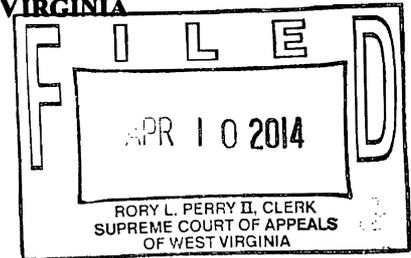


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-1193



**THE WEST VIRGINIA INVESTMENT
MANAGEMENT BOARD, a public body
corporate, and THE WEST VIRGINIA
CONSOLIDATED PUBLIC RETIREMENT
BOARD, a public agency,**

Petitioners Below, Petitioners,

v.

Appeal from Final Orders of the Circuit
Court of Kanawha County (09-C-2104)

**THE VARIABLE ANNUITY LIFE
INSURANCE COMPANY, a Texas corporation,**

Defendant Below, Respondent.

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COMPANY**

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STATEMENT OF THE CASE

The West Virginia Investment Management Board (“IMB”) and The West Virginia Consolidated Public Retirement Board (“CPRB”) (collectively, “Petitioners”) ask this Court to ignore the plain language of two separate contracts they entered into with Respondent The Variable Annuity Life Insurance Company (“VALIC”), and to hold that these contracts grant Petitioners rights they never bargained for or obtained. The first contract, issued to CPRB in 1991 (the “1991 Contract”), provides a fixed annuity investment option to participants in West Virginia’s teachers’ defined contribution plan (the “DCP”). The second contract, issued to IMB in 2008, provided a fixed annuity investment to fund the West Virginia’s teachers’ pension plan (the “TRS”).¹

Because VALIC promised under both contracts to pay a minimum fixed rate of interest of no less than 4.5 percent for so long as the contracts remained in effect—an obligation that could potentially last many decades—both contracts contained identical unambiguous provisions restricting withdrawals to five payments over four years. Notwithstanding this restriction, VALIC agreed to transfer approximately \$250 million from the 1991 Contract to the 2008 Contract, when legislation in 2008 directed CPRB to transfer those funds to IMB. VALIC granted this accommodation based on IMB’s representation that it would hold the 2008 Contract as an investment within TRS and did not intend to liquidate the investment immediately. When IMB broke its word and demanded immediate withdrawal of funds eight days after signing the 2008 Contract, VALIC properly insisted that IMB comply with the withdrawal restrictions in the 2008 Contract.

¹ Although the two contracts provide virtually identical terms, they were negotiated separately, by different parties at different times, and incorporate different documents. The 1991 Contract incorporates VALIC’s 1991 response to CPRB’s request for proposal and a letter of understanding between CPRB and VALIC, while the 2008 Contract only incorporated a letter of understanding between IMB and VALIC.

Neither the law nor the undisputed facts supports Petitioners' revisionist and illogical construction of the annuity contracts. Petitioners failed to identify a single ambiguity in the contracts in their briefing or at oral argument on VALIC's Motions for Summary Judgment, and again fail to do so on appeal. Their position—echoed by amici curiae—seems to be that the Court should disregard the plain language of the contracts and confiscate VALIC's property under the color of law because the State has historically underfunded pension obligations that may come due in years to come. Simply put, no citizen's property would be safe against such an extraordinary extra-legal attack if this Court fails to reject it.

The Circuit Court properly granted VALIC's Motions for Summary Judgment because Petitioners are not entitled to the relief they seek as a matter of law. The 2008 Contract unambiguously prohibited IMB from immediately withdrawing all of the funds held in the annuity, and all evidence shows that there is no live, justiciable controversy or any damages related to the 1991 Contract. The Circuit Court's ruling should be affirmed.

I. FACTUAL BACKGROUND

A. CPRB And IMB Serve Separate And Distinct Roles For West Virginia's Teacher Retirement System and Defined Contribution System.

The pension plan for West Virginia teachers—the TRS—was created in 1941 to provide retirement benefits for the State's public school teachers and other school service personnel. A.R. 76 at ¶ 9, 1417. While IMB and CPRB are both trustees for the TRS, they serve separate and distinct roles. IMB, as trustee for the investment of funds in the TRS and other state pension plans, is responsible for selecting and managing the investments used to fund those plans. A.R. 75-76 at ¶ 5, 1422-23, 1436, 1549; W. Va. Code § 12-6-3(a). CPRB, as administrator of the TRS and the other state retirement plans, is responsible for collecting contributions to be invested in

the retirement plans and overseeing the payment of benefits to plan participants. A.R. 75 at ¶ 3, 1435-36, 1492-93, 1549; W. Va. Code §§ 5-10D-1(a), (f)(1), (g), 18-7B-5.

In 1990, fearing the projected consequences of having long underfunded the TRS, the West Virginia legislature created a defined contribution plan for teachers and other school service personnel—the DCP—which allows participants to allocate their retirement funds to various investment options. A.R. 76-77 at ¶ 10, 1605 at ¶¶ 8, 13; W. Va. Code § 18-7B-3. Under the legislation, as of July 1, 1991, the TRS was closed to new participants, new teachers were automatically enrolled in the DCP, and participants in the TRS could elect to transfer to the DCP. A.R. 76-77 at ¶ 10, 1605 at ¶ 9; W. Va. Code §§ 18-7B-7(a), 18-7B-8. CPRB serves as both the administrator of and the trustee for the investment of funds held in the DCP. A.R. 1422-23. CPRB is responsible for overseeing the collection of contributions and payout of benefits under the DCP, as well as selecting and managing the investment options available to DCP participants. A.R. 75 at ¶ 3, 1605 at ¶ 14; W. Va. Code §§ 5-10D-1(a), (f)(1), (g). Petitioners concede that IMB does not play any role with respect to the DCP. *See* Pet’rs’ Br. at 33.

B. Since 1991, VALIC Has Provided The Fixed Annuity Option Available To DCP Participants.

Since the DCP’s inception in 1991, the investment options available to DCP participants have included stock, bond, and money market funds, and a fixed annuity option. A.R. 1587-88 (Resp. to Interrog. No. 16). On October 8, 1991, VALIC issued the 1991 Contract to CPRB, which has served, from the inception of the DCP to the present, as the funding entity for the DCP’s only fixed annuity option. A.R. 1438, 1611, 1613, 1707, 1719-20.

The 1991 Contract includes an endorsement (the “Endorsement”) that addresses “participants’” rights to withdraw funds from the annuity before one of the contract’s

enumerated payout methods has been triggered.² Specifically, the Endorsement replaces the contract's provision imposing a surrender *charge* on early withdrawals (Section 3.02) with a *restriction* on the *timing* of those withdrawals. A.R. 1622. The Endorsement provides, in relevant part:

Section 2.03 (Surrender Value) is amended by adding the following:

A) Except as provided in (B) below, in the case of withdrawal for transfer to another funding entity only 20% of the Surrender Value may be withdrawn once a year.

A Participant may choose to have the Surrender Value withdrawn for transfer in one of the following ways:

(1) Five Year Equal Annual Installment Method. The interest rate during the five year payout period will be declared in advance by VALIC. No other withdrawals may be made once payments begin.

(2) Decreasing Balance Method. 1/5 of the account balance the first year. 1/4 of the remaining balance the second year. 1/3 of the remaining balance the third year. 1/2 of the remaining balance the fourth year. The entire remaining balance the fifth year. Interest under this method will be credited at a rate determined by VALIC. Withdrawals may be made under this method.

B) The 20% a year restriction does not apply if:

(1) The Surrender Value remaining would be less than \$500, or;

(2) The withdrawal is for transfer to the funding entity for the West Virginia ORP Common Stock Fund or the West Virginia ORP Bond Fund.

Section 3.02 is deleted. There will be no surrender charges under this Contract. The account Surrender Value is equal to the Annuity Value.

² The 1991 Contract permits cash distributions for individual teachers, under limited, specified circumstances: (1) retirement; (2) death; (3) permanent, total disability; or (4) termination from employment. A.R. 367 (explaining beneficiary's rights if a participant dies), 475-479 (explaining various payout events under the contract, including termination and retirement). The contract's distribution restrictions are consistent with the rules and regulations governing the DCP, which only contemplate cash distributions from the DCP in the event of retirement, death, termination from employment, or permanent and total disability. W. Va. Code §§ 18-7B-11(a), 18-7B-12(a), 162-3-3.1.q, 162-3-7.2.a.

In the late 1990s, at the request of CPRB's third-party administrator for the DCP, the parties began treating the 1991 Contract as an unallocated contract. A.R. 1708-1711, 2355-57; *see also* A.R. 1441-42, 2509, 2513, 2515. In other words, from that time forward, the rights and obligations of individual "participants" in the contract—individual members of the DCP—were treated as rights and obligations of all participants in the DCP as a group. Accordingly, the withdrawal restriction, previously applicable to individual participants' withdrawals from the annuity, was enforced from that point on at the group level, restricting withdrawals when CPRB sought to withdraw more than twenty percent of the total DCP funds held in the VALIC Annuity. A.R. 1708-11, 2509, 2513, 2515.

CPRB's corporate representative and executive director in 2008 both acknowledge that, as a result of VALIC's agreement to treat the 1991 Contract as unallocated, the Endorsement restricts CPRB's ability to withdraw funds from the contract at the group level. A.R. 1441-42, 1447-48, 1708-11; *see also* A.R. 565-66, 1691, 2515 (May 17, 2004 analysis of the VALIC annuity explaining that, under the withdrawal restriction, if CPRB sought to "liquidate[]" the contract, it would have to do so over multiple years pursuant to the Endorsement); 2479-2482 (Dec. 16, 2003 email from VALIC to CPRB explaining, "The group may withdraw up to 20% of the policy's surrender value each year[.]").

