NO. 436 PA 13-4 TWENTY-SEVEN-A DISTRICT

****

SUPREME COURT OF NORTH CAROLINA

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I. BEVERLY LAKE, et al., and all others similarly situated,	)	
Plaintiffs-Appellants,	)	
vs.	)	From Gaston County COA17-1280
STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, et al.,	)	
Defendants-Appellees.	)	

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BRIEF OF AMICI CURIAE AARP AND AARP FOUNDATION IN SUPPORT OF APPELLANT

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BRIEF OF AMICI CURIAE AARP AND AARP FOUNDATION IN SUPPORT OF APPELLANT

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INTEREST OF AMICI CURIAE

AARP[1] is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live

[1] No person or entity other than amici and its counsel have written this brief or contributed money for its preparation. See N.C. R. App. P. 28(i)(2).

as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on financial stability, health security, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

Among other things, AARP and AARP Foundation seek to support the health and financial well-being of retirees. In service of this goal, *amici* conduct a wide range of activities, including providing programs that help retirees maximize their income, educating retirees, researching health and financial issues affecting retirees, and advocating for retirees. One of *amici*'s main objectives is to ensure that employees receive in retirement those benefits that they have been promised, given that the quality and stability of their lives in retirement depend substantially on receiving these benefits.

The Court's decision in this case will significantly impact the household finances of thousands of retirees in North Carolina. The position urged by the state, and adopted by the Court of Appeals, will

impose substantial unanticipated health costs on former employees who faithfully served the State and relied on its promises in transitioning out of the workplace. Many retiree households will suffer greater financial instability as a result.

ARGUMENT

I. Treating Vested Retirement Health Benefits as Contractually Promised Deferred Compensation Is Consistent with North Carolina Law and the Laws of Other States with Similar Statutes

As plaintiffs argue, the health benefits that North Carolina conferred on retirees are "deferred compensation," creating a contractual obligation on the state's part. Pet. Br. at 50 (citing *Bailey v. State*, 348 N.C. 130, 141-42, 500 S.E.2d 54, 60-62 (1998). Simply put, these health benefits are part of the retirement system—the total compensation package promised to state employees upon their retirement if they meet specified service requirements.

The legislative intent to treat these health benefits as an integral part of a larger compensation package is reflected in numerous statutory provisions. North Carolina law makes the State Health Plan available only to "eligible retired employees," which the statute defines until 2021 as retired teachers and state employees "who are receiving monthly

retirement benefits from any retirement system supported in whole or in part by contributions of the State of North Carolina, so long as the retiree is enrolled." N.C. Gen. Stat. §§ 135-48.1(18), 48.2. In other words, only retired employees who have vested and begun to receive retirement income from a state retirement system are eligible for retirement benefits. *Id.* A statutory amendment further confirms this by directing the State Health Plan administrator to "inform, in writing, all employees and retired employees enrolled in the Plan . . . of additional employer contributions to the Plan . . . as a part of the total compensation package for employees and retired employees." N.C. Session Law 1987-857 § 23(b). Those promised health benefits are, therefore, contractual, and the State may not retrospectively alter them for vested employees.

This would not be an unprecedented conclusion; other states that have a similar statutory structure for retirement benefits treat health benefits as part of the deferred compensation package promised to employees who vest in the plan. For instance, the Supreme Court of Alaska treated health insurance benefits as part of the "employee retirement system" in *Duncan v. Retired Public Employees of Alaska, Inc.*, 71 P.3d 882 (Alaska 2003). In that case, the state constitution

provided, "Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired." *Id.* at 886.

As in North Carolina, retirement benefits were considered "an element of the bargained-for consideration given in exchange for an employee's assumption and performance of the duties of his employment." *Id.*; *accord Bailey*, 348 N.C. at 146, 500 S.E.2d at 60 (state employees "had a contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested"). While the state argued that this provision only covered pension benefits, the court concluded that "accrued benefits" included "all retirement benefits that make up the retirement benefit package that becomes part of the contract of employment when the public employee is hired, including health insurance benefits." *Duncan*, 71 P.3d at 888. And, the court utterly rejected the state's argument that fluctuating and rising medical costs militated in favor of excluding medical benefits from the phrase "accrued benefits." *Id.* at 887-88.

