To Be Argued By:
KERSTIN M. MILLER
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Court of Appeals

STATE OF NEW YORK

In the Matter of the Application of

ANNE MARIE R. COLON,

Petitioner-Appellant,

—against—

TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK and YVONNE DAVALOS, in her capacity as Guardian of Minor Child B.C.B,

Respondents-Respondents.

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

BRIEF FOR PETITIONER-APPELLANT

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PRELIMINARY STATEMENT

Petitioner-Appellant Anne Marie Colon ("Petitioner-Appellant" or "Colon") submits this Brief in support of her appeal of the decision and order of the Appellate Division, First Department, dated October 25, 2022 (the "Decision"), which reversed Supreme Court's decision granting Colon ordinary death benefits from the Teachers' Retirement System of the City of New York ("Respondent-Respondent" or "TRS"). Colon was the registered domestic partner of Louis Barcelo ("Barcelo"), a New York City schoolteacher who passed away from COVID-19 in April 2020. Following Barcelo's death, TRS initially informed Petitioner that she was "designated" to receive death benefits "due" to her from TRS as Barcelo's chosen beneficiary. Six weeks *after* Barcelo's death, the State Legislature retroactively amended the law governing public retirement system death benefits. Specifically, the amended law ("Amended Law") expanded the circumstances in which death benefits are paid out to a "statutory" beneficiary chosen for members by the Legislature, and restricted the circumstances in which death benefits are paid out to a "designated" beneficiary of the member's own choosing. As a result of the intervening change in law, TRS denied Petitioner's claim for death benefits, even though the benefits were indisputably due to her at the time of Barcelo's death. This Court should reverse the First Department's Decision and grant Petitioner the benefits due to her.

This appeal raises substantial constitutional questions of statewide importance, and will determine whether the hundreds of thousands of members of New York's public retirement systems can have confidence that their beneficiary designations will be honored after their death.

The New York 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 (the "Pension Impairment Clause"). 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*, 6 N.Y.2d 1, 9 (1958). One of the most important and meaningful rights of membership in a public retirement system is the right of a member to choose his or her own beneficiary to receive the member's hard-earned pension benefits upon the member's death. The right to choose one's own beneficiary enables members to make informed financial plans to care for their loved ones in the event of the member's untimely death.

The primary question presented in this case is whether the right to choose one's own beneficiary, as that right existed at the time the member joined the public retirement system (or, at the very least, as that right existed at the time of the member's death), is guaranteed by the Pension Impairment Clause—or, can it be ripped away at the whim of the Legislature? If the Pension Impairment Clause only

protects the *amount* of a member's pension benefits, and not the right to choose the *recipient* of those benefits (as that right existed at the time the member joined the retirement system), then nothing prevents the Legislature from taking possession of members' pension benefits after their death. The Pension Impairment Clause is rendered practically meaningless if the Legislature can, at any time, enact a law that gives members' pension benefits to someone other than the member's chosen beneficiary.

While the Legislature is always free to modify pension rights with respect to *new* members of the public retirement system, the express purpose of the Pension Impairment Clause was to prevent the Legislature from diminishing or impairing the pension rights of *current* members (and their beneficiaries) at any time after they joined the public retirement system. Any law that newly restricts the circumstances in which current members (and, as in this case, *already deceased* members) can choose their own beneficiary, inherently impairs members' pension rights, and is unconstitutional. And, further, any law that retroactively takes away pension benefits that were already due to a chosen beneficiary on the date of the member's death, inherently diminishes and impairs the rights of the member's beneficiary, and is unconstitutional.

QUESTIONS PRESENTED

1. Question: Did the First Department err in its Decision by holding that ordinary death benefits were not due to Petitioner under the plain language of the Amended Law?

Answer: *Yes.* Nothing in the Amended Law allowed TRS to suspend Petitioner's claim for "ordinary" death benefits while it waited to receive a not-yet-existing claim for "accidental" death benefits from a statutory beneficiary.

2. Question: Did the First Department err in its Decision by holding that a law that newly restricts the circumstances in which current members can choose their own beneficiary does not impair members' rights in violation of the New York State Constitution, article V, § 7?