In fact, since at least 1994, CPRB expected VALIC to enforce the withdrawal restriction if CPRB sought to replace and discontinue the VALIC annuity in the DCP. A July 1994 evaluation of the DCP prepared for CPRB explained, "[I]f the State should terminate its contract with VALIC and transfer assets to another investment provider . . . there is a 20% transfer limitation. It appears, therefore, if the State did terminate its contract, it would receive payment

of its account under one of the two following methods: 1) Five Year Annual Installment Method . . . or 2) Decreasing Balance Method.” A.R. 2432.

C. In 2008, Legislation Permitted DCP Members To Elect To Transfer From The DCP To The TRS.

On March 16, 2008, the West Virginia legislature passed House Bill 101x, which permitted DCP members to voluntarily transfer their retirement accounts to the TRS effective July 1, 2008, so long as at least 65 percent of actively-contributing DCP members elected to transfer. W. Va. Code §§ 18-7D-3, 18-7D-5(a). As of June 3, 2008, 78.3 percent of DCP participants had elected to transfer. A.R. 1451-52, 1679. As a result, CPRB began the process of transferring the electing members’ accounts to the TRS. A.R. 1679.

Both before and after the bill’s enactment, VALIC reminded CPRB, who participated in drafting the legislation, that the withdrawal restriction in the 1991 Contract would affect CPRB’s ability to transfer the funds immediately to the TRS.³ A.R. 1691 (March 17, 2008 email from VALIC to CPRB, explaining that withdrawal restriction applied to the group and would limit withdrawals to 20 percent per year), 1699-1700 (June 25, 2008 letter from VALIC to Great-West Retirement Services (“Great West”), the third-party administrator for the DCP, explaining 1991 Contract’s withdrawal restriction and options for withdrawal), 1723-26, 1737-39 (June 29-July 2, 2008 email exchange, wherein CPRB confirmed that it understood the withdrawal restriction limited withdrawals to 20 percent per year unless the funds were transferred to the funding entity for the ORP Common Stock Fund or Bond Fund), 2002-05.

³ CPRB mistakenly contends that VALIC improperly attempted to impose a surrender charge on CPRB’s withdrawal from the 1991 Contract. Although VALIC discussed the potential of waiving the withdrawal restriction in exchange for a lump sum payment from CPRB, VALIC did not attempt to impose a surrender charge on the withdrawal. A.R. 2002-04.

D. CPRB Attempted To Withdraw From The 1991 Contract Pursuant To Its Terms By Transferring The VALIC Funds To The DCP's Bond Fund.

At no point did CPRB demand immediate cash surrender of the electing teachers' assets, or even suggest it had the right to do so. A.R. 2021-22; *see also* A.R. 1486-89, 1570-71, 1711-13, 1717-18, 1721, 1727-32, 2002-08, 2363-65. Nor did CPRB assert that the withdrawal restriction in the 1991 Contract was somehow inapplicable to the transfer to the TRS. *See, e.g.*, A.R. 1727-34, 1737-39, 1760-61.

Instead, CPRB initially attempted to transfer the funds of the electing teachers held in the 1991 Contract to American Funds' Bond Fund of America (the DCP "Bond Fund"), a stratagem CPRB understood would allow it to avoid application of the withdrawal restriction. A.R. 1443-44, 1737-39, 1746-47 (June 30, 2008 letter from CPRB instructing Great West to transfer the electing teachers' funds invested with VALIC to the Bond Fund "to avoid withdrawal surcharges and liquidity restrictions on the [VALIC] account"), 1471-72, 2483 (June 30, 2008 email from CPRB noting that the VALIC funds will be "placed in the WV ORP Bond Fund (which is and always has been American) to comply with the Endorsement"), 2488 (June 30, 2008 email from CPRB to Great West noting, "[T]he endorsement allows the withdrawal to go to the bond fund (or the stock fund)."). VALIC agreed to transfer the electing teachers' assets to the Bond Fund pursuant to CPRB's request. A.R. 1471-72, 1760-61, 1765, 1769-70, 2009-11, 2038. Ultimately, however, American Funds refused to accept transfer of the funds because it was unable to reach an agreement with IMB on terms intended to protect American Funds and its investors from short term losses. A.R. 1774-76, 1782, 2009-11, 2501-02.

E. CPRB Requested, And VALIC Agreed To Issue, A New Annuity Contract To IMB With The Same Terms And Conditions As The 1991 Contract.

After Petitioners abandoned their plan to transfer the VALIC funds to the Bond Fund, CPRB requested that VALIC transfer the electing-teachers' assets in the 1991 Contract to a new

annuity contract that VALIC would issue to IMB. A.R. 1445-46, 1508, 1528-30. The parties agreed that the 2008 Contract would include the *identical* Endorsement found in the 1991 Contract, restricting IMB's right to withdraw the funds transferred into the 2008 Contract. *Compare* A.R. 1622 with 954; *see also* A.R. 1499, 1787-88, 2022.

VALIC would not have entered into the 2008 Contract had it not included the withdrawal restriction contained in the Endorsement. A.R. 1311, 2022. Both CPRB's own investment consultant and its former third-party administrator have testified that withdrawal restrictions of this type are common features of long-term guaranteed rate investment products like the VALIC fixed annuity. A.R. 2027-28, 2039, 2042, 2273-80. Accordingly, VALIC sought and obtained Petitioners' repeated assurances that IMB did not intend to liquidate the assets held in the new fixed annuity contract. A.R. 1422-25 (Sept. 17, 2008 email from CPRB to VALIC stating that the transfer "involves no liquidation of the funds just a new fiduciary for these VALIC accounts"), (Sept. 19-22, 2008 email exchange between VALIC, CPRB, and IMB, confirming that the proposal to create a new annuity contract was "not an attempt by the CPRB or IMB to liquidate the assets in the new fixed annuity contract"), 1787 (Sept. 25, 2008 email from VALIC to CPRB and IMB clarifying that it would "issue the new fixed annuity contract with the understanding that such an exchange is not an attempt by the CPRB or any State party to liquidate the assets in the existing fixed annuity contract contrary to its terms and conditions"). At no point during negotiation of the 2008 Contract did Petitioners indicate to VALIC that they believed the withdrawal restriction—which was duplicated in the 2008 Contract—would not apply to IMB. A.R. 1517, 1572, 2012-22, 2022, 2326, 2343-44.

Based on Petitioners' assurances that IMB did not intend to liquidate the investment immediately, but instead intended to use the VALIC annuity as an investment and funding

vehicle for the TRS, VALIC agreed to issue the 2008 Contract to IMB in November 2008 on terms virtually identical to those in the 1991 Contract. A.R. 938, 1476-1477, 1499, 1787. VALIC also agreed to language IMB proposed in a Letter of Understanding that characterized the 2008 Contract as an “investment and funding vehicle for the TRS Plan,” and expressly provided that references to “participant” rights in the contract would mean IMB’s rights in the contract. A.R., 1811-13, 1818-20, 2344-47. On December 10, 2008, VALIC and IMB executed the Letter of Understanding, thus finalizing their agreement. *Id.* Upon executing the letter, VALIC transferred \$248,345,458.77 from the 1991 Contract to the 2008 Contract. A.R. 1850.

F. Eight Days After The 2008 Contract Was Finalized, IMB Requested Immediate Withdrawal Of All Funds Held Under The 2008 Contract.

Despite Petitioners’ repeated representations to VALIC that IMB did not intend to liquidate the assets in the 2008 Contract, IMB attempted to do just that only eight days after signing it, requesting withdrawal and transfer of all funds held under the 2008 Contract on or before December 31, 2008. A.R. 1852. In response, VALIC reminded IMB that the withdrawal restriction prohibited immediate liquidation of the contract and that IMB needed to submit instructions electing a withdrawal method. A.R. 1858-59, A.R. 1863-83.

On April 23, 2009, IMB elected to withdraw funds from the 2008 Contract pursuant to the contract’s equal installment method. A.R. 1893-95. In accordance with IMB’s instructions, VALIC transferred the first distribution of \$55,058,102.37 to IMB’s Short Term Fixed Income Pool, a money market fund and another funding entity for the TRS, on May 5, 2009. A.R. 1550-52, 1901, 2064. For each of the four years thereafter, VALIC transferred the requisite funds to IMB’s Short Term Fixed Income Pool. A.R. 1550-52, 1573-74, 2420-22. The fifth and final transfer occurred in May of 2013. A.R. 1577.

II. PROCEDURAL HISTORY

A. Petitioners Initially Sued VALIC For Declaratory Relief And Later Amended The Complaint To Seek Monetary Damages.

CPRB and IMB initiated this action on November 12, 2009, seeking declaratory relief, asking the Court to declare their right to a full surrender of the VALIC funds held under the 2008 Contract, “upon demand . . . and without penalty or other restriction.” A.R. 2371 at ¶ 1. For the next two years, Petitioners did nothing to prosecute their case, until February 8, 2012, when Petitioners sought leave to amend the complaint to add a claim for “damages,” claiming that VALIC’s “refusal to release the full amount of the funds held under the Annuity Contracts upon [Petitioners’] demand [had] caused [Petitioners] to lose the opportunity to invest those funds and earn higher returns.” A.R. 82 at ¶ 36. To be clear, Petitioners do not claim, nor could they, that Petitioners have suffered any actual losses as a result of the annuity contracts—VALIC has paid at least 4.5 percent interest on all amounts invested in both contracts since the first contract inception in 1991. A.R. 1714, 1719-22. Instead, Petitioners seek damages in the form of “lost investment earnings” (i.e., the purported investment returns Petitioners claim IMB could have earned had it been able to invest the assets held by VALIC in other TRS funds). A.R. 82 at ¶ 37.

