To Be Argued By:
KERSTIN MILLER
(of the bar of the State of Maryland
and District of Columbia)
by permission of the court
Time Requested: 15 Minutes

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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of the Application of
ANNE MARIE R. COLON,

Petitioner-Respondent,

—against—

TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK,

Respondent-Appellant,

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

Respondent.

For a Judgment under Article 78
of the Civil Practice Law and Rules

CASE NO.
2021-03148

BRIEF FOR PETITIONER-RESPONDENT

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PRELIMINARY STATEMENT

Petitioner Anne Marie Colon ("Petitioner") was the loving registered domestic partner of Louis Barcelo ("Barcelo"), a New York City teacher who tragically died from COVID-19 on April 16, 2020. Years prior to his death, Barcelo designated Petitioner as his beneficiary to receive "ordinary" death benefits that might become due under the New York City Teachers' Retirement System ("TRS"). If Barcelo were to die from an in-service "accident" as defined by the law in effect at the time he joined TRS, then a different "statutory" beneficiary (defined by law) would receive "accidental" death benefits, and ordinary death benefits would not be paid. It is undisputed that when Barcelo died on April 16, 2020, the circumstances of his death did not qualify under New York law as an in-service "accident," and ordinary death benefits were to be paid to Petitioner.

Following Barcelo's death, TRS sent a letter to Petitioner summarizing the ordinary death benefits "due" to her as Barcelo's designated beneficiary. As of May 19, 2020, Petitioner had provided TRS with all of the information necessary to *claim* the death benefits, and she only needed to send TRS her instructions regarding how to *distribute* the

benefits. On June 22, 2020, after recovering from her own battle with COVID-19 and seeking financial and legal advice, Petitioner attempted to provide TRS with her distribution instructions, only to learn for the first time that her claim had been suspended.

Petitioner filed an article 78 proceeding to seek recovery of the benefits due to her. In response, TRS argued that a new law (the "Amended Law") enacted on May 30, 2020—approximately six weeks *after* Barcelo's death—had retroactively changed the status of Barcelo's death from an "ordinary" death to an "accidental" death. TRS contended that it was required to suspend Petitioner's pending claim for ordinary death benefits in order to prioritize a statutory beneficiary's anticipated claim for accidental death benefits. After a hearing, Supreme Court, New York County ordered that ordinary death benefits be paid to Petitioner and accidental death benefits (minus ordinary death benefits) be paid to the statutory beneficiary. Its judgment should be affirmed.

As Supreme Court correctly held, TRS's decision was arbitrary and capricious and an error of law. First, TRS's interpretation of the Amended Law violated rules of statutory construction. Nothing in the Amended Law prevented TRS from paying ordinary death benefits to

Petitioner; in fact, it expressly recognized that ordinary death benefits could be paid out before accidental death benefits, in which case the accidental death benefits would still be paid, but in a reduced amount. Moreover, nothing in the Amended Law required (or allowed) TRS to suspend Petitioner's *pending* claim in order to prioritize a statutory beneficiary's *anticipated* (but not yet existing) claim.

Second, Supreme Court astutely recognized that the retroactive application of the Amended Law, if it were read to preclude payment of ordinary death benefits to Petitioner in this case, would violate the New York State Constitution's "Pension Impairment Clause." Because Barcelo died prior to the enactment of the Amended Law, its retroactive application would: (1) impair Barcelo's right to select his own beneficiary and plan for her support; and (2) impair and diminish Petitioner's right to vested benefits that became due to her upon Barcelo's death.

Make no mistake: the retroactive application of the Amended Law did not "enhance" Barcelo's benefits under these facts. Rather, it eliminated one of the most important and meaningful rights held by Barcelo—the right to designate his beloved partner as his beneficiary and plan for her support.

QUESTIONS PRESENTED

1. Did Supreme Court correctly order ordinary death benefits be paid to Petitioner where: (a) the Amended Law expressly allows for accidental death benefits to be reduced by the amount of ordinary death benefits paid, and (b) TRS prevented ordinary death benefits from being paid to Petitioner by sending filing instructions to the wrong address, and then suspending the processing of her claim, even though the Amended Law did not require or allow such suspension and TRS had not received an application for accidental death benefits at the time of suspension?

2. If the Amended Law is interpreted to require payment of accidental death benefits to Barcelo's statutory beneficiary in lieu of payment of ordinary death benefits to Petitioner, is it unconstitutional because it retroactively impairs and diminishes rights that had vested at the time of Barcelo's death?

STATEMENT OF THE CASE

A. Statutory Background

1. The law governing death benefits in effect at the time of Barcelo's death

Barcelo became a member of TRS on October 1, 1995 (Record on Appeal ("R") 128). Among the benefits to which a member of TRS is

entitled is a payment, upon the member's death, to a surviving beneficiary. Death benefits are classified as "ordinary," which are paid to a designated beneficiary of the member's choice, or "accidental," which are paid to certain statutory beneficiaries as defined by a ranked list provided in the statute. Retirement and Social Security Law ("RSSL") §§ 606-a; 601(d); 607. Ordinary death benefits are the default classification, and are payable "upon the death" of a member. RSSL § 606-a. Accidental death benefits are not due unless a statutory beneficiary submits an application demonstrating that an in-service "accident" caused the death. RSSL § 607(a).

