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(*Captions continue on inside front cover.*)

On Appeals from the United States District Court
for the Northern District of New York

BRIEF FOR DEFENDANTS-APPELLEES

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(*Captions continued from front cover.*)

THE NEW YORK STATE CORRECTIONAL OFFICERS & POLICE BENEVOLENT ASSOCIATION, INC., et al. v. CUOMO, et al.	18-3151
LILLIAN ROBERTS, et al. v. CUOMO, et al.	18-3172
POLICE BENEVOLENT ASSOCIATION OF NEW YORK STATE, INC., et al. v. CUOMO, et al.	18-3183
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CITATION GUIDE AND GLOSSARY

For convenience, we cite each appeal by the name of the union plaintiff. The Joint Appendix for each appeal is cited as "J.A."; the Special appendix is cited as "S.A."; and defendants' motion for judicial notice is cited as "Motion." In *Brown v. Cuomo,* we distinguish between the Strandberg appeal (18-3122) and the Clancy appeal (18-3166 and 18-3345).

Council 82:	The New York State Law Enforcement Officers Union Council 82, the union plaintiff in 18-3142.
CSEA:	Civil Service Employees Association, Inc., the union plaintiff in the lead case, *Donohue v. Cuomo,* 18-3193.
DC37:	District Council 37, the union plaintiff in 18-3172.
Executive-branch CBAs	Those CBAs entered into by Council 82, NYSCOA, NYSCOPBA, NYSPIA, PBANYS, NYSTPBA, PEF, and UUP, along with the CBAs between CSEA or DC37 and government units other than the Unified Court System.

Judicial-branch CBAs	The CBAs entered into by the State of New York – Unified Court System with (a) the Judicial-Branch Unions, (b) NYSCOA, (c) CSEA, or (d) DC37.
Judicial-Branch Unions:	The union plaintiffs in *Brown v. Cuomo,* 18-3122(L), 18-3166(CON), and 18-3345(CON), including the New York State Supreme Court Officers Association; the Court Officers Benevolent Association of Nassau County; the Court Attorneys Association of the City of New York; and the New York State Court Clerks Association.
NYSCOA:	The New York State Court Officers Association, the plaintiff in 18-3221.
NYSCOPBA:	The New York State Correctional Officers & Police Benevolent Association, Inc., the union plaintiff in 18-3151.
NYSPIA:	The New York State Police Investigators Association, the union plaintiff in 18-3066.

PBANYS:	The Police Benevolent Association of New York State, Inc., the union plaintiff in 18-3183.
NYSTPBA:	The Police Benevolent Association of the New York State Troopers, Inc., the union plaintiff in 18-3049.
PEF:	The New York State Public Employees Federation, the union plaintiff in 18-3140.
UUP:	United University Professions, the union plaintiff in 18-3220.

PRELIMINARY STATEMENT

The plaintiffs in these twelve appeals are public-sector unions, along with union officers, members and former members now retired from state service. They challenge what for most is a two-percentage-point reduction in the State's contributions to premiums that retirees pay to participate in the New York State Health Insurance Program ("NYSHIP"). The plaintiff unions negotiated the same reduction with the State on behalf of active employees, and the State's reduced contribution was thereafter included in plaintiffs' respective collective-bargaining agreements ("CBAs"). An amendment to the New York Civil Service Law ("CSL"), adopted in 2011 to address the global financial crisis, authorized the State to extend the same reduction to retirees.

Plaintiffs contend that the percentage of the State's contributions to retirees' health-insurance premiums "vested" and became unalterable, and thus assert that the statute's amendment impaired a contractual right in violation of the Contract Clause and gave rise to a state breach-of-contract claim. As recent guidance from the U.S. Supreme Court makes clear, their position is untenable.

Vesting a particular contribution percentage—or any other contractual term—indefinitely into the future is a highly unusual constraint on the parties. The 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 general duration clause, unless a special exception extends their life beyond that date. *CNH Industrial N.V. v. Reese,* 138 S. Ct. 761, 763-64, 766 (2018); *M&G Polymers USA, LLC v. Tackett,* 135 S. Ct. 926, 936-37 (2015).

The CBAs here contained no such special exception. And nothing else in the CBAs provided 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 (D'Agostino, D.J.) granted defendants summary judgment in all of the underlying actions. Those judgments should be affirmed on the authority of *Reese* and *Tackett*.

JURISDICTION

While this Court generally has jurisdiction over these appeals under 28 U.S.C. §§ 1331 and 1291, the Court lacks jurisdiction over one of the three appeals consolidated in *Brown v. Cuomo.* Specifically, the

notice of appeal of Joseph Walsh, as President and on behalf of the New York State Court Clerks Association, docketed as 18-3345 and consolidated with 18-3122(L) and 18-3166, was not filed until November 2, 2018. (*See* Judicial-Branch Unions J.A.667-668 [Clancy appeal].)[1] That is 39 days after September 24, 2018, when judgment was entered. (*See* Judicial-Branch Unions S.A.66-67 [Clancy appeal].) The 30-day period for noticing an appeal under 28 U.S.C. § 2107(a) and Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure is jurisdictional. *See Bowles v. Russell,* 551 U.S. 205, 209-10 (2007). Consolidation did not cure the problem, because the Court cannot consolidate cases over which it lacks jurisdiction. Therefore, Walsh's appeal, which was briefed along with the Clancy appeal, must be dismissed.

ISSUES PRESENTED

1. Whether the district court correctly granted defendants summary judgment rejecting plaintiffs' contract-impairment and state breach-of-contract claims, holding that neither New York Civil Service Law nor the relevant collective bargaining agreements vested in retirees

[1] Party-name abbreviations are set forth in a glossary at the beginning of this brief.

a contractual right to retain throughout retirement the same percentage of State contributions to their health-insurance premiums.

2. Whether the district court correctly granted summary judgment rejecting plaintiffs' contract-impairment claim for the additional reason that, even if plaintiffs had the requisite vested right, the State's modest reduction of contributions to retirees' health-insurance premiums was reasonable and necessary.

3. Whether defendant-appellee Hite was authorized to extend to retirees, with approval of the budget director, the same reductions of the State's contributions to health-insurance premiums that were recently negotiated with unions, as provided in the 2011 amendment to CSL § 167(8).

4. Whether the district court reasonably exercised its discretion by considering two affidavits that, among other things, largely duplicated other evidence in the record.

STATEMENT OF THE CASE

A. The Parties

Plaintiffs are public-sector unions, union officers, current union members, and former union members who are now retired. The plaintiff unions include the two largest state employee unions, CSEA and PEF, along with seven other executive-branch employee unions and several judicial-branch employee unions.

Defendants-appellees include Governor Cuomo, former Acting Civil Service Commissioner Patricia Hite, other members of the New York State Civil Service Commission, and former New York State Division of the Budget Director Robert Megna.

B. 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. The State contributes to the cost of health-insurance premiums for its current and retired employees. Through 2011, the State's percentage share of retirees' premiums was set by statute. That share had changed over time for both active employees and retirees, but had remained static since 1983.

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." 1956 N.Y. Laws 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 ch. 461 (1956), 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 process." *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* 1960 N.Y. Laws ch. 329, § 1 & n.* (*codified at* former CSL § 160[1]). 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]).

The next relevant amendment to the statute, in 1967, established that the State would pay 100% of employees' and retirees' premiums for individual coverage and 50% of premiums for dependent coverage. 1967 N.Y. Laws, 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. 1967 N.Y. Laws ch. 617, § 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. 1970 N.Y. Laws 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." (CSEA J.A.1091.) To address the issue, the State and the unions negotiated a reduction in the State's contribution percentage for active employees from 100% to 90%. (*See* CSEA J.A.1089, 1091-1092.) To implement the reduction, the Legislature amended Civil Service Law § 167(1) and codified the newly reduced contribution percentage. 1983 N.Y. Laws ch. 14 (*reproduced at* CSEA J.A.1088-1090).

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* CSEA J.A.1089-1090, 1092.) For those who retired on or after January 1, 1983, however, the 1983 amendment reduced the State's contribution percentage from 100% to 90%. (CSEA

J.A.1089, 1091-1092.) Thus, going forward, then-current employees upon retirement would contribute the same percentage to their premiums as had been negotiated for active employees.

In 1999, the Legislature added a new provision to the Civil Service Law expressly authorizing the State to increase its contribution to health insurance for active employees. 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." 1999 N.Y. Laws, ch. 442, § 1 (*codified at* CSL former § 167[8]). The amendment stated that the increased contributions "shall not be applied during retirement." *Id.*

C. The CBAs

CBAs are the product of periodic negotiations between the State and the unions representing active employees in the respective bargaining units. There are CBAs covering employees in the executive and judicial branches of state government. The executive-branch CBAs are negotiated on behalf of the State by the Governor's Office of Employee

Relations (GOER), while the judicial-branch CBAs are negotiated on behalf of the State by the State's Unified Court System.

1. Executive-branch CBAs

The State used the contract terms agreed upon with CSEA as a model for negotiations with the other executive-branch employee unions. (NYSTPBA J.A.1061; NYSPIA J.A.846, 1060, 2479.) Thus, with specific exceptions noted, the relevant provisions of other executive-branch CBAs substantively resembled CSEA's. Six clauses of these CBAs are especially relevant here.

a. Duration clauses

Every executive-branch CBA contained a duration clause.[2] For example, CSEA's 2007-2011 CBA provided: "The term of this Agreement shall be from April 2, 2007 to April 1, 2011." (CSEA J.A.931.)

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[2] *See* CSEA J.A.873, 949, 980, 1004, 1026, 1044, 1061, 1074, 1276, 1298, 1352; CSEA Motion Ex. H; NYSTPBA J.A.72 ¶55; NYSTPBA Motion Exs. A-I; NYSPIA J.A.273, 348, 409, 459, 500; NYSPIA Motion Ex. A; PEF J.A.851, 894, 911, 939, 961, 983, 1002, 1012; PEF Motion Ex. H; Council 82 J.A.691, 778; Council 82 Motion Exs. A-F; NYSCOPBA J.A.376, 413, 453, 484, 513, 528, 539, 549, 557; DC37 J.A.403, 421, 439, 453, 465, 478, 489, 497; PBANYS J.A.33-34, 285; PBANYS Motion Exs. A-G; UUP J.A.338, 353, 367, 377, 388, 399, 409, 422, 432.

b. Integration clauses

The CBAs at issue were integrated agreements that superseded all prior agreements and negotiations.

CSEA's 2007-2011 CBA expressly 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." (CSEA J.A.930.)[3]

Nearly all of the other executive-branch CBAs contained equivalent integration clauses.[4] Only the CBAs for NYSTPBA, NYSPIA, and Council 37 lacked integration clauses. Those CBAs were nonetheless integrated agreements under New York law, as explained *infra* at 73-75.

c. General continued-coverage clauses

The CBAs all made health-insurance coverage available to active employees. For example, NYSPIA's CBA for 1999-2003 stipulated that

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[3] *Accord* CSEA J.A.873, 978, 1297; CSEA Motion Exs. A-H; *see also* CSEA S.A.5-6 & n.4.

[4] *See* PEF J.A.1034; PEF Motion Exs. A-I; Council 82 J.A.521, 537, 548, 591, 728, 904; Council 82 Motion Exs. A-B, F; NYSCOPBA J.A.704, 796; NYSCOPBA Motion Exs. A-E; PBANYS J.A.239, 255, 270, 281, 308; PBANYS Motion Exs. B-C; UUP J.A.353, 367, 377, 399, 409, 421, 431-432; UUP Motion Exs. A-B.

"[t]he State shall continue to provide all the forms and extent of coverage as defined by the contracts in force on March 31, 1991 with the State's health and dental insurance carriers unless specifically modified or replaced pursuant to this Agreement." (NYSPIA J.A.252.) The other executive-branch CBAs contained language to the same effect.[5]

d. Continued coverage expressly for retirees

A minority of the CBAs at issue in these appeals, including many of CSEA's and PEF's, assured continued health-insurance coverage after retirement. For example, PEF's 2007-2011 CBA provided:

> Employees on the payroll and covered by the State Health Insurance Program have the right to retain health insurance coverage after retirement, upon the completion of ten years of State service.

(PEF J.A.1362.) PEF's CBAs since 1982 contained the same provision, in substance. (*See, e.g.,* PEF J.A.1011.) Some of the other executive-branch CBAs, including those of CSEA, contained similar provisions.[6]

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[5] *See, e.g.,* CSEA J.A.859, 906, 1472-1478; NYSTPBA J.A.831, 1025; NYSPIA J.A.281; PEF J.A.834, 876, 990; Council 82 J.A.399, 477, 563; NYSCOPBA J.A.377, 414, 550; DC37 J.A.387, 407, 482; PBANYS J.A.215, 245, 296; UUP J.A.342, 357, 413.

[6] *See* CSEA J.A.869, 1069; DC37 J.A.389, 485; UUP J.A.334, 350. UUP's CBAs before 2007 contained no such provision, however. *See* UUP J.A.357-366 (2003-2007 CBA), 413-420 (1985-1988 CBA).

The CBAs for NYSTPBA, NYSPIA, Council 82, NYSCOPBA, and PBANYS did *not* assure continuing health-insurance coverage. In those cases, the State furnished retirees health insurance under the authority of CSL § 167(1).

Whether the CBAs' assurance of continued health-insurance coverage vested a right for retirees to be covered is not at issue here. For argument's sake, we assume it did. But *coverage* is different from State contributions to health-insurance *premiums*. The assurance of ongoing coverage for retirees did not vest those retirees with a right to maintain the same percentage of State contributions toward premiums. Those contribution percentages were set separately by CSL § 167(1).

e. The "90/75" clauses

The executive-branch CBAs all specified the State's proportionate share of employees' health-insurance premiums. 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. (CSEA J.A.1066-1067.) Other unions' 1982 CBAs were similar.[7]

In 1982, the State and some of the unions entered into memoranda of understanding ("MOUs") 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.[8] The MOUs did not reference premiums or contributions for retirees.

Consistent with the MOUs, beginning with the 1985-1988 CBA that the State entered into with CSEA, the State reduced to 90% its contribution toward the premium for employees' individual coverage. (CSEA J.A.1051.) That reduced contribution percentage was thereafter reflected in all of CSEA's subsequent CBAs, through its 2007-2011 CBA

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[7] *See* PEF J.A.1009; Council 82 J.A.572; NYSCOPBA J.A.558; PBANYS J.A.305. *But see* NYSTPBA J.A.943-944 (agreeing to continue benefits "[p]ending the outcome of reopened negotiations"); NYSPIA J.A.507 (agreeing that "negotiations may be reopened" on health-insurance programs); UUP J.A.426-427 (establishing power of joint committee, among other things, to "[a]djust the employees' share of the premium").

[8] *See* NYSPIA J.A.702-712, 727-784 (collecting MOUs); PEF J.A.1213-1223; Council 82 J.A.740-750; NYSCOPBA J.A.715-725; PBANYS J.A.393-403.

(CSEA J.A.1478-1479), as well as in all of the other executive-branch CBAs for that time period.[9]

f. The "unremarried-spouse" clause

The executive-branch CBAs typically included a provision assuring ongoing health-insurance coverage for the unremarried spouse and dependent children of a qualifying employee after the employee's death. CSEA's 2011-2016 CBA, for example, provided:

> The unremarried spouse and otherwise eligible dependent children of an employee, who retires after April 1, 1979, with ten or more years of active State service and subsequently dies, shall be 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.

(CSEA J.A.869.) CSEA's preceding CBAs included comparable clauses, as did the other executive-branch CBAs.[10]

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[9] *See, e.g.,* NYSTPBA J.A.931, 851; NYSPIA J.A.255, 283, 466; PEF J.A.991, 1356; Council 82 J.A.564, 421; NYSCOPBA J.A.400, 551; DC37 J.A.390, 493; PBANYS J.A.220, 247, 297; UUP J.A.327, 359, 415.

[10] *See, e.g.,* CSEA J.A.923, 1055; NYSTPBA J.A.851-852, 889; NYSPIA J.A.260, 364; PEF J.A.1011, 1361-1362; Council 82 J.A.421, 462, 565; NYSCOPBA J.A.400, 440, 552; DC37 J.A.388, 485; PBANYS J.A.229, 251, 298; UUP J.A.334, 396. (The CBAs for UUP did not contain an "unremarried-spouse" clause until 1991.)

2. Judicial-branch CBAs

The judicial-branch CBAs at issue in these appeals all contained duration clauses[11] and integration clauses.[12] They also provided health-insurance coverage for active employees, stating substantially as follows:

> The State shall continue to provide health and prescription drug benefits administered by the Department of Civil Service. *Employees enrolled in such plans* shall receive health and prescription drug benefits to the same extent, *at the same contribution level* and in the same form and with the same co-payment structure *that applies to the majority of represented Executive Branch employees covered by such plans*.

(DC37 J.A.502 [emphasis added].)[13]

CSEA and PEF members comprise a majority of the represented executive-branch employees.[14] As of December 1, 2011, the majority of

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[11] CSEA Motion Exs. I-O; DC37 J.A.845; Judicial-Branch Unions Motion Ex. A (Strandberg appeal); Judicial-Branch Unions Motion Exs. A-C (Clancy appeal); NYSCOA J.A.136; NYSCOA Motion Exs. A-G.

