To be argued by:
JAMISON DAVIES
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New York Supreme Court
Appellate Division: First Department

In the Matter of

Case No.
2021-03148

ANNE MARIE R. COLON,

Petitioner-Respondent,

against

TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK,

Respondent-Appellant,

and

YVONNE DAVALOS, in her capacity as Guardian of Minor Child B.C.B,

Respondent.

REPLY BRIEF

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PRELIMINARY STATEMENT

The law at issue is straightforward. It provides that an accidental death benefit "shall" be paid in full to the statutory beneficiary of a member of the Teachers' Retirement System (TRS) if that person died from a COVID infection contracted within 45 days of reporting to work in person. Louis Barcelo, a member of the TRS system, tragically died of COVID after reporting to work as a teacher and, in accordance with the law, TRS sought to pay an accidental death benefit to his minor daughter, the only qualifying statutory beneficiary.

Nothing in Colon's brief overcomes TRS's rational interpretation of the statutory text. She relies solely on a statutory provision that requires an accidental benefit to be reduced if an ordinary benefit had already been paid. But that provision has no application here, because no ordinary death benefit had yet been paid. Her attempt to leverage that narrow provision into a broader implication that all ordinary death benefit beneficiaries should be immediately paid is unsupported by the statute's text, context, or

the legislative history (which she ignores). It would also nullify the Legislature's considered choice to give the statute retroactive effect.

Colon's argument that the statute, as TRS construes it, would violate the New York Constitution's pension impairment clause is no better founded. Put simply, the statute enhances Barcelo's pension benefits by making it easier to obtain more generous accidental death benefits. The distinction between accidental and ordinary death benefits, and the corresponding difference in the survivor entitled to each type, had been a feature of the system since well before Barcelo joined and the law does nothing to alter it. And while courts have held that restrictions on beneficiary choice do not violate the pension impairment clause, the law does not limit any member's ability to designate a beneficiary in any event. Members have precisely the same designated and statutory beneficiaries they did before the law went into effect. The new law's intent and effect was to enhance the benefits available to TRS members, and it achieved that aim.

ARGUMENT

NONE OF COLON'S ARGUMENTS SALVAGES SUPREME COURT'S ERRONEOUS DECISION

A. TRS, the agency charged with administering the statute, rationally interpreted it to require payment of an accidental death benefit to Barcelo's statutory beneficiary.

At the outset, Colon cannot overcome the statute's language, placing the weight of her argument on a provision that cannot bear it. The law is straightforward and TRS's construction of it, which is entitled to deference, is rational. The text provides that, if a member who reported to work in person after March 1, 2020 contracted COVID-19 within the next 45 days and later died as a result, then "such member's statutory beneficiary *shall* receive an accidental death benefit." Retirement and Social Security Law (RSSL) § 607-i(a)(3) (emphasis added).

Since there is no dispute that Barcelo met the statutory requirements or that his daughter was his statutory beneficiary, under the statute's plain terms, TRS was required to pay his daughter an accidental death benefit. *Id.*; *see DeVera v. Elia*, 32 N.Y.3d 423, 435 (2018) ("[T]he use of 'shall' makes what follows

mandatory" (quotation marks and alterations omitted)); L 2020, Ch. 89, Introducer's Memo. in Support of Bill No. S8427, at 1 (explaining that, if law's requirements are met, "the accidental death benefit is mandatory"). That should end the inquiry.

Colon does not disagree with any of that, but instead argues that the statutory beneficiary's benefit is "always subject to reduction" (Brief for Petitioner-Respondent ("Colon Br.") 18). Her argument finds no home in the text of the statute or in the legislative history. She relies on the language of the statute providing that any "amount payable" as an accidental death benefit "shall be reduced by any amount paid … to any recipient of ordinary death benefits." RSSL § 607-i(b). Thus, she argues that, purely by implication, there must be circumstances where the ordinary death benefit is paid to a designated beneficiary even under the new law (Colon Br. 19). But the statutory text, context, and history make clear that this provision is limited to circumstances where an ordinary death benefit had *already* been paid because, for example, the retirement system had no knowledge of the existence of a

statutory beneficiary or that the circumstances of a member's death qualified as an "accident" under the RSSL.

