DISSENTING OPINION BY MOON, C.J.,
IN WHICH LEVINSON, J., JOINS

My departure from the majority stems from my disagreement with the majority's conclusion that Act 100 violates article XVI, section 2 of the Hawai'i Constitution. I, therefore, respectfully dissent.

I cannot agree with the majority's conclusion that the ERS trustees have carried their "burden of showing unconstitutionality beyond a reasonable doubt." Watland v. Lingle, 104 Hawai'i 128, 133, 85 P.3d 1079, 1084 (2004) (citation omitted). What is troubling about the aforementioned conclusion is that the majority's analysis in its entirety essentially disregards this court's well-established rules of constitutional construction, to wit, that, "with the exception of statutes that classify on the basis of suspect categories, . . . every enactment of the legislature is presumptively constitutional," State ex rel. Anzai v. City & County of Honolulu, 99 Hawai'i 508, 515, 57 P.3d 433, 440 (2002) (internal quotation marks and citation omitted), and that "all doubts must be resolved in favor of the act," State ex rel. Amemiya v. Anderson, 56 Haw. 566, 574, 545 P.2d 1175, 1181 (1976) (internal quotation marks and citation omitted). Instead, the majority treats Act 100 as presumptively unconstitutional and resolves all doubts against Act 100.

Article XVI, section 2 of the Hawai'i Constitution provides in its entirety:

> Membership in any employees' retirement system of the State or any political subdivision thereof shall be a contractual relationship, the accrued benefits of which shall not be diminished or impaired.

Haw. Const. art. XVI, § 2 (emphasis added). Pursuant to the plain language of article XVI, section 2, membership in the ERS establishes a "contractual relationship" between the members and the ERS and the members' "accrued benefits" from that relationship "shall not be diminished or impaired." This court has previously construed article XVI, section 2 in Chun v. Employees' Retirement System, 61 Haw. 596, 607 P.2d 415 (1980), wherein it accepted the Committee of the Whole's interpretation of the subject provision. Id. at 606, 607 P.2d at 421. The Committee of the Whole explained the intent of article XVI, section 2 as follows:

> It should be noted that [article XVI, section 2] would not limit the legislature in effecting a reduction in the benefits of a retirement system provided the reduction did not apply to benefits already accrued. In other words, the legislature could reduce benefits as to (1) new entrants into a retirement system, or (2) as to persons already in the system in so far [sic] as their future services were concerned. It could not, however, reduce the benefits attributable to past services. Further, the section would not limit the legislature in making general changes in a system, applicable to past members, so long as the changes did not necessarily reduce the benefits attributable to past services.

Comm. of the Whole Report No. 18, 1 Proceedings of the Constitutional Convention of Hawai'i at 330 (1950) (emphases added); see Chun, 61 Haw. at 605-06, 607 P.2d at 421. This court stated that:

> The Committee of the Whole's interpretation of [article XVI, section 2], which we accept, indicates that a member of the retirement system is entitled to the benefits available under the system that have been accrued by the member. From the Committee of the Whole Report, we conclude that [article XVI, section 2] was meant to **protect an employee from a reduction in accrued benefits**. However, the extent of such benefits as well as the conditions under which an employee should receive benefits, are governed by applicable statutory provisions[.]

Chun, 61 Haw. at 606, 607 P.2d at 421 (emphases added).

The majority states that "the delegates to the 1950 Constitutional Convention clearly manifested the intent to adopt and follow the then New York system." Majority op. at 80. Specifically, the majority states that, "[i]n adding the word 'accrued,' the delegates did not express an intent to diverge from following the New York system which they had recently lauded numerous times[.] Instead, the delegates only sought to indicate that there 'can be no impairment of past benefits, but that [the] future benefits can be changed by the legislature[.]'" Majority op. at 82 (third and fourth set of brackets in original) (citation and emphases omitted).