B. Petitioners Only Appeal The Circuit Court’s Granting Of VALIC’s Motions For Summary Judgment.

In the Circuit Court, Petitioners and VALIC filed competing motions for summary judgment—each arguing that the contracts unambiguously supported their interpretation of the agreements. All parties agreed that, in resolving the motions, the Court did not need to resolve any disputed issues of fact. A.R. 96. Petitioners only appeal the Circuit Court’s granting of VALIC’s Motions for Summary Judgment; they do not appeal the Circuit Court’s denial of Petitioners’ own Motion for Summary Judgment. Pet’rs’ Br. at 1.

Petitioners identify five assignments of error. First, Petitioners contend that, contrary to the Circuit Court's orders, the 1991 Contract allowed CPRB to withdraw the funds of the electing teachers from the VALIC annuity without a "five year" delay or surrender charge.⁴ This Court need not reach that issue, because it was not raised in VALIC's Motions or addressed by the Circuit Court and it is not necessary to resolution of this appeal.⁵ The Circuit Court properly awarded summary judgment with respect to the claims related to the 1991 Contract because there is no live, justiciable controversy with respect to the 1991 Contract, and neither CPRB nor IMB suffered any damages under the 1991 Contract. Sections II, III, *infra*. As a result, the Circuit Court did not need to construe the provisions governing withdrawal in the 1991 Contract or declare any rights under the 1991 Contract. *Hustead on Behalf of Adkins v. Ashland Oil, Inc.*, 197 W. Va. 55, 61 574 S.E.2d 55, 61 (1996) (citations omitted); *Absure, Inc. v. Huffman*, 213 W. Va. 651, 655, 584 S.E.2d 507, 511 (2003).

This Court likewise need not, and should not, address Petitioners' first assignment of error. *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 219, 530 S.E.2d 676, 692 (1999) ("In the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which have not been decided by the court from which the case has been appealed."). VALIC addresses assignments of error two through five below.

SUMMARY OF ARGUMENT

In their opening brief, Petitioners intentionally blur the lines separating the 1991 Contract and the 2008 Contract to obscure the fact that neither CPRB nor IMB, individually, is entitled to

⁴ Throughout their briefing, Petitioners erroneously refer to a "five year" withdrawal restriction. In fact, the withdrawal restriction provides for five payments over four years. VALIC made the fifth and final payment in 2013.

⁵ VALIC has consistently contended that the 1991 Contract unambiguously restricts any attempt by CPRB to withdraw from the contract, but did not raise the issue in its Motions for Summary Judgment.

the relief it seeks. Implicitly recognizing the flaws in their arguments with respect to the 2008 Contract, Petitioners focus almost exclusively on the 1991 Contract, arguing that documents and conduct of the parties related to the 1991 Contract somehow establish that IMB was entitled to immediate withdrawal of the funds held under the 2008 Contract, *a separate, unambiguous contract executed 17 years later*, just days after the contract was finalized. As Petitioners concede, however, VALIC did not ask the Court to find that the 1991 Contract prohibited CPRB from immediately withdrawing all funds from the contract, and the Circuit Court did not address the issue. Instead, VALIC argued and the Circuit Court properly found that Petitioners are not entitled to relief under the 1991 Contract because they did not request a full cash withdrawal from the 1991 Contract. VALIC complied with the only actual request to withdraw and transfer CPRB submitted, which was to transfer the funds to the 2008 Contract. Neither CPRB nor IMB suffered any damages under the 1991 Contract.

The Circuit Court also correctly found that the 2008 Contract unambiguously prevented IMB from obtaining an immediate, unrestricted withdrawal of all funds held in the 2008 Contract. Petitioners do not and cannot identify any legal or factual basis for avoiding the withdrawal restriction in the 2008 Contract, and fail to overcome fatal flaws in essential elements of their claims. The Circuit Court's grant of summary judgment in VALIC's favor should be affirmed for the following reasons:

First, the Circuit Court properly determined based on the plain and unambiguous language of the 2008 Contract that the withdrawal restriction prohibited IMB from immediately withdrawing all funds from the contract. Construing the 2008 Contract as Petitioners suggest would nullify the contract's withdrawal restriction and would grant Petitioners a windfall not contemplated by the parties' agreement, and impose a concomitant hardship on VALIC.

Second, even if this Court were to find that the language of the 2008 Contract is ambiguous—it should not—VALIC is still entitled to summary judgment on Petitioners' claims based on the 2008 Contract because all extrinsic evidence before the Court demonstrates that both VALIC and Petitioners knew that the withdrawal restriction was intended to and would prohibit IMB from immediately withdrawing all of the funds from the 2008 Contract.

Third, the Circuit Court properly found there is no live, justiciable controversy as to the 1991 Contract because VALIC followed CPRB's request to transfer the funds out of the contract without restriction, and Petitioners do not have any damages related to the 1991 Contract.

Fourth, the Circuit Court properly concluded that neither CPRB nor IMB had standing to enforce the other's contract. IMB is not a party to the 1991 Contract, and IMB plays no role with respect to the investment options or administration of the DCP. Likewise, CPRB is not a party to the 2008 Contract, and once VALIC transferred the funds to IMB through the 2008 Contract, CPRB lost any interest or control it had over the investment of those funds.

Finally, the Court should not rewrite the 1991 Contract as the amici curiae suggest. Three teachers unions urge the Court to disregard and rewrite the plain terms of the 1991 Contract, even though doing so would undisputedly impair (indeed, eliminate) VALIC's contractual right to enforce the withdrawal restriction. The arguments asserted in the amici curiae briefs are not properly before this Court because they were not raised below—and for good reason, as accepting them would undeniably violate the Contract Clause. The plain mandate and purpose of the 2008 legislation, to transfer the funds of electing teachers from the DCP to the TRS, was accomplished when VALIC agreed to issue the 2008 Contract to IMB to fund the TRS. Rewriting the parties' agreement is unnecessary and would destroy the confidence of private parties in the sanctity of their contracts with the State of West Virginia.

For these reasons, VALIC respectfully requests that this Court affirm the Circuit Court's orders granting summary judgment in VALIC's favor.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Although VALIC believes that the issues presented for appeal are adequately presented in the briefs and record on appeal, VALIC does not oppose Petitioners' request for oral argument. Following briefing and argument, VALIC respectfully requests that the Court issue an opinion upholding the Circuit Court's orders granting summary judgment in VALIC's favor.

STANDARD OF REVIEW

A Circuit Court's entry of summary judgment is reviewed *de novo*. *Painter v. Peavy*, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994). West Virginia Rule of Civil Procedure 56 is “‘designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial,’ if there essentially ‘is no real dispute as to salient facts’ or if it only involves a question of law.” *Fayette Cnty. Nat’l Bank v. Lilly*, 199 W. Va. 349, 352, 484 S.E.2d 232, 235 (1997) (citation omitted). Accordingly, “[s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. Thus, if one element fails, there is no possibility for recovery[.]” *Belcher v. Wal-Mart Stores, Inc.*, 211 W. Va. 712, 719, 568 S.E.2d 19, 26 (2002) (citation omitted).

Petitioners agreed during summary judgment briefing that there were no disputed issues of fact but now claim the Circuit Court improperly disregarded fact issues to grant summary judgment for VALIC. Not only is Petitioners' contention inaccurate, it is well settled that “the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise

properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. The essence of the inquiry the court must make is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 61, 459 S.E.2d 329, 338 (1995) (citation and internal quotation marks omitted). Where, as here, “the record could not lead a rational trier of fact to find for the non-moving party,” summary judgment is warranted. *Armor v. Lantz*, 207 W. Va. 672, 677, 535 S.E.2d 737, 742 (2000).

ARGUMENT

I. The Circuit Court Properly Concluded That The Endorsement In The 2008 Contract Restricted IMB From Immediately Withdrawing All Of The Funds Held In The VALIC Annuity

The Circuit Court correctly found that the 2008 Contract unambiguously restricted IMB’s right to withdraw funds from the annuity. Whether a contract is ambiguous is a question of law that is properly adjudicated on summary judgment. *Harrison v. Town of Eleanor*, 191 W. Va. 611, 615-616, 447 S.E.2d 546, 550-551 (1994). “The mere fact that parties do not agree to the construction of a contract does not render it ambiguous.” *Benson v. AJR, Inc.*, 226 W. Va. 165, 175, 698 S.E.2d 638, 648 (2010) (citation omitted). Instead, “contract language is considered ambiguous where an agreement’s terms are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations undertaken.” *Id.* In other words, the “term ‘ambiguity’ is defined as language reasonably susceptible of two different meanings or language of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning.” *Estate of Tawney v. Columbia Natural Res., LLC*, 219 W. Va. 266, 272, 633 S.E.2d 22, 28 (2006) (citations omitted).