At the time Barcelo became a member of TRS, as well as at the time of his death, potential exposure to an illness running rampant in the general population, such as COVID-19[1], was not considered an in-service "accident" that qualified for accidental death benefits. (R13, 163-164). At the hearing before Supreme Court, TRS agreed that "nobody is contesting that [Petitioner] was the designated beneficiary, at the time of death,

[1] During his introduction of the Amended Law on May 28, 2020, Senator Gounardes acknowledged that COVID-19 was a "pandemic" that had already taken "more than 100,000 lives of our fellow Americans." (R237, 238).

when there was no statute in existence" converting the circumstances of Barcelo's death from "ordinary" to "accidental." (R257).

Under the law in effect at the time of Barcelo's death, to be eligible for accidental death benefits, a statutory beneficiary had to prove that the member died "as the natural and proximate result of an accident not caused by his or her own willful negligence sustained in the performance of his or her duties in active service . . . ." RSSL § 607(a). With limited exceptions[2], all of which are inapplicable to this case, a member of the retirement system (or his statutory beneficiary) has long born the burden of proving that an "accident" caused the member's disability or death. *See Pugliese v. New York State & Local Employees Retirement Sys.*, 161 A.D.2d 1095, 1095 (3d Dep't 1990) (explaining that in a claim for accidental disability retirement benefits, the member bears the burden of showing that his injury was due to an "accident" as defined by RSSL).

It is well established that not all job-related injuries or medical conditions qualify for "accidental" benefits. For decades, the term

[2] The RSSL creates a rebuttable presumption that an "accident" occurred under certain circumstances, such as when a member is disabled or dies from a qualifying World Trade Center condition. *See, e.g.,* RSSL 507-b. However, in each of those circumstances, the law merely creates a *rebuttable* presumption, which may be controverted by competent evidence that the disease or medical condition was not, in fact, contracted at work. *Id.*

"accident" in the RSSL has been narrowly interpreted to mean a "sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact" or, more succinctly, a "sudden, unexpected event that was not an inherent risk of petitioners' regular duties." *See Matter of Kelly v. DiNapoli*, 30 N.Y.3d 674, 681-84 (2018) (providing historical overview of the interpretation of the term "accident" in the RSSL); *Tortorello v. McCall*, 286 A.D.2d 841, 842 (3d Dep't 2001) (rejecting claim for accidental death benefits where no "particular incident" was identified as a possible cause of the fatal coronary occlusion); *Nerney v. New York State Policemen's & Firemen's Retirement Sys.*, 156 A.D.2d 775, 776 (3d Dep't 1989) (to qualify for accidental death benefits, "some identifiable event . . . must have occurred that is claimed to be the cause" of death).

2. After Barcelo's' death, the Legislature retroactively amended the law to allow accidental death benefits arising out of COVID-19

On May 30, 2020, the RSSL was amended to extend eligibility for accidental death benefits in circumstances where: (1) a member reported to his worksite at the direction of his public employer on or after March 1, 2020; (2) the member contracted COVID-19 within forty-five days after

reporting to work; (3) the member died on or before December 31, 2020[3]; and (4) COVID-19 caused or contributed to the death. RSSL § 607-i(a). The Amended Law did not remove the requirement that a statutory beneficiary must first submit an application to be eligible for accidental death benefits. *Id.*; RSSL § 607. Despite the widespread occurrence of COVID-19 in the general population, and unlike other provisions of the RSSL that provided a rebuttable presumption that an in-service accident had occurred, the Amended Law did not provide any opportunity to rebut the presumption that the member contracted COVID-19 at work. *Id.*

While the Amended Law made it easier to claim accidental death benefits, it did not preclude the payment of ordinary death benefits. In fact, the Amended Law expressly recognized that ordinary death benefits might be paid out before accidental death benefits. In that case, accidental death benefits would still be paid, but they "shall be reduced by any amount paid" by the retirement system "to any recipient of ordinary death benefits." RSSL § 607-i(b). Accordingly, a retirement system is not in jeopardy of paying a double recovery if it processes a

[3] The law was later extended to apply to deaths that occurred on or before December 31, 2022. L. 2021, ch. 78, § 14.

claim for ordinary death benefits arising out of a COVID-related death, in advance of a claim for accidental death benefits. *Id.* Moreover, nothing in the Amended Law required (or allowed) a retirement system to suspend a designated beneficiary's pending claim for ordinary death benefits in order to prioritize a statutory beneficiary's anticipated (but not yet existing) claim for accidental death benefits. RSSL § 607-i.

While the Amended Law was not enacted until May 30, 2020 (i.e., approximately six weeks *after* Barcelo's death), it purported to be in "full force and effect" on and after March 1, 2020 (i.e., *prior* to Barcelo's death). L. 2020, Ch. 89, § 14.

B. Petitioner's Claim for Benefits and TRS's Final Determination

Petitioner was the registered domestic partner of Barcelo, a New York City teacher and a member of TRS. (R12, 49). In 2017, Barcelo designated Petitioner as his beneficiary for ordinary death benefits. (R135). Sadly, Barcelo died from COVID-19 on April 16, 2020, with his immediate cause of death listed on his Death Certificate as "viral pneumonia-COVID-19." (R49). Prior to his death, Barcelo specifically confirmed to Petitioner that he wanted her to receive his death benefits,

and he requested that Petitioner provide some financial support to his daughter out of those funds, which Petitioner agreed to do. (R15).

