No. S239958

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

CAL FIRE LOCAL 2881 (formerly known as CDF Firefighters), *et al.*,

Petitioners and Appellants,

v.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
(CalPERS)

Defendant and Respondent,

and

THE STATE OF CALIFORNIA,

Intervener and Respondent.

On Review From The Court Of Appeal For the First Appellate District, Division Three, Civil No. A142793

After An Appeal From the Superior Court For The State of California, County of Alameda, Case Number RG12661622, Hon. Evelio Grillo, Presiding Judge

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PETITIONERS AND APPELLANTS' CONSOLIDATED ANSWER TO AMICI CURIAE

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I.

INTRODUCTION

The California Rule is a clear, long-standing judicial rule that is straightforward to apply and sets the baseline for how and when pension rights vest. Principles of *stare decisis* strongly support the Court leaving this Rule in place. Individuals, legislatures, pension managers, and unions have all relied on it when negotiating, budgeting, and making important life-decisions. Although the California Rule sets a baseline, the California Legislature and all relevant parties knew at all times how a legislature could create pension rights that vest later, conditionally, or not at all.

The Legislature created a vested pension right when it granted employees the right to purchase Additional Retirement Service Credit ("ARSC") by passing Government Code section 20909. Therefore, its subsequent repeal of the right to purchase ARSC in 2012 violated the Contract Clause. Public employees who were eligible to purchase ARSC after five years of service had agreed on the first day of their service that every day thereafter (as long as they were still employed), part of their compensation would be the value of the State holding open the option to make a one-time election to purchase ARSC before retirement at a time of their choosing.

To the extent changes to vested pension rights can be justified under certain circumstances, those circumstances do not exist here. First, concerning ARSC specifically, the State cannot bear its burden of proving that the impairment is necessary. The benefit at issue was established to be cost-neutral to the State, and there is no evidence that the ARSC benefit had any significant impact on the financial stability of the State. Second, and more generally, there are many ways that local governments and the State can ensure that they have the funds to discharge their current pension obligations without impinging on the vested rights of employees and pensioners, and they must do so.

Forty-seven amici have filed fourteen briefs providing supplemental information and arguments in this case. Six of these briefs support Respondents.[1] Respondents' amici attempt to over-complicate the California Rule, exaggerate how dire the financial circumstances are, and hope this Court doesn't realize that they are asking for a second bite at the apple after failing to persuade the political branches through the normal course of policy debates.

Amici provide no arguments in support of Respondents that survive serious scrutiny, and therefore this Court should reverse the lower courts and remand with instructions that reaffirm the California Rule and invalidate the repeal of California Government Code section 20909 for employees hired before January 1, 2013.

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[1] Amici's Briefs are referred to in this Answer by the first named amicus appearing on the brief.

II.

<u>THE COURT SHOULD INVALIDATE THE REPEAL OF ARSC BECAUSE RESPONDENTS HAVE NOT DEMONSTRATED SUFFICIENT NECESSITY</u>

Among other requirements, in order to survive scrutiny under the Contract Clause, Respondents must demonstrate that the impairment of a vested contractual right is necessary. (*See U.S. Trust Co. of New York v. New Jersey* (1977) 431 U.S. 1, 25.) Although amici seek to embroil this Court in a much broader and more dramatic reversal of the California Rule (*see infra* section III), this Court need not even reach that question.

The facts of this case cannot support a finding of necessity. There are a limited number of parties involved in this dispute: the union (and named members of the union), CalPERS, and the State. ARSC is the only benefit at issue here, and it was designed to be cost neutral to the State. To the extent it was priced erroneously in the past, the Legislature already reserved to CalPERS the authority to correct that error without violating the California Rule. (*See* Joint Appx., at pp. 312–321.) ARSC, even if it was temporarily priced erroneously, had such a marginal impact on the State's financial situation that the State cannot bear its burden of proving necessity. CalPERS may not be fully funded, but it recently released a report showing that it increased from 68.3% funded in 2015–2016 to 71.0% funded as of December 31, 2017 because of a series of good management and fund allocation decisions. (CalPERS, *A Solid Foundation for the Future*, [December 31, 2017] at p. 3, available at https://www.calpers.ca.gov/docs/forms-publications/solid-foundation-for-the-future.pdf.)

