IN THE SUPREME COURT OF THE STATE OF ALASKA

Kelly Tshibaka, Commissioner of the Department of Administration in her Official Capacity, Appellant, v. The Retired Public Employees of Alaska, Appellee.	)	Supreme Court No. **S-17577**

Trial Court Case No. **3AN-16-04537 CI**

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE ERIC AARSETH

REPLY BRIEF OF APPELLANT STATE OF ALASKA, COMMISSIONER OF THE DEPARTMENT OF ADMINISTRATION

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CONSTITUTIONAL PROVISIONS:

Alaska Const. art. XII, § 7

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.

ALASKA STATUTES:

AS 39.30.090

(a) The Department of Administration may obtain a policy or policies of group insurance covering state employees, persons entitled to coverage under AS 14.25.168, 14.25.480, AS 22.25.090, AS 39.35.535, 39.35.880, or former AS 39.37.145, employees of other participating governmental units, or persons entitled to coverage under AS 23.15.136, subject to the following conditions:

(1) a group insurance policy shall provide one or more of the following benefits: life insurance, accidental death and dismemberment insurance, weekly indemnity insurance, hospital expense insurance, surgical expense insurance, dental expense insurance, audiovisual insurance, or other medical care insurance;

(2) each eligible employee of the state, the spouse and the unmarried children chiefly dependent on the eligible employee for support, and each eligible employee of another participating governmental unit shall be covered by the group policy, unless exempt under regulations adopted by the commissioner of administration;

(3) a governmental unit may participate under a group policy if

(A) its governing body adopts a resolution authorizing participation and payment of required premiums;

(B) a certified copy of the resolution is filed with the Department of Administration; and

(C) the commissioner of administration approves the participation in writing;

(4) in procuring a policy of group health or group life insurance as provided under this section or excess loss insurance as provided in AS 39.30.091, the Department of Administration shall comply with the dual choice requirements of AS 21.86.310, and shall obtain the insurance policy from an insurer authorized to transact business in the state under AS 21.09, a hospital or medical service corporation authorized to transact business in this state under AS 21.87, or a health maintenance organization authorized to operate in this state under AS 21.86; an excess loss insurance policy may be obtained from a life or health insurer authorized to transact business in this state under AS 21.09 or from a hospital or medical service corporation authorized to transact business in this state under AS 21.87;

(5) the Department of Administration shall make available bid specifications for desired insurance benefits or for administration of benefit claims and payments to (A) all insurance carriers authorized to transact business in this state under AS 21.09 and all hospital or medical service corporations authorized to transact business under AS 21.87 who are qualified to provide the desired benefits; and (B) insurance carriers authorized to transact business in this state under AS 21.09, hospital or medical service corporations authorized to transact business under AS 21.87, and third-party administrators licensed to transact business in this state and qualified to provide administrative services; the specifications shall be made available at least once every five years; the lowest responsible bid submitted by an insurance carrier, hospital or medical service corporation, or third-party administrator with adequate servicing facilities shall govern selection of a carrier, hospital or medical service corporation, or third-party administrator under this section or the selection of an insurance carrier or a hospital or medical service corporation to provide excess loss insurance as provided in AS 39.30.091;

(6) if the aggregate of dividends payable under the group insurance policy exceeds the governmental unit's share of the premium, the excess shall be applied by the governmental unit for the sole benefit of the employees;

(7) a person receiving benefits under AS 14.25.110, AS 22.25, AS 39.35, or former AS 39.37 may continue the life insurance coverage that was in effect under this section at the time of termination of employment with the state or participating governmental unit;

(8) a person electing to have insurance under (7) of this subsection shall pay the cost of this insurance;

(9) for each permanent part-time employee electing coverage under this section, the state shall contribute one-half the state contribution rate for permanent full-time state employees, and the permanent part-time employee shall contribute the other one-half;

(10) a person receiving benefits under AS 14.25, AS 22.25, AS 39.35, or former AS 39.37 may obtain auditory, visual, and dental insurance for that person and eligible dependents under this section; the level of coverage for persons over 65 shall be the same as that available before reaching age 65 except that the benefits payable shall be supplemental to any benefits provided under the federal old age, survivors, and disability insurance program; a person electing to have insurance under this paragraph shall pay the cost of the insurance; the commissioner of administration shall adopt regulations implementing this paragraph;

(11) a person receiving benefits under AS 14.25, AS 22.25, AS 39.35, or former AS 39.37 may obtain long-term care insurance for that person and eligible dependents under this section; a person who elects insurance under this paragraph shall pay the cost of the insurance premium; the commissioner of administration shall adopt regulations to implement this paragraph;

(12) each licensee holding a current operating agreement for a vending facility under AS 23.15.010--23.15.210 shall be covered by the group policy that applies to governmental units other than the state.

(b) In this section,

(1) “eligible employee” means

(A) an employee who has served in permanent full-time or part-time employment with the same governmental unit for 30 days or more, except an emergency or temporary employee;

(B) an elected or appointed official of a governmental unit, effective upon taking the oath of office; and

(C) a contractual employee of the legislative branch of state government under AS 24.10.060(f) if the employee's personal services contract provides that the employee is entitled to coverage;

(2) “governmental unit” means the state, a municipality, school district, or other political subdivision of the state, and the North Pacific Fishery Management Council;

(3) “insurance”, “insurance carrier” and “insurance policy” include health care services, health care service contractors and contracts, and health maintenance organizations.

AS 39.35.095

The following provisions of this chapter apply only to members first hired before July 1, 2006: AS 39.35.095--39.35.680.