[12] CSEA Motion Exs. I-O; DC37 J.A.844-845; Judicial-Branch Unions Motion Ex. A (Strandberg appeal); Judicial-Branch Unions Motion Exs. A-C (Clancy appeal); NYSCOA J.A.136, 463; NYSCOA Motion Exs. A-G.

[13] *Accord* Judicial-Branch Unions J.A.123, 126, 129, 131, 134, 136, 138, 141, 1111-1112 (Strandberg appeal); DC37 J.A.338, 615; NYSCOA J.A.107, 463.

[14] Judicial-Branch Unions J.A.1113-1114 (Strandberg appeal); DC37 J.A.362-363, 340, 615; NYSCOA J.A.465.

represented executive-branch employees were subject to the reduced State contribution percentages agreed upon in 2011.[15]

D. 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. (CSEA J.A.1483.) 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. (CSEA J.A.1482-83, 1495.)

In those three fiscal years, the State adopted a range of measures to close those gaps and balance the budgets. (CSEA J.A.1483.) The measures included reducing the State's payments for public schools, health-care providers, local governments, social services and other services; imposing cost controls on the operations of State agencies; deferring required payments to the State's pension system; and increasing taxes, including personal-income and sales taxes. (CSEA J.A.1483.)

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[15] Judicial-Branch Unions J.A.1116 (Strandberg appeal); DC37 J.A.363; NYSCOA J.A.468.

For 2011-2012, the State addressed the $10 billion budget gap with a gap-closing plan that struck a balance among constituencies and allocated savings across a range of activities. (CSEA J.A.1483-1486, 1495.) In setting savings targets, the State considered and weighed service needs and trends, fiscal and policy priorities, legal and administrative constraints, economic effects, feasibility, and effects on the State's long-term operating position. (CSEA J.A.1485-1486.) The gap-closing plan included measures to reduce spending growth. For example, it cut $2.8 billion from education aid, $2.7 billion from Medicaid, $1.6 billion from various other programs and activities, and $1.5 billion from State agency operations. (CSEA J.A.1484, 1486, 1495.) Of the $1.5 billion in cuts to State agency operations, $450 million was to come from workforce-related cost reductions. (CSEA J.A.1495.)[16]

To avoid laying off nearly 9,800 employees (CSEA J.A.1495), the Governor's office asked all state agencies, including the Department of Civil Service, for proposals. (CSEA J.A.846.) Many proposals were discussed, including changes to NYSHIP. (CSEA J.A.846, 1487.)

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[16] *Accord* Judicial-Branch Unions J.A.145-146 (Strandberg appeal); PBANYS J.A.759.

One such proposal was to decrease the State's proportionate share of NYSHIP premiums. 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. (CSEA J.A.846-847, 1496.)

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 changing the CBAs and then amending the statute to implement the change. Second, contribution percentages for retirees' health insurance were likewise written into CSL § 167(1), so the statute would need to be amended before the State could reduce those contribution percentages as well. Each of those barriers was surmounted.

E. 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. (CSEA J.A.854, 857-874.) The agreement, covering 2011-2016, included negotiated reductions in the State's proportionate share of health-insurance premiums for NYSHIP. (CSEA J.A.854.) 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. (CSEA J.A.865.) The State's contributions for active 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. (CSEA J.A.865.) Although CSEA's 2011-2016 CBA took effect April 2, 2011 (CSEA J.A.873), the reduced-contribution percentages did not take effect until October 1, 2011 (CSEA J.A.865).

All of the other executive-branch CBAs negotiated in 2011 and thereafter reflected the reduced contribution percentages.[17]

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." (CSEA J.A.854.) By agreeing to the contract, the union avoided "broad layoffs" that otherwise would have

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[17] *See* PEF J.A.1376; Council 82 J.A.461; NYSCOPBA J.A.438-439; UUP J.A.342.

been necessary to achieve workforce savings. (CSEA J.A.854.) A press release issued by PEF after members ratified its 2011 CBA similarly reported that "ratification of the new agreement save[d] the jobs of 3,496 PEF members." (PEF J.A.831.)

F. The 2011 Amendment to the Civil Service Law and the Implementation of that Amendment

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

With the bill to amend that statute pending, the Legislature requested a message of necessity from the Governor.[18] *See* Letter from J. Yates to M. Denerstein (June 22, 2011), *reprinted in* Bill Jacket for 2011 N.Y. Laws ch. 491, at 7. In issuing the requested message, the Governor stated: "Without consideration and passage of this bill, the State may have no other recourse but to lay off thousands of employees in order to

[18] 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.

realize necessary cost savings." Message of Necessity, *reprinted in* Bill Jacket for 2011 N.Y. Laws ch. 491, at 5. The Governor further observed that the bill "would provide for significant cost savings for the State." *Id.*

As amended, CSL § 167(8) provided:

> *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, 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.

2011 N.Y. Laws ch. 491, pt. A, § 2 (emphasis added) (reproduced at CSEA J.A.879-880 & *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, namely, retirees and unrepresented employees. The contribution percentages for retirees could therefore be changed.

Acting under the authority granted by CSL § 167(8) as amended, by letter dated September 21, 2011, Acting Commissioner Hite of the Department of Civil Service sought approval from Budget Director Megna to extend to retirees and unrepresented employees the modified State contribution percentages provided for represented employees in CSEA's 2006-2011 CBA. (CSEA J.A.847, 1078-1079.) Megna gave his approval the following day. (CSEA J.A.847, 1079.)

Thereafter, conforming changes were made to Civil Service's regulations. *See* N.Y. Comp. Codes R. & Regs. Tit. 4 ("4 N.Y.C.R.R.") § 73.3(b) (*See* CSEA J.A.847, 1082-1084). 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%.[19] (*See* CSEA J.A.1082-1083, 1481.) The amended regulation also changed contribution percentages prospectively for employees retiring on or after January 1,

[19] By 2011, the number of pre-1983 retirees had grown "relatively small." (CSEA J.A.1363.) Because changing the contributions for pre-1983 retirees would not yield sufficient cost savings, that group was not included in the revision. (CSEA J.A.1363.)

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. (CSEA J.A.1082-1083, 1481.) The new contribution percentages were identical to what the State negotiated with CSEA and, ultimately, with other 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) increased by approximately $10.50 for individual coverage and approximately $28.50 for family coverage.[20] (*See* NYSCOA J.A.94 [reporting cost for two months].)

G. The Article 78 Proceeding

In state court, the Retired Public Employees Association ("RPEA") and several individuals brought a hybrid article 78 proceeding/declaratory judgment action challenging the State's reduced contribution percentages. Among other things, RPEA asserted the same

[20] For persons retiring from salary grade 10 positions or higher beginning in 2012, the increases would have been slightly more.

contract-impairment claim asserted in these cases, along with state-law claims that the reduction was arbitrary and capricious, ultra vires, and in violation of state statutory law, namely CSL § 167(1)(a).

The state supreme court rejected these claims, *Retired Public Employees Ass'n, Inc. v. Cuomo,* No. 7586-11, 2012 WL 6654067 (Sup. Ct. Albany Cty. Dec. 17, 2012), and the Appellate Division affirmed, *Matter of Retired Public Employees Ass'n v. Cuomo,* 123 A.D.3d 92 (3d Dep't 2014). The Appellate Division reasoned that CSL § 167(8), as amended, "plainly and unambiguously permits modification of the fixed contribution rates for retiree health insurance premiums set forth in Civil Service Law § 167(1)(a)." *RPEA,* 123 A.D.3d at 95. Although the old contribution percentages remained in § 167(1), the court observed that § 167(8) specifically stated that it applied "[n]otwithstanding any inconsistent provision of law," thus "mak[ing] clear" that the old contribution percentages written into CSL § 167(1)(a) would "not apply where [they] would otherwise conflict" with the revised § 167(8). *RPEA*, 123 A.D.3d at 95.

As to the contract-impairment claim, the Appellate Division observed that RPEA did not allege any express contractual agreement,

but instead relied upon CSL § 167(1)(a) as a source of allegedly vested rights. *Id.* at 96. The Appellate Division concluded that the statute did not vest any right to receive a fixed percentage contribution toward health-insurance premiums because the statute contained no "'words of contract'" or other "terms that signal an intent to create a contractual or vested right." *Id.* at 97 (citations omitted).

RPEA did not appeal the Appellate Division's order.

H. Proceedings Below

In federal court, unions, union officers, current union members, and retirees (but not RPEA) brought these eleven lawsuits challenging the reduction in State contributions to existing retirees' health-insurance premiums and, in some cases, the prospective reduction of contributions for active employees who had not yet retired. The complaints advanced a variety of legal theories, including impairment of contract in violation of the Contract Clause and state-law breach of contract.[21]

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[21] *See* CSEA J.A.611-643; NYSTPBA J.A.59-97; NYSPIA J.A.135-172; Judicial-Branch Unions J.A.25-67 (Strandberg appeal); PEF J.A.596-656; Council 82 J.A.36-83; NYSCOPBA J.A.21-64; DC37 J.A.5-44; PBANYS J.A.19-60; UUP J.A.151-176; NYSCOA J.A.18-49.)

After defendants answered,[22] one of the judicial-branch unions, NYSCOA, moved for a preliminary injunction in its case. The U.S. District Court for the Southern District of New York (Scheindlin, D.J.) denied the motion, finding a failure to demonstrate a likelihood of success on the contract-impairment claim. *NYSCOA v. Hite*, 851 F. Supp. 2d 575, 582 (S.D.N.Y. 2012). The court reasoned that NYSCOA's CBA unambiguously provided the same health-insurance benefits as the majority of executive-branch CBAs. *Id.* at 579-80. The fact that contribution percentages had not changed in 28 years "simply reflect[ed] the fact that the contribution rates of the majority of executive branch employees had not changed during that time period either." *Id.* at 580. The court also reasoned that CSL § 167(1) did not create vested contractual rights; instead, the statute "la[id] out policy, just like innumerable other laws," *id.* at 582, and thus was subject to amendment.

On NYSCOA's interlocutory appeal, this Court affirmed "for substantially the reasons stated" by the district court. *NYSCOA v. Hite,*

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[22] *See* CSEA J.A.645-658; NYSTPBA J.A.666-676; NYSPIA J.A.173-186; Judicial-Branch Unions J.A.737-749 (Strandberg appeal); PEF J.A.657-677; Council 82 J.A.244-256; NYSCOPBA J.A.242-254; DC37 J.A.131-142; PBANYS J.A.62-72; UUP J.A.179-193; NYSCOA J.A.50-58.

475 F. App'x 803, 805 (2d Cir. 2012). The case was later transferred to the Northern District. (*See* CSEA J.A.525 n.12.)

The parties entered into stipulations that, among other things, narrowed the scope of plaintiffs' claims. CSEA and PEF agreed to restrict their claims to persons who retired between January 1, 1983 and October 1, 2011 (and their spouses and dependents), thus limiting the dispute to the two-percentage-point reduction in State contributions authorized by CSL § 167(8). (CSEA J.A.684; PEF J.A.692.) In other cases, the stipulations cut off the group of retiree claimants at different dates keyed to the expiration dates of the relevant CBAs.[23] Plaintiffs in three of the lawsuits, however, insisted that the modifications were invalid even as to individuals who were actively employed when CBAs with modified contribution percentages were adopted, but who thereafter retired.[24]

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[23] *See* PBANYS J.A.55; Council 82 J.A.295; NYSCOPBA J.A.291; NYSTPBA J.A.736; UUP J.A.206-207; *NYSPIA v. Cuomo,* No. 11-cv-1527, ECF #70 (N.D.N.Y.).

[24] *See* NYSCOA J.A.60; Judicial Branch Unions J.A.162 (Clancy Appeal); *Roberts v. Cuomo,* No. 12-cv-46, ECF #65 (N.D.N.Y.) (Court Unit employees).

Thereafter, on defendants' motions, the district court granted summary judgment to defendants in all eleven cases.[25] Because the CSEA and UUP plaintiffs had also cross-moved for summary judgment, the court denied those motions.[26]

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 premium contribution rates at a specific level." (CSEA S.A.22; *see also* CSEA S.A.20-22.)[27] While the CBAs continued "coverage," they did not promise that the State would maintain the same percentage contributions to premiums. (CSEA S.A.23.) Instead, the provision affording employees the right to retain health insurance in retirement was "silent as to contribution rates." (CSEA S.A.25.) And CSEA's CBA contained an

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[25] *See* CSEA S.A.1-53; NYSTPBA S.A.1-12; NYSPIA S.A.1-12; Judicial-Branch Unions S.A.1-12 (Strandberg appeal); PEF S.A.1-27; Council 82 S.A.1-14; NYSCOPBA S.A.1-12; DC37 S.A.1-13; PBANYS S.A.1-11; UUP S.A.1-13; NYSCOA S.A.1-10.

[26] *See* CSEA S.A.52; UUP S.A.10-11.

[27] The district court filed its decision in CSEA's case on the docket of each of the other cases, and incorporated it by reference into each of the decisions in those cases. (*E.g.*, NYSPIA S.A.2 n.1, 13-65; PEF S.A.2 n.1, 28-80; UUP S.A.2 n.1, 14-66.)

integration clause, which declared that the CBA constituted the "entire agreement" between the State and CSEA. (CSEA S.A.5-6.)

Moreover, "all of the CBAs at issue have durational limits," which governed absent a separate duration clause for premium contribution percentages. (CSEA S.A.25-26.) "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." (CSEA S.A.26.)

Because "any expectation of a perpetually fixed contribution rate in retirement was unreasonable based on the plain language of the CBAs," the district court went on to find that defendants had not substantially impaired those contracts. (CSEA S.A.27-28.) Additionally, the district court held that the 2011 amendment "served a significant and legitimate purpose that was reasonable and necessary." (CSEA S.A.29.) The "extremely modest" reduction in State contributions to retiree premiums was narrowly tailored. (CSEA S.A.30-31.)

The district court's conclusion that the CBAs did not vest retirees with a right to retain the same contribution percentages perpetually into

the future disposed of plaintiffs' claims for breach of contract. (*See* CSEA S.A.33-34.) Because "the CBAs at issue did not promise Plaintiffs a perpetual premium contribution rate," the defendants "did not breach this nonexistent contract term." (CSEA S.A.34.) The old contribution percentages in CSL § 167(1) likewise did not afford plaintiffs any enforceable contract rights. (CSEA S.A.45-48.)

The district court further upheld Hite's authority to extend the change in premium contributions upon obtaining the budget director's approval. (CSEA S.A.40-42, 44-45.) And the district court rejected plaintiffs' request to strike the State's declarations from Dominic Colafati and Darryl Decker for failing to timely disclose the identities of the two potential witnesses in a timely fashion. Among other things, the court reasoned that the facts in Colafati's declaration were largely undisputed, that both declarations overlapped with declarations from other potential witnesses to whom plaintiffs did not object, and that plaintiffs could not establish prejudice. (CSEA S.A.48-52.)

I. Appeals to this Court

Plaintiffs thereupon appealed. In all eleven appeals, plaintiffs restrict their substantive arguments to the claims for contract

impairment and state-law breach of contract.[28] Plaintiffs thereby abandon any other claims. *Gordon v. Softech Intern., Inc.*, 726 F.3d 42, 47 n.1 (2d Cir. 2013); *Jackler v. Byrne,* 658 F.3d 225, 233 (2d Cir. 2011); *Norton v. Sam's Club,* 145 F.3d 114, 117 (2d Cir. 1998).

STANDARD OF REVIEW

Summary judgment is mandated when "there is no genuine dispute as to any material fact" and "the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). This Court reviews a grant of summary judgment de novo, viewing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in that party's favor. *Wrobel v. Cnty. of Erie*, 692 F.3d 22, 27 (2d Cir. 2012).

A fact is "material" when it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

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[28] *See* CSEA Br.3; NYSTPBA Br.vi; NYSPIA Br.2, 4; Judicial-Branch Unions Br.viii (Strandberg appeal); Judicial-Branch Unions Br.2-3 (Clancy appeal); PEF Br.8; Council 82 Br.2; NYSCOPBA Br.2; DC37 Br.3; PBANYS Br.3, 5-6; UUP Br.2; NYSCOA Br.viii.

"[C]onclusory statements, conjecture, or speculation by the party resisting the motion will not defeat summary judgment." *Kulak v. City of New York*, 88 F.3d 63, 71 (2d Cir. 1996).

Plaintiffs opposing a properly supported summary-judgment motion cannot rest on mere denials, but must instead "present affirmative evidence" sufficient to create a jury question. *Anderson,* 477 U.S. at 256-57.

SUMMARY OF ARGUMENT

The district court properly granted defendants summary judgment rejecting plaintiffs' contract-impairment and state breach-of-contract claims for the same reason: plaintiffs had no vested contractual right to retain throughout retirement the same percentages of State contributions to health-insurance premiums. Consequently, the State did not impair or breach any such right by amending the Civil Service Law in 2011 to allow those percentages to be reduced under the circumstances present here.

