

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 15-0554

EDWARD D. WRZESIEN and LACEY VAN GRINSVEN,
individually and on behalf of all similarly situated persons, and
MMEGAN ASHTON, individually,

Plaintiffs and Appellants,

v.

STATE OF MONTANA and MONTANA PUBLIC
EMPLOYEE RETIREMENT ADMINISTRATION,

Defendants and Appellees.

APPELLEES' RESPONSE BRIEF

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable James P. Reynolds, Presiding

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INTRODUCTION

Appellants, three participants in public employee defined contribution retirement plans (collectively “Participants”), challenge the plan choice rate provision, an allocation of public employer funds. But they do not allege that the State arbitrarily placed them in a defined contribution plan. Nor do they allege that they were unaware of the effect of the plan choice rate or the amount the State, their employer, would contribute to their personal account.

Instead they claim, despite their affirmative choice to join a defined contribution plan in lieu of the default defined benefit plan, two entirely different retirement plans, that they are entitled to a larger contribution from the State than they bargained for. Such a scenario does not implicate the equal protection clause. Likewise, the legislature did not act arbitrarily when it relied on the advice of actuaries and created the plan choice rate to address the likely impact on the defined benefit plan’s pension trust fund, thereby meeting its constitutional duty fund the retirement system “on an actuarially sound basis.” Mont. Const., art. VII, § 15(1). The district court’s Order should be affirmed.

STATEMENT OF THE ISSUES

1. Did the District Court correctly conclude that equal protection is not implicated where Appellants opted into their respective retirement plans by choice,

and where the defined contribution plans they affirmatively chose are investment schemes distinct from the defined benefit plan they would otherwise have remained in by default?

2. Did the District Court correctly conclude that the plan choice rate does not violate substantive due process where the plan choice rate is directly related, per actuarial analysis, to the constitutional duty to maintain actuarial soundness for the retirement plan?

STATEMENT OF THE CASE

Participants' complaint, and later amended complaint, challenges the plan choice rate (PCR), a statutory allocation of public employer funds related to the defined contribution retirement plan option, and also seeks class certification. At a subsequent scheduling conference, the parties and the district court agreed that class certification proceedings should be held in abeyance while the merits were first addressed on summary judgment, and a summary judgment briefing schedule was set. Doc. 28. After cross motions for summary judgment were briefed and argued, the district court issued its Order, roughly a month after argument, granting summary judgment for the State. Doc. 53 (attachment 1 to Participants' Opening Brief) (Order). However, the Order was inadvertently not provided to the parties for several months, at which time final judgment was entered and a notice of

judgment provided to Participants. Docs. 56 and 58. Participants then filed a timely notice of appeal.

STATEMENT OF FACTS

I. OVERVIEW OF MONTANA’S STATUTORY RETIREMENT SYSTEM FOR PUBLIC EMPLOYEES

A. The Defined Contribution Plan Is Statutorily Created as an Alternative Option to the Defined Benefit Plan, and the Plan Choice Rate Is Adopted to Ensure Actuarial Soundness of the Retirement Pension Fund.

Prior to 2001 the Montana Public Employees’ Retirement System (PERS or the Retirement System), contained only a defined benefit plan. *See* Mont. Code Ann. § 19-3-103(1) (defined benefit retirement plan established in 1945). A defined benefit plan is, in essence, a pension trust fund wherein an employee, upon retirement, is provided a defined amount of income per month, as opposed to a lump sum of money. Mont. Code Ann. §§ 19-3-901 to -904; *Governmental Plans Answer Book*, § 2:27, Calhoun, Moore and Brainard, at 2-16 (2d ed. 2007).

In order to provide an alternative retirement plan allowing investment control to the employee, the Legislature assigned the Committee on Public Employee Retirement Systems (the Committee) to study the creation of a defined contribution retirement option. House Bills 90 and 91 (1997). The Committee met periodically from July 1997 through the end of 1998 and received numerous

reports from actuaries and retirement contribution plan administrators. Doc. 35, Ex. 1A (Final Recommendations of the Committee); *see also* Doc. 35, Ex. 2A (PERS Report No. 2, May 13, 1998).

