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MONTANA FIRST JUDICIAL DISTRICT COURT  
 LEWIS AND CLARK COUNTY

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EDWARD D. WRZESIEN and	)	Cause No. DDV 2012-931
LACEY VAN GRINSVEN, individually and	)	
on behalf of all similarly situated persons,	)	<b>STATE'S RESPONSE TO</b>
and MEGAN ASHTON, individually,	)	<b>CROSS-MOTION FOR</b>
	)	<b>SUMMARY JUDGMENT</b>
Plaintiffs,	)	<b>AND REPLY</b>
	)	
v.	)	
	)	
STATE OF MONTANA and MONTANA	)	
PUBLIC EMPLOYEE RETIREMENT	)	
ADMINISTRATION,	)	
	)	
Defendants.	)	

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**INTRODUCTION**

Plaintiffs assert that theirs is not a claim of buyer's regret--they just want more employer contributions to flow to their individual accounts than was represented when they voluntarily elected to participate in a defined contribution plan. *See* Pls' SJ Br. at 8 to 9 (listing the extra amounts that might be in Plaintiffs' accounts if the Plan Choice

Rate had instead been directed to them). Whether due to buyer's regret, or just the desire to receive more benefits than they bargained for, Plaintiffs' goal is to change the statutory allocation of the State and local government's (i.e. the employer's) contribution so that the portion currently directed to the pension trust fund's unfunded liability is instead directed into their individual accounts.

Plaintiffs, however, fail to meet their "burden of proving the statutes unconstitutional" under rational basis review. *Farrier v. Teacher's Ret. Bd.*, 2005 MT 229, ¶ 13, 328 Mont. 375, 120 P.3d 390. Plaintiffs' claims fail for two main reasons. First, Plaintiffs voluntarily elected to be in the defined contribution plan with full notice of the amount of employer funds that would be contributed to their individual accounts. This voluntary choice precludes an equal protection or due process violation. *See id.*, ¶ 21 (determining there was no equal protection violation where "[t]he legislature designed its retirement conditions upon the expected employment decisions of participating members" who were "given a choice" and "knowingly signed a notice of election.") (emphasis added).

Second, the Plan Choice Rate allocates state and local funds, not funds of the individual employee, to ensure the DB Plan remains actuarially sound as required by Mont. Const. art. VIII, § 15. There is no question, under rational basis review, that the Legislature was entitled to rely on actuarial analysis to protect the DB Plan against the financial consequences of those PERS members who elected into a defined contribution plan. *Id.*, ¶ 20 (concluding "that when the job and its associated pension plan involves public employment, the State's interest in, and control over, the financial consequences

proves a legitimate exercise of its constitutional mandate.”). The Court should therefore grant summary judgment for the State.

## ARGUMENT

### **I. PLAINTIFFS HAVE FAILED TO PROVE AN EQUAL PROTECTION VIOLATION.**

#### **A. State Action Is Lacking.**

As explained by Defendants in their opening brief, Plaintiffs are not in a defined contribution plan by virtue of immutable characteristics such as their age, sex or race. Instead they voluntarily elected to be in a defined contribution plan. Plaintiffs, furthermore, were provided substantial educational materials and had a year window to make their election. If they had neglected to make a choice, they would have remained in the DB Plan by default. *See* Defs.’ Op. Br. at 21-22. Plaintiffs do not dispute these facts. As such, the requisite “state action” is lacking because the state did not “adopt a classification” where it merely provided a choice of two (or three) types of retirement plans. *Powell v. State Fund*, 2000 MT 321, ¶ 22, 302 Mont. 518, 15 P.3d 877; *In re Will of Cram*, 186 Mont. 37, 42, 606 P.2d 145, 148-49 (1980).