No contract was created by former CSL § 167(1); rather, the statute declared current State policy. The Legislature could therefore amend

that statute to modify the State's contributions to retirees' health-insurance premiums without violating any contract.

Nor did the CBAs vest retirees with the rights they assert here. The CBAs contained general duration clauses. Because the CBAs did not except the premium contribution percentages from the effect of their duration clauses, the contribution percentages provided in the CBAs did not vest under the U.S. Supreme Court's decisions in *Tackett* and *Reese*.

While particular plaintiffs cite various other clauses from certain executive-branch CBAs—including, among other provisions, the general continued-coverage clause, the continued-coverage clause for retirees, and the 90/75 clause—none changes the result. None of those clauses extended the duration of the State's contribution percentages beyond a CBA's expiration.

The judicial-branch CBAs prescribed contribution percentages for active employees, but not retirees. And the prescribed contribution percentages were whatever a majority of the represented executive-branch employees received. Because a majority of the executive-branch employees since 2011 have received the reduced contribution percentages, that reduction flowed through to the judicial-branch CBAs.

Plaintiffs mistakenly seek to rely on extrinsic evidence of the parties' purported understanding of the CBAs. The CBAs are unambiguous: nowhere do they provide for a vested right to continued State contributions to retiree premiums at fixed percentages. Indeed, most of the CBAs contain an integration clause that nullifies all prior agreements and understandings, and all of them are subject to the parol-evidence rule. Plaintiffs therefore cannot establish a vested contractual right through evidence of failed negotiations and rejected proposals, their own subjective understanding, or a past practice of keeping the same contribution rate from year to year.

Further, even if plaintiffs had the requisite vested right, their contract-impairment claim would nonetheless fail because the State's modest reduction in its premium contributions—only two percentage points for most retirees—served a legitimate purpose and was reasonable and necessary. The State reduced contribution percentages for retirees only after implementing or rejecting other cost-cutting measures. The defendants acted reasonably under difficult circumstances.

Plaintiffs' challenge to Hite's authority to implement the reduced contribution percentages likewise fails. Indeed, the Court should not

even address it because the Eleventh Amendment precludes federal courts from adjudicating a state-law challenge to Hite's authority. In any event, Hite possessed the requisite statutory and administrative authority to implement the reduced contribution percentages.

Finally, the district court did not abuse its discretion in considering the declarations of Colafati and Decker. Among other things, each of those declarations was substantially duplicated by other testimony in the record.

ARGUMENT

POINT I

PLAINTIFFS' CONTRACT-IMPAIRMENT AND STATE BREACH-OF-CONTRACT CLAIMS FAIL FOR THE SAME REASON: PLAINTIFFS HAD NO VESTED RIGHT TO RETAIN FOREVER THE SAME PERCENTAGE OF STATE CONTRIBUTIONS TO HEALTH-INSURANCE PREMIUMS

Plaintiffs' claims under the Contract Clause and for breach of contract both fail because plaintiffs cannot establish the violation of a contractual right.

To establish that a state law violates the Contract Clause, U.S. Const. art. I, § 10, cl. 1, a litigant must first establish that the law substantially impairs a contractual relationship. *Sveen v. Melin*, 138 S.

Ct. 1815, 1821-22 (2018). Doing so requires the litigant to show that a contractual relationship exists. *General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992). If so, the litigant must then additionally establish that the subject law would impair that contractual relationship and the impairment would be substantial. *Id.*

The elements of a breach-of-contract claim under New York law overlap with those of an impairment claim. To recover for breach of contract, plaintiffs must show an agreement between the parties; adequate performance by the plaintiffs; breach of the agreement by the defendant; and damages. *Fischer & Mandell, LLP v. Citibank, N.A.*, 632 F.3d 793, 799 (2d Cir. 2011). The agreement must be a binding one. *Stonehill Capital Mgmt., LLC v. Bank of the West*, 28 N.Y.3d 439, 448 (2016).

As the record makes plain, the CBAs did not contain a binding agreement to vest retirees with a contractual right to retain throughout retirement a fixed percentage of State contributions to health-insurance premiums. Plaintiffs thus cannot establish the violation of any contractual right, and their contract-impairment and state breach-of-

contract claims necessarily fail. The district court therefore properly granted summary judgment rejecting both claims.

A. The Civil Service Law Did Not Vest the Plaintiff Retirees with a Contractual Right to Retain State Contributions to Health-Insurance Premiums at Fixed Percentages.

New York's Civil Service Law, specifically CSL § 167(1), did not vest future retirees with a contractual right to retain forever the 90% contribution rate set forth in the statute. To the extent that plaintiffs argue otherwise,[29] they are mistaken.

"[T]he presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-66 (1985) (citation omitted). Thus, courts "will not lightly construe that which is undoubtedly a scheme of public regulation to be, in addition, a private contract to which the State is a party." *Id.* at 467; *see also Dodge v. Bd. of Educ.*, 302 U.S. 74, 80 (1937) (statute did not contain "the normal language of a contract"); *Pineman v. Fallon,* 662 F. Supp. 1311, 1318 (D.

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[29] *See, e.g.,* NYSCOPBA Br.7-10, 21; UUP Br.16; NYSCOA Br.25.

Conn. 1987) (Cabranes, J.) (noting that courts have generally "sought to avoid interpreting statutory benefit programs as waiving the exercise of sovereign power to amend the statute in the future"), *aff'd,* 842 F.2d 598 (2d Cir. 1988). Under New York law, statutes establishing "terms and conditions of employment" are "indisputably among those classes of legislative acts long presumed to create no private contractual rights." *Cook v. City of Binghamton*, 48 N.Y.2d 323, 330-31 (1979). Plaintiffs cannot overcome that presumption here.

The amendment of CSL § 167(1)(a) in 1983 established State contributions for employees and future retirees of 90% of premiums for individual coverage and 75% of premiums for dependent coverage:

> Nine-tenths of the cost of premium or subscription charges for the coverage of state employees and retired state employees retiring on or after January first, nineteen hundred eighty-three who are enrolled in the statewide and supplementary health benefit plans shall be paid by the state. Three-quarters of the cost of premium or subscription charges for the coverage of dependents of such state employees and retired state employees shall be paid by the state.

Nothing in that text precluded the State from changing those contributions in the future by legislative amendment, as it did in 2011 with the amendment to CSL § 167(8).

In *RPEA,* the state Appellate Division correctly held that CSL § 167(1)(a) does not contain the "clear and irresistible evidence" required to show that the Legislature "intended to fetter[] its power in the future with respect to retirees' health insurance contributions." *RPEA,* 123 A.D.3d at 96-97 (citation and internal quotation marks omitted). As the Appellate Division explained, the statute contains no "'words of contract'" and employs no "terms that signal an intent to create a contractual or vested right," *id.* at 97 (quoting *Cook*, 48 N.Y.2d at 330), for example, by employing the word "contract," "covenant," "guarantee," or any other similar term.

Moreover, when the Legislature wanted to vest rights—for example, in the pension context—it did so expressly. *See, e.g.,* N.Y. Retirement & Social Sec. Law § 612 (providing for pension "[v]esting"); *see also* N.Y. Const. art. V, § 7 (assuring that pension or retirement system membership "shall be a contractual relationship" and its benefits "shall not be diminished or impaired"). The Legislature created no express vesting provision for the State's percentage contribution to health-insurance premiums. Under settled principles of construction, courts should not imply one. *See* N.Y. Statutes § 240 (McKinney 1971)

(where law "expressly describes a particular act," an "irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded").

Nothing in CSL § 167(1)'s history evinces a legislative intent to create private contractual or vested rights either. To the contrary, the statute's history confirms that the Legislature contemplated adjusting the State's contribution percentages. From NYSHIP's inception in 1953, those percentages were intended to be flexible. *See supra* at 6-9. In 1983, the Legislature amended CSL § 167(1)(a) specifically to reduce the State's contributions for post-1982 retirees from 100% to 90%. 1983 N.Y. Laws ch. 14. As here, the 1983 amendment was enacted when the State's financial resources were "severely strained." (CSEA J.A.1091.) While the Legislature made the policy choice at that time to leave in place the State's contribution percentages for those who had retired by the end of 1982, it did not curb the authority of future legislatures to modify State contribution percentages for post-1982 retirees, nor did it suggest an intent to do so.

Viewed against that background, CSL § 167(1)(a) reflects "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." *RPEA,* 123 A.D.3d at 97. The Legislature made such a later change in 2011, when it amended § 167(8) to authorize the president of the Civil Service Commission, with the budget director's approval, to extend to retirees and unrepresented employees the modified State cost of premiums agreed upon for represented employees in the collective-bargaining process. *See* 2011 N.Y. Laws ch. 491, pt. A, § 2.

This Court reached a similar conclusion when it affirmed the denial of a preliminary injunction in *NYSCOA* "for substantially the reasons stated" in the district court's opinion and order. *NYSCOA,* 475 F. App'x at 805. The district court found that plaintiffs were not likely to succeed on their claim that § 167(1)(a) created contractual rights. The district court explained that "[t]he language of the statute lays out policy, just like innumerable other laws, and its terms do not 'clearly and unequivocally' express an immutable contractual guarantee." 851 F. Supp. 2d at 582 (citation omitted). "Reading section 167 as a contract," the court held, "would improperly impair the ability of the Legislature to change its policies regarding its employees' health insurance plans." *Id.*

B. The Collective-Bargaining Agreement in Effect upon a Covered Employee's Retirement Did Not Vest the Employee with a Right to Retain Forever that Agreement's Contribution Percentages.

Nothing in the CBAs suggests that the contribution percentages set forth in those contracts provide a vested benefit that cannot be altered. To the contrary, every CBA relevant here contained a general duration clause with an expiration date, and no CBA stated that contribution percentages were subject to a different duration clause or otherwise survived the contract's expiration. Consequently, the CBA in effect upon the retirement of a covered employee did not, under the Supreme Court's decisions in *Tackett* and *Reese*, afford that retiree a vested right to forever retain the contribution percentages set forth in that CBA.

In *M&G Polymers USA, LLC v. Tackett,* 135 S. Ct. 926 (2015), the Supreme Court held that the question whether retiree health-insurance benefits vest, and thus cannot be altered, must be determined based on "ordinary principles of contract law." *Id.* at 930, 933, 935, 937. The *Tackett* Court identified two such principles. First, "courts should not construe ambiguous writings to create lifetime promises." *Id.* at 936. Second, "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement." *Id.* at 937 (citation and

internal quotation marks omitted). Applying those principles, the *Tackett* 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.* (emphasis added).

In 2018, the Supreme Court reemphasized and extended *Tackett*'s holding. In *CNH Industrial N.V. v. Reese,* 138 S. Ct. 761 (2018), the Court made clear that where a CBA contains an express termination date, the CBA does not vest health benefits in retirees unless it "specifie[s] that the health care benefits were subject to a different durational clause." *Id.* at 766. The *Reese* Court reiterated that "[c]ontractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement." *Id.* at 763 (citations and internal quotation marks 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.*; *see also Gallo v. Moen Inc.,* 813 F.3d 265, 269 (6th Cir. 2016) ("When a specific provision of the CBA does not include an end date," courts must "refer to the general durational clause to determine that provision's

termination."); *Cooper v. Honeywell Int'l, Inc.,* 884 F.3d 612, 622 (6th Cir. 2018) (holding that *Tackett* required courts to "import[] the general durational clause's end date into every provision of the CBA").

The CBA in *Reese* was "silent on the question of vesting." 138 S. Ct. at 766. The Court explained that, if the parties had meant to vest the benefits at issue, they "easily could have said so in the text." *Id.* 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.*

Some plaintiffs[30] mistakenly argue that *Tackett* "declined to adopt an explicit language requirement" for vesting. The *Tackett* Court expressly warned that "courts should not construe ambiguous writings to create lifetime promises," 136 S. Ct. at 936, and it rejected an inference of vesting when a contract is "silent as to the duration of retiree benefits," *id.* at 937.

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[30] In particular, CSEA (Br.21, 27), NYSTPBA (Br.18), NYSCOA (Br.10-11), and one of the Judicial-Branch Unions (Br.10-11 (Strandberg appeal).

In light of *Tackett* and *Reese*, a provision stating simply "that retirees will be eligible for a particular healthcare plan and that the company will pay the premium costs for that plan" is not sufficient to overcome a general duration clause. *Fletcher v. Honeywell Int'l, Inc.,* 892 F.3d 217, 224 (6th Cir.), *cert. denied,* 139 S. Ct. 493 (2018); *accord Cole v. Meritor, Inc.,* 855 F.3d 695, 699-701 (6th Cir. 2017), *cert. denied,* 138 S. Ct. 477 (2017). Rather, a finding of vesting requires "unambiguous evidence" that retiree benefits survive the contract's expiration. *Barton v. Constellium Rolled Products-Ravenswood, LLC,* 856 F.3d 348, 352 (4th Cir. 2017); *accord Zino v. Whirlpool Corp.,* 763 F. App'x 470, 472 (6th Cir. 2019) (health benefits did not vest "because no CBA unambiguously disconnects healthcare benefits from the governing general durational clauses"); *Serafino v. City of Hamtramck,* 707 F. App'x 345, 352 (6th Cir. 2017) (overcoming general duration clause would require "strong indication within the four corners of the agreement," such as a "specific-durational clause" applying to provision at issue); *Grove v. Johnson Controls, Inc.,* 694 F. App'x 864, 868 (4th Cir. 2017) (clause regarding agreements' termination dates controlled over clause regarding continuation of benefits).

The CBAs at issue here contained no such "unambiguous evidence." Just as in *Tackett* and *Resse,* the CBAs contained general duration clauses, and no CBA stated that contribution percentages were subject to a different duration clause or otherwise survived the contract's expiration.

Tacitly acknowledging *Tackett*'s controlling effect, PEF suggests (Br.15) the decision should not apply retroactively. The suggestion has no basis in precedent. Although the plaintiffs in *Tackett* had retired in the 1990s, *see* 135 S. Ct. at 931, the Supreme Court's decision applied to them. Similarly, *Reese* involved a CBA that ran from 1998 to 2004, *see* 138 S. Ct. at 764, and the Court's decision determined its effect. Unsurprisingly, PEF cites, and we could find, no case limiting *Tackett* and *Reese* to prospective application.

Tackett and *Reese* also supersede any earlier decisions of the federal Courts of Appeals, to the extent they are inconsistent. Plaintiffs therefore err by relying on pre-*Tackett* case law (*e.g.,* PEF Br.15; Council 82 Br.28).

Plaintiffs also seek to rely on various New York state cases.[31] Those cases do not assist plaintiffs for two reasons.

First, at most, the subject state cases would be relevant to plaintiffs' state-law breach-of-contract claims. Plaintiffs' contract-impairment claims are governed by federal law.

When a federal court is asked to invalidate a state statute under the Contract Clause, the "existence of the contract and the nature and extent of its obligation become federal questions" for that purpose. *Irving Trust Co. v. Day,* 314 U.S. 556, 561 (1942); *accord State of Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938); *Pineman v. Oechslin*, 637 F.2d 601, 604 (2d Cir. 1981). While state law can inform the federal court's answer, federal courts ultimately must "decide for [them]selves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation." *Brand*, 303 U.S. at 100.

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[31] *See, e.g.,* CSEA Br.43; NYSPIA Br.18-19; Judicial-Branch Unions Br.22-23, 25 (Strandberg appeal); PEF Br.19-20; Council 82 Br.25-26; DC37 Br.20-21; PBANYS Br.17-19; UUP Br.26-28; NYSCOA Br.22-23.

Second, and in any event, it is highly unlikely that the New York Court of Appeals would depart from the holdings of *Tackett* and *Reese*. *See generally Kendzierski v. Macomb Cty.*, __ N.W.2d __, 2019 WL 2307955, *4-14 (Mich. May 30, 2019) (declining to depart from holdings of *Tackett* and *Reese* for purposes of Michigan state law).

Indeed, in *Kolbe v. Tibbetts,* 22 N.Y.3d 344 (2013), a pre-*Tackett* decision, the New York Court of Appeals foreshadowed *Tackett*'s approach. At issue in *Kolbe* was whether retirees had a vested right to retain the same co-payment regime in effect when they retired. The *Kolbe* court recognized that, to decide such issues, courts must "look to well established principles of contract interpretation," and that, [a]s a general rule, contractual rights and obligations do not survive beyond the termination of a collective bargaining agreement." *Id.* at 353. In the matter before it, the court found that the CBAs were sufficiently ambiguous to warrant remittal for the consideration of extrinsic evidence. *Id.* at 355. The *Kolbe* court did not find ambiguity in silence, however. Rather, the court found that the placement of the co-payment provision in a section that also provided an unambiguous promise to vest a different benefit "until the employee reaches 70" created sufficient

ambiguity to warrant remittal. *Id.* at 353-55. The court also found an ambiguity as to whether "coverage" included prescription co-payments, *id.* at 355-56, a question not presented here.[32]

Plaintiffs also cite state intermediate appellate decisions, namely *Baff v. Bd. of Educ.*, 169 A.D.3d 1322, 1324 (3d Dep't 2019), *Della Rocco v. City of Schenectady*, 252 A.D.2d 82, 84 (3d Dep't 1998), *Matter of Warner v. Bd. of Educ.,* 108 A.D.3d 835, 837 (3d Dep't 2013), and *Myers v. City of Schenectady,* 244 A.D.2d 845, 847 (3d Dep't 1997). But *Baff* is the only one of these decisions that post-dates *Tackett,* and it fails to cite that decision or the Supreme Court's 2018 decision in *Reese.* Moreover, as in *Kolbe,* the *Baff* Court did not find ambiguity as to vesting in silence; instead, it found ambiguity and a triable issue of fact where the parties agreed that retirees would receive health-insurance coverage "on the same basis as they have in the past," 169 A.D.3d at 1322, a phrase that reasonably could refer to the costs of premiums for that coverage, *id.* at

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[32] 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 360 (8th ed. 2004). Copayments are thus features of insurance coverage, while a premium, in contrast, is the price paid to obtain coverage in the first place. *See infra* at 55-58.