I submit, however, that the majority's view blurs the distinction between the "system" itself and the constitutional protection of that system. Although the delegates did not express an intent to depart from following the New York system, the delegates ultimately refrained from adopting New York's constitutional protection of the system. Specifically, the delegates indicated that Hawaii's system at the time of the 1950 Constitutional Convention was "practically the same as the New

York system. It's based on the same formula, one-seventieth for each year of service. It's a formula plan. It varies with the number of years of service." Comm. of the Whole Debates, 2 Proceedings of the Constitutional Convention at 497 (1950) (emphasis added). However, the delegates ultimately refrained from adopting New York's constitutional protection of the system by rejecting the purported New York-based initial provision (i.e., Proposal No. 129) to a significant extent by inserting the word "accrued" before the word "benefits." Consequently, I believe that the delegates significantly modified the purported New York-based initial provision. Cf. Kraus v. Bd. of Trs. of Police Pension Fund of Village of Niles, 390 N.E.2d 1281, 1291 (Ill. App. Ct. 1979) (stating that, "if the constitutional convention had intended to depart from the New York construction, presumably the terms of the provision would have been changed so as to effectuate that intent") (citation omitted) (emphasis added). Indeed, the Kraus court recognized that:

> At the time of the constitutional convention in Illinois, [that is, 1970,] three states other than New York had established pension provisions in their constitutions: Alaska, Hawai'i, and Michigan. What is significant about these provisions, besides the reference to funding in the Michigan provision, is that all three refer to "accrued" benefits as being within the scope of protection, in significant contrast to the New York provision.

Id. (footnotes omitted) (emphases added).[1] Although the majority states that "Kraus was proven inconsistent by subsequent case law from Alaska determining that the term 'accrued benefits' does not mandate the provision be interpreted in 'significant contrast' with the New York provision," majority op. at 106-07, I believe that "[t]he clearly expressed intentions of the framers of [our c]onstitution must control over any discordant interpretation from a sister state[, i.e., in this case, Alaska]." McNamee v. State, 672 N.E.2d 1159, 1165 (Ill. 1996). Consequently, unlike the majority, I would not rely on New York case law without limitation. Rather, I believe that New York case law should be accorded some weight to the extent that it is applicable to "accrued benefits" inasmuch as article XVI, section 2 refers to "accrued benefits" and not benefits in general as being within the scope of protection.

The majority also maintains that "Alaska's case law is instructive in interpreting [article XVI, section 2]." Majority op. at 91. Specifically, the majority relies on Hammond v. Hoffbeck, 627 P.2d 1052 (Alaska 1981), in support of its

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[1] I note that the Illinois Court of Appeals has indicated that the Illinois convention debates "establish an intent to adopt the language and basic thrust of the New York constitutional provision[.]" Kraus, 390 N.E.2d at 1290. Article XIII, section 5 of the Illinois Constitution provides:

> Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.

(Emphasis added.)

assertion that "the phrase 'accrued rights' is synonymous with vested rights." Majority op. at 92 (citing Hammond, 627 P.2d at 1055 n.4) (emphasis and footnote omitted). It is unclear, however, how an explanation of "accrued rights," a phrase not contained in either article XII, section 7 of the Alaska Constitution[2] or article XVI, section 2 of the Hawai'i Constitution, is "instructive." It appears that the Alaska Supreme Court has consistently -- although mistakenly -- referred to the phrase "accrued rights" as being found in article XII, section 7 of the Alaska Constitution. See Municipality of Anchorage v. Gallion, 944 P.2d 436, 441 n.7 (Alaska 1997) (noting that "[t]he phrase 'accrued rights' in article XII, section 7 of the Alaska Constitution is synonymous with 'vested rights'") (citing Hoffbeck, 627 P.2d at 1055 n.4); Sheffield v. Alaska Pub. Employees' Ass'n, Inc., 732 P.2d 1083, 1085 n.7 (Alaska 1987) (same). Consequently, given the Alaska Supreme Court's consistent and mistaken reference to a phrase not even contained in its constitution, i.e., "accrued rights" (as opposed to the actual phrase "accrued benefits"), Alaska's case law is hardly instructive, especially in light of the fact that the clearly

[2] Article XII, section 7 of the Alaska Constitution provides:

> 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.

(Emphasis added.)

expressed intentions of the framers of Hawaii's constitution must control. See McNamee, 672 N.E.2d at 1165.

