHIP costs by an estimated $30 million annually, maintain the plan's benefits and overall design, and impose only a minimal additional cost on each employee and retiree. (RA626, 927.)

Two barriers stood in the way of implementing that proposal. First, the State's contribution percentages for active employees were collectively bargained and codified in CSL § 167(1). Thus, they could not be reduced without renegotiating the 90/75 clause in the CBAs and then amending the statute to implement the change. Second, contribution percentages for those who had already retired, although not collectively bargained, had been written into CSL § 167(1). The statute would therefore need to be amended before the State could reduce those contribution percentages. Each of those barriers was surmounted.

D. The State and Unions Agree on Reduced State Contributions toward Active Employees' Health-Insurance Premiums

In June 2011, the State reached a five-year labor agreement with CSEA. (RA633, 636-653.) The agreement, covering 2011-2016, included negotiated reductions in the State's proportionate share of health-insurance premiums for NYSHIP. (RA633.) For employees in grade 9 or

below, the State would pay 88% of the cost of individual coverage and 73% of the cost of dependent coverage—two percentage points less than the previous contributions of 90% and 75%, respectively. (RA644.) The State's contributions for employees in grades 10 and above were reduced a bit more, to 84% of the cost of individual coverage and 69% of the cost for dependent coverage. (RA644.)

Although CSEA's 2011-2016 CBA took effect April 2, 2011 (RA652), the reduced-contribution percentages did not take effect until October 1, 2011 (RA644).

Following the negotiations that resulted in the reduced contribution percentages, CSEA President Danny Donohue commented that "[t]hese are not ordinary times," and that the 2011-2016 CBA included "shared sacrifice" which "help[ed] produce the Labor savings that Governor Cuomo sought." (RA633.) By agreeing to the contract, the union avoided "broad layoffs" that otherwise would have been necessary to achieve workforce savings. (RA633.) Other unions followed suit and agreed to the same reduced contribution percentages.

E. The 2011 Amendment to CSL § 167

Once the unions agreed to reduce the State's proportionate share of contributions to premiums for active employees, the State needed to amend CSL § 167 both to implement those reductions and also, independently, to reduce its proportionate share of contributions for retirees.

With a bill to amend the statute pending, the Legislature requested a message of necessity from the Governor.[4] *See* Letter from J. Yates to M. Denerstein (June 22, 2011), *reprinted in* Bill Jacket for L. 2011, ch. 491, at 7. In issuing the requested message, the Governor observed that the bill "would provide for significant cost savings for the State." Message of Necessity, *reprinted in* Bill Jacket for L. 2011, ch. 491, at 5. The Governor further stated that "[w]ithout consideration and passage of this bill, the State may have no other recourse but to lay off thousands of employees in order to realize necessary cost savings." *Id.*

As amended, CSL § 167(8) provided:

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[4] The issuance by the Governor of a message of necessity allows the Legislature to vote on a measure immediately, rather than having to wait three days from when the bill is printed in final form. *See* N.Y. Const. art. III, § 14.

> Notwithstanding any inconsistent provision of law, where and to the extent that an agreement between the state and an employee organization … so provides, the state cost of premium or subscription charges for eligible employees covered by such agreement may be *modified* pursuant to the terms of such agreement. *The president [of the Civil Service Commission], with the approval of the director of the budget, may extend the modified state cost of premium or subscription charges for* employees or *retirees* not subject to an agreement referenced above and shall promulgate the necessary rules or regulations to implement this provision.

L. 2011, ch. 491, pt. A, § 2 (emphasis added) (reproduced at RA658-659 and codified at CSL § 167[8]). By changing the word "increased" to "modified," the amendment authorized the State to implement the reduced-contribution percentages negotiated for active union employees. The amendment also authorized the State to extend those reduced percentages to persons not covered by a CBA "referenced above," *i.e.*, containing the modified terms: retirees and the State's approximately 12,000 management/confidential employees. Thereafter, the contribution percentages for retirees could be changed through the process described in the statute.

Acting under the authority granted by CSL § 167(8) as amended, by letter dated September 21, 2011, Acting Civil Service Commissioner Hite sought approval from Budget Director Megna to extend to retirees

and unrepresented employees the State's modified contribution percentages provided for represented employees in CSEA's 2006-2011 CBA. (RA626, 857-858.) Megna gave his approval the following day. (RA626, 858.)

Conforming changes were made to Civil Service's regulations. *See* 4 N.Y.C.R.R. § 73.3(b). (*See* RA626, 861-863.) For retirees who left service between January 1, 1983 and January 1, 2012, the State's contribution to health-insurance premiums for individual coverage changed from 90% to 88%, while the State's contribution to health-insurance premiums for dependent coverage changed from 75% to 73%. (*See* RA861-862.) The amended regulation also changed contribution percentages prospectively for employees retiring on or after January 1, 2012: for salary grade 9 and below, the State would contribute 88% of the premium for individual coverage and 83% of the premium for dependent coverage; for salary grades 10 and above, the State would contribute 84% of the individual coverage premium and 69% of the dependent coverage premium. (RA862.) The new contribution percentages were identical to what the State negotiated for active employees with CSEA and, ultimately, the other state employee unions.

As a result of these changes, the cost of monthly health-insurance premiums for those who had already retired (other than pre-1983 retirees, who were unaffected)[5] increased by approximately $10.50 for individual coverage and approximately $28.50 for family coverage. (*See* RA1066 [reporting cost for two months].)

F. Proceedings in Federal Court

Unions, union officers, current union members, and retired union members brought eleven lawsuits in federal court challenging the State's reduced contributions to existing retirees' health-insurance premiums. Plaintiffs' complaints advanced a variety of legal theories, including impairment of contract in violation of the U.S. Constitution's Contract Clause and breach of contract under New York law. (*See* AA98-128 [complaint]; AA129-159 [amended complaint].)

Respondents moved to dismiss (RA1-4), based in part on the State's immunity under the Eleventh Amendment. The district court dismissed most of plaintiffs' claims on that ground, including (1) all claims against

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[5] By 2011, the number of pre-1983 retirees had grown "relatively small." (AA504.) Because changing the contributions for pre-1983 retirees would not yield significant cost savings, that group was not included in the revision. (AA504.)

the State and its agencies (RA407, 446); (2) all claims for monetary relief against the defendants acting in their official capacities as agents of the State (RA413-414, 446); and (3) all claims for declaratory relief regarding the State defendants' past conduct (RA413-414, 447). The court allowed claims for prospective injunctive and declaratory relief (RA414-415), and a federal contract-impairment claim against defendant Hite if the evidence showed she acted "without any authority whatsoever" under state law (RA415-416 [internal quotation marks and citation omitted]).[6]

Respondents answered the amended complaint (AA160-170), and the parties thereafter cross-moved for summary judgment. The district court granted summary judgment to defendants and denied that relief to plaintiffs. (AA634-686.) Citing the U.S. Supreme Court's decision in *Tackett*, the district court held that "the unambiguous terms of the CBAs at issue did not create a vested interest in the perpetual continuation of

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[6] Respondents continued to argue for Eleventh Amendment immunity as to other claims in a motion for reconsideration (RA1032-1033), and a motion for judgment on the pleadings (RA1046-1049). Those arguments became moot after the district court granted summary judgment to respondents on other grounds. The Eleventh Amendment's protections were not waived, as the Second Circuit erroneously speculated (*see* AA69-70 n.15).

premium contribution rates at a specific level." (AA655.) While the CBAs continued "coverage," they did not promise that the State would maintain the same percentage contributions to premiums. (AA656.) Instead, the provision affording employees the right to retain health insurance in retirement was "silent as to contribution rates." (AA658.) And CSEA's CBA contained an integration clause, which declared that the CBA constituted the "entire agreement" between the State and CSEA. (AA638-639.)