1324. No such phrase appears in the CBAs' continuation clauses here and, after extensive discovery, plaintiffs were unable to find one elsewhere in the governing documents.

The rest of the cited intermediate appellate decisions predate *Tackett* and *Reese,* and thus are not persuasive. Indeed, the inference they draw—that the respective bargaining units must have intended to insulate retirees from future benefit changes when they would no longer be represented by unions and possess collective bargaining rights—is the very *Yard-Man* inference[33] that the Supreme Court squarely rejected in *Tackett* and again in *Reese*. While the *Tackett* Court recognized that parties may bargain for employee benefits in retirement, 135 S. Ct. at 936, it held that the *Yard-Man* inference erroneously ignored the CBA's general duration clause, *id.*

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[33] *See International Union, United Automobile, Aerospace, and Agricultural Implement Workers v. Yard-Man, Inc.*, 716 F.2d 1476, 1482 (6th Cir. 1983) (holding that, where union "owes no obligation to bargain for continued benefits for retirees," retirees should have "assurance that once they retire they will continue to receive such benefits regardless of the bargain reached in subsequent agreements"), *abrogated by Tackett,* 135 S. Ct. at 935-37, and *Reese,* 138 S. Ct. at 765-66.

This Court should therefore find that plaintiffs' contract-impairment and state law breach-of-contract claims both fail under the Supreme Court's decisions in *Tackett* and *Reese*.[34]

C. The Various Clauses of the Collective-Bargaining Agreements Cited by Plaintiffs Do Not Vest a Right to Receive the Same Percentage of State Premium Contributions Forever.

To establish the requisite "unambiguous intent" to vest in post-1982 retirees a right to retain forever the State contribution percentages in effect at the time of retirement, plaintiffs collectively seek to rely on seven clauses of the CBAs. Their reliance is misguided. As we demonstrate below, none of the subject clauses promised to vest specific State contributions to retirees' premiums.

The CSEA plaintiffs also argue that, "taken together," three provisions of the CBAs "collectively" establish that State contribution percentages vested. (CSEA Br.22, 29.) The fact that plaintiffs must cobble together different provisions itself shows that the parties did not

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[34] To the extent this Court finds state law unclear on a question where state law is material, it may certify a question to the New York Court of Appeals. *See* 22 N.Y. Comp. Codes R. & Regs. tit. 22, § 500.27(a).

unambiguously provide for vesting. Had the State and CSEA intended such vesting, they could simply have said: "The State's percentage contribution to retiree health-insurance premiums is hereby vested." The parties would not have expressed such a concise intention by requiring readers to construct a story from three different provisions, none of which mentions vesting.

In contrast, the executive-branch CBAs expressly used the term "vested" when referring to pension benefits. (*E.g.,* CSEA J.A.971-972 [referring to deceased employees who were "vested in the Employees' Retirement System"].[35]) But the CBAs never described health-insurance contribution percentages in that manner. As courts have explained, "it is significant when a CBA uses 'vested' in one place and yet omits the word in the provision at the center of the vesting dispute." *See Cooper,* 884 F.3d at 621; *accord Fletcher*, 892 F.3d at 224, 226.

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[35] *Accord* NYSTPBA J.A.889, 901-902; NYSPIA J.A.364-365, 422; PEF J.A.844, 1011, 1362; Council 82 J.A.422, 495, 565; NYSCOPBA J.A.400, 472, 552; DC37 J.A.389, 415, 485; PBANYS J.A.229, 251, 298; UUP J.A.334, 350.

NYSHIP is a comprehensive plan that provides valuable benefits. At relevant times, for most retirees the State has paid 88-90% of premiums for individual coverage and 73-75% of premiums for dependent coverage.[36] The fact that these percentages include a modest reduction did not make the benefit "inconsequential," as NYSCOA (Br.25) and NYSPIA (Br.19 n.9) assert.

None of the seven CBA clauses variously relied upon in these appeals overrode the respective CBAs' general duration clauses' application to the premium contribution percentages established in those CBAs. In fact, several of the subject clauses demonstrate that contribution percentages were not intended to vest.

1. The general continued-coverage clauses addressed coverage, not premiums.

Contrary to plaintiffs' arguments,[37] the CBAs' general continued-coverage clauses did not vest retiree premium contribution percentages.

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[36] As explained *supra* at 23-24, for employees retiring after January 1, 2012 from positions grade 10 or above, the state contributed 84% of the premiums for individual coverage and 69% of the premiums for dependent coverage. *See* 4 N.Y.C.R.R. § 73.3(b)(2)-(3).

[37] NYSTPBA (Br.7, 9), PEF (Br.17), Council 82 (Br.21, 25), PBANYS (Br.9, 16), and UUP (Br.23, 25) make arguments on the basis of the general continued-coverage clauses.

All of the executive-branch CBAs contained continued-coverage clauses similar to that of CSEA's 2007-2011 CBA: "The State shall continue to provide all the forms and extent of coverage as defined by the contracts and in force on March 31, 2007 with the State's health insurance carriers unless specifically modified by this Agreement." (CSEA J.A.906.)

If anything, the subject clause suggests that the benefits being continued did *not* vest. "There would be no need to 'continue' such benefits if prior CBAs had created vested rights to such benefits." *Gallo*, 813 F.3d at 270. Thus, "when a CBA provision promises to 'continue' providing benefits, we can assume only it 'guarantee[s] benefits until the agreement expires, nothing more.'" *Cooper*, 884 F.3d at 620 (citation and emphasis omitted); *accord Watkins,* 875 F.3d at 327; *Cole,* 855 F.3d at 700; *Gallo*, 813 F.3d at 269; *Grove,* 694 F. App'x at 868.

But the continued-coverage clauses did not address State contribution percentages in any event. Rather, the clauses addressed, and thereby ensured the continuation of, the "forms and extent of coverage," i.e., the health-insurance product provided. Insurance "coverage" in that context means "the risks within the scope of an

insurance policy." Black's Law Dictionary 394 (8th ed. 2004). The "forms and extent" of coverage therefore refers to the kinds of risks that are insured (major medical, hospital, dental, etc.) and the extent to which those risks are covered.

Premiums are different; they are the prices charged for coverage. *See* Black's Law Dictionary 1219 (8th ed. 2004) (defining "premium" as "[t]he periodic payment required to keep an insurance policy in effect"). Indeed, the executive-branch CBAs separately addressed the State's contribution to the health-insurance premiums of active employees, providing in a different section that the State would pay "90 percent of the *cost of* individual coverage and 75 percent of the *cost of* dependent coverage." (*E.g.,* CSEA J.A.918 [emphasis added].)[38]

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[38] Contrary to PEF's argument (Br.16-17), the 1982 MOUs did not equate contributions and coverage. PEF's MOU said the State would pay 90% "of the cost of premium or subscription charges *for the coverage* of State employees." (PEF J.A.1213 [emphasis added].) "Coverage" was something the premiums purchased; premiums were "charges" for that coverage. The MOU's reference to "the modifications to health insurance coverage set forth above" followed five pages containing numerous changes to coverage, which PEF omits with ellipses. (*Compare* PEF J.A.1215-1221 *with* PEF Br.16.)

The State's contracts with its insurers, referenced in the continued-coverage clause, likewise distinguished coverage from premiums. For example, in its medical/surgical contract with the State, Metropolitan Life "promise[d] to pay the insurance and other benefits described" in the policy's exhibits "[i]n consideration of the payment by the Employer of the initial premium and of the payment hereafter by the Employer, during the continuance of this Policy, of all premiums." (PEF J.A.1678.) The Metropolitan Life contract listed the premium rates in a separate "Schedule of Premiums." (Council 82 J.A.1031.) And the attached General Information Booklet stated that the State would pay 90% of "the cost of your coverage." (Council 82 J.A.1040.) The Metropolitan Life contract thus distinguished between premiums (*i.e.,* the cost of coverage) and the coverage itself.

Similarly, the health-insurance plan brochure attached to the medical/surgical contract warned participants about "Cancellation for Non-Payment of Premiums" (PEF J.A.1698) and provided for a "Waiver of Premium" if participants were disabled (PEF J.A.1699-1700). The General Information Booklet submitted by Council 82 likewise advised that the State "helps you pay for your health insurance coverage" by

paying 90% "of the cost of your premium for Individual coverage." (Council 82 J.A.1103.) The Request for Proposals for the prescription drug program contained a separate table of "Monthly Premium Rates." (Council 82 J.A.1077.) The HMO Specifications described the "Employer Premium Contribution" toward "the cost of HMO coverage" and explained that employees must "contribute toward the cost of the NYSHIP coverage option they select." (Council 82 J.A.1089-1090.)

This Court likewise has recognized that coverage and premiums differ. *See, e.g., GlobalNet Financial.Com, Inc. v. Frank Crystal & Co.,* 449 F.3d 377, 388 (2d Cir. 2006) (recognizing contractual right to cancel coverage for non-payment of premiums); *Armada Supply Inc. v. Wright,* 858 F.2d 842, 851-52 (2d Cir. 1988) (noting that insurer's acceptance and retention of premium did not waive its objection to asserted coverage).

2. The continued-coverage clauses for retirees did not address premiums.

The CBAs in four of these appeals provided employees with ongoing health insurance upon retirement. For example, CSEA's CBAs stated: "Employees covered by [NYSHIP] have the right to retain health insurance after retirement upon completion of ten years of service." (CSEA J.A.869; *see also, e.g.,* PEF J.A.1011; DC37 J.A.389, 485; UUP

J.A.334, 350.) That provision did not speak to premium contributions, however. The State does not dispute that, in certain CBAs, it agreed to make health insurance available to retirees with 10 years of service. At issue is whether the State could reduce its premium contributions for that insurance, in most cases by only two percentage points. On that issue, as the district court properly found (CSEA S.A.25), the subject provision was silent.

3. The 90/75 clauses did not apply to those who retired after the expiration of the respective CBAs.

The CBAs specified the State's share of health-insurance premiums for active employees in substantially the following language: "The State agrees to pay 90 percent of the cost of individual coverage and 75 percent of the cost of dependent coverage toward the hospital/medical/mental health and substance abuse components provided under the Empire Plan." (CSEA J.A.865.) That language did not, as plaintiffs contend (*e.g.*, CSEA Br.29, 31; Council 82 Br.24, 27; UUP Br.23, 45), vest retirees with the right to receive the same contribution percentages in perpetuity.

The 90/75 clauses have no vesting language. Nothing in those clauses suggests that the contribution percentages would continue upon the expiration of the relevant CBA, let alone provides the unambiguous

language necessary to override a CBA's general duration clauses. Under *Tackett* and *Reese,* those contribution percentages therefore expired at the end of each CBA's term.

Indeed, in 2011, the CBAs reduced the State's contributions for active employees, which had been set forth in the 90/75 clause. (*E.g.,* CSEA J.A.865.) Because the active employees' contributions were reduced, the 90/75 clause obviously had not vested them. The very same 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.

CSEA (Br.32) asks why, in its 2011-2016 CBA implementing the newly negotiated contribution percentages, the first sentence identifying the rates of 90 percent and 75 percent remained in the labor contract if those rates were not intended to remain in effect for retirees. The answer is simple: While CSEA's 2011-2016 CBA took effect on April 2, 2011, the change in contribution percentages took effect on October 1, 2011. (CSEA J.A.865, 873.) The 90/75 contribution percentages were therefore retained in the CBA to cover current employees for the period April 2 to October 1, 2011.

Also easily explained is why the clause reducing the State's contribution percentages specifically referenced current employees. It was not, as CSEA argues (Br.32), because the retirees' contribution percentages could not be reduced. Rather, for CBAs beginning in 2011, the clause had to address current employees expressly because, for the first time, the State's contributions would not be uniform: going forward, higher-paid employees would be required to contribute more toward their health-insurance premiums. In CSEA's 2011-2016 CBA,"[e]ffective October 1, 2011 for employees in a title Salary Grade 9 or below … the State agrees to pay 88 percent of the cost of individual coverage and 73 percent of the cost of dependent coverage." (CSEA J.A.865.) For employees Salary Grade 10 and above, the State contributed somewhat less (84% of individual premiums and 69% of premiums for dependent coverage). (CSEA J.A.865.)

In each instance, the word "employee" was coupled with a salary grade. Specifying the salary grade was necessary to set forth the agreed-upon changes. Proving the point, the 2009-2016 CBA for security supervisors, all of whom were grade 10 or above, provided solely for the 84/69 contributions—absent a need to distinguish between two levels of

contribution, the security supervisors' clause did not use the word "employees." (*See* Council 82 J.A.461.)

4. The unremarried-spouse clauses did not apply to retirees.

For those employees with ten years of State service who retired and later died, most executive-branch CBAs provided that the retiree's "unremarried spouse" and eligible dependent children 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,* CSEA J.A.869.) That provision did not vest a right to retain indefinitely the same State share of premium contributions. At most, it vested a right to continue in the health-insurance program at whatever contribution percentage might be "required of" active employees.

By explicitly pegging the contribution percentages of dependent survivors to those of active employees, the unremarried-spouse clause demonstrates that, when the parties wished to address contribution percentages, they did so expressly, as the district court noted. (*See* CSEA S.A.24.) The parties did not expressly address contribution percentages for retirees by providing that they would remain the same in perpetuity.

Thus, they did not vest retirees with a right to retain the same contribution percentages in perpetuity.

Finally, the unremarried-spouse clause affected only dependent survivors, not the retirees themselves. As this Court has held previously when deciding whether health benefits vested for life, "the 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,* 892 F.3d at 225 (because CBA "explicitly provide[d] for lifetime benefits for surviving spouses and dependents only," retirees could not "claim a contractual right to such benefits"); *see also Barton*, 856 F.3d at 355-56 ("surviving spouses" provision "simply define[d] a category of people *eligible* to receive benefits; it says nothing about the *duration* for which those benefits will last").

5. The sick-leave clauses did not address the State's share of premium contributions.

DC37 and UUP rely on a clause that allowed retiring employees to apply their accumulated sick-leave credits "toward defraying the required contribution to the monthly premium during their own

lifetime."[39] The subject clause does not suggest the vested right plaintiffs assert, let alone provide the unambiguous language required to vest contribution percentage rates.

The sick-leave clause allowed a retiree to defray the cost of the retiree's share of NYSHIP premiums by using unexhausted sick leave. The value of unexhausted sick leave to a particular retiree would be 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 toward those premiums. It said only that the sick-leave credit would defray the cost of the retiree's "required contribution."

In interpreting the sick-leave clause, DC37 misconstrues (Br.16) the import of the phrase "during their own lifetime." The State imposes no relevant limit on the sick leave that may be accrued over an employee's many years of service, and the length of time that a retiree may live after retirement can vary widely. Making the sick-leave provision effective for

[39] DC37 Br.7-8, 10, 16, 20; UUP Br.24; *see* DC37 J.A.389; UUP J.A.592.

a retiree's lifetime ensured that retirees would not lose the benefit of any sick days they had accumulated.

Defendants do not dispute that for those CBAs containing continued-coverage clauses specifically for retirees, including DC37's, the clauses vested the retirees' right to coverage. But neither the sick-leave clause nor the retirees' continued-coverage clause addressed how much the State would contribute toward the retirees' premiums after making coverage available.

6. The "proposal" clauses show the parties understood that retirees did not have a vested right to retain the same State share of premium contributions.

From 1991 through 2004, anticipating changes to government accounting standards, CSEA's CBAs stated that the parties agreed to "develop a proposal to modify the manner in which employer contributions to retiree premiums are calculated." (CSEA J.A.1120; *see* CSEA J.A.972, 997, 1018.) Similar clauses appeared in UUP's CBAs. (UUP J.A.587, 594.)

Contrary to the arguments of CSEA (Br.10-11) and UUP (Br.30-31), these clauses provided no evidence of vesting. They committed the parties only to develop a proposal—not to provide a particular level of

contributions. No such proposal was ever implemented. (CSEA J.A.1121-1122.)