AS 39.35.120

(a) An employee of the state shall be included in this plan upon commencement of employment with the state, or on January 1, 1961, whichever is later. Unless an employee participates in a university retirement program under AS 14.40.661--14.40.799, an employee of a political subdivision or public organization that becomes an employer shall be included in the plan on the effective date of the employer's participation or the date of the employee's commencement of employment with the employer, whichever is later.

(b) Inclusion in the plan is a condition of employment for an employee except as otherwise provided for

(1) an elected official;

(2) Repealed by SLA 2005, ch. 50, § 10 eff. July 1, 2009.

(3) an employee of the university who participates in a university retirement program under AS 14.40.661--14.40.799.

AS 39.35.535

(a) Except as provided in (d) of this section, the following persons are entitled to major medical insurance coverage under this section:

(1) for employees first hired before July 1, 1986,

(A) an employee who is receiving a monthly benefit from the plan and who has elected coverage;

(B) the spouse and dependent children of the employee described in (A) of this paragraph;

(C) the surviving spouse of a deceased employee who is receiving a monthly benefit from the plan and who has elected coverage;

(D) the dependent children of a deceased employee who are dependent on the surviving spouse described in (C) of this paragraph;

(2) for members first hired on or after July 1, 1986,

(A) an employee who is receiving a monthly benefit from the plan and who has elected coverage for the employee;

(B) the spouse of the employee described in (A) of this paragraph if the employee elected coverage for the spouse;

(C) the dependent children of the employee described in (A) of this paragraph if the employee elected coverage for the dependent children;

(D) the surviving spouse of a deceased employee who is receiving a monthly benefit from the plan and who has elected coverage;

(E) the dependent children of a deceased employee who are dependent on the surviving spouse described in (D) of this paragraph if the surviving spouse has elected coverage for the dependent children

(b) Except as provided in (d) of this section, after an election of coverage under this section, major medical insurance coverage takes effect on the same date that benefits begin, and stops when the member or survivor is no longer eligible to receive a monthly benefit. The coverage for persons age 65 or older is the same coverage available for a person under 65 years of age. The benefits payable to persons age 65 or older supplement any benefits provided under the federal old age, survivors and disability insurance program. The medical premium and optional insurance premiums owed by a member or survivor shall be deducted from the benefit owed to the member or survivor before payment of the benefit.

(c) A benefit recipient may elect major medical insurance coverage in accordance with regulations and under the following conditions:

(1) a person, other than a disabled member or a disabled member who is appointed to normal retirement, must pay an amount equal to the full monthly group premium for retiree major medical insurance coverage if the person is

(A) younger than 60 years of age and has less than

(i) 25 years of credited service as a peace officer under AS 39.35.360 and 39.35.370; or

(ii) 30 years of credited service under AS 39.35.360 and 39.35.370 that is not service as a peace officer; or

(B) of any age and has less than 10 years of credited service;

(2) a person is not required to make premium payments for retiree major medical coverage if the person

(A) is a disabled member;

(B) is a disabled member who is appointed to normal retirement;

(C) is 60 years of age or older and has at least 10 years of credited service; or

(D) has at least

(i) 25 years of credited service as a peace officer under AS 39.35.360 and 39.35.370; or

(ii) 30 years of credited service under AS 39.35.360 and 39.35.370 not as a peace officer.

(d) Receipt under a qualified domestic relations order of a monthly benefit from the plan does not entitle a person or the person's spouse or child to insurance coverage under (a) of this section. However, a member's former spouse who receives a monthly benefit under a qualified domestic relations order is entitled to receive major medical insurance coverage if the former spouse

(1) elects the coverage within 60 days after the first monthly benefit paid under the order is mailed first class or otherwise delivered; and

(2) pays the premium established by the administrator for the coverage.

(e) The administrator shall inform members who have requested appointment to retirement that the health insurance coverage available to retired members may be different from the health insurance coverage provided to employees. The administrator shall also notify those members of time limits for selecting optional health insurance coverage and whether the election is irrevocable. A member who has requested appointment to retirement shall indicate in writing on a form provided by the administrator that the member has received the information required by this subsection and whether the member has chosen to receive optional health insurance coverage.

(f) On and after July 1, 2007, benefits under this section shall be provided in part by the Alaska retiree health care trust established under AS 39.30.097(a).

AS 39.35.700.

The provisions of AS 39.35.700--39.35.990 apply only to members first hired on or after July 1, 2006, to members who are employed by employers that do not participate in the defined benefit retirement plan established under AS 39.35.095--39.35.680, to former members as defined in AS 39.35.680, or to members who transfer into the defined contribution retirement plan under AS 39.35.940.

ALASKA ADMINISTRATIVE CODE:

2 AAC 39.240

(a) A benefit recipient who elects dental-vision-audio insurance coverage must pay for that coverage by paying the premium established by the administrator. Premium payments are deducted from the monthly benefit warrant unless the benefit is insufficient to permit the deduction of the full monthly premium. If at any time the benefit amount is insufficient to cover the full monthly premium, the administrator will notify the benefit recipient, and all premium payments due after the notice must be made by the benefit recipient directly to the insurance carrier. Retroactive premiums, to the date coverage would have lapsed due to an insufficient benefit warrant, must be paid directly to the insurance carrier by the benefit recipient.

(b) A benefit recipient who pays a premium directly to the insurance carrier forfeits the right to participate in the plan if

(1) a premium payment is delinquent by more than 60 days; or

(2) premium payments are delinquent twice in any one calendar year by more than 31 days.