Answer: *Yes.* A law that newly restricts the circumstances in which current members of the public retirement system can choose their own beneficiary impairs members' rights of membership in the public retirement system and is unconstitutional.

3. Did the First Department err in its Decision by holding that the retroactive application of a newly enacted law, which results in taking away benefits that were already due to a beneficiary at the time of a member's death, does not impair or diminish the beneficiary's rights in violation of the New York State Constitution, article V, § 7?

Answer: *Yes.* Article V, § 7 of the New York State Constitution protects the rights of beneficiaries, as well as members, of the public retirement system. A law that is enacted after a member's death, the retroactive application of which takes away benefits that were already due to the member's chosen beneficiary at the time of the member's death, diminishes and impairs the beneficiary's vested pension rights, and is unconstitutional.

STATEMENT OF FACTS, PROCEDURAL POSTURE, AND JURISDICTION

A. The Law Governing Death Benefits in Effect at the Time of Barcelo's Death

Colon was the registered domestic partner[1] of Louis Barcelo ("Barcelo"), a New York City teacher who tragically died from COVID-19 on April 16, 2020. *See* Record on Appeal ("R") 12(¶¶4-5, 8-9), 49. Years prior to his death, Barcelo designated Colon as his beneficiary to receive death benefits that might become due from TRS. (R. 13(¶10), 45).

[1] During oral argument, the First Department referred to Colon as Barcelo's "companion"; however, Colon was much more than a "companion." A registered domestic partnership is a "legal relationship permitted under the laws of the State and City of New York for couples that have a close and committed personal relationship" and to qualify, domestic partners are required to make a showing similar to the requirements to be eligible for marriage. *See* https://www.cityclerk.nyc.gov/content/domestic-partnership-registration (last accessed March 27, 2023). "The Domestic Partnership Law recognizes the diversity of family configurations, including lesbian, gay, and other non-traditional couples." *Id.* Registered domestic partners are entitled to a number of quasi-spousal rights and privileges, including, for example, for domestic partners of any employee killed in the September 11, 2001 attacked, the right under Workers' Compensation Law § 4 to be treated as a spouse for the purposes of any death benefit to which a surviving spouse would be entitled upon death. *Id.* ("Other New York State Rights and Benefits").

Barcelo became a member of TRS on October 1, 1995. (R. 128(¶84)). Under the law in effect at the time Barcelo joined the retirement system, if a member were to die prior to his retirement in circumstances other than an in-service "accident," then his chosen, "designated beneficiary" would receive "ordinary" death benefits. Retirement and Social Security Law ("RSSL") § 606(a). If a member were to die prior to his retirement from an in-service "accident," then a beneficiary defined by statute in a ranked list (the "statutory beneficiary") would receive "accidental" death benefits, and ordinary death benefits would not be paid to the designated beneficiary. RSSL §§ 601(d), 607. Often, the "designated beneficiary" and the "statutory beneficiary" are the same person (e.g., a spouse). However, despite their quasi-spousal legal relationship, registered domestic partners are not on the ranked list of statutory beneficiaries. RSSL § 601(d).

Ordinary death benefits are the default classification and are payable "upon the death" of a member. RSSL § 606(a)(2). 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). To be eligible for accidental death benefits, a statutory beneficiary must 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 the member's statutory beneficiary) has long born the burden of proving that an in-service "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, an unexpected, sudden mischance") (citing *Matter of Lichtenstein v. Bd. of Trustees of Police Pension Fund*, 57 N.Y.2d 1010, 1012 (1982)).