Moreover, "all of the CBAs at issue have durational limits" which, absent a separate duration clause for premium contribution percentages, governed the 90/75 clause. (AA658-659.) "The only reasonable interpretation of the unambiguous language of the CBAs is that the premium contribution rates are subject to the general durational clauses and that this obligation ceased upon the termination of each respective CBA." (AA659.) Because "any expectation of a perpetually fixed contribution rate in retirement was unreasonable based on the plain language of the CBAs" (AA660), the district court went on to find that defendants had not substantially impaired those contracts (AA661).

Appellants, along with the plaintiffs in the ten related cases, appealed to the Second Circuit. After briefing and oral argument, the Second Circuit certified two questions of New York law to this Court. (AA20-97.) This Court accepted the certified questions on December 15, 2020. (AA4.)

THE LAW ON VESTING

This case was litigated against the background of developing law in state and federal courts on when employee welfare benefits provided under a CBA "vest" and thereby become unalterable.

A. *Yard-Man* and the Ensuing Conflict Among Circuit Courts

The notion that welfare benefits, such as health-insurance coverage, may vest without express language in the CBA to that effect first gained traction in *International Union v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983). In *Yard-Man,* the Sixth Circuit concluded that an employer had breached its obligations under a CBA when it cancelled retirees' health insurance upon the CBA's termination. The court based its ruling on a series of inferences derived not from evidence, but rather from the panel's view of how health-insurance benefits should work in retirement.

The *Yard-Man* court opined that retiree health-insurance benefits, "are typically understood as a form of delayed compensation or reward for past services," and therefore viewed it as "unlikely" that such benefits would be "left to the contingencies of future negotiations." *Id.* at 1482. Further, the court wrote, if employees "forego wages now in expectation of retiree benefits, they would want assurance that once they retire they will continue to receive such benefits regardless of the bargain reached in subsequent agreements"—even "in the absence of explicit language" vesting the right. *Id.*

The court then opined that retiree health insurance benefits were "'status' benefits" that "carry with them an inference that they continue so long as the prerequisite status is maintained." *Id.* "[W]hen the parties contract for benefits which accrue upon achievement of retiree status," the court concluded, "there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree." *Id.*

Yard-Man generated severe criticism in the ensuing years. Other federal circuits did not apply the *Yard-Man* inferences, finding them inconsistent with contract law. *See, e.g., Nichols v. Alcatel USA Inc.,* 532

F.3d 364, 378 (5th Cir. 2008); *International Union v. Skinner Engine Co.,* 188 F.3d 130, 140-41 (3d Cir. 1999); *Anderson v. Alpha Portland Indus., Inc.,* 836 F.2d 1512, 1517 (8th Cir. 1988). As the Seventh Circuit observed, "a reversal of these presumptions would make better sense" because "if the union negotiated for [vesting] rights, they would surely appear in the collective bargaining agreement." *Rossetta v. Pabst Brewing Co.,* 217 F.3d 539, 543 (7th Cir. 2000).

B. The U.S. Supreme Court Resolves the Conflict by Applying Ordinary Contract Principles

The U.S. Supreme Court resolved the circuit-court conflict in *Tackett,* holding that *Yard-Man* violated ordinary principles of contract law. *M & G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 438 (2015). *Yard-Man* violated those principles "by placing a thumb on the scale in favor of vested retiree benefits" in all CBAs, a rule that "distorts" attempts to ascertain the parties' intent. *Id.* The *Yard-Man* panel's "suppositions" about what labor and management should intend were "too far removed from the context of any particular contract to be useful in discerning the parties' intention." *Id.* at 438-39.

Compounding its errors, the Sixth Circuit in *Yard-Man* and subsequent cases failed to apply the CBA's general durational clause, thereby "distort[ing] the text of the agreement." *Id.* at 440.

The Supreme Court in *Tackett* identified three principles of contract law that should guide judicial inquiry on whether CBAs vest retiree health-insurance benefits. First, "the written agreement is presumed to encompass the whole agreement of the parties." *Id.* at 440. Second, "courts should not construe ambiguous writings to create lifetime promises." *Id.* at 441. Third, "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement." *Id.* at 441-42 (internal quotation marks and citation omitted). Applying those principles, the Court held that "when a contract is silent as to the duration of retiree benefits, a court *may not infer* that the parties intended those benefits to vest for life." *Id.* at 442 (emphasis added).

The Sixth Circuit nonetheless returned to its old ways. In *Reese v. CNH Indus. N.V.*, 854 F.3d 877 (6th Cir. 2017), that court found a CBA ambiguous, "partially from [its] silence as to the parties' intentions" as to vesting, and declined to enforce the CBA's general durational clause. *Id.* at 882. The Sixth Circuit took the position that it could "find[] ambiguity

from silence" and then consider the same factors it used to infer vesting under *Yard-Man*. *See CNH Indus.*, 854 F.3d at 882-83.

The U.S. Supreme Court granted certiorari and reversed. *CNH Indus. N.V. v. Reese,* 138 S. Ct. 761, 766-67 (2018). The Court made clear that where a CBA contained a duration clause with a termination date, the CBA did not vest health benefits in retirees unless it "specified that the health care benefits were subject to a different durational clause." *Id.* at 766. The Court reiterated that "[c]ontractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement." *Id.* at 763 (internal quotation marks and citations omitted). A CBA's general duration clause thus "applied to all benefits, unless the agreement specified otherwise." *Id.* at 766. Where "[n]o provision specified that the [retiree] health care benefits were subject to a different durational clause," the general duration clause governed. *Id.*

Although the CBA in *Reese* was "silent on the question of vesting," the Court explained that if the parties had meant to vest the benefits at issue, they "easily could have said so in the text" of their CBA. *Id.* at 766. Because the parties did not say otherwise, "the only reasonable

interpretation" of the CBA was that "the [retiree] health care benefits expired when the collective-bargaining agreement expired." *Id.*

After *Reese,* even the Sixth Circuit—*Yard-Man*'s birthplace—recognized that applying ordinary contract-law principles "means *not* doing what we used to do under [*Yard-Man*] and its progeny." *International Union v. Honeywell Int'l, Inc.,* 954 F.3d 948, 954 (6th Cir. 2020) (emphasis is the court's).

C. This Court and Other State Courts Address Vesting

Before the U.S. Supreme Court clarified the law in *Tackett* and *Reese,* state courts, like the lower federal courts, were divided over the circumstances under which welfare benefits that CBAs granted to retirees could vest.