Therefore, there was no necessity. The repeal is unconstitutional. Petitioners win.

The only burden on the State that Respondents or their amici have pointed to is the difference between the erroneous price and the proper price, (Amicus Pacific Research Institute [“PRI”], at p. 23; Amicus California Business Roundtable, at pp. 28–30; Amicus City of Pacific Grove, at pp. 15–16; Amicus Association of California School Administrators, at p. 14), and they have failed to introduce evidence as to how many people purchased ARSC at an erroneous price, how many were likely to purchase it at an erroneous price in the future, and how these facts specifically would cause critical damage to the financial health of the State.

As discussed in more depth below, public employers in California are continuing to spend money on their political priorities while pleading poverty when pensioners return to collect their due. The relative merits of particular policy preferences (such as high-speed rail, water tunnels, or keeping billions of dollars in the State’s rainy-day fund) are not before this Court. However, as *U.S. Trust Co. of New York v. New Jersey, supra*, 431 U.S. at p. 24, [“*U.S. Trust*”] explains, this Court has the institutional and structural responsibility of making sure that the word of our Legislature can be trusted going forward. The ability of government employers to spend money chasing their current policy goals is not absolute, and these employers cannot displace their responsibility to pay for the very contractual obligations they have accrued that enabled them to achieve their *past* policy goals.

Although a number of amici supporting Respondents turn straight to challenging the California Rule, the fact that a pension change must be "necessary" is a dispositive test that Respondents fail. The bulk of this Brief responds to amici's attacks on the other aspects of the California Rule, but this fact should not be lost amidst all the confusion amici sow.

III.
THE CALIFORNIA RULE IS A WELL-DEFINED, LONG-STANDING JUDICIAL REQUIREMENT, AND AS SUCH HAS GENERATED SIGNIFICANT RELIANCE INTERESTS

Amici have offered many different novel formulations of what constitutes the California Rule – hanging ornaments off of it, mashing together steps, and adding hurdles and qualifiers pulled from any number of adjacent areas of law. (*See, e.g.*, Amicus League of California Cities, at pp. 16–17 [laying out a free-floating test consisting of merely "factors to be considered"], Amicus California Business Roundtable, at pp. 33, 36, 15, 21, 43, 49, 71 [claiming that Rule makes it "virtually impossible" to change benefits, which the employer "can never reduce" because impairments "automatically" violate the Contract Clauses], Amicus PRI, at p. 40

[requiring statutory text to "clearly and unequivocally express[]" intent to make offer irrevocable], Amicus Association of California School Administrators, at p. 14 [permitting changes to pension laws if they are "not operating as originally designed"], Amicus Howard Jarvis Taxpayers Association, at p. 23 [claiming that Petitioners' description of the California Rule is a "modern-day version of *Lochnerism*"].)

The California Rule is a judicially-created doctrine that is based on black letter contract law principles. There will always remain questions concerning its application around the edges,[2] but amici have taken aim at the core of the California Rule, which is and has been well defined for decades.

A. The California Rule

As described in our prior briefing, California courts considering challenges to vested pension rights use a straightforward, three part analysis. (Petitioners' Opening Br., at pp. 21–22.) Due to the unique reliance interests inherently present in the pension context, the California

[2] Just last month, a California Court of Appeal addressed the question of whether a first day of employment for an elected judge under the Public Employees' Pension Reform Act of 2013 was measured from the date of election or the date of ascension. (*McGlynn v. State of California* (March 20, 2018, A146855) __ Cal.App.5th__ [2018 WL 1391909], at pp. *5–*6.) It is noteworthy that the *McGlynn* Court, while considering this question, treated the claim that "the right to pension benefits vests upon the acceptance of employment" as settled law – which it is. (*Id.* at *6 [citing *Miller v. State of California* (1977) 18 Cal.3d 808, 815].)