It is well established that not all job-related injuries or medical conditions qualify members for "accidental" benefits. *See McCambridge v. McGuire*, 62 N.Y.2d 563, 567-68 (1984) ("Not every line of duty injury will result in an award of accidental [benefits]."). For decades, the term "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*

[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 and related to a sudden, unexpected "event." *Id.*

v. DiNapoli, 30 N.Y.3d 674, 681-84 (2018) (providing historical overview of the interpretation of the term "accident" in the RSSL) (internal citations omitted); *see also Matter of Rizzo v. DiNapoli*, 39 N.Y.3d 991, 992 (2022) ("An injury which occurs without an unexpected event as the result of activity undertaken in the performance of ordinary employment duties . . . is not an accidental injury") (internal quotations and citations omitted); *McCambridge*, 62 N.Y.2d 563 at 568 (explaining that injuries sustained "while performing routine duties but not resulting from unexpected events"—such as hearing loss sustained as a result of exposure to loud noises at work—do not qualify as an "accidental" injury); *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 a fatal coronary occlusion). Even critics of the current framework for analyzing "accidental" injuries or death have affirmed that a qualifying accidental hazard should not be "part of the ordinary risks of daily life." *See Matter of Rizzo*, 39 N.Y.3d at 994 (Wilson, J., dissenting).

Under the law in effect 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 the flu or COVID-19[3]—in other words, a hazard that is

[3] 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

"part of the ordinary risks of daily life"—was not deemed an in-service "accident" that qualified for accidental death benefits. (R. 13(¶14), 163-164 (TRS affirmed that Barcelo's death from COVID-19 only qualified for accidental death benefits as a result of a "new law" enacted after his death). It is undisputed that Barcelo's death did not qualify as an in-service "accident" under the law in effect on the date of his death. Indeed, 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" converting the circumstances of Barcelo's death from an ordinary death into one qualifying for accidental death benefits. (R. 257).

B. Following Barcelo's Death, TRS Acknowledged that Ordinary Death Benefits were "Due" to Petitioner

Sadly, Barcelo died from COVID-19 on April 16, 2020. (R.49). Prior to his death, Barcelo specifically confirmed to Petitioner that he wanted her to receive his death benefits, and he asked Petitioner to provide financial support to his daughter out of those funds, trusting that his partner would support his daughter in the way that he wanted. (R. 15(¶21); 246).

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

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of our fellow Americans." (R237, 238). Therefore, by the time the Amended Law was enacted, COVID-19 had become an ordinary risk of daily life.

death benefits. (R. 15(¶22)). 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. (R. 15(¶23), 87). The death certificate and change of address were delivered to TRS on April 25, 2020. (R. 15(¶23)).

Subsequent to sending her change of address, 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 that are due you." (R. 16(¶¶26-29), 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 (the "Misdirected Letters"). (R. 16(¶29), 17(¶31), 93-96).

One of the Misdirected Letters explained that Petitioner had been designated to receive a death benefit "due" in the amount of approximately $438,681.14.[4] (R. 95). It directed Petitioner to file a claim and to provide an original or certified copy of the death certificate, along with Petitioner's date of birth, to "process" the benefit. (R. 95). Nothing in the letter suggested that Petitioner might lose out on the benefit in its entirety if she failed to complete her claim within any particular period of time.

[4] The letter noted that dollar figures are approximations because "[a]ctual payment amounts may differ due to accruing interest." (R. 96). Thus, the letter confirmed that the benefit due to Petitioner might be *more* than the estimated amount—but nothing suggested that the benefit could be *less*.

(R. 95). Rather, the letter confirmed that Petitioner had been designated to receive a benefit that was now "due," it referred to the benefit as "*your* benefit," and it warned that Petitioner should file as soon as possible to preserve eligibility for the "distribution option you want." (R. 95-96) (emphasis added). A separate letter provided a claim code to log onto TRS's website, and noted that the code would expire in sixty (60) days (i.e., on June 27, 2020). (R. 153).

The same day that Petitioner received TRS's claim filing instructions, she logged onto the TRS website and completed the online registration process. (R. 17(¶36)). TRS had already confirmed receipt of Barcelo's death certificate on April 30, 2020. (R. 89). Accordingly, as of May 19, 2020, Petitioner had provided all required documentation necessary to claim the ordinary death benefits. (R. 18(¶37)). The only information that Petitioner still needed to provide to TRS as of May 19, 2020 was her instruction regarding how TRS should distribute the funds. (R. 18(¶38)).