Duncan noted that numerous other state courts had likewise concluded that "medical benefits are part of vested retirement benefits," including California, New Jersey, New York, Oklahoma, and West Virginia. *Id.* at 888 n.23 (collecting cases). The origins of the public entities' contractual obligations varied among the cases on which *Duncan* relied. While Alaska's obligations were constitutional (*id.* at 886), other states' were statutory (*City of Wheeling Retirees' Ass'n v. City of Wheeling*, 407 S.E.2d 384, 387 (W. Va. 1991), regulatory (*Emerling v. Vill. of Hamburg*, 255 A.D.2d 950, 961 (N.Y. App. Div. 1998), created by municipal ordinance (*McMinn v. City of Oklahoma City*, 952 P.2d 517, 521 (Okla. 1997)[2]; *Thorning v. Hollister Sch. Dist.,* 11 Cal. App. 4th 1598, 1605 (1992)), and promised by a county welfare board resolution (*Weiner v. County of Essex*, 620 A.2d 1071 (N.J. Super. Ct. Law Div. 1992).[3] The source of the obligation was, to the Supreme Court of Alaska, a

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[2] Of particular relevance here, *McMinn* held unequivocally that while "the City would narrow the definition of "retirement purposes" . . . to include only the payment of a monthly pension . . . had this been the intent of the drafters of the contract, we believe the more narrow term 'pension' would have been used rather than the word 'retirement.'" 952 P.2d at 521.

[3] As *Duncan* acknowledged, other states have disagreed. *See* 71 P.3d at 888 n.23 (citing cases from Colorado, Michigan, and Tennessee).

distinction without a difference—and it should be here, as well. A contract is a contract.

More recently, the highest courts of both Illinois and Hawaii have also concluded that health benefits are part of a retirement system, where the state has contractually obligated itself to pay retirement benefits to vested employees. *See Kanerva v. Weems*, 13 N.E.3d 1228, 1240 (Ill. 2014); *Everson v. State*, 228 P.3d 282, 296-98 (Haw. 2010). In *Kanerva v. Weems*, the Supreme Court of Illinois held that health insurance subsidies were part of the state's "pension or retirement system," the benefits of which were contractually enforceable. 13 N.E.3d at 1239-40. As in North Carolina, "[a]though some of the benefits are governed by a group health insurance statute and others are covered by the Pension Code, eligibility for all of the benefits is limited to, conditioned on, and flows directly from membership in one of the State's various public pension systems." *Id.* at 1240. Notably, while the state constitution gave rise to the state's contractual obligations, the *Kanerva* court pointed out that "[t]he construction of constitutional provisions is governed by the same general principles that apply to statutes." *Id.* Consequently, giving the constitutional language its "plain and ordinary

meaning, all of these benefits, including subsidized health care, must be considered to be benefits of membership in a pension or retirement system of the State and, therefore, within that provision's protections." *Id.* (citing *Everson*, 228 P.2d at 296-98)).

There is no reason to reach a different conclusion here. Retiree health benefits are part of the retirement system, which promises deferred compensation to state employees who vest. That is a binding contract.

II. Shifting Healthcare Costs to Retirees Increases the Load on a Population That Is Already Under Financial Stress and Ill-Equipped to Shoulder Additional Burdens

While the sustained increase in healthcare costs presents a challenge at all levels of society, the magnitude and consequences of this challenge are particularly acute for retirees. As with seniors as a whole, many retirees are in financially precarious positions. Many also face the further problem of being on fixed incomes, meaning that rising healthcare costs, which already comprise one of the biggest expenditures in senior households, pose an exceptionally harsh burden. Offloading additional healthcare costs onto retirees can therefore have an outsize effect on retirees' household budgets and their financial stability.

For tens of millions of seniors, making ends meet is simply not possible. Nationally, expenses in households headed by those 65 and older outstrip take-home income. In 2018, median total income after taxes for senior households was $45,550. U.S. Bureau of Labor Statistics, Consumer Expenditure Survey, 2017-2018, Table 3254, https://tinyurl.com/y7krhz25 (hereinafter "BLS Survey").[4] This figure from the BLS Survey encompassed income from all sources, including earnings, Social Security, and retirement and pension plans. *See BLS Survey* at 3. Average annual expenditures for senior households, meanwhile, totaled $50,165. *BLS Survey* at 1. Thus, the average senior household faces an annual deficit of nearly $5,000.

This financial strain holds true for almost eighty percent of senior households. *See BLS Survey* at 1. Expenses exceed income after taxes for all households earning less than $50,000, and those with income between $50,000 and $70,000 have an annual surplus of $385—just $32 per month. *See id.* The only groups for which income is meaningfully greater

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[4] The BLS Survey tracks "consumer units," which are equivalent to households. *See* U.S. Bureau of Labor Statistics, Consumer Expenditures and Income: Concepts (Feb. 25, 2016), https://tinyurl.com/ yaufferh.

than expenses are those earning $70,000 and above. *See id.* For nearly eighty percent of America's seniors, financial distress is a fact of daily life.