In fact, the proposal clauses provide further evidence that employer contributions for retirees did *not* vest. They showed the parties' understanding that "employer contributions to retiree premiums" could be "modif[ied]."

7. The lifetime-maximum clauses and other provisions relied upon by UUP similarly did not vest a right to retain the same State share of premium contributions.

UUP argues (Br.24-25) that lifetime-maximum clauses applicable to various benefits vested a right for retirees to retain the 90/75 contribution percentages. UUP's CBA is one that affirmatively provides health-insurance coverage for retirees. The CBA's inclusion of lifetime maxima is consistent with retirees having the "right to retain health insurance coverage after retirement." (*E.g.,* UUP J.A.334.) .

At issue here, however, is whether the CBAs created a vested right to retain forever the 90/75 contribution percentages. The 90/75 clauses in UUP's CBAs did not state that they extended for anyone's lifetime. (*E.g.,* UUP J.A.327.) The fact that certain provisions in UUP's CBAs extended for life, while the State's contribution percentages did not, provides still

further evidence that retirees did not attain a vested right to retain fixed percentages. "[W]e must assume that the explicit guarantee of lifetime benefits in some provisions and not others means something." *Gallo*, 813 F.3d at 270; *accord Fletcher,* 892 F.3d at 224.

Nor should the Court accept UUP's argument (Br.23-26) that Article 39 of its 2007-2011 CBA, taken as a whole, vested an entitlement to retain the 90/70 contribution percentages. Again, the record shows the opposite. Article 39.10 is entitled "Retiree/Dependent Coverage." (UUP J.A.592.) It contains multiple provisions describing retirees' coverage, but does not reference the State's contributions to health-insurance premiums.

Moreover, each of UUP's CBAs set forth the parties' "entire agreement." (*See* UUP J.A.353, 367, 377, 399, 409, 421, 431-432; UUP Motion Exs. A-B.) When the State and UUP meant to confer rights on retirees, they did so expressly—most recently, in the separate article devoted to retiree coverage. (UUP J.A.333-334, 350.) The Court should not imply a new term—a lifetime guarantee of contribution percentages—that the parties did not include in that section, or

anywhere else in the CBA. *See Tackett,* 135 S. Ct. at 937; *Reese,* 138 S. Ct. at 766.

D. The Judicial-Branch Collective-Bargaining Agreements Could Not Provide Benefits, Let Alone Vest Rights, When the Executive-Branch Agreements Did Not Do So.

The judicial-branch CBAs provided "[e]mployees enrolled in such plans" with health and prescription drug benefits "at the same contribution level" that "applie[d] to the majority of represented Executive Branch employees covered by such plans." (*E.g.,* DC37 J.A.502.)

The district court correctly granted summary judgment to defendants because the judicial-branch CBAs "are all silent as to the premium contribution rate to be paid by retirees." (NYSCOA S.A.8.) *See Serafino,* 707 F. App'x at 352-53. The cited clauses provided no benefits for retirees, let alone vested contribution percentages. The general statement that the State would "continue to provide the health insurance plan administered by the Department of Civil Service" was followed

immediately by details of what "*[e]mployees* enrolled in such plans" would receive. (DC37 J.A.502.[40])

Because the grant of benefits referenced only employees, and not retirees, the judicial-branch CBAs were silent on the issue of how much, if anything, the State would contribute to the health-insurance premiums of retirees. Where the judicial-branch CBAs were silent, they cannot have vested retirees with any right to fixed contribution percentages. In *Tackett,* the Supreme Court wrote 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." 135 S. Ct. at 937. Three years later, the Court reaffirmed that principle, holding in *Reese* that when a CBA "is merely silent on the question of vesting," courts should "conclude that it does *not* vest benefits for life." *Reese,* 138 S. Ct. at 766.

Even if the judicial-branch CBAs' grant of benefits were deemed to apply to retirees despite the absence of such a term, the State would still be entitled to summary judgment. The judicial-branch CBAs granted the

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[40] *Accord* CSEA J.A.1432-1433, 1436; *accord* Judicial-Branch Unions J.A.1111-1112 (Strandberg appeal); NYSCOA J.A.107; *see also* CSEA J.A.1441, 1445 (variant judicial-branch continued-coverage clauses not mentioning retirees).

same health-insurance benefits and set the same contribution percentages received by "the majority of represented Executive Branch employees." (*E.g.,* DC37 J.A.502.) Since 2011, the majority of represented executive-branch employees—those in CSEA and PEF—have received reduced State contributions of 88% for individual coverage and 73% for dependent coverage (grades 9 and below) or 84% individual and 69% dependent (grades 10 and up).[41]

As the district court held in denying NYSCOA's preliminary injunction motion—a decision affirmed by this Court—the judicial-branch CBAs' continuation clause "does not guarantee that Union members will receive health benefits at the rates set by Civil Service Law § 167(1)"; rather, it "guarantees that they will receive benefits at the same rate as the majority of executive branch employees." *NYSCOA,* 851 F. Supp. 2d at 579. Those rates can change.[42]

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[41] *See* Judicial-Branch Unions J.A.1093, 1116 (Strandberg appeal); DC37 J.A.363, 518, 535-536; NYSCOA J.A.468.

[42] The fact that some judicial-branch CBAs have expired (*see* Judicial-Branch Unions Br.17-18 [Clancy appeal]) does not assist plaintiffs. If the CBAs expired, absent an unambiguous vesting provision they have no further force or effect. And the judicial-branch CBAs did not refer to the rates in particular executive-branch CBAs, or suggest that the executive-branch contribution percentages were unalterable.

NYSCOA argues (Br.18) that the Court should alter the CBAs' text by adding an "implied term" that the "same contribution level" in its continuation clause means the contribution level "as of the date of the Collective Bargaining Agreement." The parties could have included such language, but chose not to do so. In those circumstances, this Court has stated firmly that it will not "judicially rewrite" the CBA "because one party now wishes it were different." *Saint Mary Home, Inc. v. Service Employees Intern. Union,* 116 F.3d 41, 45 (2d Cir. 1997). Because NYSCOA's CBA set forth the parties' "entire Agreement" and "terminate[d] all prior agreements and understandings (NYSCOA J.A.136; NYSCOA Motion Exs. A-G), the Court should not imply such an unbargained term.

E. The Court Should Disregard Plaintiffs' Extrinsic Evidence Because the Collective Bargaining Agreements Are Integrated Contracts.

Because the language of the CBAs themselves provides no evidence that the parties intended to create a vested right in the State's existing contribution percentages, plaintiffs seek to rely on extrinsic evidence to establish such a right. Among other things, plaintiffs cite (1) the parties' bargaining history, including the State's proposals to change retiree

contribution percentages in 1991, 2003, and 2007 to a sliding scale or some other basis;[43] (2) plaintiffs' purported subjective understanding that contribution percentages vested;[44] and (3) the parties' past practice of not changing contribution percentages for retirees between January 1, 1983 and October 1, 2011.[45] None of that evidence—nor any similar material in the record—can establish a vested contractual right that appears nowhere in the written contracts because the CBAs are all integrated, either expressly or as a matter of law.

Most of the CBAs at issue contain integration clauses. For instance, and as the district court expressly recognized (CSEA S.A.5-6), CSEA's 2007-2011 CBA constituted "the entire agreement" of the parties, and "terminate[d] all prior agreements and understandings" between them (CSEA J.A.873).

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[43] *E.g.,* CSEA Br.10-15, 22-23, 33; NYSTPBA Br.13; NYSPIA Br.25; Judicial-Branch Unions Br.12-13, 27-28 (Strandberg appeal); DC37 Br.8-9, 10; PEF Br.21-22; UUP Br.29-30; NYSCOA Br.27.

[44] *See* CSEA Br.32-33; NYSTPBA Br.12; Judicial-Branch Unions Br.5-6, 21-22, 26-27 (Strandberg appeal); Judicial-Branch Unions Br.15-16 (Clancy appeal); Council 82 Br.27; UUP Br.28-29; NYSCOA Br.21-22, 26-27.

[45] CSEA Br.22; NYSTPBA Br.20; Judicial-Branch Unions Br.11, 20 (Strandberg appeal); PEF Br.20; UUP Br.17; NYSCOA Br.12, 20.

When a document declares in an integration clause that it contains the parties' entire agreement, plaintiffs cannot use extrinsic evidence to add a new provision—here, one that would vest a right to retain indefinitely the State's contribution percentages that the CBA sets forth. *See North Atlantic Instruments, Inc. v. Haber,* 188 F.3d 38, 48 (2d Cir. 1999); *Primex Intern. Corp. v. Wal-Mart Stores, Inc.,* 89 N.Y.2d 594, 599-600 (1997). Rather, "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).

While the executive-branch CBAs for NYSTPBA, NYSPIA, and DC37 did not contain an express integration clause, under settled contract law, "the written agreement is presumed to encompass the whole agreement of the parties." *Tackett,* 135 S. Ct. at 936. For those CBAs without an integration clause, the intent to create an integrated agreement is nonetheless plain. Those agreements brought negotiations to a close, providing that the parties could "reopen" negotiations if part

of the CBA were found invalid,[46] or for a specific, identified issue.[47] When the State and NYSPIA reached an understanding outside the written CBA, it was memorialized in a letter and appended to the CBA. (*E.g.,* NYSPIA J.A.333-341.) Indeed, NYSPIA acknowledges (Br.15-16, 20 n.2) that its CBAs were integrated agreements.

Even without an express integration clause, an agreement is integrated as a matter of law when the document is a "complete written instrument" and the agreement is "one which the parties would ordinarily be expected to embody in the writing." *Braten v. Bankers Trust Co.,* 60 N.Y.2d 155, 162 (1983) (citations and internal quotation marks omitted); *accord Battery Steamship Corp. v. Refineria Panama, S.A.*, 513 F.2d 735, 738 n.3 (2d Cir. 1975); *Manufacturers Hanover Trust Co. v. Margolis*, 115 A.D.2d 406, 407 (1st Dep't 1985); Restatement (Second) of Contracts § 209(3) (1981); *see also Air Line Pilots Ass'n v. Midwest Exp. Airlines, Inc.,* 279 F.3d 553, 558 (7th Cir. 2002) (presence of integration clause in CBA "is just one way of showing that a contract is integrated").

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[46] *See e.g.,* NYSPIA J.A.264, 489, 529; DC37 J.A.421, 453; NYSTPBA Motion Ex. E.

[47] *See* NYSTPBA Motion Ex. G.

The parol-evidence rule covers agreements that—like those alleged by plaintiffs—"the parties would ordinarily be expected to embody in the writing." *Fogelson v. Rackfay Constr. Co.,* 300 N.Y. 334, 338 (1950) (citation and internal quotation marks omitted). It "forbids proof of an oral agreement to add to or vary the writing." *Id.* "[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., Inc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990).

Consequently, plaintiffs' extrinsic evidence must be disregarded as a matter of law.

That includes plaintiffs' evidence of the State's attempt during negotiations to secure the unions' agreement on NYSHIP modifications by offering a vested sliding scale for contributions. Because the unions *rejected* the State's proposals for a vested sliding scale,[48] they did not

[48] *See* Council 82 J.A.1206, 1214-1215, 1219, 1222, 1224-1225, 1227; NYSCOPBA J.A.2091-2095; UUP J.A.540.

become part of the contract,[49] and they are irrelevant to the vesting issue presented here.

Similarly irrelevant are plaintiffs' assertions about the parties' subjective understanding and intent. Thus, for instance, NYSTPBA should not be heard to argue (Br.12) that the State's health-insurance contributions "were always understood" to be "vested property rights."[50] "When interpreting the meaning of a contract, it is the objective intent of the parties that controls." *Klos v. Polskie Linie Lotnicze,* 133 F.3d 164, 168 (2d Cir. 1997). "The secret or subjective intent of the parties is irrelevant." *Id.*; *accord Wells v. Shearson Lehman/American Exp., Inc.*, 72 N.Y.2d 11, 24 (1988).

Finally, "past practice, like any other form of parol evidence, is merely an interpretive tool and cannot be used to create a contractual right independent of some express source in the underlying agreement." *Matter of Aeneas McDonald Police Benevolent Assn. v. City of Geneva,* 92

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[49] The State's proposals during negotiations were made without prejudice. (*See* NYSPIA J.A.868.)

[50] Similar arguments are made by CSEA (Br.15-16), the Judicial Branch Unions in the Clancy appeal (Br.15-16), Council 82 (Br.28), UUP (Br.28), and NYSCOA (Br.26-27).

N.Y.2d 326, 333 (1988). Past practice "should not be used to add terms to a contract that is plausibly complete without them." *Cup v. Ampco Pittsburgh Corp.,* 903 F.3d 58, 64 (3d Cir. 2018) (citations and internal quotation marks omitted). As the district court recognized, "all that this pattern establishes is that, during the period in question, the need did not arise to make changes to the premium contribution rates." (CSEA S.A.28.)

Indeed, during the period in question, the retirees' contribution percentages were mandated by CSL § 167(1), and could not be changed without amending the statute. Thus, contribution percentages for retirees did not change until after the Legislature amended CSL § 167(8) in 2011. But the Legislature was not barred from amending the statute. The fact that the State "hope[d] to subsidize healthcare benefits for its retirees for as long as possible does not mean it has promised to do so," or that it had no right to alter the subsidies in the future. *Gallo*, 813 F.3d at 274.

F. Plaintiffs' Remaining Arguments Lack Merit.

1. The memoranda of understanding from 1982 did not address contribution percentages for retirees.

The MOUs from 1982 did not vest retirees with a right to retain the 90/75 State contribution percentages. The MOUs simply provided, among other things, that the State's contribution percentages for *active* employees' coverage would be reduced from 100 to 90. *See supra* at 14.

Although the MOUs are contracts, they did not vest, or even address, the State's contributions percentages for retirees' health-insurance premiums. The MOUs' provision on contribution percentages addressed only "State employees."[51] The omission of retirees is dispositive. Each MOU was a formal, written agreement that superseded the parties' CBA only "as set forth below in this Memorandum of Understanding."[52]

PBANYS incorrectly argues (Br.7) that its MOU must have included retirees because "beginning on the January 1, 1983 trigger date

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[51] NYSPIA J.A.702, 727-728, 736, 748-749, 762-763, 774-775, 850-851; Council 82 J.A.740-741.

[52] *See* NYSPIA J.A.702, 727, 736, 748, 762, 774, 850; Council 82 J.A.740.

set forth in the MOU, those who retired began contributing at the rates set forth therein." Retirees' contribution percentages increased on January 1, 1983 because that was the date set forth in CSL § 167(1), which set and governed retirees' contribution percentages until CSL § 167(8) was amended in 2011.

Four of the plaintiff unions—NYSTPBA (Br.25-26), NYSPIA (Br.6, 10), Council 82 (Br.6-7, 27), and PBANYS (Br.8)—also cite deposition testimony from the State's 1982 negotiator, Meyer Frucher, relating what he "believe[d]" the MOUs said 35 years ago, although he was unable to "remember specifics." (NYSPIA J.A.848 [Tr. at 108].) A witness's oral recollection of documents cannot override the documents' actual terms. *See* Fed. R. Evid. 1002.

2. Council 82's and NYSCOPBA's purported oral side deal is unsupported and unenforceable.

Council 82 (Br.5-6) and NYSCOPBA (Br.5-6)[53] contend that, while the MOUs were being negotiated in 1982, Council 82 made an oral side

[53] Until 1999, Council 82 represented the bargaining unit that NYSCOPBA now represents. (NYSCOPBA Br.3 n.1, 17.) Similarly, members of PBANYS were previously subject to the NYSCOPBA CBA or the Council 82 CBA for the Security Services Unit. (PBANYS J.A.166.)

deal with the State. The parties to this deal supposedly agreed that, "in exchange for current employees and future retirees contributing 10% toward individual health insurance and taking the 'hit,'" contribution percentages for pre-1983 retirees "would remain untouched" and those for employees retiring on or after January 1, 1983 "would be permanently fixed at 10% for individual coverage and 25% for dependent coverage." (Council 82 Br.5-6; NYSCOPBA Br.5-6.) Any such oral agreement had no legal effect.

To begin with, any such agreement would have been extinguished by the integration clauses in multiple successive CBAs, each of which "terminate[d] all prior agreements or understandings."[54]

The alleged oral agreement, moreover, would be void under the Statute of Frauds. The supposed agreement involved a promise to maintain retirees' contribution percentages "permanently." (Council 82 J.A.1333-1334.) The Statute of Frauds voids such an undertaking because the alleged promise could "not … be performed in one year" and,

[54] Council 82 J.A.521, 537, 548, 591; Council 82 Motion Exs. A-B, F; NYSCOPBA J.A.796; NYSCOPBA Motion Exs. A-E.

separately, could "not … be completed before the end of a lifetime." N.Y. Gen. Oblig. Law § 5-701(a)(1).

In any event, the district court correctly held that "[n]o reasonable finder of fact could conclude the existence of such a side deal." (NYSPIA S.A.9.) The parties' MOU did not mention it. (*See* Council 82 J.A.740-750.) The portion of the MOU dealing with premium contribution percentages referenced only "State employees," not retirees. (Council 82 J.A.740-741.) The MOU stated expressly that the parties "have agreed" to modify their CBAs "as set forth below in this Memorandum of Understanding." (Council 82 J.A.740.) If the State had agreed to maintain retirees' contribution percentages forever, the parties would have set forth such a material commitment in their written agreement.