Plaintiffs respond by pointing to *Oberson v. United States Dep’t of Agric.*, 2007 MT 293, 339 Mont. 519, 171 P.3d 715, and *Brewer v. Ski-Lift*, 234 Mont. 109, 762 P.2d 226 (1988) as examples where individual “choice” did not shield a statute from equal protection claims. Pls.’ Resp. Br. at 27. But these cases, where a statute waived liability for snowmobiling and skiing, respectively, are inapposite. Here, the argument is

not that Plaintiffs waived liability (though they did acknowledge “I . . . assume complete responsibility for this irrevocable election,” Exs. 4E, 4G, and 4I to Defs.’ Opening Brief (Defs.’ Br.), but that the action that placed them in the defined contribution plan was taken by Plaintiffs, not the State. Whether the “state action” requirement was met was simply not an issue in either *Oberson* or *Brewer*.

**B. Plaintiffs Have Failed to Show that the Law Affects Similarly Situated Classes in an Unequal Manner.**

In our opening brief, Defendants explain that, like the two classes of firefighters for purposes of retirement benefits in *Bean v. State*, 2008 MT 67, ¶ 17, 342 Mont. 85, 179 P.3d 524, the Legislature here did not create similarly situated classes by offering alternative defined contribution retirement plans. Defs.’ Br. at 23-24. The DB Plan and defined contribution plans are entirely different plans, each with their own unique methods of funding and investment. *Id.* Importantly, the employer contributions serve vastly different purposes under each plan--to fund the individual accounts of those in the DC Plan or ORP, and to fund the general pension trust fund, not individual accounts, for the DB Plan. *Id.* at 5-6.

Plaintiffs ignore the complete factual dissimilarity between the plans and instead argue that the “only difference” between the two plans is that those in defined contribution plans “see over 40% of their employer contribution paid as a fee into the DB Plan,” and similarly that “[o]nly DC Plan participants are required to pay part of their employer contribution to a plan from which they cannot benefit.” Pls.’ Br. at 23-24 (emphasis added). This argument is representative of a misleading approach that

pervades Plaintiffs' brief. *See, e.g., id.* at 2 (referring to the Plan Choice Rate as being “diverted from” their accounts); *id.* at 4 (“DC Plan participants pay 2.37%”); *id.* at 12 (“Plan Choice Rate is deducted from their respective employer contributions”); *id.* at 38 (Plaintiffs are “assessed a fee for their choice.”).

The problem with Plaintiffs' allegations is that the employer contributions are not “theirs” and Plaintiffs do not “pay” anything to the DB Plan. While the funds allocated by the Plan Choice Rate are based on “the compensation paid to all of the employer’s [PERS eligible] employees” participating in a defined contribution plan, the funds are entirely those of the State and local governmental employers. Mont. Code Ann. §§ 19-3-316(1), -2117(2)(a)(ii). The Plan Choice Rate (and the additional 1% allocation) is simply a method of allocating funds of the State and local governmental entities to pay down the pension trust fund’s unfunded actuarial liability (UAL). Defs.’ Br. at 3-4; Mont. Code Ann. § 19-3-2117(2)(c). No portion of the individual member’s contribution is diverted to the DB Plan--all of it is invested in the defined contribution plan member’s individual account. Mont. Code Ann. § 19-3-2117(1).

There is no reason, and Plaintiffs have failed to suggest one (other than their sense of “fairness”) that the Legislature is required to allocate the same level of employer funds for each employee regardless of which retirement plan the employee is in. The Legislature does not have an obligation to ensure the defined contribution plans are actuarially sound, because by their nature defined contribution plans do not guarantee a certain level of benefit and thus have no associated actuarial liability. Defs.’ Br. at 3-4. But the Constitution does require that the Legislature ensure the DB Plan is actuarially

sound. Mont. Const. art. VIII, § 15. The Legislature could have, for example, set the employer contribution for those in defined contribution plans at 4.17%, and then provided a lump sum yearly payment from State and local funds to address the UAL. The Legislature instead opted to tie the employer contribution to the salaries for those in defined contribution plans, thereby more specifically addressing the UAL caused by those members not participating in the DB Plan. Defs.' Br. at 4.