On April 17, 2020, the day after Barcelo's death, the secretary of the school at which Barcelo worked called Petitioner to inform her of steps to file a claim for death benefits. (R15). In response, on April 24, 2020, Petitioner sent a copy of Barcelo's death certificate to TRS, along with a note advising of her change of address to ensure that all future communications from TRS would be properly directed. (R15, 87). The death certificate and change of address were delivered to TRS on April 25, 2020 (R15; TRS Appellate Brief ("Br.") at 9 (acknowledging receipt of authenticated death certificate from Petitioner)).

Petitioner did not receive any communications from TRS until May 19, 2020, when TRS sent her an email explaining how to file for the death benefits "due" to her. (R16, 91). Attached to the email were letters dated April 28, 2020, which TRS had sent to Petitioner's old address, despite having Petitioner's change of address on file. (R93-96).

One of the letters explained that Petitioner had been designated to receive a death benefit "due" in the amount of approximately

$438,681.14.[4] (R95). It directed Petitioner to file a claim and provide an original or certified copy of the death certificate along with Petitioner's date of birth in order to "process" the benefit. (R95). The letter explained that various deadlines would impact "*how*" the benefit could be distributed—not "*if*" it would be distributed. (R95). Nothing in the letter suggested that Petitioner might lose out on the benefit in its entirety if she failed to complete the required information within any particular period of time. (R95). Rather, the letter confirmed that the death benefits were "due" to Petitioner, and merely warned that Petitioner should file as soon as possible to preserve eligibility for the "distribution option you want." (R95-96). A separate letter provided a claim code to log in to TRS's website, and explained that the code would expire after sixty days (i.e., on June 27, 2020). (R153).

The same day Petitioner received TRS's claim filing instructions, she logged onto the TRS website and completed the online registration process. (R18). TRS had already confirmed receipt of Barcelo's death

[4] The letter noted that dollar figures are approximations because "[a]ctual payment amounts may differ due to accruing interest." (R96). Thus, the letter confirmed that the benefit due to Petitioner might be *more* than was estimated—but would not be less.

certificate on April 30, 2020. (R89). Accordingly, as of May 19, 2020, Petitioner had provided all required documentation necessary to claim the funds. (R18). The only information that Petitioner still needed to provide as of May 19, 2020, was her distribution instructions. (R18).

Because Petitioner was ill with COVID-19 at the time she received the letters, she was unable to immediately consult with financial and legal advisors regarding her preferred distribution method for the death benefits due to her. (R18). Petitioner had no reason to expect that this brief delay due to her own battle with COVID-19 would impact her claim for death benefits. (R18). In reliance upon the unequivocal language in TRS's April 28, 2020 letter, Petitioner understood that the death benefits would be processed and paid out when she instructed TRS where to send the funds. (R18). This understanding was again affirmed when TRS sent another letter to Petitioner on May 28, 2020, reiterating that she had been "designated to receive" the benefit "due" as a result of Barcelo's death and urging her to complete her claim. (R160). The letter further indicated that if Petitioner's claim code had expired, she could call the Member Services Center to address the issue. (R160).

After Petitioner recovered from COVID-19, she spoke with financial advisors and attorneys seeking guidance on the preferred distribution method for the benefits due to her. (R19). On June 22, 2020, Petitioner tried to access TRS's website to provide her distribution instructions, only to learn for the first time that her account had been frozen. (R19). TRS subsequently informed Petitioner that it had suspended her pending claim due to an intervening change in law, and it believed that it was now required to prioritize an anticipated claim for accidental death benefits from a statutory beneficiary, in direct contravention of the wishes and expectation of Barcelo. (R19-20). On July 3, 2020, the Executive Director of TRS confirmed to Petitioner that if the death benefits had already been rolled over to Petitioner's account prior to the date the Amended Law was enacted, TRS would not have sought their return. (R20). Therefore, had TRS sent the April 28, 2020 letter to Petitioner's correct address on file, Petitioner would have had the opportunity to complete her claim sooner, and consequently would have been paid the death benefits due to her prior to the change in law. (R20).

After engaging with Petitioner's counsel, TRS issued its final determination to Petitioner on August 10, 2020, stating that "*if* TRS

receives a valid application for a . . . accidental death benefit from a statutory beneficiary, which we expect, the accidental death benefit will be paid out in lieu of the non-accidental death benefit . . . ." (R130, 198) (emphasis added). TRS admits that it did not receive an application for accidental death benefits until on or about September 17, 2020, approximately three months after Petitioner had attempted to provide her distribution instructions. (R130).

C. Supreme Court's Decision Granting Petitioner's Article 78 Petition

Following receipt of TRS's final determination, Petitioner filed this article 78 proceeding seeking to annul, vacate, and set aside TRS's final determination on the grounds that it was arbitrary and capricious, it violated due process, and the Amended Law as interpreted by TRS violated the Pension Impairment Clause. (R22-26).