Legislative-history materials concerning the 1983 amendments to CSL § 167 (*see* Council 82 J.A.752-762) do not assist plaintiffs. As enacted, the legislation did not create any vested right to contributions. *See supra* at 39-42. "[R]eference to legislative history is inappropriate when the text of the statute is unambiguous." *Dept. of Housing & Urban Devpt. v. Rucker*, 535 U.S. 125, 132 (2002). Summaries and characterizations of the MOUs and CBAs (*e.g.,* Council 82 J.A.755, 762)

cannot override the content of those documents. *See* Fed. R. Evid. 1002. And none of the legislative materials states that the 90/75 contribution percentages were intended to vest.

3. Retiree health-insurance contributions were not a form of deferred compensation.

The Court should reject the arguments in four of these appeals[55] that the State's contributions to retiree health-insurance premiums constituted a form of deferred compensation and thus could not be changed after retirement. The State has a deferred-compensation plan. *See* N.Y. State Finance Law § 5. That plan does not provide for the contributions at issue.[56]

Further, in *Tackett*, the Supreme Court flatly declared that "[r]etiree health care benefits are not a form of deferred compensation." 135 S. Ct. at 936; *see also Reese*, 138 S. Ct. at 764 (reiterating this point). Although the Supreme Court was applying ERISA, other courts have

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[55] *See* NYSPIA Br.3; Judicial-Branch Unions Br.5, 23 (Strandberg appeal); PEF Br.26; NYSCOA Br.5, 23.

[56] The plan is found at https://www.nysdcp.com/tcm/nysdcp/static/Plan_Document.pdf?r=1 (last viewed July 5, 2019).

extended the Supreme Court's logic to government plans. *See, e.g., Serafino,* 707 F. App'x at 352; *Kendzierski,* 2019 WL 2307955 at *5 n.4, 6. The district court here properly recognized as much. (*See* PEF S.A.14 n.3 [citing cases].)

Nor are the State's contributions to retiree health-insurance premiums reasonably characterized as deferred compensation. 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 301 (8th ed. 2004). Premium contributions, in contrast, are not related to work performed. Indeed, higher-paid workers retiring since 2012 receive a lower percentage contribution to health-insurance premiums. *See* 4 N.Y.C.R.R. § 73.3(b)(2)-(3). Further, an employee who worked for 40 years and lived only a day after retiring would receive virtually no contributions in retirement, while an employee who worked only 10 years and lived for 30 years after retiring, would receive substantial amounts in retirement. (*See generally* NYSPIA J.A.920 [union "didn't feel that years of service should be the basis for contributions" to retiree health-insurance premiums].)

The 90/75 clause did contain a 10-year threshold; the State would not contribute to a retiree's health-insurance premiums unless the retiree had worked in State service for 10 years. That fact did not turn the contributions into deferred compensation, however. The 10-year threshold in the 90/75 clause is an eligibility criterion for contributions, which themselves constitute a classic welfare benefit. The CBAs refer to employees who are "*eligible* to continue health insurance coverage upon retirement."[57] *See generally Barton*, 856 F.3d at 355 (surviving-spouse clause "define[d] a category of people *eligible* to receive benefits" but did not speak to the benefits' duration).

[57] *E.g.,* CSEA J.A.869 [emphasis added]; *see also, e.g.,* NYSTPBA J.A.852 (containing similar provision); NYSPIA J.A.258 (same); PEF J.A.844, 1362 (same); Council 82 J.A.409 (same); NYSCOPBA J.A.387 (same); DC37 J.A.389 (same); PBANYS J.A.225 (same).

4. The collective-bargaining agreements did not incorporate the contribution percentages from Civil Service Law § 167(1).

The Court should similarly reject the argument in four of these appeals[58] that CSL § 167(1), and thus the contribution percentages that it contains, was incorporated into plaintiffs' CBAs.

Even if the CBAs of these plaintiffs had incorporated § 167(1) by reference (and we see no such reference), that incorporation would not give these plaintiffs a vested right to retain the statute's contribution percentages indefinitely. As the Appellate Division held in *RPEA* and this Court affirmed in *NYSCOA*, CSL § 167(1) did not itself vest any rights, but rather always remained subject to future amendment. *See supra* at 24-26, 27-28, 38-42. Incorporating that statutory provision in the CBAs could thus not vest any rights either.

Plaintiffs nonetheless insist[59] that contracts are deemed to incorporate existing law. Because existing law provided 90/75

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[58] *See* Judicial-Branch Unions Br.15-17 (Strandberg appeal) and 14-15 (Clancy appeal); UUP Br.34, 43-44; NYSCOA Br.15-16.

[59] *See* Judicial-Branch Unions Br.15-16 (Strandberg appeal); Judicial-Branch Unions Br.14-15 (Clancy appeal); UUP Br.34, 43-44; NYSCOA Br.16.

contribution percentages for retirees, *see* CSL § 167(1), plaintiffs argue that their CBAs incorporated that term, which became a vested condition of their health-insurance benefits in retirement. Plaintiffs are incorrect.

Plaintiffs' cases stand for the uncontroversial proposition that contracts must be interpreted in light of existing law. The subject cases all predate *Tackett* and *Reese*, which clarified the law on interpreting retiree health-insurance provisions in CBAs. None of those cases suggests that substantive economic benefits provided by a statute become incorporated into a CBA as additional terms that vest for an employee's lifetime. Indeed, most of plaintiffs' cited authorities on the effect of existing law on contract interpretation do not concern CBAs or retiree health insurance at all.[60]

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[60] *Maryland Cas. Co. v. Continental Cas. Co.*, 332 F.3d 145 (2d Cir. 2003) was an insurance case. There, this Court turned to state insurance laws to interpret the meaning of "sudden and accidental," an otherwise ambiguous policy term. *Id.* at 156-59. Here, in contrast, the relevant terms of the CBAs are unambiguous. In *Bloomfield v. Bloomfield*, 97 N.Y.2d 188 (2001), the New York Court of Appeals considered the scope and enforceability of a prenuptial agreement. The *Bloomfield* court reaffirmed the presumption that "a deliberately prepared and executed agreement reflects the intention of the parties." *Id.* at 193. The U.S. Supreme Court's decision in *Farmers & Merchants' Bank v. Federal Reserve Bank of Richmond,* 262 U.S. 649, 659-60 (1923), involved the

In the one case involving CBAs that plaintiffs cite on this point, *Norfolk & W. Ry. v. Am. Train Dispatchers' Assoc.,* 499 U.S. 117 (2003), the Supreme Court held that the Interstate Commerce Act exempted a carrier from its legal obligations under a CBA, because the Act's exemption of carriers from "all other law" effected "an override of contractual obligations." *Id.* at 129-30. Here, CSL § 167(8), as amended, specifies that the modified contribution percentages apply "[n]otwithstanding any inconsistent provision of law." CSL § 167(8). Thus, *Norfolk* supports defendants' position that the modified percentages control.

5. The Triborough amendment and related caselaw did not vest plaintiffs' right to particular levels of state contributions.

A 1982 amendment to the Civil Service Law known as the "Triborough amendment"[61] makes it an improper practice for public employers to "refuse to continue all the terms of an expired [CBA] until

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background rules for check processing, which the Court found would bind the drawer, payee, and subsequent holders of a check.

[61] The name derives from the Public Employment Relations Board decision in *Matter of Triborough Bridge & Tunnel Auth.,* 5 PERB ¶ 3037 (1972).

a new agreement is negotiated." *See* 1982 N.Y. Laws ch. 868 (*codified at* CSL § 209-a[1][e]). The provision, which codified caselaw, ensures harmonious labor relations by maintaining the status quo while negotiations continue. *See Matter of County of Niagara v. Newman*, 104 A.D.2d 1, 4-5 (4th Dep't 1984). Contrary to plaintiffs' contention,[62] neither the Triborough amendment nor related caselaw provided retirees with a vested right to retain the same contribution percentages for their health-insurance premiums.

The Triborough amendment did not erase the CBAs' duration clauses. It just delayed their effect "until a new agreement [was] decided upon."[63] Once a succeeding CBA was adopted, the duration clause in the prior CBA took effect and the prior CBA was deemed terminated. Thus, regardless of the Triborough amendment, general duration clauses caused the CBAs to terminate at some point, and would have extinguished any provisions for contributions to retiree health-insurance

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[62] *See* NYSPIA Br.18; Judicial-Branch Unions Br.18 (Strandberg appeal); PBANYS Br.20.

[63] *See* Memorandum from Joseph R. Lentol (sponsor) to John McGoldrick (July 14, 1982), included in Bill Jacket for 1982 N.Y. Laws ch. 868.

premiums, if such provisions existed. As a matter of contract interpretation under *Tackett* and *Reese,* the presence of general duration clauses, coupled with the absence of an express exception for retiree premiums, established that the State's contribution percentages did not vest.

6. The grant of summary judgment properly included post-1999 retirees from NYSPIA and PBANYS.

NYSPIA (Br.23-24) and PBANYS (Br.22-23) argue that, because their 1999 CBAs remained in effect for a time after 2011, the district court erred in entering summary judgment as to their post-1999 retirees. There are two problems with that argument.

First, once a member of NYSPIA or PBANYS retired from State service, that retiree was no longer covered by the then-current CBA's provisions relating to health insurance. Neither NYSPIA's nor PBANYS's contracts included a provision continuing health-insurance coverage for retirees. *See supra* at 12-13. Thus, although the CBAs remained in effect, the 90/75 contribution percentages no longer applied to NYSPIA or PBANYS retirees.

Instead, upon retirement, a NYSPIA or PBANYS retiree's contribution percentages were governed exclusively by the CSL. And

after its amendment in 2011, the CSL provided that if "an agreement between the state and an employee organization" modified the State's "cost of premium or subscription charges" for active employees, the State could "extend the modified state cost of premium or subscription charges" to retirees who were not subject to such an agreement. CSL § 167(8). The amended statute thus authorized the State to extend to NYSPIA and PBANYS retirees the same modified contribution percentages that the State had negotiated with other plaintiff unions for their active employees.

Second, even if NYSPIA's and PBANYS's retirees were entitled to the benefit of the 1999 CBAs' terms as long as those CBAs remained in effect (and they were not), that benefit would nonetheless have ended once new CBAs were adopted. As shown above, the fact that terms of otherwise-expired CBAs remained in effect until successor CBAs were adopted did not cause the otherwise-expired CBAs' terms to vest. *See supra* at 87-89.

7. The parties were not required to include a "sunset clause" in each provision to show the provision did not create vested rights.

Three of the plaintiff unions—NYSPIA (Br.20-21), Council 82 (Br.28-29), and PBANYS (Br.19-20)—additionally seek to rely on the absence of what is known as a "sunset clause," stating that contribution percentages were intended to expire at the end of the contract term, as evidence that those percentages supposedly remained effective in perpetuity. The three unions base their argument principally on the testimony of GOER director Michael Volforte, which they cite out of context.

Volforte described a specific proposal that the State made in 2003 to increase the State's contributions to retirees' health-insurance premiums. (NYSPIA J.A.1050 [Tr.22-23]; *see* NYSPIA J.A.1104-1105.) He explained that the State proposed at that time to provide a vested right to retain increased contribution percentages "into perpetuity." (NYSPIA J.A.1050 [Tr.23]; *see also* Council 82 J.A.1191-1196 [Feinberg testimony].) But the union—in this case, NYSPIA—did not agree to the proposal. (Council 82 J.A.1195-1196.)

Volforte did not testify that *any* proposal without a sunset date similarly lasts in perpetuity, as these plaintiff unions argue. Indeed, though counsel at Volforte's deposition asked whether a proposed clause with no sunset date would last in perpetuity, counsel then withdrew that question. Thus, when Volforte responded "Yeah, okay," he was responding to the withdrawal of the question, not the question itself. (NYSPIA J.A.1050 [Tr. 23].)[64]

In any event, contrary to the arguments of NYSPIA (Br.22, 26) and Council 82 (Br.29), the absence of a sunset clause does not give rise to a legal presumption that the terms of a CBA survive the duration clause; nor does it create ambiguity where none otherwise exists. The presumption urged by plaintiffs would conflict with the Supreme Court's rule in *Tackett* and *Reese*. A CBA's duration clause applies to the entire

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[64] In response to NYSPIA's inclusion of out-of-context legal propositions in its statement of "material facts," defendants stated that the cited testimony did not support plaintiffs' assertions, and that NYSPIA failed to identify particular terms or proposals to which their statement applied. (NYSPIA J.A.2492-2493 ¶¶ 56, 58.) Defendants inadvertently omitted a response to ¶ 57, but their responses to ¶¶ 56 and 58 covered the issue. *See Vermont Teddy Bear Co. v. 1-800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir. 2004) (on summary judgment, court "must be satisfied that the citation to evidence in the record supports the assertion").

contract unless the terms include a specific exception. It would be unreasonable to require the parties to insert a sunset clause in every provision of a CBA to show that the subject provision expires at the end of the CBA's term.

Nor does New York caselaw support such an unwieldy rule. A sunset provision indicates only that the parties do not "wish to carry" the particular clause "into the status quo period" prescribed by the Triborough amendment. *See Professional Staff Congress-City University of New York v. N.Y.S. Public Employment Relations Board*, 7 N.Y.3d 458, 468 (2006). Clauses without a sunset provision remain in effect after a CBA's expiration until the successor CBA is adopted, but they still do not vest; rather, their effect ends when the successor CBA is adopted. *See supra* at 87-89. And the absence of a sunset clause cannot create new rights that otherwise do not exist in the contract.

8. Defendants did not admit the existence of an agreement to vest contribution rates for retirees.

Various plaintiffs contend that defendants conceded the existence of vested rights to specific State contribution percentages in one or more of four documents—summary-judgment papers, a retirement-planning document, an earlier State proposal to modify contributions to health-

insurance premiums, and a task-force report. None of these documents contains any such concession.

Contrary to the arguments of NYSPIA (Br.10-11, 14) and PBANYS (Br.14-15), defendants' summary-judgment papers did not concede that the CBAs established rights in contribution percentages at the time of retirement. Defendants simply assumed for purposes of argument that, "[e]ven if plaintiffs do have a vested right to a perpetually fixed premium contribution rate, they can demonstrate no substantial impairment of that right."[65] Defendants thus accepted plaintiffs' premise for argument's sake, but made clear elsewhere that "the contractual term that plaintiffs allege was impaired does not exist."[66]

The Q&A entitled "Planning for Retirement—September 2009" similarly contained no concession, despite PEF's argument here (Br.22). The document stated: "The amount you must contribute toward the cost of your health insurance coverage as a retiree is the same as what you

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[65] *See NYSPIA v. Cuomo,* No. 11-cv-1527, ECF #88-1 at 9 (N.D.N.Y.); *PBANYS v. Cuomo,* No. 11-cv-1528, ECF #71-1 at 10 (N.D.N.Y.).

[66] *NYSPIA v. Cuomo,* No. 11-cv-1528, ECF #88-1 at 5 (N.D.N.Y.); *PBANYS v. Cuomo,* No. 11-cv-1528, ECF #71-1 at 6 (N.D.N.Y.).

pay as an employee." (PEF J.A.1515.) That statement was true in September 2009, when the Q&A was created (*see* PEF J.A.1511) and in September 2011, when the example in the record was printed (*see* PEF J.A.1511, 2516-2517). Although the contribution percentages changed on October 1, 2011 (PEF J.A.1376), the statement remained true for prospective retirees, who were the intended audience for a Q&A entitled "Planning for Retirement" (*see* PEF J.A.1511). Because the contribution percentages changed for both active employees and retirees, prospective retirees could still expect to pay the same contribution percentages that they paid during their active employment. (*Compare* PEF J.A.1376 *with* 4 N.Y.C.R.R. §73.3[b][2]-[3].)

NYSPIA (Br.8, 25) also mistakenly finds a concession in a statement from defendants' summary-judgment papers regarding an earlier proposal to change contribution percentages. In response to NYSPIA's statement of material facts, defendants did not dispute that the State's earlier proposal for sliding-scale contributions by retirees "sought to modify the existing agreement as it pertained to the retiree health insurance premium contribution 90%/10% and 75%/25%." (NYSPIA J.A.2488.)

That statement was correct: the earlier proposal sought to modify the existing CBA, and the proposal "pertained to" retiree premium contributions. The reference to "the existing agreement" did not concede that the existing contribution percentages for retirees were vested in perpetuity. To the contrary, defendants sought summary judgment because "the CBAs do not establish a contractual right to a perpetually fixed health insurance contribution rate" for retirees.[67]

Finally, NYSPIA (Br.22) and PBANYS (Br.20-21) seek to rely on an excerpt from a task-force report stating that retirees' benefits "cannot be altered" after retirement, "except as set forth" in their CBA. That statement, however, merely reflects the opinion of a task force. The excerpt provides no legal citation to support its assertion, and it predates both *Tackett* and *Reese*, which set forth the governing law on the question. The report is unsigned (NYSPIA J.A.1498), and the Governor does not appear to have been a task force member (*see* NYSPIA J.A.1490). The statement thus was not an admission by the Governor. *See* Fed. R. Evid. 801(d)(2).