Not only have Plaintiffs failed to show that the plans are similarly situated, they have also failed to show they are unequal. Those in defined contribution plans enjoy many benefits, such as the freedom to invest as they choose and the right to keep employer contributions once vested, that those in the DB Plan do not enjoy. *Id.* at 5-8. It is possible, in fact, if they invest well and the market is favorable, that Plaintiffs will retire with more benefits than they would have had if they had elected the DB Plan. Such a scenario defeats Plaintiffs' equal protection claim, for how can they claim inequality when they may ultimately benefit more from their defined contribution plan than if they were in the DB Plan? Plaintiffs' speculation as to how much additional funds they might have had in their account if the Plan Choice Rate were directed to them is irrelevant to this analysis. This is not a tort claim where Plaintiffs need to prove damages. Simply showing they would have benefited more if the Plan Choice Rate had instead been directed to their individual accounts is not sufficient. If Plaintiffs cannot show they are treated unequally, they cannot prove an equal protection violation. *Powell*, ¶ 22.

In an effort to distinguish *Bean*, Plaintiffs assert that "the Legislature did not create a new retirement system when it created the DC Plan," but instead "a new

retirement plan within the same system.” Pls.’ Br. at 25. Semantics aside, it is true that Plaintiffs, and all DB Plan participants, are all members of PERS. But this conceptualization does not help Plaintiffs’ case. Even if all those in PERS are considered as one class, they are all treated equally. Each PERS employee is provided a choice, after being fully educated, as to which plan they wish to participate in. If they do not make an affirmative choice, they are placed in the DB Plan by default. In other words, each employee has an equal choice and is thereby treated equally. Because Plaintiffs have failed to meet their burden of proving that the State treats similarly situated classes unequally, summary judgment should be granted to Defendants.

C. **In Any Case, the Plan Choice Rate Is Directly Related to Ensuring the Pension Trust Fund Is Actuarially Sound.**

Rational basis is the lowest level of scrutiny and constitutes the “paradigm of judicial restraint.” *FCC v. Beach Communications*, 508 U.S. 307, 314 (1993). Where there are “plausible reasons” for a law, the judicial inquiry is at an end. *Id.* at 313-14. This makes sense when you combine the presumption of constitutionality of statutes with the directive that “the wisdom or expediency of the legislation is beside the question.” *Rohlfs v. Klemenhausen*, 2009 MT 440, ¶ 26, 354 Mont. 133, 227 P.3d 42 (citation omitted).

The State need not provide “current empirical proof” regarding the law’s rationale, but instead need only show that the facts the Legislature relied on “could reasonably be conceived to be true.” *Vance v. Bradley*, 440 U.S. 93, 111 (1978). In other words, “[t]he purpose of the legislation does not have to appear on the face of the legislation or in the

legislative history. It may be any possible purpose of which the court can conceive.” *Rohlf*s, ¶ 26 (emphasis added).

The Montana Supreme Court applied this deferential standard in *Farrier*, a decision that is on all fours with Plaintiffs’ claim and therefore controlling. Like Plaintiffs here, *Farrier* argued that a provision in the Teacher’s Retirement System (TRS)--namely the discrepancy in the availability of benefits between retired teachers who taught at a public university and those who worked in other employment--violated equal protection. The district court (Judge Sherlock) “concluded on remand that no rational basis existed for treating *Farrier* differently from similarly situated retired teachers who proceeded to work in other public employment and lawfully received benefits from a different retirement system.” *Id.*, ¶ 9. The classification, in Judge Sherlock’s opinion, “proved arbitrary.”

The Montana Supreme Court disagreed and reversed. Applying rational basis review, the Court concluded “that when the job and its associated pension plan involves public employment, the State’s interest in, and control over, the financial consequences proves a legitimate exercise of its constitutional mandate.” *Id.*, ¶ 20. Whether “sound policy” or not, this is more than sufficient rationale where “the Montana Constitution itself charges the legislature and TRB with a duty to keep the budget and retirement system actuarially sound.” *Id.*, ¶¶ 19-20 (citing Mont. Const. art. VIII, § 15).