Colon's contrary argument fails on three fronts. First, she relies on the phrase "any recipient" to suggest that a recipient could be a designated beneficiary who has not already been paid a benefit (Colon Br. 18). But nothing about the phrase indicates, even by implication, that a recipient should include an individual who has not yet received any benefit. Instead, the straightforward reading of the word "recipient" connotes a person who has already received something, not someone who at some point in the future may receive something. *See* "Recipient," *Cambridge English Dictionary*, https://perma.cc/PVF5-PS84. And her reading makes little sense in the context of the broader statutory framework. The remainder of the RSSL provides that a member is entitled to either an accidental or an ordinary death benefit, not some of one and the remainder of the other. If the Legislature had intended to upend the usual understanding, it would have been much clearer.

Second, Colon's interpretation fails because the statute only provides that an accidental death benefit should be reduced by the

amount "*paid*" to a recipient of ordinary death benefits. RSSL § 607-i(b). The use of the term "paid" makes clear that the benefit is only reduced when an ordinary death benefit has already been paid, not just where someone might have a future claim to an ordinary death benefit. *See People v. Quinones*, 95 N.Y.2d 349, 352 (2000) (explaining that the Legislature's choice of tense is significant). And the law itself makes clear that the Legislature selected the term "paid" advisedly, because in other parts of the same law, it instead used the phrase "any amounts paid *or payable*." RSSL § 607-i(c)(2); *see also Orens v. Novello*, 99 N.Y.2d 180, 187 (2002) ("When different terms are used in various parts of a statute or rule, it is reasonable to assume that a distinction between them is intended.").[1]

[1] Colon argues that this reading violates canons of statutory interpretation because it "nullifies" the setoff clause by "restricting it" to a limited set of situations (Colon Br. 19). But a statutory provision is not nullified if it applies in some circumstances, no matter how restricted. *See People v. Jeanty*, 94 N.Y.2d 507, 516 (2000) (explaining that narrow application of a statutory provision does not "nullify" it); *see also* Bryan A. Garner, *Dictionary of Legal Usage* 620 (3d Ed. 2011) (to "nullify something is to deprive it of *all* efficacy" (emphasis added)).

Colon's only response to the clear import of the Legislature's use of different terms to refer to different concepts is to argue that the section of the law using the term "payable" refers to different types of claims—ones where a statutory beneficiary elects to convert a service or disability retirement benefit to an accidental death benefit (Colon Br. 22). But that is entirely the point—the Legislature distinguished between already "paid" and prospectively "payable" claims and used different terms to govern each. *See* RSSL § 607-i(c)(2) (referring to "prospective benefits payable"). Colon's point that the differing language refers to different kinds of claims serves only to highlight the distinction in the Legislature's language choice. And the only exception to the statute's generally applicable mandate—that the accidental benefit "shall" be paid to the member's statutory beneficiary—presupposes that an ordinary death benefit has already been "paid" to a "recipient." RSSL § 607-i(b).

Even if Colon's distinction between the types of claims had any merit, it would nonetheless fail because the Legislature made the exact same distinction in the section on which she relies. The

law provides that any "amount *payable*"—in the future—to a statutory beneficiary shall be reduced by "any amount *paid*"—in the past—to a designated beneficiary. RSSL § 607-i(b). Thus, Colon's sole purported explanation for the Legislature's distinct use of the terms "paid" and "payable"—that they apply to different types of claims—falls apart entirely because the law makes the same distinction *within* § 607-i(b).