Supreme Court has adopted special rules for these pension cases, defining which contractual impairments are unreasonable or unnecessary. Although not every court dwells on each step in every case, the three hurdles that have characterized the courts' application of the California Rule for over fifty years are:

> With respect to active employees . . . any modification of vested pension rights must be reasonable, must bear a material relation to the theory and successful operation of a pension system, and, when resulting in a disadvantage to employees, must be accompanied by comparable new advantages.

(*Allen v. Board of Admin.* (1983) 34 Cal.3d 114, 120.)

A failure on any of these three hurdles will invalidate a proposed pension modification. Therefore, it is not surprising that courts regularly spend the majority of their decisions analyzing whichever hurdle is the easiest to apply in that case. (*See, e.g.*, *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131–133 [spending almost the entirety of the Court's analysis on the dispositive "material relation" test].)

It is further predictable that the hurdle Courts often choose in this respect is the clearest and easiest to apply: the 'Comparable New Advantage' Test.

In *Betts v. Board of Administration* (1978) 21 Cal.3d 859, for example, this Court considered a proposed change to a pension formula for a former California Treasurer. It found that the State had changed the

Treasurer's pension formula to his detriment, and had failed to provide a comparable new advantage. (*Id.* at pp. 868–869.) It then announced that "[t]he result we reach herein makes it unnecessary to consider petitioner's additional contentions." (*Id.* at p. 869.) Similarly, in *Olson v. Cory* (1980) 27 Cal.3d 532, 540–542, the Court invalidated the law at issue based on the dispositive 'Comparable New Advantage' Test, and spent no time analyzing whether the change was "reasonable." More recently, in *Legislature v. Eu* (1991) 54 Cal.3d 492, 529–531, the Court did not perform any analysis of the "material relation" hurdle, instead invalidating the relevant law purely based on an analysis of the 'Comparable New Advantage' Test.

1. The 'Comparable New Advantage' Test Is Not Redundant

Amici attack the 'Comparable New Advantage' prong of the California Rule, claiming that it cannot be compulsory because it is necessarily irrelevant by the time a court reaches it. Their arguments fail to account for the fact (discussed *supra* section III.A) that this Court's past pension cases have considered the dispositive and most relevant questions first. (*See People v. Garcia* (2017) 2 Cal.5th 792, 804 [finding that constitutional avoidance canon rests in part on "a preference for avoiding the unnecessary resolution of constitutional questions"].)

(a) Amicus PRI's Argument

Amicus Pacific Research Institute ("PRI") claims that the California Rule's 'Comparable New Advantage' Test cannot logically be mandatory because it only applies after the court has already found that there was a "substantial impairment" that was "reasonable and necessary." (*See* Amicus PRI, at pp. 16, 53–54.)

The modifier "substantial" in amicus's proposed "substantial impairment" formulation comes from the United States Supreme Court's more general Contract Clause analysis. (*Id.* at pp. 27–28 [over-reading *Fourth La Costa Condominium Owners Ass'n v. Seith* (2008) 159 Cal.App.4th 563, 584, to say that *all* federal contract clause jurisprudence exactly mirrors state contract clause jurisprudence].) Amicus PRI cites no *pension* case applying the California Rule that have required a "substantial" impairment before beginning the California Rule analysis. (Amicus PRI, at pp. 25–28.) Amicus PRI bases this equivalency on its argument that the California Contract Clause analysis is identical to the federal Contract Clause analysis (*id.* at pp. 28–35), and ignores the fact that the California Rule is a special application of this more general test to the pension context, in which this Court has repeatedly set down specific rules.

But even presuming that a "substantial" impairment is necessary in order for the Contract Clause to apply, Amicus PRI misunderstands what a showing of "substantial impairment" requires. It is the first half of what is, functionally, a burden shifting test. This Court looks first to see if there was such an impairment for an individual employee or pensioner in order to decide whether or not to begin the more complex Contract Clause analysis at all. This first step focuses on whether the Petitioner identified a qualifying impairment. Only *after* such an impairment has been found does the inquiry shift to whether the government's impairment was legal because, *inter alia*, the Legislature provided a comparable new advantage that reduced or eliminated the impact of this impairment.

