No. 436P13-4 TWENTY-SEVEN-A DISTRICT

SUPREME COURT OF NORTH CAROLINA

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I. BEVERLY LAKE, JOHN B. LEWIS, JR., EVERETTE M. LATTA, PORTER L. McATEER, ELIZABETH S. McATEER, ROBERT C. HANES, BLAIR J. CARPENTER, MARFILYN L. FUTRELLE, FRANKLIN E. DAVIS, THE ESTATE OF JAMES D. WILSON, THE ESTATE OF BENJAMIN E. FOUNTAIN, JR., FAYE IRIS Y. FISHER, STEVE FRED BLANTON, HERBERT W. COOPER, ROBERT C. HAYES, JR., STEPHEN B. JONES, MARCELLUS BUCHANAN, DAVID B. BARNES, BARBARA J. CURRIE, CONNIE SAVELL, ROBERT B. KAISER, JOAN ATWELL, ALICE P. NOBLES, BRUCE B. JARVIS, ROXANNA J. EVANS, and JEAN C. NARRON, and all others similarly situated,	)	
Petitioners,	)	From
v.	)	Gaston
	)	County
STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, BOARD OF TRUSTEES OF THE TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, DALE L. FOLWELL, in his official capacity as Treasurer of the State of North Carolina, and the STATE OF NORTH CAROLINA,	)	
Respondents.	)	

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MOTION TO DISMISS APPEAL AND
RESPONSE TO PETITION FOR DISCRETIONARY REVIEW
AND RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

The State of North Carolina and other state defendants respectfully submit this combined motion to dismiss plaintiffs' notice of appeal, response to plaintiffs' petition for discretionary review, and response to plaintiffs' petition for certiorari.

In the decision below, the Court of Appeals correctly applied this Court's precedents and held that the State did not enter a contract with plaintiffs for retirement health benefits. This Court's review of that ruling is not warranted for at least three reasons.

First, plaintiffs' claims lack support in existing case law. Thus, the decision of the Court of Appeals broke no new legal ground. A party cannot invoke this Court's review merely by concocting a novel legal theory. Because the Court of Appeals correctly applied settled law to reject plaintiffs' claim, this Court need not review that decision here.

Second, the Court of Appeals has resolved the practical concerns that were created by the trial court's order. In that order, the trial court barred the State from enforcing state statutes, required the State to disburse additional benefits worth over a billion dollars, and constrained the State's power to address an impending fiscal crisis. By reversing that far-reaching

order, the Court of Appeals has restored certainty to the State's financial planning.

In contrast, granting review here would again thrust the State's financial planning into disorder. That disorder would persist for at least a year or more, until this Court issued a final ruling on the merits. Denying review would therefore advance the State's ongoing efforts to plan strategically for the future of the State Health Plan.

Third, the decision below does not burden plaintiffs. The State continues to fulfill its statutory duty to provide plaintiffs with retirement health benefits that are equivalent to those available to current employees. Moreover, for the great majority of class members, those state-provided benefits comply even with plaintiffs' demands here. Specifically, all retirees who are eligible for Medicare may enroll in a Medicare Advantage Plan—a plan that plaintiffs concede complies with the alleged contract. At least 75% of the certified class belongs to this group, a figure that will only grow as more class members become eligible for Medicare. Thus, the real-world impact of this case will only diminish with time.

For these reasons, the State respectfully requests that this Court dismiss the notice of appeal, deny the petition for discretionary review, and deny the petition for writ of certiorari.

FACTUAL AND PROCEDURAL HISTORY

A. History of the State Health Plan

Since 1972, the State has offered health benefits to its employees. Act of July 20, 1971, ch. 1009, § 1, 1971 N.C. Sess. Laws 1588, 1588. In 1974, the State extended these benefits to retired state employees. Act of Apr. 11, 1974, ch. 1278, § 1, 1973 N.C. Sess. Laws 454, 454.

In 1982, the General Assembly changed the terms of the State Health Plan and codified those terms by statute. Act of June 23, 1982, ch. 1398, § 6, 1982 N.C. Sess. Laws 288, 289-311. For example, under the 1982 law, the health plan had coinsurance of 5%. Id. at 297. Thus, after the deductible was met, members were required to pay 5% of their eligible health costs until they reached the plan's out-of-pocket maximum.