Further, the legislative history contains abundant support for TRS's reading of the statute. It first specifies that the exception invoked by Colon and Supreme Court applies only in circumstances where an ordinary death benefit had "already been paid." Legislative Bill Drafting Commission Report 12055-04-0, Fiscal Note, Bill Jacket, L 2020, Ch. 89, at 37. Likewise, the Introducer's Memorandum in Support explains that the law's purpose is to "provide accidental death benefits to the *statutory beneficiaries* of all public employees" who died of COVID after reporting to work. Introducer's Memo. in Support of Bill No. S8427, Bill Jacket, L 2020, Ch. 89, at 1 (emphasis added). And, in its summary of provisions, the memo explains that the "bill provides *protections for*

statutory beneficiaries" and that it "specifies that the *statutory* beneficiary of any public employee … *will receive* an accidental death benefit" if the statutory requirements of proof are met. *Id.* (emphases added).

Colon's response to this unambiguous legislative history is to ignore it entirely (*see generally* Colon Br.). But legislative history "is not to be ignored, even if words be clear." *Altman v. 285 W. Fourth LLC*, 31 N.Y.3d 178, 185 (2018) (quotation marks omitted). Here, the legislative history leaves no doubt that the Legislature intended that an accidental death benefit "shall" be paid to the statutory beneficiary of a member who dies from COVID after reporting to work, and may only be reduced by any amount already paid to a recipient of ordinary death benefits. RSSL § 607-i(a)(3), (b).

Finally, longstanding principles of agency deference also support TRS's conclusion that the accidental death benefit had to be paid to Barcelo's daughter. "Deference must be given to an agency's statutory construction of statutes which the agency administers" so long as its construction is "not irrational, a

principle which applies to pension cases." *Caruso v. Ward*, 160 A.D.2d 557, 557 (1st Dep't 1990) (citation omitted); *accord Kaslow v. City of New York*, 23 N.Y.3d 78, 88 (2014). Courts should also look to "the agencies' practical experience in administering the program," and defer to agencies' statutory construction where the "interpretation of a statute or its application involves knowledge and understanding of underlying operational practices." *Stevens v. Wing*, 293 A.D.2d 49, 52–53 (1st Dep't 2002) (quotation marks omitted). The challenged law comports with this principle as well, as it authorizes the various retirement systems to develop their own "rules and regulations to administer this benefit." RSSL § 607-i(d).

Colon's only response is that this is a question of "pure statutory construction" (Colon Br. 17), but, in fact, the question implicates how TRS processes applications for benefits. Indeed, Colon's own arguments about when and how TRS should have processed her benefit prove as much (*see* Colon Br. 21–24). While the law is clear on its face, TRS's interpretation should also be accorded deference.

B. TRS was not obliged to permit Colon to submit a claim after the law went into effect.

Colon also argues that, notwithstanding the new law, TRS should have permitted her to submit and complete her claim and paid her even after the law went into effect (Colon Br. 19–24). She is wrong. At the time the law went into effect, TRS had no completed claim from Colon and was obliged to follow the law's mandatory language. *See* RSSL § 607-i(a)(3); *DeVera,* 32 N.Y.3d at 435. The letters that TRS sent to Colon before the law went into effect made clear that she had to submit a claim, which she did not attempt to do until well after the new law went into effect.[2] And, even if she had, any claim would have been just that—a claim for benefits that "may be payable" and that TRS would have had to process, which, as it informed her, could have taken "several weeks to several months" (R155).

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[2] Colon mischaracterizes TRS's argument as contending that she was "required to perfect her claim by May 19th" (Colon Br. 20 n.7). But TRS only argued that she was made aware that she could make a claim by May 19 at the absolute latest. Nothing required her to file by May 19 (Brief for Appellant 20 n.5). And the thrust of TRS's argument is that the timing was irrelevant because processing benefits would have taken "from several weeks to several months to complete" (R155). Thus, contrary to her argument and Supreme Court's decision, it would not have altered the outcome if TRS had initially sent the letters to her updated address.