Because Petitioner was ill with COVID-19 at the time she received the Misdirected Letters, she was unable to consult immediately with financial and legal advisors regarding her preferred distribution method for the benefits due to her. (R. 18(¶40)). Petitioner had no reason to expect that this brief delay would impact her claim for death benefits. (R. 18(¶40)). In reliance upon 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. (R. 18(¶41)). 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 the result of Barcelo's death and urging her to complete her claim. (R. 160).

C. Approximately Six Weeks After Barcelo's Death, the Legislature Retroactively Amended the Law Governing Death Benefits

On May 30, 2020, the New York State Legislature amended the RSSL to change the circumstances under which accidental death benefits are paid. RSSL § 607-i(a). As interpreted by TRS and the First Department, the Amended Law radically expanded the circumstances in which accidental death benefits are paid to a statutory beneficiary in lieu of ordinary death benefits being paid to the member's chosen beneficiary. Specifically, the Amended Law required the payment of accidental death benefits in circumstances where: (1) a member reported to his or her worksite at the direction of his or her 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[5]; and (4) COVID-19 caused or contributed to the death. RSSL § 607-i(a).

Critically, the Amended Law removed the long-standing requirement that the member's death must have actually occurred from an in-service "accident"—i.e., a

[5] The law was later extended to apply to deaths that occurred on or before December 31, 2024. L. 2022, Ch 783, § 12

sudden, unexpected *event* sustained *in service*—to qualify for accidental death benefits. Not only did the Amended Law remove the statutory beneficiary's burden to prove that the member's death occurred from an identifiable "event," it went even further by creating an *irrebuttable* presumption that the COVID-19 infection was work-related merely because the employee had reported to work within 45 days prior to becoming infected. *Id.* Indeed, even if there was *no* evidence suggesting that a member had been exposed to COVID-19 at work, and *clear* evidence, supported by a medical expert's professional opinion, that such member had contracted COVID-19 elsewhere (such as at a super-spreader social event), the Amended Law would still require the payment of accidental benefits. *Id.*

While the Amended Law made it easier to claim accidental death benefits, it did not actually preclude the payment of ordinary death benefits. In fact, the Amended Law expressly recognized that ordinary death benefits might still be paid out before accidental death benefits. RSSL § 607-i(b) 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." *Id.* Accordingly, a retirement system would not be in jeopardy of paying a double recovery if it processed a 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 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.

D. After the Amended Law was Enacted, TRS Suspended and Eventually Denied Petitioner's Claim for Death Benefits

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. (R. 19(¶43)). On June 22, 2020, Petitioner attempted to access TRS's website to provide her distribution instructions, only to learn for the first time that her account had been frozen. (R. 19(¶44)). 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. (R. 19(¶48), 163 (explaining that "as a result of recent New York State legislation, we must suspend your claim" for ordinary death benefits)).

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. (R. 20(¶49)). 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. (R. 20(¶51)).

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 . . . ." (R. 130(¶99), 198 (emphasis added)). TRS admits that it did not receive an application for accidental death benefits from Barcelo's daughter until on or about September 17, 2020, approximately three months after Petitioner had attempted to provide her distribution instructions. (R. 130).

E. Supreme Court Granted Petitioner's Article 78 Petition

Following receipt of TRS's final determination, Petitioner filed this article 78 proceeding in the Supreme Court, New York County, 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. (R. 22-26). By a decision and order entered on July 14, 2021, Supreme Court granted Petitioner's article 78 petition. (R. 6).

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. (R. 249-51, 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. (R.251, 261).

Second, Supreme Court held that if the Amended Law did 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. (R. 253-61). As Supreme Court reasoned, Barcelo "could not have envisioned enactment of [a] statute" after his death, that would convert a death from COVID-19 into one qualifying for accidental death benefits. (R. 261). The Court noted that "[f]or all we know" Barcelo may have planned to provide for his daughter through alternative arrangements, such as a million-dollar life insurance policy. (R. 254). After Barcelo died, he could no longer

respond to the change in law by making alternative arrangements to provide for Petitioner. (R. 254-55, 260-61). Moreover, Supreme Court agreed that the ordinary death benefits had already become due to Petitioner upon Barcelo's death, and thereafter could not be taken away due to an intervening change in law. (R. 257-59).