Supreme Court granted the petition. First, Supreme Court rejected TRS's statutory interpretation, holding that the Amended Law expressly recognized that ordinary death benefits could be paid out prior to accidental death benefits, and nothing in the statute required TRS to suspend a pending claim for ordinary death benefits in order to prioritize an anticipated claim for accidental death benefits. (R249-251, 256). In

response to TRS's argument that it suspended Petitioner's account because it did not have a "complete application" on file (presumably because Petitioner had yet to provide her distribution instructions), Supreme Court noted that TRS had actively prevented Petitioner from completing her application, first by sending the filing instructions to the incorrect mailing address, even though it had a change of address on file, and then by locking Petitioner out of her account. (R251, 261).

Second, Supreme Court determined that if the Amended Law was interpreted to preclude payment of ordinary death benefits to Petitioner, then the law would violate the Pension Impairment Clause because it retroactively impaired and diminished the rights of Barcelo and his designated beneficiary. As Supreme Court reasoned, Barcelo "could not have envisioned" that a statute would be enacted after his death, that would convert an illness running rampant in the general population into an in-service "accident" for purposes of his pension benefits. And after Barcelo died, he could no longer respond to the change in law by making alternative arrangements to provide for his loved one. (R254-255, 261). Moreover, Supreme Court agreed that the death benefits became due to

Petitioner upon Barcelo's death, and thereafter could not be taken away. (R257-259).

Finally, Supreme Court emphasized the unique circumstances of this case, noting that its decision would only impact the small number of cases in which the member died between March 1, 2020 and May 30, 2020.[5] (260-261).

ARGUMENT

POINT I

SUPREME COURT CORRECTLY CONCLUDED THAT COLON WAS ENTITLED TO AN ORDINARY DEATH BENEFIT UNDER THE PLAIN LANGUAGE OF THE STATUTE

As Supreme Court correctly determined, TRS's conclusion that it did not have the "legal ability to process Colon's claim after the law took effect" (Br. at 15) was an error of law. The statutory construction that TRS urges this Court to adopt disregards the plain language of the statute and, further, attempts to read language into the statute that

[5] Indeed, as Petitioner's counsel noted at the hearing, the decision would only impact an even smaller subset of cases in which the designated beneficiary was a different person than the statutory beneficiary. (R256). In the majority of cases, the designated beneficiary will likely be the member's spouse, who is also the statutory beneficiary of first priority. RSSL § 601(d).

simply does not exist. Accordingly, Supreme Court's judgment should be affirmed.

The standard of judicial review in an article 78 proceeding is whether the administrative determination "was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious, or was an abuse of discretion." *Matter of Franklin St. Realty Corp. v. NYC Envtl. Control Bd.*, 165 A.D.3d 19, 23 (1st Dep't 2018). "Where . . . the question is one of pure statutory interpretation," a court "need not accord any deference to the agency's determination and can undertake its function of statutory construction." *Matter of DeVera v. Elia*, 32 N.Y.3d 423, 434 (2018). "As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." *Id.* at 435.

A. The Amended Law Expressly Allows Ordinary Death Benefits to be Paid Before Accidental Death Benefits

Under the plain language of the Amended Law, the payment of death benefits is not the "all-or-nothing" proposition that TRS suggests; rather, the Amended Law specifically contemplates that ordinary death

benefits could be paid out before accidental death benefits, in which case accidental death benefits would still be paid, just in a reduced amount.

Although the text provides that a statutory beneficiary "*shall*" receive an accidental benefit if the required elements of the COVID-19 provision are met, that benefit is always subject to reduction. The Amended Law expressly recognizes that accidental death benefits shall be reduced by the amount paid by the retirement system to "any recipient of ordinary death benefits." RSSL § 607-i(b)[6]. The Legislature's use of the word "*any*" to qualify the term "recipient of ordinary death benefits," confirms that ordinary death benefits could be paid out even in situations where, as here, the designated beneficiary is a different person than the statutory beneficiary.

Notably, the plain language of the statute does not limit this setoff provision to circumstances in which ordinary death benefits were paid before the statute was enacted. Rather, the statute unequivocally states

[6] TRS argues that the Amended Law's prefatory phrase "[n]otwithstanding any other provision of this article, or of any general, special, or local law to the contrary," signals that the Legislature intended to preempt an ordinary beneficiary's right to payment in circumstances in which the COVID-19 provisions apply. (Br. at 21). But the provision that expressly allows payment of the ordinary death benefit was not in another "provision of this article"—rather, it was part of the Amended Law itself. RSSL § 607-i(d).

that accidental death benefits under the COVID-19 provision "shall" be reduced by the amount of ordinary death benefits paid—with no restrictions on the timing of that payment. *Id.* A court "cannot read into the statute that which was specifically omitted by the legislature." *Commonwealth of the N. Mariana Is. v. Canadian Imp. Bank of Comm.*, 21 N.Y.3d 55, 62 (2013).

Here, TRS is in effect amending the statute by supplying its own deadline for the "payment" of ordinary death benefits when the law does not provide one. TRS's interpretation nullifies the setoff clause by impermissibly restricting it to situations where the ordinary death benefit was paid before the statute was enacted. *See Matter of New York County Lawyers' Assn. v. Bloomberg*, 95 A.D.3d 92, 101 (2012) (explaining that a construction "resulting in the nullification of one part of the [statute] by another[] is impermissible").

