

NOT FOR PUBLICATION WITHOUT APPROVAL OF COMMITTEE ON OPINIONS

PREPARED BY THE COURT

CHRISTOPHER BURGOS,
Individually and as President
of the State Troopers Fraternal
Association of New Jersey;
JAMES KIERNAN, Individually and
as President of State Troopers
Non-Commissioned Officers
Association of New Jersey
State, Inc.; STEPHEN STERNIK,
Individually and as President
of State Troopers Superior
Association of New Jersey;
STATE TROOPERS FRATERNAL
ASSOCIATION OF NEW JERSEY, on
behalf of all its present and
retired members; STATE TROOPERS
NON-COMMISSIONED OFFICERS
ASSOCIATION OF NEW JERSEY,
INC., on behalf of all its
present and retired members;
and STATE TROOPERS SUPERIOR
OFFICERS ASSOCIATION OF NEW
JERSEY, on behalf of all its
present and retired members,

Plaintiffs,

v.

STATE OF NEW JERSEY;
CHRISTOPHER CHRISTIE, Governor
of the State of New Jersey;
ANDREW SIDAMON-ERISTOFF,
Treasurer of the State of New
Jersey; NEW JERSEY STATE
SENATE; and NEW JERSEY STATE
GENERAL ASSEMBLY,

Defendants,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MERCER COUNTY

CIVIL ACTION

DECISION GRANTING PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT,
AND DENYING DEFENDANTS' MOTION
TO DISMISS

DOCKET NO. MER-L-1267-14

AND

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO; PROFESSIONAL FIREFIGHTERS ASSOCIATION OF NEW JERSEY, IAFF, AFL-CIO; NEW JERSEY FRATERNAL ORDER OF POLICE; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 73; AMERICAN FEDERATION OF TEACHERS NEW JERSEY STATE FEDERATION, AFL-CIO; INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL EMPLOYEES, AFL-CIO, LOCAL 195; HEALTH PROFESSIONAL AND ALLIED EMPLOYEES, AFT, AFL-CIO; NEW JERSEY STATE AFL-CIO; SANDRA P. COHEN; MICHAEL A. JUSTINIANO; DOMINICK MARINO; DONNA CHIERA; DIANE CAMERON; and RUSSELL LEAK,

Plaintiffs,

v.

CHRIS CHRISTIE, as Governor of the State of New Jersey; NEW JERSEY DEPARTMENT OF THE TREASURY; and ANDREW P. SIDAMON-ERISTOFF, Treasurer, State of New Jersey,

Defendants,

AND

NEW JERSEY EDUCATION ASSOCIATION; NEW JERSEY STATE POLICEMEN'S BENEVOLENT ASSOCIATION, INC.; NEW JERSEY STATE FIREFIGHTERS' MUTUAL BENEVOLENT ASSOCIATION; AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL

EMPLOYEES, COUNCIL 1, AFL-CIO;
CHRISTINE SAMPSON-CLARK; HEIDI
OLSON; PATRICIA PROVNICK; KEITH
DUNN; PATRICK COLLIGAN; MARK
KOVAR; TIM DEUTSCH; KYLE
HUGHES; JOHN E. MURPHY, JR.;
LANCE P. LOPEZ, SR.; THE NEW
JERSEY PRINCIPALS AND
SUPERVISORS ASSOCIATION; JANET
S. ZYMROZ; JOHN C. ALFIERI,
JR.; HOPE GRANT; and ROSARIO
CAPACCIO,

Plaintiffs,

v.

STATE OF NEW JERSEY;
CHRISTOPHER J. CHRISTIE, as
Governor of the State of New
Jersey; NEW JERSEY DEPARTMENT
OF THE TREASURY; and ANDREW P.
SIDAMON-ERISTOFF, Treasurer,
State of New Jersey,

Defendants,

AND

PROBATION ASSOCIATION OF NEW
JERSEY, PROFESSIONAL CASE-
RELATED UNIT; PROBATION
ASSOCIATION OF NEW JERSEY,
PROFESSIONAL SUPERVISORS UNION;
DWIGHT COVALESKIE; GAVIN
CUMMINGS; and ELLEN CRIBBIN,

Plaintiffs,

v.

STATE OF NEW JERSEY;
CHRISTOPHER J. CHRISTIE, as
Governor of the State of New
Jersey; NEW JERSEY DEPARTMENT

OF THE TREASURY; and ANDREW P.
SIDAMON-ERISTOFF, Treasurer,
State of New Jersey,

Defendants.

Attorneys for Plaintiffs,
Christopher Burgos et al.:
Leon B. Savetsky, Esq.
Michael A. Bukosky, Esq.
LOCCKE CORREIA, LIMSKY &
BUKOSKY
24 Salem Street
Hackensack, New Jersey 07601

Attorneys for Plaintiffs, New
Jersey Education Association et
al.:
Edward M. Suarez, Jr., Esq.
Kenneth I. Nowak, Esq.
ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN
1 Riverfront Plaza, Suite 320
Newark, New Jersey 07102

Attorney for Plaintiffs, New
Jersey State Firefighters'
Mutual Benevolent Association,
Tim Deutsch, Kyle Hughes, and
John E. Murphy, Jr.:
Craig S. Gumpel, Esq.
1447 Campbell Street
Rahway, New Jersey 07065

Attorney for Plaintiffs,
Professional Firefighters
Association of New Jersey,
American Federation of Teachers
New Jersey Federation, AFL-CIO,
and Dominick Marino:
James M. Mets, Esq.
METS SCHIRO & MCGOVERN LLP
555 Highway One South, Suite
240
Iselin, New Jersey 08830

Attorney for Plaintiffs,
Communication Workers of
America et al.:
Steven P. Weissman, Esq.
Ira Mintz, Esq.
WEISSMAN & MINTZ, LLC
One Executive Drive, Suite
200
Somerset, New Jersey 08873

Attorney for Plaintiffs,
International Federation
of Professional and
Technical Engineers, AFL-
CIO & CLC, Local 195:
Arnold Shep Cohen, Esq.
60 Park Street, 6th Floor
Newark, New Jersey 07102

Attorney for Plaintiffs,
Probation Association of
New Jersey et al:
Daniel J. Zirrith, Esq.
FOX and FOX, LLP
70 South Orange Avenue,
Suite 203
Livingston, New Jersey
07030

Attorney for Plaintiffs,
New Jersey Principals and
Supervisors Association:
Janet S. Zymroz, John C.
Alfieri, Jr., Hope Grant,
and Rosario Capaccio:
Robert M. Schwartz, Esq.
12 Centre Drive
Monroe Township, New
Jersey 08831

Attorney for Plaintiffs, New Jersey Fraternal Order of Police and Russell Leak:
Mathew D. Areman, Esq.
MARKOWITZ AND RICHMAN, Esqs.
121 South Broad Street
Philadelphia, Pennsylvania
19107

Attorneys for amicus curiae:
Bennet Zurofsky, Esq.
17 Accademy Street, Suite 1201
Newark, New Jersey 07102

Robert D. Klausner, Esq.
KLAUSNER, KAUFMAN, JENSEN &
LEVINSON
10059 N.W. 1st Court
Plantation, Florida 33324

Attorneys for Defendants,
the State of New Jersey,
Governor Christopher J.
Christie, the Department
of the Treasury, and State
Treasurer Andrew P.
Sidamon-Eristoff:
Jean P. Reilly, A.A.G.
Office of the Attorney
General
Division of Law
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625

Attorney for Defendants,
New Jersey State Senate and
General Assembly:
Leon Sokol, Esq.
SOKOL, BEHOT & FIRORENZO
433 Hackensack Avenue
Hackensack, New Jersey
07601

INTRODUCTION

These consolidated matters put the court in the difficult position of deciding whether the New Jersey Constitution can be read to invalidate a clear Legislative directive, approved and followed by the Governor for two years, which provided a contractual guarantee to hundreds of thousands of New Jersey's public employees that the State would pay its fair share into New Jersey's public pension funds. The purpose of the contractual guarantee was to place those funds on a sounder fiscal footing and to rectify the severe underfunding that has plagued the funds for

decades. Plaintiffs, several unions representing hundreds of thousands of New Jersey's public employees, including public school teachers, law enforcement personnel, and much of the State government workforce, have challenged Governor Christie's decision to reduce the State's contributions to New Jersey's public pension funds for both FY 2014 and FY 2015, contributions that are mandated by State statutes, due to "a significant, unanticipated revenue shortfall." Supporting the unions in this effort are the Boards of Trustees of the pension funds themselves, which were granted the right to participate as amicus curiae by the court.

While this court upheld the Governor's decision not to make the FY 2014 payment as within the emergency powers of the executive and as reasonable and necessary under the Contract Clause of the State and Federal Constitutions due to the severe unanticipated revenue shortfall that arose at the end of FY 2014, the court specifically left open the challenge to nonpayment of the guaranteed amounts for FY 2015. That is the dispute now before this court. Although the Legislature had approved a budget for FY 2015 that included the full payment into the pension funds, based on new sources of revenue, the Governor exercised his line-item veto power to withhold the majority of the State's required payment by directing that none of the unfunded amortized actuarial liability be paid. As a result, the Governor deleted from the FY 2015 Appropriations Act approximately \$1.57 billion that was due

to be paid into the public pension funds as part of a broader plan to address severe underfunding of the funds that included increased contributions from public employees. Notably, State employees have continued to make increased contributions to the pension funds throughout this period, while the State's required contributions to the funds have been severely truncated.

As noted above, this matter first came before the court following the Governor's announcement in May 2014 of his decision to reduce State payments into the pension system for FY 2014 when it had become clear that tax collections had fallen well below anticipated revenues. At that time, plaintiffs filed four separate lawsuits--that were consolidated--seeking to compel the State to make the full contributions into the pension systems for both FY 2014 and FY 2015, as required by 2010 N.J. Laws 1, § 38 (codified at N.J.S.A. 43:3C-14) ("Chapter One") and 2011 N.J. Laws 78, § 26 (codified at N.J.S.A. 43:3C-9.5) ("Chapter 78"). Counsel in two of the lawsuits filed orders to show cause seeking emergent relief prior to the end of FY 2014, which the court denied in a decision issued on June 25, 2014. Burgos v. State, No. MER-L-1267-14, (Law Div. June 25, 2014) (order denying preliminary injunction). No appeal was taken from that ruling, and the current applications by plaintiffs focus solely on the State's failure to make the full contribution to the pension funds for FY 2015.

The unions' applications for relief for FY 2015, seeking primarily declaratory relief regarding the State's obligation to make the full payments into the public pension systems, are presently before the court, as is the motion by the State to dismiss all the lawsuits. Underscoring the importance and sensitivity of the issues before the court is the fact that over 500 hundred pages of legal briefs and over a thousand pages of appendices have been filed by the parties and amicus.

Turning to the legal arguments, plaintiffs claim that the Governor's decision to significantly reduce State pension contributions violates State pension statutes and impairs the constitutionally-protected contractual rights of all public employee members of the affected pension systems. The Governor, on the other hand, despite having endorsed the pension legislation by signing it into law, and having worked with the Legislature to design these reforms, has done an apparent about-face and now claims that certain provisions in the State Constitution, namely the Debt Limitation Clause and the Appropriations Clause, invalidate the contractual right to the required payments codified in N.J.S.A. 43:3C-9.5. In addition, the Governor argues that his line-item veto removing from the FY 2015 Appropriations Act both the payment for the unfunded liability and the revenue sources adopted by the Legislature to support those payments were justified by the State constitutional mandate requiring a balanced budget.

He also contends that granting plaintiffs' requests for relief would impermissibly impinge on his line-item veto authority. Just stating the main issues raised in this controversy highlights how they implicate the fragile balance at the heart of the legislative process and create a landscape where political, constitutional, and judicial forces appear to collide.

The State of New Jersey is no stranger to public battles over the State budget, which typically involve intense debate about the future of the State government and the policy choices best able to secure that future. See, e.g., Commc'ns Workers of Am. v. Florio, 130 N.J. 439, 454 (1992). And, history has shown that the public pension system and its members routinely have been targeted by administrations of both parties when budget problems arise. See Berg v. Christie, 436 N.J. Super. 220, 236-37 (App. Div. 2014) (describing a "series of Executive and Legislative policy decisions" that "resulted in underfunding of the pension systems" and deciding whether a legislative act suspending cost of living adjustments for current and future retirees violated the contract clause); City of Passaic v. Consol. Police & Firemen's Pension Fund Comm'n, 18 N.J. 137, 143 (1955) (describing the early public pension fund deficit during the 1950s). The dispute before the court today is the product of this enduring battle over policy decisions made in times of fiscal challenge.

Indeed, the statutory language central to this dispute is the direct result of a prior court battle over required contributions to the Teachers' Pension and Annuity Fund ("TPAF"), which were withheld due to budget shortfalls during FY 2004-2007. See N.J. Educ. Ass'n v. State, 412 N.J. Super. 192 (App. Div. 2010) [hereinafter NJEA], certif. denied, 202 N.J. 347 (2010). At the time of the NJEA suit, N.J.S.A. 43:3C-9.5(b) provided for a "non-forfeitable right to receive [pension] benefits." Id. at 215. The Appellate Division, interpreting that language, found that there was a contractual right under the pension laws for public employees to receive pension benefits in retirement, but no contractual right to State funding to support the actuarial soundness of the teachers' pension system. Ibid. After that decision was issued, the Legislature enacted Chapter 78, which amended the pensions statutes to include the unprecedented language at the center of the current dispute that cloaks the State's obligation to address the actuarial soundness of the pension system in constitutional protections.

Now, for the first time, Chapter 78 expressly provides that members of the public pension systems "shall have a contractual right to the annual required contribution amount being made by the member's employer or by any other public entity." N.J.S.A. 43:3C-9.5(c)(2); see also Berg, supra, 436 N.J. Super. at 240 (describing these events). The statute also specifically provides that, "The

amount of the State's annually required contributions shall be included in all annual appropriations acts as a dedicated line item." N.J.S.A. 43:3C-9.5(c)(1). The Legislature directed that the required contributions be made annually on a timely basis "to help ensure that the retirement system is securely funded and that the retirement benefits to which the members are entitled by statute and in consideration for their public service and in compensation for their work will be paid upon retirement." N.J.S.A. 43:3C-9.5(c)(2). Notably, the language chosen by the Legislature unmistakably invokes the Contract Clause of the State and Federal Constitutions when it provides unequivocally that, "The failure of the State or any other public employer to make the annually required contribution shall be deemed to be an impairment of the contractual right of each employee." Ibid. (emphasis added). Moreover, the Legislature further emphasized the necessity of making the annual payments by deliberately modifying the provision of the statute that had reserved the right of the State to change the retirement systems by adding that, "The rights reserved to the State in this subsection shall not diminish the contractual rights of employees" created by Chapter 78. N.J.S.A. 43:3C-9.5(e). The clear intent of this language was to insulate the State contributions into the pension funds from the vicissitudes of the political process that had placed the integrity of the funds in significant jeopardy in the past. Indeed, the

Governor himself characterized this pension legislation as constituting "historic reforms" that "bring to an end years of broken promises and fiscal mismanagement by securing the long-term solvency of the pension and benefit systems." Press Release, New Jersey Leads the Way with Landmark Bipartisan Pension and Health Benefits Reform (June 23, 2011), <http://www.state.nj.us/governor/news/news/552011/approved/20110623d.html>.

Nonetheless, after ostensibly winning the right to adequate annual funding of the State public employees' pension systems, the hundreds of thousands of public employees represented by plaintiffs now find themselves seeking court intervention to enforce this language, which was part of the pension reform that the Governor himself touted as his "biggest governmental victory," and a "bold," bi-partisan effort to "save" the pension systems while also "providing real, long-term fiscal stability for future generations of New Jerseyans." Ginger Gibson, Gov. Christie calls pension overhaul his 'biggest governmental victory' in exclusive interview, NJ.com (June 26, 2011, 12:48 PM), http://www.nj.com/news/index.ssf/2011/06/gov_christie_calls_pension_ove.html; Press Release, Office of Governor Chris Christie, Governor Christie Signs Into Law Bold, Bipartisan Pension & Health Benefits Reform (June 28, 2011), <http://www.state.nj.us/governor/news/news/552011/approved/20110628B.html>. The Governor now takes the unusual position in this court of claiming that this

legislative contractual guarantee, which embodied significant reforms for which he took substantial credit with great national fanfare, violates the New Jersey Constitution. It is against this backdrop that the court embarks on analyzing the sensitive and critically important issues raised by the parties. The task requires the court to balance many competing interests, and to endeavor to reconcile a complicated constellation of constitutional, statutory, and decisional law, in order to reach a conclusion that is both legally sound and equitable to the parties.

STATEMENT OF FACTS & PROCEDURAL HISTORY

Having set forth a full account of the facts relevant to this matter in its June 25, 2014, opinion, the court will only briefly discuss the background and procedural history of this case, focusing on facts relevant to the instant challenge for contributions due at the end of FY 2015. The appropriations relevant to these consolidated cases are the annual funds provided to the various State pension systems. The Police and Firemen's Retirement System ("PFRS") (N.J.S.A. 43:16A-1 to -68), the Public Employees' Retirement System ("PERS") (N.J.S.A. 43:15A-1 to -161), and the Teachers' Pension and Annuity Fund ("TPAF") (N.J.S.A. 18A:66-1 to -93) are the three major pension systems administered by the State of New Jersey. The State also administers the State

Police Retirement System ("SPRS") (N.J.S.A. 53:5A-1 to -47), the Consolidated Police and Firemen's Pension Fund ("CPFPF") (N.J.S.A. 43:16-5 to -21), the Judicial Retirement System ("JRS") (N.J.S.A. 43:6A-1 to -47), and the Prison Officers' Pension Fund ("POPF") (N.J.S.A. 43:7-7 to -27). The administration of these pension systems is conducted through the Division of Pensions and Benefits, which is part of the Department of the Treasury. All of these systems guarantee pension payments to participants upon retirement based on salary and time spent in the pension system. Vested participants who became members of the systems before May 21, 2010, obtain a "non-forfeitable right" to receive benefits when they earn five years of service credit in the retirement system. N.J.S.A. 43:3C-9.5(b).

Retirement benefits are funded by investment returns, contributions from employees, and contributions from public employers, such as the State of New Jersey. N.J.S.A. 43:3C-9.5. Under the statutory framework requiring employer contributions, the State is required to make an "annually required contribution" ("ARC") which is composed of the "annual normal contribution" and the "annual unfunded accrued actuarial liability contribution" ("UAAL"). N.J.S.A. 43:3C-9.5(c). The annual normal contribution is the present value of the additional pension benefits earned by active employees during the current year, and the UAAL is an amortization payment towards the State's unfunded actuarially

accrued liability of the pension systems. The State's unfunded actuarially accrued liability is the gap between the pension systems' actuarial value of assets and the present value of all current actuarial liabilities for both active and retired members. The ARC amount due to be paid in any fiscal year must be included in every annual Appropriations Act as a dedicated line item. Ibid. Historically, the ARC payment has been made on the last day of the fiscal year, June 30.