F. The First Department Reversed Supreme Court's Decision, and Petitioner Appealed

TRS appealed Supreme Court's decision and order to the First Department. (R. 1). The First Department reversed Supreme Court's decision in a sparse Final Decision and Order issued October 25, 2022 (the "Decision"). (R. 271-73). In its Decision, the First Department held that it was "appropriate" for TRS to suspend Petitioner's claim while it awaited an application for accidental death benefits. (R. 272). It further held, without any detailed explanation or analysis, that "[p]etitioner's contention that the amended statute, as construed by respondent, violated the State Constitution's Pension Impairment Clause is unavailing, as petitioner failed to show that the retirement benefits and associated rights were 'diminished or impaired.'" (R. 273).

Petitioner-Appellant was served by TRS with a copy of the First Department's Decision and notice of its entry. On November 22, 2022, Petitioner-Appellant filed her Notice of Appeal to this Court on the grounds that the case directly and necessarily involves substantial constitutional questions of statewide importance.

(R. 269). The parties subsequently exchanged jurisdictional responses at the request of the Chief Clerk and Legal Counsel to the Court. On February 8, 2023, the Chief Clerk and Legal Counsel to the Court notified the parties that the case would proceed in the normal course.

This Court has jurisdiction because Petitioner-Appellant has appealed from a final decision and order of the Appellate Division, First Department (R. 269-73), and has shown that she has the right to appeal as a matter of course, pursuant to CPLR § 5601(b)(1), on the grounds that this case involves substantial constitutional questions. Petitioner preserved each of her arguments at the courts below (R. 243-49); *see also* Petitioner's Brief submitted to the First Department at pp. 16-38 (submitted to this Court with the companion digital filings).

ARGUMENT

POINT I

ORDINARY DEATH BENEFITS SHOULD HAVE BEEN PAID TO PETITIONER UNDER THE PLAIN LANGUAGE OF THE AMENDED LAW

As a preliminary matter, ordinary death benefits should have been paid to Petitioner under the plain language of the Amended Law. Nothing in the Amended Law allowed TRS to suspend Petitioner's claim for ordinary death benefits while it awaited an application for accidental death benefits.

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.*, 164 A.D.3d 19, 23 (1st Dep't 2018) (quoting CPLR § 7803). "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) (internal quotations and citations omitted). "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 (internal citations and quotations omitted).

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 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). 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 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.

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 application for accidental death benefits materialized (after some unidentified period of time), 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 Amended Law was enacted, this new theory must be disregarded because TRS failed to make any such argument before Supreme Court. *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, and then by freezing Petitioner's account to prevent her from filing her distribution instructions. According to TRS's reasoning, Petitioner was not entitled to the ordinary death benefits because they were not yet "paid"; yet the only reason that the benefits were not paid was because TRS refused to pay them. 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 Allowed TRS to Suspend a Claim for Ordinary Death Benefits in Order 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 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).

In sum, the Amended Law allowed TRS to pay out ordinary death benefits to Petitioner prior to paying accidental death benefits, and did not allow TRS to suspend Petitioner's claim for ordinary death benefits while it waited to receive an anticipated but *not yet existing* claim for accidental death benefits. Accordingly, Supreme Court correctly determined that Petitioner was entitled to ordinary death benefits under the plain language of the Amended Law, and the First Department's Decision should be reversed.

POINT II

THE AMENDED LAW VIOLATES THE PENSION IMPAIRMENT CLAUSE OF THE STATE CONSTITUTION BECAUSE IT IMPAIRS MEMBERS' RIGHT TO CHOOSE THEIR OWN BENEFICIARY

Even if this Court were to accept the First Department's interpretation that Petitioner was not entitled to ordinary death benefits under the plain language of the Amended Law, the First Department's Decision must *still* be reversed because the Amended Law violates the Pension Impairment Clause of the New York State Constitution.