A. The Withdrawal Endorsement Unambiguously Restricted IMB's Withdrawals From The VALIC Annuity.

The withdrawal restriction in the 2008 Contract can only reasonably be read to have restricted IMB's ability to withdraw funds from the VALIC Annuity. Two provisions are relevant to determining the amount and timing of withdrawals of funds invested in the 2008 Contract. The first is Section 2.03 of the contract, which defined the "Surrender Value" of the annuity. It states: "The Surrender Value of a Participant's Account shall be equal to the Annuity Value less any applicable surrender charges." A.R. 942.

The second relevant provision is the West Virginia Optional Retirement Plan Endorsement, which changed how withdrawals from the contract were treated by amending the contract to (1) delete the section of the contract that provided for charges for partial or total surrenders (Section 3.02), and (2) add the following language to Section 2.03 (Surrender Value):

[I]n the case of withdrawal for transfer to another funding entity only 20% of the Surrender Value may be withdrawn once a year. . .

The 20% a year restriction does not apply if: (1) The Surrender Value remaining would be less than \$500, or; (2) The withdrawal is for transfer to the funding entity for the West Virginia ORP Common Stock Fund or the West Virginia ORP Bond Fund.

Section 3.02 is deleted. There will be no surrender charges under this Contract. The account Surrender Value is equal to the Annuity Value.

A.R. 954. In other words, the Endorsement amended the contract to restrict the amount and timing of IMB's ability to withdraw from the contract to twenty percent per year, rather than imposing a monetary charge for withdrawals (as the contract would have provided, in Section 3.02, without the Endorsement). *Id.* The Circuit Court properly concluded that these terms unambiguously prevented IMB from obtaining unrestricted and immediate surrender of all the funds held in the 2008 Contract.

Petitioners nevertheless contend that the withdrawal restriction could not have applied to IMB's request to withdraw from the 2008 Contract, claiming (i) the restriction only applied when individual participants sought to make in-plan transfers between investment options in the DCP, (ii) other provisions of the contract permitted unrestricted surrenders, and (iii) extrinsic evidence related to the 1991 Contract and a contract interpretation principle—neither of which are relevant here—should be used to interpret the 2008 Contract against VALIC. But Petitioners do not and cannot cite a single term in the 2008 Contract or any other admissible evidence to support their illogical construction of the contract. The unambiguous contract language, including the Letter of Understanding, makes clear that the Endorsement applied to restrict IMB from immediately withdrawing all assets from the 2008 Contract for transfer into other TRS funds.

1. Application of the withdrawal restriction in the 2008 Contract cannot logically be limited to individual participant transfers within the DCP.

Petitioners acknowledge, as they must, that the Endorsement defined the rights of “participants” to withdraw assets held in the contract. A.R. 954, 2344-47. Petitioners ignore, however, that IMB is the only “Participant” in the 2008 Contract; there were no individual participants in the 2008 Contract. A.R. 1818-20, 2344-47. Accordingly, the Letter of Understanding to the 2008 Contract, which IMB drafted, clarified that the 2008 Contract operated “as an investment and funding vehicle for the TRS Plan, rather than as an annuity in which individual participants have specific rights . . .” and that “[r]eferences to participant rights in the Annuity Contract shall be deemed to mean rights vested in WVIMB”⁶ A.R. 1818-20 (emphasis added), 2344-47. This clarification made perfect sense because the contract was intended to fund the TRS. A.R. 2344-47. While individual participants in the DCP direct

⁶ Because the contract between VALIC and IMB included the 2008 Contract and the 2008 Letter of Understanding, the writings must be read together. *Ashland Oil, Inc. v. Donahue*, 159 W. Va. 463, 469, 223 S.E.2d 433, 437 (1976); A.R. 1820.

and control the investment of their individual retirement assets in the various DCP investment options, IMB is responsible for directing and controlling the investment of TRS assets, which ultimately fund individual pension benefits. W. Va. Code §§ 12-6-3(a), 12-6-9a(a) ; A.R. 75 at ¶¶ 3, 5, 1436, 1549, 1605 at ¶ 13. Thus, the Endorsement plainly defined IMB's rights to withdraw assets from the 2008 Contract.

Petitioners nevertheless argue that the Endorsement did not restrict IMB's ability to withdraw all funds from the 2008 Contract because the Endorsement only applied to restrict in-plan transfers *within the DCP*. Nothing in the 2008 Contract can reasonably be read to so limit the application of the withdrawal restriction. On its face, the restriction applied to *any* "withdrawal for transfer to another funding entity," not just internal transfers within the DCP. A.R. 954. Indeed, to construe the 2008 Contract as Petitioners suggest would require this Court to discard the withdrawal restriction, thereby rendering its inclusion in the 2008 Contract illusory. The Circuit Court correctly refused to read unwritten, un-bargained-for limitations into the plain language of the withdrawal restriction. *Cabot Oil & Gas Corp. v. Huffman*, 227 W. Va. 109, 117, 705 S.E.2d 806, 814 (2010).

2. No provision in the 2008 Contract gave IMB the right to make unrestricted withdrawals.

Nothing in the language of the 2008 Contract or the accompanying Letter of Understanding can be read to have given IMB the right to withdraw all funds from the 2008 contract without restriction. Notably, IMB does not contend that the *entire* Endorsement should be discarded. Instead, IMB asks the Court to enforce that part of the Endorsement it likes (eliminating surrender charges), but refuse to enforce that part it does not like (restricting withdrawals). Petitioners essentially argue that IMB was permitted to hold VALIC to an indefinite 4.5 percent guaranteed return on a \$250,000,000 contract, but to withdraw the funds

from the VALIC annuity anytime without restriction or penalty. The contract cannot reasonably be read this way. It is elementary in contract interpretation that “[w]here the contractual language is clear, then, such language should be construed as reflecting the intent of the parties; courts are not at liberty to, *sua sponte*, add to or detract from the parties’ agreement. ‘It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them.’” *Cabot Oil*, 227 W. Va. at 117, 705 S.E.2d at 814 (citation omitted); *see also Henrietta Mills, Inc. v. Comm’r of Internal Revenue*, 52 F.2d 931, 934 (4th Cir. 1931). Read as whole and giving meaning to every provision, the 2008 Contract unambiguously restricted IMB’s ability to withdraw funds from the contract.

Petitioners also cannot avoid the withdrawal restriction by claiming IMB sought to “surrender” rather than request “withdrawal” from the 2008 Contract. The terms “surrender” and “withdrawal” were used interchangeably in the very provision Petitioners claim would make a requested surrender distinct from a withdrawal. A.R. 947 (“6.08 Deferment of Withdrawal,” outlining VALIC’s option to defer total or partial surrenders). Section 6.08 did not entitle IMB to obtain full surrender of the contract without restriction—indeed, Section 6.08 did not confer any substantive rights on IMB. The Section provided, in its entirety, “VALIC may defer payment of any partial or total surrender. Any such deferral shall not exceed six months from the receipt, at VALIC’s Home Office, of the surrender form. Interest shall be paid at a rate determined by VALIC if payment is deferred for thirty (30) days or more.” *Id.* Section 6.08 gave VALIC the option to defer any “withdrawals” or “surrenders” for up to six months. Nothing in the 2008 Contract entitled IMB to make unrestricted surrenders or withdrawals.

In 2008, despite its present attempt to re-frame its request as a “surrender,” IMB actually requested “the withdrawal of all funds held under the [2008 Contract]” and directed VALIC to transfer the funds into another TRS funding entity (the TRS Short Term Fixed Income Pool), in accordance with the contract’s terms. A.R. 1537-38, 1551-53, 1893-95, 1901. Thus, IMB recognized it was requesting a withdrawal for transfer to another TRS funding entity.

3. Neither extrinsic evidence nor the contract construction rule Petitioners rely upon should be used to vary the express terms of the 2008 Contract.

Petitioners incorrectly claim that extrinsic evidence related to the 1991 Contract and a contract interpretation principle—neither of which are relevant here—require this Court to interpret the 2008 Contract against VALIC.

First, Petitioners argue that documents incorporated into the 1991 Contract VALIC issued to CPRB and the conduct of the parties to that contract show VALIC and IMB did not intend the 2008 Contract to restrict IMB’s right to withdraw. Pet’rs’ Br. at 23-25. Even if Petitioners’ contentions accurately reflected the evidence—they do not—extrinsic evidence related to the 1991 Contract is not admissible to interpret what the Circuit Court correctly found to be unambiguous terms of the 2008 Contract.⁷ *Wilkinson v. Searls*, 155 W. Va. 475, 484, 184 S.E.2d 735, 741 (1971).

Second, Petitioners urge this Court to construe the 2008 Contract against VALIC because it was an insurance contract and was drafted by VALIC. Pet’rs’ Br. at 18. However, this rule of interpretation is one of “last resort” that applies only where the Court has found the contract to be ambiguous *and* all other rules of interpretation have failed to give meaning to the ambiguous term. 30 Williston on Contracts § 32:12 (4th ed.); *see also* 2 Couch on Ins. § 22:16. Because the Circuit Court properly concluded that the 2008 Contract unambiguously restricted IMB from

⁷ Even if this Court finds the 2008 Contract to be ambiguous, the extrinsic evidence indisputably confirms that both contracts prohibited unrestricted withdrawals. Section I.C.4, *infra*.

withdrawing all funds from the contract, this rule of last resort should not be applied to rewrite the express terms of the parties' agreement.

B. IMB Withdrew Funds For Transfer To “Another Funding Entity,” Bringing The Withdrawal Squarely Within The Withdrawal Restriction.