In the 1982 law, the General Assembly specifically "reserve[d] the right to alter, amend, or repeal" the plan. Id. at 311 (codified as amended at N.C.

Gen. Stat. § 135-48.3). The plan's annual benefit booklets likewise warned retirees that benefits could be reduced in the future. For example:

- The 1982 booklet said that because "the cost of health care is increasing each year at an alarming rate," the health plan's benefits could fall. (Doc. Ex. 1240)
- The 1986 booklet informed retirees that the Plan's value had already been reduced. The booklet pointed out that "[g]iven the continued rise in health care costs and utilization (some 12% to 14% a year in this plan alone!) further benefit changes may be necessary." (Doc. Ex. 1280)
- Later booklets repeatedly warned retirees that "[t]he North Carolina General Assembly determines benefits for the State Health Plan and has the authority to change benefits." (E.g., Doc. Ex. 1486, 1535, 1652, 1867, 2316, 2765)

Acting on this authority, the General Assembly has continually amended the statutes that govern the State Health Plan. Over the twenty-nine years between 1982 and the filing of this lawsuit in 2011, the General Assembly amended the plan at least two hundred times. Lake v. State

Health Plan for Teachers & State Emps., No. COA17-1280, slip op. at 21-22 (N.C. Ct. App. Mar. 5, 2019). Many of these amendments have reduced plan benefits. For example:

- In 1985, coinsurance rose to 10%. In 1991, it rose again to 20%. See id. at 22.
- The deductible rose from the original $100 to $250, then to $350, then to $450. See id.
- The out-of-pocket maximum rose to $1000, then to $1500, then to $2000. See id.

Moreover, over the years, the State has offered a wide variety of health plans with different benefits and features.

For example, in 2006, the State began offering a new kind of health plan: "preferred provider organization" (PPO) plans. See id. at 3. The State Health Plan offered members a choice among three different PPO plans, each with a different rate of coinsurance. These plans are known as the 70/30 PPO plan, the 80/20 PPO plan, and the 90/10 PPO plan. Id.

Effective in 2008, the General Assembly discontinued the indemnity health plan that the State had offered since 1982. Id.

Since 2008, however, the State has continued to offer a variety of health plans to retirees. At least one of these plans has always been premium-free for individual coverage. For example, the State has never charged a premium for retirees to enroll in the 70/30 PPO plan. Id. at 3-4.

Before 2011, the 80/20 PPO plan, too, did not charge a premium. Id. at 3. In 2011, however, the General Assembly authorized the State Health Plan to charge state employees and retirees a monthly premium for individual coverage under the 80/20 PPO plan. See id. at 3-4.

In 2014, the State introduced new types of health plans that were also premium-free. For example, the State began to offer premium-free Medicare Advantage plans to members who are eligible for Medicare, the federal health plan available to Americans 65 and older. Id. at 4. Medicare Advantage plans are private health plans that substitute for Medicare. Over 75% of North Carolina state retirees are eligible to enroll in a Medicare Advantage plan. Id.

B. The Current Litigation

In 2012, plaintiffs here, a group of retired state employees and teachers, filed this lawsuit. Plaintiffs alleged that by enacting the benefit statute in

1982, the General Assembly made an offer to contract with them. See id. at 4. Under that alleged contract, plaintiffs claim the right to premium-free health benefits at or above a fixed level for the rest of their lives. Specifically, plaintiffs claimed a contract for what they called an "80/20 health insurance plan." Id.

The trial court agreed with plaintiffs' contract theory. It held that the State was barred from imposing a premium on the 80/20 PPO plan. It then issued a permanent injunction that requires the State to give plaintiffs premium-free health benefits, at or above a defined level, for the rest of their lives. Id. Specifically, the trial court required the State to give plaintiffs a health plan that has an actuarial value equivalent to the September 2011 version of the 80/20 PPO Plan. (R pp 618-19, ¶¶ A-G)

The Court of Appeals reversed. In a unanimous opinion, the court rejected plaintiffs' theory that they have a contract right to premium-free health benefits at a fixed level for life. Lake, No. COA17-1280, slip op. at 2, 9, 25-27.

The Court of Appeals began by observing that this Court has applied a presumption that statutes do not create contracts, but instead set policies

that later legislatures may change. Id. at 10-11 (citing N.C. Ass'n of Educators, Inc. v. State, 368 N.C. 777, 786, 786 S.E.2d 255, 262 (2016) [NCAE]).