2 AAC 39.280

When necessary to maintain the financial integrity of the plan, the administrator may change the premiums and the terms of coverage.

ARGUMENT

I. This Court should confirm that the diminishment clause protects deferred compensation a public employee earns in exchange for work, not benefits retirees purchase outside the employment contract.

This case asks whether benefits retirees purchase with their own money at the time of retirement fall within the "accrued benefits"[1] of State employment. RPEA's overbroad view of the diminishment clause locks the State into selling retirees an increasingly expensive insurance plan, even as it becomes ever less desirable for retirees to buy. Neither the plain meaning of Article XII, section 7 nor common sense supports that result.

The plain meaning[2] of the constitutional phrase "accrued benefit," read in conjunction with considerable precedent from this Court and others, leads to one conclusion: the diminishment clause protects "deferred compensation."[3] Deferred compensation is earned in exchange *for work*, and does not include benefits available for purchase at the time of retirement.[4] Insurance coverage retirees buy through premium

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[1] Alaska Const. Art. XII, § 7. "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."

[2] *Hammond v. Hoffbeck*, 627 P.2d 1052, 1056 n.7 (Alaska 1981) ("Unless the context suggests otherwise, words are to be given their natural, obvious[,] and ordinary meaning.").

[3] A "benefit" is "consideration that moves to the promisee" in a contractual relationship, Black's Law Dictionary 178 (9th ed. 2004), and it becomes "accrued" when it "comes into existence as an enforceable claim or right." *Id.* at 23.

[4] *E.g.*, Black's Law Dictionary 322 (9th ed. 2004) (defining "deferred compensation" as "[p]ayment for work performed, to be paid in the future or when some future event occurs."); *Livingston v. Metro. Util. Dist.*, 692 N.W.2d 475, 480 (Neb. 2005) ("Deferred compensation . . . is defined as compensation which is earned in exchange for

payments—rather than earn with their labor as public employees—does not "accrue" until it is actually purchased.

RPEA acknowledges the important distinction between this case and *Duncan v. Retired Public Employees of Alaska, Inc.*[5]: retirees receive major medical coverage without paying for it, as part of their compensation, but must buy dental benefits. [Ae. Br. 17] But, ignoring the State's analysis of the plain meaning of the phrase "accrued benefits," RPEA stubbornly insists that there is "no principled basis" for treating these different things differently. [Ae. Br. 21] RPEA argues that "whether dental insurance is part of the contract that employees form when they are hired is the central question this Court must resolve, not something the State may presume." [Ae. Br. 20]

The State does not presume anything. The "principled basis" for distinguishing this case from *Duncan* is found in the diminishment clause, which makes the Legislature's promises to employees in its statutory retirement benefits scheme enforceable as a matter of contract law. Thus, the constitutional limits of "accrued benefits" are defined by ordinary contract law principles about offer, acceptance, and consideration.[6]

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services rendered."); *Duncan v. Retired Public Employees of Alaska, Inc.*, 71 P.3d 883, 886 (Alaska 2003) ("[R]etirement benefits are 'regarded as an element of the bargained-for consideration given in exchange for an employee's assumption and performance of the duties of his employment.'") (quoting *Hammond*, 627 P.2d at 1056).

5 *Duncan*, 71 P.3d at 883.

6 *See Bd. of Trustees, Anchorage Police and Fire Retirement*, 144 P.3d 439, 450 (Alaska 2006) (explaining that not every benefit is a contractually enforceable, vested right, and "the question is whether the practical effect of the whole complex of provisions impaired a vested right.").

The right to major medical coverage is enforceable as a unilateral contract.[7] That means an employee can accept the Legislature's offer to provide major medical insurance only through performance over time, and the employee's labor for a certain number of years is the consideration given to receive the insurance package at retirement.[8] While the employee performs her end of the bargain, the State may not diminish the medical coverage it offered in exchange. This is the contract law principle confirmed in *Duncan*.[9]

By contrast, the most that is promised at the time of employment regarding dental coverage is the possibility that the State will make an offer in the future.[10] Employees' performance of their duties during employment earns them medical coverage, but does not earn them dental coverage.[11] Instead, employees may form a new contract with the

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[7] *See, e.g.*, *Moro v. State*, 351 P.3d 1, 18, 20 (Or. 2015) ("An offer for a unilateral contract invites the other party to accept with performance—that is, by actually *doing* the performance that the offering party seeks." (citing Corbin on Contracts § 1.23)).

[8] *See id.*; *Duncan*, 71 P.3d at 887 (explaining that "accrued benefits" includes "the consideration that the state contracts to tender *in exchange for services rendered* by the employee" (emphasis added) (quoting *Hammond*, 627 P.2d at 1059))

[9] *Duncan*, 71 P.3d at 888 (holding that the term "accrued benefits" includes "all retirement benefits" that "become[] part of the contract of employment *when the public employee is hired*, including health insurance benefits" (emphasis added)).

[10] *Compare* AS 39.30.090(a) ("The Department of Administration may obtain a policy" of dental coverage for current and retired employees, and retirees who "elect[] to have insurance" "shall pay the cost") *with* AS 39.35.535 (providing that eligible retirees "are entitled to major medical insurance coverage").