A funding ratio of less than 100% means that the pension systems owe more than has been set aside to pay for the systems' liabilities. The State has failed to pay its full ARC every year from FY 1997 to 2012. In fact, the State has generally made payments totaling less than 10% of the ARC during that time, with payments rising to slightly above 50% in FY 2007 and FY 2008. The State's continued failure to make the full ARC payment results in exponential growth in the UAAL through both lost contributions and lost expected return on the investment of the contributions. The numbers bear out this reality: to take a sampling of the pension funds at issue in this matter, a comparison of the annual reports of the actuaries for each system against the Division of Pension and Benefits Comprehensive Annual Report for the fiscal year ending on June 30, 2013, reveals that the unfunded liability of PERS increased from approximately \$2.6 billion in 2004 to an estimated \$16.5 billion in 2012; the unfunded liability of TPAF increased

from \$5.8 billion in 2004 to an estimated \$21.4 billion in 2012; the unfunded liability of PFRS increased from approximately \$3.6 billion in 2004 to an estimated \$8.1 billion in 2012; and the unfunded liability of SPRS increased from approximately \$51.8 million in 2004 to an estimated \$798 million in 2012. Compare Division of Pensions and Benefits, Comprehensive Annual Financial Report for Fiscal Year Ended June 30, 2013 82 (Nov. 20, 2013), with Public Employees' Retirement System Annual Report Fiscal Year 2007 37 (June 30, 2007), and Teachers' Pension and Annuity Fund Annual Report Fiscal Year 2007 35 (June 30, 2007), and Police and Firemen's Retirement System Annual Report Fiscal Year 2007 41 (June 30, 2007), and State Police Retirement System Annual Report Fiscal Year 2007 38 (June 30, 2007).

In response to this chronic underfunding of the pension system, the Legislature passed, and the Governor signed into law, an act comprehensively reforming the public pension and benefits systems in 2010. See 2010 N.J. Laws 1 ("Chapter One"). Chapter One made various changes to the pension system--including raising eligibility requirements, and altering retirement allowance formulas and compensation definitions. These changes were aimed at stabilizing the system and reducing the financial burden of the pension funds on the State. See S. 2, 214th Leg. (N.J. 2010). Chapter One also permitted the State to make no annual required contribution for FY 2011 and to defer for seven years the State's

obligation to make its full ARC payment. See Chapter One, § 39. While the statute made an exception for the State, allowing the State to defer its full payment, other public employers, such as municipalities, were required to make their full ARC payments into the pension system. The relevant sections of Chapter One, codified at N.J.S.A. 43:3C-14 and N.J.S.A. 43:3C-9.5(c)(1), establish phased-in partial payments of the full ARC for State employers only. Beginning in FY 2012, Chapter One required the Legislature to appropriate a payment to the pension funds equivalent to 1/7th of the ARC. In each subsequent year thereafter for six fiscal years, the Legislature is required to increase the annual appropriation by 1/7th, so that by FY 2018, the State would be required to make a full, 100% ARC payment, including a 7/7th payment toward the UAAL. The State made its required 1/7th contribution for FY 2012, and its 2/7th contribution for FY 2013. The State did not make its required 3/7th payment for FY 2014, which this court held was valid in light of the drastic and unexpected emergency budget situation that arose at the end of FY 2014. Nor has the State made its required 4/7th payment for FY 2015, which is the subject of the motions now before this court.

Less than a month before the Legislature approved Chapter One, the Appellate Division held that public employees had no contractual right to statutorily-required funding of the TPAF pension system. NJEA, supra, 412 N.J. Super. at 196. In response

to the Appellate Division decision, the Legislature passed and the Governor signed into law Chapter 78 in 2011, which included further reforms of the pension system, including increased employee contributions. See 2011 N.J. Laws 78 ("Chapter 78"). Contributions from members of TPAF and PERS increased from 5.5% to 6.5%, with an additional contribution of 1% to be phased-in through equal installments over a period of seven years commencing with the first year following the effective date of the legislation. N.J.S.A. 43:15A-2(b)(3). Employee contributions to the PERS system increased from 8.5% to 10%. N.J.S.A. 43:16A-15(2). Employee contributions into the SPRS system were raised from 7.5% to 9%. N.J.S.A. 53:5A-38. Chapter 78 also suspended the cost-of-living adjustments ("COLAs") to the monthly pension payments to all current and future vested retirees. N.J.S.A. 43:3B-2. This suspension is the subject of the litigation in Berg, supra, 436 N.J. Super. at 220, which the Appellate Division remanded to the Law Division for further proceedings.

In exchange, Chapter 78 strengthened the employer funding requirements set forth in Chapter One by expressly creating an unmistakable contractual right to the State's statutorily-mandated payments of the ARC. See Chapter 78, § 26 (codified at N.J.S.A. 43:3C-9.5(c)(2)). The contractual right means that the State shall make the ARC payment "on a timely basis," in order to "help ensure that the retirement system is securely funded and that the

retirement benefits . . . will be paid upon retirement.” N.J.S.A. 43:3C-9.5(c)(2). The statute expressly declares that the failure of the State to make the ARC constitutes an impairment of the contractual right of each employee-participant in the pension systems. Ibid. Finally, the law establishes jurisdiction in the Superior Court, Law Division, to hear actions brought by members of the pension systems to enforce their contractual rights and forbids the State from asserting sovereign immunity in such an action. Ibid. These provisions, taken together, are unprecedented in the long history of public pensions legislation in New Jersey. The obvious intent of the legislation is to prevent chronic underfunding of the systems and to curtail the State’s past practices of not making pension fund payments whenever fiscal expedience arose, which happened almost every year. As noted by Governor Christie upon the adoption of Chapter 78, “We are fixing our pension and health benefit systems in order to save them and in the process bringing fiscal sanity to our State.” Press Release, New Jersey Leads the Way with Landmark Bipartisan Pension and Health Benefits Reform (June 23, 2011), <http://www.state.nj.us/governor/news/news/552011/approved/20110623d.html>.

Under the pension-funding framework described above, the State is required to make a 4/7th payment for FY 2015. The Governor’s original proposed budget for FY 2015, issued in February 2014, included a full 4/7th ARC payment of \$2.25 billion,

representing approximately \$389.1 million towards the normal contribution and approximately \$1.861 billion towards the amortized unfunded liability payment. See Andrew P. Sidamon-Eristoff, FY 2015 Budget May 21, 2014 (2014), available at http://www.njleg.state.nj.us/legislativepub/budget_2015/treasurer_testimony_05212014_ABU.pdf. State Treasurer Andrew Sidamon-Eristoff announced on May 21, 2014, in testimony before the General Assembly Budget Committee, that the Governor's proposed budget for FY 2015 would be revised. Mr. Sidamon-Eristoff explained that cuts were needed because annual revenues had fallen significantly below the State's projections, primarily because of decreases in anticipated income tax revenues.

Recognizing the need for other revenue sources in the short-term to fund the pension contributions, the Legislature passed an FY 2015 Appropriations Bill, including a \$2.25 billion appropriation to cover the State's full pension payment, 2014 N.J. Laws 14, to be financed in part by a "millionaire's tax," which increased the tax rate on income exceeding \$1 million for taxable years 2014, 2015, and 2016. See Gen. Assemb. 3485, 216th Leg. (N.J. 2014). The Legislature estimated that the millionaire's tax would raise \$723,500,000 in additional revenues. See Cohen Cert., Def. App., at 316. The Legislature also passed a one-year Corporation Business Tax surcharge, which it estimated would produce \$389 million in revenue. See Gen. Assemb. 3484, 216th

Leg. (N.J. 2014). The State executive defendants, including the Governor and the State Treasurer, claim that the Legislature overestimated the amount of revenue that these two tax proposals would generate. See Sidamon-Eristoff Cert., Def. App., at 576-78.

In enacting the "millionaire's tax" and the Corporation Business Tax surcharge, the Legislature declined to adopt two alternative revenue enhancers proposed by Governor Christie in his FY 2015 Budget Message. Governor Christie had proposed eliminating the existing sales tax exemption on businesses in Urban Enterprise Zones, which was estimated to raise approximately \$70 million in revenue. See Chris Christie, The Governor's FY 2015 Budget Summary 32 (2014). The Governor also proposed a tax on electronic cigarettes, which was estimated to raise \$35 million in revenues. Id. at 24. Neither of these alternatives, alone or together, would come anywhere close to covering the UAAL due for FY 2015, although they may have ameliorated some of the Governor's concerns about shortfalls in the revenue options endorsed by the Legislature.

Reflecting disagreement between the Legislature and the Governor, on June 30, 2014, Governor Christie exercised his line-item veto to delete \$1.57 billion of the State's required pension payment from the Appropriations Act. This amount had been included in the FY 2015 Appropriations Act and would have covered the unfunded liability payment into the pension system. As a result, the State's total contribution to the pension funds for FY 2015

was reduced to \$681 million, which represented the full normal contribution. In a veto message, Governor Christie stated his opposition to the Legislature's plan to raise taxes to pay for the budget deficit and cited the Governor's constitutional responsibility to deliver a balanced budget as reasons for deleting the UAAL payment for FY 2015. Governor Christie also exercised absolute vetoes over the Legislature's proposed "millionaire's tax" and the Corporation Business Tax surcharge. In sum, the Governor's revised budget plan totally eliminated the unfunded liability payments while increasing the normal payments for FY 2015. The immediate practical effect of the Governor's actions is that while the State will not make its unfunded liability payment, which is aimed at covering future liabilities, the State will make its normal contribution for FY 2015 in the amount of \$681 million, which covers the current benefit accruals for active employees. To date, the Legislature has not held a vote to override Governor Christie's budget-cutting decisions, and the Governor has not put forth any other initiatives, except to establish the New Jersey Pension and Health Benefit Study Commission to examine the health of the funds and to make recommendations for further pension reform. See Exec. Order No. 161 (Aug. 1, 2014). Notably, a 2014 Status Report issued by the Commission referred to the problems of the public employee pension system in New Jersey as "dire," and the amount of the UAAL as "grievous." Truth & Consequence, N.J.

Pension and Health Benefit Study Commission 6 (Sept. 25, 2014), <http://www.state.nj.us/treasury/pdf/NJPHBSC.pdf>.

Plaintiffs, on behalf of hundreds of thousands of New Jersey State public employees, object to the Governor's actions to remedy budget shortfalls by eliminating the State's amortization payments to the pension funds. To that end, a number of State Police-associated groups (the "State Trooper plaintiffs"), the Communications Workers of America ("CWA"), the New Jersey Education Association ("NJEA"), and several other unions and organizations filed complaints and orders to show cause alleging statutory violations, impairment of contractual rights under the New Jersey and Federal Constitutions, violations of substantive and procedural due process under both Constitutions, a violation of plaintiffs' Equal Protection rights, promissory estoppel, and violations of the New Jersey Civil Rights Act, among other claims. The court signed the orders to show cause for these plaintiffs, consolidated the three matters, denied plaintiffs' application for temporary restraints, and scheduled a preliminary injunction hearing regarding the State's pension payments for FY 2014. Thereafter, the court granted a motion filed by the New Jersey Principals and Supervisors Association to intervene in the action filed by NJEA, and consolidated an additional complaint filed by the Probation Association of New Jersey ("PANJ") seeking similar injunctive and mandamus relief for both FY 2014 and FY 2015.

After full briefing by the parties, on June 25, 2014, the court heard oral argument on plaintiffs' motion for preliminary injunctive and mandamus relief for the State's FY 2014 payment. On the same day, the court issued a decision denying plaintiffs' application for relief. In the decision, the court held that Chapter 78 conferred on plaintiffs a contractual right to the State's pension payments and that Governor Christie's decision in Executive Order 156 to withhold payments into the pension funds for FY 2014 constituted a substantial impairment of that right. However, the court held that in light of the emergency budget shortfall discovered towards the end of FY 2014, the Governor's action was a reasonable and necessary impairment of plaintiffs' contractual right to pension payments that was justified by statutory executive emergency powers. Relevant to the issues before the court today, the court also held that plaintiffs' claims for FY 2015 were not yet ripe. In the original complaints, plaintiffs challenged the Governor's initial budget recommendation for FY 2015 expenditures, but the Legislature had not yet passed its Appropriations Act for FY 2015, which implements the Governor's recommendations. The court noted that if the Legislature chose to adopt the Governor's recommendations, making an appropriation for FY 2015 that did not comply with Chapter 78, plaintiffs could proceed with a challenge to that appropriation (or lack thereof) as unconstitutional. Since the court's June 24, 2014 decision,

the Legislature passed the FY 2015 Appropriations Act, including the statutorily-required 3/7th payment (3/7th because the State did not make that payment in FY 2014). As discussed above, the Governor exercised his line-item veto over that appropriation for FY 2015 as well as the funding mechanisms designed to finance the payment. Neither the Legislature nor the Governor has taken any further action to increase the payments required for FY 2015 by the pension statutes described above. This decision addresses the consolidated applications for relief regarding the non-payment of the required contributions by the State, and the motion to dismiss the complaints filed by the Governor and other public officials described by defendants' counsel as the "State executive defendants."

ANALYSIS

I. THE COURT HAS JURISDICTION TO HEAR THIS DISPUTE.

A. Jurisdiction is Appropriate in the Trial Court.

Despite the general rule that the Appellate Division has jurisdiction to review final decisions or actions of any State administrative agency or officer, including the Governor, see R. 2:2-3(a)(2); Bullet Hole, Inc. v. Dunbar, 335 N.J. Super. 562, 572 (App. Div. 2000), the Legislature has expressly vested jurisdiction in the Superior Court, Law Division to decide cases brought by "a member of any system or fund or any board of trustees to enforce the contractual right" guaranteed by Chapter 78.

N.J.S.A. 43:3C-9.5(c)(2). Plaintiffs thus properly brought their claims for relief based on Chapter 78 in the Law Division of Mercer County. Since jurisdiction in this court is clear based on the plain language of that statute, the court may issue declaratory relief pursuant to the Declaratory Judgment Act, N.J.S.A. 2A:16-50 to -62, which grants all courts the power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. N.J.S.A. 2A:16-52.

B. The Political Question Doctrine does not divest this court of jurisdiction.

Defendants argue that plaintiffs' complaints present non-justiciable political questions because no judicially manageable standards exist for resolving the issues presented by plaintiffs. Under the separation of powers doctrine, courts should not decide an issue if there is "a lack of judicially discoverable and manageable standards for resolving it." De Vesa v. Dorsey, 134 N.J. 420, 430 (1993) (quoting Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 710, 7 L. Ed. 2d 663, 686 (1962)). In support of their argument that plaintiffs' claims in this case present non-justiciable political questions, defendants cite In re Veto by Governor Chris Christie of Minutes of N.J. Racing Comm'n from June 29, 2011 Meeting, 429 N.J. Super. 277 (App. Div. 2012), certif. denied, 214 N.J. 116 (2013). In that case, the Thoroughbred Breeders' Association of New Jersey ("TBA") challenged a decision

by Governor Christie to veto an action taken by the New Jersey Racing Commission, arguing that the Governor did not have authority under the New Jersey Constitution to veto the Commission's actions. The Appellate Division rejected that argument and upheld the constitutionality of the veto without making reference to the political question doctrine. TBA then argued that even if the veto procedure was constitutional, the Governor's decision itself was arbitrary and capricious. With respect to this latter argument, the court found that there were no judicially manageable standards to determine whether the Governor's decision to issue the veto was arbitrary and capricious, because that decision involved "competing policy decisions." Id. at 293. The Appellate Division held that reviewing the Governor's veto decision "would tread dangerously close to the boundary line separating our Constitutional power to review executive action, and the statutory and constitutional [sic] power accorded another coequal branch of government." Id. at 292-93.

The factual circumstances considered by the Appellate Division in applying the political question doctrine in In re Veto are inapposite to the situation presented by these consolidated cases. Here, plaintiffs have challenged the Governor's actions as both violative of Chapter 78 and as unconstitutional. As is set forth below, case law precedents provide judicially manageable standards to apply to claims of impairment of contract, which form

the primary basis of plaintiffs' application for relief, and to claims raising due process and equal protection rights. The court can review these claims without addressing the wisdom of the Legislation or the Governor's veto. Moreover, plaintiffs have not sought to invalidate the Governor's veto as arbitrary and capricious. See id. at 291-92 (explaining that the court does not apply an arbitrary, capricious or unreasonable standard of review to the discretionary actions of a Governor). To the extent that plaintiffs challenge discretionary decisions made by the Governor, this opinion discusses those claims and their relation to the political question doctrine as they arise in the course of the court's analysis. But the political question doctrine does not operate as a bar to prevent this court from deciding plaintiffs' underlying constitutional claims.

Moreover, defendants cite no precedent where a New Jersey court refused to hear the merits of a challenge to a gubernatorial veto affecting the budget because of the political question doctrine. On the contrary, the Appellate Division recently did not shy away from resolving a budget dispute involving the Governor's authority on the merits. See Perth Amboy Bd. of Educ. v. Christie, 413 N.J. Super. 590 (App. Div. 2010); see also Karcher v. Kean, 97 N.J. 483 (1984) (deciding whether the Governor had properly exercised his line-item veto power in deleting items of appropriation in a Budget Bill). Furthermore, the well-

established test for determining whether there has been an impairment of a contractual obligation involves determining whether defendants have a reasonable basis for the impairment. U.S. Trust Co. v. New Jersey, 431 U.S. 1, 25-26, 97 S. Ct. 1505, 1519 52 L. Ed. 2d 92, 111-12 (1977). As the impairment test therefore suggests, it is precisely the role of the courts to adjudicate the reasonableness of defendants' actions when the court is confronted with a constitutional challenge.

To the extent that defendants' reliance on the Debt Limitation and Appropriations Clauses touch upon political issues, New Jersey courts have also not hesitated to review such claims. See, e.g., Lonegan v. State, 176 N.J. 2, 19 (2003) [Lonegan II] (deciding whether the Debt Limitation Clause barred the Legislature from issuing appropriations-backed debt); City of Camden v. Byrne, 82 N.J. 133 (1980) (holding that the Appropriations Clause barred the Court from ordering an appropriation). Indeed, despite the political overtones of this dispute, the court has an obligation to resolve constitutional controversies, even where the delicate balance among the three branches of government is implicated. See Gen. Assembly v. Byrne, 90 N.J. 376 (1982) (deciding whether the legislative veto provision in the Legislative Oversight Act violated separation of powers principles).

II. CHAPTER 78 CONFERS A CONTRACTUAL RIGHT TO PENSION PAYMENTS.

For the same reasons discussed in the court's June 25, 2014, decision and order denying plaintiffs' application for preliminary injunctive and mandamus relief, the court concludes once again that Chapter 78 confers on plaintiffs a contractual right to the amortization payments required by the legislation. "[A] statute will not be presumed to create private, vested contractual rights, unless the intent to do so is clearly stated." NJEA, supra, 412 N.J. Super. at 206 (citing Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 465-66, 105 S. Ct. 1441, 1451, 84 L. Ed. 2d 432, 446 (1985)). The presumption against finding that legislation creates a contract right "is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state." Nat'l R.R., supra, 470 U.S. at 465-66, 105 S. Ct. at 1451, 84 L. Ed. 2d at 446. Moreover, because "[p]olicies, unlike contracts, are inherently subject to revision and repeal," there is danger in construing laws as contracts when the legislature did not intend to create a contractual right--binding future legislatures in contracts would "limit drastically the essential powers of a legislative body." Ibid.

Despite the inherently limiting consequences of creating contractual rights through statutory language, the New Jersey

Legislature deliberately and unequivocally created contractual rights for public employees for seven years of increasing State payments to support the actuarial soundness of the pension funds and to remedy decades of underfunding. See N.J.S.A. 43:3C-14; N.J.S.A. 43:3C-9.5(c) (1). In NJEA, supra, 412 N.J. Super. at 217, the Appellate Division found that there was no contractual right to State funding to support the actuarial soundness of the teachers' pension system, in part because no clear legislative statement created such a right. In finding that there was no contractual right to State funding of the pension system in NJEA, the Appellate Division relied on the New Jersey Supreme Court's decision in Spina v. Consolidated Police & Firemen's Pension Fund Committee, 41 N.J. 391, 399-400 (1964). In Spina, plaintiffs challenged the Legislature's enactment of an increase in the retirement age for State pension funds. Id. at 397. The Court upheld the increased retirement age in Spina because "[n]ot a word" in the relevant statute "smacks of an intent to require or to permit [a contract]." Id. at 400. Consequently, the Court concluded that "the terms and conditions of public service in office or employment rest in legislative policy rather than contractual obligation, and hence may be changed except of course insofar as the State Constitution specifically provides otherwise." Ibid. Similarly, the Appellate Division held in NJEA, supra, 412 N.J. Super. at 213, that the pre-Chapter 78 statutory

language at issue there “does not clearly and unequivocally express an explicit enforceable legislative commitment to a set level of future funding” The implication in both Spina and NJEA, however, is that the Legislature could create such a contractual right if it used unmistakable language demonstrating its intent. Moreover, shortly after the NJEA decision was issued and in obvious response to it, the Legislature enacted Chapter 78, which expressly states that members of the public pension systems “shall have a contractual right to the annual required contribution amount being made by the member’s employer or by any other public entity.” N.J.S.A. 43:3C-9.5(c)(2). This recent statutory amendment has thus superseded the contrary holding by the Appellate Division in NJEA, supra, 412 N.J. Super. at 205, and the earlier decision of the New Jersey Supreme Court in Spina, supra, 41 N.J. at 400.