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[67] *NYSPIA v. Cuomo,* No. 11-cv-1527, ECF #88-1 at 1 (N.D.N.Y.).

G. CSEA's and UUP's cross-motions for summary judgment were properly denied.

CSEA (Br.42-44) and UUP (Br.20-21, 41, 52) argue that the district court should have awarded summary judgment in their favor. To award plaintiffs summary judgment, the district court would have been required to find the absence of any question that the CBAs provided "vested rights for fixed retiree health insurance contributions" which were "perpetual and which should have continued uninterrupted for the life of the retiree." (CSEA Br.42; UUP Br.42.) For the reasons set forth above, the CBAs vested retirees with no such right. Consequently, the district court properly denied their cross-motions for summary judgment.

POINT II

PLAINTIFFS' CONTRACT-IMPAIRMENT CLAIM FAILS FOR THE ADDITIONAL REASON THAT THE STATE'S MODEST REDUCTION IN CONTRIBUTIONS TO RETIREE HEALTH-INSURANCE PREMIUMS WAS REASONABLE AND NECESSARY

The Contract Clause prohibits states from passing laws "impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. The prohibition, however, "is not an absolute one and is not to be read with

literal exactness like a mathematical formula." *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 428 (1934).

This Court has recognized that the Contract Clause "must be accommodated to the inherent police power of the State to safeguard the vital interests of its people," a power "paramount to any rights under contracts between individuals." *CFCU Community Credit Union v. Hayward*, 552 F.3d 253, 266 (2d Cir. 2009) (citations and internal quotation marks omitted). "Thus, state laws that impair an obligation under a contract do not necessarily give rise to a viable Contract Clause claim." *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 368 (2d Cir. 2006) (internal citation omitted). A state legislature may still exercise its police power for the public good, even though contracts previously entered into may be affected. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-13 (1983).

To be actionable, an impairment must be substantial. *Sveen*, 138 S. Ct. at 1821-22; *General Motors,* 503 U.S. at 186; *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 244-45 (1978). And even if a litigant satisfies that threshold, a state law still remains valid if (1) it "serve[s] a legitimate public purpose such as remedying a general social or economic

problem"; and (2) the means chosen to accomplish that purpose are "reasonable and necessary." *Buffalo Teachers*, 464 F.3d at 368. Here, the district court correctly found that the challenged 2011 amendment to the state Civil Service Law did not substantially impair a contract right (even if such a right existed) and, in any event, the subject amendment served a legitimate public purpose through reasonable and necessary means. (*See* CSEA S.A.28-33.)

A. The Change in Contribution Percentages Did Not Substantially Impair Plaintiffs' Rights.

The primary consideration in determining whether an impairment is substantial is the extent to which it disrupts reasonable expectations under the contract. *Sanitation & Recycling Ind. v. City of New York*, 107 F.3d 985, 993 (2d Cir. 1997). "If the plaintiff could anticipate, expect, or foresee the governmental action at the time of contract execution, the plaintiff will ordinarily not be able to prevail." *Sal Tinnerello & Sons, Inc. v. Town of Stonington*, 141 F.3d 46, 53 (2d Cir. 1998).

Here, for any of four reasons, plaintiffs reasonably should have foreseen that the State's share of their health-insurance premiums could change in the future.

First, as we have explained, the CBAs all expired on fixed dates in accordance with their duration clauses. And none of the CBAs contained language stating that the contribution percentages they set forth were subject to different expiration dates. Thus, the reasonable expectation was that contribution percentages were not fixed for life, but rather could change. As the Supreme Court observed in *Tackett*, the "traditional principal" is that "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement." 135 S. Ct. at 937 (citation and internal quotation marks omitted).

Second, since 1983, sustained increases in the price of almost everything—especially health care—made it unreasonable for plaintiffs to believe their share of health-insurance premium contributions would never increase. The fact that, as health-insurance costs escalated, the gross amounts retirees paid for health insurance "increased every year" (*see* PEF J.A.1762 ¶19, 1777 ¶20; *accord* UUP J.A.541 ¶18) made it unreasonable for plaintiffs to expect that their proportionate share of premiums would not also increase. Indeed, as a result of these ever-escalating expenses, health-care costs became a focus of negotiations. As CSEA's lead negotiator testified, "[r]outinely, health insurance costs

were one of the main subject areas where changes were proposed by the State or have been negotiated by the parties." (CSEA J.A.1126.) With contribution percentages for active employees up for renegotiation so frequently, retirees had no reason to believe the State's contributions to their own health-insurance premiums would not be revisited.

Third, and as some plaintiffs acknowledge (*see, e.g.,* NYSPIA Br.25; DC37 Br.22), the State expressed its desire to restructure retiree health-insurance contributions on prior occasions. As early as 2004, the State regarded the cost of retiree health-insurance contributions as "extremely high" and a "tremendous burden." (NYSPIA J.A.944, 962.) Although the State ultimately maintained the same contribution percentages until 2011, the 2011 decision should have come as no surprise. In the unprecedented recession of 2009-2011, the costs that posed a "tremendous burden" in 2004 became unsustainable.

Finally, CSL § 167(1) did not give plaintiffs a reasonable expectation that their share of health-insurance premiums would never increase, because statutes can always be amended. The statute itself provides evidence that the CBAs did not vest retirees' contribution percentages. As the district court observed, "[i]f retirees had a

contractually vested perpetual right to the same contribution rates in effect at the time of their retirement, there would have been no need for an affirmative legislative carve-out specifically applicable to them." (CSEA S.A.26.)

B. The Change in Contribution Percentages Served a Legitimate Public Purpose.

"A legitimate public purpose is one 'aimed at remedying an important general social or economic problem rather than providing a benefit to special interests.'" *Buffalo Teachers*, 464 F.3d at 368 (*quoting Sanitation & Recycling,* 107 F.3d at 993).

This Court just recently held that a significant public purpose was served by a 2010 ordinance reducing the City of White Plains' contributions to retired police officers' health-insurance premiums and that the subject ordinance was reasonable and necessary to effectuate that purpose. *Barr v. City of White Plains,* __ F. App'x __, 2019 WL 2754953 (2d Cir. July 2, 2019) (summary order). This Court pointed to record evidence that the ordinance "was passed to address a serious budget shortfall" caused by the global financial crisis beginning in 2008. *Id* at *1.

Here, as in *Buffalo Teachers* and *Barr*, "the legislative interest in addressing a fiscal emergency is a legitimate public interest." *Buffalo Teachers,* 464 F.3d at 369; *see also Kirshner v. United States*, 603 F.2d 234, 239 (2d Cir. 1978) (no contract clause violation where State legislation modified contract rights to protect fiscal integrity of New York City); *Subway-Surface Sup'rs Ass'n v. N.Y.C. Transit Auth.*, 44 N.Y.2d 101, 110-12 (1978) (addressing City's financial crisis was valid public purpose justifying wage freeze that impaired CBAs).[68]

Further, closing the State's budget gap in 2011 was not a favor for special interests. State law requires a balanced budget. *See* N.Y. Const. art. VII, § 2; *Wein v. State,* 39 N.Y.2d 136, 141 (1976). The Legislature authorized the reduction in State contribution percentages as part of a wide-ranging effort to close multi-billion-dollar budget gaps caused by the Great Recession. (*See* CSEA J.A.1482-1483.) Because numerous State operations were subjected to budget cuts, it cannot be said that

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[68] In contrast, in *AFSCME v. City of Benton, Arkansas,* 513 F.3d 874, 882 (8th Cir. 2008) (cited at CSEA Br.35), the defendants did not challenge the finding that the impairment at issue was substantial, and failed to demonstrate that the defendant city faced any "broad, generalized economic or social problem" that justified the impairment.

defendants acted out of self-interest when they reduced contribution percentages for retiree premiums.

C. The Change in Contribution Percentages Was Reasonable and Necessary.

To establish that a contract impairment was reasonable and necessary, the State must show it did not (1) consider impairing the contracts on par with other policy alternatives; (2) impose a drastic impairment when an evident and more moderate course would serve its purpose equally well; or (3) act unreasonably in light of the surrounding circumstances. *Buffalo Teachers,* 464 F.3d at 371.

Where, as here, the State is a party to an allegedly impaired contract, this Court affords less deference to the State's assessment of the reasonableness and necessity than when the alleged impairment affects a purely private contract. *Buffalo Teachers*, 464 F.3d at 369. But "less deference does not imply no deference." *Id.* at 370. "Nor is the heightened scrutiny to be applied as exacting as that commonly understood as strict scrutiny." *Id.* As shown below, the limited reduction in the State's percentage contributions to retirees' health-insurance premiums meets each part of this Court's test.

1. The State reduced contribution percentages only after numerous other cost-cutting measures proved insufficient.

The State did not consider the reduction in contributions to retiree health-insurance premiums on par with other policy alternatives. Rather, it sought first to address the fiscal problem with numerous other measures, but ultimately found that this additional cost-saving measure was also required.

In 2009-2010, the State faced a budget gap of $17.9 billion; in 2010-2011, the gap was $9.2 billion. (CSEA J.A.1482-1483.) For both of those years, the State adopted a wide array of cost-cutting measures and tax increases. (CSEA J.A.1483-1484.) These included reductions of $2.8 billion for education aid and $2.7 billion for Medicaid. (CSEA J.A.1483.) Yet with numerous other measures in place, the State still faced a $10 billion budget gap for the 2011-2012 fiscal year. (CSEA J.A.1482-1483.)

The State therefore looked, among other things, to cut another $1.5 billion from the cost of State agency operations, including $450 million from workforce costs. (CSEA J.A.1485-1486, 1495; Judicial-Branch Unions J.A.145-146 [Strandberg appeal].) Some of $450 million in savings was achieved through temporary reductions in employee salary

levels, increases in prescription drug co-payments, and increases in deductibles for non-network physician visits. (CSEA J.A.1496.) But by reducing the State's contributions to retiree health-insurance premiums, the State could save approximately $30 million annually.[69] (CSEA J.A.1496.) That was approximately 6.7% of the $450 million needed to close the gap.

The State deemed these contribution reductions "to be a critical component in achieving the $450 million in cost reductions." (CSEA J.A.1496.) Without the subject contribution reductions, the $450 million in workforce cost reductions would not have been achieved. (CSEA J.A.1497.)

The State's contributions to retiree health-insurance premiums thus were reduced only after the State "had already taken other more drastic measures" and found that the reduced contributions were still essential. *Buffalo Teachers,* 464 F.3d at 371; *see also Barr*, 2019 WL

[69] Although retirees were not part of the workforce, the various NYSHIP changes were counted as workforce cost reductions. (*See* CSEA J.A.1496.)

2754953 at *1 (city had already pursued a range of measures to increase revenue and cut expenses).

Indeed, the State considered but rejected more drastic reductions to contributions to health-insurance premiums, including increasing the health-insurance premium contributions for employees and retirees by three, four, five, six, or ten percentage points. (CSEA J.A.1496-1497.) These proposals were rejected for various reasons, including the availability of other, more moderate cost reduction options. (CSEA J.A.1497.)[70] Thus, in contrast to *Donohue v. Paterson,* 715 F. Supp. 2d 306, 323-24 (N.D.N.Y. 2010), the State here "actually considered and

[70] The State also considered and rejected other proposals, including changing the methodology used to calculate overtime compensation, location pay, and hazardous duty pay; eliminating longevity payments and performance advance increases; reducing workers' compensation benefits; increasing State employees' parking fees; increasing copayments due for certain medical services; increasing the coinsurance paid by enrollees for non-network medical services; changing the methodology used to reimburse claims incurred at non-network hospitals; eliminating Medicare Part B premium reimbursements for newly eligible retirees; and increasing the health-insurance premium contributions paid by employees and retirees by one percentage point. (CSEA J.A.1496-1497.) The rejected measures were not implemented because, among other things, they would not have yielded significant enough savings, public employee unions would not have accepted them, and/or more moderate options were available. (CSEA J.A.1497.)

compared" its options and engaged in a "real and demonstrable consideration of needs and alternatives" before reducing premium contributions.

The Court should not be swayed by plaintiffs' attempt (*e.g.,* CSEA Br.35) to analogize this case to the far more substantial fiscal consequences considered in the "lag payroll" cases—*Condell v. Bress,* 983 F.2d 415 (2d Cir. 1993), *Association of Surrogates v. State,* 940 F.2d 766 (2d Cir. 1991), and *Association of Surrogates v. State,* 79 N.Y.2d 39 (1992). The cost-savings measure in those cases would have implemented a five-day lag payroll by withholding 10% of employee wages each week over a period of weeks, an amount that would not be refunded until the employee died, retired, or otherwise left state employment. *See Condell,* 983 F.2d at 417; *Surrogates,* 940 F.2d at 772.

In striking the measure as an unconstitutional impairment of contract, this Court found the lag payroll to be unnecessary. It was enacted to fund maintenance and expansion of the state court system, which could have been financed through cuts to court programs, reallocation of funds from other programs, or increased taxes. *Surrogates,* 940 F.2d at 772-73. Moreover, this Court reasoned that the measure

placed at risk the employees' ability to meet "personal long-term obligations such as mortgages, credit cards, car payments, and the like." *Id.* at 772. As shown *infra* at 109, the reduction in the State's contributions to retirees' health-insurance premiums was too modest to impose similar personal fiscal crises on retirees.

2. The modest reduction in State contributions was appropriately tailored.

The State did not drastically reduce its share of retirees' health-insurance premiums. The reduction was modest: no change for workers who retired before 1983, only two percentage points for those who retired from 1983-2011, and two to six percentage points for employees who retired from 2012 onward. 4 N.Y.C.R.R. § 73.3(b)(1)-(3). (*See* CSEA J.A.1078.)

As a result, the additional cost for retirees who left State service between January 1, 1983 and December 1, 2011 was approximately $10.50 per month for individual coverage and approximately $28.50 per month for family coverage. (*See* NYSCOA J.A.94 [providing two-month figures].) The total savings from reducing the percentage of State contributions to health-insurance premiums for post-January 1, 1993 retirees was $30 million annually. (CSEA J.A.1496.) That savings was

achieved without any change to the plan's overall design or loss of valuable health-insurance benefits. (*See* CSEA J.A.846-847.)

"[T]he extent of the impairment is 'a relevant factor in determining its reasonableness.'" *Buffalo Teachers,* 464 F.3d at 371 (quoting *U.S. Trust Co. v. New Jersey,* 431 U.S. 1, 27 (1977)). Because the wage freeze approved in *Buffalo Teachers* proved sufficiently narrow, the small differential in contributions to health-insurance premiums should be sufficiently narrow as well. In the words of Howard Glaser, Director of State Operations, the Executive Budget strove "to wield a scalpel, not an ax" on labor costs. (Judicial-Branch Unions J.A.145 [Strandberg appeal].) The reduction in contribution percentages that the State ultimately adopted was "appropriately tailored to the emergency that it was designed to meet." *Allied Structural Steel,* 438 U.S. at 242.

Seizing on the restricted nature of the alleged impairment, CSEA urges that savings achieved by the reductions in contribution percentages amounted at most to ".023% of the overall $131.7 billion State budget." (CSEA Br.41.) But the entire State budget is not the relevant benchmark. The relevant question is the extent to which the savings helped close the *budget gap*. Here, the reduction in contribution

percentages for retiree health-insurance premiums was "deem[ed] … to be a critical component" of the necessary cost reductions. (CSEA J.A.1496.)

In its papers below (UUP J.A.522-523), UUP argued that the reduced contribution percentages were not "specifically tailored to meet the societal ill," because the reductions were permanent, not temporary. But the State's massive projected deficits during the Great Recession were due in part to "continued reliance" on "non-recurring and temporary" cost reductions "to pay for recurring expenses." (NYSPIA J.A.1507.) Closing the $10 billion budget gap for 2011-12 thus required "recurring spending reductions" (NYSPIA J.A.1506), including the reduced contribution percentages challenged here.

3. Defendants acted reasonably under the circumstances.

In modestly adjusting the State's contributions to retiree health-insurance premiums, defendants acted reasonably under the circumstances. As in *Buffalo Teachers*, the State faced a "very real fiscal emergency" in 2011-2012. *See id.,* 464 F.3d at 373. To close the multi-billion-dollar budget gap, the State had to make hard choices and reduce costs across the board. Among other things, that year saw cuts in State

aid for public schools, health-care providers, local governments, and social services; deferral of required payments to the State pension system; and the use of non-recurring resources. (CSEA J.A.1495.)

While some plaintiffs observe that the Legislature did not issue a finding that reduced premium contributions were necessary,[71] no such finding was required. The Legislature did, however, request a formal message of necessity so that the bill to implement the reduced premium contributions could be voted on immediately. Letter from James Yates to Mylan Denerstein (June 22, 2011), contained in Bill Jacket for 2011 N.Y. Laws, ch. 491 at 7. And when the Governor issued the requested message, he stated expressly that failing to pass the bill could force the State "to lay off thousands of employees." Message of Necessity (June 22, 2011), contained in Bill Jacket for 2011 N.Y. Laws, ch. 491 at 5-6.