Contrary to Colon's claim that she merely had to "perfect" her claim (Colon Br. 20 n.7), the letters TRS sent make clear that she needed to "file [her] benefit claim" and to secure whatever amount "*may* be payable" (R150–51, 155). And, even if she had, it would still have to be processed in the ordinary course, which could take "several weeks to several months," (R155), and that processing would have necessarily been suspended on the enactment of the new law, given that TRS was aware that the circumstances of Mr. Barcelo's death met the criteria for a COVID accidental death benefit and that he had a minor daughter who was his statutory beneficiary. Thus, Colon's contention that she "reached the finish line before the statute was enacted" (Colon Br. 23) is incorrect—she had not even left the starting block.

Colon's argument also makes little sense in the context of TRS's administration of death benefits. In her view, TRS should have paid out an inchoate claim in violation of the newly enacted law simply because it had previously informed Colon of the potential for her to claim a benefit under preexisting law. She still cites nothing to suggest that TRS was obligated to process her claim

once the new law went into effect. A death benefit claim is a process that involves a number of requirements that all must be reviewed and satisfied before TRS issues a payment. There is no support for Colon's claim that taking a first step towards filing a claim entitles her to payment. Colon's reading of the law as awarding the benefit to whichever claimant filed first would also work a particular harm on beneficiaries—like Barcelo's daughter here—who are infants, and thus require appointment of a guardian before they can make a claim on a member's benefits (*see* R201, 204).

Moreover, Colon's reading would nullify the retroactive application of the statute, which the Legislature explicitly provided for. L. 2020, Ch. 89, § 14; *see also Matter of OnBank & Trust Co.*, 90 N.Y.2d 725, 730 (1997) (explaining that courts give retroactive effect to laws if "retroactive application is clearly indicated"). If a retirement system were obliged to continue to process and pay ordinary death benefits to beneficiaries of those who died between its effective date and the date of passage, then the retroactivity provision would have no effect. *See Mestecky v. City of New York*, 30

N.Y.3d 239, 243 (2017) (explaining that "meaning and effect should be given to every word of a statute" (quotation marks omitted)).

C. The statute, properly construed, does not violate the New York State Constitution's pension impairment clause.

Colon fares no better on her constitutional claim. She cannot overcome the basic conclusion that the newly enacted law did nothing to impair any retirement benefit to which Colon was entitled and, therefore, it cannot violate the New York State Constitution. As the Court of Appeals has "consistently held," the Constitution prohibits "'official action during a public employment membership in a retirement system which adversely affects the *amount* of the retirement benefits payable to the members.'" *Civil Serv. Empl. Ass'n, Local 1000 v. Regan*, 71 N.Y.2d 653, 658 (1988) (emphasis added) (quoting *Birnbaum v. N.Y. State Teachers Ret. Sys.*, 5 N.Y.2d 1, 11 (1958); *see also McDermott v. McDermott*, 119 A.D.2d 370, 382–83 (2d Dep't 1986) (holding that a "restriction of option or beneficiary choices does not diminish a pension").

None of the cases Colon cites are to the contrary. She first relies on *Day v. Mruk*, 307 N.Y. 349 (1954), for the proposition that

the Court of Appeals has made a distinction between the amount of a pension and "vested interests" in some unspecified benefits (Colon Br. 25). But *Day* says no such thing. The Court there was considering whether a police officer who joined the force before the pension impairment clause was enacted had a "vested interest" in his pension such that it could not have been reduced after the pension impairment clause went into effect, and the Court concluded that he did not. *Id.* at 354. The Court simply did not draw the distinction Colon claims that it did.