A. The Pension Impairment Clause Protects *All* Rights of Membership in the Public Retirement System—Not Merely the Amount of Benefits

The New York 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).

TRS argued before the lower courts that the Pension Impairment Clause merely protects the *amount* of retirement benefits payable to members, and that it does not protect members from restrictions in beneficiary choices. The Court of Appeals has never issued such a ruling. In fact, the Pension Impairment Clause protects *all* rights of membership in the public retirement system—not merely the amount of the benefit.

If the Pension Impairment Clause were *only* interested in protecting the amount of benefits from being reduced, then it would have only needed to state that pension benefits may not be "*diminished*" (i.e., reduced)—and the additional word "*impaired*" would be superfluous. N.Y. Const., Art. V, § 7; *see also People v. Galindo,* 38 N.Y.3d 199, 205 (2022) ("[A] core principle of statutory construction [is] that effect and meaning must, if possible, be given to the entire statute and every part and word thereof . . . [a] construction that would render a provision superfluous is to be avoided.") (internal citations and quotations omitted).

In fact, in the earliest cases involving the Pension Impairment Clause, the Court of Appeals framed the State Constitution as broadly protecting the rights and interests of members in the public retirement system—as opposed to merely protecting the amount of benefits. *See Birnbaum v. New York State Teachers' Retirement System,* 5 N.Y.2d 1, 19 (1958) (explaining that 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") (emphasis added); *Day v. Mruk*, 307 N.Y. 349, 354 (1954) (explaining that the Pension Impairment Clause protects members' "vested *interests* which could not thereafter be diminished or impaired") (emphasis added); *see also Public Employees Fed'n v. Cuomo*, 62 N.Y.2d 450, 460 (1984) (explaining that this Court has previously examined the Pension Impairment Clause "to determine whether statutory changes in the *computation or availability* of benefits of membership" in the public retirement system violate it, and holding that changes that are applied retroactively to members of the public retirement system have been held "unconstitutional on the theory that a member's *rights* were frozen as of the date of employment") (emphasis added).

While it is true that many of the cases involving the Pension Impairment Clause naturally have challenged reductions in the amount of benefits, courts have also applied the Pension Impairment Clause to protect other rights of membership. *See, e.g., 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 Pension Impairment Clause Protects the Right to Choose One's Own Beneficiary

One of the most important and meaningful rights/incidents of membership in a public retirement system is the right to choose one's own beneficiary. It does members little good to know that the *amount* of their benefits is protected, if the Legislature can, at any time, enact a law that gives those benefits to someone other than their chosen beneficiary. Indeed, this Court has previously recognized that the right of a member of the public retirement system to choose his or her own beneficiary is of the greatest importance.

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. The Court explained that the right to designate one's own beneficiary flows from the "public policy underlying the [public retirement] system," which is to "protect the surviving family *or other objects of the member's bounty* after death." *Id.* at 354 (emphasis added). This public policy recognizes that a member must be able to make informed financial plans to provide for his or her loved ones by choosing beneficiary designations as the member

best sees fit: for example, a member may decide that it is wise "to change the beneficiary from a wife in comfortable circumstances to surviving children who are handicapped or in need."[6] *Id.* at 354.

In the courts below, TRS ignored the guiding principles of *Caravaggio*, and instead relied upon cases involving marital property to argue that the Pension Impairment Clause does not protect beneficiary choices. This reliance is misplaced, because marital property is recognized as a unique exception to the general rule that a member has the contractual right to choose his or her own beneficiary.

In *Majauskas v. Majauskas*, 61 N.Y.2d 481 (1984), a case previously 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 because it prevented him from choosing his own beneficiary. *Id.* at 493. At the same time, however, the Court made clear that

[6] *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. As explained in greater detail herein, cases involving the distribution of marital property to a former spouse in connection with a divorce proceeding are clearly distinguishable from cases that do not involve marital property. While *Caravaggio* was struck down with respect to marital property cases, the application of its reasoning to cases that do not involve marital property—like this case—remains sound.