As this court stated in the June 25, 2014 decision, from this language, and the related language contained in Chapter 78, it is difficult to imagine any clearer way by which the Legislature could manifest an intention to create a contractual relationship between public employees and their employers and a contractual right to State pension contributions. Chapter 78 sets forth the scope of the contractual right, providing the court with guidance for understanding how to weigh the State’s responsibilities against the rights of the members of the pension funds. The statute provides in no uncertain terms that the right to the annual

required contribution "means that the employer or other public entity shall make the annual required contribution on a timely basis" and that "[t]he failure of the State or any other public employer to make the annually required contribution shall be deemed to be an impairment of the contractual right of each employee." N.J.S.A. 43:3C-9.5(c)(2). With this language, invoking the terms of the Contract Clause itself which proscribes laws impairing contracts, the Legislature anticipated the precise situation before the court today. There frankly is no other way to read this language except as a direction to the court to find a contractual right to timely payment of the pension contributions "to help ensure that the retirement system is securely funded." Ibid. The Legislature therefore left no doubt about its intent to confer upon public employees a constitutionally-protected contractual right to the State's pension contributions. In light of the broad scope of that contractual right, the Legislature made clear its intention that the right not be compromised.

III. THE NEW JERSEY CONSTITUTION DOES NOT BAR ENFORCEMENT OF THE CONTRACT RIGHT TO PENSION PAYMENTS IN CHAPTER 78.

The State executive defendants challenge the constitutionality of the contractual right in Chapter 78. Specifically, defendants argue that there can be no contractual right because it would violate the Debt Limitation and Appropriations Clauses of the New Jersey Constitution, and because

enforcement of such a right encroaches on the Governor's constitutional veto power. In defending the State's failure to make the full pension payment for FY 2015, defendants assert contradictory positions. On one hand, the State claims that plaintiffs' complaint should be dismissed because the contractual guarantee in Chapter 78 is unconstitutional. In essence, despite unmistakable language creating contractual rights, the State argues that no contract was created because the incremental payments that form the centerpiece of the guarantee violate the New Jersey Constitution. On the other hand, defendants nonetheless assert that the executive defendants are not walking away from the State's pledge to make the full pension payments required by statute to bring the funds into solvency and to ensure that there will be assets available to pay pension benefits well into the future. The court rejects defendants' position that finding Chapter 78 unconstitutional somehow does not result in the inevitable abandonment of the State's obligation to its employees and holds instead that the New Jersey Constitution does not bar enforcement of Chapter 78's contractual obligation.

A. Standard of Review.

Generally courts shall not "declare void legislation 'unless its repugnancy to the Constitution is clear beyond a reasonable doubt.'" In re P.L. 2001, Chapter 362, 186 N.J. 368, 392 (2006)

(quoting Harvey v. Bd. of Chosen Freeholders, 30 N.J. 381, 388 (1959)). The burden falls on the party challenging the legislation to demonstrate clearly that it violates a constitutional provision. Lewis v. Harris, 188 N.J. 415, 459 (2006) (citing Caviglia v. Royal Tours of Am., 178 N.J. 460, 477 (2004)). Furthermore, there is a strong presumption of validity afforded to enactments of the Legislature. N.J. Sports & Exposition Auth. v. McCrane, 61 N.J. 1, 8 (1972) (“[E]very possible presumption favors the validity of an act of the Legislature.”), appeal dismissed, 409 U.S. 943, 93 S. Ct. 270, 34 L. Ed. 2d 215 (1972); Behnke v. N.J. Highway Auth., 13 N.J. 14, 25 (1953) (“[A] legislative enactment will not be declared void unless its repugnancy to the Constitution is so manifest as to leave no room for reasonable doubt.”). It is not the court’s task to weigh the “efficacy or wisdom” of the challenged legislation. Brown v. State, 356 N.J. Super. 71, 80 (App. Div. 2002) (citing State Farm Mut. Auto. Ins. Co. v. State, 124 N.J. 32, 45 (1991)). Rather, courts aim to effectuate legislative intent and will uphold legislation unless a constitutional infirmity is clear. Behnke, supra, 13 N.J. at 25. Consequently, in order to prevail on their motion to dismiss, defendants must show that Chapter 78’s contractual right “unmistakably . . . run[s] afoul of the Constitution.” Lewis, supra, 188 N.J. at 459.

B. The Debt Limitation Clause does not bar plaintiffs' contractual right to State pension fund payments.

Defendants argue that Chapter 78 could not have created a contractual right to future State funding of the pension system because such a right would run counter to the State Constitution's Debt Limitation Clause. The State argues that because Chapter 78 requires future Legislatures to pay the pension funds' substantial unfunded actuarial liability without voter approval, it runs afoul of the constitutional mandate prohibiting the Legislature from incurring debts exceeding one percent of the annual budget. There is great irony in the State's position. In the extensive body of Debt Limitation Clause jurisprudence in New Jersey, the State has rarely, if ever, argued that the Clause rendered a statute--which was deemed valid by the Office of Legislative Services, enacted by the Legislature, and signed by the Governor--unconstitutional. Rather, when faced with challenges to statutes based on the Debt Clause's limitations on legislative authority, the New Jersey Supreme Court has, in all but two cases, upheld the statute despite the Constitution's seemingly broad limitation on State debt. See Lonigan v. State, 174 N.J. 435, 475 (2002) [hereinafter Lonigan I] (Stein, J., dissenting in part and concurring in part) (giving an overview of Debt Limitation Clause jurisprudence). Notably, these judicial actions were taken at the behest of the State, which routinely--unlike the situation here--urged the judiciary to give

a narrow reading to the Clause in keeping with modern fiscal realities.

Although “[t]he scope and meaning of the restrictions imposed on the legislative branch by the [Debt Limitation] Clause have been discussed at length in an extensive body of case law spanning more than fifty years,” id. at 438-39 (majority opinion), this matter presents the court with an issue of first impression. Chapter 78’s language securing a contract right to State contributions into the pension funds is, to the court’s knowledge, unprecedented. Moreover, the State’s reading of the Debt Limitation Clause in this case collides with the constitutional guarantee provided to State employees, which explicitly invoked Contract Clause protection. The State makes no effort to harmonize the Clauses and claims that the Debt Limitation Clause should be given precedence. No case law supports that position. Rather, courts must harmonize constitutional provisions, if possible, to give effect to each. See N.J. Const. art. VIII, § 2, ¶ 3 (Debt Limitation Clause); N.J. Const. art. IV, § 7, ¶ 3 (Contract Clause); see also, by analogy In re Adoption of a Child by W.P., 163 N.J. 158, 182 (2000) (citing State v. Federanko, 26 N.J. 119, 130 (1958)) (interpreting two conflicting statutes and stating that “[w]hen reviewing two separate enactments, the Court has an affirmative duty to reconcile them, so as to give effect to both expressions of the lawmakers’ will”). Therefore, the court

undertakes its review of Chapter 78's constitutionality by thoroughly examining the historical circumstances surrounding the adoption of the Clause, the case law interpreting the Clause, and the text of the Clause itself to determine if the Debt Limitation Clause can be harmonized with the Contract Clause in the context of this case.

1. The historical circumstances leading to the adoption of the Debt Limitation Clause support reading the Clause to apply only to contract debt that accrues interest.

The historical circumstances surrounding adoption of the Clause support reading the Debt Limitation Clause as applying solely to restrict the Legislature's ability to take on "debts" or "liabilities" in the form of loans with ongoing interest payments. The history surrounding the adoption of the Debt Limitation Clause is valuable to the court's inquiry into its application to Chapter 78. New Jersey courts turn freely "to the pertinent constitutional and legislative history for aid in ascertaining the true sense and meaning of the language used." Lloyd v. Vermeulen, 22 N.J. 200, 206 (1956); see also Lonegan I, supra, 174 N.J. at 443-45 (setting forth the history surrounding the adoption of the Debt Limitation Clause). Inquiry into the circumstances surrounding the adoption of the Debt Limitation Clause is particularly appropriate here because the court is faced with the difficult task of deciding whether the Clause bars a unique approach to pension funding

adopted by the Legislature. This case also arises under unprecedented circumstances, in which the State's interpretation of the Debt Limitation Clause would supersede protections guaranteed by the Contract Clause, requiring the court to harmonize these two constitutional provisions, if possible.

New Jersey's Debt Limitation Clause came about after certain events unfolded in the 1830s. Lonagan I, supra, 174 N.J. at 443. At the beginning of the decade, an economic boom caused many states to begin engaging in heavy borrowing by issuing bonds for a variety of projects, including the development of canals, roads, and railroads. Id. at 444. However, American crops failed in the middle of the decade, and an economic panic and banking collapse followed in the late 1830s, which caused many states that had made investments in public improvement projects to default on their bond obligations. Ibid. As a reaction to these financial difficulties in other states, New Jersey adopted the Debt Limitation Clause in 1844. Ibid. The framers "expressed their concern about 'opening a door for burthening the State with a debt which would encumber it from generation to generation.'" Ibid. (quoting Proceedings of the Constitutional Convention of 1844 519 (1942)). The Clause has remained essentially unchanged since its adoption in 1844 "except that the amount of permissible unrestrained debt in a given year was altered from a predetermined amount (\$100,000) to one-percent of the amount appropriated by the

Legislature in the general appropriation act for that fiscal year," which is how the Clause remains today. Ibid.

In neighboring New York, the Legislature engaged in debates, contemporaneous with those occurring in New Jersey, about how to respond to the debt crisis of the 1830s. These debates are useful in understanding the motivations behind New Jersey's Debt Limitation Clause because the two states were in relatively similar financial situations at the time, New Jersey ultimately adopted a clause virtually identical to the language of a clause proposed in New York, and New York's economic development and response to the economic crisis of the late 1830s has been better documented than the debate in New Jersey. Although both New Jersey and New York witnessed significant growth in the amount of bonded debt taken on by the state by the late 1830s, neither state defaulted on its loans. Consequently, New Jersey and New York were not affected by the public debt crisis to the same degree as were other states that ended up defaulting on their bonded debt. In New York, the early success of the Erie Canal, completed in 1825, mired the state in numerous additional canal projects, so that by 1841 New York had constructed over 600 miles of canals with another 300 miles in progress. L. Ray Gunn, The Decline of Authority: Public Economic Policy and Political Development in New York State, 1800-1860 47 (1975). This massive canal infrastructure led to government oversight of financing, construction, and operation of the system.

Ibid. Although the state collected tolls for use of the canals to offset the capital expenditures necessary to build them, the ongoing administration of the canal system caused the state to incur a debt of \$27 million. Id. at 48. As the economic Panic of 1837 hit, the New York State government's involvement in internal improvements became a target of reform. Id. at 110.

With significant pressure from the banking industry, New York resisted falling into default on this considerable debt by instituting a "Stop and Tax" policy. Id. at 145. That policy called for the withdrawal of State government involvement in canal construction, and the institution of a property tax to ensure that the State would pay off its existing debts before taking on new obligations. Ibid. As an extension of this policy, New York Governor William C. Bouck called for a constitutional debt limitation amendment in his annual message on January 2, 1844, explaining to the Legislature that "some farther constitutional checks should be adopted against the creation of a debt, or the expenditure of the public money for any purpose, not coming within the ordinary operations of government." Annual Message of Governor William C. Bouck, 1844, in IV Messages from the Governor (Charles Z. Lincoln ed., 1909) (emphasis added). To that end, the New York State Legislature passed a constitutional amendment on March 21, 1844, which stated, virtually identically to New Jersey's Debt Limitation Clause:

The Legislature shall not in any manner create any debt or debts, liability or liabilities of the State direct or contingent which shall singly or in the aggregate at any time exceed one million of dollars . . . unless the same shall be authorized by a law for some single object or work to be distinctly specified therein and such law shall impose and provide for the collection of a direct annual tax sufficient to pay the interest of such debt or liability as it falls due and also to pay and discharge the principal of such debt or liability within eighteen years

[Assembly Document No. 150 at 11-12, VI Documents of the Assembly of the State of New York (1844).]

Although New York did not ultimately adopt this revised amendment until 1846, it was proposed just three months before New Jersey's Constitutional Convention of 1844 debated the language of New Jersey's Debt Limitation Clause. See Amos Tilton, Constitutional Limitations on the Creation of State Debt 3 (1947) (stating that the Committee on the Legislative Department to the New Jersey Constitutional Convention submitted a report setting forth the text of a proposed Debt Limitation Clause on May 28, 1844). New York's experience is exemplary of the debate occurring at the time New Jersey adopted its own Debt Limitation Clause, given that both states were addressing similar fiscal concerns. See John Joseph Wallis, "The Other Foundings: Federalism and the Constitutional Structure of American Government," in Founding Choices: American Economic Policy in the 1790s 204 n.37 (Douglas A. Irwin & Richard Sylla, eds., 2009).

This historical background supports the view that the Debt Limitation Clause was intended to prevent the State from falling victim to the public debt crisis of the 1830s by making it difficult for the State Legislature to acquire additional bonded indebtedness--largely for internal improvement projects--before it had paid down its prior obligations. See id. at 204 ("Debt provisions affected the procedures by which debt could be issued rather than imposing absolute limits on borrowing."). In other words, the Clause was not intended to stymie the government's ordinary operations, or to prevent it from allocating funds to meet its financial obligations. Rather, this historical gloss suggests that the framers intended for the Clause to ensure that the Legislature engage in the ultimate form of fiscal responsibility: that the State make good on its prior commitments before taking on new ones.

2. Prior Debt Limitation Clause case law supports construing the Clause to apply only to contract debt.

The vast majority of cases arising under the Debt Limitation Clause in New Jersey involve challenges to various legislative financing mechanisms aimed at financing specific projects with funding acquired through debt instruments, such as bonds. In surveying the New Jersey Supreme Court's prior decisions under the Debt Limitation Clause, it is notable that in all but two cases involving challenges to a statute under the Debt Limit Clause, the

Court has upheld the statute despite the Constitution's seemingly broad limitation on State debt. Lonegan I, supra, 174 N.J. at 475 (Stein, J., dissenting in part and concurring in part) (reviewing prior precedents). When faced with challenges based on the Debt Limitation Clause's restriction on debt, the Supreme Court has taken a somewhat flexible approach, narrowing the Clause's scope over time, in large part due to the changing role of government in modern society, and the practical considerations involved in identifying funding sources necessary for the efficient operation of State government. Indeed, requiring the Legislature to get the approval of the voters every time it seeks to fund government operations costing more than one percent of the annual budget is cumbersome in today's society, where "states are routinely involved in activities . . . that in the past were considered speculative but now are seen as essential and appropriate governmental functions." Lonegan II, supra, 176 N.J. at 14. Consequently, the New Jersey Supreme Court has held that the Debt Limitation Clause does not apply when an independent public corporate entity creates the debt at issue, and when the Legislature expresses an intent in a statute to provide future funding.

The largest group of New Jersey Supreme Court decisions construing the Debt Limitation Clause holds "that the constitutional provision does not apply to the creation of debt by

independent public corporate entities, e.g., the Turnpike Authority, Building Authority, or Educational Facilities Authority.” In re Loans of N.J. Prop. Liab. Ins. Guar. Ass’n, 124 N.J. 69, 75 (1991) [hereinafter N.J. PLIGA]; see, e.g., Lonegan II, supra, 176 N.J. at 10 (upholding the constitutionality of appropriations-backed debt issued by independent state agencies); Enourato v. N.J. Bldg. Auth., 90 N.J. 396 (1982) (holding that bonds issued by the New Jersey Building Authority for construction of facilities to be leased by the State did not violate the Debt Limitation Clause); N.J. Sports and Exposition Auth., supra, 61 N.J. at 1 (upholding debts issued by a corporate agency issued by the Legislature against a challenge under the Debt Limitation Clause); Holster v. Bd. of Trs., 59 N.J. 60 (1971) (holding that bonds of the Educational Facilities Authority do not create liabilities of the State); N.J. Tpk. Auth. v. Parsons, 3 N.J. 235 (1950) (holding that revenue bonds to finance construction of the New Jersey Turnpike did not violate the Debt Limitation Clause because the Turnpike Authority is an independent entity, and the bonds were to be paid from tolls and other revenue derived from the Turnpike). Although these cases are less relevant to the present dispute, which does not involve creation of an independent authority, the Court’s treatment of the Debt Limitation Clause through the progression of these cases is helpful in understanding

the Court's view about the Clause's scope, and its role in modern government.

The first case in which the Court upheld the constitutionality of revenue bonds to be undertaken by an independent authority despite the limitations of the Debt Clause is New Jersey Turnpike Authority, supra, 3 N.J. at 235. In that case, the Court set forth a two-pronged test under which debt would be upheld: debt undertaken by the Legislature would be approved (1) if the statute provided an independent funding mechanism to repay the amount of the debt, and (2) if the statute made it clear that the bonds were not secured by the faith and credit of the State. The case involved a challenge to the New Jersey Turnpike Authority Act, pursuant to which the Turnpike Authority was authorized to issue revenue bonds to finance construction of the New Jersey Turnpike. Id. at 238. The enabling legislation provided that the bonds would be "payable solely from [Turnpike] tolls and revenues" and would not "constitute a debt or liability of the State . . . or a pledge of the faith and credit of the State." Ibid. The Court upheld the Act based on that statutory language. Id. at 242. Because the Court relied both on the language establishing an independent revenue source to repay the bonds, and the language providing that the bonds would not be backed by the faith and credit of the State, the Court declined to decide whether the availability of a

dedicated revenue source, on its own, would pass muster under the Debt Limitation Clause. Id. at 246.

The two-pronged test set forth in New Jersey Turnpike Authority was extended to uphold a statute establishing the New Jersey Educational Facilities Authority in Clayton v. Kervick, 52 N.J. 138 (1968). The Educational Facilities Authority was an independent agency created to construct projects for participating educational institutions to be financed by bonds issued by the Authority. Id. at 142. The projects generally would be revenue-producing facilities, such as dormitories, which would be leased to the participating colleges in return for adequate rent that would cover the amortization of the bonds. Id. at 144. Notably, though, the statute itself did not explicitly provide that only the income derived from rent would be used to pay off the bond debt. Ibid.

In Holster, supra, 59 N.J. at 60, the Court departed from the two-pronged test set forth in New Jersey Turnpike Authority and extended in Clayton and upheld a bond issue that was amortized solely by legislative appropriations with no independent revenue source. Holster concerned the constitutionality of the County College Bond Act, which authorized county colleges to apply for and to receive State support for up to one-half of the cost of capital projects. Id. at 63. The Act set up a financing scheme under which the county where the college was located would issue

bonds, and the proceeds of the bonds would fund the State's share of the capital project, with the interest and principal of the bonds to be paid by legislative appropriations. Id. at 65. In upholding the Act, the Court stressed that, like the independent authorities established in New Jersey Turnpike Authority and Clayton, the counties issuing the bonds had the ultimate obligation for their repayment. Id. at 73. Therefore, when faced with a novel financing scheme in Holster, the Court weakened the two-pronged test set forth in New Jersey Turnpike Authority in order to uphold the creative funding approach proposed by the Legislature.