Indeed, TRS's own final determination recognized that ordinary death benefits could still be paid out after the statute was enacted. In its final determination, TRS stated that "*if*" it were to receive a valid application for accidental death benefits from a statutory beneficiary, then it would refuse to pay the ordinary death benefits to Petitioner.

(R198). The clear implication is that if no valid application for accidental death benefits materialized, then TRS would pay the ordinary death benefits to Petitioner. To the extent that TRS now argues that an ordinary death benefit could not be paid after the statute was enacted, this new theory must be disregarded. *See Aronsky v. Bd. of Educ.*, 75 N.Y.2d 996, 1000-1001 (1990) (explaining that it is "well settled that judicial review of an administrative determination is limited to the ground invoked by the agency" at the time of its decision, and a court "may not sustain the determination" by substituting a different basis).

Finally, as Supreme Court recognized, it was TRS's own actions that prevented the benefit from being paid, first by ignoring Petitioner's change of address on file,[7] and then by freezing Petitioner's account to

[7] Shockingly, TRS faults Petitioner for not sending her distribution instructions until the end of June, alleging that she "was aware that she could make a claim no later than May 19th." (Br. at 20, Fn.5). Not only did TRS fail to raise this allegation in its final determination or before Supreme Court, but it is not supported by a shred of evidence in the record. Due to TRS's mistake in sending the letters to the wrong address, Petitioner did not even receive filing instructions or a claim code from TRS until May 19th. (R16, 91). The filing instructions were dated April 28, 2020 and did not contain any deadline to file, but noted that the particular claim code provided would expire in 60 days (i.e., June 27, 2020). (R153). Most importantly, TRS send a follow-up letter to Petitioner on May 28, 2020, again urging her to complete her claim and noting that if the claim code had expired she could reach out to TRS for assistance. (R123, 160-161). TRS's new and baseless allegation that Petitioner was required to perfect her claim by May 19th must be rejected. *See Aronsky*, 75 N.Y.2d at 1000-1001 (1990) ("[J]udicial review of an administrative determination is limited to the ground invoked by the agency" at the time of its decision).

prevent her from filing her distribution instructions. TRS attempts to escape responsibility for its actions by urging the Court to put on blinders and ignore whether the death benefit "should have been paid." (Br. at 18). According to TRS's reasoning, Petitioner was not entitled to the benefit because it was not "paid"; yet the only reason that the benefit was not paid, was because TRS refused to pay it. This is a classic catch-22, and the Court should reject the agency's circular logic as arbitrary and capricious. *See Matter of Bailenson v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist.*, 194 A.D.3d 1039, 1041 (2d Dep't 2021) (holding, in article 78 proceeding, that Supreme Court correctly rejected agency's "circular reasoning").

B. Nothing in the Amended Law Requires TRS to Suspend a Claim for Ordinary Death Benefits to Prioritize an Anticipated Claim for Accidental Death Benefits

Not only did the Amended Law expressly acknowledge that ordinary death benefits could be paid in advance of accidental death benefits, but nothing in the statute required (or allowed) TRS to suspend Petitioner's claim while it was waiting to receive an application for accidental death benefits. This critical omission in the statute cannot be supplied by statutory construction. See *Myers v. Schneiderman*, 140

A.D.3d 51, 58 (1st Dep't 2016) ("[I]t is a general rule of construction that omissions in a statute cannot be supplied by construction; omissions are to be remedied by the Legislature, and not by the courts.") (quoting McKinney's Cons Laws of NY, Book 1, Statutes § 363, Comment).

TRS argues that the Legislature's distinction between the terms "paid" and "payable" in a different section of the Amended Law supports its position that it was required to suspend any claim for ordinary death benefit that had not yet been paid as of the effective date of the statute. (Br. at 19). But that section of the Amended Law uses the term "payable" to address claims that were payable *at the time the statutory beneficiary filed an application for accidental death benefits*. RSSL § 607-i(c)(2).[8] Accordingly, this further confirms that the law did not allow TRS to suspend Petitioner's claim prior to receipt of an application from the statutory beneficiary.

[8] Specifically, that provision of the Amended Law governs members who had already retired as of the effective date of the statute. It allowed a statutory beneficiary to apply to convert a "service or disability retirement benefit into an accidental death benefit" but only if, *"[a]t the time of the conversion*," the statutory beneficiary relinquished the right to claim other benefits that were "payable" and, further, if such conversion were granted, the accidental death benefit payments would be reduced by any amounts "paid or payable" to any other statutory beneficiary. RSSL § 607-i(c)(2).

TRS further asserts that the statutory language must be read to allow the suspension of Petitioner's claim in order to avoid a race to file. (Br. at 21.) But if this had been a race, then Petitioner already reached the finish line before the statute was enacted. She had already provided to TRS all information necessary to *claim* the benefits, and TRS was merely awaiting her instructions regarding how to *distribute* the benefits. In contrast, the statutory beneficiary had not yet filed an application, which was a condition precedent to becoming entitled to accidental death benefits. RSSL § 607(a).

Indeed, even if the statute somehow led to a "race to file," that would not be sufficient justification to read language into the statute that simply does not exist. A court "cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the Legislature did not see fit to enact," no matter how "just and desirable it may be to supply the omitted provision."[9] *Myers v. Schneiderman*, 140 A.D.3d 51, 58 (1st Dep't 2016) (quoting McKinney's Cons Laws of NY, Book 1, Statutes § 363, Comment).