In order to allow the option of a defined contribution plan, the Legislature had to ensure that the Defined Benefit (DB) Plan's pension trust fund remained "funded on an actuarially sound basis," as required by the Montana Constitution. Mont. Const. Art. VIII, § 15(1). Montana law defines "actuarially sound basis" to mean "that contributions to each retirement plan must be sufficient to pay the full actuarial cost of the plan." Mont. Code Ann. § 19-2-409. For the DB Plan "the full actuarial cost includes both the normal cost of providing benefits as they accrue in the future and the cost of amortizing unfunded liabilities over a scheduled period of no more than 30 years." *Id.*¹

To maintain actuarial soundness and offset the lack of contributions that would otherwise come from an employee's participation in the DB Plan, the actuarial analysis suggested that the employer (here, the State and University System, collectively "the State") would have to provide a percentage of funds to the DB Plan pension trust fund for each employee in the defined contribution plan. Doc. 35, Ex. 1A at 3 (plan choice rate intended "to pay for past unfunded liability

¹ For the defined contribution plan, "the full actuarial cost is the contribution defined by law that is payable to an account on behalf of the member." Mont. Code Ann. § 19-2-409.

obligations and to compensate the DB plan for increased DB plan costs resulting from PERS members selecting the DC plan”); Ex. 2A at III-6 to III-7; Ex. 2B at 2 (Milliman letter, November 25, 2003) (acknowledging “the purpose of the PCR is to maintain adequate funding of the DBRP Unfunded Actuarial Liability”); H.B. 107 at 1 (App. 4 to Participant’s Opening Br. (Op. Br.)) (“the plan choice rate was established to pay the portion of the PERS-DBRP unfunded actuarial liabilities associated with PERS members who elected to join the [defined contribution plan] rather than the [DB Plan]”).

This actuarially-required rate was originally estimated at 2.96 % of the employee’s compensation. Doc. 35, Ex. 2A at III-7. Ultimately the Legislature, after receiving updated actuary accounts of the pension trust fund’s unfunded liability, settled on a rate of 2.37%. Doc. 35, Ex. 1A at 3; H.B. 79 (1999). This rate is referred to as the “Plan Choice Rate” in statute. Mont Code Ann. § 19-3-2117(2)(a)(ii).

B. The Differing Statutory Plans of the Public Retirement System

Covered employees when hired are initially placed in the DB Plan, and then have a year to choose whether to elect the Defined Contribution (DC) Plan, or, if they are a covered University employee, the Optional Retirement Program (ORP) (renamed the University System Retirement Program in 2013²), or to remain in the

² See Mont. Code Ann. § 19-21-101 (2013).

DB Plan. Mont. Code Ann. §§ 19-3-401(1), -2111(2)(a), -2112(2)(b). If the employee fails to make an election within the allotted year, the employee “remains a member of the defined benefit plan.” Mont. Code Ann. §§ 19-3-2111(2)(b), -2112(2)(c). Thus the default is the DB Plan. An election, once made, is irrevocable.³ Mont. Code Ann. §§ 19-3-2111(2)(c); -2112(2)(d).

Under the *DB Plan* the funds contributed by the employer and employee are allocated to the pension trust fund, not to an individual account. Mont. Code Ann. § 19-3-316. Upon retirement, the employee’s monthly benefit is determined by a formula that considers the employee’s age at retirement, length of employment, and the employee’s highest consecutive three or five years of compensation. Mont. Code Ann. §§ 19-3-108(6), -904. The total contributed by the employee and his or her employer, though tracked, does not determine the amount of benefits the employee is entitled to upon retirement. *Id.* If an employee leaves employment prior to meeting age and tenure requirements, *see* Mont. Code Ann. §§ 19-3-901, -902, the employee is entitled to their individual contributions *but not* to the employer contributions which remain in the pension trust fund. Mont. Code Ann. §§ 19-2-503, -602.

³ Unless the employee leaves covered employment for more than two years before being rehired. Mont. Code Ann. § 19-3-2113.

The *defined contribution plans*,⁴ on the other hand, do not specify a particular retirement benefit, but instead specify how much is contributed to the individual account. Under the DC Plan and the ORP, the employee chooses between investment alternatives based on the employee's risk tolerance and preference of investment options. Mont. Code Ann. § 19-3-2122; Doc. 35, Ex. 3A. The resulting individual retirement account of a vested defined contribution plan member is made up of the employee's and employer's statutorily-prescribed contributions, as well as any investment gain (or loss). Mont. Code Ann. §§ 19-2-303(55), 19-3-2116; Doc. 35, Ex. 3B at ¶ G. The employee also has the option to roll over contributions from another eligible retirement plan to their individual account. Mont. Code Ann. § 19-3-2115(1)(a).

When a vested employee in a defined contribution plan retires, their retirement benefit consists of the accumulated funds in their individual account. Mont. Code Ann. §§ 19-3-2116, -2123; Doc. 35, Ex. 3B at ¶ J. They are not entitled to any payments from the DB Plan pension trust fund. Mont. Code Ann. § 19-3-309; Doc. 35, Ex. 3B at ¶ J. And while a defined contribution plan participant is not able to switch to the DB Plan once they have made their election, they are able to switch between the investment alternatives within their plan and to

⁴ The defined contribution plans, plural, refers to the DC Plan and the ORP.

change the allocation of their contributions. Mont. Code Ann. § 19-3-2122(2), (5); Doc. 35, Ex. 3A.