Similarly, in Enourato, supra, 90 N.J. at 396, the Court upheld the constitutionality of the New Jersey Building Authority Act. The Act established the New Jersey Building Authority to acquire land and build office facilities for state agencies and authorized the Authority to issue bonds not exceeding \$250 million to finance the Authority's activities. Id. at 398. The buildings constructed by the Authority would then be leased to the State, and at the expiration of the lease, title to the buildings would be conveyed to the State. Id. at 410; see also Enourato v. N.J. Bldg. Auth., 182 N.J. Super. 58, 69-70 (App. Div. 1981), aff'd o.b., 90 N.J. 396 (1982). The Court relied on its decision in Holster, stating that there was "[n]o relevant distinction . . . between the financing schemes upheld in those cases and that in

the New Jersey Building Authority Act," even though a factor critical to the decision in Holster was that the counties issued the bonds, and not the State. Enourato, supra, 90 N.J. at 410. Consequently, once again, faced with a novel funding scheme, the Court weakened its prior test even further to uphold a creative legislative proposal that would necessarily require the State itself to take on bonded debt.

This progression of cases shows that the Court's interpretation of the Debt Limitation Clause has remained flexible over time to permit various projects proposed by the Legislature, from construction of the New Jersey Turnpike to construction of buildings for State government offices, to proceed without offending the Debt Clause. Gradually, the Court's interpretation of the Debt Limitation Clause narrowed, so that by the time the Court upheld the Building Authority Act in Enourato, the Court backed away from its earlier insistence that repayment of loans be funded through an independent, non-State-derived funding source. Therefore, in these cases, the Court permitted legislative debt through an independent authority as a means of avoiding the Debt Limitation Clause's restriction on debt, even when there was no special fund to finance repayment of that debt, a factor that had previously been necessary under earlier applications of the Debt Limitation Clause.

In another group of cases arising under the Debt Limitation Clause, the Court showed increasing willingness to narrow the scope of the Clause in contexts other than challenges to legislation establishing an independent authority to take on contract debt. The evolution of these cases supports the proposition that the Debt Limitation Clause, which provides, "The Legislature shall not, in any manner, create in any fiscal year a debt or debts, liability or liabilities of the State," should not be read literally. N.J. Const. art. VIII, § 2, ¶ 3(a) (emphasis added). Broadly, the Court in these cases opines that "in any manner" does not mean, e.g., that the Legislature cannot provide a mechanism to pay for prior State commitments. In these cases, the Court held that "legislative expressions of intent to provide future funding do not create present debts of the State." N.J. PLIGA, supra, 124 N.J. at 76; see, e.g., Bulman v. McCrane, 64 N.J. 105 (1973) (holding that future rent installments to be paid out of current revenues did not constitute a present debt); State v. Lanza, 27 N.J. 516 (1958) (holding that a statute setting forth a formula by which the State would pay municipalities to replace property taxes lost due to condemnation for construction of a reservoir system did not create a debt), appeal dismissed, Lanza v. New Jersey, 358 U.S. 333, 79 S. Ct. 351, 3 L. Ed. 2d 350 (1959); City of Passaic, supra, 18 N.J. at 137 (upholding a pension statute providing for State contributions into the State pension funds).

In Bulman, supra, 64 N.J. at 107, the Court upheld a proposal by the State to enter into a long-term lease agreement on a building to be built by a developer on State land for the State's use as a records storage center and printing facility. At the end of the 25-year lease, title to the property would revert to the State. Ibid. The Court had previously rejected a similar payment scheme in McCutcheon v. State Building Authority, 13 N.J. 46 (1953), on the grounds that the plan resembled an installment contract, which created a debt, rather than a true lease. But, twenty years after McCutcheon, the Court in Bulman pointed to the progression of prior New Jersey Supreme Court case law interpreting the Debt Limitation Clause, including the flexible approach taken in Clayton, supra, 52 N.J. at 138, and in Holster, supra, 59 N.J. at 60. The Court noted that prior Debt Limitation Clause cases assessed "the scope of the evils sought to be abated by such clauses" and afforded a "degree of flexibility in methods of financing publicly needed facilities" to "modern legislatures and public officials where such methods do not seem to entail the conditions which begot the debt limitation provisions but may yet, on analytical scrutiny, be strongly argued in substance to offend the letter thereof." Bulman, supra, 64 N.J. at 111. With this approach in mind, the Court reviewed the terms of the lease agreement and concluded that it was "harmonious with the theory of a lease as opposed to a sale." Id. at 114. The Court stated that

the fact that the State would ultimately acquire title to the property after the lease term expired "represents no good reason for judicial assiduity in laying hold of the circumstance to destroy the transaction as an unconstitutional debt." Id. at 117. The Court concluded that under the lease agreement, "[t]he sole obligation of the State . . . is for future installments of rent" that "will presumably be paid out of current revenues as annually appropriated for the purpose." Id. at 117-18. Consequently, despite the fact that the lease agreement was a contract, binding the State to make future rent payments, the Court held that there was no present debt as defined by the Constitution since any payment on the lease was subject to legislative appropriation. Id. at 118.

Similarly, in N.J. PLIGA, supra, 124 N.J. at 60, the Court upheld an order issued by the State Department of Insurance pursuant to the Fair Automobile Insurance Reform Act of 1990, which required PLIGA to loan approximately \$160 million per year to the New Jersey Automobile Insurance Guaranty Fund. The Court explained that the statute did not set forth a fixed schedule for repayment, an independent means of paying the interest, or even the precise amount that the State would eventually repay to PLIGA. Id. at 75. Because repayment of the PLIGA loans depended "upon a number of contingencies," the Court held that the statute did not create a

debt of the State in violation of the Debt Limitation Clause. Id. at 77.

Somewhat curiously in light of the indulgence given to the State in these cases, defendants argue that this line of precedent invalidates any contractual right that Chapter 78 purported to create. According to defendants, the outcome in these cases is premised on the notion that any statute requiring the State to make a future payment is contingent on legislative appropriation. See Spina, supra, 41 N.J. at 399 (noting that a statute stating that municipalities "shall" contribute to a pension fund "was simply an expression of legislative policy which remained within the control of that and every subsequent Legislature"); City of Passaic, supra, 18 N.J. at 147 (stating that "[n]o debt has been created here, but rather present legislation merely provides that the State shall annually contribute to the fund"). Defendants argue that Chapter 78, in contrast, purports to bind the State into making future payments into the pension system, while the Debt Limitation Clause requires that any such payments can only be voluntary.

However, defendants' position fails to recognize that the State's pension payments under Chapter 78 are subject to a number of contingencies, a critical factor in placing the payments outside of the scope of the Debt Limitation Clause. See N.J. PLIGA, supra, 124 N.J. at 75 (holding that no debt was created where the State's

payment on PLIGA's loans depended on "a number of contingencies"). While this approach to the Debt Clause has not been well-developed in New Jersey, the court is persuaded by the experience of other states in applying the Debt Limitation Clause to legislation requiring payments into a state pension system to reduce the system's unfunded liability. See, e.g., Lonegan II, supra, 176 N.J. at 14 (citing to seven out-of-state cases in interpreting the New Jersey Debt Limitation Clause); N.J. Sports & Exposition Auth., supra, 61 N.J. at 15 (citing to fifteen out-of-state cases in construing the New Jersey Debt Limitation Clause). Other jurisdictions have found that legislative promises to pay pension benefits or to fund public pension systems do not constitute debts in violation of a state constitution's debt clause. See Cnty. of Orange v. Ass'n of Orange Cnty. Deputy Sheriffs, 192 Cal. App. 4th 21 (Cal. Ct. App. 2011) (holding that a promise to increase retirement benefits did not constitute a "debt or liability" because, at the time of promising to pay the unfunded liability, "'unfunded liability' is simply a projection made by actuaries based upon assumptions regarding future events," and therefore, "[n]o basis for any legally enforceable obligation arises until the events occur"); Columbia Cnty. v. Bd. of Trs., 17 Wis. 2d 310, 329 (Wis. 1962) (reasoning that "[t]he obligation for past service credits is not ascertainable for any period of time except for the convenience of making payments during a given year" and

that “[t]he best that can be said is that the obligation is to pay some amount which varies”).

Similarly, here the State’s contribution is an actuarially-determined amount “based on an annual valuation of the assets and liabilities of the system or fund.” N.J.S.A. 43:3C-14 (emphasis added). The UAAL represents the excess of the current actuarial accrued liability for both active and retired members over the actuarial value of current assets of the fund. No aspect of the UAAL can be pre-determined: the current actuarial liability depends on the number of active members paying into the system, which varies, while the number of retired members placing demands on the system also varies. Moreover, the UAAL adjusts based on the actuarial value of current assets of the fund, which value goes up and down reflecting the return on investments based on market performance. Therefore, while the State can make projections of its required UAAL contribution based on actuarial assumptions, the precise amount of the contribution will depend on a number of contingencies. For that reason, Chapter 78’s contractual obligation does not bind future legislatures in contradiction to the Debt Limitation Clause.

In addition to the contingent nature of the State’s payments into the pension fund, the court is persuaded in applying the Clause in this case by the New Jersey Supreme Court’s continued efforts to harmonize the Debt Limitation Clause with modern fiscal

practice. In the past, when faced with challenges to legislative spending mechanisms, the Court has afforded a "degree of flexibility" to those schemes due to the public's interest in having an effective State government. Bulman, supra, 64 N.J. at 111. The extent of the flexibility the Court should afford to legislative spending was the subject of debate among the Justices in the recent Lonegan cases, where the Court upheld the Legislature's ability to issue appropriations-backed debt despite the Debt Limitation Clause's restriction on the State's acquisition of debt. Lonegan II, supra, 176 N.J. at 14; Lonegan I, supra, 174 N.J. at 475. The Lonegan cases reflect the Court's most recent view of the Debt Limitation Clause's scope and impact on modern fiscal policy.

The Lonegan plaintiffs challenged a group of statutes "authorizing the issuance of appropriations-backed debt through independent state agencies" that were designed to fund various capital projects. Lonegan II, supra, 176 N.J. at 10. Plaintiffs argued that the bonds were unconstitutional: in particular, they asserted that the "subject to appropriation" qualification, which is included in all of the State's contracts to avoid the Debt Limitation Clause, was meaningless because the State cannot, as a practical matter, default on its bonds without incurring a significant and highly untenable negative impact on its credit rating. Id. at 10-11.

The Court upheld the Legislature's ability to issue appropriations-backed debt, observing that since the Clause's adoption, methods of financing debt and the role of the state have both changed dramatically. The Court explained that, "The variety of financing mechanisms employed in both the private and the public sectors today were unheard of when the Debt Limitation Clause was made a part of our Constitution." Id. at 14. In addition, states are now "routinely involved in activities such as road and railway construction and expansion, as well as other public works projects, that in the past were considered speculative but now are seen as essential and appropriate government functions." Ibid. This language addressed the concerns of the framers of the Clause back in the 1840s. As a result, the Court observed, "[T]he variety of functions assumed by the government . . ., and the sophisticated means now used to finance those functions, make it difficult if not impossible to differentiate among acceptable and unacceptable types of twenty-first century appropriations-backed debt under a nineteenth-century paradigm." Id. at 15. The Court opined that, "the Debt Limitation Clause may no longer be the most relevant contemporary standard for determining whether the issuance of additional State debt is economically sound.'" Id. at 20 (quoting Lonegan I, supra, 174 N.J. at 468 (Stein, J., concurring in part and dissenting in part)). This holding applied specifically to the use of bonds to fund public projects. Consequently, the Court

declined to adopt a strict interpretation of the Debt Limitation Clause that would have hampered progress on important State projects.

The majority's flexible approach to the Debt Limitation Clause was met with opposition from three dissenting Justices, who argued for a broad reading of the Clause that would require voter approval for the issuance of bonds, repayment of which is unsupported by independent revenues, by any State entity. Id. at 22 (Long, Verniero, and Zazzali, JJ., dissenting). Much like the State's proposed approach here, according to the dissent's view in Lonegan II, "the phrase 'in any manner' constitutes a broad umbrella . . . cover[ing] any legislative enactment that binds the state, either by design or by indirect result, to the payment of incurred debt out of general revenues." Id. at 19 (majority opinion). But, relevant to the present dispute, the dissenting Justices explained that they would exclude from their expansive reading of the Debt Limitation Clause "labor agreements, leases, and any other arrangement or transaction that does not require the State's contractual borrowing of funds." Id. at 24 (Long, Verneiro, and Zazzali, JJ., dissenting). Therefore, even under the generous reading of the Debt Limitation Clause promoted by the dissenting Justices in Lonegan II, the State's required payments into the pension system would not be barred by the Clause's restriction on debt.

The majority declined to adopt the dissent's approach to the Debt Limitation Clause because the Justices joining the majority opinion found no "principled basis" for the dissent to make exemptions from its interpretation of the Clause for labor agreements, leases, and other transactions not requiring the State to borrow funds under a contract. Id. at 19 (majority opinion). The majority reasoned, "[I]n certain of those transactions debt costs are included and the State is bound for a period of years." Ibid. Consequently, although the majority rejected the dissent's approach, the rejection was not due to disagreement with the dissent's view that transactions not requiring the State to borrow funds under a contract fall outside of the scope of the Debt Limitation Clause. Ibid. Rather, the majority appeared concerned that the examples given by the dissent of contracts that should be exempt from the Clause actually could entail "debt costs," e.g., interest payments, and thus, did not provide a clear rule capable of consistent application.

This exchange between the majority and dissenting Justices is admittedly somewhat cryptic. This line of analysis was likely not developed further and clarified because the issue of payments for normal government operations was not before the Court in Lonegan II. Nonetheless, as the Court's most recent pronouncement on the scope of the Debt Limitation Clause, this court views this exchange as relevant to the current dispute. Notably, the pension payments

at issue in this case do not include "debt costs," such as interest payments. Indeed, Chapter 78 provides for no borrowing, no loans, and no issuance of bonds. Cf. Spadoro v. Whitman, 150 N.J. 2, 9-10 (1997) (Handler, J., concurring in part and dissenting in part) (although the Court found the dispute moot, Justice Handler authored an opinion disapproving of a Bond Act under the Debt Clause that created an independent State agency to issue bonds for the purpose of paying the \$3.2 billion of accrued unfunded liability of the pension systems on the grounds that the Act did not provide an independent source of revenue to make payments on the bonds and because the bonds did not have a "governmental purpose[] distinct from the regularly recurring operations of the State," such as major capital improvements). Therefore, under the most recent New Jersey Supreme Court commentary on the Debt Limitation Clause in Lonegan II, it appears that payments such as the State's contributions to the pension system as set forth in Chapter 78 would not fall within the Clause's prohibitions because no "debt costs" are involved. The Court's interpretation of the Debt Limitation Clause in Lonegan II represents an effort to give the Clause's language meaning without placing a stranglehold on modern government. While not definitive of the dispute before this court, the Supreme Court's willingness to find a contemporary, workable interpretation of the Clause to accommodate fiscal realities in the 21st century signals the kind of approach that

this court will follow to resolve the State's Debt Limitation Clause argument in this case.

3. The plain language of the Debt Limitation Clause supports the Court's decision to apply the Clause only to expenditures with "debt costs."

The court now turns to the language of the Clause, set forth in its entirety:

The Legislature shall not, in any manner, create in any fiscal year a debt or debts, liability or liabilities of the State, which together with any previous debts or liabilities shall exceed at any time one per centum of the total amount appropriated by the general appropriation law for that fiscal year, unless the same shall be authorized by a law for some single object or work distinctly specified therein. Regardless of any limitation relating to taxation in this Constitution, such law shall provide the ways and means, exclusive of loans, to pay the interest of such debt or liability as it falls due, and also to pay and discharge the principal thereof within thirty-five years from the time it is contracted; and the law shall not be repealed until such debt or liability and the interest thereon are fully paid and discharged. Except as hereinafter provided, no such law shall take effect until it shall have been submitted to the people at a general election and approved by a majority of the legally qualified voters of the State voting thereon.

[N.J. Const. art. VIII, § 2, ¶ 3(a) (emphasis added).]

The plain text of the Debt Limitation Clause restricts the Legislature's ability to take out large loans or to issue bonds

exceeding one percent of total annual appropriations without the consent of the voters. The language clearly covers borrowing with significant, long-term obligations to pay back principal and interest. The Clause explicitly places restrictions on laws authorizing "some single object" (e.g., a project or some other public work) by requiring that legislation authorizing such a public work also provide an independent source of monies to pay the "interest of such debt or liability" as well as the "principal." Therefore, the Clause itself--when read in full--limits its definition of "debts" and "liabilities" to situations where the Legislature seeks to borrow funds in any manner and commit to loan instruments, which have a principal balance and accumulate interest, to pay for a legislative initiative. Consequently, based on how the Clause refers to "debts" or "liabilities" as having both interest and principal, it is difficult to see how the Clause could be understood to apply broadly to any State expenditure undertaken for the operation of government, which does not require the State to use contract debt. Indeed, the interpretation of the State would require frequent approval from the voters for routine, recurring and perpetuating expenses. Surely this is an unworkable process that was not contemplated by the framers of the constitutional language. Moreover, this interpretation of the Clause is supported by the history of its adoption, discussed above.

Defendants argue in favor of a sweeping reading of the Debt Limitation Clause. Defendants point out that liability has been read in the context of the Debt Limitation Clause as "including almost every character of hazard or responsibility, absolute, contingent or likely." Behnke, supra, 13 N.J. at 28. Defendants argue that the court should give expansive meaning to the definition of "liability" and find that the repayment terms set forth in Chapter 78 violate the Debt Limitation Clause--despite the clear contractual language put in the statute to assure State contributions to the fiscally troubled funds.

Such a reading of the term would expand the scope of the Debt Limitation Clause beyond the meaning expressed by its plain language when viewed in the context of the entire Clause. When interpreting the text of a constitutional provision, "its essential character must ever be kept in mind." Id. at 25. Furthermore, the "language [of our Constitution] speaks for itself." Vreeland v. Byrne, 72 N.J. 292, 302 (1977). It is presumed that the words within the Constitution were "carefully measured and weighed to convey a certain and definite meaning." Behnke, supra, 13 N.J. at 24; see also State v. Apportionment Comm'n, 125 N.J. 375, 382 (1991). Here, the "essential character" of the Debt Limitation Clause is to limit the Legislature's authority to take on debts or liabilities, requiring the continual payment of interest and principal into the future.

Notably, it is settled in New Jersey that a "limitation upon the exercise of the legislative function must be clear and imperative" and should be "defined by the words of the instrument . . . and not by some supposed underlying spirit that is not given tangible expression." Behnke, supra, 13 N.J. at 25; see also State v. Baldinotti, 127 N.J.L. 46, 49 (Sup. Ct. 1941) ("That which the legislature may not do, because it is prohibited by the Constitution, must be definite and precisely stated and may not be broadened or extended by implication or by reading into the limitation itself something that is not clearly set forth therein."); State v. Murzda, 116 N.J.L. 219, 223 (E. & A. 1936). Taking the words of the Debt Limitation Clause at face value, the court concludes that in referring to the payment of the "interest" and the "principal" of any "debt" or "liability" that is undertaken by the Legislature, the intention of the Clause is to restrict the Legislature from taking out loans, with interest, or issuing bonds requiring periodic payments to bondholders, to fund public projects or other broad initiatives, such as Green Acres acquisitions to preserve open space. See, e.g., N.J.S.A. 13:8A-1-13:8A-13 (setting forth the procedures for the use of voter-approved funds to be used for the acquisition of property for recreation and conservation purposes). The Clause simply should not be read to restrict the Legislature's ability to make expenditures for routine operations necessary for the efficient

operation of the State government. To use it in this fashion would do violence to the spirit and scope of the Clause drafted by the framers. Therefore, given the Clause's reference to payments on "debts" or "liabilities" involving "interest" and "principal," the court finds that the State's broad interpretation of the Debt Limitation Clause is a "forced or unnatural construction," which should be avoided. Behnke, supra, 13 N.J. at 25.