[9] Indeed, the most "just and desirable" result here is to accept the plain language of the statute and respect that the deceased's express wishes for his beneficiary designation should not be altered by statute after his death.

In sum, the Amended Law allowed TRS to pay out ordinary death benefits to Petitioner, and did not allow TRS to refuse to process Petitioner's application for ordinary death benefits—the only application for death benefits that it had received at the time. Supreme Court correctly determined that Petitioner was entitled to ordinary death benefits under the plain language of the Amended Law, and its judgment should be affirmed.

POINT II

THE STATUTE AS INTERPRETED BY TRS VIOLATES THE STATE CONSTITUTION

Supreme Court also correctly determined that if the Amended Law was interpreted to preclude payment of ordinary death benefits to Petitioner, it would violate the Pension Impairment Clause of the New York State Constitution.

A. The Pension Impairment Clause Prohibits the Retroactive Application of Any Law that Impairs the Rights of Members of the Public Retirement System and Their Designated Beneficiaries

The State Constitution provides that membership in a public retirement system "shall be a contractual relationship, the benefits of which shall not be diminished or impaired." N.Y. Const., Art. V, § 7

("Pension Impairment Clause"). The Pension Impairment Clause reflects a "policy of ensuring civil servants that the pension benefits they had been promised would be available" to them. *McDermott v. McDermott*, 119 A.D.2d 370, 381 (2d Dep't 1986) The purpose of the Pension Impairment Clause is "to fix the rights of the employee at the time he became a member of the [public retirement] system" *Birnbaum v. New York State Teachers Retirement System*, 5 N.Y.2d 1, 9 (1958).

The Pension Impairment Clause also protects the rights of designated beneficiaries:

> The New York Constitution provides that public employees of New York and its subdivisions, *and their designated beneficiaries*, have a constitutionally established contract right to the benefits of membership in the public retirement system to which they belong, as those benefits existed at the time they joined the system.

McDermott v. Regan, 191 A.D.2d 47, 48-49 (3d Dep't 1993) (emphasis added).

Contrary to TRS's assertions, the Pension Impairment Clause does not merely protect the *amount* of a member's benefits. In 1954, the Court of Appeals explained that the Pension Impairment Clause protects members' "vested *interests*"—as opposed to amounts. *Day v. Mruk*, 307 N.Y.349, 354 (1954) (emphasis added). In the following decades, courts

have stressed that the Pension Impairment Clause protects all rights of membership in a public retirement system. *See Nickels v. New York City Hous. Auth.*, 208 A.D.2d 203, 211 (1st Dep't 1995) (transferring members of one retirement system to another was not unconstitutional because it would "not cause a diminution in pension *and related rights,*" as members would be entitled to the "same rights and benefits" upon transfer) (emphasis added); *McDermott v. McDermott*, 119 A.D.2d 370, 381-82 (2d Dep't 1986) (noting that the Pension Impairment Clause has been applied not only "to prohibit the Legislature from altering the formula by which the *amount* of retirement benefits is determined," but also to prohibit the Legislature from impairing "*other incidents of membership* in the retirement system") (emphasis added).

B. The Amended Law Retroactively Impairs Barcelo's Right to Select His Own Beneficiary

One of the most important and meaningful rights/incidents of membership in a public retirement system is the right to select one's own beneficiary. If the Pension Impairment Clause only protects the *amount* of benefits, and not the right to choose the *recipient* of those benefits, then nothing prevents the Legislature from taking control of members' death benefits. Indeed, the Legislature could enact a law granting *any* arbitrary

person priority to receive death benefits. It would be of little comfort to a member that the Legislature's hand-picked beneficiary—as opposed to the loved one who the member wanted to protect—would be guaranteed to receive the promised amount.

The Court of Appeals has recognized that the right to select one's own beneficiary is of great significance. In *Caravaggio v. Retirement Bd. of Teachers' Retirement Sys.*, 36 N.Y.2d 348 (1975), a case concerning an anti-assignment clause, the Court explained that the right to designate a beneficiary is so important that it cannot be "bargained away," even for a "worthy member of the family." *Id.* at 354.[10] The right to designate one's own beneficiary flows from the "public policy underlying the [retirement] system," which is to "protect the surviving family or other objects of the member's bounty after death." *Id.* at 354. This public policy recognizes that a member must be able to make informed plans to provide for his loved ones through his pension, and meet the demands of changing circumstances: for example, "it may be wise to change the beneficiary

[10] *Caravaggio* was eventually overturned in *Kaplan v. Kaplan*, 82 N.Y.2d 300 (1993), on the grounds that a former spouse's claims are not barred by anti-assignment rules when the pension is marital property. *Id.* at 307. But the application of its reasoning to cases not involving marital property remains sound.

from a wife in comfortable circumstances to surviving children who are handicapped or in need." *Id.* at 354.