The Circuit Court properly applied the undisputed facts to find that IMB's request to withdraw from the 2008 Contract was subject to the withdrawal restriction. *Williams*, 194 W. Va. at 66, 459 S.E.2d at 343 (“If a court properly determines that the contract is unambiguous on the dispositive issue, it may then properly interpret the contract as a matter of law and grant summary judgment because no interpretive facts are in genuine issue.”) (citations omitted). The Endorsement provides, in relevant part:

[I]n the case of withdrawal for transfer to another funding entity only 20% of the Surrender Value may be withdrawn once a year. . . . The 20% a year restriction does not apply if: (1) The Surrender Value remaining would be less than \$500, or; (2) The withdrawal is for transfer to the funding entity for the West Virginia ORP Common Stock Fund or the West Virginia ORP Bond Fund.

A.R. 954. It is undisputed that IMB withdrew funds from the 2008 Contract for transfer to the TRS Short Term Fixed Income Pool, which was another funding entity for the TRS. A.R. 1494, 1537-38, 1551-53, 1893-95, 1901-1904.

IMB now argues without basis—and in direct contradiction of its own Annual Report—that the withdrawal restriction did not apply because the Short Term Fixed Income Pool was not a money market fund. *Compare* Pet'rs' Br. at 28, 38 *with* A.R. 2064 (IMB 2008 Annual Report describing the Short Term Fixed Income Pool as a fund “structured as a money market fund, where the goal is a stable dollar value per share, thus preserving principal.”). However, even if the TRS Short Term Fixed Income Pool was not technically a money market fund, the withdrawal restriction still applied. On its face, the withdrawal restriction applied to *any transfer to another funding entity*, unless one of the two enumerated exceptions apply. A.R. 954. It is

undisputed that the TRS Short Term Fixed Income Pool is neither a common stock fund nor a bond fund, and thus the first exception does not apply.

The remaining exception applied only when the Surrender Value remaining in the VALIC annuity *at the time of a withdrawal request* is less than \$500.⁸ A.R. 954 at ¶ (B)(1). Reading this exception as Petitioners suggest—to permit unrestricted withdrawals when the Surrender Value would be less than \$500 *after the withdrawal*—would render the withdrawal restriction meaningless, authorizing full withdrawals without restriction in every instance. There would be no reason to carve out an additional exception for transfers to the common stock or bond fund if IMB could withdraw the Surrender Value at any time, so long as it left no more than \$500 in the account. When IMB formally requested a full surrender of the 2008 Contract in December 2008, the Surrender Value was over \$248 million. A.R. 1850. The second exception therefore plainly did not apply. Accordingly, the Circuit Court correctly concluded that the withdrawal restriction governed IMB’s requested withdrawal and neither of the Endorsement’s two exceptions applied.

C. In The Alternative, Even If The Court Finds The 2008 Contract Ambiguous, The Undisputed Evidence Demonstrates That The Parties’ Intended The 2008 Contract To Impose The Withdrawal Restriction On VALIC Funds.

Even if this Court were to disagree with the Circuit Court and find the 2008 Contract somehow ambiguous, summary judgment in VALIC’s favor is still warranted. “De novo review on appeal means that the result and not the language used in or reasoning of the lower tribunal’s decision is at issue. A reviewing court may affirm a lower tribunal’s decision on any grounds.” *U.S. Steel Min. Co., LLC v. Helton*, 219 W. Va. 1, 3 n.3, 631 S.E.2d 559, 561 n.3, (2005); *see also Weirton Ice & Coal Co., Div. of Starvaggi Indus., Inc. v. Weirton Shopping Plaza, Inc.*, 175 W. Va. 473, 476 n.1, 334 S.E.2d 611, 614, n.1 (1985) (citations omitted).

⁸ Section 2.03 of the 2008 Contract, as amended by the Endorsement, defined “Surrender Value” as “equal to the Annuity Value.” A.R. 942, 954.

As VALIC argued below, even if the 2008 Contract was ambiguous, VALIC is nonetheless entitled to summary judgment because the undisputed evidence demonstrates that the parties intended the 2008 Contract to restrict IMB's withdrawals from the contract. *See Lee Enters., Inc. v. Twentieth Century-Fox Film Corp.*, 172 W. Va. 63, 67, 303 S.E.2d 702, 705 (1983) (“[I]f the parol evidence is not in dispute, then a summary judgment may be appropriate since the construction is one for the court to determine.”); *McShane v. Imperial Towers, Inc.*, 165 W. Va. 94, 97, 267 S.E.2d 196, 197-98 (1980).

The Court may consider various sources of parol evidence to interpret an ambiguous contract. For example, “parol evidence is admissible to show the situation of the parties, the surrounding circumstances when the writing was made, and the practical construction given to the contract by the parties themselves either contemporaneously or subsequently.” *Lee Enters.*, 172 W. Va. at 66, 303 S.E.2d at 705. Likewise, “[p]arol evidence of former dealings between the parties, as well as their acts subsequent to the execution of the contract, are admissible” *Bragg v. Peytona Lumber Co.*, 102 W. Va. 587, 135 S.E. 841, Syllabus (1926). Finally, the Court may look to the custom and usage of a term in the relevant industry at the time the contract was executed. *Cotiga Dev. Co. v. United Food Gas Co.*, 147 W. Va. 484, 496, 128 S.E.2d 626, 635 (1962); *see also Energy Dev. Corp. v. Moss*, 214 W. Va. 577, 587, 591 S.E.2d 135, 145 (2003); *Davis v. Hardman*, 148 W. Va. 82, 89, 133 S.E.2d 77, 91 (1963); *Bruen v. Thaxton*, 126 W. Va. 330, 28 S.E.2d 59, 64 (1943).

The undisputed evidence, coupled with the common industry usage and purpose of withdrawal restrictions in fixed annuity contracts, demonstrates that the parties intended the withdrawal restriction to apply to withdrawals from the 2008 Contract. Because VALIC properly

enforced the withdrawal restriction as understood by the parties, summary judgment was appropriate.

1. Communications between the parties before and after the issuance of the 2008 Contract demonstrate that all parties understood that only 20 percent of the Annuity Value could be withdrawn per year.

The parties' extensive negotiations before VALIC's issuance of the 2008 Contract demonstrate that *all* parties understood IMB could not immediately withdraw all funds from the 2008 Contract.

It is undisputed that IMB was fully aware of the existence and effect of the withdrawal restriction before it entered the 2008 Contract. Craig Slaughter, IMB's Executive Director, admits that he discussed the withdrawal restriction internally at IMB, with CPRB, and with IMB's counsel, before he executed the 2008 Contract. A.R. 1445-46, 1517-18, 2321, 2326, 2349-50. Indeed, Slaughter was aware of the withdrawal restriction as early as June 2008, when he attended a meeting of the Joint Committee on Pensions and Retirement during which the withdrawal restriction was discussed. A.R. 1467-68.

On multiple occasions throughout the parties' negotiation of the 2008 Contract, VALIC made clear that the contract would restrict IMB's ability to withdraw from the contract and that it would issue the contract with the understanding that IMB would not seek to liquidate (i.e., withdrawal all funds from) the contract after its execution. In September 2008, when CPRB emailed VALIC, IMB, and the Governor's General Counsel to propose the creation of a new VALIC account in IMB's name, CPRB represented that the transfer "*involves no liquidation of the funds just a new fiduciary for these VALIC accounts.*" A.R. 1425 (emphasis added). Before agreeing to issue the new contract to IMB, VALIC sought written confirmation from both IMB and CPRB that their proposal to create a new annuity contract was "*not an attempt by the CPRB or IMB to liquidate the assets in the new fixed annuity contract.*" A.R. 1423 (emphasis added).

Both Lambright and Slaughter confirmed that VALIC's understanding was correct. A.R. 1422-23. VALIC also expressly stated that it would agree to issue a new annuity contract to IMB with the understanding that the exchange was "*not an attempt by the CPRB or any State party to liquidate the assets in the existing fixed annuity contract contrary to its terms and conditions.*" A.R. 1787 (emphasis added). Neither CPRB nor IMB disputes that through these communications, the parties made their understanding of the contract clear. A.R. 1483, 1508-10, 1515-1518, 1529-1533.

Despite several opportunities to correct any misunderstanding, Petitioners repeatedly confirmed that VALIC's understanding of the purpose of the transfer and effect of the withdrawal restriction was correct, and IMB did not propose any changes to or clarification of the withdrawal restriction. Although IMB raised several questions about the terms of the new contract, neither CPRB nor IMB disputed VALIC's understanding that IMB would not seek to liquidate the new account. A.R. 1474-75, 1479-81, 1529-33, 1811. Although VALIC asked IMB to propose "any agreement or understandings [it] deem[ed] necessary as to the nature of the parties and the purpose of the fixed annuity contract . . . [,]" IMB did not propose any changes to or clarification of the withdrawal restriction. A.R. 1514-15, 1524-26, 1541-44, 1811, 1818-20.