The Court of Appeals went on to observe that the contract that plaintiffs claim here does not resemble any statutory contract that this Court has ever recognized. Id. at 11-14. Specifically, the court noted that health benefits, unlike pensions, are not deferred compensation. Id. (citing Faulkenbury v. Teachers' & State Emps. Ret. Sys., 345 N.C. 683, 690, 483 S.E.2d 422, 427 (1997), and Bailey v. State, 348 N.C. 130, 141, 500 S.E.2d 54, 60 (1998)). The court examined several factors that distinguish retirement health benefits and pensions:

- Pensions vary according to an employee's salary or length of service. Health benefits do not.
- Pensions are mandatory both for employees and the State. Health benefits are optional.
- Pensions are funded in part through automatic payroll deductions from employees' paychecks. Health benefits are funded mainly through annual appropriations from the legislature.

- Pension funds are explicitly protected by law from being reduced. Health benefits are not.

Id. at 13-14.

In light of these differences, the Court of Appeals applied the relevant test under the Contract Clause of the U.S. Constitution: whether the General Assembly has shown an "unmistakable legislative intent" to create a statutory contract. NCAE, 368 N.C. at 787, 786 S.E.2d at 263. The court held that it has not, for at least three reasons:

- First, the General Assembly has never described health benefits as contractual. Lake, No. COA17-1280, slip op. at 19-20.
- Second, the General Assembly has explicitly reserved for itself an unlimited right to amend the terms of the State Health Plan. Id. at 21 (citing N.C. Gen. Stat. § 135-48.3).
- Third, the General Assembly has continually exercised its right to change the plan's terms. Id. at 21-23.

For these and other reasons, the court held that plaintiffs did not prove that they had a contract for lifetime, premium-free health benefits with a fixed value. Id. at 25-27.

Plaintiffs then filed a notice of appeal to this Court, invoking the Court's jurisdiction over cases that involve a substantial constitutional question. They also filed, in the alternative, a petition for discretionary review and a petition for writ of certiorari.

REASONS WHY THE NOTICE OF APPEAL SHOULD BE DISMISSED

Plaintiffs assert that they have a right of appeal to this Court under section 7A-30(1) of the General Statutes, which provides that parties may appeal decisions that "directly involve[ ] a substantial question" under the federal or state Constitutions. N.C. Gen. Stat. § 7A-30(1). Plaintiffs argue that the State breached a contractual obligation to provide them retirement health benefits. They claim that this alleged breach violates the Contracts Clause of the U.S. Constitution. They also claim that the breach constitutes an unconstitutional taking. Notice at 15.

Plaintiffs' appeal warrants dismissal for at least two reasons.

First, the decision of the Court of Appeals did not break new constitutional ground. As explained further below, the Court of Appeals faithfully applied settled law from this Court and the U.S. Supreme Court to reject plaintiffs' claims. See infra pp 14-25. For example, the Court of Appeals held that the General Assembly's decision to reserve an unlimited right to amend the State Health Plan prevented the plan from being contractually guaranteed. Lake, No. COA17-1280, slip op. at 21-23. This ruling applied over a century of case law from the U.S. Supreme Court. See, e.g., The Sinking Fund Cases, 99 U.S. 700, 720 (1879).

Although plaintiffs have sought here to stretch the bounds of existing law into new constitutional territory, that attempt does not justify automatic review. To be substantial under section 7A-30(1), a constitutional claim must be more than invented; it must be "real." State v. Colson, 274 N.C. 295, 305, 163 S.E.2d 376, 383 (1968). That standard is not satisfied when, as here, the Court of Appeals merely applies settled law to reject a novel constitutional claim.

Second, many of the points raised by plaintiffs here do not involve constitutional issues at all. For example, the notice of appeal assumes that plaintiffs have a contract with the State. Notice at 16. But plaintiffs later clarify that one of the central legal issues they seek to raise is: "What evidence can be considered in determining the existence and terms of any contracts between private individuals and the State?" Pet. 26; see also id. at 33-39. That evidentiary question principally concerns state contract law, not the U.S. Constitution's Contract Clause.

For these reasons, defendants respectfully move that the notice of appeal be dismissed.