Likewise, in *Nickels v. New York City Housing Authority*, 208 A.D.2d 203 (1st Dep't 1995), this Court referred in passing to petitioners' "pension and related rights." *Id.* at 211. But the "related rights" to which petitioners referred was the right to retire without a three-year waiting period, affecting the member's ability to access the full amount of benefits, not anything to do with beneficiaries. *Id.* at 212. And in *McDermott*, the Second Department made clear that the "other incidents of membership" it referred to, and on which Colon relies, were also things that would affect the potential amount of benefits: "the right upon discontinuance of service to

withdraw funds contributed to the system" and "the right to reenter the system upon renewed public employment." 119 A.D.2d at 382. Notably, though Colon does not mention it, *McDermott* held specifically that a "restriction of option or beneficiary choices does not diminish a pension." *Id.* at 382–83.

Here, the law did not even restrict Barcelo's ability to designate a beneficiary. Members of the pension system have exactly the same right to designate a beneficiary as they did before the law went into effect, and the statutory beneficiaries for a member who is subject to the accidental death benefit are the same as well. The law merely permits streamlined proof that a death from COVID after reporting to in-person work is accidental.

Thus, Colon's argument that the pension impairment clause means that a retirement system cannot deprive a member of the "right to choose the recipient of [pension] benefits" is plainly wrong (Colon Br. 26 (emphasis removed)). Members have never been free to select the recipients of accidental death benefits—they have always gone to the member's statutory beneficiaries. RSSL § 601(d).

For that reason, Colon's reliance on the since-overturned decision in *Caravaggio v. Retirement Board of Teachers Retirement System*, 36 N.Y.2d 348 (1975) is misplaced. The Court there explained why the designation of a beneficiary could not be irrevocable. *Id.* at 352–53. It had no occasion to consider statutory beneficiaries, and certainly made no pronouncement on the interplay between statutory and designated beneficiaries. *See id.* at 350–58. Likewise, the Court did not analyze the pension impairment clause, citing it only in passing to emphasize the "importance" of retirement benefits. *Id.* at 352. Indeed, in *Majauskas v. Majauskas*, the Court of Appeals pointed out that a party's "reliance upon *Caravaggio*" to support a pension impairment clause claim was "misplaced," because *Carvaggio* "depended not upon the Constitution but upon an antiassignment statute." 61 N.Y.2d 481, 493 (1984).

Colon's extensive discussion of *McCauley v. New York State & Local Employees' Retirement System*, 146 A.D.3d 1066 (3d Dep't 2017) is similarly irrelevant (Colon Br. 28–30). The law at issue there automatically revoked the designation of an ex-spouse as a

beneficiary upon divorce. *Id.* at 1068. Notably, the Third Department did not even consider or cite the pension impairment clause, instead resolving the case on general retroactivity principles. *Id.* It certainly did not issue the hypothetical advisory holding Colon imputes to it: that, if the law challenged there had been retroactive, it would violate the Constitution (Colon Br. 28–30). And, in any event, unlike the law there, the law challenged here does not alter any member's designated beneficiary.

Thus, the sum of Colon's argument is two cases that do not actually consider the import of the pension impairment clause. And her only attempt to distinguish the cases on which TRS relies (Brief for Appellant ("App. Br.") 25), which do consider the pension impairment clause, is to argue that they deal with marital property (Colon Br. 30–31). True enough, but she does not offer any persuasive reason to discount those cases in favor of others that do not consider the pension impairment clause at all. While they were decided in the context of marital property, the courts' reasoning is clear that the clause only prohibits "the pension fund … pay[ing] any lesser amount" of benefits than was set when the employee

joined. *Majauskas*, 61 N.Y.2d at 493; *McDermott*, 119 A.D.2d at 382 (holding that what "the Constitution prevents" is "reduction by the public employer of the financial benefits promised in the pension contract").[3] And, in any event, Colon can point to no cases holding otherwise.

Colon also has no answer for the basic fact that, like other laws, the effect of the challenged law was merely to make it easier to claim more generous accidental death benefits, in line with other laws such as the provision making it easier to obtain accidental death benefits for a qualifying World Trade Center condition, *see* RSSL § 507-b, which present no issue under the pension impairment clause.