IMB was also fully aware of the operation of and practical limitations to the only potentially-applicable exception to the withdrawal restriction (permitting unlimited transfers to the West Virginia ORP Common Stock Fund or West Virginia ORP Bond Fund) before it entered the 2008 Contract. In July 2008, before the parties' negotiation of the new annuity contract, CPRB attempted to transfer the funds of the electing-teachers' accounts held in the 1991 Contract to the West Virginia ORP Bond Fund to avoid the five-year withdrawal period. A.R. 1443-44, 1737-39, 1746-47, 1471-72, 2483, 2488. Craig Slaughter was actively involved in

working with CPRB to effectuate the transfer. *See, e.g.*, A.R. 1501-10, 1520-21, 1566-67, 1765, 2322-23. IMB was also copied on several communications related to the attempted transfer that outlined the parameters of the withdrawal restriction and its exception for transfers to the Bond Fund. A.R. 1765 (July 21, 2008 email from CPRB to IMB explaining that VALIC would “honor the agreement negotiated by the Board in the 1990’s and allow all the former VALIC accounts to be transferred to the WV bond fund OR allow 20% of the total former VALIC accounts to be liquidated this year (and 20% of the former VALIC accounts each year for the next 4 years) to be invested by WV-IMB”), 2284 (July 10, 2008 email from CPRB to IMB noting that VALIC agreed the “penalties and withdrawal limitations would not apply if [CPRB] moved the [DCP] transfer funds . . . to the WV bond fund which is actually Bond Fund of America’s bond fund”).

2. IMB’s alleged understanding of the withdrawal restriction, disclosed for the first time more than four years after the contract was executed, is not relevant to the interpretation of the agreement.

Notwithstanding the extensive evidence demonstrating the parties shared understanding of the withdrawal restriction at the time of contracting, in his depositions more than four years after the fact, IMB’s Executive Director, Craig Slaughter, claimed that he always believed the withdrawal restriction did not apply to IMB. A.R. 1535-37, 2333-39, 2348. Slaughter’s undisclosed intent is irrelevant to the interpretation of the contract. “What a party’s intention at a given time was depends, not so much upon what the party may subsequently testify it to have been, as upon what all the circumstances attending the transaction show it to have been. It would be vain for a person to swear that his intention at a given time and about a given act was one thing, when all the circumstances tended to show it was another thing.” *McLure v. Wilson*, 292 F. 109, 112 (4th Cir. 1923); *see also Trademark Properties Inc. v. A & E Television Networks*, 422 F. App’x 199, 205 (4th Cir. 2011); *Freeport Stone Co. v. Carey’s Adm’r*, 42 W. Va. 276, 265 S.E. 183, 186 (1896); 11 Williston on Contracts § 30:6 (4th ed.).

Slaughter admits that, before his deposition in 2013, he never disclosed to VALIC his undisclosed understanding that the withdrawal restriction would not apply to IMB. A.R. 1517, 2326, 2343-44; *see also* A.R. 2014-15, 2022. Thus, to the extent IMB now claims that its understanding of the withdrawal restriction differed from VALIC's understanding at the time the contact was executed, IMB's undisclosed understanding cannot be considered.

3. Withdrawal restrictions similar to those in the parties' contracts are commonly used in the retirement industry.

Petitioners do not and cannot dispute that withdrawal restrictions such as the one included in the 2008 Contract are commonly used in the retirement benefit industry to ensure that annuity providers can support the interest rates offered under annuity contracts without exposure to potential investment losses that could result from demands for the instant withdrawal of all funds. A.R. 2002-06, 2027-28, 2039, 2042, 2272-77. As explained in Susan Mangiero's expert report:

Life insurance companies post significant reserves to protect policyholders. Insurers attempt to match their investments to the projected stream of payments from these reserves that they expect to make in the future, a concept known as "duration matching." Absent withdrawal restrictions, in the event that withdrawals occur sooner than expected, insurance company annuity providers are exposed to possible investment losses. Unexpected withdrawals could impair the financial health of insurance companies if they are forced to liquidate investments at a loss and thereby lose capital. Consequently, life insurance companies that issue fixed annuities seek to protect the duration of their liabilities by placing limits on amounts that may be withdrawn as a way to minimize 'run on the bank' losses.

Given regulatory reserve rules that restricted VALIC's liquidity position, VALIC's investment and risk strategies were designed to protect its fixed annuity contract clients. Based on my more than 20 years of experience in institutional investment management, it is my opinion that VALIC's withdrawal restriction was a prudent and necessary means of providing this protection.

A.R. 2296.

Indeed, VALIC repeatedly explained to CPRB and IMB that the withdrawal restriction was necessary to support the interest rates it offered under the annuity contract. A.R. 1647, 1654

(VALIC's Annuity Proposal, explaining that the withdrawal restriction is "necessary in order for VALIC to invest in a manner to support the interest rates offered under the V-Plan contract."), 1865 (Jan. 12, 2009 Letter from VALIC to IMB noting that the withdrawal restriction is reasonable because the contract provides a guaranteed return of no less than 4.5 percent), 2317-18 (Sept. 23, 1999 letter from VALIC to CPRB explaining that VALIC guarantees a minimum interest rate based in part on VALIC's expected returns on its investments). And this is precisely why VALIC would not have issued the 2008 Contract to IMB without a withdrawal restriction. A.R. 1369, 2002-06.

4. VALIC consistently enforced the withdrawal restriction in both contracts.

Both the unambiguous language of the 1991 Contract and all evidence of the parties' conduct under the 1991 Contract support VALIC's construction of the 2008 Contract.

i. The 1991 Contract unambiguously restricts CPRB's ability to withdraw funds from the contract.

Contrary to Petitioners' claim, nothing in the 1991 Contract can be read to limit application of the withdrawal restriction to individual participant in-plan transfers among options in the DCP, as opposed to transfers to the TRS. The Endorsement unambiguously imposes the restriction on withdrawals for transfer to any other "funding entity" without limitation. A.R. 369. Had the parties wished to carve out an exception for transfers to the TRS, they could have done so, as was done for transfers to the ORP Bond Fund and ORP Stock Fund. The Court should not read a limitation into the withdrawal restriction where none exists. *Cabot Oil*, 227 W. Va. at 117, 705 S.E.2d at 814 (citation omitted); *see also Henrietta Mills*, 52 F.2d at 934.

Moreover, Petitioners ignore the fact that, in the late 1990s, CPRB and VALIC agreed that the withdrawal restriction would apply at the group level, rather than at the participant level. A.R. 1708-11, 2355-57. From that time forward, the withdrawal restriction, previously

applicable to individual participants, was enforced at the group level, restricting CPRB's ability to withdraw more than 20 percent of the total funds held in the VALIC annuity. A.R. 1708-11, 1441-42, 1447-48, 2509, 2413, 2515, 2281-82. The withdrawal restriction therefore limited CPRB's ability to withdraw from the 1991 Contract, just as it limited IMB's ability to withdraw from the 2008 Contract.

ii. The 1991 Letter of Understanding and VALIC's 1991 Proposal to CPRB are consistent with the terms of the withdrawal restriction.

Petitioners also incorrectly contend that VALIC's Annuity Proposal and the October 15, 1991 Letter of Understanding somehow expanded CPRB's rights under the 1991 Contract, thereby also expanding IMB's rights under the 2008 Contract. However, both the 1991 Letter of Understanding and the Proposal are consistent with, and do not contradict or amend, the withdrawal endorsement.⁹

As Petitioners acknowledge, when VALIC issued the 1991 Contract, the investment choices in the DCP were the Merrill Lynch Bond Fund, the Federated Common Stock Fund, and the Vanguard Money Market Fund. Pet'rs' Br. at 6. At the time, CPRB was considering adding a guaranteed investment contract as a DCP investment option. A.R. 514. Thus, when VALIC issued the 1991 Contract, participants could transfer 100 percent of their VALIC balances to the Merrill Lynch Bond Fund or the Federated Common Stock Fund without restriction, but were prohibited from transferring more than 20 percent of their balances per year to the Vanguard Money Market Fund or to the guaranteed investment contract. Both parties understood, however, that additional investment options could be added to the DCP and that the withdrawal

⁹ CPRB's 1991 Request for Proposal is likewise consistent with the withdrawal endorsement. It provides that each participant may change their investment options and current balances at the end of each quarter. A.R. 514. It further provides that there will be "no charge or surrender charge of any transfer from one account to another." *Id.* In accordance with this provision, the Endorsement removes surrender charges and, instead imposes restrictions on the amount and timing of withdrawals. A.R. 369.

restriction would apply equally to such investments. A.R. 514, 536-37, 561-64. Accordingly, the 1991 Letter of Understanding and Proposal accurately described how the withdrawal restriction operated when the contract was issued.

iii. VALIC has not waived its right to enforce the withdrawal restriction in the 1991 Contract.

Petitioners also contend that VALIC somehow acted inconsistently with its construction of the withdrawal restriction in the 2008 Contract by allegedly permitting a limited number of participants to withdraw from the 1991 Contract in 1995 and 2001. However, neither of the prior requests required application of the withdrawal restriction. In 1995, CPRB asked to move only 168 of the many thousand participants out of the DCP. None of the evidence Petitioners cite purports to capture or reflect VALIC's views on the construction or application of the withdrawal restriction or indicates that VALIC somehow waived future application of the restriction. *See* A.R. 232; *Blue v. Hazel-Atlas Glass Co.*, 106 W. Va. 642, 147 S.E. 22 (1929) (waiver requires a showing that "all the attendant facts, taken together, . . . amount to an intentional relinquishment of a known right."). In 2001, according to the documents Petitioners cite, CPRB asked to transfer only a handful of the many thousand participants in the DCP without restriction.¹⁰ CPRB thus requested surrender of far less than 20 percent of the amount invested in the 1991 Contract, so the withdrawal restriction simply did not apply.

In sum, the evidence of the parties' communications and conduct throughout the negotiation of the 2008 Contract, coupled with common industry practice, unequivocally demonstrate that all of the parties understood that a withdrawal restriction would apply to IMB's request to withdraw funds from the 2008 Contract in December 2008. Because VALIC's

¹⁰ Petitioners produced these documents *for the first time* after the close of discovery, when they filed their Motion for Summary Judgment. VALIC never had the opportunity to question a witness about these internal CPRB documents, but they appear to relate to withdrawal of a few thousand dollars from the DCP.

enforcement of the withdrawal restriction was not a breach of the 2008 Contract, summary judgment was proper.