Plaintiffs should not be heard to argue that the State should simply have raised taxes. The State in fact increased personal income taxes, sales taxes, and other taxes. (CSEA J.A.1483.) But as this Court explained in *Buffalo Teachers*, "it is always the case that to meet a fiscal

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[71] *See* CSEA Br.17-18, 40; NYSTPBA Br.16; NYSPIA Br.28; UUP Br.38-39.

emergency taxes conceivably may be raised," yet it "cannot be the case" that raising taxes must be "a legislature's *only* response to a fiscal emergency." *Buffalo Teachers*, 463 F.3d at 372. Were the possibility of raising taxes or cutting other programs sufficient to preclude a showing of reasonableness and necessity, "no impairment of a governmental contract could ever survive constitutional scrutiny, for these courses are always open, no matter how unwise they may be." *Baltimore Teachers Union v. Mayor & City Council of Baltimore*, 6 F.3d 1012, 1019-20 (4th Cir. 1993).

NYSPIA (Br.28) and PBANYS (Br.29) stress that the State ended 2011-2012 with a surplus of $1.376 billion, while increasing its "rainy day reserve fund" to $275 million. But those numbers paled in comparison to "the projected $10 billion General Fund current services gap" which, according to NYSPIA's own source, would be closed "primarily with recurring spending reductions." (NYSPIA J.A.1506.[72]) Even after the State implemented all of its cost-saving measures for 2011-2012,

[72] *See also* NYSPIA J.A.1502 (noting that for 2010-2011, State's general fund reported "operating surplus" of $1.5 billion, but still had "an accumulated fund deficit of $2 billion").

including the reductions in premium contributions, it still faced projected budget gaps of $2.4 billion for 2012-2013, $2.8 billion for 2013-2014, and $4.6 billion for 2014-2915. (CSEA J.A.829.)

Deference is owed to the Legislature's judgment as to how spending should be reduced, and by how much. *See Energy Reserves,* 459 U.S. at 412-13. Courts should not "second-guess the wisdom of picking" one alternative over another, "especially those that appear more Draconian." *See Buffalo Teachers,* 464 F.3d at 372. "Answering these sorts of questions, and thereby determining the 'reasonableness and necessity' of a particular statute is a task far better suited to legislators than to judges." *Local Div. 589, Amalgamated Transit Union v. Massachusetts,* 666 F.2d 618, 643 (1st Cir. 1981); *see also Baltimore Teachers,* 6 F.3d at 1021-22 (contracts clause does not require courts to "sit as superlegislatures" and weigh merits of the "multitude of alternatives" for addressing funding crisis).

POINT III

HITE HAD THE REQUISITE STATUTORY AUTHORITY TO EXTEND TO RETIREES THE SAME CONTRIBUTION PERCENTAGES THAT THE STATE HAD NEGOTIATED WITH THE PLAINTIFF UNIONS

As a preliminary matter, the district court should not even have reached plaintiffs' claim that defendant Hite lacked authority under state law to modify the State's share of contributions to retiree health-insurance premiums. Instead, it should have dismissed that claim for want of subject-matter jurisdiction, an issue this Court can consider for the first time on appeal.

The Eleventh Amendment bars claims in federal court against state officials acting in their official capacities, except for those seeking prospective injunctive relief to enjoin ongoing federal constitutional violations. *See generally Ex parte Young,* 209 U.S. 123, 155-56 (1908). A key element to this Eleventh Amendment exception is that immunity is forfeited only as to conduct that violates a federal constitutional right. As this Court has recognized, "[f]ederal court adjudication of a claim challenging a state official's conduct under state law" is "not permissible as it would fly squarely in the face of the Eleventh Amendment." *Alliance of Am. Insurers v. Cuomo,* 854 F.2d 591, 604 (2d Cir. 1988). Indeed, "[i]t

is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

If the Court nonetheless address the claim on the merits, it should uphold the district court's ruling that defendant Hite had the requisite authority to modify the State's share of contributions to retiree health-insurance premiums (CSEA S.A.44-45; PEF S.A.22-23; UUP S.A.10), and reject the contrary arguments of CSEA (Br.17), PEF (Br.11, 25) and UUP (Br.46-49).

CSL § 167(8) states that "[t]he president, 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." Under CSL § 5(1), the head of the Department of Civil Service "shall be the president of the state civil service commission." CSL § 5(1). The department head and the president are thus the same person.

In 2010, Nancy Groenwegen headed the Department of Civil Service and served as the Commission's president. (CSEA J.A.845.) On December 22, 2010, Groenwegen named Hite to serve as Director of the Department of Civil Service's Division of Classification and Compensation, a position that required Hite to execute an oath of office. (CSEA J.A.1406.) At the same time, Groenwegen designated Hite to serve as her first deputy. (CSEA J.A.845, 1405.) As first deputy, Hite was empowered to act in Groenwegen's absence and to "perform the duties of head of the New York State Department of Civil Service in my absence from office or inability to act, or in the event of a vacancy in such office." (CSEA J.A.1405; *accord* CSEA J.A.845.) Under New York law, a deputy shall "possess the powers and perform the duties of his principal" during "a vacancy in his principal's office." N.Y. Public Officers Law § 9; *see Matter of McSpedon v. Roberts,* 117 Misc.2d 679, 682 (Sup. Ct. N.Y. Cty. 1983).

Therefore, when Groenwegen resigned from her position on December 22, 2010 (CSEA J.A.845), by operation of law, Hite became acting head of the Department of Civil Service (CSEA J.A.846), and also assumed relevant duties of the Commission president that were

delegated to her as Groenwegen's deputy. Hite thus issued the regulations extending the modified State contribution percentages in her capacity as "Acting President" of the Commission. (CSEA J.A.1086.)

To be sure, Hite had not been formally appointed to either position by the Governor. But that fact is irrelevant. Hite nonetheless served as the head of the Department of Civil Service and, for this purpose, acted as president of the Commission. Her delegated responsibilities included "promulgating and amending the necessary regulations to implement NYSHIP." (CSEA J.A.846.) State law therefore authorized Hite to take the administrative actions of seeking authority from the Director of the Budget and establishing regulations governing the reduction in the State's contributions toward health-insurance premiums. *See* CSL §§ 5(1), 7(1), 167(8). It was not necessary to wait for the Governor to appoint a new head of the Civil Service Department or president of the Commission. *Cf.* Office of the Attorney General, Formal Opinion No. 250, 1941 WL 52436, *2 (Oct. 15, 1941) (opining that, where office of State Comptroller was vacant, pending appointment of acting Comptroller, "the duties of the office may be performed by the deputy qualifying under section 9 of the Public Officers Law").

Moreover, Hite performed those administrative actions in compliance with state law. As required by the governing statute, she sought and obtained approval for the change from Budget Director Megna. *See* CSL § 167(8). (CSEA J.A.1078-1079.) Indeed, even if Hite lacked the requisite authority to seek to subject modifications, that fact would be irrelevant because her action was immediately ratified by Budget Director Megna, who was specifically authorized to approve the change. *See* CSL § 167(8).

The regulations have also been ratified subsequently by the Commission and the Department, which implemented the measure and never sought to disavow or retract Hite's actions. Even if the Court were to find that State law requires a formal ratification, it should afford the current Commission president a reasonable time to issue such a ratification nunc pro tunc. *See Budin v. Davis,* 172 A.D.3d 1676 (3d Dep't 2019) (allegation that payments by town were illegal was "rendered moot by the town Board's adoption of a resolution ratifying and approving, nunc pro tunc, the renewal of the Town's contract"); *Israel v. Matthews,* 171 A.D.2d 896, 899 (2d Dep't 1991) (invalid resolution "may, however,

become the act of the County Committee, nunc pro tunc, by proper ratification").

POINT IV

THE DISTRICT COURT REASONABLY EXERCISED ITS DISCRETION IN DECLINING TO STRIKE THE COLAFATI AND DECKER DECLARATIONS

Defendants' summary-judgment papers in each case included a declaration from Dominic Colafati of the Division of the Budget. Colafati's declaration described the State's budget process, the deficits that resulted from the Great Recession, and the gap-closing plan adopted for 2011-2012. (*E.g.*, CSEA J.A.822-831.)

For cases involving the executive-branch CBAs, defendants also submitted a declaration from Daryl Decker of GOER identifying the CBAs to which the State and the union were parties and describing the general continued-coverage clause. (*E.g.,* CSEA J.A.832-835.) For cases involving judicial-branch CBAs, defendants submitted a Decker declaration showing that CSEA and PEF together accounted for a majority of the unionized executive-branch employees and had agreed on reduced contributions for active employees. (*E.g.,* NYSCOA J.A.89-92.) Defendants then used those facts to establish that the reduction in State

contributions for CSEA and PEF members' health-insurance premiums flowed through to the unionized judicial-branch employees.

Plaintiffs argued below that the Colafati and Decker declarations should be precluded for failure to disclose the identities of the two potential witnesses in a timely fashion. The district court denied their requests. (*E.g.,* CSEA S.A.48-52.)

Denial of a request to preclude testimony under Rule 37(c)(1) of the Federal Rules of Civil Procedure is reviewed for abuse of discretion. *Patterson v. Balsamico*, 440 F.3d 104, 117 (2d Cir. 2006). Consideration of the Colafati and Decker declarations lay well within the district court's discretion. The district court's detailed analysis of plaintiffs' arguments (*e.g.,* CSEA S.A.48-52) shows that its review of those declarations was "substantially justified or … harmless." Fed. R. Civ. P. 37(c)(1).

A. The District Court Did Not Abuse Its Discretion in Considering the Colafati Declaration.

Preliminarily, if the Court agrees that the State did not impair a vested contractual right, it need not review the district court's refusal to strike Colafati's declaration. Colafati's declaration provided factual background on the State's budgetary processes and fiscal situation in 2011-2012. It was thus relevant only to defendants' argument that any

contract impairment caused by the State's reduction in its contributions to health-insurance premiums was reasonable and necessary under the circumstances. If the Court agrees that the State did not impair a vested contractual right, then it need not address the propriety of considering the Colafati declaration.

In any event, the district court gave two independent reasons for declining to strike Colafati's declaration, either of which justifies that evidentiary ruling.

First, the court properly held (CSEA S.A.51) that plaintiffs were not prejudiced by the Colafati declaration because almost all its content was also contained in the declarations of James DeWan, which were filed in all of these actions. (*See, e.g.,* CSEA J.A.1493-1498.) DeWan was previously disclosed as a potential witness and was deposed by plaintiffs (*see* CSEA J.A.1241, 1362), who properly did not object to the submission of his declaration.

Second, the court correctly recognized that Colafati testified to institutional facts about the State's budget for 2011-2012, many of which were publicly known. (*See* CSEA S.A.51.) Those facts included background on the State's general budgeting process (*e.g.,* CSEA J.A.824,

826); the size of the budget gaps in relevant fiscal years (*e.g.,* CSEA J.A.824, 828-829); the cost-cutting measures the State adopted in response (*e.g.,* CSEA J.A.825, 827-828); and the positive effect of cost-cutting on the State's credit rating (*e.g.,* CSEA J.A.829-830).

Plaintiffs fail to explain what evidence they might have developed to refute Colafati's declaration, had the witness's identity been earlier disclosed. Indeed, the CSEA plaintiffs largely admitted the content of Colafati's declaration. (*See* CSEA J.A.1482-1487; *see also* CSEA S.A.51.)

To be sure, some plaintiffs purported to dispute Colafati's evidence. But they failed to introduce contrary evidence, or even make an offer of proof as to what contrary evidence a deposition might have yielded.[73] Those plaintiffs that submitted opposing evidence established only that the State could potentially have chosen to cut other State spending.[74] As shown *supra* at 112-113, the latter fact is not sufficient to refute the

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[73] *See* NYSTPBA J.A.1042-1051; Judicial-Branch Unions J.A.1117-1121 (Strandberg appeal); Council 82 J.A.1371-1380; NYSCOPBA J.A.1299-1308 (responding to NYSCOPBA J.A.650-654); DC37 J.A.617-619 (responding to DC37 J.A.343-347); UUP J.A.522-523 (responding to UUP J.A.286-289); NYSCOA J.A.470-474. PEF, on the other hand, asserts that Colafati's declaration is immaterial. (PEF Br.27.)

[74] *See* NYSPIA J.A.1752-1753, 1756; PBANYS J.A.1270-1271.

State's position that the significant budget gap in 2011-2012 warranted a series of significant cost-cutting measures, and that the measure to reduce premium contributions was a legitimate and reasonable means to achieve that purpose.

Had plaintiffs wished to develop additional evidence in response to Colafati's declaration, they could have asked the district court for what they now say was denied: the "opportunity to depose Mr. Colafati to reveal his qualifications, the sources on which he relies for his testimony, and the basis of his statements and conclusions." (*See* CSEA Br.50).

After Colafati's declaration was filed, plaintiffs could have sought to depose him on an emergency basis. They had almost seven weeks to do so, from November 3, 2017 (when defendants' summary-judgment motions were filed) to December 20, 2017 (when plaintiffs' oppositions were filed). Granting such a request would have been within the district court's "wide discretion" in handling discovery.[75] Plaintiffs also could

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[75] *See Cruden v. Bank of New York,* 957 F.2d 961, 972 (2d Cir. 1992); *see, e.g., Warren v. Pataki,* 823 F.3d 125, 144 (2d Cir. 2016) (rejecting challenge to limitation on pretrial depositions where counsel had "ability to request permission to depose witnesses during the trial"); *Dunlap-McCuller v. Riese Org.,* 980 F.2d 153, 158-59 (2d Cir. 1992) (district court

have obtained the facts set forth in Colafati's declaration via a deposition of the Division of the Budget under Federal Rule of Civil Procedure 30(b)(6), but they chose not to conduct one. (CSEA J.A.1499-1500.) Having failed to pursue either of these remedies, plaintiffs should not be heard now to complain that they lacked the ability to conduct discovery of Colafati.

Finally, some plaintiffs assert that Colafati's declaration should have been precluded because his declaration contained expert testimony that was not submitted with the necessary disclosures.[76] The district court correctly rejected that argument. (*See* CSEA S.A.51). Colafati testified to historical facts regarding the State's budget. (*See* CSEA J.A.823-830.) His testimony was based on knowledge he obtained while serving as Chief Budget Examiner for the unit responsible for overseeing the State's Financial Plan, and was supported by the business records of the Division of the Budget. (CSEA J.A.823.) He did not rely on "scientific,

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did not abuse its discretion by allowing two telephonic depositions "during the middle of the trial").

[76] *See* CSEA Br.47-50; DC37 Br.11, 23-27; UUP Br.18, 50.

technical, or other specialized knowledge" or apply "principles and methods to the facts of the case." *See* Fed. R. Evid. 702.

B. The District Court Did Not Abuse its Discretion in Considering Decker's Declaration.

The district court also correctly denied plaintiffs' motions to preclude Decker's declarations. As the court pointed out, Decker's declarations substantially duplicated those of his predecessor in office, Priscilla Feinberg, who was both disclosed as a witness and deposed by plaintiffs. (CSEA S.A.52; *see* CSEA J.A.836-839, 1241, 1378.)

In any event, Decker's testimony was innocuous. After stating his credentials (*e.g.,* CSEA J.A.833), Decker affirmed facts that are not disputed. He listed the CBAs to which the State was a party in each case (*e.g.,* CSEA J.A.834). He offered the self-evident facts that the CBAs contained a general continued-coverage clause (*e.g.,* CSEA J.A.834), and that the reference in that clause to "contracts in force … with the State health insurance carriers" referred to contracts between the State and its health-insurance carriers (*e.g.,* CSEA J.A.834).

DC37 nonetheless suggests (Br.12, 28-29) that Decker lacked a basis to testify about the meaning of language in CBAs executed before he assumed his position. (*See also* CSEA Br.52.) But Decker affirmed

that, "[a]s part of my responsibilities as head of the [GOER] Health Benefits Unit, I am familiar with the provisions in the various CBAs relating to benefits provided" under NYSHIP. (DC37 J.A.361.) He then explained that the general continued-coverage clause was "substantively identical" in all the DC37 CBAs for the Rent Regulation Services Unit. (DC37 J.A.362.) Because Decker was familiar with the CBAs, and the provisions were substantially identical, he was competent to testify about them. *See* Fed. R. Evid. 601, 602.

Finally, as with Colafati, plaintiffs failed to ask the district court for what they now claim (CSEA Br.52) was foreclosed: an "opportunity to examine Mr. Decker's credentials and experience, or the basis for his knowledge and opinions." As with Colafati, plaintiffs could have sought to depose Decker on an emergency basis, but took no such action.

CONCLUSION

The district court's judgments should be affirmed.

Dated: Albany, New York
July 8, 2019

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CERTIFICATE OF COMPLIANCE

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/s/ Frederick A. Brodie