The Court emphasized that all TRS members “were given a choice to receive benefits by meeting statutory eligibility requirements” and *Farrier* had “knowingly signed a notice of election” when exercising his option to pay his retirement into the ORP. *Id.*,

¶ 21. Because the Legislature’s design was based “upon the expected employment decisions of participating members,” the Court left to the discretion of the Legislature the task of “devising a rationally related pension system.” *Id.*

Here, the same rationale applies to the Plan Choice Rate (and the additional 1% allocation) as with the TRS system in *Farrier*. The “law operates equally upon those within the class” because all PERS members, including Plaintiffs, “were given a choice” and “knowingly signed a notice of election.” *Id.*, ¶¶ 15, 21. And like *Farrier*, the Plan Choice Rate and additional 1% allocation were designed to meet the Legislature’s “duty to keep the budget and retirement system actuarially sound.” *Id.*, ¶ 19.

The Legislature was entitled to “accommodate” the desire for a defined contribution plan by imposing the Plan Choice Rate on the employer. *Id.*, ¶ 21. The Rate was based on actuarial analysis provided to the Legislative Committee on Public Retirement Systems as a means to ensure actuarial soundness of the DB Plan by addressing the UAL associated with members that choose to join a defined contribution plan. Exs. 2A (at III-1, III-6 to III-7) and 2B (at 2) to Defs.’ Br. Because the “associated pension plan involves public employment [and public funds], the State’s interest in, and control over, the financial consequences proves a legitimate exercise of its constitutional mandate.” *Farrier*, ¶ 20. This is especially true here, where the Plan Choice Rate “is actuarially determined to maintain the financial stability of the Defined Benefit Retirement Plan.” Ex. 2B to Defs.’ Br. at 1. (emphasis added).

Contrary to Plaintiffs’ assertions, Pls.’ Br. at 30, “cost-containment” is a legitimate (in fact constitutionally required) governmental interest in the context of public pension

plans. *Farrier*, ¶ 20. The purpose of the Plan Choice Rate is “to maintain adequate funding of the DBRP [Defined Benefit Retirement Plan] Unfunded Actuarial Liability,” Ex. 2B to Defs.’ Br. at 2 (emphasis added), and the Rate is therefore rationally related to a legitimate governmental interest as explained in *Farrier*. The additional 1% allocation likewise is allocated to pay down the DB Plan’s “unfunded liabilities” and therefore is also rationally related to the legitimate interest of ensuring actuarial soundness. Mont. Code Ann. § 19-3-2117(2)(c).

These contributions are necessary not only to address “past unfunded liability obligations,” Pls.’ Br. at 31, but also the portion of the current UAL attributable to defined contribution plan participants. Exs. 2A (at III) and 2B (at 1-2) to Defs.’ Br.; Mont. Code Ann. § 19-3-2121(2)(b) (requiring adjustment by PERB to ensure “the sufficiency of the plan choice rate to actuarially fund the defined contribution plan member’s appropriate share of the defined benefit plan’s unfunded liabilities.”). Though the “initial schedule” to “fund the appropriate share of the [DB Plan’s] unfunded liabilities” was determined based on the liabilities “as of the June 30, 1998, actuarial valuation,” the schedule is reduced “by 1 year each biennium” to reflect the current “appropriate share.” Mont. Code Ann. § 19-3-2121(4).

Without providing any expert actuarial analysis, Plaintiffs offer speculative calculations and infer that the Plan Choice Rate is not necessary because “since inception [the Rate has made] up less than one-half of one percent of the DB Plan’s total assets.” Pls.’ Br. at 8. Questioning whether the Plan Choice Rate is “necessary,” however, is an inappropriate inquiry under rational basis review in general, *Vance*, 440 U.S. at 111, and

under the discretion recognized by the Court in *Farrier* in particular. Whether correct or not, Plaintiffs' speculation does not trump the Legislature's "discretion" to devise a "pension system" based on actuarial analysis. *Farrier*, ¶ 21.