II. The Circuit Court Properly Concluded There Is No Live Controversy Because CPRB Has Not Invoked, Nor Been Denied, Any Right Under The 1991 Contract

The Circuit Court properly determined on the basis of the undisputed facts that there is no live, justiciable controversy with respect to the 1991 Contract because CPRB did not make a demand for a full withdrawal of the funds of the transferring teachers held in the 1991 Contract. “Before a circuit court can grant declaratory relief pursuant to the provisions of the Uniform Declaratory Judgment Act . . . , West Virginia Code §§ 55-13-1 to -16 (1994), there must be an actual, existing controversy.” *Hustead*, 197 W. Va. at 61, 475 S.E.2d at 61 (citations omitted). An actual, justiciable controversy exists where “**a legal right is claimed by one party and denied by another**” *Dolan v. Hardman*, 126 W. Va. 480, 29 S.E.2d 8 (1944) (emphasis added) (citation omitted). Where, as here, a plaintiff fails to invoke a right under a contract provision on which it seeks declaratory relief, summary judgment is warranted. *State Farm Mut. Auto. Ins. Co. v. Schatken*, 230 W. Va. 201, 210-11, 737 S.E.2d 229, 238-9 (2012) (reversing Circuit Court’s entry of summary judgment on insurance contract provision that was not affirmatively invoked by the plaintiffs).

Petitioners contend that a live controversy exists with respect to the 1991 Contract because they claim (i) CPRB demanded a full withdrawal from the contract and (ii) that they are entitled to a determination of CPRB’s current and future right to immediately withdrawal from the 1991 Contract without restriction. Neither argument justifies reversal of the Circuit Court.

A. CPRB Never Demanded Cash Withdrawal Of The Transferring Teachers’ Accounts In the VALIC Annuity.

Petitioners have conceded—consistent with the terms of the 1991 Contract—that CPRB was required to make a demand to trigger any obligation of VALIC to withdraw the assets of the

electing teachers. A.R. 74 at ¶ 1 (alleging that VALIC must surrender the annuity funds “upon demand”), 83 (asking the Court to declare that Petitioners are entitled to the “withdrawal of the full amount of the public money held by VALIC for members of WVTRS and WVTDC, upon demand and without restriction”).

The undisputed evidence demonstrates, however, that CPRB never demanded a withdrawal from the 1991 Contract because it understood and agreed that the unambiguous terms of the withdrawal restriction prohibited it from withdrawing the electing teachers’ assets in the 1991 Contract without restriction. CPRB’s actions before and after the transfer legislation make this clear. *See, e.g.*, A.R. 1699, 1737, 2002-05, 2432, 1760. In fact, before this litigation, CPRB had never even claimed that the withdrawal restriction in the 1991 Contract was inapplicable to the transfer to the TRS. *See, e.g.*, A.R. 1727-34, 1737-39, 1760-61

CPRB distorts the record to create the appearance of a formal demand for full cash withdrawal that, in truth, never occurred. For example, CPRB confuses VALIC’s awareness of the transfer legislation and subsequent teacher election with formal demands for the withdrawal of funds. When Great West, the third-party administrator for the DCP, called VALIC in June 2008 to discuss logistics regarding the transfer to the TRS, VALIC forwarded a form for CPRB to use to designate its preferred method of withdrawal, consistent with the terms of the 1991 Contract. A.R. 1699-1700, 2029-34, 2363-65. As VALIC’s letter to Great-West dated June 25, 2008, makes clear, while VALIC was aware that CPRB might seek to withdraw funds from the 1991 Contract, CPRB never demanded withdrawal from the contract by providing VALIC with the information needed to process such a withdrawal. A.R. 1699 (explaining that VALIC sought the “instructions and information *necessary*” to effectuate a transfer) (emphasis added), 1739 (June 29, 2008 email in which VALIC reiterated that it would “require a duly authorized

instruction from [CPRB] . . . before effectuating a transfer.”), 2021-22, 2035-37. Instead, CPRB declined to make a transfer request, tacitly agreeing that the withdrawal restriction applied to the transfer. The Great-West executive who was a party to that conversation, Tom Pfeifle, confirmed that he had not requested transfer of funds as of June 29, 2008, and indeed there is no evidence that CPRB ever did so before December 10, 2008. A.R. 1850, 2031-34.

The undisputed facts demonstrate that VALIC never refused any withdrawal request from CPRB, but rather VALIC acceded to both of CPRB’s two demands to transfer the funds without restriction. When CPRB took steps to facilitate a transfer in accordance with the terms of withdrawal endorsement—which allowed unrestricted transfers to the Bond Fund— VALIC fully cooperated with CPRB’s request. A.R. 1443-44, 1457-60, 1737, 1760, 1765, 2009-10, 2035-37. When the Bond Fund refused the transfer of funds, CPRB changed direction and asked VALIC to transfer the electing teachers’ assets to a new contract (the 2008 Contract) it would issue to IMB. A.R. 1445-46, 1471-72, 1508, 1528-30, 1737. VALIC complied with CPRB’s request and the funds were transferred to the 2008 Contract. A.R. 1787, 1850.

B. There Is No Live Controversy With Respect To CPRB’s Current Or Future Right To Withdraw From The 1991 Contract.

Petitioners are not entitled to declaratory relief with respect to the *existing* 1991 Contract because CPRB has not demanded, and VALIC has not denied, any withdrawal from the 1991 Contract. *State Farm*, 230 W. Va. at 239, 737 S.E.2d at 211 (citation omitted) (“The rights, status, and legal relations of parties to a proceeding under the Uniform Declaratory Judgments Act depend upon facts existing at the time the proceeding is commenced. Future and contingent events will not be considered.”). Current DCP members with assets in the 1991 Contract remain invested in the VALIC fixed annuity, and CPRB has taken no action to replace VALIC as a provider for the DCP. A.R. 81 at ¶ 29, 1438, 1707. It is undisputed that VALIC has not denied

any individual DCP participant who has terminated his or her employment with the State the right to withdraw 100 percent of his or her funds from the VALIC annuity. A.R. 1441, 1719-21, 2040-41. Since the contract's inception in 1991, VALIC has kept its promise to pay DCP participants invested in the VALIC annuity an interest rate of at least 4.5 percent, as required by the contract, even as the rates paid for investments in comparable fixed-rate products plummeted. A.R. 1714, 1719-22. Because there is no live controversy with respect to CPRB's ability to withdraw from the 1991 Contract, summary judgment was warranted.

III. The Circuit Court Properly Concluded That Petitioners Did Not Suffer Any Damages Related To the 1991 Contract

To establish a claim for damages under the 1991 Contract, Petitioners must prove the “existence of a valid, enforceable contract, that the plaintiff has performed under the contract, that the defendant has breached or violated its duties or obligations under the contract, *and that the plaintiff has been injured as a result.*” *Wince v. Easterbrooke Cellular Corp.*, 681 F. Supp. 2d 688, 693 (N.D. W. Va. 2010) (citation omitted) (original emphasis). “It is a rather well settled principle of the law that more is necessary to maintain a civil action than a simple breach of the duty. There must also be an injury. A breach of duty, without an injury . . . is not actionable.” *Absure, Inc. v. Huffman*, 213 W. Va. 651, 655, 584 S.E.2d 507, 511 (2003).

Petitioners' claim for damages related to the 1991 Contract is a recent invention. Before submitting their Motion for Summary Judgment, Petitioners had not identified *any* harm relating to the 1991 Contract. In their Amended Complaint, Petitioners identified a live and justiciable controversy only with respect to the 2008 Contract. A.R. 81 at ¶ 32 (“There is a real and actual dispute about the requirement of the written agreement governing WVIMB's request for withdrawal of the funds held by VALIC. VALIC claims that the Annuity Contracts Prohibit WVIMB from withdrawing the full amount of the funds at once . . .”).

Consistent with the Amended Complaint, CPRB's corporate representative admitted at her deposition that she was not aware of any breaches of the 1991 Contract by VALIC, and Petitioners' purported damages expert, whom Petitioners conceded outlined all of Petitioners' damages, explicitly disclaimed any damages related to the 1991 Contract. A.R. 1584 at No. 6 (identifying the expert report of Chad Coffman as containing all facts supporting CRPB's claim that VALIC's refusal to release the funds caused CPRB to lose the opportunity to invest the funds and earn higher returns), 1590 at No. 22 (identifying Coffman's report as describing "all income and/or losses recognized by the WVCPRB as a result of the investment options in the DCP."), 1600 at No. 39 (identifying Coffman's report as the only document "supporting WVCPRB's claim for damages"), 1906-07, 1914-1927, 2241 at No. 6 (identifying the Coffman's report as containing all facts supporting IMB's claim that VALIC's refusal to release the funds has caused IMB to lose the opportunity to invest the funds and earn higher returns), 2247 at No. 32 (identifying Coffman's report as describing "all income and/or losses recognized by the WVIMB as a result of the investment options in the DCP."), 2257 at No. 39 (identifying Coffman's report as "all documents supporting WVIMB's claim for damages in this civil action.").