The highest courts of Washington and Wisconsin followed *Yard-Man* and applied an inference or presumption that retiree health-insurance benefits vested. *See Navlet v. Port of Seattle*, 164 Wash. 2d 818, 837-41 (2008); *Roth v. City of Glendale,* 237 Wis. 2d 173, 184-85 (2000). The highest court of Connecticut, in contrast, rejected *Yard-Man* and

declined to infer that retiree welfare benefits vested. *See Poole v. City of Waterbury,* 266 Conn. 68, 86-88 (2003).[7]

After *Tackett*, the state-law tide turned against applying the *Yard-Man* inferences. The highest courts of Michigan and Illinois followed the U.S. Supreme Court's lead and declined to infer that retiree health-insurance benefits vested. *Kendzierski v. Macomb Cty.*, 503 Mich. 296, 306-14 (2019); *Matthews v. Chicago Transit Auth.*, 51 N.E.3d 753, 768-69 (Ill. 2016).[8]

In New York, this Court first considered a claim for vested retiree health-insurance benefits in *Matter of Aeneas McDonald Police Benevolent Ass'n v. City of Geneva,* 92 N.Y.2d 326 (1998). After 24 years of furnishing health insurance to retirees, the City of Geneva had switched to a new insurer with coverage inferior to that previously offered. Although the parties' CBAs did not provide retiree health

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[7] *Accord Anderson v. Town of Smithfield,* No. C.A. PC05-3823, 2005 WL 3481627, *6-7 (R.I. Super. Dec. 20, 2005).

[8] *Accord Township of Toms River v. Fraternal Order of Police Lodge No. 156,* No. A-0827-1453, 2016 WL 1313174, *6 (N.J. App. Div. March 16, 2016).

benefits, the petitioner union contended that the City's past practice made it unlawful to reduce such benefits unilaterally. *Id.* at 329-30.

Foreshadowing *Tackett*, this Court determined that "general contract principles" must govern. *Id.* at 333. Applying those principles, this Court declined to find ambiguity because the CBAs simply did not address retiree health insurance. *Id.* And because the contracts were not ambiguous, the Court did not consider parol evidence. *Id.*

This Court again confronted a retiree health-insurance claim in *Kolbe v. Tibbetts,* 22 N.Y.3d 344 (2013). At issue in *Kolbe* was whether retirees had a vested right to retain the co-payment regime in effect when they retired. As in *Aeneas McDonald*—and *Tackett* and *Reese*—this Court held that courts must determine whether retiree benefits vest by looking to "well established principles of contract interpretation." *Id.* at 353.

One such principle, the Court stated, was that a written agreement that is "complete, clear and unambiguous on its face" must be "enforced according to the plain meaning of its terms." *Id.* (internal quotation marks and citation omitted). Another principle cited by the Court was that "[a]s a general rule, contractual rights and obligations do not survive beyond the termination of a collective bargaining agreement." *Id.*

The 1999-2003 CBA in *Kolbe* provided:

> Full-time employees who retire from the Newfane Central School District under the New York State Employees' Retirement plan shall be entitled to receive credit toward group health insurance premiums (including District contribution toward Flexible spending account) for accumulated sick leave. The amount contributed by the District shall be calculated as follows, but shall not exceed 100%.
>
> $$\frac{\text{\# Unused Sick} \times 100}{205} = \text{Percent of Contribution paid by the District } \textit{until the employee reaches age 70}$$
>
> Notwithstanding the foregoing, full-time employees who work less than 1950 hours per year shall have this benefit pro-rated by an amount equal to their annual hours divided by 1950.
>
> In the event of the retiree's death, this benefit shall transfer to the surviving spouse. *The coverage provided shall be the coverage which is in effect for the unit at such time as the employee retires.*

Kolbe v. Tibbetts, No. APL-2013-00035, Record on Appeal at 244-245 (emphasis added).

Looking to the CBA's "plain meaning," the *Kolbe* Court found that the CBA "unambiguously establishe[d]" a vested right to coverage until the retirees reached age 70. *Kolbe,* 22 N.Y.3d at 353. The Court based its conclusion in part on the CBA's specific "durational language" ("until the employee reaches age 70"). *Id.*

The Court treated the plaintiff retirees' claimed right to a fixed co-payment regime differently, however, explaining that the amount of a co-payment is a feature of the *scope* of coverage. *Id.* at 354. And on the question whether the CBA vested a right to coverage with a particular scope, the Court held that the CBA was sufficiently ambiguous to warrant remittal for the consideration of extrinsic evidence. *Id.* at 355-56. The Court did not find ambiguity in silence. Rather, the Court found that, by providing retirees with the same "coverage," the CBAs were ambiguous on the question whether that coverage included co-pays, a point that warranted further factual development, *id.* at 355-56. The *Kolbe* Court thus concluded that it had "no need … to rule on whether New York applies an inference of vesting for retiree health insurance rights." *Kolbe,* 22 N.Y.3d at 354 (citing *Yard-Man*).

The Appellate Division, Third Department, appears to have applied such an inference, however. The Third Department has stated that when retirees are granted benefits, it is "logical to assume that the bargaining unit intended to insulate retirees from losing important insurance rights during subsequent negotiations." *Della Rocco v. City of Schenectady*, 252

A.D.2d 82, 84 (3d Dep't 1998), *lv. dismissed*, 93 N.Y.2d 999, 1000 (1999);[9] *accord Matter of Evans v. Deposit Central Sch. Dist.,* 183 A.D.3d 1081, 1083 (3d Dep't 2020); *Matter of Warner v. Bd. of Educ.,* 108 A.D.3d 835, 837 (3d Dep't 2013), *lv. denied,* 22 N.Y.3d 859 (2014); *Myers v. City of Schenectady,* 244 A.D.2d 845, 847 (3d Dep't 1997). The Fourth Department has followed suit. *Guerrucci v. School Dist. of City of Niagara Falls,* 126 A.D.3d 1498, 1499-1500 (4th Dep't), *lv. dismissed*, 25 N.Y.3d 1194 (2015).

In contrast, the Appellate Division, Second Department, recently followed *Tackett* in *Village of Old Brookville v. Village of Muttontown,* 179 A.D.3d 972 (2d Dep't 2020). Rejecting a claim that paid retiree health insurance vested, the Second Department explained that "courts should not construe ambiguous writings to create lifetime promises," and that "when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life." *Id.* at 975 (quoting *Tackett*).

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[9] While *Kolbe* cited *Della Rocco,* it did so only while summarizing the plaintiffs' arguments. *See Kolbe*, 22 N.Y.3d at 354-55.

ARGUMENT

POINT I

THE CBAS DID NOT VEST RETIREES WITH A RIGHT TO KEEP THE STATE'S SHARE OF CONTRIBUTIONS TO HEALTH-INSURANCE PREMIUMS UNCHANGED

Both branches of the first certified question should be answered in the negative. The CBA clauses listed in the Second Circuit's order did not, either individually or collectively, vest with retirees a right to receive indefinitely the same State percentage contribution to health-insurance premiums. The subject clauses did not even create ambiguity on the issue warranting consideration of extrinsic evidence. On the question whether retiree contribution percentages vest, the CBAs are silent rather than ambiguous. In light of that silence, the parol-evidence rule and the CBAs' integration clauses bar the consideration of extrinsic evidence. Finally, this Court should reject appellants' invitation to depart from ordinary principles of contract interpretation by implying vesting terms in contracts that do not expressly vest benefits.

A. The CBA Clauses Identified by the Second Circuit Do Not, Individually or Collectively, Vest the Percentage of Premiums the State Must Contribute.

The Second Circuit asked whether five clauses from CSEA's 2007-2011 CBA, "singly or in combination," create a vested right in retirees to have the State's contribution to their health-insurance premiums remain unchanged during their lifetimes. The answer is "no."

1. The Continued-Coverage Clause for Retirees Did Not Vest Contribution Rates.

The continued-coverage clause gave employees "the right to retain health insurance after retirement upon completion of ten years of service." (*See, e.g.,* RA702.) Even assuming that the provision vested a right, the provision by its terms addressed only the availability of *health insurance* under NYSHIP. It did not address the State's contribution to the *premiums* charged for that insurance, let alone vest a right to a particular contribution percentage.