Just like all other rights of membership, a member's right to designate his own beneficiary cannot be retroactively impaired. In other circumstances where the Legislature has enacted limits on an individual's ability to control the distribution of their assets after death, the courts have carefully considered whether such restrictions violate the Pension Impairment Clause. An instructive case is *Matter of McCauley v. New York State & Local Employees' Ret. Sys.*, 146 A.D.3d 1066, 1068 (3d Dep't 2017), in which the Court held that a statute modifying the right to select one's own beneficiary did not impair vested rights because it did not apply retroactively to deceased members of the retirement system. *Id.* at 1068.

In *McCauley*, the ex-wife of a member of the public retirement system challenged an amendment to the Estates, Powers & Trusts Law ("EPTL"). *Id.* The amendment provided that upon divorce, a designation of an ex-spouse as the beneficiary for pension benefits would be deemed automatically revoked, even if the member did not take affirmative

action to revoke the designation. *Id.* The Court determined that the statute did not "impair vested rights." *Id.*

First, the statute did not impair the member's vested rights. *Id.* By its terms, the law did not apply retroactively to revoke the designation of an ex-spouse in situations where a member had already died on the date the law was enacted. *Id.* Because the member in this case was alive on the date the law was enacted, he had the opportunity to make alternative arrangements in response to the law, including the opportunity to re-designate his ex-wife as beneficiary if he so desired. Thus, the Court reasoned, the law did not impair his vested rights. *Id.* Second, the law did not impair the ex-wife's vested rights. *Id.* The Court reasoned that the ex-wife did not have a vested right to death benefits as the designated beneficiary *until the decedent's death*. *Id.* Because the member was still alive when the law was enacted, the ex-wife did not have a current right to benefits on the date of enactment, and therefore, no vested rights were taken away from her. *Id.*

Unlike in *McCauley*, the Amended Law in this case impaired Barcelo's vested rights because it restricted his beneficiary selection after he had already died and was unable to make alternative arrangements

to protect his chosen beneficiary. And it impaired Petitioner's vested rights to the death benefits, which had already become due to her upon Barcelo's death.

TRS ignores the guiding principles of *Caravaggio* and *McCauley*, and instead relies exclusively upon cases involving marital property to support its position that the Pension Impairment Clause does not protect any particular beneficiary choices. This reliance is misplaced, because marital property is recognized as a unique exception to the general rule.

For example, in *Majauskas v. Majauskas*, 61 N.Y.2d 481 (1984), a case cited by TRS for the position that the Pension Impairment Clause does not protect a "particular putative beneficiary," the issue presented was whether a husband's vested rights in a public pension plan were subject to an award of equitable distribution in a divorce proceeding. *Id.* at 485-88. The Court held that the pension benefits were marital property, and rejected in summary fashion the husband's argument that the ruling violated the Pension Impairment Clause. *Id.* at 493. At the same time, however, the Court made clear that the unique considerations inherent in marital property awards were critical to its ruling, noting that generally applicable rules such as anti-assignment provisions

simply do not apply with respect to a former spouse's claim to marital property. *Id.*

Similarly, in *McDermott v. McDermott*, 119 A.D.2d 370 (2d Dep't 1986), another case cited by TRS, the Court explained that the Pension Impairment Clause is not violated by an award of marital property, because the ex-spouse has an "interest in the contractual right" to the pension plan "to the extent the interest was acquired during the marriage"; and it "is from that vantage point that the legal issues . . . must be viewed." *Id.* at 375, 383. The Court concluded that "the contract that may not be 'diminished or impaired' [under the Pension Impairment Clause] . . . is now a *co-owned* contract," *id.* at 383 (emphasis added), and measures could be taken to "protect the ownership interests of both" co-owners. *Id.* at 400.

These cases are inapplicable to the case at hand. Barcelo's pension was not marital property, and his daughter—unlike a former spouse—was not a "co-owner" of his membership contract. Accordingly, Barcelo's

right to designate his own beneficiary could not be retroactively impaired, even for a worthy family member.[11]

TRS further contends that the Amended Law merely applies the "pre-existing distinction between accidental and ordinary death benefits." (Br. at 23). That is false. The Amended Law did not just make it "easier" to show that an in-service accident occurred—rather, it radically changed the definition of an in-service accident, completely eliminating the underlying requirement that the death must have been caused by a "sudden, identifiable event" that occurred in the course of the member's job duties. Likewise, the law did not merely follow in the footsteps of other laws expanding eligibility for accidental death benefits. It went much further than other historic amendments.

For example, contrary to TRS's assertions, the Legislature did not enact the "same scheme" for a member who dies from a qualifying World Trade Center ("WTC") condition. (Br. at 16, citing RSSL § 507-b(f)). Unlike the Amended Law, the WTC amendment merely created a

[11] While Barcelo had the absolute right to designate his beloved partner as his sole beneficiary, it is important to note that his selection did not cut his child off from his support. Rather, as explained previously, Barcelo's desire was that his partner would use a portion of the funds to help support his child in the manner that Barcelo felt was most appropriate. *See* supra at 10.

rebuttable presumption in favor of accidental death benefits. RSSL § 507-b(f) (disregarding the presumption that a WTC condition was accidental if "*the contrary be proven by competent evidence*") (emphasis added). Accordingly, the WTC amendment gave interested parties, such as designated beneficiaries, the opportunity to prove that a member's death did not, in fact, meet the definition of an "accidental" death that had been part of the member's contract upon joining the retirement system. *Id.*

In stark contrast, here, the Amended Law completely obliterated the pre-existing statutory qualifications for accidental death benefits by eliminating any requirement that the member's death must have been caused by an in-service accident. The Amended Law provides no opportunity for either TRS or a designated beneficiary, such as Petitioner, to provide evidence to rebut the presumption that the member contracted COVID-19 at work, and to provide "competent evidence" showing that the death was not, in fact, "accidental." Thus, the Amended Law did not merely make it "easier" to prove an "accidental" death; it radically changed the very nature of the "accidental" death benefit as it existed at the time Barcelo joined the retirement system. Accordingly, the Amended Law is distinguishable in a very material respect from prior

legislative changes, and it severely impaired Barcelo's and Petitioner's contractual rights as they existed at the time Barcelo joined TRS.