Petitioners nevertheless continue to maintain that they have suffered the same damages as a result of lost investment income caused by VALIC's alleged breach of the 1991 Contract as they allegedly did under the 2008 Contract. Because the contracts were allegedly breached at different times, Petitioners' claimed lost investment income resulting from alleged breaches of the 1991 Contract and the 2008 Contract must be different. Petitioners' damages expert commenced his damages analysis on December 18, 2008, the date IMB first demanded that VALIC release the funds from the 2008 Contract. But Petitioners contend VALIC breached the 1991 Contract as early as March 2008, when the transfer legislation was enacted. Given the

drastic losses in the market during the latter half of 2008, if they accrued in March rather than December 2008, Petitioners' purported lost investment damages could not possibly be as high as Petitioners' expert calculated. It is therefore not surprising that Petitioners' expert did not calculate, and Petitioners have not otherwise identified, any damages resulting from VALIC's alleged breach of the 1991 Contract.

IV. The Circuit Court Properly Concluded That IMB Did Not Have Standing To Enforce The 1991 Contract And CPRB Did Not Have Standing To Enforce The 2008 Contract

Summary judgment is required where a party lacks standing to seek a declaration of rights under or to enforce a contract. *See, e.g., Raines Imports, Inc. v. Am. Honda Motor Co.*, 223 W. Va. 303, 311, 674 S.E.2d 9, 17 (2009). Generally, only parties to a contract and third party beneficiaries of a contract have standing to sue to enforce it. *Shobe v. Latimer*, 162 W. Va. 779, 785, 253 S.E.2d 54, 58 (1979) (citation omitted); *see also Robinson v. Cabell Huntington Hosp., Inc.*, 201 W. Va. 455, 460, 498 S.E.2d 27, 32 (1997); *King v. Scott*, 76 W. Va. 58, 84 S.E. 954, 955 (1915).

Petitioners do not have standing to seek declaratory relief related to or to enforce each other's contracts. IMB does not dispute that it is neither a party to nor an intended beneficiary of the 1991 Contract, and CPRB does not dispute that it is neither a party to nor an intended beneficiary of the 2008 Contract.

As a result, to bring claims under the Declaratory Relief Act, Petitioners must qualify as "interested persons" under the other's contract. They cannot do so. An interested person has standing to sue for declaratory relief only when he can demonstrate that his interests are "significant" or "substantial." *Shobe*, 162 W. Va. at 785, 791, 253 S.E.2d at 58, 61 (1979). IMB, as trustee for the TRS—not the DCP—does not have any, much less a significant or substantial, interest in the 1991 Contract offered as an investment option in the DCP. A.R. 75-76 at ¶ 5,

1422-23, 1549; W. Va. Code §§ 12-6-3(a), 12-6-9a(a). CPRB's status as a trustee for the TRS likewise is insufficient to give CPRB standing under the 2008 contract. As CPRB recognizes, CPRB and IMB are trustees for different purposes. CPRB's role as trustee is limited to processing payments to TRS members and beneficiaries, whereas IMB is responsible for the investment of funds for the TRS. A.R. 75-76 ¶¶ 3, 5; W. Va. Code §§ 5-10D-1(a), 18-7B-5, 12-6-3(a), 12-6-9a(a). CPRB does not dispute that once the transfer legislation was enacted, the transferring teacher's funds belonged to the TRS.

Nor have Petitioners shown that VALIC's actions have impacted CPRB's ability to perform its duties for the TRS, or that this lawsuit will impact any members or beneficiaries of the TRS. There is no evidence that VALIC's conduct has prevented CPRB from processing benefit payments owed under the TRS. By statute, members and beneficiaries of the TRS are entitled to receive benefits, notwithstanding a longstanding failure to fully fund the TRS, and Petitioners have made no showing that CPRB has been unable to meet its statutory obligations. W. Va. Code § 18-7A-25. The mere possibility that the TRS underfunding may someday result in nonpayment of benefits to its members and their beneficiaries does not give additional entities standing to sue on contracts to which they were not parties.

V. Amici Curiae Improperly And Incorrectly Claim The Circuit Court's Orders Should Be Reversed To Eliminate VALIC's Unambiguous Contractual Right To Restrict Petitioners' Withdrawal From The Contracts

Amici curiae argue that the Court should disregard and rewrite the plain terms of the 1991 Contract to give effect to the 2008 transfer legislation. Petitioners did not make this argument before the Circuit Court; therefore, this Court has no basis for considering it now. *Powderidge Unit Owners Ass'n v. Highland Props., Ltd.*, 196 W. Va. 692, 700, 474 S.E.2d 872, 880 (1996) ("Although our review of the record from a summary judgment proceeding is de novo, this Court for obvious reasons, will not consider evidence or arguments that were not

presented to the circuit court for its consideration in ruling on the motion. To be clear, our review is limited to the record as it stood before the circuit court at the time of its ruling.”); *Meadows*, 207 W. Va. at 219, 530 S.E.2d at 692 (1999).

In any event, eliminating VALIC’s right to limit withdrawals from the contracts is not necessary to fulfill the mandate of the legislation. House Bill 101x did not require the electing teachers’ DCP assets to be distributed to IMB in cash. Instead, the transfer legislation simply directed CPRB to transfer “all properties” of the electing teachers to the TRS. W. Va. Code § 18-7D-5(a), 18-7D-7(b)(1); A.R. 650. The legislative mandate was accomplished when VALIC transferred assets from the electing-teachers’ accounts in the 1991 Contract to the 2008 Contract, which IMB owned as trustee for the TRS. A.R. 938, 1508, 1528-30. Indeed, Petitioners concede that by agreeing to issue the new contract to IMB, the statute’s requirement that the property be transferred to the TRS was satisfied. Pet’rs’ Br. at 22.

Moreover, disregarding and rewriting the terms of the 1991 Contract would unquestionably violate the Contract Clause of the state and federal constitutions. The following three-pronged test guides the Court’s analysis under Article 1, Section 10, Clause 1 of the United States Constitution and Article II, Section 4 of the West Virginia Constitution:

[T]he initial inquiry is whether the statute has substantially impaired the contractual rights of the parties. If a substantial impairment is shown, the second step of the test is to determine whether there is a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem. Finally, if a legitimate public purpose is demonstrated, the court must determine whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation’s adoption.

Shell v. Metro. Life Ins. Co., 181 W. Va. 16, 20-21, 380 S.E.2d 183, 187-88 (1989) (citations and internal quotation marks omitted) (adopting United States Supreme Court test to analyze impairment under both federal and state constitutions). Because the transfer legislation, as

interpreted by the amici curiae, would eliminate VALIC's contractual rights without any justifiable, legitimate purpose, it could not satisfy the constitutional requirements.

First, the amici curiae concede, as they must, that reading the transfer legislation to require the liquidation of the transferring teachers' VALIC accounts would substantially impair (indeed extinguish) VALIC's contractual rights. W. V. School Service Personnel Association's Amicus Curiae Br. at 11-12.

Second, if the statute is given the meaning urged by the amici curiae, this Court must carefully consider the nature and purpose of the legislation. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978); *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 413 n.14 (1983) (citations omitted) ("When a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets.").

The State did not have a significant and legitimate public purpose in requiring the immediate liquidation of the 1991 Contract without penalty or restriction. The plain language of the legislation confirms that the central purpose of the transfer legislation was to allow electing teachers to transfer control over and the risks related to the investment of their retirement funds to the IMB. W. Va. Code § 18-7D-1. Nothing in the legislation prevented IMB from investing TRS funds in the VALIC fixed annuity contract.

Finally, the purpose of the transfer legislation would not be reasonably accomplished by requiring VALIC to liquidate the transferring teachers' accounts. The statute plainly contemplated that Petitioners could incur costs associated with accomplishing the transfers. W. Va. Code § 18-7D-2 (defining "Assets" as "all member contributions and employer contributions made on the member's behalf to the Defined Contribution Retirement System and earnings

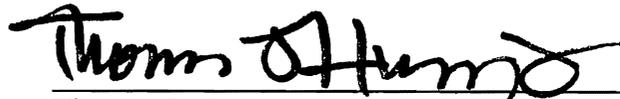
thereon, *less any applicable fees* as approved by the board”) (emphasis added). Petitioners were perfectly capable of accomplishing and did fulfill the statute’s mandate without requiring VALIC to relinquish its contractual rights. There is no reason for this Court to rewrite the agreement they negotiated.

It simply cannot be that significantly impairing a contractual right is constitutionally permissible so long as it would further a legitimate government purpose. The government almost always has a legitimate purpose in enacting legislation, and the impairment of a party’s contractual rights would almost always further the legislative purpose. Adopting the position of amici curiae would consequently eviscerate the protections of the Contract Clause.

CONCLUSION

For the foregoing reasons, VALIC respectfully requests that the Court affirm the Circuit Court’s Orders granting summary judgment in favor of VALIC.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-1193

**THE WEST VIRGINIA INVESTMENT
MANAGEMENT BOARD, a public body
corporate, and THE WEST VIRGINIA
CONSOLIDATED PUBLIC RETIREMENT
BOARD, a public agency,**

Petitioners,

v.

Appeal from Final Orders of the Circuit
Court of Kanawha County (09-C-2104)

**THE VARIABLE ANNUITY LIFE
INSURANCE COMPANY, a Texas corporation,**

Defendant.

CERTIFICATE OF SERVICE

I, Thomas J. Hurney, Jr., counsel for Defendant, The Variable Annuity Life Insurance Company, do hereby certify that service of the foregoing *Respondent's Brief* was made upon counsel record this the 10th day of April, 2014, by hand delivering a true and exact copy thereof, addressed as follows:

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