[11] *See Duncan*, 71 P.3d at 997 ("[M]edical insurance is . . . part of an employee's benefit package and the whole package is an element of the consideration that the state contracts to tender in exchange for services rendered by the employee"); AS 39.30.090(a) (retirees "shall pay for" their dental coverage); *Moro*, 351 P.3d at 22 (Or. 2015) ("[A]n employee earns a contractual right to the offered PERS benefits at the time that the employee renders his or her services to the employer.").

State when they retire, and the terms of that agreement—premium and coverage—are not fixed until that point.[12] Dental coverage for retirees is a classic bilateral contract;[13] no contract right arises for the diminishment clause to protect at the time of employment.

Rather than responding to the heart of the State's argument, RPEA attempts to dodge it by finding a "concession" from the State that the distinction between benefits *earned* and benefits *purchased* has no constitutional significance. [Ae. Br. 17-18] But the State's focus on this distinction has always been the key to its constitutional argument.[14] The State did not concede or waive its right to rely on its main argument.

RPEA focuses on the subset of retirees—especially younger and Tier 4 retirees—who pay part or all of their medical premiums. [Ae. Br. 17-18] Assuming—based on nothing beyond the State's supposed "concession"—that these retirees' self-funded

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[12] 2 AAC 39.240 ("A benefit recipient who elects dental-vision-audio insurance coverage must pay for that coverage by paying the premium established by the administrator."); 2 AAC 39.280 ("When necessary to maintain the financial integrity of the plan, the administrator may change the premiums and the terms of coverage.").

[13] *Moro*, 351 P.3d at 21 (2015) ("An offer for a bilateral contract invites the other party to accept with a return promise—that is, by promising some future performance." (citing 1 Corbin on Contracts § 1.23)).

[14] A few examples from the State's arguments below: "[T]he only term offered to an employee at the time of employment is the option to purchase DVA coverage during retirement if the Department obtains such a policy." [R. 110]; "By requiring retirees to pay the entire cost of DVA coverage, the Legislature evinced clear intent that this coverage was not being provided as compensation for the retiree's public service." [R. 193]; "Because there is no risk that the State will impair a right earned through the course of the employee's public service, the diminishment clause is not implicated [by a change to DVA coverage]." [R. 199]; "Because coverage under the DVA plan is not offered as consideration for the state employees' public service, and rights to DVA coverage vest only after the retiree elects coverage and begins to pay the premium, DVA coverage is not an "accrued benefit" protected by article XII, section 7." [R. 230].

medical insurance falls within the diminishment clause, RPEA argues that dental coverage should receive the same protection. But RPEA's premise is wrong. *Duncan* was decided in 2003, before the creation of Tier 4 and at a time when the State paid full medical premiums for nearly everyone.[15] This Court in *Duncan* had no reason to—and did not—address application of the diminishment clause to *retiree-funded* medical coverage. That remains an open question.[16]

RPEA relies heavily on this Court's holding in *Sheffield* that "optional" early retirement pension benefits are "accrued benefits" within the meaning of the diminishment clause. [Ae. Br. 21][17] But the benefit at issue in *Sheffield*—a certain level of pension payments calculated using an actuarial formula—fits within the plain meaning of the clause. Pension benefits are deferred compensation for work; retirees do not buy them during retirement. They are "optional," in the sense that a retiree may opt to retire

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[15] [*See* Exc. 23] Importantly, the State's "concession" was in response to RPEA's argument and reference to a Retirement Application Instruction Booklet for Tiers I-III. *See* Exc. 29. As the State noted in its briefing, "[u]nlike DVA coverage, major medical is part of PERS and all employees participate in, and make contributions to PERS as a condition of their employment." [R. 236] In that context, the State was referring to the defined benefit program of PERS. *See* AS 39.35.120(b) ("Inclusion in [PERS] is a condition of employment."); *see also* Ch. 200, §§ 1-2, SLA 1975 (mandating "major medical insurance coverage" for employees in the defined benefit plan). Tier 4 employees are not members of the defined benefit program. *See* AS 39.35.700.

[16] Medical coverage retirees purchase themselves, like the dental coverage they must purchase for themselves, cannot be an "accrued benefit" under the plain meaning of that phrase. Practically speaking, this means that if younger retirees who buy their own coverage urged the State to move them into a less expensive plan until they reached eligibility for State-funded insurance, the State would be free to do so. But that is not an issue in this case.

[17] *Sheffield v. Alaska Public Employees' Ass'n, Inc.*, 732 P.2d 1083, 1084 (Alaska 1987).

early and accept a lower pension benefit than would be available at normal retirement age. But retirees still earn their pension benefits, whether at the early retirement level or normal retirement level, by working. *Sheffield* is consistent with *Duncan* and with the holding the State urges the Court to confirm here: the benefits the employee earns through his service "accrue" when offered, and may not be diminished while the employee works to accept them.[18] Benefits retirees buy in retirement accrue later.

RPEA asks this Court to rely on cases from Hawaii and Illinois, because both emphasize that the protected benefit derives simply from "membership in one of the State's public pension systems."[19] But neither of those courts addressed the question here—a benefit that retirees purchase themselves. In Hawaii, the court decided a case similar to *Duncan* and held that State-paid retiree health insurance was an accrued benefit protected under the diminishment clause.[20] Consistent with the State's position in this case, that court explained that the benefits protected are "attributable to past services."[21]

The Illinois case involved a legislative attempt to reduce health insurance premium subsidies guaranteed by statute.[22] The court, relying in part on *Duncan*, held

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18 *Id.* at 1089.