The "reasonable and necessary" language Amicus PRI refers to (p. 16) also comes from the federal Contract Clause analysis in *U.S. Trust*. Again, Amicus' argument fails because it ignores the fact that the California Rule is an application of this more general test to the pension context, in which this Court has set down specific rules defining changes that are *per se* deemed unreasonable or unnecessary. Therefore, even if a proposed change passes the three hurdles of the California Rule, it can still fail the more general Contract Clause analysis if, in the totality of the circumstances, the Legislature nevertheless failed to persuade this Court that the proposed change was "necessary" (*see supra* Section II). The Court need not reach this question if the proposed action fails on one of the prongs of the California Rule. (*See, e.g.*, *Allen v. Bd. of Admin.* (1983) 34 Cal.3d 114; *Olson v. Cory* (1980) 26 Cal.3d 672.)

(b) Amicus California Business Roundtable's Argument

In a related argument, Amicus California Business Roundtable claims that the 'Comparable New Advantage' Test cannot logically apply because a court must have already determined that the impairment is necessary, and the 'Comparable New Advantage' Test prevents the government entity from reducing its financial obligation to its employees and pensioners. (Amicus California Business Roundtable, at p. 33 ["[The] California Rule makes it virtually impossible . . . to control pension benefits for current employees."].) The 'Comparable New Advantage' Test is a part of a separate *per se* unreasonableness analysis. The fact that a court decides that the employer is in sufficiently dire straits to deem *some* sort of an impairment 'necessary,' does not mean that *the State's proposed* impairment has passed the hurdles to be deemed 'reasonable.' Furthermore, as Amicus concedes, "the necessity defense has been rejected by every California case where it was presented as a justification for the impairment of vested contractual rights." (*Id*. at p. 44, citing Petitioners' Reply Br., at p. 35.)

More fundamentally, Amicus California Business Roundtable errs by treating the 'Comparable New Advantage' Rule as if it was measured in terms of costs to employers when in fact it is measured in terms of benefits to employees. Although often costs and benefits vary in the same direction, these are not one-to-one relationships. One of the fundamental assumptions underlying our exchange-based society is that the benefit to one party in a transaction need not equal the cost borne by the providing party.

In this instance, the proper measure of whether a new advantage is "comparable" is the benefit to any particular individual beneficiary. (*Abbott v. City of Los Angeles* (1958) 50 Cal.2d. 438, 449, 453; *Eu, supra*, 54 Cal.3d at pp. 528–532.) Cities and individuals have different risk preferences and different opportunities to diversify and aggregate costs. Under the Rule, the 'comparable new benefit' that the government employer provides may still be less financially burdensome to the government than the current system. For example, government employers could: (a) have a comparative advantage in providing that benefit; (b) want to offer delayed payment of a larger sum in order to avoid short-term budget shortfalls; or (c) take advantage of economies of scale or scope to provide services or benefits at less of a cost than pensioners/employees could find on the open market.

(c) Amici's Arguments Prevent Employees from Benefitting from Their Bargain

Lastly, amici attempt to redefine *sub rosa* the concept of 'comparable new advantages' so as to prevent pension recipients from receiving the benefit of any bargain they strike. (*See, e.g.*, Amicus Association of California School Administrators, at p. 13.) Pension planning and negotiation necessarily involves employers and employees exchanging and bargaining over an optimal allocation of risk and value. (Amicus Orange County Attorneys' Association, at pp. 14–15.) In the ARSC context, pensioners chose to take on the risk that – for example – they will die early and lose the value of their ARSC purchase. Therefore they should not be prevented from receiving the benefit of the bargain if they live a longer-than-expected life.

The State may benefit from the bargains it makes. (Accord. *El Paso v. Simmons* (1965) 379 U.S. 497, 515 ["Laws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of a contract."].) Petitioners are not arguing that the State may not enforce a pension term that, based on some contemplated contingency, has turned out to save the State money. All Petitioners are asking is that the same should go for public employees who make a deal, the value of which also turns based on some foreseeable future contingency which may resolve in their favor.

Therefore, to the extent pensioners have foreseeably benefitted from the tradeoffs and risks that the political process allocated between employees and employers (when the Legislature drafted the terms in the pension statutes, and through negotiations), these benefits are vested pension rights protected by the Contract Clause.