"Health insurance" and "premiums" are two different things. "Insurance" is "a contract by which one party (the insurer) undertakes to indemnify another party (the insured) against risk of loss, damage, or liability arising from the occurrence of some specified contingency." Black's Law Dictionary 953 (11th ed. 2019). "Health Insurance" is

"[i]nsurance covering medical expenses resulting from sickness or injury." *Id.* at 956.

Premiums are different; they are the *price charged* for health insurance. "An insured party usu[ally] pays a premium to the insurer in exchange for the insurer's assumption of the insured's risk." *Id.* at 953. Thus, a "premium" is "[t]he amount paid at designated intervals for insurance." Black's Law Dictionary 1430 (11th ed. 2019). *Accord* National Ass'n of Insurance Commissioners, Glossary of Insurance Terms, *available at* https://content.naic.org/consumer_glossary.htm (last visited May 18, 2021) (defining "premium" as "[m]oney charged for the insurance coverage reflecting expectation of loss"). Premiums may increase or decrease even though the coverage purchased remains the same.

The CBAs elsewhere distinguished health insurance (sometimes also referred to in the CBAs as "health insurance coverage"[10]) from premiums. The sick leave credit gave employees who were "eligible to

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[10] CSEA's CBAs use these terms synonymously. *Compare, e.g.,* RA702 ("health insurance" in 2007-2011 CBA) *with* RA834 ("health insurance coverage" in 1985-1988 CBA); *see also, e.g.,* RA702-703 (applying sick leave credit to employees who are "eligible to continue health insurance coverage upon retirement").

continue health insurance coverage upon retirement" a credit against "any employee contribution toward the cost of the premium." (RA702-703.) The 90/75 clause provided that the State would pay "90 percent of the *cost of* individual coverage and 75 percent of the *cost of* dependent coverage." (*E.g.,* RA__ [CSEA J.A.918] [emphasis added].) The dependent-survivor clause similarly permitted eligible dependents "to continue *coverage in the health insurance program* with *payment at the same contribution rates* as required of active employees for the same *coverage*." (*E.g.,* RA__ [CSEA JA 923] [emphasis added].)

This Court has also recognized that insurance coverage and premiums are different things. For example, the Court held that use of the word "annual" to describe the frequency of premium payments did not create ambiguity as to the duration of coverage. *Goldman v. Metro. Life Ins. Co.,* 5 N.Y.3d 561, 571 (2005). In a later case, the Court observed that uninsured motorist "coverage … is part of the insured's own policy—a policy that the insured selected and for which he pays premiums." *State Farm Mut. Auto Ins. Co. v. Langan,* 16 N.Y.3d 349, 356 (2011). And in *Health Insurance Assoc. v. Harnett*, 44 N.Y.2d 302 (1978), the Court sustained a statute requiring insurers to cover maternity expenses,

despite plaintiffs' argument that "the inclusion of maternity coverage in health insurance policies" would bring about "increases in premiums." *Id.* at 311.

Kolbe's conclusion that the term "coverage" was ambiguous, *see* 22 N.Y.3d at 354-56, does not make the term "health insurance" ambiguous here. The issue in *Kolbe* was whether defendants breached the parties' CBAs by increasing co-pays, which the Court explained was an aspect of the "scope" of plaintiffs' right to coverage. *Id.* at 354. A copayment is "[a] fixed amount that a patient pays to a healthcare provider according to the terms of the patient's health plan." Black's Law Dictionary 423 (11th ed. 2019); *accord* Harvey Rubin, Barron's Dictionary of Insurance Terms 109 (5th ed. 2008) (defining "copayment" as "partial payment of medical service expenses required in group health insurance"). Copayments are thus features of the insurance coverage provided by a plan.

The State's contributions to premiums, in contrast, are relevant to the *cost* of coverage. Indeed, *Kolbe*'s finding that the parties may have vested "coverage" without vesting a right to a fixed co-payment supports defendants' position that contracts may vest insurance coverage while not vesting premium contributions. Despite the Second Circuit's

speculation to the contrary (AA59 n.12), the availability of coverage and the cost of that coverage are two different things and are not even necessarily related. Anyone who purchases insurance knows that premiums can increase while coverage remains the same. The State's contributions to the cost of coverage are yet a further step removed from the availability of coverage.

Finally, the continued-coverage clauses of CSEA's earlier CBAs show that the parties intended and expected that premium contribution levels for retirees could change. In the CBAs for 1991-1995, 1995-1999, and 1999-2003, immediately following the grant of a "right to retain health insurance after retirement," the parties stated that they "recognize the need to address the inequity of providing employees who serve the minimum amount of time necessary for health insurance in retirement with the same benefits as career employees." (RA751, 776, 797.) Consequently, the CBAs provided that "[p]rior to the expiration of this contract CSEA and the State shall, through the Joint Committee

process, develop a proposal to modify the manner in which employer contributions to retiree premiums are calculated."[11] (RA751, 776, 797.)

2. The 90/75 Clause Did Not Vest Contribution Rates.

The 90/75 clause, which provided that "[t]he State agrees to pay 90 percent of the cost of individual coverage and 75 percent of the cost of dependent coverage" under the Empire Plan (*e.g.*, RA697), did not vest retirees with the right to receive those contribution percentages in perpetuity.

The 90/75 clause contained no vesting language. It did not say or suggest that the contribution percentages would continue upon the CBAs' expiration. To the contrary, the clause stated that the State "agrees"—present tense—to pay 90% and 75% of the participants' and dependents' respective premium costs. (RA697.) And the CBA's duration clause provided that "[t]he term of this Agreement shall be from April 2, 2007 to April 1, 2011" (RA710), or whatever effective dates were chosen in prior CBAs (*see supra* at 11 and record excerpts cited).

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[11] The joint committee process ultimately did not result in a change to the calculation of premium contributions.

CSEA's CBAs did not provide a "right to retain" those contribution percentages upon retirement, as they did with coverage. (*See, e.g.,* RA702; *see supra* at 11-12.) And unlike the language that *Kolbe* found sufficient to create ambiguity as to vesting, CSEA's CBAs nowhere specify that retirees' premium contributions must be the same as those "in effect for the unit at such time as the employee retires." *See Kolbe*, 22 N.Y.3d at 354-55. Because the CBAs at issue are integrated agreements, no such term should be implied.

In 2011, the CBAs reduced the State's contributions for active employees, which had been set forth in the 90/75 clause. Because the parties agreed to reduce the State's contributions for active employees, they obviously did not regard the active employees' contribution rates as having vested. Indeed, if those rates had vested, the State and CSEA could not, by a majority vote of union members, have divested the rates of the rest of its union members. *See Allied Chemical & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 181 n.20 (1971); *see also Steele v. Louisville & N. R. Co.,* 323 U.S. 192, 203 (1944) (union could not use power as bargaining representative to discriminate against members based on race). The very same 90/75 clause, containing the very

same language (with no mention of retirees), cannot have vested the contribution percentages for retirees while leaving the active employees' contributions subject to change.