REASONS WHY THE COURT SHOULD DENY THE PETITION FOR DISCRETIONARY REVIEW AND THE PETITION FOR CERTIORARI

I. The Court of Appeals Correctly Applied This Court's Precedents.

Plaintiffs claim that discretionary review and certiorari are warranted because the decision of the Court of Appeals contradicts case law from this Court. Pet. at 27-39. That argument is based on a misreading of this Court's previous statutory-contract decisions.

A. The Court of Appeals held correctly that plaintiffs cannot overcome the presumption against statutory contracts.

As this Court held in NCAE, a statute does not constitute a contract unless the General Assembly "clear[ly]" and "unmistakabl[y]" shows that it intended to create private contract rights. NCAE, 368 N.C. at 786-87, 786 S.E.2d at 262-63. This rule stems from separation-of-powers principles. Id. Because statutory contracts "bind[ ] the hands of future sessions of the legislature," a looser standard would invade the General Assembly's power to set policies to advance the public welfare. Id. (citing Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 466 (1985)). Thus, this Court has announced a strong presumption that statutes do not create contracts, but instead only establish "a policy to be pursued until the

legislature shall ordain otherwise." Id. at 786, 786 S.E.2d at 262 (quoting Dodge v. Bd. of Educ., 302 U.S. 74, 79 (1937)).

Here, the decision of the Court of Appeals faithfully applies this presumption. As the court held, three key considerations show that plaintiffs have not rebutted the presumption here.

First, the governing statutes never describe retirement health benefits as a contract. Lake, No. COA17-1280, slip op. at 19-20. In contrast, "[t]he term 'contract' is used in the statute to describe the relationship between the State Health Plan and its service providers." Id. at 19. This selective use of contractual language in the benefit statute shows that the General Assembly "knew when to use the word 'contract'" when it wanted to create private contract rights. Id. at 20; accord NCAE, 368 N.C. at 787-88, 786 S.E.2d at 263. Thus, as the Court of Appeals held, the statute's specific references to other contracts show that retirement health benefits are not contractual. Lake, No. COA17-1280, slip op. at 20; see Morrison v. Sears, Roebuck & Co., 319 N.C. 298, 303, 354 S.E.2d 495, 498 (1987) (under the expressio unius canon of construction, when a statute mentions one item, it implicitly shows a decision to exclude other related items).

Second, the General Assembly explicitly reserved "'the right to alter, amend, or repeal' the State Health Plan." Lake, No. COA17-1280, slip op. at 21 (quoting N.C. Gen. Stat. § 135-48.3). As the Court of Appeals held, "[t]his express reservation by the General Assembly is 'hardly the language of contract.'" Id. (quoting National Railroad, 470 U.S. at 467). Rather, the right-to-amend provision empowers the General Assembly to change the terms of the plan when necessary "to meet changing conditions, benefits, and future advances" in health care. Id.

This holding flowed directly from over a century of precedent from the U.S. Supreme Court. Since at least 1879, that Court has held that when a legislature reserves the unlimited power to amend a statute, it "not only retains, but has given special notice of its intention to retain, full and complete power" to revise the statute without risking any contract-based claims. Sinking Fund, 99 U.S. at 720.

In recent years as well, the U.S. Supreme Court has reaffirmed that a broad right-to-amend provision bars any claim that a legislature intended a statute to be a contract. For example, in National Railroad, the Court considered the effect of a statute that—like the statute here—"'expressly reserved' [a legislature's] rights to 'repeal, alter, or amend' the Act at any

time." 470 U.S. at 467 (quoting 45 U.S.C. § 541 (1970)). The Court held that this reservation of rights showed that Congress intended the statute only to create "policy that, like all policies, is subject to revision and repeal." Id.

Third, the General Assembly has repeatedly amended the statute in ways that contradict any intent to create a statutory contract. Lake, No. COA17-1280, slip op. at 21-23. Specifically, the General Assembly "has exercised [its] reserved power to revise and amend [the State Health Plan] approximately 200 times without challenge since 1983." Id. at 21. Many of these amendments "reduced the type and level of benefits." Id. at 22. For example, the General Assembly has reduced benefits by increasing the coinsurance that plan members must pay. Coinsurance rose from 5% to 10% in 1985, and from 10% to 20% in 1991. Id. As the Court of Appeals held, "[t]his 'oft-amended course' of statutory amendments is further evidence of the lack of intent by the State to create an unalterable static contract." Id. (quoting NCAE, 368 N.C. at 788, 786 S.E.2d at 264).