The majority also relies on Gallion in support of its assertion that the ERS "was weakened by Act 100 and could be adversely affected in the future." Majority op. at 95. Such an assertion, however, is speculative and does not address the issue whether the accrued benefits were diminished or impaired. Indeed, even assuming arguendo that Act 100 "negatively contributed to the large unfunded actuarial liability of the ERS, . . . stripped the ERS of investment opportunities, and . . . prevented the ERS from establishing a rainy day fund for the years of poor investment returns," majority op. at 95 (internal quotation marks omitted), the majority does not point to anything in the record to indicate that an employee's accrued benefits have been reduced as a result of Act 100. See Chun, 61 Haw. at 606, 607 P.2d at 421 (concluding that article XVI, section 2 "was meant to protect an employee from a reduction in accrued benefits").

Relying on California case law, namely, Valdes v. Cory, 189 Cal. Rptr. 212 (Cal. Ct. App. 1983), the majority advances the proposition that "impairment to the source of the benefits constitute[s] a constitutional impairment of the employees' vested rights." Majority op. at 99 (citation omitted). Valdes, however, is distinguishable from the instant case inasmuch as the petitioners in Valdes, who were members of the Public Employees'

Retirement System (PERS), contended that certain legislation suspending periodic state funding of the system constituted an "impairment of contractual relationships between employees who are members of PERS and their public employers in violation of article 1, section 9, of the California Constitution[3] and article 1, section 10, clause 1 of the United States Constitution."[4] 139 Cal. Rptr. at 220 (emphases added). The ERS trustees in this case did not allege a claim of impairment of contractual obligations in violation of article 1, section 10, clause 1 of the United States Constitution, commonly referred to as the Contract Clause of the United States Constitution. Moreover, as previously stated, the "contractual relationship" referred to in article XVI, section 2 of the Hawai'i Constitution is between the system and its members, not between the State/Counties, i.e., the public employers, and the members of the system. Indeed, article XVI, section 2 provides in relevant part that "[m]embership in any employees' retirement system of the State or any political subdivision thereof shall be a contractual relationship[.]" (Emphases added.) The New York Court of Appeals has held that New York's similar provision, which states that "membership in any pension or retirement system

[3] Article 1, section 9 of the California Constitution provides in relevant part that a "law impairing the obligation of contracts may not be passed."

[4] Article 1, section 10, clause 1 of the United States Constitution provides in relevant part that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts[.]"

of the state or of a civil division thereof shall be a contractual relationship," N.Y. Const. art. V, § 7 (emphases added), "establishes a contractual relationship between the employee and the retirement system in which benefits cannot be diminished or impaired." McDermott v. Regan, 624 N.E.2d 985, 987 (N.Y. 1993) (emphasis added). Consequently, it is the impairment of the accrued benefits of the contractual relationship between the employee and the retirement system, not the impairment of contractual relationships between employees and their public employers, that is protected under article XVI, section 2 of the Hawai'i Constitution. Accordingly, Valdes, in my view, is inapposite to the instant case.

In addition to relying on inapposite case law, the majority does not focus on the scope of protection provided in article XVI, section 2, which states that the "accrued benefits" "shall not be diminished or impaired." Rather, the majority states throughout its analysis that (1) the Hawai'i legislature "is restricted by article XVI, section 2 from diminishing or impairing retirement funds," majority op. at 60, (2) the "source[s] of the funds" were impaired, majority op. at 90, (3) "the $346.9 million reduction in employer contributions unconstitutionally impaired the pension system[,]" majority op. at 103 (footnote omitted), and (4) such "impairment to the source of the benefits constituted a constitutional impairment of the employees' vested rights," majority op. at 99. Consequently, the

impairment discussed by the majority is conspicuously outside the scope of protection provided in article XVI, section 2.

It should also be pointed out that the majority's characterization of Act 100 is totally inaccurate. Specifically, the majority maintains that "actions tantamount to removing funds from the ERS would constitute a violation of our constitution." Majority op. at 90 (footnote omitted) (emphasis added). Although the majority attempts to qualify its characterization of Act 100 by including the word "tantamount," the majority is essentially creating the illusion that Act 100 enabled the State and county employers to remove funds from the ERS. However, as previously stated, Act 100 retroactively reduced the amounts the State and county employers contributed to the ERS in fiscal years 1997 and 1998 by crediting actuarial investment earnings in excess of ten percent of the actuarial investment yield rate toward those contributions. In other words, a crediting of earnings for contributions is not "tantamount" to an outright removal of funds.