Rather, as appellants correctly recognize (Br. at 33), the 90/75 clause applies only to employees.[12] Retirees' contribution rates are instead governed by CSL § 167. To answer the question posed by appellants (Br. at 33-34), language concerning the 90% and 75% contribution rates remained in CSEA's 2011-2016 CBA (RA644) to govern the six-month period between April 2, 2011, when the 2011-2016 CBA took effect (RA652), and October 1, 2011, when the new rates became effective (RA644).

The State had once before authorized a decrease in the percentage of premiums it contributed for retirees, notwithstanding the 90/75 clause. For the HMO option, the 1988-1991 and 1991-1995 CBAs contained 90/75 clauses that mirrored those applicable to the Empire Plan. (RA793, 813.)

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[12] The language in the 2011-2016 CBA establishing the new contribution rates mentions "employees" specifically because, for the first time, the State's contributions would not be uniform, but would vary with an employee's salary grade. (*See* RA644.) In contrast, the CBA for security supervisors, who were all at the same level, did not mention "employees." (*See* RA1094.)

The State then negotiated modifications to those provisions that, after a phase-in (RA772-773), capped the State's contribution to certain HMO premiums at the dollar amount of the State's contributions to premiums for the Empire Plan (*see* RA697, 722, 745). The Legislature implemented that cap for *all* NYSHIP participants, including non-union members and retirees. *See* L. 1995, ch. 317 (*codified at* CSL § 167[1][b].) And HMO premiums have indeed increased more than Empire Plan premiums, with the result that the State's contributions to those HMO premiums have since amounted to less than 90% of individual premiums and 75% of family premiums for retirees in the HMO option.

3. The Dependent-Survivor Clause Did Not Vest Contribution Rates.

Appellants' vesting argument receives no assistance from the CBA clause providing that dependent survivors of a qualifying deceased retiree were "permitted to continue coverage in the health insurance program with payment at the same contribution rates as required of active employees for the same coverage." (*E.g.,* RA702.)

The dependent-survivor clause nowhere vested retirees with a right to retain in perpetuity the same share of premium contributions. The clause did not fix any specific share of premiums, but rather incorporated

by reference whatever contribution percentage might be "required of" active employees. The contributions required of active employees were not vested and could change from contract to contract, as they did in 2011. (*See* RA633, 644.)

Nor does the dependent-survivor clause create ambiguity as to whether retirees' contributions vested. To the contrary, the dependent-survivor clause demonstrates that, when the parties wished to address contribution percentages, they did so expressly—in this case, by linking dependent survivors' premium contributions to those of active employees. If the parties had intended to vest the 90/75 contribution percentages for retiree health insurance, the CBAs would have specified those rates and said they would remain unchanged for the remainder of the retirees' lives. The CBAs, however, said nothing of the kind.

Further, the dependent-survivor clause affected only dependent survivors, not the retirees themselves. As the Second Circuit has explained, a "promise to the surviving spouses does not require lifetime benefits for the Retirees, and does not constitute affirmative language that could reasonably be interpreted as creating a promise to vest the Retirees' benefits." *Bouboulis v. Transport Workers Union,* 442 F.3d 55,

62-63 (2d Cir. 2006); *accord Fletcher v. Honeywell Int'l, Inc.,* 892 F.3d 217, 225 (6th Cir. 2018) (because CBA "explicitly provide[d] for lifetime benefits for surviving spouses and dependents only," retirees could not "claim a contractual right to such benefits").

The requirement that retirees accumulate 10 years of service before their dependent survivors could receive benefits (*see, e.g.,* RA702) was not a vesting provision; rather, it was an eligibility criterion for the award of benefits. Civil Service regulations identify the 10-year threshold as such. *See* 4 N.Y.C.R.R. § 73.2(b)(3) (under general heading "Eligibility"). The CBAs referred to the 10 years as "benefits eligible service" (*e.g.*, RA702) and afforded sick-leave credits to employees who were "eligible to continue health insurance coverage upon retirement" (*e.g.,* RA702-703). *See also* 4 N.Y.C.R.R. § 73.1(e) (NYSHIP coverage of retirees continues "under the eligibility privileges of the plan"). Such a clause "simply defines a category of people *eligible* to receive benefits; it says nothing about the *duration* for which those benefits will last." *Barton v. Constellium Rolled Products-Ravenswood, LLC,* 856 F.3d 348, 355-56 (4th Cir. 2017) (emphasis in original).

The fact that the contribution rates for dependent survivors did not change in 2011 (*see* Br. at 23, 32-33) similarly does not aid appellants' cause. The State had the right to contribute a greater share than that required by contract. The CBAs provided a floor, not a ceiling, for benefits. For dependent survivors, the State continued the 90/75 contributions partly as a matter of administrative convenience, grouping all post-1979 retirees' dependent survivors together, regardless of whether a particular retiree's union had agreed to a new CBA that modified the rates for active employees (a process that in some cases took years). The State also exercised its discretion to continue the 90/75 contribution rates for dependent survivors to provide economic assistance for this small, economically vulnerable population.

4. The Sick-Leave Credit Did Not Vest Contribution Rates.

The entitlement to a sick-leave credit against premiums did not vest the respective percentages of premiums contributed by retirees and the State. The value of unexhausted sick leave to a retiree would be the same, regardless of whether the retiree was responsible for 10% or 12% of health-insurance premiums. Consequently, the sick-leave clause did

not address the respective shares that the State and retiree would contribute to premiums.

To be sure, if employees became eligible to continue health-insurance coverage (*i.e.,* accumulated 10 years of service), the CBAs made the sick-leave credit available to them "during their own lifetime." (*E.g.,* RA703.) That availability is consistent with the notion that, under the continued-coverage clause, employees with 10 years of service have a right "to retain health insurance after retirement" (*see, e.g.,* RA702).

Nothing in the provision implies a right to retain contribution rates, however. The clause providing sick-leave credit did not address *what percentage* of premiums retirees must contribute. Rather, the sick-leave credit could be used to offset "*any* employee contribution," whatever "the required contribution" may be at the time. (*E.g.*, RA702-703 [emphasis added].) And the right to retain a particular contribution rate should not be inferred from silence.

Indeed, the clause's provision allowing retirees to use sick-leave credits to defray premium costs "during their own lifetime" shows the drafters knew how to provide "lifetime" rights. The fact that sick-leave credits expressly endure for life, while the 90/75 contribution rates do

not, is evidence that the 90/75 contribution rates were not intended to vest. "[W]e must assume that the explicit guarantee of lifetime benefits in some provisions and not others means something." *Gallo v. Moen, Inc.*, 813 F.3d 265, 270 (6th Cir. 2016); *accord Fletcher*, 892 F.3d at 224.

5. The Suspension Clause Did Not Vest Contribution Rates.

The suspension clause, which allowed a retiree to "delay commencement or suspend his/her retiree health coverage and the use of the employee's sick leave conversion credits indefinitely" (RA703), did not vest the State's contribution percentages.[13] In fact, the suspension clause did not address premiums or contribution percentages at all—only "coverage." *See supra* at 39-42 & n.10. Premiums have increased regularly for retirees as well as active employees. (*See* RA1108 ¶19, 1110 ¶20.) Had the parties also intended to empower retirees to maintain the same premium contribution rates indefinitely, they could and would have said so.

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[13] Appellants did not cite the suspension clause in their briefs to the Second Circuit.