Under this reading of the Debt Limitation Clause, the court concludes that the payments set forth in Chapter 78 are not "debts" or "liabilities" within the meaning of the Constitution. Courts in New Jersey have consistently viewed pension payments as a form of "deferred compensation" that an employee earns for prior service. Uricoli v. Bd. of Trs. Police & Firemen's Ret. Sys., 91 N.J. 62, 71 (1982); see also Charles C. Widdis, P.E., L.S. v. Pub. Emp. Ret. Sys., 238 N.J. Super. 70, 77 (App. Div. 1990) ("Deferred compensation benefits have been earned by an employee and are no longer considered a gratuity."); In re Hess, 422 N.J. Super. 27, 35 (App. Div. 2011) ("Pension statutes should be liberally construed . . . because they represent deferred compensation for a government employee's service."). No party has suggested, for example, that the Legislature must submit the State's total salary payments or pension payments to retirees to the voters for approval pursuant to the Debt Limitation Clause. There simply is no reason not to treat UAAL payments in the same way. Indeed, the UAAL is

not even listed on the balance sheets of pension funds as a "liability" in the accounting sense. See Cnty. of Orange v. Ass'n of Orange Cnty. Deputy Sheriffs, 192 Cal. App. 4th 21, 39 (Cal. Ct. App. 2011) (explaining that the UAAL is not reported on the balance sheet of the pension system as a liability). The only reason that the State's payments pursuant to Chapter 78 might be considered State "debt" is because the pension system has been severely underfunded in the past, making the State's contributions past-due. Therefore, in enacting Chapter 78, the State was not creating a new debt, nor was it borrowing money, but it was instead guaranteeing that the State would pay down its pre-existing obligations related to normal government operations through creation of a payment plan. See Bulman, supra, 64 N.J. at 105 (holding that installment payments, to be paid out of current revenues, towards the purchase of a building for use by the State was not a debt falling under the Debt Limitation Clause); Lanza, supra, 27 N.J. at 516 (upholding a statute which set forth a formula by which State would pay municipalities year-by-year to replace property taxes lost due to condemnation for construction of a reservoir system against a Debt Limitation Clause challenge). So while Chapter 78 provided contractual rights to State employees, the contract did not include debt costs, provided an essential obligation of government, and did not run afoul of the strictures of the Debt Clause.

The court is also guided by the experience of other states in interpreting the meaning of the Debt Limitation Clause. For example, in Rochlin v. State, 540 P.2d 643, 647 (1975), the Arizona Supreme Court upheld the constitutionality of the state's retirement system on the grounds that the term "debt" as used in Arizona's constitution, applies only "when the State or a political subdivision borrows money." See also Village of Chefnak v. Hooper Bay Constr. Co., 758 P.2d 1266, 1270 (Alaska 1988) (stating that the Alaska Constitution's restrictions on contracting debt only apply "where a political subdivision has endeavored to borrow money"); State ex rel. Wittler v. Yelle, 399 P.2d 319, 324 (Wash. 1965) (defining the term "debt" in the Washington Constitution as referring to "borrowed money"); Columbia Cnty. v. Bd. of Trs., 17 Wis. 2d 310, 331 (Wis. 1962) (upholding a pension statute that required counties to make contributions despite a clause in the Wisconsin Constitution prohibiting counties from "incurring any indebtedness" because indebtedness under the constitution means debt that is "created by contract or express agreement"). As noted above, New Jersey courts frequently look to the precedents of sister states when interpreting parallel constitutional provisions, especially in cases of first impression such as this one. See, e.g., Lonegan II, supra, 176 N.J. at 14 (citing to seven out-of-state cases in interpreting the New Jersey Debt Limitation Clause); N.J. Sports & Exposition Auth., supra, 61 N.J. at 15

(citing to fifteen out-of-state cases in construing the New Jersey Debt Limitation Clause).

Based on an extensive review of the New Jersey Supreme Court's Debt Limitation Clause jurisprudence, this court concludes that the Debt Limitation Clause should not be given the far-reaching reading suggested by the State executive defendants. The court reaches this conclusion in light of the New Jersey Supreme Court's persistent efforts to reconcile the Clause with modern fiscal policy.

Here, the court must also reconcile the Clause with a potentially conflicting constitutional provision--the Contract Clause. When faced with a potential conflict between two sections of the Constitution, "the court must harmonize them" so that "one part is not allowed to defeat another, if by any reasonable construction the two can be made to stand together." State ex rel. Kenny v. Hudspeth, 59 N.J.L. 504 (E. & A. 1896) (internal quotations omitted); see also, by analogy In re Adoption, supra, 163 N.J. at 182 (stating that "it is our obligation to make every effort to harmonize separate statutes, even if they are in apparent conflict, insofar as we are able to do so"). The State's broad interpretation of the Debt Limitation Clause would necessarily eliminate plaintiffs' rights under the Contract Clause. The State argues that the court should elevate the Debt Limitation Clause over plaintiffs' rights under the Contract Clause because "[n]ot

all constitutional provisions are of equal majesty.” Vreeland, supra, 72 N.J. at 304. Yet, there is no support for defendants’ position that the Debt Limitation Clause should be treated as more important than the rights guaranteed under the Contract Clause, especially in the present context where the legislative intent and invocation of constitutional protections is so clear, and the Supreme Court has treated the Debt Limitation Clause flexibly to uphold most of the legislative initiatives challenged under the Clause. The court therefore rejects the State’s position and instead seeks to harmonize the two clauses.

Under this court’s holding, the Debt Limitation Clause retains a place in our State’s Constitution and applies only when legislative policies require the State to take on contract, or bonded, debt that accrues interest. Interpreting the Debt Limitation Clause in this way allows the court to harmonize the Clause with the Legislature’s unmistakable intent in Chapter 78 to cloak plaintiffs’ rights to the State’s pension contributions in constitutional language. The State’s more expansive interpretation would necessarily read plaintiffs’ rights under the Contract Clause out of the Constitution and out of Chapter 78.

The State’s argument that the Debt Limitation Clause should prevail over the Contract Clause also relies on the oft-cited phrase that one Legislature not be able to incur debts “which subsequent Legislatures would be obliged to pay” Camden,

supra, 82 N.J. at 152. However, the context in which the Court made that statement is distinguishable from the context here. Camden involved a challenge in which several municipalities and counties argued that the Legislature failed to appropriate State funds in violation of certain statutes that purported to provide funds for local government use. Id. at 141. The statutes at issue there did not include an unmistakable contractual right to funding, which had been enacted by the Legislature and signed by the Governor. In fact, the Camden Court noted that the statutes relevant to that case did not confer "substantive rights" on any citizens because "[a]ny benefits which may accrue to governmental subdivisions under these statutes would affect their residents only indirectly." Id. at 148. Chapter 78, in contrast, contains an explicit constitutionally-protected contractual right to benefits that directly and deliberately accrues to members of the various pension funds in an effort to correct decades of underfunding. Therefore, the State's payments into the pension system go to the operation of State government and not to other entities to ensure that money will be available well into the future to pay retired public employees the amount of deferred compensation that they are owed for work already completed. Moreover, the Debt Limitation Clause discussion in Camden occurred over twenty years before the Supreme Court examined the evolution of the Clause's role in Lonegan II. In short, Camden does not

provide the State with the legal authority to renege on its promises to make payments pursuant to a legislatively-created contract, especially where public employees have an undisputed contractual right to receive benefits in retirement and where current employees are meeting their statutory obligation of making increased contributions to the pension funds. Camden simply cannot be read to elevate the Debt Limitation Clause over the Contract Clause and the clear legislative intent in Chapter 78, especially where a harmonizing interpretation is available.

The State executive defendants also point to the recent Appellate Division opinions in NJEA, supra, 412 N.J. Super. at 192, and Berg, supra, 436 N.J. Super. at 220, in support of their argument that Chapter 78's contractual obligation runs afoul of the Debt Limitation Clause. The Appellate Division in NJEA rejected plaintiffs' Contract Clause argument because the statutes at that time failed to "clearly and unambiguously evince a legislative intent" to extend contractual rights to actuarial funding of the public pension systems. NJEA, supra, 412 N.J. Super. at 217. The court noted that the pension statutes expressly preserve the Legislature's power of revision under N.J.S.A. 43:3C-9.5(e), which the Appellate Division found was "contrary to any intent to confer private contractual rights to a systematic or particular level of State funding in the future." Id. at 215. In further explaining its reliance on that provision, the court also

noted that interpreting the pension statutes to “forever remove[] legislative power of amendment . . . would run afoul of our State Constitution’s Appropriations Clause . . . and Debt Limitation Clause” Id. at 216.

Defendants argue that this court is bound by that language, and therefore must hold that Chapter 78’s contractual obligation violates the Debt Limitation Clause. However, the Appellate Division did not consider whether enforcement of a contractual right to State pension payments would involve acquisition of a debt or a liability within the meaning of the Debt Limitation Clause. The central issue in NJEA was whether the Legislature had unmistakably intended to create a contractual right to actuarial pension funding. Id. at 207 (“[T]he responsibility for creating public contracts is the Legislature’s . . . [a] commitment of that kind should be so plainly expressed that one cannot doubt the individual legislator understood and intended it.” (quoting Spina, supra, 41 N.J. at 405)). Although the Appellate Division found no clear legislative intent to confer a contract right in NJEA, the court did not hold that no such contract right could ever be created. In explaining that there was no clear legislative intent to create a contract, the Appellate Division noted that, “absent specific legislative permission, a governing body cannot divest its successors of legislative power.” Id. at 214-15. Therefore, the Appellate Division recognized in NJEA that the

Legislature could create such a contract right, so long as there is "specific legislative permission," i.e., an explicit statement of intent to create a contractual right.

Subsequent legislation supersedes the Appellate Division's holding in NJEA and establishes an explicit contract right to pension contributions by the State. As the court discussed above, after the Appellate Division decided NJEA, the Legislature enacted Chapter 78, which expressly provides for "a contractual right to the annual required contribution amount being made by the member's employer or by any other public entity." N.J.S.A. 43:3C-9.5(c)(2). In fact, in deciding whether TPAF members had a contractual right to pension payments, the Appellate Division specifically pointed to the legislative history of N.J.S.A. 43:3C-9.5 and noted that while members of the New Jersey Teachers' Association had urged the Legislature to adopt an alternative proposal providing for a "contractual property right to a secure and financially sound retirement system," the Legislature did not adopt that language. NJEA, supra, 412 N.J. Super. at 217 n.15 ("The legislative history of N.J.S.A. 43:3C-9.5 is highly instructive."). If the statute had explicitly provided for a contractual right, as it does now, the Appellate Division's analysis would have been different.

In Berg, supra, 436 N.J. Super. at 246, the Appellate Division held that the Debt Limitation and Appropriations Clauses did not bar plaintiffs' contractual claim to COLAs. The court reasoned

that "at the current time, there are sufficient funds in the pension systems to pay COLAs to current retirees" and, unlike the State's UAAL contribution at issue here, payment of COLAs is not "contingent on the making of a current appropriation." Ibid. The Appellate Division noted in passing that, "[i]t may be argued that if the pension funds are not restored to fiscal health, at some point the money will run out and an appropriation will be needed to restore the funds' solvency." Ibid. The Appellate Division further warned that a suit seeking an appropriation to restore the fiscal health of the pension funds "would implicate both the Appropriations Clause and the Debt Limitation Clause." Ibid. (citing NJEA, supra, 412 N.J. Super. at 216).

However, the Appellate Division's comments regarding the Debt Limitation and Appropriations Clauses in both NJEA, supra, 412 N.J. Super. at 216, and in Berg, supra, 436 N.J. Super. at 246, were not necessary to the holdings of those cases. The primary issue in NJEA was whether plaintiffs had a contract right, not whether such a right could be enforced despite the Debt Limitation Clause. And the Appellate Division in Berg freely admitted that the issue of whether a contract right requiring legislative appropriation could be enforced was "a potential eventuality" not raised by the COLA dispute. Berg, supra, 436 N.J. Super. at 246. Consequently, the courts' comments are dicta, and are not binding

on this court. See Marshak v. Weser, 390 N.J. Super. 387, 394 (App. Div. 2007).

Defendants argue that the Debt Limitation language in NJEA is binding, even if the language is considered dicta, and cite Lippman v. Ethicon, Inc., 432 N.J. Super. 378, 407 n.11 (App. Div. 2013), certif. granted, 217 N.J. 292 (2014), in support of their argument. However, the Appellate Division's observation in Lippman that "lower courts should consider themselves bound by a higher court's dicta" was in reference to lower courts being bound by New Jersey Supreme Court dicta. See ibid. (citing State v. Dabas, 215 N.J. 114, 136 (2013)); see also State v. Allen, 212 N.J. Super. 276, 280 (Law Div. 1986) (holding that trial courts are bound by Appellate Division decisions but that Appellate Division dicta, by contrast, "must be given respectful and conscientious consideration in view of its recognized high competence as well as its position in the judicial hierarchy"), overruled on other grounds by, State v. Tischio, 107 N.J. 504, 509 (1987).

The trial court is certainly bound by final pronouncements of the Appellate Division. However, where, as here, the Appellate Division's unexplained pronouncements were not central to the final holding in either NJEA or in Berg, and there is no evidence that the issue was briefed by the parties or fully considered by those courts, this court does not consider itself bound by the Appellate Division's passing statements. See State v.

Breitweiser, 373 N.J. Super. 271, 282-83 (App. Div. 2004) (explaining that "as an intermediate appellate court, we consider ourselves bound by carefully considered dictum from the Supreme Court" (emphasis added)), certif. denied, 182 N.J. 628 (2005).

Notably, there is a distinction to be made between substantive and incidental dictum. See Black's Law Dictionary 1102 (8th ed. 2004) (defining obiter as "[i]ncidentally; in passing" and obiter dictum as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential"). New Jersey courts have noted that "to evaluate the dictum . . . '[m]uch depends on the character of the dictum. Mere obiter may be entitled to little weight, while a carefully considered statement . . . though technically dictum, must carry great weight, and may even . . . be regarded as conclusive.'" Barreiro v. Morais, 318 N.J. Super. 461, 468 (App. Div. 1999) (quoting 1 Charles A. Wright, The Law of Federal Courts § 58 at 374 (4th ed. 1983)); see also State v. Sherwood, 139 N.J. Super. 201, 205 (App. Div. 1976) (declining to follow obiter dictum), certif. denied, 70 N.J. 517 (1976); Mesce v. Auto. Ass'n of N.J., 8 N.J. Super. 130, 137 (App. Div. 1950) (noting the distinction between judicial dictum and obiter dictum). The Appellate Division's comments in NJEA and in Berg regarding the Debt Limitation and Appropriations Clauses were made in passing, with little or no analysis. Therefore, these comments are obiter

dicta and entitled to little weight, especially in light of the fact that the precise constitutional issue raised here is one of first impression in New Jersey and was not before either of those two courts.

Even if this court were to conclude that the Debt Limitation Clause invalidated Chapter 78's contractual obligation, the statute does not automatically become unenforceable. The State assumes that the effect of finding Chapter 78 unconstitutional is to void it ab initio. See Gen. Assembly, supra, 90 N.J. at 391 ("The Legislature cannot pass an act that allows it to violate the Constitution."). But, when a contract is voided on grounds of public policy, a court may still enforce the contract if equity demands such a result. See In re Resorts Int'l, Inc., 181 F.3d 505, 512-13 (3d Cir. 1999) (recognizing an equitable exception to the general rule of non-enforcement of illegal contracts in New Jersey), cert. denied, 528 U.S. 1021, 170 S. Ct. 531, 145 L. Ed. 2d 411 (1999); Marx v. Jaffee, 92 N.J. Super. 143, 146 (App. Div. 1966) (per curiam) ("[M]erely to call a contract illegal is not to state the effects of such illegality."), certif. denied, 48 N.J. 140 (1966); 15-89 Corbin on Contracts § 89.20 (2014). In deciding whether a party is entitled to equitable relief under an illegal agreement, a court weighs the interest in enforcement against the public policy in favor of not enforcing the agreement. Restatement (Second) of Contracts § 178 (1981). Factors to consider in

conducting a balancing of interests include: the parties' expectations, any forfeiture that would result without enforcement, and the strength of the policy against enforcement.

Ibid.

Here, the State executive defendants ask this court to invalidate a deal struck between the State government and its employees in direct reaction to the Appellate Division's conclusion in NJEA that the pension statutes did not confer upon employees a contractual right to contributions to pay down the UAAL by the State. That legislation was enacted by the Legislature and signed by the Governor. There is no clear prior case law suggesting that the State had a valid constitutional argument that the Debt Limitation Clause would invalidate that agreement.

The State's claim that Chapter 78 is unconstitutional is weakened further in light of the fact that until FY 2014, the State had followed through on its promise to make its scheduled payments as required under the statute. The contributions of employees continued to rise annually under the statute, and those employees had every reason to rely on the State's upholding its end of the bargain. The State was well aware of the estimated amounts it would be required to contribute to the funds under the payment structure set forth in Chapter 78 when the statute was enacted. Indeed, as counsel for amicus curiae pointed out in oral argument, even the City of Detroit continued to make payments into the city

employees' pension systems despite dire financial distress, with the result that the health of Detroit's pension system while the city went through bankruptcy was better than the fiscal condition of New Jersey's pension funds. This State's employees deserve no less.

Not enforcing the statute's contractual right also results in the funds forfeiting a \$1.5 billion contribution from the State, further weakening the fiscal health of the pension system and depriving the funds of much needed investment returns on that money. The State claims that the court must invalidate Chapter 78 to protect the public. But it is difficult to see how that goal would be advanced by a ruling that Chapter 78 is unconstitutional due to the Debt Limitation Clause--a result that would further weaken the fiscal soundness of the funds and would shore up a decision that has already led to a downgrade in the State's credit rating.

Therefore, for all of these reasons--the historical circumstances surrounding adoption of the Debt Limitation Clause, the New Jersey Supreme Court's evolving efforts to interpret the language of the Clause in response to contemporary fiscal concerns, and the language of the Debt Limitation Clause itself, the court holds that the Debt Limitation Clause should not be read to obstruct the enforcement of an explicit contractual right that was

conferred upon the State's public employees by the Legislature and approved by the Governor.

C. The New Jersey Constitution's Appropriation Clause does not bar this court from granting relief to plaintiffs.

The State executive defendants argue that Chapter 78's binding contractual right runs afoul of the New Jersey Constitution's Appropriations Clause. The Appropriations Clause mandates:

No money shall be drawn from the State treasury but for appropriations made by law. All moneys for the support of the State government and for all other State purposes as far as can be ascertained or reasonably foreseen, shall be provided for in one general appropriation law covering one and the same fiscal year No general appropriation law or other law appropriating money for any State purpose shall be enacted if the appropriation contained therein, together with all prior appropriations made for the same fiscal period, shall exceed the total amount of revenue on hand and anticipated which will be available to meet such appropriations during such fiscal period, as certified by the Governor.

[N.J. Const. art. VIII, § 2, ¶ 2.]

Defendants raise two arguments with respect to the Appropriations Clause. First, defendants argue that Chapter 78 impermissibly compels an appropriation of funds in violation of the Appropriation Clause's requirement that all State expenditures for each fiscal year be combined into a single Appropriations Act, and in violation of the requirement that the State's budget for each fiscal year be

balanced. Second, defendants argue that the judiciary cannot enforce Chapter 78's payment provisions without an appropriation, which the judiciary cannot order. The court will address each argument in turn.