The Legislature legitimately exercised its constitutional mandate to ensure actuarial soundness of the DB Plan by requiring State and local employers to allocate funds to the Plan based on the salaries of those employees enrolled in defined contribution plans. Plaintiffs might disagree with this policy, but there is "nothing irrational about the State deciding" to rely on actuarial analysis to ensure the retirement system is "funded on an actuarially sound basis." *Farrier*, ¶ 20; Mont. Const. art. VIII, § 15. Summary judgment should be granted for the Defendants as to the equal protection claim.

## **II. FOR THE SAME REASONS, THE LAW DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS.**

Plaintiffs have yet to illuminate what "underlying substantive right" they claim the Plan Choice Rate infringes for purposes of their substantive due process claim. *State v. Egdorf*, 2003 MT 264, ¶ 19, 317 Mont. 436, 77 P.3d 517. The closest Plaintiffs come is claiming that the Rate "deprive[s] DC Plan participants of a significant portion of their employer contribution, which they have earned." Pls.' Br. at 38. But, as explained above, the Rate is not paid by the participant. It is an allocation of State (or local), not individual, funds. Plaintiffs have no right, substantive or otherwise, to additional State funds that the Legislature has determined, in its discretion, should be paid to the DB

Plan's unfunded liabilities. By Plaintiffs' logic, all DB Plan members who left employment and took a refund would likewise be entitled to the State's contributions (which remain in the DB Plan trust fund). Plaintiffs' due process claim fails at the start.

Even if Plaintiffs are correct that the Plan Choice Rate penalizes them in some manner, the Supreme Court in *Farrier* has already made clear that addressing the "financial consequences" of a participant's choice "proves a legitimate exercise of [the State's] constitutional mandate" to ensure the DB Plan remains actuarially sound. *Farrier*, ¶ 18, 20. The Plan Choice Rate is "reasonably related to [this] permissible legislative objective," *Egdorf*, ¶ 21, because it addresses the additional UAL caused by the election of Plaintiffs and others to participate in a defined contribution plan as opposed to the DB Plan. Neither is this choice "arbitrary." Pls.' Br. at 38. Plaintiffs in *Farrier* likewise claimed the TRS retirement limitation was "arbitrary," but the Supreme Court explicitly deferred to the Legislature regarding the manner in which the financial concerns involved were addressed. *Farrier*, ¶¶ 9, 21. Accordingly, the Plan Choice Rate does not violate Plaintiffs' substantive due process rights and summary judgment should be granted for the State.

### III. PROCEDURAL BARS ALSO PRECLUDE PLAINTIFFS' CLAIMS.

#### A. The Statute of Limitations and Doctrine of Laches Bars the Plan Choice Rate Claim.

Plaintiffs assert that no statute of limitations applies to them, because the Plan Choice Rate is continuing. Pls.' Br. at 11-12. As explained in full above, however, the "injury" they describe is not a tort or wage claim. The funds allocated by the Plan Choice

Rate do not come from individual participants but from the coffers of the State and local governments. Because the Rate is not, and never has been, “deducted” from the Plaintiffs’ individual accounts, their claim is not analogous to the “ongoing injury” cases cited in their brief. Pls.’ Br. at 11. It instead arose when Plaintiffs made their plan elections because at that time they were “affected by [the] statute” and could have “obtain[ed] a declaration of rights” as to “any question of construction or validity arising under the . . . statute.” Mont. Code Ann. § 27-8-202.

Plaintiffs then argue that because a newer participant could file a claim for relief that would not be barred by the two-year statute of limitations, and Plaintiffs might benefit from their suit (at least going forward), “they are legally entitled to bring suit to obtain the ruling” themselves. Pls.’ Br. at 12. Plaintiffs present no case law to support their reasoning and it’s no wonder--such logic would totally eviscerate the concept of a statute of limitations, which by its very nature precludes the claims of some while permitting the claims of others for whom the limitation has not run.