19 *Kanera v. Weems*, 13 N.E.3d 1228, 1239-44 (Ill. 2014). *See also Everson v. State*, 228 P.3d 282, 297-99 (Haw. 2010)

20 *Id.* at 299. It appears that in Hawaii, retirees might sometimes pay part of their health insurance premiums. But the State provides most of the cost of coverage as part of the retiree's compensation for past service; the benefit is not purchased by the retiree as an add-on benefit during retirement. *See id.* at 298.

21 *Id.* at 299.

22 *Kanera*, 13 N.E.3d at 1240.

that the diminishment clause reached beyond pensions to cover everything that "qualifies as a benefit of the *enforceable contractual relationship* resulting from membership."[23] The court relied on statements from Illinois constitutional delegates that clearly articulate the option contract principle incorporated into the constitutional language: employees should have "basic protection against abolishing their rights completely or changing the terms of their rights after they have embarked upon the employment—to lessen them."[24] Neither case holds or suggests that benefits retirees buy with their own money, rather than earn through their service, warrant constitutional protection.

The Nebraska Supreme Court in *Livingston v. Metropolitan Utilities District* addresses that question, in persuasive detail.[25] RPEA asks this Court to ignore that case because the benefit at issue there was a long-term disability benefit, something this Court has placed under the umbrella of the diminishment clause. [Ae. Br. 22][26] But RPEA concedes that the long-term disability benefit in Nebraska "differ[s] from Alaska's long-term disability benefit because Nebraska retirees"—like Alaska retirees selecting dental coverage—"must select the benefits and pay a premium." [Ae. Br. 22 n.55] The Nebraska

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23 *Id.* (emphasis added).

24 *Id.* at 1042.

25 *Livingston v. Metro Utility Dist.*, 692 N.W.2d 475, 479 (Neb. 2005).

26 RPEA also denigrates the usefulness of this case because it was decided under a state Contracts Clause, rather than an identical anti-diminishment provision to Alaska's. [Ae. Br. 22] But Nebraska's contract clause (and Oregon's) operate just like Alaska's clause, protecting the benefits of state retirees because they are "contractual in nature" and thus, "impairment is forbidden by the Constitution." *Haplin v. Nebraska State Patrolmen's Retirement Sys.*, 20 N.W.2d 910, 915 (Neb. 2000); *Moro*, 351 P.3d at 18-19.

Supreme Court draws precisely the principled distinction the State asks this Court to make. Only "compensation which is earned in exchange for services rendered" is "accrued" as a benefit of employment.[27] Benefits purchased during retirement do not accrue as a matter of contract law until later, upon payment of the premiums, and the rationale underlying the diminishment clause does not apply to them.[28]

Finally, defending the superior court's faulty analogy to option contracts, RPEA argues that "[a] contract is no less binding merely because it offers an employee an option to purchase something at a later point in time." [Ae. Br. 19] And RPEA argues—circularly—that "the package of dental benefits may not change"—and therefore, the terms of the option contract are sufficiently specific at the time of hiring to render them enforceable and bring them under the protection of the diminishment clause. In other words, RPEA argues that the benefits must be fixed under the diminishment clause because the benefits are fixed under the diminishment clause.

RPEA's understanding of the law of option contracts is incorrect. To be binding, the consideration that will be exchanged when the option is exercised must be articulated *on both sides*; for example, Party A agrees to give something now in exchange for the option to buy something specific in the future at a set price.[29] If the key terms of the

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27 *Livingston*, 692 N.W.2d at 479.

28 *Id.* at 480 ("The accrual of coverage under this policy was not contingent upon the rendering of services, but instead depended upon the payment of premiums and the occurrence of an injury.").

29 *E.g.*, *Steiner v. Thexton*, 226 P.3d 359, 365 (Cal. 2010) ("[A]n option based on consideration contemplates two separate [contracts], *i.e.*, the option contract itself, which for something of value gives to the optionee the irrevocable right to buy under specified

contemplated future contract remain undefined, no enforceable option exists.[30]

Nothing in the Alaska Statutes, regulations, or the Division's publications resembles a definite promise to enter a contract in the future on any specific terms. The only representation made to new employees is that *if* the State exercises its discretion to offer a dental plan to employees, such a plan will also be available to retirees.[31] Unlike the mandatory statutory obligation to provide major medical insurance, the Legislature never promised employees it would offer them dental insurance—much less a specific plan—in retirement.[32] The diminishment clause, which makes the Legislature's promises enforceable as a matter of contract law, creates no binding obligation in the absence of such a promise.

The State argued in its opening brief that at most, the diminishment clause protects the narrow promise that retirees will be able to access an optional dental plan, if the Division has exercised its discretion to create one for active employees. [At. Br. 32-35]

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terms and conditions, and the mutually enforceable agreement to buy and sell into which the option ripens after it is exercised."); Restatement (Second) of Contracts, § 25 (1981).

30 *E.g.*, *Wolvos v. Meyer*, 668 N.E.2d 671, 675 (Ind. 1996) ("The question of whether an agreement is an enforceable option contract or merely an agreement to agree involves two interrelated areas: 'intent to be bound and definiteness of terms,' where 'the terms of it should be so precise as that neither party could reasonably misunderstand them.' ") (citing Restatement (Second) of Contracts § 33 cmt. f (1979)) .

31 AS 39.30.090(a); 2 AAC 39.240 ("A benefit recipient who elects dental-vision-audio insurance coverage must pay for that coverage by paying the premium established by the administrator."); 2 AAC 39.280 ("When necessary to maintain the financial integrity of the plan, the administrator may change the premiums and the terms of coverage.").