For these and other reasons, the Court of Appeals faithfully applied this Court's teachings when it held that plaintiffs failed to overcome the strong presumption against interpreting a statute as a contract.

B. The Court of Appeals was right to hold that this Court's decisions in Bailey and Faulkenbury do not apply here.

In their petition to this Court, plaintiffs do not contest any of the above holdings. Indeed, the petition does not even mention these aspects of the decision by the Court of Appeals. See Pet. at 27-33.

Instead, plaintiffs argue that the court's focus on the General Assembly's lack of contracting intent—a focus that is required by NCAE—misapplies this Court's earlier decisions in Faulkenbury and Bailey. Id. To the contrary, however, the Court of Appeals thoroughly considered those cases and rightly concluded that they are distinguishable. Lake, No. COA17-1280, slip op. at 11-14.

As the Court of Appeals explained, both Faulkenbury and Bailey held that pensions are contractual because they constitute deferred compensation. Id.; see Faulkenbury, 345 N.C. at 691, 483 S.E.2d at 427 (describing pensions as "delayed salaries"); Bailey, 348 N.C. at 141, 500 S.E.2d at 60 (holding that "a pension is but deferred compensation" "for services rendered").

Here, however, several features of retirement health benefits show that they are not deferred compensation.

First, health benefits are available to all current and former employees on equal terms. Lake, No. COA17-1280, slip op. at 14. Pensions, in contrast, are deferred compensation because "the amount of benefits to be received in retirement is based and computed upon the individual's salary and years of service." Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 808 (1989).

Second, retirement health benefits are completely optional. Lake, No. COA17-1280, slip op. at 14. No employee or retiree is required to enroll in the State Health Plan. People who decline to enroll in the State Health Plan, moreover, do not receive any additional compensation to make up for their decision to forgo state health benefits.

Pensions, in contrast, are mandatory. Id. at 13. Indeed, the pension statute provides that a mandatory contribution to the pension fund "shall" be deducted automatically from "each and every" paycheck issued to a state employee. N.C. Gen. Stat. § 135-8(f)(1)(a). In exchange, when the employee retires, she "shall receive" pension benefits according to a fixed statutory formula. Id. § 135-5(b)-(b19) (using the word "shall" 146 times to describe pension benefits).

Third, pension funds are specifically protected by law. Lake, No. COA17-1280, slip op. at 13. Because pensions are deferred compensation, the

North Carolina Constitution makes the State's pension fund "inviolab[le]." N.C. Const. art. V, § 6(2). To enforce this constitutional command, the General Assembly has enacted multiple statutory protections for pensions. For example, state employees have a nonforfeitable statutory right to get back their individual contributions to the pension fund. N.C. Gen. Stat. § 135-18.6. In contrast, the General Assembly has made the opposite pronouncement for health benefits: It has explicitly reserved the power to amend health benefits at any time. See id. § 135-48.3.

For these reasons, the Court of Appeals correctly held that retirement health benefits are not deferred compensation. Plaintiffs are thus wrong that the decision below is inconsistent with this Court's rulings in Faulkenbury and Bailey.

C. Plaintiffs' nonstatutory contract arguments do not warrant this Court's review.

Plaintiffs also argue that the Court of Appeals erred by rejecting their attempt to weave a contract out of stray language in benefit handbooks and other nonstatutory materials. Pet. at 33-39. But the court correctly applied this Court's precedents to hold that these materials did not independently create a contract here.

Although this Court has occasionally mentioned written and oral representations as additional support for a statutory contract, the Court has never held that parol representations alone can form a nonstatutory contract with the State. For example:

- In Faulkenbury, this Court held squarely that the pension statute itself created the contract: "the contract was formed" because "the General Assembly enacted laws which provided for certain benefits" to the plaintiffs in the form of deferred compensation. 345 N.C. at 691, 483 S.E.2d at 427.
- In Bailey, this Court likewise described the contract as "statutorily created." 348 N.C. at 146, 500 S.E.2d at 63.
- In NCAE, this Court rejected the plaintiffs' statutory-contract claim. 368 N.C. at 789, 786 S.E.2d at 264. Instead, the Court held that teachers' express contracts with local school districts incorporated the career-status law as a contract term. Id. The Court cited nonstatutory materials only to "demonstrate the importance of" career-status protection—not as the source of contract rights. Id.