C. State and Employee Contribution Rates Based on Actuarial Analysis

The amount of the employer and employee contributions are set out in statute. Currently the employee contribution rate is 7.9% of the employee's salary. Mont. Code Ann. § 19-3-315. The current total employer rate is 8.37%. Mont. Code Ann. § 19-3-316. Prior to March 28, 2016, the employer rate was allocated as follows for each member in the DC Plan, based on the member's salary: 4.19% to the employee's individual account, 2.37% to the DB trust fund as the plan choice rate, .04% to the education fund, .3% to a disability plan, .47% to the DB trust fund to eliminate the PCR unfunded actuarial liability (with reallocation to the disability plan once triggers are met); 1% to the DB Plan's unfunded liabilities (terminates once triggers are met) (referred to as the "additional 1% contribution"). Mont. Code Ann. §§ 19-3-2117(2), (3). The employer rate was allocated for ORP members in a similar, though not identical, manner. Mont. Code Ann. § 19-21-214(2).

In 2015, the Legislature determined that the plan choice rate, and the additional 1% and .47% contributions, would soon no longer be needed. HB 107. They based this decision on the determination, by the Public Employee Retirement Board's (the Board) actuary, "that as of June 20, 2014, the unfunded actuarial

liability associated with the plan choice rate [was] \$5,903,188, and is estimated to be fully paid within the next 2 to 3 years.” *Id.* at 2. HB 107 thus provides that the plan choice rate and additional 1% and .47% contributions “must be allocated to the member’s retirement account” once the Board verifies “that the plan choice rate unfunded actuarial liability is paid off” *Id.* at 10-12. The Board verified that the unfunded liability was paid off on March 31, 2016.⁵ As of April 2016, then, an additional 3.84% of compensation will be contributed by the public employer to defined contribution plan member’s accounts. *Id.*

II. PLAINTIFFS’ VOLUNTARY PLAN ELECTIONS

As the district court correctly found, “here all employees have access to education materials so they understand [how] the plans work and the consequences of selecting one plan over another.” Order at 19. During the one-year time period a covered employee has to decide whether to opt out of the DB Plan and join a defined contribution plan, the Montana Public Employee Retirement Administration (MPERA), the agency that administers PERS, provides numerous educational resources to inform covered employees about the available plan

⁵ See <http://mpera.mt.gov/docs/audiominutes/20160331/AudioMinutesSupplement03-31-16.pdf>.

choices, as required by Mont. Code Ann. § 19-3-112(2)(a).⁶ Doc. 35, Ex. 4, ¶ 2 (Weigand Decl.).

The resources provided include booklets, handouts, and PowerPoint presentations, as well as a toll-free question-line where employees may ask specific questions of MPERA staff. *Id.* As noted above, if the employee fails to make a selection within a year, they will by default become a permanent member of the DB Plan. Mont. Code Ann. §§ 19-3-2111(2)(b), -2112(2)(c).

Megan Ashton was hired by the State of Montana on October 20, 2003. *Id.*, ¶ 3. MPERA provided her with educational materials and presentations. *Id.*, ¶¶ 3, 6. These materials describe in detail the plan choice rate and its effect on employer contributions for DC Plan participants. For example, the “Workbook,” Doc. 35, Ex. 4A at 15, clarifies that the plan choice rate:

is the percent of the employer contribution allocated to the Defined **Benefit** Retirement Plan for employees who choose the Defined **Contribution** Retirement Plan. Required by statute, the rate is actuarially determined to maintain the financial stability of the Defined **Benefit** Retirement Plan. This rate is currently 2.37%.

Emphasis in the original.

Ashton elected to enroll in the DC Plan five and a half months after her hiring, on April 4, 2004, by signing a “Retirement Plan Choice” election form.

⁶ This must include “impartial and balanced information about plan choices, benefits, and features in a variety of formats.”

Doc. 35, Ex. 4E. Ashton's election form states, in bold, that the choice to enroll in the DC Plan is "irrevocable." *Id.* The election form also contains an acknowledgement section, which is followed by Ashton's signature. The acknowledgment begins: "I have had the opportunity to be educated about the retirement plan choices *and assume complete responsibility for this irrevocable election.*" *Id.* (emphasis added). The last paragraph of the acknowledgment specifically states: "my retirement contributions and a *statutorily-defined portion* of my employer's future retirement contributions will be placed in my DCRP account." *Id.* (emphasis added). MPERA sent Ashton an official confirmation letter on April 20, 2004, which reiterates that her election to join the DC Plan is irrevocable. Ex. F to Weigand Decl.