32 *Id.*

That argument rests on the discretionary language of the enabling statute discussed above.[33] RPEA responds, in perfunctory fashion, that this cannot be correct because the protection, in RPEA's view, would be minimal. [Ae. Br. 24] But RPEA once again presumes the outcome as its only authority supporting its argument. No constitutional basis exists to protect more than what the statutes and Division actually promise employees they will receive in exchange for their service. And again, the statutes promise nothing more than the possibility of accessing a plan if the Division elects to create one.

The fact that RPEA feels this promise does not amount to much is not a flaw in the Constitution or in the State's analysis of its scope.[34] The Legislature *promises* State employees in Alaska a valuable medical coverage benefit. But the Legislature never promised similarly robust retiree dental coverage. Dental insurance is administered in retirement by the State as a convenience, at retiree expense. No contract for that coverage exists until the Division and the retiree form one, so nothing is "accrued" until that time.

The distinction between this case and *Duncan* crystalizes when considering the State's financial incentives. Unlike in the major medical insurance context, if the State prevails in this appeal it will not save money. Retirees will. The State seeks to offer a product most retirees actually want to buy.[35] This Court in *Duncan* forbid the State from

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33 AS 39.30.090(a).

34 If this Court held that the Constitution protects retiree's ability to access a plan if one has been created for current employees, a plan that covers just one cleaning per year obviously would not suffice. [Ae. Br. 24] Retirees would be guaranteed access to the same or a similar plan as the one for active service.

35 Retrirees' preference for 2014 Plan became clear when a majority selected that plan. Many were upset to be defaulted into the old plan by the superior court's order at

diminishing the excellent, and expensive, medical insurance coverage retirees already earned through their service.[36] Restricting the State's ability to offer a reasonable value dental plan for retirees would be something very different. Most retirees prefer access to an affordable and financially sound plan, not an increasingly expensive antique that is doomed to fail.[37] The State asks this Court to preserve its ability to meet retirees' demand for a quality modern dental plan they can purchase at a reasonable price.

II. Even if the diminishment clause does protect the coverage itself, the superior court erred by ignoring the effect of premiums on the value of coverage and by eschewing quantitative analysis of value.

Following its erroneous conclusions that the diminishment clause applies and fixes the terms of the coverage, the superior court found after trial that the State diminished that coverage when it amended the plan in 2014. [Exc. 171] The State challenges this conclusion on appeal for two reasons: (1) the superior court ignored the cost retirees pay for the plan in evaluating its value to them [At. Br. 37-40], and (2) even setting aside the cost of premiums, the superior court did not find a diminishment in coverage using the quantitative comparison *Duncan* demands. [At. Br. 40-46]

RPEA argues that premiums have no effect on a diminishment analysis simply because in *Duncan*, this Court held that the benefit protected was the coverage itself. [Ae. Br. 25-26] But in the medical insurance context it is indeed the coverage, not the

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the end of the 2019 open enrollment period, after being told they could keep their current coverage without taking action, consistent with the court's April 17 order. [Exc. 216-17]

36 *Duncan*, 71 P.3d at 887.

37 *See* Exc. 216-17, Tr. 68-69, 79, 343, 533-36, 1091-93.

premium payments, that the State promises and provides to retirees.[38] With respect to dental insurance, the State promises neither premium payments nor coverage.

A theme of "value to the retiree" runs through RPEA's brief. RPEA characterizes *Duncan* as holding that "the overall *value* of the [medical] coverage to retirees as a group may not be diminished." [Ae. Br. 16, emphasis added.] And RPEA emphasizes that "the constitution protects the details of a benefit that determine its *value* to the retiree, not just the general concept of the benefit." [Ae. Br. 19] "Value," though, has no meaning without reference to price. Both the desirability of the thing purchased and the price paid must be weighed in any analysis of value.[39] Only a shopper using someone else's credit card could declare that money is no object, and prefer a top-of-the-line option in every circumstance. Retirees who receive their major medical coverage at State expense stand in this enviable position. Retirees deciding whether to buy dental coverage do not.

RPEA's second defense to this argument is to reverse the burden of proof. Denying that "the record," specifically the State's expert's testimony, "establishes that any diminishment in coverage is offset by the reduction in premiums" [Ae. Br. 27] does not excuse the superior court from evaluating premium reductions as part of a meaningful diminishment analysis. RPEA bears the burden of proof on its claims,[40] and it refused to

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38 *Duncan*, 71 P.3d at 889.

39 [Tr. 79; 533]

40 *State, Dep't of Revenue v. Andrade*, 23 P.3d 58, 71 (Alaska 2001) ("A party raising a constitutional challenge to a statute bears the burden of demonstrating the constitutional violation."); *Retired Public Employees of Alaska, Inc. v. Mathiashowski*, No. 3AN-00-7540CI, 2006 WL 4634279 (Alaska Super. Ct. April 27, 2006) (explaining,

consider or present evidence about whether the premium reduction offset any supposed diminishment in value of the coverage. RPEA's position has always been that dental benefits should be treated identically to medical benefits, and premiums are simply irrelevant. RPEA's criticism of the State's expert's analysis of equivalency, [Ae. Br. 27-29], misses the point. Even if RPEA had established that the coverage itself was quantitatively diminished—something it did not do—that conclusion ignores one side of the scale. A less expensive product can be have equal value to the consumer, if it costs sufficiently less. And the 2014 Plan costs less than the 2013 Plan.[41]

RPEA proposes that as a solution to the problem of upward spiraling premiums, retirees can simply opt out of coverage entirely, or the State can continue to fracture the retiree pool into an array of different plans. [Ae. Br. 26] These proposals clearly illustrate the unworkability of RPEA's one-sided value analysis. An insurance plan will not survive long if everyone who views the plan as too expensive simply opts out or selects a cheaper plan.[42] RPEA's myopic insistence on evaluating coverage in a cost vacuum harms retirees.