2. Foreseeability

One of the seminal cases in Contract Clause jurisprudence that addresses this foreseeability concept is *U.S. Trust*, in which the Supreme Court rejected New Jersey's attempt to disavow its similarly foreseeable contractual obligations. In *U.S. Trust*, New Jersey passed a law that would have retroactively repealed a covenant limiting the way that the New York and New Jersey Port Authority could use certain funds. (431 U.S. at p. 14.) A bondholder objected, and the Court decided in the bondholder's favor. (*Id.* at p. 32.)

In reaching that conclusion, the Court rejected New Jersey's argument that events had overtaken the original covenant. (*Id.* at pp. 28–32.) It held that the past New Jersey legislature need not have predicted with 100% clarity how much its commitments would cost in order for the current legislature to be held to them. (*Id.* at p. 31.) The legislature was bound by the contractual terms because it adopted the covenant at issue "with full knowledge" that the Port Authority's substantial operating deficits were likely. (*Id.* at pp. 31–32.) It even held that the 1970s' newly-found public interest in "environmental protection and energy conservation" was foreseeable because these issues "were not unknown," in the early 1960s when the original agreement was struck. (*Id.* at p. 32.) The legislature was not entitled to avoid the cost of its decisions merely because these eventualities came to pass. (*Ibid.*)

In this case, Amicus California Business Roundtable claims that the legislature here was "blindsided by unexpected obligations," and yet point to nothing that was unforeseen. (p. 35.)

Yes, people are living longer. (Amicus League of California Cities, at p. 25.) And the economy has had good years and bad years. (*Ibid.*) And sure, health care costs were rising, but have slowed or stabilized. People have moved into and out of California. Tax policies have changed and changed again.

Actuaries and policy-makers have known about and sought to accommodate these "known unknowns" for decades—every government decision is to some extent based on a probability distribution. And some of these changes are the direct result of policies the Legislature itself has recently adopted. Absent a persuasive showing that one or many of these risks were categorically unforeseen, it would be improper for this Court to aggrandize to itself the power of identifying broad, foreseeable social trends that it believes warrant rescission of a pension contract upon which individual employees and pensioners have come to rely. As Amicus League of California Cities admits, there are any number of changes for which policymakers in 2018 are preparing. (p. 25.) The California Legislature can and should attempt to prepare for these changes. If the Legislature wants to (and thinks it prudent and worth the uncertainty it would create), it is free to make any new vested pension rights conditional on future economic or social trends without violating any constitutional principles.

Amici make a lot of hay out of the fact that CalPERS's actuarial estimates mispriced ARSC. They claim that the California Rule forced the State to shoulder this 'unforeseen' burden that it cannot rescind. (*See, e.g.*, Amicus City of Pacific Grove, at p. 8; Amicus League of California Cities, at pp. 43, 44 [citing to cases and briefs describing a "bonanza far outstripping the[] expectations" of pensioners and "large unexpected windfalls"].) That is factually not the case here. CalPERS maintained the power to change the price of ARSC as it learned that actuarial predictions were proving erroneous.

The importance of this fact to this appeal cannot be overstated.

Government Code section 21052 gave to CalPERS the ability to set the cost of ARSC. ("The method for calculating the amount of the contribution shall be determined by the chief actuary and approved by the board.") CalPERS could, and did (*see* Joint Appx., at pp. 312–321), increase the cost of ARSC over time as their experience with the program showed them that their initial actuarial estimates were erroneous. This did not, and would not have violated the California Rule, because the Legislature had passed statutory language giving CalPERS the authority and obligation to accurately calculate this cost.

As a final point, this Court should note that amici cite no law supporting a claim that a mistake by a government employee entitles the government to break its contractual obligations protected by the California Rule. Their efforts in this regard appear to be attempts to shoehorn their policy arguments into a ‘necessity’ argument, but this underlying assumption does not have support in either the law or the facts of this case.

B. ARSC Is a Pension Right that Benefitted Both Individuals and the State

Amici discuss ARSC as if it was a give-away to employees, (Amicus City of Pacific Grove, at p. 11; Amicus Howard Jarvis Taxpayers Association, at pp. 25–26), but that is not the case.