Lacey Van Grinsven (formerly Lacey Lutz) was hired by the State of Montana on April 3, 2006. Doc. 35, Ex. 4, ¶ 4. She also received educational materials regarding the plan options and could attend PowerPoint workshops. *Id.*; Ex. 4D to Weigand Decl. One of the handbooks provided, titled "Defined Contribution Retirement Plan Basics," has a similar definition of "Plan Choice Rate" to that appearing in the workbook provided to Ashton, as quoted above, emphasizing that the rate is required by statute, allocated to the DB Plan, and is "actuarially determined to maintain the financial stability of the" DB Plan. Doc. 35, Ex. 4B at 2.

Van Grinsven elected to enroll in the DC Plan 11 months after her hiring, on March 1, 2007, by signing a “Retirement Plan Choice” election form. Doc. 35, Ex. 4G. Her election form, like that filled out by Ashton, states, in bold, that the choice to enroll in the DC Plan is “irrevocable,” and contains an identically-worded acknowledgment, followed by her signature. *Id.* MPERA sent Van Grinsven an official confirmation letter on March 13, 2007, which reiterates that her election to join the ORP is irrevocable. Doc. 35, Ex. 4H.

Edward Wrzesien was hired by the Montana University System on July 24, 2006. Doc. 35, Ex. 4, ¶ 5. Like Ashton and Van Grinsven, he was provided with educational materials regarding plans, *id.*, and had available to him several PowerPoint workshops. Doc. 35, Ex. 4D. His education materials were identical to those provided to Van Grinsven, except they contained additional material about the ORP. A separate handbook titled “Optional Retirement Program” explains the basics of the ORP for those employees in the Montana University System. Doc. 35, Ex. 4C at 2. Within the handbook there is a chart comparing the differences between the DC Plan and the ORP. *Id.* at 3.

Wrzesien elected to enroll in the ORP on August 10, 2007, by signing a “Retirement Plan Choice” election form. Doc. 35, Ex. 4I. His election form, like that signed by Ashton and Van Grinsven, states, in bold, that the choice to enroll in

the ORP is “irrevocable,” and contains an identically-worded acknowledgment⁷, followed by Wrzesien’s signature. *Id.* MPERA sent Wrzesien an official confirmation letter on September 7, 2007, which reiterates that his election to join the ORP is irrevocable. Doc. 35, Ex. 4J.

STANDARD OF REVIEW

This Court reviews “summary judgment rulings de novo, applying the criteria set forth in Mont. R. Civ. P. 56(c)”. *Montana Cannabis Indus. Ass’n v. State (MCIA II)*, 2016 MT 44, ¶ 11, 382 Mont. 256, ___P.3d ___ (citation omitted). Summary judgment is proper where “there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Id.*

“This Court exercises plenary review of constitutional issues.” *Id.*, ¶ 12. In a constitutional challenge such as this, statutes are presumed constitutional. *State v. Michaud*, 2008 MT 88, ¶ 15, 342 Mont. 244, 180 P.3d 636. Therefore, the party making the constitutional challenge bears the burden of proof, and must show the statute is unconstitutional beyond a reasonable doubt. *Id.*; *MCIA II*, ¶ 12. “If any doubt exists, it must be resolved in favor of the statute.” *MCIA II*, ¶ 12. In other words, “[t]he question of constitutionality is not whether it is possible to condemn, but whether it is possible to uphold the legislative action.” *Walters v.*

⁷ Except that it refers to the ORP, not the DC Plan.

Flathead Concrete, 2011 MT 45, ¶ 32, 359 Mont. 346, 249 P.3d 913 (citation omitted).

SUMMARY OF ARGUMENT

Participants each elected to join a defined contribution plan. This affirmative choice is the reason they are in their particular plan, and not the DB Plan. In fact they were placed in the DB Plan when hired and, if they had made no choice at all, would have stayed in the DB Plan. They now claim the State's allocation of funds for employees in defined contribution plans is unjust, but the action that placed them in the plan was not the State's. Thus state action is lacking and neither equal protection nor substantive due process is implicated.

In any case, the defined contribution plans and the defined benefit plan are entirely different plans, as the names suggest. One provides for direct contributions to an individual investment plan and allows for individual investment control, while the other guarantees a particular payment upon retirement, but does not provide contributions directly to individual members. Though members of the different plans can be seen as classes, they are in no way similarly situated. For this reason also equal protection is not implicated.