1. The Appropriations Clause does not bar judicial relief concerning constitutional obligations.

Defendants' argument that the Appropriations Clause bars enforcement of Chapter 78's contractual right to State pension payments is based primarily on Camden v. Byrne, supra, 82 N.J. at 133. As the court discussed above, Camden involved several statutes calling for the disbursement of certain State tax revenues for local government use. Id. at 145. Numerous municipalities sued the Governor and the Legislature for failure to appropriate funds in accordance with those statutes. Id. at 142. The Court held that it could not enforce the directive in those statutes to appropriate funds because to do so would run afoul of the "constitutional requirement of a unitary appropriation law covering but a single fiscal year." Id. at 145. "Even though certain of these statutes purport to 'dedicate' state revenues for a particular purpose," the Court continued, "the Legislature has the inherent power to disregard prior fiscal enactments." Id. at 147.

There is no doubt that the State's budget process, requiring a single Appropriations Act, is firmly rooted in the New Jersey

Constitution. As the Court has stated, the requirement that no appropriation can be mandated outside of the general appropriation law is "the center beam of the State's fiscal structure" in order to "eliminate uncoordinated spending on the state level and to overcome the inefficiency, confusion and abuses which had surrounded the practice of using separate and different budgets, appropriations and fiscal years." Id. at 146-47. But Camden did not involve a conflict between the Appropriation Clause's repugnancy for statutory grants of money and a substantive right supported by another provision in the Federal and State Constitutions. See id. at 148 ("The constitutional fulcrum is not shifted by attempts to characterize the several statutes as creating 'substantive rights'" because "[a]ny benefits which may accrue to governmental subdivisions under these statutes would affect their residents only indirectly.").

Seizing on that point, the Supreme Court has since limited Camden's holding where a lack of appropriations would suspend a substantive constitutional obligation of the State. See Abbott v. Burke, 206 N.J. 332, 342 (2011) [hereinafter Abbott XXI]. In Abbott XXI, the Court addressed a long-standing battle over the lack of adequate appropriations for school aid, which over time had the effect of severely underfunding poor urban school districts. Id. at 340. The Court rejected the argument that the Appropriations Clause barred judicial enforcement of the School

Funding Reform Act because the Legislature had not appropriated the funds necessary to fully fund the statute's aid formula. Id. at 363-64. The Court held, "[T]he Appropriations Clause creates no bar to judicial enforcement when . . . the shortfall in appropriations purports to operate to suspend not a statutory right, but rather a constitutional obligation," "where the harm being visited is . . . a real, substantial, and consequential blow" to that constitutional right, and "where the formula the State has underfunded was one created by the State itself." Id. at 364. Therefore, the Supreme Court has found that the Appropriations Clause does not vest the other branches with unbridled power to "modify or suspend statutes that raise some expectation of funding" when such action affects rights with constitutional protection. Id. at 362.

Defendants argue that plaintiffs' reliance on Abbott XXI is misplaced because the schoolchildren plaintiffs in Abbott XXI had a claim based on the affirmative constitutional mandate that the State of New Jersey provide a "thorough and efficient system of free public schools." N.J. Const. art. VIII, § 4, ¶ 1. Defendants posit that there is no similar constitutional provision for pensions comparable to the "thorough and efficient" Education Clause. Further, defendants argue, plaintiffs' efforts to cloak their breach of contract claim in the Constitution would allow any individual with a State contract to bring suit under the Contract

Clause and circumvent the carefully crafted appropriations process set forth in the State Constitution.

While it is true that the Supreme Court has not to date imbued the Contract Clause with the same capacity to trump the Appropriations Clause's requirements as it accorded to the "thorough and efficient" Education Clause at issue in Abbott XXI, the holding in Abbott XXI demonstrates that the Appropriations Clause is not as insurmountable an obstacle to relief as defendants contend. Indeed, there are some parallels between the school funding and the pension funding cases. Both reflect decades of underfunding with impacts on thousands of people. And both implicate funding requirements with constitutional underpinnings established in unmistakable terms by the Legislature itself that were not fully honored when budget concerns arose. Insofar as pensions contributions are concerned, the court cannot ignore the clear and unmistakable language that the Legislature chose to use in Chapter 78 to confer a contractual right, supported by the constitution, upon plaintiffs. Defendants claim that Chapter 78 is a "mere statute that purports to dedicate funds." But Chapter 78 provides in no uncertain terms that each member of the public pension systems "shall have a contractual right to the annual required contribution amount being made by the member's employer or by any other public entity" and that an employer's failure to make the required contributions constitutes an "impairment of the

contractual right." N.J.S.A. 43:3C-9.5(c)(2). By using the term "impairment," the Legislature cloaked the contractual right set forth in Chapter 78 in overt constitutional garb, as an action arising under the Contract Clause is an "impairment action."

This court also rejects defendants' assertion that finding a constitutional right here would allow "any disgruntled person with a State contract to bring suit under the Contracts Clause." Def. Reply Br., at 79. As the State itself points out, nearly all State contracts contain a specific provision stating that any payment on the contract is "subject to appropriations," language that provides protection for the State. There is no such language in N.J.S.A. 43:3C-9.5(c)(2). Furthermore, most parties to State contracts would presumably not be able to rely on a parallel statute explicitly setting forth a contractual right to State funding and defining the failure to make the payments required by the statute as "an impairment." Ibid. Because the statutory language here is so unique and unprecedented, defendants' concern that finding a constitutional right in this case will give "any disgruntled person with a State contract" the opportunity to circumvent the appropriations process by rushing to the courts is unfounded.

While the Abbott XXI Court directed an appropriation, this court is sensitive to the fact that there has been no other application of that directive. Therefore, if plaintiffs

demonstrate their right to relief under the Contract Clause, the court prefers to proceed by issuing a declaratory judgment following the New Jersey Supreme Court's approach in P, T & L Construction Co. v. Commissioner, Department of Transportation, 55 N.J. 341, 346 (1970), in which the Court referred the matter back to the Legislature and the Governor to take action after declaring the plaintiff's right to relief. Such an approach also responds to many of the State's arguments under the Appropriations Clause.

2. The Appropriations Clause does not prevent the court from adjudicating whether the State has failed to meet its constitutional obligations.

The State executive defendants also argue that the court cannot enforce the payment provisions of Chapter 78, because such action would require the court to order an appropriation in contravention to the Appropriations Clause's requirement that money can only be drawn from the State Treasury by an appropriation, which the judiciary cannot order. See Commc'n Workers of Am. v. Florio, 130 N.J. 439, 451 (1992) ("We reaffirm our commitment to that fundamental constitutional principle" that "the power and authority to appropriate funds lie solely and exclusively with the legislative branch.") (quoting Camden, supra, 82 N.J. at 148)). But the proposition that the court cannot issue an appropriation does not prevent the court from adjudicating whether the State's failure to make its full payment into the State pension system for FY 2015 violates the constitutionally-protected

guarantee conferred by the Legislature on State employees that the government will not impair their contractual rights. The New Jersey Supreme Court has held in the context of a contract dispute arising after the Governor executed a line-item veto of an appropriation that a court "ought not to withhold its hand" from adjudicating such a claim. P, T & L Constr. Co., supra, 55 N.J. at 346 ("[W]e think it is time to settle the larger question whether the courts should be open to a person who holds a contract with the State even though satisfaction of a favorable judgment would depend wholly upon the willingness of the Legislature to accept the judgment and provide for payment."). Consequently, the appropriate action here is for the court to decide whether the plaintiff has a right to satisfaction of the contract and, if so, to give the other branches an opportunity to act in accordance with the court's decree. Ibid. As the Court explained, "[T]he judiciary ought not to withhold its hand on a mere assumption that its coordinate branches would want it that way." Ibid.

The court concludes that the Appropriations Act does not prohibit the creation of Chapter 78's contractual right to State payments into the pension system. Although unusual and unprecedented, the Legislature's choice of words in Chapter 78 gives the contractual right to State pension payments unmistakable constitutional underpinnings. As a result, this court must adjudicate plaintiffs' Contract Clause claim and, if upheld, must

set forth what relief is due to plaintiffs. If relief is provided, the court will refer the matter to the Legislature and the Governor to determine how best to satisfy the judgment. That is precisely the relief requested by plaintiffs in their complaints. In fact, they ask this court to declare that the State's failure to make payments as directed by Chapter 78 constitutes an impairment of contract, and then to refer the matter to the Legislature for that body, working in concert with the Governor, to determine how best to meet the State's obligations to its employees. The court will not pass on the wisdom of past initiatives to provide the needed level of funding, but leaves those issues to the other branches of government. Consequently, the Appropriations Clause--which, like the Debt Limitation Clause, was inserted into the New Jersey Constitution to promote fiscal responsibility--should not be used as a tool to prevent the court from affording any relief to plaintiffs, although it constrains at this point the nature of the relief that can be afforded to plaintiffs under our constitutional jurisprudence.

D. Chapter 78's contractual right to State pension payments does not impermissibly weaken the Governor's constitutional veto power.

The State executive defendants argue that a judicial ruling that plaintiffs have an enforceable, contractual right to State pension payments would impermissibly derogate the Governor's

exercise of his constitutional line-item veto power. In support of this argument, defendants rely on many arguments that are similar to those dismissed by the court above. Defendants rely, in part, on Camden, in which the Court recognized that the Governor's "statutory authority to propose the State budget and his constitutional power to exercise a selective veto over legislative appropriations reflects his significant responsibilities over the State's fiscal affairs and are an important aspect of the centralization of state finances essential to efficient modern government operations." Camden, supra, 82 N.J. at 150. Based on the Governor's important role in the budget-making process, the Court held that "the judiciary is without authority to compel either the Legislature to make a specific appropriation or the Governor to recommend or approve one." Ibid. Similarly, in Karcher v. Kean, 97 N.J. 483, 487 (1984), another case cited by defendants, the Court considered the Governor's use of the line-item veto power to delete or reduce certain appropriations in the FY 1983 Appropriations Act. The Court upheld the Governor's use of the line-item veto after considerable scrutiny of each particular gubernatorial decision, noting that the Constitution's veto power gives the Governor the ability "to make selective reductions or eliminations of appropriations and discrete elements or parts of included appropriations that he deems

excessive, unwise, improper, unlawful, or unconstitutional.” Id.
at 508.

But plaintiffs do not challenge the fact of the Governor’s veto power. Rather, plaintiffs challenge the use of the power in this instance because it encroaches on their constitutionally-protected contract right to State pension payments. The Supreme Court did not conclude in Camden or in Karcher that the courts lack authority to review the Governor’s veto power. In fact, the extensive consideration and scrutiny the Court gave to the Governor’s veto decisions in Karcher, supra, 97 N.J. at 487, suggests the opposite is true: it is precisely the role of the courts to adjudicate cases involving credible challenges to the actions of State officials.

Moreover, neither Camden nor Karcher involved instances where the Governor exercised a line-item veto over an appropriation with explicit constitutional underpinnings. For that reason, the outcome in both cases--that of upholding the Governor’s exercise of the line-item veto--can be distinguished. Defendants deny that the right to pension payments in Chapter 78 is constitutionally guaranteed, asserting instead that the right to a pension payment is “merely statutorily-created.” However, such an argument effectively reads the Contract Clause out of the Constitution. As the court has stated above, the unmistakable language of Chapter 78 demonstrates that the right to pension payments has

constitutional protection. And, while the Governor has the authority to exercise his veto power broadly, the Governor also has the constitutional responsibility to "take care that the laws be faithfully executed." N.J. Const., art. V, § 1, ¶ 11. That responsibility undoubtedly includes protecting the statutorily-established contractual rights of New Jersey citizens where the Legislature has intentionally and overtly imbued those rights with constitutional authority. In sum, there is no support for defendants' broad assertion that the judiciary lacks authority to "reverse, override, or constrain the Governor's exercise of his constitutional line-item veto power." Def. Br., at 31. Such a conclusion would place the Governor's actions beyond the law. The court simply cannot conclude that it has no authority to review the Governor's veto decisions for constitutionality. Consequently, the court holds that adjudication of the present dispute does not impermissibly constrain the Governor's constitutional veto power. The State's motion to dismiss plaintiffs' complaint for failure to state a claim is therefore denied.

IV. PLAINTIFFS' FEDERAL CONSTITUTIONAL CLAIMS ARE NOT BARRED.

A. The doctrine of sovereign immunity does not bar plaintiffs' Federal Constitutional claims.

The State executive defendants argue that sovereign immunity bars plaintiffs' claims under the Federal Constitution. The

Eleventh Amendment provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. Amend. XI. Although the express terms of this Amendment apply only to suits by citizens of another state, the Eleventh Amendment has been extended to bar suits against the state by one of its own citizens. See, e.g., In re Ayers, 123 U.S. 443, 504, 8 S. Ct. 164, 182, 31 L. Ed. 216, 229 (1887) (holding that “where the contract is between the individual and the State, no action will lie against the State,” and any action against “officers of the State, the object of which is to enforce its [the contract’s] specific performance” are “equally within the prohibition of the Constitution”). Pertinent to the instant action, the Supreme Court has held that the United States Congress may not abrogate a state’s sovereign immunity power, which includes actions arising under 42 U.S.C. § 1983, to enforce a constitutional right. See Howlett v. Rose, 496 U.S. 356, 365, 110 S. Ct. 2430, 2437, 110 L. Ed. 2d 332, 346 (1990) (citing Will v. Mich. Dep’t of State Police, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989)) (holding that “the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under § 1983 in either federal court or state court”). Despite the broad reach of the doctrine of sovereign immunity,

there are several exceptions to the doctrine. For example, the doctrine does not apply if a plaintiff seeks relief from state laws that violate the Federal Constitution. Ex parte Young, 209 U.S. 123, 155-56, 28 S. Ct. 441, 452 52 L. Ed. 714 (1908). Sovereign immunity also does not apply if the State has consented to suit. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238, 105 S. Ct. 3142, 3145, 87 L. Ed. 2d 171, 177 (1985); Allen v. Fauver, 167 N.J. 69, 74 (2001).

The court agrees with defendants that plaintiffs' claims here do not fall under the Ex parte Young exception. This court and the United States District Court for the District of New Jersey previously held in a similar suit brought by the NJEA, challenging Chapter 78's suspension of the COLAs and seeking enforcement of plaintiffs' contracts with the State, that these types of claims essentially seek specific performance of their contracts with the State. N.J. Educ. Ass'n v. State, No. L-771-12 (Law Div. June 13, 2013) (slip op. at 18) ("[P]laintiffs' federal constitutional claims in essence seek specific performance of their alleged contracts with the State."); N.J. Educ. Ass'n v. New Jersey, No. 11-5024 (D.N.J. Mar. 5, 2012) (slip op. at 8) ("Therefore, the relief requested by Plaintiffs is, in both substance and practical effect, a request for specific performance of the alleged pre-Chapter 78 contract existing between Plaintiffs and the State of New Jersey."). As these two decisions explain, actions seeking

specific performance of a contract do not fall under Ex parte Young's exception from the doctrine of sovereign immunity, largely because they seek retroactive, rather than prospective, relief. Ibid.

However, Chapter 78 contains a broad waiver of sovereign immunity for actions seeking enforcement of the contractual right contained in the statute, and that waiver was not relevant to or addressed in the decisions dismissing NJEA's prior lawsuit. In the sub-section establishing plaintiffs' contractual right to pension payments, Chapter 78 provides:

The Superior Court, Law Division shall have jurisdiction over any action brought by a member of any system or fund or any board of trustees to enforce the contractual right set forth in this subsection. The state and other public employers shall submit to the jurisdiction of the Superior Court, Law Division and shall not assert sovereign immunity in such an action.

[N.J.S.A. 43:3C-9.5(c)(2) (emphasis added).]

The plain language of the statute evinces the Legislature's intent to abrogate sovereign immunity for all claims to enforce the contractual right to pension payments. Nonetheless, defendants argue that by vesting jurisdiction of those claims in the State courts, the statute's waiver only anticipates abrogation of sovereign immunity for claims based on state law.

There is no textual or legal basis to support defendants' argument. While it is true that any "waiver of sovereign immunity

will be strictly construed, in terms of its scope, in favor of the sovereign," Sossamon v. Texas, 563 U.S. ____, 131 S. Ct. 1651, 1658, 179 L. Ed. 2d 700, 709 (2011), defendants ask the court to read into the statute a requirement that does not exist in its plain language. It is well-established that "state as well as federal courts have jurisdiction over suits brought pursuant to 42 U.S.C. § 1983." Haywood v. Drown, 556 U.S. 729, 731, 129 S. Ct. 2108, 2110, 173 L. Ed. 2d 920, 925 (2009); see also Maine v. Thiboutot, 448 U.S. 1, 3 n.1, 100 S. Ct. 2502, 2503 n.1, 65 L. Ed. 2d 555, 558 n.1 (1980). When the Legislature chose the statutory language consenting to such a broad waiver of sovereign immunity, it would have been aware that 42 U.S.C. § 1983 provides the jurisdictional basis for an action alleging impairment of the Federal Contract Clause pursuant to Chapter 78. This court therefore cannot conclude solely on the basis that Chapter 78 vests jurisdiction for impairment claims in the state courts that the waiver of sovereign immunity extends only to state law claims.

In their initial brief, defendants cited several federal cases in support of this argument. See Sossamon, supra, 563 U.S. at ____, 131 S. Ct. at 1658, 179 L. Ed. 2d at 709; Lombardo v. Pennsylvania, 540 F.3d 190, 193 (3d Cir. 2008); Myers v. Texas, 410 F.3d 236, 252-53 (5th Cir. 2005), cert. denied, 550 U.S. 917, 127 S. Ct. 2126, 167 L. Ed. 2d 862 (2007). However, these cases are inapposite here, as plaintiffs correctly point out. Each of

these cases addressed the issue of whether a state had waived sovereign immunity when it sought removal of an action involving state claims to federal court. See, e.g., Lombardo, supra, 540 F.3d at 193. None of these cases addressed a broad statutory waiver of sovereign immunity, which vested jurisdiction in the state courts, such as the one at issue here. Therefore, in light of the broad waiver of sovereign immunity in Chapter 78, and the lack of a basis in the text or in case law to support the proposition that vesting jurisdiction in the state courts necessarily limits the scope of a sovereign immunity waiver to state claims, the court concludes that the sovereign immunity doctrine does not bar plaintiffs' claims arising under the Federal Constitution.

B. Plaintiffs assert a Federal impairment claim.

Plaintiffs assert that the Federal Contract Clause provides additional support for their constitutional claims. Article I, section 10, cl. 1 of the United States Constitution provides, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." The Federal and State rights under the respective Contract Clauses are coextensive, and New Jersey courts have often looked to federal case law to guide decisions regarding the applicability and scope of the State's Contract Clause. See Fid. Union Trust Co. v. N.J. Highway Auth., 85 N.J. 277, 299, appeal

dismissed, 454 U.S. 804, 102 S. Ct. 76, 70 L. Ed. 2d 73 (1981); In re Pub. Serv. Elec. & Gas Co. Rate Unbundling, 330 N.J. Super. 65, 92 (App. Div. 2000), aff'd o.b., 167 N.J. 377 (2001), cert. denied, 534 U.S. 813, 122 S. Ct. 37, 151 L. Ed. 2d 11 (2001). Notably, both the Federal and the State Contract Clauses speak of a violation of the Clause's guarantee as an "impair[ment]." Consequently, when the Legislature chose to use the term "impairment" in Chapter 78, it did not intend to limit plaintiffs' constitutional protections to the New Jersey State Constitution.