As Supreme Court recognized, Barcelo never could have envisioned that these radical changes to the accidental death benefit scheme would occur. Because the law was enacted after Barcelo's death, he had no opportunity to learn that the accidental death benefit scheme as he knew it would be radically altered. He had no opportunity to understand that if he died from COVID-19, his partner would be cut off from death benefits. He had no opportunity to weigh the risk that this might occur, and make alternative plans to provide for his loved one. The Pension Impairment Clause was enacted for this very reason: to give members such as Barcelo confidence that he could make informed decisions regarding the future availability of his pension benefits.

Even if the retroactive application of the Amended Law was specifically intended to protect the statutory beneficiaries of TRS members, as TRS argues, the legislative intent of the law—no matter how well-intentioned or "necessary" to respond to a crisis—cannot trump Barcelo's constitutional rights. It is the Court's duty to uphold the Constitution, no matter the ultimate consequences:

> Indeed, it should be said that that is the primary role of the courts in the American system in reviewing the constitutional validity of executive and legislative acts even if they bear the guise, and the courts are convinced that the guise reflects a reality, of necessity, distress, and emergency. The courts did not make the Constitution; the courts may not unmake the Constitution.

Sgaglione v. Levitt, 37 N.Y.2d 507, 514 (1975); *see also Flushing Nat'l Bank v. Municipal Assistance Corp.*, 40 N.Y.2d 731, 739 (1976) (upholding the Constitution despite the potential for dire financial consequences to a city and explaining that "the court has no choice in the performance of its judicial and constitutional function" and therefore, despite "full awareness of the practical consequences, [the court] must apply constitutional policy and law to difficult question"). Notwithstanding the Court's duty to uphold the Constitution no matter the consequences, in this case, a determination that the Amended Law is unconstitutional will only have a very limited impact on other beneficiaries. *See supra* at 16, fn.5.

For these reasons, the Amended Law retroactively impairs Barcelo's vested rights and incidents of membership, and Supreme Court's judgment should be affirmed.

C. Benefits Vested in Petitioner upon Barcelo's Death

Finally, the retroactive application of the Amended Law would also impair and diminish Petitioner's own vested benefits, in violation of the Pension Impairment Clause. The record establishes that Petitioner was entitled to receive ordinary death benefits at the time of Barcelo's death. Those benefits were thus vested in Petitioner upon Barcelo's death and could not thereafter be taken away.

The record is clear that Barcelo died from COVID-19, a disease that was widespread in the general population and did not result from a "sudden, identifiable event" that occurred at work. Notably, TRS has never contended that Barcelo's death qualified as "accidental" before the Amended Law was enacted. To the contrary, by letter dated April 28, 2020, TRS informed Petitioner that she was "entitled" to receive the ordinary death benefit "due" as a result of Barcelo's death.

After the Amended Law was enacted, TRS sent a letter to Petitioner confirming that an intervening law had changed the status of Barcelo's death from one in which "ordinary" death benefits would be paid, to one in which "accidental" death benefits would be paid. At the hearing before Supreme Court, TRS agreed that "nobody is contesting that [Petitioner]

was the designated beneficiary, at the time of death, when there was no statute in existence." Accordingly, under these facts as established by the record, Petitioner was not merely a "putative beneficiary" as TRS alleges, but the indisputable beneficiary under the law in effect at the time of Barcelo's death.

Under the facts established by the record, Petitioner's right to ordinary death benefits was no longer a mere "expectation," but a vested right. *See Public Employees Fed'n v. Cuomo*, 62 N.Y.2d 450, 462 (1984) (explaining that a death benefit is a benefit of membership protected by the Pension Impairment Clause, and a beneficiary becomes entitled to death benefits "*upon the death*" of the employee) (emphasis added); *cf. Matter of McCauley v. New York State & Local Employees' Retirement Sys.*, 146 A.D.3d 1066, 1068 (3d Dep't 2017) (holding that petitioner, a designated beneficiary, had "no vested right to the death benefits at any time prior to the [statutory] amendment" at issue because the decedent was still alive at the time of the amendment).

The Amended Law substantially impaired Petitioner's vested rights by taking benefits that had already become due to her, and it completely diminished the benefits due from approximately $438,681.14

to $0. Accordingly, the retroactive application of the Amended Law, as applied to Petitioner, violates the Pension Impairment Clause, and Supreme Court's judgment must be affirmed.

CONCLUSION

Supreme Court's decision should be affirmed, Petitioner's article 78 petition should be granted and this proceeding dismissed.

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Respectfully submitted,

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