Even if rational basis review is undertaken, under equal protection or substantive due process, *Farrier v. Teacher's Ret. Bd.*, 2005 MT 229, 328 Mont. 375, 120 P.3d 390, is directly on point and provides that where the State is making

policy in order to comply with the constitutional mandate to ensure actuarial soundness of the retirement fund, its decisions are due significant deference. This is especially true here where the Legislature followed the advice of the State’s actuaries by including the plan choice rate, which allocates State and other public employer funds to address the unfunded actuarial liability due to employees choosing a defined contribution plan. This is neither capricious nor arbitrary, especially where the employee is allowed a year to make an educated choice as to whether to join a defined contribution plan or remain in the DB Plan.

The district court carefully analyzed Participants claims under the correct standard of review. Its decision to award summary judgment to the State should be upheld.

ARGUMENT

I. THE EQUAL PROTECTION CLAIM FAILS BECAUSE PARTICIPANTS’ CHOICE FORECLOSES STATE ACTION, THE PLANS ARE ENTIRELY DIFFERENT, AND THE PLAN CHOICE RATE PASSES RATIONAL BASIS REVIEW.

The “principle purpose” of Montana’s Equal Protection Clause “is to ensure that Montana’s citizens are not subject to arbitrary and discriminatory *state action*.” *MCIA II*, ¶ 15 (citation omitted) (emphasis added). As such, its protections extend only to “state action.” *In re Will of Cram*, 186 Mont. 37, 42, 606 P.2d 145, 148-49 (1980).

If the alleged discrimination is the result of an action by the State, this Court then identifies “the classes involved and determine[s] whether they are similarly situated,” as well as “whether the law treats the classes in an unequal manner.” *MCIA II*, ¶ 15 (citation omitted). Participants thus must demonstrate that “the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.” *Id.* (citation omitted). This Court only undertakes judicial scrutiny of the challenged law if these initial thresholds are met. *Id.*

A. State Action Is Lacking Where Plaintiffs Made an Affirmative Choice to Join a Defined Contribution Plan After Being Provided Education Materials, and Would Otherwise Have Remained In the Defined Benefit Plan by Default.

Where the State has not “adopted [the] classification,” state action is not present. *See Powell v. Montana State Fund*, 2000 MT 321, ¶ 22, 302 Mont. 518, 15 P.3d 877. Generally the “state action” inquiry is undertaken when a private entity is accused of discrimination, and the court then analyzes whether “the state in any of its manifestations has been found to have become involved in such conduct to a significant extent.” *In re Will of Cram*, 186 Mont. 37 at 43, 606 P.2d 145 at 149 (citations omitted); *see also United States v. Morrison*, 529 U.S. 598, 621 (2000) (the Equal Protection Clause applies to “State action exclusively, and not to any action of private individuals.”) (citation omitted).

Here the issue is whether the State “adopted a classification” by authorizing the defined contribution plans as alternatives to the DB Plan. The answer is no.

As correctly analyzed by the district court, “[t]he employee’s choice puts her into a class (DB plan member, DC plan member, etc.), not any action by the State” and “[a]ll employees have an equal opportunity to choose.” Order at 13. Participants are not in a defined contribution plan because of some immutable characteristic, such as their race, sex or age, but by choice. *Compare to Jaksha v. Butte-Silver Bow County*, 2009 MT 263, ¶ 24, 352 Mont. 46, 214 P.3d 1248 (firefighter age limitation created unequal classes).

In fact, Plaintiffs were automatically placed in the DB Plan when hired, and had they failed to take any action during the election period they would have, by default, remained in the DB Plan. Thus, “[t]he state action here is limited to providing options, educating employees as to the benefits and consequences of each option, and placing all employees into the same class if they do not decide for themselves.” Order at 13.

Montana’s retirement system is not “an unfair system” as analyzed below and by the district court, but even if Participants’ conclusion is correct, *see* Op. Br. at 21, it would not change the fact that they made an educated, voluntarily choice to participate in this “unfair system.” Participants’ choice is not “irrelevant.” Op. Br. at 23. On the contrary their choice is the only reason they are in a defined contribution plan.

In an attempt to circumvent the lack of state action, Participants rely on *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. Op. Br. at 22-23. But whether the “state action” requirement was met, or the nature of the choice made, was simply not an issue in either *Oberson* or *Brewer*. As the district court reasoned, “the nature of choice in those cases [choosing to ride snowmobiles or go skiing] is quite different than the nature of the choice here.” Order at 13.

Merely providing retirement plan choices to all employees does not suffice as state action. The State cannot be said to discriminate against an individual where the individual’s circumstance is the result of an educated choice. As such, Participants’ equal protection claim fails at the start, and summary judgment was correctly awarded to the State.