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.*

Two years after the Court of Appeals' ruling in *Majauskas*, the Second Department reviewed a similar case and explained in greater detail why marital property awards do not violate the Pension Impairment Clause, even though they may restrict a member's right to choose his or her own beneficiary. *See McDermott v. McDermott*, 119 A.D.2d 370 (2d Dep't 1986). Specifically, the Court explained that the Pension Impairment Clause is not violated by an award of marital property to a former spouse, because the former spouse has an equal "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 (emphasis added). The Court concluded that "the contract that may not be 'diminished or impaired' [under the Pension Impairment Clause] . . . is now a *co-owned* contract," and measures could be taken to "protect the ownership interests of both" co-owners. *Id.* at 383 (emphasis added), 400.

Viewed together, *Majauskas* and *McDermott* make clear that a restriction on beneficiary choices through a marital property award does not violate the Pension Impairment Clause because the former spouse is deemed to be a "co-owner" of the pension contract. However, the clear implication is that a member's right to choose

his or her own beneficiary is an important right of membership that can *only* give way to former spouses as "co-owners" of the pension contract.

In this case, 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 choose his own beneficiary could not be restricted or impaired, not even—as instructed by *Caravaggio*—for another "worthy family member."[7]

TRS further argued in the courts below that the Amended Law merely applied the "pre-existing distinction" between accidental and ordinary death benefits, and Barcelo had the same right that he had always had to designate his own beneficiary. That is false. The Amended Law did not just make it "easier" to show that an in-service accident occurred; rather, it radically altered what it means to have an in-service "accident." By expanding the circumstances in which accidental death benefits would be paid, the law newly restricted the circumstances in which Barcelo could choose his own beneficiary, and thus it impaired Barcelo's right to choose his own beneficiary (as it had existed at the time he joined the retirement system).[8]

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[7] Again, while Barcelo had the absolute right to designate his registered domestic partner as his sole beneficiary, it is important to note that he did not intend to cut his daughter off from his support. Rather, as explained previously, Barcelo's desire was that his partner would use a portion of the funds to support his daughter in the manner that Barcelo felt was most appropriate. *See supra* at 9.

[8] If the Legislature is free to expand the definition of an in-service "accident" in this manner, then nothing prevents the Legislature from continuing to radically expand the circumstances in which

Likewise, the law did not merely follow in the footsteps of other laws that made it easier to obtain accidental death benefits. It went much further than other historic amendments. For example, the Legislature did not enact the same scheme for a member who dies from a qualifying World Trade Center ("WTC") condition. Unlike the Amended Law, the WTC amendment merely created a *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 continued to require that a member's death must have *actually* resulted from an in-service "accident" as that term has been consistently interpreted by this Court for decades. *Id.*

In stark contrast, 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 actually been caused by a "sudden, unexpected event" in the course of performing his job duties. The Amended Law creates an *irrebuttable* presumption that a death was "accidental" whenever a member

"accidental" benefits are paid, until the right to choose one's own beneficiary becomes merely illusory. For example, the Legislature could enact a statute that says that all deaths from cancer, heart conditions, diabetes, respiratory diseases, mental health issues, and other common causes of death will henceforth be deemed "accidental." The inevitable result is that death benefits would be paid out to the statutory beneficiaries in most cases, and members would have no meaningful opportunity to choose their own beneficiary, because their beneficiary designations—as in this case—would simply be disregarded.

contracted COVID-19 within 45 days of reporting to work; it provides no opportunity for either TRS or a designated beneficiary, such as Petitioner, to provide any rebuttal evidence. 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.

As Supreme Court astutely recognized, the retroactive application of the Amended Law deprived Barcelo of his right to make informed financial plans, as Barcelo never could have envisioned that these radical changes to the accidental death benefit law would occur. Because the Amended Law was enacted after Barcelo's death, Barcelo had no opportunity to understand that if he died from COVID-19—a disease that was widespread in the general population, and an ordinary risk of daily life in New York City in April 2020—then his beloved domestic partner would be denied death benefits. He had no opportunity to weigh the risk that he might die from COVID-19, and to decide whether he should make alternative arrangements to provide for Petitioner, just as he had already made alternative arrangements to provide for his daughter. The Pension Impairment Clause was enacted for this very reason: to enable members to make informed financial decisions regarding the future availability of their pension benefits.