B. The Clauses Cited by the Second Circuit Do Not Create Ambiguity that Would Allow Introduction of Extrinsic Evidence.

If, as shown above, the clauses cited by the Second Circuit do not vest in retirees a right to freeze the State's percentage contributions to their health-insurance premiums, the Second Circuit asked whether the clauses create sufficient ambiguity on that issue to permit the consideration of extrinsic evidence regarding vesting. The answer again is "no." The CBAs were integrated contracts, each of which contained the parties' "entire agreement." The CBAs nowhere set forth a vested right to retain the same level of State premium contributions for the rest of the retirees' lives. To infer vesting from silence would impermissibly add a material term to those integrated agreements.

1. The CBAs are Integrated Contracts that Contain the Parties' Entire Agreement.

Each CBA negotiated by CSEA contained an express integration clause declaring that the CBA constituted the parties' "entire agreement" and "terminate[d] all prior agreements and understandings" between the parties. (*E.g.,* RA709.) When a written contract contains the parties' entire agreement, a party cannot use extrinsic evidence to add new provisions. *See W.W.W. Assoc. v. Giancontieri,* 77 N.Y.2d 157, 162 (1990);

Fogelson v. Rackfay Constr. Co., 300 N.Y. 334, 338 (1950). If a term is not found within the four corners of an integrated contract, that is because the parties did not agree to include it. *See Wallace v. 600 Partners Co.,* 86 N.Y.2d 543, 548 (1995).

If this Court were to declare that the CBAs vest perpetually the State's level of contributions to retiree health-insurance premiums, that would add a new, material obligation to the integrated contracts that CSEA and the State negotiated. Had the parties intended the contribution percentages to vest in perpetuity, "they easily could have included a provision to that effect." *Schron v. Troutman Sanders LLP,* 20 N.Y.3d 430, 437 (2013); *accord Reese,* 138 S. Ct. at 766. Drafting a vesting provision is simple: the parties need only state that the contribution rates in the CBA cannot be changed after retirement.

The parties, however, said no such thing. "Such a fundamental condition would hardly have been omitted." *Braten v. Bankers Trust Co.,* 60 N.Y.2d 155, 163 (1983), *rearg. denied,* 61 N.Y.2d 670 (1983). A term that forever ties the State's hands on contribution percentages "is not the sort of term these sophisticated, counseled parties would have reasonably

left out." *Fundamental Long Term Care Holdings, LLC v. Cammeby's Funding LLC,* 20 N.Y.3d 438, 445 (2013).

2. Appellants' Extrinsic Evidence Should Not Be Considered.

Appellants improperly rely on extrinsic evidence, including memoranda evidencing the parties' positions in negotiations and the opinions of CSEA's negotiator Ross Hanna, to create ambiguity in the CBAs (*see* Br. at 15-23, 29, 34-36). Extrinsic evidence should not be considered.

"[W]hen parties set down their agreement in a clear, complete document," any "[e]vidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing." *W.W.W. Assocs.,* 77 N.Y.2d at 162. The parol-evidence rule "operates to exclude evidence of all prior or contemporaneous negotiations between the parties offered to contradict or modify the terms of their writing." *Marine Midland Bank-Southern v. Thurlow,* 53 N.Y.2d 381, 387 (1981).

When interpreting an integrated contract, extrinsic evidence "is not admissible to create an ambiguity." *WWW Assocs.,* 77 N.Y.2d at 163 (internal quotation marks and citation omitted); *accord Madison Ave.*

Leasehold, LLC v. Madison Bentley Assocs. LLC, 8 N.Y.3d 59, 66 (2006), *rearg. denied*, 8 N.Y.3d 867 (2007). Rather, "the question of whether an ambiguity exists must be ascertained from the face of an agreement without regard to extrinsic evidence." *Reiss v. Financial Performance Corp.,* 97 N.Y.2d 195, 199 (2001) (internal quotation marks and citation omitted); *accord South Road Assocs., LLC v. IBM Corp.,* 4 N.Y.3d 272, 278 (2005).

The Second Circuit thus correctly framed its first question as whether the five contract clauses it cited created sufficient ambiguity to "permit the consideration of extrinsic evidence." (AA95.) Unless the written document is ambiguous in the first place, extrinsic evidence cannot be considered.

Even apart from the parol-evidence rule and basic contract law cited above, appellants' four forms of extrinsic evidence should be disregarded.

1. ***Past practice.*** Appellants' assertion that the State's "practice" of providing 90/75 contributions to retiree health-insurance premiums "remained unchanged for nearly thirty years" (Br. at 35) is incorrect. As shown *supra* at 14-15 and 45-46, contributions for the HMO option were

capped by statute, and the percentages thereby reduced for some retirees, beginning in 1995. The fact that 90/75 contributions remained in effect for Empire Plan participants during the same period is unsurprising, because those contribution rates continued to be mandated by statute. *See* CSL § 167(1)(a). The State changed its contribution rates only after the statute was amended. *See* CSL § 167(8). Further, under *Aeneas McDonald,* past practice cannot "create a contractual right" without an "express source" in the CBA. *Aeneas McDonald,* 92 N.Y.2d at 333.

2. ***Rejected proposals.*** The State's proposals to change the premium contribution rate for retirees (Br. at 19-22, 34-36) were rejected by CSEA (AA267-268), and retiree premium contributions therefore were not bargained into the CBAs. The State's efforts to obtain union buy-in on proposals to place retiree contributions on a sliding scale reflected the State's politically wise preference to proceed by consensus; they did not delineate the extent of the State's power.

3. ***Unexpressed subjective intent.*** Hanna's "understanding" of the parties' agreement (Br. at 22, 34) constitutes "[u]ncommunicated subjective intent" insufficient to create a factual issue as to the contract's meaning. *See Wells v. Shearson Lehman/American Exp., Inc.*, 72 N.Y.2d

11, 24 (1988), *rearg. denied*, 72 N.Y.2d 953 (1988); *accord Commonwealth of Pa. Public School Employees' Retirement Sys. v. Morgan Stanley & Co.,* 25 N.Y.3d 543, 551 (2015); *Property Asset Mgmt., Inc. v. Chicago Title Ins. Co.,* 173 F.3d 84, 87 (2d Cir. 1999) (applying New York law).

4. ***The MOU.*** The 1982 MOU (*see* Br. at 13) affected only active employees and did not mention retirees (*see* RA1051-1061). Moreover, the MOU was extinguished by the integration clauses in subsequent CBAs, each of which "terminate[d] all prior agreements and understandings." (RA971.)

The Court in any event should decline appellants' invitation (Br. at 30, 35-36, 54) to proceed to weigh the proffered extrinsic evidence and resolve any contractual ambiguities in their favor. The Second Circuit has asked this Court whether certain clauses "create sufficient ambiguity" to "permit the consideration of extrinsic evidence." (AA95.) It did not ask the Court to resolve such ambiguities, let alone do so based solely on one side's extrinsic evidence. If this Court finds that the CBAs are ambiguous as to whether contribution percentages vest, that should end its response to the first question. The Second Circuit will then decide the effect of the ambiguity. If the ambiguity is material, the outcome may

be a trial in which each side presents extrinsic evidence.[14] But this Court should not resolve an ambiguity based on appellants' evidence alone.

C. New York Should Not Adopt the Discredited *Yard-Man* Inferences.

Appellants urge the Court (Br. at 36-48) to infer a vested right to premium contribution levels based on *Yard-Man*, a nearly 40-year-old case from an intermediate federal appellate court that the U.S. Supreme Court has expressly repudiated not once, but twice. In *Kolbe,* this Court declined to consider whether to adopt the *Yard-Man* inferences. *Kolbe,* 22 N.Y.3d at 354. This Court today should reject the inferences used in *Yard-Man* and its progeny.