Nonetheless, defendants argue, based on a line of federal cases, that plaintiffs have not asserted a federally cognizable impairment claim under federal law. Federal courts have held that a State may breach a contract without impairing a citizen's rights under the Contract Clause. See St. Paul Gas Light Co. v. St. Paul, 181 U.S. 142, 148-49, 21 S. Ct. 575, 577, 45 L. Ed. 788, 792 (1901); Brown v. Colo., 106 U.S. 95, 98, 1 S. Ct. 175, 177, 27 L. Ed. 132, 133-34 (1882) ("[T]he most that can be contended for is that the State has refused to do what the Territory agreed should be done. This may violate the contract, but it does not in any way impair its obligation."). The reason that a State may violate a contract without necessarily triggering an action under the Federal Constitution's Contract Clause relates to the essential nature of a contract: "A contract creates alternative obligations" under which a party must either perform or pay damages. TM Park

Ave. Assocs. v. Pataki, 214 F.3d 344, 349 (2d Cir. 2000); see also E&E Hauling v. Forest Pres. Dist. of Du Page Cnty., Ill., 613 F.2d 675, 679 (7th Cir. 1980). Like any private party to a contract, then, the State may repudiate a contract, as long as it is willing to pay the damages resulting from the breach. Ibid. Based on this reasoning, federal courts have established that “[t]he distinction between a breach of contract and an impairment of contract ‘depends on the availability of a remedy in damages.’” TM Park Ave. Assocs., supra, 214 F.3d at 349; see also Cherry v. Mayor & Baltimore City, 762 F.3d 366, 371 (4th Cir. 2014), cert. denied, 135 S. Ct. 768, 190 L. Ed. 2d 641 (2014).

The court need not wade into the technical aspects of the case law cited by defendants in support of their claim that plaintiffs have asserted a “mere breach” of contract rather than an impairment in light of the fact that the New Jersey Constitution also provides protection against an impairment of plaintiffs’ contract right. However, the court notes that in none of the cases cited by defendants were the courts faced with unmistakable legislative intent to give a state’s contractual obligation constitutional underpinnings. Here, Chapter 78 provides that the State’s failure to make the required contributions in a timely manner constitutes an “impairment.” N.J.S.A. 43:3C-9.5(c)(2). Moreover, there are numerous federal cases involving impairment actions against a state in which the federal court did not dismiss

the action on these grounds. See, e.g., Brown v. New York, 975 F. Supp. 2d 209, 233-41 (N.D.N.Y. 2013) (holding that the plaintiffs' impairment action under the Federal Contract Clause would survive a motion to dismiss); Roberts v. New York, 911 F. Supp. 2d 149, 171-82 (N.D.N.Y. 2012) (denying defendants' motion to dismiss plaintiffs' impairment action arising under federal law); Donohue v. Paterson, 715 F. Supp. 2d 306, 317-25 (N.D.N.Y. 2010) (concluding on an application for a stay that plaintiffs had a reasonable likelihood of success on the merits of their Federal impairment action); Allen v. Minnesota, 867 F. Supp. 853, 863-865 (D. Minn. 1994) (finding that the State impaired plaintiffs' contract under federal law). Consequently, although plaintiffs' Federal Contract Clause claims are not necessary to the outcome of this case, the court concludes that plaintiffs have properly asserted claims arising under the Federal Constitution, which support their parallel claims arising under the New Jersey Constitution.

V. THE STATE'S FAILURE TO APPROPRIATE MONEY TO FUND PUBLIC PENSIONS SUBSTANTIALLY IMPAIRS PLAINTIFFS' CONTRACTUAL RIGHTS.

Having concluded that neither the Debt Limitation Clause nor the Appropriations Clause bars the contractual right contained in Chapter 78, and that the statute's contractual right also does not impinge upon the Governor's constitutional veto power, the court

will now consider whether the State's failure to make the full ARC payment to the pension funds for FY 2015 constitutes a substantial impairment of plaintiffs' constitutionally-protected contract rights. Plaintiffs have filed a motion for summary judgment, and the court will review the materials submitted by the parties regarding the impairment analysis under the appropriate standard of review.

The court may grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-29 (1995) (quoting R. 4:46-2). The determination as to "whether there exists a genuine issue with respect to a material fact" requires the court "to consider whether the competent evidential materials presented, when viewed in the light most favorable to a non-moving party . . . are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 523. A party opposing summary judgment cannot simply rely on denials, accusations, or upon the fact that discovery has yet to be taken. The non-movant has a duty to present facts that raise a genuine issue of material fact. See Brill, supra, 142 N.J. at 530; Spiotta v. William H. Wilson, Inc.,

72 N.J. Super. 572, 581 (App. Div. 1962), certif. denied, 37 N.J. 229 (1962). Moreover, it is "well settled that '[b]are conclusions in the pleadings without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment.'" Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999) (quoting U.S. Pipe & Foundry Co. v. Am. Arbitration Ass'n, 67 N.J. Super. 384, 399-400 (App. Div. 1961)).

The New Jersey Constitution prohibits the impairment of contractual obligations, providing that, "[t]he Legislature shall not pass any . . . law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made." N.J. Const. art. IV, § 7, ¶ 3; see also U.S. Const. art. I, § 10, cl. 1. The federal and State rights are coextensive, and New Jersey courts have often looked to federal case law for guidance in adjudicating issues involving the applicability and scope of the State's Contract Clause. See Fid. Union Trust Co., supra, 85 N.J. at 299, appeal dismissed, 454 U.S. 804, 102 S. Ct. 76, 70 L. Ed. 2d 73 (1981); In re Pub. Serv. Elec. & Gas Company's Rate Unbundling, Stranded Costs & Restructured Filings, 330 N.J. Super. 65, 92 (App. Div. 2000), aff'd o.b., 167 N.J. 377 (2001). The clause protects against legislation impairing private contracts and also protects against the impairment of contracts entered into by the State. See Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244, 98 S. Ct. 2716, 2722, 57 L.

Ed. 2d 727, 736 (1978); U.S. Trust Co., supra, 431 U.S. at 17, 97 S. Ct. at 1515, 52 L. Ed. 2d at 106.

While recognizing the high value placed by our State and Federal Constitutions on the protection of contracts as a basis of ordered society, courts have held that the constitutional prohibition on the impairment of contracts is not absolute. See U.S. Trust Co., supra, 431 U.S. at 25, 97 S. Ct. at 1519, 52 L. Ed. 2d at 111; NJEA, supra, 412 N.J. Super. at 205-12. A plaintiff raising a Contract Clause claim in relation to alleged impairment of a contract by a state must first show the existence of a contract and that state action has resulted in an impairment of that contract. To succeed on a contract clause claim against a state, plaintiffs must further satisfy a two-step analysis to show that the state's abrogation of the contract is unconstitutional. The threshold issue is whether the state's action has created a substantial impairment of a contractual relationship. To answer that question, courts must determine: "whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." NJEA, supra, 412 N.J. Super. at 205 (quoting Gen. Motors Corp. v. Romein, 503 U.S. 181, 186, 112 S. Ct. 1105, 1109, 117 L. Ed. 2d 328, 337 (1992)). If a plaintiff establishes those three elements, courts proceed to the second step of the analysis, which reviews the State's conduct under an intermediate scrutiny

standard. A state's impairment of a contract is unconstitutional if it lacks a "significant and legitimate public purpose," is "based upon unreasonable conditions," and is "unrelated to appropriate governmental objectives." NJEA, supra, 412 N.J. Super. at 205 n.9 (quoting State Farm, supra, 124 N.J. at 64).

A. The State's failure to make a full ARC payment for FY 2015 constitutes a substantial impairment of plaintiffs' contractual rights.

For many of the same reasons discussed in the court's June 25, 2014, order denying preliminary injunctive and mandamus relief, the court concludes that Chapter 78 confers on plaintiffs a contractual right to the amortization payment for FY 2015 and that the State's failure to make the full payment constituted a substantial impairment of plaintiffs' contractual rights. As the court discussed above, the statute very clearly evinces Legislative intent to create a contract relationship between public employees and their employers. Thus, the remaining issue is whether the State's failure to make the required contributions impairs that contractual obligation and whether that impairment is "substantial."

The failure of the State to provide the funds to pay the unfunded liability portion of the annual State pension contribution for FY 2015 constitutes a facial violation of the funding requirements of the public pension statute. Chapter 78

requires that the State make an annual required contribution, consisting of the "annual normal contribution plus the annual unfunded accrued liability contribution." N.J.S.A. 43:3C-9.5(c)(1). Further, as discussed above, the statute gives each member of the pension funds "a contractual right to the annual required contribution amount." N.J.S.A. 43:3C-9.5(c)(2). Consequently, in failing to provide the requisite unfunded liability portion of its annual contribution, the State has not met the statutory requirement, a fact that is borne out by the numbers. For FY 2015, the State will fall approximately \$1.57 billion short of its \$2.25 billion ARC payment. It is clear that the State's non-payment impairs plaintiffs' contractual rights.

The final issue is whether that impairment is substantial. To determine whether there has been a "substantial impairment," courts look to "the legitimate expectations of the contracting parties," N.J. Retail Merchs. Ass'n v. Sidamon-Eristoff, 669 F.3d 374, 386 (3d Cir. 2012), cert. denied, 133 S. Ct. 528, 184 L. Ed. 2d 339 (2012), and whether the State action "effectively reduced the value of substantive contract rights." U.S. Trust Co., supra, 431 U.S. at 19 n.17, 97 S. Ct. at 1516 n.17, 52 L. Ed. 2d at 108 n.17; see also Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 411, 103 S. Ct. 697, 704, 74 L. Ed. 2d 569, 580 (1983) ("Total destruction of contractual expectations is not necessary for a finding of substantial impairment."). Chapter 78

expressly grants public employees the right to the State's payment of the annual required contribution on a timely basis, to "help ensure that the retirement system is securely funded and that the retirement benefits to which the members are entitled by statute and in consideration for their public service and in compensation for their work will be paid upon retirement." N.J.S.A. 43:3C-9.5(c)(2). For FY 2015, the total required ARC payment is \$2.25 billion, according to State officials. Defendants have chosen to eliminate \$1.57 billion--representing the unfunded accrued liability portion--from that payment. As plaintiffs have a contractual right to the required annual payment of the ARC, and defendants have reduced that payment by nearly seventy percent, the court concludes that the impairment of plaintiffs' contractual rights is "substantial." The amount withheld--\$1.57 billion--is substantial by any measure.

Defendants argue that because the State will make a full, 7/7th payment of the normal contribution for FY 2015, there has been no substantial impairment of plaintiffs' contractual rights, even though the unfunded liability portion of the payment has been completely eliminated. But to determine whether an impairment is substantial, courts look to the legitimate expectations of the parties. A statutory pronouncement cloaked in constitutional protections set forth a mechanism to determine the pension fund payment for FY 2015. While the State made less than its full

payment, the employees' contributions into the pension funds continued to rise. Therefore, plaintiffs had the reasonable expectation that the State would hold up its end of the bargain and make the entire ARC payment. Because the State will now make nearly seventy percent less than the statutorily-required \$2.25 billion payment, plaintiffs' expectations have been substantially impaired, even though the State is making a full normal contribution payment. In short, the aim of the legislation is not being met. The goal of Chapter 78 was to reduce the unfunded liability to put the State pension system on sounder financial footing. The legislation defined what was reasonable, and the current underfunding falls far short of that goal. The State's failure to pay \$1.57 billion is a substantial impairment both in terms of the absolute magnitude of the failure and as a percentage of the total payment that was expected under the statute.

The State also claims that the health of the pension system has not been negatively affected by the Governor's decision not to make the State's full payment for FY 2015. Defendants' assertions on this point are based largely on the certification of John D. Megariotis, Deputy Director of Finance, Division of Pensions and Benefits. Mr. Megariotis certifies that if the State returns to its regular annual payment schedule including the full ARC payments in the future, then the deferral of the 4/7ths UAAL payment this year "will not materially impact the health or stability of the

pension system.” Megariotis Cert., Def. App., at 518. Defendants’ argument about the health of the fund is premised on the assumption that the State will return to its full payment schedule in FY 2016. Unsurprisingly, the Governor does not make any promises that the budget for FY 2016 will include a full payment for the pension systems. The court is unwilling to rely on what has now become a succession of empty promises. Defendants’ assertions about the health of the fund also do not take into account the fact that the State’s failure to make its payments in a timely fashion results in the loss of interest on the investment of money that otherwise should have been put into the pension funds. The continued failure to make timely payments therefore causes the unfunded liability to increase exponentially. As the court noted above, for this reason, the City of Detroit’s pension systems for its employees are in better health than New Jersey’s pension systems because Detroit continued to make contributions despite being faced with bankruptcy. Chapter 78 sets forth clearly the expectations of the parties, and the sheer magnitude of the State’s failure to hold up its end of the bargain constitutes a substantial impairment of those expectations.

B. Scrutinizing the Impairment.

The constitutional prohibition against State impairment of contractual obligations does not absolutely restrict the power of

the State to protect the general welfare. See Contributors to the Pa. Hosp. v. City of Phila., 245 U.S. 20, 23, 38 S. Ct. 35, 36, 62 L. Ed. 124, 127 (1917); Beer Co. v. Mass., 97 U.S. 25, 32, 24 L. Ed. 989, 992 (1878). The State retains the sovereign authority to impair the obligation of contracts "to protect the lives, health, morals, comfort and general welfare of the people," which is "paramount to any rights under contracts between individuals." Manigault v. Springs, 199 U.S. 473, 480, 26 S. Ct. 127, 130, 50 L. Ed. 274, 278 (1905). Courts have consistently held that this principle applies to public contracts as well as private contracts. See U.S. Trust Co., supra, 431 U.S. at 21-22, 97 S. Ct. at 1519, 52 L. Ed. 2d 92, 111-12 ("As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose"); United Auto., Aerospace, Agric. Implement Workers of Am. Int'l Union v. Fortunato, 633 F.3d 37, 41 (1st Cir. 2011); Buffalo Teachers Fed'n v. Tobe, 464 F.3d 362, 369 (2d Cir. 2006), cert. denied, 550 U.S. 918, 127 S. Ct. 2133, 167 L. Ed. 2d 864 (2007). This court relied on these principles in upholding Executive Order No. 156, which directed non-payment of the FY 2014 pension contribution due to an unexpected shortfall in revenues occurring late in the fiscal year. See Burgos v. State, No. MER-L-1267-14, initial decision (June 25, 2014).

For the State's failure to pay a portion of the State's ARC payment for FY 2015 to withstand constitutional scrutiny under the Contract Clause, it must be justified by a "significant and legitimate purpose . . . such as the remedying of a broad and general social or economic problem," and its scope must be "both reasonable and necessary to serve the admittedly important purposes claimed by the State." Energy Reserves Grp., supra, 459 U.S. at 411-12, 103 S. Ct. at 704-05, 74 L. Ed. 2d at 581 (citing U.S. Trust Co., supra, 431 U.S. at 22, 97 S. Ct. at 1517, 52 L. Ed. 2d at 109). When scrutinizing the State's justifications for impairing private contractual obligations, several factors may inform the court's consideration of the State's action, including: "whether the Act (1) was an emergency measure; (2) was one to protect a basic societal interest, rather than particular individuals; (3) was tailored appropriately to its purpose; (4) imposed reasonable conditions; and (5) was limited to the duration of the emergency." Energy Reserves Grp., supra, 459 U.S. at 410 n.11, 103 S. Ct. at 704 n.11, 74 L. Ed. 2d at 580 n.11 (citing Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 434, 54 S. Ct. 231, 238, 78 L. Ed. 413, 426 (1934)). Further, after a State binds itself in a contract, "a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives." U.S. Trust Co., supra, 431 U.S. at 31, 97 S. Ct. at 1522, 52 L. Ed. 2d at 115. Consequently, while it is

admittedly not the court's role to pass judgment on acts of legislative discretion, once a State has conferred a contractual right, as is the case here, the court can scrutinize how, in this case, defendants came to the decision to impair plaintiffs' contracts.

Although a state's asserted justifications for impairing private contractual obligations are typically given significant deference by the courts, less deference is accorded to a state in regard to public contracts because a state's self-interest is at stake. See, e.g., United Auto., Aerospace, Agric. Implement Workers, supra, 633 F.3d at 41; Condell v. Bress, 983 F.2d 415, 418 (2d Cir. 1993), cert. denied, 507 U.S. 1032, 113 S. Ct. 1849, 123 L. Ed. 2d 473 (1993). As the Supreme Court explained, a State cannot abandon its financial obligations, for "[i]f a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." U.S. Trust Co., supra, 431 U.S. at 26, 97 S. Ct. at 1519, 52 L. Ed. 2d at 112; see also Energy Reserves Grp., supra, 459 U.S. at 412 n.14, 103 S. Ct. at 705 n.14, 74 L. Ed. 2d at 581 n.14 ("When a State itself enters into a contract, it cannot simply walk away from its financial obligations."); Murray v. Charleston, 96 U.S. 432, 445, 24 L. Ed. 760, 763 (1877) ("A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity").

Here, the State asserts a valid public interest. State Treasurer Andrew Sidamon-Eristoff testified that tax revenues for April 2014 fell short of budgeted projections, resulting in a "very serious two-year challenge" for the State's budget. The projected budget shortfall is a staggering \$1.7 billion. The court cannot deny the importance of maintaining a balanced budget: the requirement is enshrined in the State Constitution. See N.J. Const. art. VIII, § 2, ¶ 2 (mandating that the Governor certify that appropriations will not exceed revenues on hand or anticipated); Camden, supra, 82 N.J. at 146 (describing the Appropriations Clause as the "center beam of the State's fiscal structure").

But while the State has asserted a valid public interest in addressing the State's budget deficit, defendants do not adequately explain the reasonableness of the Governor's actions in vetoing the full ARC payment for FY 2015. While Mr. Sidamon-Eristoff stated that it is "beyond the capacity of our economy right now" to make the full ARC payment for FY 2015, he did not address the constitutionally-based imperative underlying pension payments or the damage to the State's bond ratings from failure to make these payments. Defendants also point to Governor Christie's veto message of the FY 2015 Budget Bill as justification for his veto action. But Governor Christie's veto message simply attacks the Legislature's proposed form of funding. Governor Christie

wrote, "Simply stated, I do not accept the premise that we can tax our way to prosperity in this matter," before launching into a four-page litany of reasons why he did not accept the Legislature's funding mechanisms for the FY 2015 Appropriations Act. Neither Mr. Sidamon-Eristoff's testimony, nor Governor Christie's veto message contain any explanation of why the Governor chose to make the particular cuts he did and targeted State employees' contractual rights in the process.

The emergency that existed at the end of FY 2014 also does not justify the Governor's line-item veto for FY 2015. When the court considered plaintiffs' application for emergent injunctive relief for payments to the pension systems for FY 2014, the court concluded that the State executive defendants had justified their impairment of plaintiffs' contractual rights due to the unanticipated revenue shortfall, discovered only at the end of April of 2014, and the budget emergency that ensued. At the time the staggering shortfall of over \$1 billion was discovered, a little over two months remained in FY 2014. The Director of the Division of Budget and Accounting certified to the court that the deficit was so large that it could not be remedied even if the State government were to be shut down for the remainder of FY 2014. This emergent situation required the Governor to take drastic action for the sake of the State's fiscal health. Here, the State became aware of the alleged budget shortfall for FY 2015 over a

year before the end of the fiscal year. Consequently, there was enough time for the Governor to return to the Legislature to take action to address the shortfall, even if such action required raising revenue. While the State Legislature adopted funding sources that, even if the Governor's estimates are correct, could have provided a much larger ARC payment that would have required a different analysis under Contract Clause principles, the Governor recommended no effective substitutes in his veto message or at any time since.