Likewise, laches bars Plaintiffs’ Plan Choice Rate claims, because the relief they seek would cause prejudice to the State and to the DB Plan, and the funds allocated by the Rate were relied on by past Legislatures. *Cole v. State ex rel. Brown*, 2002 MT 32, ¶ 25, 308 Mont. 265, 42 P.3d 760; Defs.’ Op. Br. at 17-19. Plaintiffs assert, though, that any prejudice is “irrelevant” because the Plan Choice Rate has constituted a small percentage of the funds contributed to the DB Plan trust fund. Pls.’ Br. at 15-16. But this simplistic view is not based on an actuarial assessment, and ignores the constitutional requirement that the DB Plan be funded on an actuarially sound basis. It also ignores the

opinion of actuaries, past and present, that the Plan Choice Rate is necessary to address the DB Plan's UAL. *See* Exs. 2A-2D to Defs.' Br.; Ex. 1 to this brief.

Defendants admit that Plaintiffs' amended claim regarding the additional 1% allocation is not barred by the statute of limitations or laches. That claim nevertheless fails to present a violation of equal protection or due process for the reasons stated above.

**B. DB Plan Participants Would Be Prejudiced.**

Plaintiffs, in addressing the application of laches and whether DB Plan participants are necessary parties under Mont. Code Ann. § 27-8-301, assert that DB Plan participants have no interest in the millions of dollars Plaintiffs seek to have transferred to the accounts of DC Plan and ORP participants, at the expense of the DB Plan, because "DB Plan participants are guaranteed a statutorily-defined retirement benefit." Pls.' Br. at 15, 17. By this logic, DB Plan members would have no cause for concern if the State and local governments entirely stopped contributing funds to the DB Plan trust fund.

Plaintiffs' argument, once again, is not substantiated by actuarial analysis. PERB's actuary, on the other hand, stated several negative consequences for the DB Plan, including: decreasing the system's assets; increasing the unfunded actuarial liability; decreasing the funded ratio; and possibly decreasing the Guaranteed Annual Benefit Adjustment. Ex. 2D to Defs.' Br. And while the benefits due DB Plan members are set in statute and are not based on the liquidity of the pension trust fund, if the fund goes bankrupt (the Court can take judicial notice here of Detroit's bankruptcy, e.g.), DB Plan members will not get their full benefits. Admittedly, ending the Plan Choice Rate and paying back prior contributions likely would not cause the fund to go bankrupt by itself,

but it may contribute to such a scenario, and putting the fund at risk certainly affects the interests of all DB Plan members. Because DB Plan members would be prejudiced, and therefore have an “interest which would be affected by the declaration,” Mont. Code Ann. § 27-8-301 precludes the requested declaratory relief.

#### **IV. ORAL ARGUMENT REQUESTED**

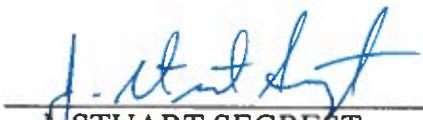
The State requests that the Court set a hearing on the motions for summary judgment.

#### **CONCLUSION**

For the above-stated reasons the State is entitled to judgment as a matter of law. Summary judgment should be granted for the State and Plaintiffs’ cross-motion for summary judgment denied.

Respectfully submitted this 27th day of June, 2014.

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By:   
J. STUART SEGREST

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing to be mailed to:

Mr. Travis Dye  
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DATED:

6/27/14

J. Stuart Segrest  
J. STUART SEGREST

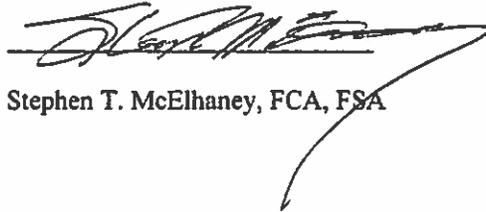


with the Code of Profession Conduct and applicable Actuarial Standards of Practice set out by the Actuarial Standards Board, as I state in the letter.

3. The general effects upon the PERS Defined Benefit Plan that I list in the letter, if all of the Plan Choice Rate Contributions were returned and future contributions were prohibited, are correct to the best of my knowledge.

4. I hereby declare under penalty of perjury under the laws of the State of Montana that the foregoing is true and correct.

Dated this 20<sup>th</sup> day of June, 2014.



Stephen T. McElhaney, FCA, FSA