1. *Yard-Man* Conflicts with the Well-Established Contract Principles Applied by this Court.

This Court in *Kolbe* analyzed vesting by looking to "well established principles of contract interpretation." *Id.* at 353. It recognized the "general rule" that "contractual rights and obligations do not survive beyond the termination of a collective bargaining agreement." *Id.* And it

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[14] Appellants' attacks on the weight of respondents' extrinsic evidence (Br. at 35) are matters for the trier of fact, if the Second Circuit ultimately finds a trial is necessary.

found that certain benefits vested because the contract included an express "durational provision" that continued their effect until the employees reached aged 70. *Id.* at 353-54. In *Aeneas McDonald,* where there was no such provision, this Court declined to infer vesting from extrinsic evidence of past practice. 92 N.Y.2d at 333.

Those holdings are consistent with the U.S. Supreme Court's teachings in *Tackett* and *Reese* that (1) CBAs should be interpreted using ordinary principles of contract law, *Tackett,* 574 U.S. at 435; *Reese,* 138 S. Ct. at 763, 766; (2) contractual obligations ordinarily cease when a CBA's term ends, *Tackett,* 574 U.S. at 441-42; *Reese,* 138 S. Ct. at 763; and (3) courts "may not infer" vesting when a CBA is silent on the question, *Tackett,* 574 U.S. at 442; *Reese,* 138 S. Ct at 766.

The holdings in *Kolbe* are also consistent with this Court's other decisions holding that "where a contract was negotiated between sophisticated, counseled business people negotiating at arm's length, courts should be especially reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include." *2138747 Ontario, Inc. v. Samsung C&T Corp.,* 31 N.Y.3d 372, 381 (2018) (internal quotation marks and citation omitted);

accord Skanska USA Building Inc. v. Atlantic Yards B2 Owner, LLC, 31 N.Y.3d 1002, 1006 (2018), *rearg. denied,* 31 N.Y.3d 1141 (2018).

Inferring or implying a new vesting term applicable to the retirees' premium contributions, when the contract does not provide for vesting expressly, would violate this Court's well-established rule that "courts may not fashion a new contract under the guise of contract construction." *Slatt v. Slatt,* 64 N.Y.2d 966, 967 (1985), *rearg. denied,* 65 N.Y.2d 785 (1985); *accord Morlee Sales Corp. v. Mfrs. Trust Co.,* 9 N.Y.2d 16, 19-20 (1961) (courts "may not by construction add or excise" contract terms).

The new term, moreover, would be material. By 2030, all baby boomers will be older than 65, so that one in every five U.S. residents will be retirement age.[15] By 2034, older people will outnumber children under 18 for the first time in U.S. history.[16] The health-care costs for that population are immense and increase daily.

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[15] U.S. Census Bureau, "Older People Projected to Outnumber Children for First Time in U.S. History" (last rev'd Oct. 8, 2019), *available at* https://www.census.gov/newsroom/press-releases/2018/cb18-41-population-projections.html (last visited May 18, 2021).

[16] *Id.*

How to meet the medical needs of the retiree population is a policy question that is being actively discussed at both the federal and state levels. By following *Yard-Man,* this Court would write its own policy into New York's labor contracts by "placing a thumb on the scale in favor of vested retiree benefits." *Tackett*, 574 U.S. at 438. The judicial thumb would confer on CSEA's retirees a benefit that the State never agreed to place in those contracts: a requirement to continue paying in perpetuity 90% of retirees' health-insurance premiums and 75% of their dependents' premiums. That judicially-imposed term could force the State to carry burdensome economic obligations.

As the Connecticut Supreme Court observed, "courts should not impose lightly an indefinite financial obligation when, unlike with pension plans, the employer lacks the ability to predict or control costs." *Poole,* 266 Conn. at 86. The *Yard-Man* inferences are particularly inappropriate when applied to the State, which "must ensure its fiscal integrity to provide not only benefits for past and future employees, but also necessary services to its residents." *Id.*

2. Retiree Health Insurance Is Not Deferred Compensation.

Appellants err in characterizing the State's contributions to retiree health-insurance premiums as a form of deferred compensation (Br. at 5, 42-43, 46, 51-52).[17] It would make no sense to treat the State's premium contributions as deferred compensation for vesting purposes.

The term "deferred compensation" refers to "[p]ayment for work performed, to be paid in the future or when some future event occurs." Black's Law Dictionary 354 (11th ed. 2019). The State's contributions to retiree health-insurance premiums, in contrast, are not related to the type or amount of work the retirees performed. Rather, the value of the State's contributions will depend on how long a particular retiree or the retiree's qualifying survivors receive those contributions. For example, an employee who worked for 40 years, lived only a day after retirement, and had no qualifying survivors would receive virtually no contributions during retirement, while an employee who worked only 10 years before retiring and lived 30 years thereafter would receive substantial

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[17] New York State already has a deferred-compensation plan, and it does not provide for the contributions at issue. *See* State Finance Law § 5.

contributions as a retiree. Analogously, this Court has ruled that contributions toward judges' health insurance premiums were not judicial "compensation" within the meaning of the New York Constitution. *Bransten v. State,* 30 N.Y.3d 434, 440-43 (2017).

To be sure, the State would not contribute to a retiree's health-insurance premiums unless the retiree had worked in State service for 10 years. But that fact does not turn the contributions into deferred compensation. As shown *supra* at 48, the 10-year threshold was an eligibility criterion for contributions.

In any event, deferred compensation does not necessarily vest. *See, e.g., Morris v. Schroder Capital Mgmt. Int'l,* 7 N.Y.3d 616, 619 (2006) (deferred compensation award did not vest for three years and could be forfeited); *Burns v. Burns,* 84 N.Y.2d 369, 376 (1994) (nonvested pension may be deferred compensation). The Public Employment Relations Board ("PERB") cases cited by appellants did not undertake a vesting analysis; instead, PERB treated retiree health-insurance expenses as a form of deferred compensation for the purpose of making it a mandatory subject

of negotiation. *See Matter of CSEA v. Yonkers City Sch. Dist.,* 45 PERB ¶ 3039 (2012).[18]

3. State Labor Law Does Not Require an Inference that the Parties Agreed to Vest the State's Contribution Rates.

A central policy of New York labor law is that public employers and public-employee unions should "negotiate … and enter into written agreements." CSL § 200. As a corollary of that principle, courts should not rewrite the parties' written contracts to add new terms. "The bargain, having been struck, must now be honored." *Binghamton Civ. Serv. Forum v. City of Binghamton*, 44 N.Y.2d 23, 30 (1978).[19]

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[18] The U.S. Supreme Court held in *Tackett* that, for vesting purposes, "[r]etiree health care benefits are not a form of deferred compensation." 574 U.S. at 440; *see also Reese*, 138 S. Ct. at 764 (reiterating this point). Although the Supreme Court was applying the federal Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1002(1)(A), (2)(A)(ii), the highest court of at least one other state has extended *Tackett*'s reasoning to non-ERISA government plans. *See Kendzierski,* 931 N.W.2d at 609 n.4, 611 & n.8; *see also Serafino v. City of Hamtramck,* 707 F. App'x 345, 352 (6th Cir. 2017) (observing that Michigan courts have endorsed *Tackett*'s reasoning in both private and public-sector contexts).