Based on my reading of article XVI, section 2 of the Hawai'i Constitution, the debates of the 1950 Constitutional Convention pertaining to article XVI, section 2, the Committee of the Whole's Report, and my interpretation of New York case law, I would conclude that necessarily implied in article XVI, section 2 is the protection of the sources of funds needed to maintain the actuarial soundness and/or actuarial integrity of the system with

respect to its members' accrued benefits. I would further conclude that the protection afforded by article XVI, section 2 is more limited than that afforded by article V, section 7 of the New York Constitution inasmuch as our provision indicates that the "accrued benefits," rather than "benefits," "shall not be diminished or impaired." In my view, such an interpretation recognizes the delegates' concerns regarding the right of current government employees to receive the benefits attributable to past services and the "preserv[ation]" of such benefits, that is, accrued benefits. My interpretation likewise recognizes the delegates' disinclination to unduly interfere with and/or limit the legislature's powers to make general changes to the system.

In applying the foregoing standard to the facts of the instant case, Act 100 did not constitute "a plain, clear[,] and manifest violation" of article XVI, section 2. The record reveals that the ERS's own actuary concluded that, as of June 30, 2001, the ERS was "actuarially sound," and, on June 30, 2002, concluded that "the present assets plus future required contributions will be sufficient to provide the benefits specified in the law[.]" (Emphasis added.) The ERS trustees do not point to anything in the record to suggest otherwise. In other words, the ERS trustees have not shown that accrued benefits have been "diminished or impaired."

Furthermore, the majority does not point to anything in the record to indicate that the sources of funds needed to

maintain the actuarial soundness and/or actuarial integrity of the system with respect to the accrued benefits have been adversely affected by Act 100. Rather, as previously stated, the majority merely asserts that, even "assuming, arguendo, the ERS is actuarially sound, it was weakened by Act 100 and could be adversely affected in the future." Majority op. at 95 (emphasis added). However, such an assertion is purely speculative. In fact, in holding that the Kaho'ohanohano plaintiffs lacked standing, the majority observed that the Kaho'ohanohano plaintiffs were not "able to show any 'immediate threat that the pension fund will become insolvent.'" Majority op. at 29 (citation omitted).

The majority additionally states that, "through Act 100, the legislature retroactively divested the ERS of $346.9 million worth of employer contributions for 1997, 1998, and 1999. This divestment related to the past services of ERS members during 1997, 1998, and 1999." Majority op. at 79 (some emphases in original and some added) (citation and footnote omitted). The majority then concludes that "[i]t would be inconsistent with the delegates' statements and the Committee of the Whole report to conclude that the delegates intended to afford legislative flexibility to the extent that the legislature could ultimately diminish or impair the benefits already accrued and contractually guaranteed." Majority op. at 80 (emphasis omitted). First, the majority mischaracterizes the retroactive reduction of the state

and county employers' contributions as a "divestment." See supra discussion. Second, the majority then characterizes this "divestment" as "relat[ing] to past services of ERS members during 1997, 1998, and 1999" to create the notion that the retroactive reduction of employer-contributions for past services somehow equates to a reduction in accrued benefits. There is nothing in the record that demonstrates that the reduced contributions for those years in any way diminished or impaired the accrued benefits of the ERS members. Finally, having concluded that the Kaho'ohanohano plaintiffs lack standing to pursue their claims in the instant matter, the majority determined that the Kaho'ohanohano plaintiffs, i.e., the members of the ERS, had failed to allege any actual or threatened injuries resulting from the passage of Act 100. Accordingly, it cannot now be said that the members' benefits attributable to past services were reduced as a result of Act 100.

Based on the foregoing, I would conclude that the ERS trustees did not carry their "burden of showing unconstitutionality beyond a reasonable doubt." Watland, 104 Hawai'i at 133, 85 P.3d at 1084 (citation omitted); see Anderson, 56 Haw. at 574, 545 P.2d at 1181 (stating that the presumption "is in favor of constitutionality, and all doubts must be resolved in favor of the act") (internal quotation marks and citation omitted). Accordingly, I would hold that the circuit

court did not err in granting summary judgment in favor of the State.