Because this Court has never held that nonstatutory materials can independently create a binding contract with the State, the Court of Appeals was right to reject plaintiffs' nonstatutory contract theory on this basis. Lake, No. COA17-1280, slip op. at 18-19.

Indeed, even if oral and written representations could theoretically create a contract in some circumstances, this case would be a poor vehicle to address that issue. For at least two independent reasons, the nonstatutory materials here cannot create a contract in any event.

First, as this Court has held, a state agency or official can bind the State in contract only pursuant to an express grant of statutory authority. Whitfield v. Gilchrist, 348 N.C. 39, 42-43, 497 S.E.2d 412, 414-15 (1998). This Court has affirmed this principle in a case that involved a cabinet official who purported to enter a contract with an individual employee for retirement benefits. McCaskill v. Dep't of State Treasurer, Ret. Sys. Div., 204 N.C. App. 373, 396, 695 S.E.2d 108, 125 (2010), aff'd per curiam, 365 N.C. 69, 706 S.E.2d 226 (2011). Because that contract had not been authorized by statute, the contract was unenforceable. Id. Likewise, in NCAE, this Court enforced contracts between teachers and local school districts, but only because contracts of that kind were specifically authorized by statute. 368

N.C. at 788, 786 S.E.2d at 264; see N.C. Gen. Stat. § 115C-325(m) (2012). Here, it is undisputed that the General Assembly has never authorized the State Health Plan or its officials to offer contracts to state employees for retirement benefits.

Second, the materials that the plaintiffs cite do not support the contract that they allege here. Plaintiffs claim that they are entitled to lifetime, premium-free health benefits with a fixed value. Lake, No. COA17-1280, slip op. at 4, 7. But plaintiffs do not identify any materials that support a contract with those terms. See Pet. at 37-38.

To the contrary, the plan booklets on which plaintiffs rely contradict their claim for a contract with fixed benefits. Those booklets show the hundreds of changes made to the State Health Plan over the years. See Lake, No. COA17-1280, slip op. at 21-23. Many of those changes reduced plan benefits. Id. at 22. This history defeats plaintiffs' claim that they are entitled to a fixed level of health benefits. As the Court of Appeals rightly observed, the very nature of health care requires the State Health Plan to have "flexibility . . . to meet changing conditions, benefits, and future advances" in medicine. Id. at 21.

Moreover, those same plan booklets repeatedly warned retirees that "[t]he North Carolina General Assembly determines benefits for the State Health Plan and has the authority to change benefits." (E.g., Doc. Ex. 1486, 1535, 1652, 1867, 2316, 2765) These warnings, coupled with the benefit statute's explicit right-to-amend provision, would independently defeat plaintiffs' nonstatutory-contract theory. In any event, under that theory, any contract would include the right-to-amend provision as a contract term. See Pet. at 28; NCAE, 368 N.C. at 789, 786 S.E.2d at 264.[1]

* * *

In sum, the Court of Appeals faithfully applied this Court's precedents when it rejected plaintiffs' claim for a lifetime contract for premium-free health benefits at a fixed level. Plaintiffs are thus incorrect that review is warranted to correct a conflict between those precedents and the decision below.

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[1] Plaintiffs are also wrong that the State Health Plan booklets referred to health benefits as "vested." Pet. at 37. The materials that plaintiffs cite use that term only to describe pensions. For example, plaintiffs cite the pension system's 2008 plan booklet. Id. (citing Doc. Ex. 4340). That booklet says that retirees "become vested" in the pension system after five years of service. (Doc. Ex. 4340)

II. The Court of Appeals Has Resolved the Concerns That Previously Warranted This Court's Review.

As the petition points out, the parties previously filed a joint petition for discretionary review before determination by the Court of Appeals. Pet. 6, 11-12; see also Joint Pet., Lake v. State Health Plan for Teachers & State Emp., No. 463P13-3 (N.C. Dec. 5, 2017) [Bypass Pet.]. That petition was based on three practical concerns that have since been resolved.

First, the trial court's order prevented the State from enforcing state statutes, including the 2011 amendment that allowed the State Health Plan to charge a premium on the 80/20 PPO plan. Lake, No. COA17-1280, slip op. at 6-8; Bypass Pet. at 20. Because the Court of Appeals has reversed that injunction, this Court's review is no longer needed to restore the State's sovereign authority to implement state statutes.