Even if the Amended Law was enacted for the purpose of protecting statutory beneficiaries in the midst of a pandemic, as TRS argued in the courts below, the legislative intent of the law—no matter how well-intentioned—cannot trump Barcelo's constitutional right to choose his own beneficiary for his hard-earned pension benefits. 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").

For these reasons, the First Department's Decision should be reversed, and Supreme Court's judgment should be affirmed.

POINT III

THE AMENDED LAW VIOLATES THE PENSION IMPAIRMENT CLAUSE BECAUSE IT RETROACTIVELY IMPAIRS AND DIMINISHES BENEFITS THAT HAD ALREADY VESTED IN BARCELO'S DESIGNATED BENEFICIARY UPON BARCELO'S DEATH

A. The Pension Impairment Clause Protects the Rights of Designated Beneficiaries

In addition to protecting the rights of members, the Pension Impairment Clause also protects the rights of members' 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); *see also Guzman v. New York City Employees' Retirement Sys.*, 45 N.Y.2d 186, 191 (1978) (holding that the pension rights of the member and those of his *"nominated beneficiary*, are to be regarded as part of the contract terms" protected by the Pension Impairment Clause) (emphasis added). Accordingly, to the extent that a law diminishes or impairs death benefits due to a designated beneficiary, the law violates the Pension Impairment Clause.

B. Ordinary Death Benefits Vested in Petitioner Upon Barcelo's Death

The record definitively establishes that Petitioner was entitled to receive ordinary death benefits under the law in effect at the time of Barcelo's death. It is

undisputed that Barcelo died from COVID-19, a disease that was widespread in the general population and part of the ordinary risks of daily life at the time of Barcelo's death. Barcelo did not die from a sudden, unexpected, identifiable event that occurred in the performance of his job duties. Therefore, under the law in effect at the time of Barcelo's death, Barcelo did not die from an in-service "accident."

Notably, TRS has *never* contended that Barcelo's death qualified as "accidental" prior to the enactment of the Amended Law. By email dated May 19, 2020, TRS provided Petitioner a claim code to file for the "death benefits that are due you." It was not until after the Amended Law was enacted that TRS sent a letter to Petitioner confirming that due to an *intervening change in law* it was required to suspend Petitioner's claim for ordinary death benefits. 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" converting Barcelo's death into an "accidental" death. Accordingly, under these facts as established by the record, Petitioner was not merely a *putative* beneficiary, but the *indisputable* beneficiary under the law in effect at the time of Barcelo's death.

Therefore, at the time of Barcelo's death, Petitioner's right to ordinary death benefits was no longer a mere "expectation," but a vested right that could not thereafter be taken away. *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); *Cook v. Binghamton*, 48 N.Y.2d 323, 331 (1979) (noting that a pension benefit "becomes a vested right upon the performance of the requested service and the occurrence of a specified event . . . i.e., death or retirement"); *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 the amendment was enacted, thus suggesting that the inverse also holds true—had the decedent been dead at the time the amendment was enacted, the designated beneficiary would have had a vested right to the death benefits).

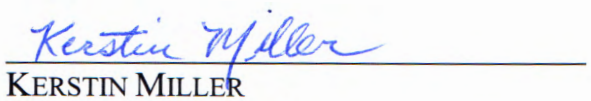
The Amended Law substantially impaired Petitioner's vested rights by taking away benefits that had already become due to her, and it completely diminished the benefits due from approximately $438,681.14 to $0. Accordingly, the retroactive application of the Amended Law, as applied to Petitioner, violates the Pension Impairment Clause, and the First Department's Decision must be reversed.

CONCLUSION

Appellate Division, First Department's decision should be reversed, Petitioner's article 78 petition should be granted and this proceeding dismissed.

Dated: New York, NY
April 5, 2023

Respectfully submitted,



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