B. Members of Defined Contribution Plans Are Not Similarly Situated to Members of the Defined Benefit Plan Because Each Plan Is An Entirely Separate Vehicle for Funding Retirement Benefits.

Participants’ insistence that the State “acted” by creating different retirement plans runs them squarely into the next threshold: if the alleged classes are not similarly situated, equal protection is not implicated. A law “does not violate the right to equal protection simply because it benefits a particular class.” *Bean v.*

State, 2008 MT 67, ¶ 13, 342 Mont. 85, 179 P.3d 524. In fact, a law “may impose different treatment upon differing groups or classes of people.” *Id.* Therefore an equal protection challenge will fail “if the groups at issue do not constitute similarly situated classes.” *Id.*

In *Bean*, the Supreme Court considered whether a statute that “restructured the retirement system for Guard firefighters by creating one class of firefighters hired on or after October 1, 2001, and one class consisting of all Guard firefighters hired before that date” created similarly situated classes. *Id.*, ¶ 17. The Court determined it did not, but instead created “two dissimilar classes of firefighters.” *Id.* (citation omitted); *see also Gulbrandson v. Carey*, 272 Mont. 494, 503-04, 901 P.2d 573, 579-80 (1995) (upholding judicial retirement system providing superior benefits to judges retiring after a certain date). Thus, the statute was upheld, even though it created “an inequitable situation.” *Id.*, ¶ 19.

Here, as with *Bean and Gulbrandson*, the law creates entirely different classes of retirement plans that are not similarly situated. In fact, the classes here are even less similar than the hiring-date classes analyzed in *Bean*. The retirement system does not merely place some employees into the DB plan and others into a defined contribution plan based on their hiring date. It instead provides alternative plans, each unique. These plans are quite different. The defined contribution plans each create an individual retirement account where the employee chooses how they

want to invest their retirement savings, whereas the DB Plan provides a certain pension payment upon retirement, but does not allow for any control, or ownership, over the investment of the retirement funds. *See* Statement of Facts above. The retirement system plan options thus created “dissimilar classes of [retirement system members].” *Bean*, ¶ 17.

Participants try to evade *Bean*’s holding by claiming that in *Bean* the statutes created two separate retirement systems, whereas here there are only separate plans within the same public retirement system. Op. Br. at 19-20. But Participants fail to explain why this semantic distinction matters to the underlying analysis. At most the difference is beneficial to the analysis in this case because here the employees have a choice of which plan to join, unlike in *Bean*.

The differences between the defined contribution and defined benefit plans also do not create an “inequitable situation.” A law “may impose different treatment upon differing groups or classes of people.” *Bean*, ¶ 13. It is in no way clear that one retirement plan is better than the other, as was the case with the two plans at issue in *Bean*--otherwise why would Plaintiffs have voluntarily joined a defined contribution plan? Instead the different retirement plans each have distinct advantages and disadvantages.

A person who elects to join a defined contribution plan gains investment control over their retirement account. If they are vested when they terminate

employment (after five years), then they are entitled to withdraw or roll over their entire account, including the funds contributed by the State. Mont. Code Ann. § 19-3-2116(2). It therefore may be more lucrative for an eligible employee who plans to work more than five years, but less than the time necessary to qualify for retirement under the DB Plan, to choose a defined contribution plan.

Employees who choose to stay with the DB plan, on the other hand, gain the certainty of a defined benefit upon retirement, but lose the ability to control the investment. They do not own an individual retirement plan. Instead the employee's contributions, as well as the employer's, are directed to the DB Plan's pension trust fund. Mont. Code Ann. § 19-3-316. If a DB Plan employee terminates prior to meeting age and service requirements and seeks a refund, they are only entitled to reimbursement of their own accumulated contributions. Mont. Code Ann. § 19-2-602. The employer's contributions remain in the DB Plan pension trust fund. *Id.*; § 19-2-503.

Unable to distinguish *Bean*, Participants attempt to analogize their case to the similarly situated classes discussed in *Reesor v. Montana State Fund*, 2004 MT 370, 325 Mont. 1, 103 P.3d 1019 and *Henry v. Montana State Fund*, 1999 MT 126, 294 Mont. 449, 982 P.2d 456. Op. Br. at 14-15. As the district court concluded, though, the classes in this case are distinguishable from those in *Reesor* and *Henry*. There “the only distinction between the classes was age or the way the injury was

incurred.” Order at 16. Here, on the other hand, “the distinction between the two classes is a fundamentally different approach to retirement savings.” *Id.*

The fatal “flaw in [their] argument” is Participants’ assumption that the entire allocation of State funds, as the employer, is “their” employer contribution. *See, e.g.*, Op. Br. at 2 and 8; Order at 15. The plan choice rate does not allocate Participants’ funds, or funds they are statutorily guaranteed, and deposit those funds in the DB Plan. Instead, the plan choice rate is an allocation of public funds to the pension trust fund based on the number of participants in defined contribution plans, and the resulting impact on the pension fund. H.B. 107 at 1 (“the plan choice rate was established to pay the portion of the PERS-DBRP unfunded actuarial liabilities associated with PERS members who elected to join the [defined contribution plan] rather than the [DB Plan]”). The amount is based on a percentage of the wage of the employee in the defined contribution plan, but this is merely an allocation mechanism. It allows the rate to be directly tied to the number of members participating in defined contribution plans, as opposed to the DB Plan.