Provisions like those alter the background requirement that a member show their death was caused by a "sudden, identifiable event" (Colon Br. 7, 32, 36) that occurred in the course of the member's job duties in certain circumstances. *See*, *e.g.*, *Bitchatchi v. Bd. of Trs. of the N.Y. City Police Dep't Pension Fund, Art. II*, 20

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[3] Though Colon argues that *McDermott* is "inapplicable to the case at hand" (Colon Br. 31), she nonetheless relies on it in elsewhere in her brief (Colon Br. 25–26).

N.Y.3d 268, 276 (2012) (explaining that a WTC-benefit claimant need only show that they responded on September 11th and that they have a qualifying condition); *Uniformed Firefighters Ass'n v. Beekman*, 52 N.Y.2d 463, 468 (1981) (explaining that "heart bills" create a presumption that deaths from fatal heart conditions are accidental within the meaning of RSSL). In those cases, the Legislature created presumptions because of the "evidentiary difficulty" in establishing that a "non-trauma" condition could be traced to a member's performance of their duties. *Bitchatchi*, 20 N.Y.3d at 281. So too here, it would be difficult, if not impossible, for a given member to specifically trace a COVID infection to in-person work, as opposed to some other source. Thus, the law follows in the footsteps of well-established precedents in removing that evidentiary barrier.

Also of note, both *Bitchatchi* and *Beekman* also explain that accidental death or disability benefits are "more generous." *Bitchatchi*, 20 N.Y.3d at 275; *Beekman*, 52 N.Y.2d at 468 (explaining that accidental disability benefits are "special pension benefits"). Thus, as we have consistently pointed out (App. Br. 24),

making it easier to qualify for accidental death benefits enhances, rather than diminishes, members' benefits. Colon argues that the amended law is different because the WTC law only provides a "rebuttable presumption" that the member is entitled to accidental death benefits (Colon Br. 33). She contends that the law gives "designated beneficiaries, the opportunity to prove that a member's death did not … meet the definition of an 'accidental' death" (*id.*). She is mistaken: the law only permits the "pension fund [to] rebut the presumption," not a designated beneficiary. *Bitchatchi*, 20 N.Y.3d at 281. Likewise, she is wrong that the law providing accidental death benefits to Barcelo "eliminat[ed] any requirement that the member's death must have been caused by an in-service accident" (Colon Br. 33). To the contrary, the law presumes that contracting COVID while working in person *is* an in-service

accident—a claim that a member could have made before the law was enacted, but which would have been difficult to prove.[4]

In sum, the amended law, properly construed, does not violate the pension impairment clause because it does not reduce any benefit to a member. Members have precisely the same right to designate beneficiaries now that they did before the enactment of the law. It merely emulates other long-established laws in altering the burden of proof for obtaining more generous accidental death benefits. Even if the law did alter the ability to select beneficiaries, which it does not, a "restriction of option or beneficiary choices does not diminish a pension." *McDermott*, 119 A.D.2d at 382–83.

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[4] Colon's characterization of the challenged law as a major departure from similar statutes such as the WTC benefit is also incorrect. While it does not contain the same opportunity for the retirement system to rebut the presumption of causation that the WTC law provides, it is limited by the stricter statutory requirements that the member contracted COVID within 45 days of reporting to work and died from COVID as certified by a medical professional. RSSL § 607-i(c)(1)(iii)–(iv). Accidental death or disability benefits claimed under the WTC benefit provisions have no temporal restrictions and place no burden of proving causation on the member whatsoever.