[19] *See, e.g., Matter of City of Rochester v. Rochester Police Locust Club,* 133 A.D.3d 1357, 1358 (4th Dep't 2015) (arbitrator may not rewrite contract by adding new clause based on past practices); *Matter of Local 2841 v. City of Albany,* 53 A.D.3d 974, 975-76 (3d Dep't 2008) (arbitrator

Appellants argue that vesting should be inferred because retiree health insurance is a mandatory subject of negotiation for current employees and non-mandatory for retirees (Br. at 5, 45-48). But the status of retiree health insurance as a potentially bargained item does not mean the 90/75 contribution rates are vested for retirees; it simply establishes that the parties may make such a bargain if they choose. To determine whether the parties *did* make that bargain, one must examine the written CBAs that constitute their "entire agreement" (*e.g.,* RA709).

The State bargained with CSEA when required.[20] For active employees, the State and CSEA agreed to the premium-contribution changes. (*See* RA633-634.) If the parties had reached an agreement to vest the State's contribution rates for retirees, that term would have been bargained and reflected in the CBAs. But as the Second Circuit observed, the CBAs "do not provide for [contribution-rate] vesting in explicit terms"

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exceeded power by granting benefit not contained in CBA); *N.Y.C. Transit Auth. v. Patrolmen's Benev. Ass'n,* 129 A.D.2d 708, 708 (2d Dep't) (arbitrator may not make past practices "an implied part of the contract"), *app. dismissed,* 70 N.Y.2d 719 (1987).

[20] If the State had failed or refused to bargain when required, PERB would have had "exclusive nondelegable jurisdiction" over such a claim. CSL §§ 205(5)(d), 209-a(1)(d). No such claim was brought before PERB.

and "do not expressly specify the duration" of the obligation to pay 90/75 contributions toward retiree health insurance premiums. (AA33, 56.) Instead, the retirees' contribution rates were set by statute in CSL § 167(1), which the Legislature amended by enacting CSL § 167(8) in 2011. The 2011 amendment authorized a change in those statutory rates.

POINT II

THE 2011 AMENDMENT TO CSL § 167(8) DID NOT EXTINGUISH STATE-LAW REMEDIES FOR BREACH OF CONTRACT

The answer to the second certified question is "no": the 2011 amendment to CSL § 167(8) did not "preclude" state-law remedies for breach of contract. The Legislature had no reason to think it was violating a contractual right and thus it took no action to foreclose a state-court remedy for the violation of a contractual right.

In the Court of Claims Act, New York waived its sovereign immunity from liability for breach of contract, provided that the litigant strictly complies with the Act's requirements. *See* N.Y. Court of Claims Act § 8; *accord id.* § 9(2). *See generally Kolnacki v. State,* 8 N.Y.3d 277, 281 (2007) (requirements in Court of Claims Act § 11[b] are substantive

conditions on State's waiver of sovereign immunity), *rearg. denied,* 8 N.Y.3d 994 (2007).

If the Legislature intends in an enactment to restrict historic statutory rights to sue, "we would expect to see evidence of such intent within the statute." *ABN AMRO Bank, N.V. v. MBIA Inc.,* 17 N.Y.3d 208, 224 (2011). "A change in long established rules of law is not deemed to have been intended by the Legislature in the absence of a clear manifestation of such intention." N.Y. Statutes § 153 (McKinney 1971).

Nothing in the text of the 2011 amendment to CSL § 167(8) purported to modify the waiver of immunity in the Court of Claims Act for breach-of-contract claims against the State. The introductory clause stating that section 167(8) applies "[n]otwithstanding any inconsistent provision of law" did not do so. That clause was designed to override CSL § 167(1), which had set contribution rates in 1983 and had remained in effect thereafter. *See Retired Public Employees,* 123 A.D.3d at 95 (section 167[8] "plainly and unambiguously permits modification of the fixed contribution rates for retiree health insurance premiums set forth in Civil Service Law § 167[1][a]"). Moreover, the limited waiver of sovereign immunity in the Court of Claims Act is not "inconsistent" with section

167(8)'s procedure for extending modified NYSHIP premium contributions beyond active-duty, union-represented workers.

Nor does the 2011 budget bill's legislative history suggest an intent to preclude the Court of Claims from exercising jurisdiction over a breach-of-contract claim. The absence of legislative history is unsurprising because the legislators understood that retirees' premium contribution rates were set by a statute that could be amended or modified.

"In the case of a general law, such as one fixing rates," the "presumption is that it is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Penn. R. Co. v. State,* 11 N.Y.2d 504, 511-12 (1962) (internal quotation marks and citation omitted); *accord Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-66 (1985); *Cook v. City of Binghamton*, 48 N.Y.2d 323, 330-31 (1979); *Eagan v. Livoti,* 287 N.Y. 464, 468-69 (1942). Section 167(1) contained no "'words of contract'" and employed no "terms that signal an intent to create a contractual or vested right." *Retired Public Employees,* 123 A.D.3d at 97 (internal quotation marks and citation omitted). The

legislators therefore had no reason to think that retirees had a private, enforceable right to keep the State's share of NYSHIP premiums unchanged.

The absence of a restriction on the right to sue for breach of the CBAs indicates that such a right remained in place. That conclusion accords with the general rule that "a person has a right to sue on any cause of action which he holds, and any statutory exception to that right must be distinctly expressed." N.Y. Statutes § 311 (McKinney 1971); *accord Matter of Lobbett v. Galpin,* 228 A.D. 65, 67 (4th Dep't 1930). That rule has been "a well-settled rule in this state" for more than 100 years. *Saxe v. Peck,* 139 A.D. 419, 420 (3d Dep't 1910); *see also Morell v. Balasubramanian,* 70 N.Y.2d 297, 303-04 (1987) (passage of Public Officers Law § 17, providing for defense and indemnification of State employees, did not diminish other remedies available to injured party).

This is not to say appellants would, or should, prevail in a suit brought in the Court of Claims. The State may assert available defenses to a breach-of-contract claim. And appellants' own choice of a federal forum restricts the availability of a state-law remedy in their federal case. The district court held that the Eleventh Amendment limits the

available remedies on appellants' contract claim to prospective injunctive and declaratory relief. (*See* RA414-415.) Appellants did not challenge that ruling in the Second Circuit. The ruling, therefore, remains law of the case.

In sum, nothing in CSL § 167(8) suggests that the Legislature intended to deprive the Court of Claims of jurisdiction to hear a breach-of-contract claim. Moreover, the availability of a state-court remedy will be sufficient to defeat appellants' federal contract-impairment claim, even if this Court finds that the CBAs did indeed vest in retirees a right to receive in perpetuity the same State contribution percentages to health-insurance premiums. *See TM Park Ave. Assocs. v. Pataki,* 214 F.3d 344, 349 (2d Cir. 2000). Consequently, upon the return of this case to the Second Circuit, the plaintiffs' federal contract-impairment claims would fail, and the federal court could in its discretion dismiss the state-law claims and leave plaintiffs to pursue those claims in state court.

CONCLUSION

Both certified questions should be answered in the negative.

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Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Attorney for Respondents

By: 
FREDERICK A. BRODIE
Assistant Solicitor General

The Capitol
Albany, New York 12224
(518) 776-2317

BARBARA D. UNDERWOOD
Solicitor General
ANDREA OSER
Deputy Solicitor General
FREDERICK A. BRODIE
Assistant Solicitor General
of Counsel

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, FREDERICK A. BRODIE an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains **13,183** words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7).

FREDERICK A. BRODIE