In sum, the different retirement plan options are just that--different plans with different schemes. Because members of the plans are not similarly situated or treated unequally, the district court’s grant of summary judgment to the State should be upheld.

C. **The Plan Choice Rate Is Rationally Related to Ensuring the Retirement System Is Funded on an Actuarially Sound Basis.**

The district court appropriately went no further in its analysis because the state did not adopt the classifications, and the different plans did not create similarly situated classes. Order at 16-17. Nevertheless, the law easily survives judicial review.

An equal protection claim regarding the receipt of retirement benefits is subject to rational basis review. *Jaksha*, ¶ 19 (applying rational basis review to retirement plan challenge). “Rational basis is the most deferential standard of review.” *MCIA II*, ¶ 26 (citations omitted). “The rational basis test requires a law to be rationally related to a legitimate government interest.” *Rohlf’s v. Klemenhausen*, 2009 MT 440, ¶ 31, 354 Mont. 133, 227 P.3d 42 (citation omitted). “Under the rational basis test, it is the challenger’s burden to show the law is not rationally related to a legitimate government interest.” *Id.*, ¶ 26; *Big Sky Colony v. Montana Dep’t of Labor & Indus.*, 2012 MT 320, ¶ 65, 368 Mont. 66, 291 P.3d 1231.

Moreover, “[w]hat a court may think as to the wisdom or expediency of the legislation is beside the question and does not go to the constitutionality of a statute.” *Rohlf’s* ¶ 31. In the absence of an affirmative showing that no valid reason existed to support the law, the Legislature’s choice is not to be disturbed.

Id.

The purpose of the plan choice rate is to ensure the actuarial soundness of the DB Plan. H.B. 107 at 1. This rationale is more than merely a legitimate state interest--it is mandated by Montana's Constitution. Article VIII, section 15(1) requires that the public retirement system "be funded on an actuarially sound basis." The actuarial analysis undertaken at the time the Legislature considered providing a defined contribution plan option cautioned that, in order to offset the lack of contributions that would otherwise come from the employees' participation in the DB Plan, a certain percentage of funds would need to be provided to the pension trust fund for each employee in a defined contribution plan. Doc. 35, Ex. 1A at 3 and Ex. 2B at 1 (the plan choice rate was "actuarially determined to maintain the financial stability of the Defined Benefit Retirement Plan."); H.B. 107 at 1.

As such, this Court's decision in *Farrier*, a decision on all fours with the claim here, compels the conclusion that rational basis is met. Like Participants 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. *Id.*, ¶ 9.

Applying rational basis review, this 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 (emphasis added). 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).

Here, as in *Farrier*, “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 was 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 allocating State resources via the plan choice rate to meet its constitutional mandate. *Id.*, ¶ 21.

Participants’ focus on “cost containment,” Op. Br. at 24-25, is thus off base. First, in the context of public retirement plan policy, cost containment does provide a rational basis. *Farrier*, ¶ 20 (“the State’s interest in, and control over, the financial consequences proves a legitimate exercise of its constitutional mandate.”). Second, unlike *Caldwell v. MACo Workers’ Comp. Trust*, 2011 MT 162, 361 Mont. 140, 256 P.3d 923, the different retirement plans here are based on individual choice, and the plan choice rate is not intended to save the State money (in fact it is a cost to the State), but to meet its constitutional obligation based on actuarial analysis. Doc. 35, Ex. 1A at 3 and Ex. 2B at 1; H.B. 107 at 1.

Participants fail to explain how relying on actuarial analysis to meet the constitutional requirement of maintaining the retirement fund's actuarial soundness is not rationally related to a legitimate state interest. It is, and summary judgment was appropriately granted for the State.

II. RELYING ON ACTUARIAL ANALYSIS TO PROTECT THE RETIREMENT FUNDS' ACTUARIAL SOUNDNESS IS NEITHER ARBITRARY NOR CAPRICIOUS.