As for the State's second argument—that the superior court erred by overlooking the demands of *Duncan* for a quantitative, actuarial diminishment analysis—RPEA responds with a strained reading of that case that again upends the burden of proof.

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in the *Duncan* case on remand, that "[t]he plaintiffs bear the overall burden of proof as to each of their causes of action.").

41 *See* Exc. 154, 160; Tr. 693-94, 751.

42 *See* Tr. 1092-93.

RPEA asserts that *the State* bore the burden of proving it offered a non-diminished plan. [Ae Br. 30] But *Duncan* did not shift the initial burden of proof to the defendant.[43] More importantly, the State presented exactly what this Court asked for in *Duncan*, following the methods approved by the superior court on remand in that case.[44] The State presented "solid statistical data," "including accepted actuarial sources," to compare the benefits. The function of the State's expert at trial was to show the superior court, using a straightforward calculation, that the 2014 Plan provided coverage to retirees with a higher actuarial value than the 2013 Plan.

The superior court committed reversible error not because it quibbled with details of the State's expert's analysis, but rather, through its wholesale rejection of actuarial methodology in favor of RPEA's expert's subjective "gut feeling" comparison of the two plans. This Court's decision in *Duncan* recognized that the Division cannot operate in a world so unpredictable. Solid, statistical, mathematical analysis is the only objective way to value and compare insurance plans.[45]

III. The superior court improperly ignored Civil Rule 59(f) by dramatically amending the final judgment while this appeal was pending.

RPEA agrees with the State that the superior court "awarded RPEA the declaratory and injunctive relief it sought" in its April 17 Order. [Ae. Br. 41] And RPEA does not dispute that it never requested any other relief until well after entry of Final

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43 *Mathiashowski*, No. 3AN-00-7540CI, 2006 WL 4634279, Conclusions of Law ¶ 2.

44 *Id.*

45 *See Duncan*, 71 P.3d at 792.

Judgment, despite being given ample opportunity to do so. [Exc. 158, 180-81; R. 2132] Yet RPEA asks this Court to approve the superior court's dramatic post-judgment additional remedies, as either purported "enforcement" of the original order or as simply "such other relief as the court deems just and equitable," [Ae. Br. 47], regardless of the timing of the request. Both of these arguments fail.

Civil Rule 58 requires the superior court to "promptly enter judgment" after resolving all the issues in the case. That happened here. The final judgment encompassed injunctive language in the final order drafted by RPEA's counsel. Using RPEA's language, the Court gave the State three options. The State chose option two, which reads: "The State may . . . provide individual retirees **the option of returning to the 2013 plan** or continuing with the 2014 plan." [Exc. 179 (Emphasis added.)] So, the State rapidly reconstructed the 2013 plan, named it the "Legacy Plan," and "provide[d] individual retirees the option of returning to" that Plan during Fall 2019's open enrollment period. The State did exactly what the April 17 order directed.

Well after final judgment, RPEA changed its mind about what it wanted the State to do. At the eleventh hour, RPEA asked the Court to require the State to force *all* retirees to return to the 2013 Plan as the default, and instead provide the "option" of staying in the 2014 Plan. This cannot be described with a straight face as "enforcement" of the April 17 order. It is an entirely different order, and the superior court went beyond its authority by changing the rules so completely after final judgment.

Nevertheless, the State pulled off the last-minute switch near the end of the open enrollment period. And many retirees who had already been told they would keep their

current coverage if they did nothing during open enrollment were surprised and upset to find themselves dumped into a more expensive plan they did not select. [Exc. 217] No vehicle in the Civil Rules allowed the superior court to amend its final judgment in this way, under the guise of "enforcement."

RPEA argues that this portion of the State's appeal is moot because the State complied with the order, 2019's open enrollment period happened, and the year of default coverage for those who made no selections will expire before this appeal is decided. [Ae. Br. 43 n.106] This logic deprives the State of an opportunity to appeal the issue. The default plan cannot be retroactively switched for 2020. Only an extraordinarily expedited appeal or a lengthy stay could have kept the 2014 Plan as the status quo, as contemplated by the April 17 order. Neither would have been practical.

Given the circumstances of this case, the public interest exception to mootness applies. That exception allows this Court to "choose to address certain issues" that might technically be moot, based on an analysis of three factors.[46] The Court asks "(1) whether the disputed issues are capable of repetition, (2) whether the mootness doctrine, if applied, may cause review of the issues to be repeatedly circumvented, and (3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine."[47]

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46 *Fairbanks Fire Fighters Ass'n, Local 1324 v. City of Fairbanks*, 48 P.3d 1165, 1168 (Alaska 2002).

47 *Id.*

This issue could easily recur. Any time the State adjusts an insurance plan, similar challenges could arise, followed by post-judgment disputes about the default. This exact scenario might be unlikely. But the core issue—a superior court dramatically altering a final judgment under the guise of "enforcement"—could happen in any type of case. The issue could evade review repeatedly in cases like this one, where practical considerations drive the defendant to comply with a post-judgment order, rendering their appeals moot.