North Carolina is no exception to this national problem. The median income for 65+ households in the state is $40,062. *See* Income by Zip Code, Income Statistics for North Carolina Zip Codes (Dec. 19, 2019), https://tinyurl.com/yagqhj62 (calculating incomes using data from the U.S. Census Bureau's American Community Survey). This strongly suggests the strain on the state's seniors is as severe as that on seniors elsewhere, if not more so.[5]

Seniors are unlikely to be able to rely on savings for defraying new expenses sustainably. As of 2013, nearly two-thirds of households headed by adults 60 and older carried debt, strongly suggesting that they do not have substantial savings. *See* National Council on Aging, Economic Security Fact Sheet (Dec. 2016), https://tinyurl.com/yxmk2454. Of those

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[5] Actual take-home income is lower than suggested by this figure, which reflects gross income. The data underlying this number comes from the U.S. Census Bureau's American Community Survey, which defines wage and salary income to include wages and salaries before deductions for taxes, pensions, union dues, and other deductions. *See* U.S. Census Bureau, *Am. Comty. Survey & Puerto Rico Cmty. Survey: 2018 Subject Definitions* (Sep. 16, 2019), at 82, https://tinyurl.com/y95jbnfe.

with savings in non-retirement accounts, the amount varied widely by household type, from about $6,600 to $16,000. *See* Emmie Martin, *This chart shows how much money Americans have in savings at every age*, CNBC, Mar. 12, 2019, https://tinyurl.com/yxbnh3fc. These numbers are not of the order needed to sustain a new, recurring expense like a monthly health insurance premium. A monthly premium of $100, for example, would consume $6600 of savings in less than 6 years, meaning that a 65 year-old forced to make those premium payments would have no savings left by the age of 71 (assuming nothing else requires spending the savings and that the premium stays constant).

Moreover, healthcare costs constitute one of the biggest expenses seniors face. Annually, senior households spend $6,684 on healthcare.[6] *BLS Survey* at 1. Thirty percent of this amount (or about $2000) goes toward non-premium expenses, including medical services, drugs, and medical supplies. *BLS Survey* at 1. Seniors spend more on healthcare than on every other category of goods and services other than housing and transportation. *BLS Survey* at 1-3.

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[6] This is net of reimbursement. *See* Ann C. Foster, U.S. Bureau of Labor Statistics, Household Healthcare Spending in 2014 (Aug. 2016), https://tinyurl.com/y8we56m9.

For more than a decade healthcare costs have been increasing, with negative consequences particularly for the elderly. Healthcare costs have increased for everyone, both in absolute numbers and as a share of income. Francesca Ortegren, *How U.S. Health Policy Changes Have Affected Healthcare Costs Over Time*, Clever, Sept. 23, 2019, https://tinyurl.com/y7xtfmrs (analyzing data from federal government and Kaiser Family Foundation). But compounding the impact of this increase has been the fact that, as people age, they typically require more healthcare services. *See* Ann C. Foster, U.S. Bureau of Labor Statistics, Consumer Expenditures Vary by Age (Dec. 2015), https://tinyurl.com/yazw8tgf. Seniors are thus hit two-fold, needing more healthcare services as they age, and paying more for those services. Plaintiffs' experience reflects this increase: In the first year of being charged for the 80/20 Plan, non-Medicare retirees were charged $21.62 per month. (R vol. 3 p 355.) By 2016, that premium had nearly quintupled, increasing to $104.20. *Id.* Given these trends, it is not surprising that the cost of medical care has been a primary driver of debt among the 60% of senior households that are debt-burdened. *See* National Council on Aging, Older Adults and Debt: Trends, Trade-offs, and Tools to Help (2018),

https://tinyurl.com/y9odez99. In fact, more than half of the respondents to one survey said that "medical debt was the most significant barrier to the economic wellbeing of seniors[.]" *Id.* In short, most senior households are economically vulnerable to begin with, and the prospect of healthcare-driven expenses as they age is already a near-certainty.

The rising cost of healthcare is a difficult problem that must be addressed. Shifting that cost onto the people least-positioned to absorb it is not the answer, however. If the Court does not require the State to maintain the retiree health benefits it promised to hard-working public servants who anticipated being able to rely on those benefits in retirement, that is exactly what will happen. In addition to departing from precedent, such a result would upend the retirement security of some of North Carolina's most vulnerable citizens.

CONCLUSION

For these reasons, amici respectfully submit that the Court should reverse the decision of the Courts of Appeals.

Respectfully submitted this 29th day of June 2020.

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Pursuant to Rule 33(b) of the Rules of Appellate Procedure, I certify that counsel listed below, Ali Naini, has authorized me to list his name on this document as if he has personally signed it.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for Amici Curiae AARP and AARP Foundation certifies that the foregoing brief, which is prepared using a proportionally-spaced font, is less than 3,750 words (excluding cover, captions, indexes, tables of authorities, certificates of service, this certificate of compliance, counsel's signature block, and appendixes) as reported by the word-processing software used to prepare this brief.

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