The Governor also had legal support for his decision not to fund the state pensions for FY 2014 that does not exist for FY 2015. In FY 2014, the Disaster Control Act, N.J.S.A. 52:27B-26, provided the Governor with statutory support for issuing E.O. 156. Under the Disaster Control Act, the Governor may issue executive orders to "provide for the health, safety and welfare of the people of the State of New Jersey and to aid in the prevention of damage to and the destruction of property during any emergency." N.J.S.A. App. A:9-33, -45. The court found that the statute allowed the Governor to act when there was a "substantial likelihood" of harm "within the immediate future." Worthington v. Fauver, 88 N.J. 183, 197 (1982) (emphasis added). Several federal cases in other jurisdictions also supported the State's contention that a fiscal crisis constituted a sufficient emergency to impinge upon a statutorily-granted contractual right to pension benefits. See

United Auto., Aerospace, Agric. Implement Workers, supra, 633 F.3d at 46-47 (finding a "basic societal interest" in addressing a budget deficit); Buffalo Teachers Fed'n, supra, 464 F.3d at 368-69 (upholding legislative enactment that impaired unions' labor contract because the city was "suffering at the time, and continues to suffer, a fiscal crisis."); Baltimore Teachers Union v. Mayor of Baltimore, 6 F.3d 1012 (4th Cir. 1993) ("[E]nsuring the financial integrity of the City is a significant public purpose."), cert. denied, 510 U.S. 1141, 114 S. Ct. 1127, 127 L. Ed. 2d 435 (1994). Given the short timeframe available to resolve the drastic budget deficit for FY 2014, and the constitutional, statutory, and case law in support the Governor's actions, the court concluded that there was sufficient justification to deny plaintiffs' application for injunctive and declaratory relief for FY 2014.

Although the federal cases relied upon by the State to justify the Governor's emergency action to balance the State budget were persuasive when the court was considering whether to grant plaintiffs an injunction for FY 2014 expenditures, those cases are not persuasive at this juncture. In both Baltimore Teachers Union, supra, 6 F.3d at 1012, and Buffalo Teachers Federation, supra, 464 F.3d at 362, the court upheld the contested salary reductions and wage freezes in part because the municipalities in both cases had pursued other alternatives prior to taking the more drastic step of cutting municipal expenditures for teachers' salaries.

Baltimore Teachers Union, supra, 6 F.3d at 1020, involved a challenge to a salary reduction for teachers that was put in place due to budgetary shortfalls only after the City had taken steps, such as cancelling previously negotiated pay raises, and instituting layoffs and early retirements. Similarly, in Buffalo Teachers Federation, supra, 464 F.3d at 371, the City of Buffalo instituted a wage freeze as a "last resort measure" imposed "only after other alternatives had been considered and tried," including instituting a hiring freeze and layoffs. Here, there is no similar evidence that failing to fund the UAAL payment in FY 2015 was a last resort measure. It appears to have been the primary target employed to address the revenue shortfall, despite the clear contractual rights contained in the legislation to prevent just such an eventuality and to prevent a return to the approach that created the pension crisis in the first place.

Defendants argue that it is not the court's role to make judgments about budgetary policy. But the court need not go that far--generally, a contract impairment will be considered unreasonable if the State considered impairment of the contract right "on a par with other policy alternatives." U.S. Trust, supra, 431 U.S. at 30-31, 97 S. Ct. at 1522, 52 L. Ed. 2d at 115. Here, the record shows that the State has continued to prioritize payment of other State contracts above payment of the contractual guarantee the State made with its public employees. This

prioritization is particularly curious in light of the fact that, as defendants claim, it is standard practice that State contracts have language making payment on them subject to appropriations. Chapter 78 does not contain any such limiting language. In fact, by enacting Chapter 78, the Legislature amended the section of the pension statute, which previously gave the State the right to "alter, modify or amend such retirement systems and funds." N.J.S.A. 43:3C-9.5(e). That section now states that "[t]he rights reserved to the State" to alter or modify the pension systems "shall not diminish the contractual rights of employees" Ibid. The State's continued prioritization of payment on other contracts to which the State is a party before making payment on the State employees' pensions therefore has no basis in the contractual language or in case law. Indeed, such action makes the constitutionally-protected guarantee in Chapter 78 less effectual than contracts expressly subject to appropriations. That irony alone infects the State's defense of its actions here.

The State provides a recitation of excuses for why the Governor could not make funding cuts to other programs. But other courts have held that similar justifications for spending cuts in impairment actions are not adequate. For example, in Donohue v. Paterson, 715 F. Supp. 2d 306, 322 (N.D.N.Y. 2010), a Federal District Court rejected the reasonableness of New York's mandatory furlough program due to a \$6.8 billion budget deficit for FY 2011.

In that case, defendants offered "a list of assorted expenditure decisions made by the State over the past two years" as support for the argument that the contractual impairment was not considered on a par with other alternatives. Ibid. The court concluded, "Without any showing of a substantial record of considered alternatives the reasonableness and necessity of the challenged provisions are cast in serious doubt." Ibid.

Based on the evidence before the court, at best, the State executive defendants' justification for FY 2015 appears to be that they have no responsibility to explore funding options for the UAAL with the Legislature in an effort to effectuate a compromise. In addition to the testimony of Mr. Sidamon-Eristoff and the Governor's veto message, the State provides certifications from Mr. Sidamon-Eristoff; Ms. Charlene Holzbaur, Director of the Office of Management and Budget within the Department of the Treasury; Mr. Roger Cohen, Director of the Office of Revenue and Economic Analysis and Assistant Treasurer; and Mr. John D. Megariotis, Deputy Director of Finance, Division of Pensions and Benefits. None of the certifications give evidence that alternative courses of action that would allow increased payments to the UAAL were carefully considered. And none of the certifications propose any funding mechanism that could provide appreciably more money for the ARC than the normal cost for FY 2015.

Mr. Cohen's certification addresses only the Legislature's proposed short-term tax increases and sets forth the basis for the Governor's argument that the Legislature's proposed funding would not close the gap between income and expenditures for FY 2015. Mr. Megariotis's certification similarly does not address the inquiry as to whether the State considered not making its full ARC payment for FY 2015 only as a desperate measure to balance the State budget. In his certification, Mr. Megariotis explains the repayment scheme set forth in Chapter 78 for bringing the pension funds into solvency and the purported effect of the State's failure to make its payment towards the UAAL for FY 2015.

Of the four certifications and accompanying voluminous exhibits that were submitted by the State, only two remain that could potentially aid in the court's inquiry of whether the State executive defendants considered cutting the pension payments for FY 2015 as a last resort. Mr. Sidamon-Eristoff's certification states, in conclusory fashion, that "the Governor determined that the last resort and least undesirable alternative was to reduce the pension contribution." Mr. Sidamon-Eristoff then explains, in significant detail, why the Governor was averse to the Legislature's tax plan, and why the Governor could not make other cuts. Mr. Sidamon-Eristoff himself sums up the situation well: "the Governor disagreed with the Legislature's revenue enhancers." But assertions about why the Governor opposed temporarily

increasing income taxes on millionaires or on corporations, or why cuts in other areas were not politically feasible, does not justify the Governor's actions to target the contractually-guaranteed pension contributions without engaging in further efforts to meet the payment schedule, or at least to come much closer to the full ARC payment than making only the normal contribution and leaving \$1.57 billion unpaid. Under current circumstances, the State's projected meager payment accounts for just 19% of its total contributions required under Chapter 78.

Ms. Holzbaaur's certification similarly offers the State little support for the argument that all other alternatives were considered before resorting to cutting the State's pension payments for FY 2015. In her certification, Ms. Holzbaaur sets forth the basic expenditure amounts for various spending categories for FY 2015 and asserts that reducing State staffing or implementing layoffs were not feasible options to solve the FY 2015 budget crisis. Ms. Holzbaaur also certifies that, five months into FY 2015, the remaining funds left to be appropriated could not be diverted to make the State's ARC payment without compromising the health, safety, and welfare of the public. But Ms. Holzbaaur's certification does not offer any proof that failing to make the State's ARC payment for FY 2015 was a last-ditch effort, only considered after the State had considered all other options. It may be the case that as of December 2015, there were

no other options for diverting funds from appropriations meant for schools or for municipalities, but Ms. Holzbaaur does not offer an explanation for why the State executive defendants did not take immediate action, in June and July of 2015, to find a way to make the pension contributions, especially after the Governor vetoed the mechanisms chosen by the legislature to address the funding gap and offered no substitutes.

The State argues that the court should deny plaintiffs' summary judgment motion because the State does not bear the burden of proof on these issues. But even the State admits that the issue of which party bears the burden of proof is an open question, with a split in the Federal Circuits. Compare United Auto., supra, 633 F.3d at 42 (holding in case concerning budgetary matters and provision of public benefits that "where plaintiffs sue a state . . . challenging the state's impairment of a contract to which it is a party, plaintiffs bear the burden on the reasonable/necessary prong of the Contract Clause analysis"), and Buffalo Teachers Fed'n, supra, 464 F.3d at 365 (holding in balanced-budget case that "plaintiffs have the burden of proof"), with Welch v. Brown, 551 Fed. Appx. 804, 811 (6th Cir. 2014) ("Having determined that the orders substantially impair [p]laintiffs' contracts, the burden shifts to the state to articulate 'a significant and legitimate public purpose.'" (quoting Toledo Area AFL-CIO Council v. Pizza, 154 F.3d 307, 323 (6th Cir. 1998))); and S. Cal. Gas Co.

v. City of Santa Ana, 336 F.3d 885, 894 (9th Cir. 2003) (adopting the district court's opinion, which allocated burden to the city). The State also fails to take into account the procedural posture of this case, which is a motion for summary judgment. On a motion for summary judgment, the non-movant has a duty to present evidence that raises a genuine issue of material fact. See Brill, supra, 142 N.J. at 530; Spiotta, supra, 72 N.J. Super. at 581. Based on the evidence before the court, the State has failed to present facts material to the issue of whether the Governor considered realistic alternative actions prior to vetoing the funding for the State's FY 2015 ARC payment; nor have defendants provided any facts to refute plaintiffs' argument that the Legislature and the Governor took no actions whatsoever following the veto to raise or locate the necessary funds. The court therefore grants plaintiffs' motion for summary judgment.

VI. THE COURT IS ABLE TO GIVE PLAINTIFFS A REMEDY.

The State executive defendants argue that no remedy is available to plaintiffs because the court cannot order an appropriation and because plaintiffs have failed to name the Legislature as a party to the case. But the court dealt with, and dismissed, many of these arguments already. As the court discussed above in dismissing defendants' argument that the Appropriations Act bars Chapter 78's contractual right, the proposition that the

court cannot issue an appropriation does not prevent the court from adjudicating whether the State's failure to make its full payment into the State pension system for FY 2015 violates plaintiffs' constitutionally-protected contractual rights to pension contributions. The New Jersey Supreme Court has held in the context of a contract dispute arising after the Governor executed a line-item veto of an appropriation that a court "ought not to withhold its hand" from adjudicating such a claim. P, T & L Constr. Co., supra, 55 N.J. at 346 ("[W]e think it is time to settle the larger question whether the courts should be open to a person who holds a contract with the State even though satisfaction of a favorable judgment would depend wholly upon the willingness of the Legislature to accept the judgment and provide for payment."). Consequently, as plaintiffs request, the appropriate action is for the court to decide whether the plaintiff has a right to satisfaction of the contract, and if so, to give the other branches an opportunity to act in accordance with the court's decree. Ibid. As the Court explained in Abbott XXI, "It simply cannot be said that the authority to 'disregard prior fiscal enactments,' carries a corresponding authority to suspend judicial decrees issued to remedy substantiated constitutional deprivations." Abbott XXI, supra, 206 N.J. at 363 (internal citations removed) (quoting Camden, supra, 82 N.J. at 147)); see also P, T & L Constr. Co., supra, 55 N.J. at 346 (concluding in a

breach of contract action against the State where a remedy would require a Legislative appropriation that "the judiciary ought not to withhold its hand on a mere assumption that its coordinate branches would want it that way").

The fact that plaintiffs did not name the Legislature as a party to this action does not bar the relief requested here. The Legislature was not a party to either P, T & L or to Abbott XXI. Abbot XXI, supra, 206 N.J. at 332; P, T & L Constr. Co., supra, 55 N.J. at 341. Logically speaking, the remedy sought by plaintiffs--a court order declaring that they have a contractual right to the pension payments and that the FY 2015 Appropriations Act is invalid insofar as it undermines that right--does not require the Legislature to be a party to the action. It is precisely the role of the courts to determine the contours of an individual's constitutional rights, and to invalidate legislation that impinges upon those rights. Having satisfied that role, the court will refer the matter back to Legislature and the Governor, which branches can determine how best to accomplish the remedy. P, T & L. Constr. Co., supra, 55 N.J. at 346.

Finally, defendants argue that if the court orders that plaintiffs have a contractual right to pension payments, the court should give future effect to its holding to avoid disrupting the FY 2015 budget at a time eight months into the fiscal year. Defendants rely on the New Jersey Supreme Court's decision in Lance

v. McGreevey, 180 N.J., 590, 599 (2004), in which the Court invalidated the FY 2005 Budget Act because it relied on bond sales in order to balance income with the year's expenditures. Holding that bond debt cannot be considered income for the purposes of the Appropriations Clause, the Court applied its ruling prospectively to avoid the disruption that would inevitably result from "significant revisions to, if not a complete overhaul of, the current fiscal year's budget." Ibid. However, Lance can be distinguished because the Court in that case was not faced with an action alleging an impairment of a constitutional right.

In determining the appropriate remedy, the court is "acting within the framework of appropriate equitable relief with respect to an unconstitutional . . . statute." Salorio v. Glaser, 93 N.J. 447, 463 (1983), cert. denied, 464 U.S. 993, 104 S. Ct. 486, 78 L. Ed. 2d 682 (1983). And the court has broad discretion to fashion an appropriate equitable remedy because such equitable remedies "are a special blend of what is necessary, what is fair, and what is workable.'" Id. at 464 (quoting Lemon v. Kurtzman, 411 U.S. 192, 200, 93 S. Ct. 1463, 1469, 36 L. Ed. 2d 151, 161 (1973)). Furthermore, "[r]eliance interests weigh heavily in the shaping of an appropriate equitable remedy.'" Id. at 464 (quoting Lemon, supra, 411 U.S. at 203, 93 S. Ct. at 1470, 36 L. Ed. 2d at 162).

While the State claims that plaintiffs waited too long to challenge the Governor's veto action, plaintiffs sought relief for

FY 2015 at the end of July 2014, less than one month after the Governor issued his line-item veto of the State's pension funding on June 30, 2014, and less than one full month after the start of the fiscal year. The fact that the court is adjudicating plaintiffs' claims with regard to FY 2015 more than half-way through the fiscal year is a direct result of this court's acceptance of defendants' argument in June 2014 that the FY 2015 claims were not ripe until the Legislature had made its appropriation for FY 2015. Once the Legislature made its FY 2015 appropriation, which does not comply with Chapter 78 as a result of the Governor's line-item veto, plaintiffs sought prompt relief. The several months that have elapsed since that time were necessary to accommodate extensive briefing, argument, and court review, due to the complexity of the issues and the scope of the State's defense, which totaled 232 pages. The court cannot conclude that plaintiffs' requested relief should be delayed further simply because it may be inconvenient for the Legislature and the Governor to go back to the drawing board in the middle of a budget cycle. The court's conclusion in this regard is supported by the absence from the record of any cooperative efforts between the Governor and the Legislature to provide sources to meet the requirements of Chapter 78 since the line-item veto that blocked funding for the UAAL in FY 2015.

In fashioning relief in this case, the court is aware of the fact that invalidating the FY 2015 Appropriations Act insofar as it denies full ARC contributions to the State pension funds may put the legislative and executive branches in a difficult position. However, that fact alone is not sufficient for the court to conclude that relief should be delayed in this case. The clear and unmistakable statutory language demonstrating that plaintiffs are entitled to the State's full pension contribution gives rise to a significant reliance interest on the part of hundreds of thousands of State employees. The Legislature--and the Governor--gave that right State and Federal constitutional protection when they deliberately chose the far-reaching language in Chapter 78. While there are less than five months remaining in FY 2015, the court cannot condone further delay. The legislative and executive branches have now had almost ten months to find a solution to the pensions crisis for FY 2015, since the shortfall was discovered in April of 2014. The practical reality of the situation is that time is of the essence for the legislative and executive branches to work together to come up with a solution to the pension crisis, especially given the fact that the record is devoid of any serious efforts to find a solution since the revenue shortfall accrued.

Although the end of the fiscal year is just over four months away, it is conceivable that there may be revenue available between

now and the end of the fiscal year, when the pension fund payments are due, that could be directed to the UAAL. The State will not know for certain whether this year's tax revenues will exceed what was estimated in the FY 2015 Appropriations Act for a few more months. If revenues do exceed what was anticipated in the Appropriations Act, those funds may be available to increase contributions to the pension funds. The court cannot allow the State to simply turn its back on its obligations to New Jersey's public employees--especially in light of the fact that the State's failure to make its full payment constitutes a substantial blow to the solvency of the pension funds in violation of plaintiffs' constitutional rights, and due to the fact that the terms of the UAAL payments were set forth--and even publicly endorsed--by the Governor himself. In short, the court cannot allow the State to "simply walk away from its financial obligations," especially when those obligations were the State's own creation. Energy Reserves Grp., supra, 459 U.S. at 412 n.14, 103 S. Ct. at 705 n.14, 74 L. Ed. 2d at 581 n.14. The court acknowledges that plaintiffs are prevailing parties and entitled to counsel fees under N.J.S.A. 43:3C-9.5(c)(2). The court's order provides dates for submission of plaintiffs' application for fees by plaintiffs' attorneys.

VII. THE COURT DOES NOT REACH PLAINTIFFS' OTHER CLAIMS.

Plaintiffs raise a number of other claims that the court does not need to reach in this decision. In particular, counsel for the State Trooper plaintiffs argued that the State's failure to make the required contributions into the State pension systems constitutes a violation of plaintiffs' rights under the Equal Protection Clause of the United States Constitution. U.S. Const. amend. XIV, § 1. However, courts generally do not reach "questions of a constitutional nature unless absolutely necessary to a decision of the case." Burton v. United States, 196 U.S. 283, 295, 25 S. Ct. 243, 245, 49 L. Ed. 482 (1905); see also Donadio v. Cunningham, 58 N.J. 309, 325-26 (1971) (citing Ahto v. Weaver, 39 N.J. 418, 428 (1963)). Because the court concluded that the State's failure to make the contributions into the pension systems was a substantial impairment of plaintiffs' constitutionally-protected contract rights, the court need not reach the issue of whether the State's failure to contribute to the pension funds for FY 2015 also constitutes a violation of plaintiffs' rights under the Equal Protection Clause.

Plaintiffs also argue that the State's failure to make the contributions to the pension systems violates the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 to -2, a claim that relates directly to the constitutional contentions in the complaint. Because the court concluded that the State's failure to make the required

payment under Chapter 78 constitutes a violation of plaintiffs' substantive rights, plaintiffs are entitled to reasonable attorneys' fees and costs, N.J.S.A. 10:6-2(f), which are also available to them under N.J.S.A. 43:3C-9.5(c)(2).

The complaints raise a number of other claims that were not argued by plaintiffs either in the moving briefs or in the reply briefs. For example, the complaints allege estoppel, unconstitutional taking, breach of the implied covenant of good faith and fair dealing, and violation of a criminal statute. But as none of these claims were argued by plaintiffs as part of their motion for summary judgment, and as the court's analysis above is dispositive of the matter, the court does not reach the merits of these remaining claims. To the extent that the amicus curiae supported plaintiffs' arguments, they are addressed above. In light of the court's ruling, issues raised only by the amicus need not be reached, i.e., that the New Jersey Constitution, art. VIII, § 2, ¶ 8, requires the return of diverted money meant for the pension systems. The court will issue an order conforming with this decision.

CONCLUSION

For the reasons explained in this opinion, defendants' motion to dismiss plaintiffs' claims is DENIED. Plaintiffs' motion for summary judgment on the impairment of contract claim is GRANTED.

Consequently, plaintiffs' application for declaratory judgment is GRANTED.