D. The ordinary death benefit did not "vest" in Colon.

Finally, Colon briefly argues that the ordinary death benefit "vested" in her at the time of Barcelo's death (Colon Br. 36–38). As we pointed out in our opening brief (App. Br. 22), there is no merit to Colon's argument that her benefit "vested" on Barcelo's death. Nothing in the RSSL indicates that a benefit immediately vests to a beneficiary, even before a determination as to whether accidental or ordinary death benefits apply. Instead, even under the preexisting statutory scheme, there was always a possibility that, at any point before payment of the ordinary death benefit, TRS could learn that the cause of death was accidental and become obligated to pay a statutory, rather than designated, beneficiary.

Colon's argument to the contrary rests on a mischaracterization of the letter TRS sent to her informing her that she could file a claim. While the letter provides an "estimated

benefit due,"[5] it also makes clear that Colon would need to "file a claim and provide documentation" to obtain any benefit (R150). Another letter sent shortly thereafter explains that processing any claim "typically requires from several weeks to several months" (R155), dispelling any notion that the claim was instantaneously payable. And yet another communication explains that several steps are necessary and TRS will "make every effort to efficiently process any death benefits payable" once it receives "all required documentation and payments" (R144).

Thus, there is no support for Colon's argument that ordinary death benefits instantaneously vested in her at the moment of Barcelo's death. And such a rule would upend processing benefits claims. TRS, and other similar bodies, have systems in place for the

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[5] Colon refers, without record citation, to an April 28, 2020 letter as informing her "that she was 'entitled' to receive the ordinary death benefit 'due' as a result of Barcelo's death" (Colon Br. 36). Two letters in the record referring to Barcelo's death benefits are dated April 28, 2020. One refers to an "estimated benefit due" (R150). One refers to "benefit(s) you may be due" (R153). Neither contains the word "entitled" (R150–51, 153). The only use of that word in the record correspondence is in a letter sent later, in June 2020, explaining that TRS suspended claims processing in light of the new COVID law and indicating only that previous correspondence "*may* also have indicated that you are entitled to receive a benefit," not that she was entitled to any benefit (R163 (emphasis added)).

orderly processing of claims. Under Colon's interpretation, the system would be inverted, giving beneficiaries an immediate, "vested" right to the benefit before any claim is made or any application may be processed.

Because such a system would make little sense, it is no surprise that Colon lacks any legal support for her argument. Nothing in the RSSL provides that any benefit "vests" in a beneficiary at any particular point in time. Likewise, the Court of Appeals statement in *Public Employees Federation v. Cuomo*, 62 N.Y.2d 450 (1984), that a member's beneficiary becomes "entitled to the death benefit … upon the death of the employee," *id.* at 462, does not stand for the proposition that a beneficiary has an immediate, unconditional right to the benefit at the moment of the member's death. The Court there made only the "undisputed" point that a death benefit, paid to any beneficiary, is a "benefit of membership in the retirement system" that cannot be reduced. *Id.* There is simply nothing to support Colon's argument that she had a vested, unalienable right to Barcelo's ordinary death benefit.

Though she characterizes it differently, in substance, Colon's vesting argument sounds in estoppel. She contends that, once TRS informed her she was due a payment, it could not then alter that determination (*see* Colon Br. 36–38). But, with rare exceptions not present here, "estoppel is not available as a remedy to prevent a governmental agency from discharging its statutory duties." *W. Midtown Mgt. Grp., Inc. v. State of N.Y., Dep't of Health, Off. of the Medicaid Inspector Gen.*, 31 N.Y.3d 533, 541–42 (2018). Even if TRS had unambiguously misled Colon about her rights, which it did not, that is not a sufficient basis on which to estop TRS from applying the correct law and discharging its statutory duties. *Id.*; *see also Ly v. N.Y.C. Empls. Ret. Sys.*, 189 A.D.3d 1410, 1413–14 (2d Dep't 2020).

CONCLUSION

Supreme Court's order should be reversed, Colon's article 78 petition should be denied and this proceeding dismissed.

Dated: New York, NY
September 16, 2022

Respectfully submitted,

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