Second, the trial court's order had a "significant economic impact[ ] upon the state budget." Lake, No. COA17-1280, slip op. at 7; see Bypass Pet. at 12-13. By entering a sweeping injunction against the State, the order also saddled the State Health Plan with administrative burdens of uncertain scope. (See R pp 618-20) The decision by the Court of Appeals, however, relieves these grave fiscal and administrative pressures, as well as the many

practical problems that would arise if the trial court's decree were reinstated. By rejecting plaintiffs' claim, the Court of Appeals has allowed the State to resume its budgetary planning without the looming cloud of a billion-dollar unfunded liability.

Third, both the State and plaintiffs have a strong interest in resolving this lawsuit without delay. Bypass Pet. at 4 ("delay in resolving this appeal would cause substantial harm for the State and plaintiffs alike"). Delay harms the State because it "impede[s] efforts to strategically plan for the future of the State Health Plan." Id. That strategic planning is necessary to preserve the State Health Plan itself: the plan faces a funding shortfall "of thirty-five billion to forty-three billion dollars." Id. Delay also harms plaintiffs, because it prolongs "uncertainty about the extent of [their] future health coverage." Id. at 5. That uncertainty undermines their ability to engage in personal health and financial planning. Id. at 18.

In sum, this Court would finally resolve the practical concerns posed by the trial court's order by denying plaintiffs' petition here. In contrast, granting review would revive the fiscal and other uncertainties caused by the trial court's order. Practical considerations of the kind emphasized in the parties' joint petition thus point against this Court's review now.

III. The Decision Below Does Not Disturb Plaintiffs' Statutory Right to Retirement Health Benefits.

In their petition, plaintiffs raise the alarming prospect that the State will "immediately terminate" health benefits for all retired state employees. Pet. at 21. This claim is completely unfounded. The decision below does nothing to disturb plaintiffs' statutory right to health benefits from the State. Indeed, plaintiffs do not dispute that the State has always provided them with access to the same or better health plans that current state employees have. Thus, discretionary review is not needed to preserve plaintiffs' health benefits. No matter what happens here, plaintiffs will continue to receive statutory health benefits from the State.

The Court of Appeals explicitly recognized that plaintiffs will continue to receive retirement health benefits. Specifically, the court observed that, under current law, plaintiffs have the right to "health care benefits on an equal basis with active state employees." Lake, No. COA17-1280, slip op. at 26. As the court held, however, the source of that right is statutory. The

court thus rejected plaintiffs' claim that those benefits are also protected by contract. Id. at 25-26.[2]

Moreover, as a practical matter, the decision below affects only a fraction of the certified class. At least 75% of the class members here are 65 or older, and thus eligible for Medicare. (Doc. Ex. 53-54) Those retirees are therefore eligible to enroll in premium-free Medicare Advantage plans. (Doc. Ex. 132) Because these plans have an actuarial value that exceeds what plaintiffs seek in this lawsuit, even the trial court held that the plans comply with the alleged contract. (R p 616 ¶ 32) Indeed, plaintiffs have never claimed on appeal that the State impaired any contract for Medicare-eligible class members.

Thus, the outcome of this lawsuit will have no effect on the vast majority of the certified class. And the practical effects of this case will only

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[2] Plaintiffs are wrong that the decision below is ambiguous on the source of their right to continued health benefits. See Pet. at 20-21, 24-25. The Court of Appeals squarely held that the State does not owe plaintiffs "any specific contractual financial obligation." Lake, No. COA17-1280, slip op. at 26; see also id. at 23 ("the State Health Plan is not a vested right nor a contract for deferred compensation."); id. at 24 ("Plaintiffs failed to carry their burden to prove the existence of a valid contract"). Thus, the court's comment that retirees continue to have the ability to "access health care benefits" merely described statutory terms. Id. at 26.

continue to shrink over time. As time goes on, a growing number of plaintiffs—a group that consists entirely of retirees—will become eligible for Medicare. At that point, those plaintiffs will gain access to health plans that plaintiffs concede comply with their demands here. The diminishing practical impact of the decision below further reinforces that the case does not warrant this Court's review.

CONCLUSION

For these reasons, defendants respectfully request that this Court dismiss the notice of appeal, deny the petition for discretionary review, and deny the petition for writ of certiorari.

This 22nd day of April, 2019.

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