Participants' due process claim fails for similar reasons as their equal protection claim. Because no fundamental right is implicated here, "substantive due process analysis requires a test of the reasonableness of [the] statute in relation to the State's power to enact legislation." *MCIA II*, ¶ 21 (citation omitted). In other words, the law must not be "unreasonable, arbitrary or capricious," and must be reasonably related to a permissible legislative objective. *Id.*, *State v. Egdorf*, 2003 MT 264, ¶ 19, 317 Mont. 436, 77 P.3d 517. Under substantive due process, then, a law "will be upheld if it has any rational basis." *Bieber v. Broadwater County*, 232 Mont. 487, 491, 759 P.2d 145, 148 (1988) (citation omitted).

Here, as explained above, this Court "need not surmise possible purposes for the legislation" because the legislative committee that drafted the original legislation, and subsequent actuaries and legislatures, have made the purpose explicit. *MCIA II*, ¶ 23 (citation omitted). The purpose of the plan choice rate is to ensure the actuarial soundness of the DB Plan. Doc. 35, Ex. 1A at 3 (plan choice

rate intended “to pay for past unfunded liability obligations and to compensate the DB plan for increased DB plan costs resulting from PERS members selecting the DC plan”); Ex. 2B at 1 (the plan choice rate was “actuarially determined to maintain the financial stability of the Defined Benefit Retirement Plan.”); H.B. 107 at 1 (“the plan choice rate was established to pay the portion of the PERS-DBRP unfunded actuarial liabilities associated with PERS members who elected to join the [defined contribution plan] rather than the [DB Plan]”). This purpose is not just legitimate, but mandated by Montana’s Constitution.

And, as explained above, the plan choice rate is reasonably related to ensuring the public pension fund’s actuarial soundness. It calculates the public employers’ payment to the pension trust fund based on the actuarial effect of those employees that choose to join a defined contribution plan. H.B. 107 at 1. This specific mechanism was suggested by the State’s actuaries. Doc. 35, Ex. 1A at 3. Participants respond that this analysis does not take into account the savings obtained “from not being obligated to pay benefits to DC Plan participants.” Op. Br. at 28, 35. Participants point to no evidence to support this assumption, and presumably it was considered by the State’s actuaries when determining the plan choice rate. In any case, this Court’s role “is not one of second guessing the prudence of the conclusions reached,” and therefore “mathematical exactitude” is not required. *MCIA II*, ¶¶ 26, 31.

Participants also suggest that H.B. 107's statement that "the normal cost of benefits" in the DB Plan has "never significantly changed because of PERS members selecting" a defined contribution plan, implies the plan choice rate was not related to maintaining the pension trust fund's actuarial soundness. Op. Br. at 36. Participants confuse the normal cost with the Plan's unfunded actuarial liability attributable to the defined contribution plan. The normal cost is the cost to fund the DB Plan--it does not include the Plan's actuarial liability. Mont. Code Ann. §§ 19-2-303(5) and (34). The State's actuaries advised the State that the plan choice rate was necessary not only to address the normal cost but also the effect on the DB Plan's unfunded actuarial liability. In fact, when H.B. 107 was passed the State's actuary estimated just under \$6 million unfunded liability remained that was attributable to defined contribution plan participants. H.B. 107 at 2.

The legislature followed actuarial advice and implemented the plan choice rate to protect the fund's actuarial soundness, and dissolved it when it was no longer needed. *See* H.B. 107. This was neither arbitrary nor capricious, but directly related to addressing the constitutional mandate to maintain actuarial soundness.

Participants suggest that *Newville v. State*, 267 Mont. 237, 883 P.3d 793 (1994) and *Hardy v. Progressive Specialty Ins.*, 2003 MT 85, 315 Mont. 107, 67 P.3d 892, support their claim, because they allege the plan choice rate deprives

them “of their hard earned money for no consideration.” Op. Br. at 34 (citing *Hardy*, ¶ 37). As the district court noted, however, it “is not the employee’s money that she must give up. It is an allocation of state funds.” Opinion at 18. As such, and considering the constitutional mandate to maintain actuarial soundness, *Newville* and *Hardy* are inapplicable.

The Legislature did not have to allow a defined contribution plan option to address the need for individual investment control, but when it did, it had to ensure actuarial soundness. Mont. Const. Art. VIII, § 15(1); *Farrier*, ¶ 20 (“The legislature accommodated the University's need to offer an optional retirement program, but passed a number of provisions aimed at protecting TRS, its membership and its contributions.”). The Legislature’s decision to follow actuarial advice and implement the plan choice rate did not violate substantive due process, and the district court properly awarded summary judgment.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court’s Order granting summary judgment for the State.

Respectfully submitted this 21st day of April, 2016.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 6,650 words, excluding certificate of service and certificate of compliance.

J. STUART SEGREST