As for the public interest, litigants and superior court judges would benefit from clarity that final judgments are indeed final, and the vehicle to modify them after entry is Civil Rule 59(f): "A motion to alter or amend the judgment shall be served not later than 10 days after the entry of the judgment." Absent a timely Rule 59(f) motion, litigants must live with the relief they managed to obtain, or seek to make changes via an appeal. Cases must eventually end. Trial court judges cannot go on awarding new relief endlessly whenever a prevailing party has buyers' remorse and wishes for something more.

The other challenged amendment to the final judgment—the superior court's order for a review of years of claims under the 2014 Plan to determine which denied claims might have been covered under the old plan—also cannot stand. RPEA has abandoned its superior court argument that this relief constitutes mere enforcement of the original judgment. Instead, ignoring the post-judgment timing of the request, RPEA now argues that this relief is appropriate under its boilerplate ask in the Complaint for whatever relief the court deems just. [Ae. Br. 41, 48] Acknowledging that reimbursements to retirees—payments for coverage their premiums did not include—would indeed be "an improper expansion of the relief requested in the complaint," [Ae. Br. 47], RPEA provides a

different rationale for its request. RPEA now argues that information gleaned from this enormous post-judgment discovery exercise might inspire "[i]ndividual retirees" to seek "reimbursement or other relief" in "separate proceedings." [Ae. Br. 47] In other words, RPEA would like to harness the authority of the superior court to conduct discovery for as-yet-unimagined (and frivolous) lawsuits by non-parties to recoup benefits to which they were never contractually entitled, and seeks to do this *after* its own case is over and on appeal. That cannot be permissible.

In sum, RPEA justifies the trial court's dramatic post-judgment amendments to the relief it received by reimagining them as mere "enforcement" of the Court's original order or as additional "equitable relief" allowed by boilerplate pleading language, regardless of the timing. Both post-judgment orders unquestionably gave RPEA wildly different relief than what it requested and received. Both should be reversed.

IV. Alaska Statute 09.60.010(c) is best read to mean that prevailing constitutional litigants receive "full reasonable fees" and "costs," where "costs" are determined using Civil Rule 79.

If this Court rejects all the State's arguments and RPEA remains the prevailing party, this Court should nevertheless reverse the extraordinary and unexplained award of tens of thousands of dollars of ordinarily non-recoverable costs. That award should not stand, either under the best interpretation of AS 09.060.010(c) or as an assumed silent exercise of discretion under Civil Rule 94.

RPEA argues that the statutory phrase "full reasonable fees and costs" unambiguously means "full reasonable fees" and "full reasonable costs." [Ae. Br. 37-38] But the language is equally susceptible to the State's interpretation: "full reasonable fees"

and also, simply, "costs." The legislative history described by RPEA says nothing about costs, [Ae. Br. 39 & n.99], and that silence cuts in favor of the State's interpretation.

The Legislature did not enact AS 09.060.010 on a clean slate. Rather, as both parties have explained, the passage of the statute concluded a lengthy policy debate among the three branches of government regarding this Court's judicially created public interest exception to Civil Rule 82. [At. Br. 48-49; Ae. Br. 39-40] And where, as here, "statutory language and legislative history are ambiguous," this Court "looks to the common law as a useful tool to discern legislative intent and to interpret statutes."[48] "The common law . . . furnishes one of the most reliable backgrounds upon which analysis of the objects and purposes of a statute can be determined."[49] This Court must therefore "presume that the legislature is aware of the common law when enacting statutes," and select an interpretation of a statute altering the common law "that effects the least possible change in common law."[50]

Nowhere in this Court's cases, the legislative history, or anywhere else, did any participant in that discussion contemplate a dramatic expansion of ordinary cost awards. To the contrary, this Court's public interest litigant cases limited cost awards to the ordinary Rule 79 framework.[51] The policy debate centered instead on how far to *retract* special full fee awards for particular classes of litigants. A silent simultaneous expansion

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48 *Young v. Embley*, 143 P.3d 936, 945 (Alaska 2006).

49 *Id.*

50 *Id.*

51 *See, e.g.*, *Hickel v. Southeast Conference*, 868 P.2d 919, 931 (Alaska 1994).

of the longstanding status quo on costs—ordinary Rule 79 costs—would surely surprise the Legislature that passed the statute. Against this common law backdrop, the State's sensible interpretation of AS 09.060.010(c) most likely reflects legislative intent.

RPEA argues in the alternative that Civil Rule 94 can be used to relax Rule 79 and award additional costs, in the superior court's discretion. This argument lacks plausibility. Civil Rule 79's language is clear and mandatory: "only" the listed items are "allowed as costs." And Rule 94's general language about the "relaxation of rules" does not create a Rule 79 analogue to Rule 82(b)(3), which explicitly gives trial courts discretion to vary presumptive attorneys' fee awards based on equitable factors. Instead, this Court's Rule 94 precedent requires a party seeking relaxation of a rule to make "a showing . . . that [the party] will suffer injustice if the rule is strictly enforced . . . ."[52] RPEA did not ask the superior court to employ Rule 94 as an exception to Rule 79,[53] and the superior court certainly made no finding that limiting RPEA to Rule 79 costs would work an injustice. The cost award cannot be upheld on this alternative basis.

CONCLUSION

The State asks this Court to reverse the judgment of the superior court and hold that retiree-funded benefits are not "accrued benefits" of public employment.

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52 *Cook v. Aurora Motors, Inc.*, 503 P.2d 1046, 1049-50 (Alaska 1972).

53 [Exc. 253-55, 231-35]