The State benefits from offering ARSC to the extent that long-tenured public employees will opt to take earlier retirement (at no additional cost to the State), which will vacate positions and permit the State to hire less expensive, younger employees. Amicus City of Pacific Grove complains, without providing any evidence, that the early retirements that ARSC created were bugs in the system. (p. 8.) Instead, when properly managed, these early retirements were features – a no cost means of reducing the State’s salary obligations. (*Cnty. of Orange v. Ass'n of Orange Cnty. Deputy Sheriffs* (2011) 192 Cal.App.4th 21, 45, 47, citing *American River Fire Protection Dist. v. Brennan* (1997) 58 Cal.App.4th 20, 67 [discussing value to employers of providing incentive to retire].)

Additionally, amici who treat ARSC as a boondoggle (*see, e.g.*, Amicus Howard Jarvis Taxpayers Association, pp. 25–26) fail to acknowledge that both the State and employees benefit substantively from ARSC as a public program. One of the legislative purposes behind ARSC was to permit employees to take time out of state service to raise children or gain education without sacrificing their ability to earn a pension. (Joint Appx., at pp. 256, 260, 266, 271–272.) This did benefit employees who wanted to take advantage of ARSC. But it also benefitted the State by attracting and retaining the kinds of employees who sought to undertake parenting responsibilities and further education.

There is no difference in this respect between ARSC and the pension benefits that remain in place, which permit, for example, members of the military to get credit for time served in public service elsewhere. (*See* Cal. Gov. Code § 21020 *et seq.*) The State has defined particular attributes in potential employees that it wants to attract, and Amicus Association of California School Administrators' attempts to draw such a distinction fails. (p. 9.)

Amici argue that one of the reasons ARSC was not a pension right was because it was not related to the length of time a person was employed. They claim that the five-years of service requirement was intended merely to be "consistent" with the Internal Revenue Code. (*See, e.g.,* Amicus

League of California Cities, at pp. 30–31.) This is not relevant for two reasons.

First, just because there is currently a requirement under the Internal Revenue Code regulating retirement plans, that doesn't mean that the employees who qualify for pension benefits haven't been required to provide service towards that benefit. And second, this cannot be relevant as a matter of law, because Congress could modify or repeal the Internal Revenue Code section at issue, and it wouldn't negate the fact that the California legislature adopted this particular requirement into their ARSC vesting scheme.

Additionally, amici repeat Respondents' claims that ARSC is not a pension right because it is not deferred compensation. (Amicus League of California Cities, at pp. 16–17; Amicus PRI, at p. 37; Amicus Association of California School Administrators, at pp. 8–11.) These arguments fail for the same reason Respondents' arguments fail. (*See* Petitioners' Reply Br. at pp. 13–17 [discussing mechanisms and benefits protected by the California Rule such as other sorts of alternative pension credits, the requirement of actuarial soundness in pension management, cost of living adjustments, and disability retirement rights]; Petitioners' Opening Br., at pp. 26–27 [also discussing longevity pay and sabbaticals].)

In the same manner, amici claim that rescinding the right to purchase ARSC from those already employed was necessary to restore a link between pension benefits and public service. (Amicus League of California Cities, at p. 48; Amicus PRI, at pp. 48–49. *See also* Amicus Association of California School Administrators, at p. 9.) Petitioners have already answered these arguments in their prior merits briefing. First, the five-year requirement for ARSC already maintained the relationship between pensions and time served. (Petitioners' Opening Brief, at pp. 23–29.) And second, ARSC – like the other, still-available alternate service credit options – was designed by the State to permit employees to pursue valuable and noble lifestyle choices (like additional education or raising children) without forcing them to sacrifice their ability to earn a livable pension. (Petitioners' Reply Brief, at p. 42.)

C. The Removal of ARSC Was neither Reasonable nor Necessary

Although ARSC was very important to particular individual employees, amici are mistaken to claim that the cost of ARSC was a significant factor driving a fiscal crisis. An analysis of some of the statistical sleight-of-hand and hyperbole they use is found *infra* section VI. Respondents have provided no estimate about how many individuals purchased ARSC at an erroneous price, how 'underpriced' their ARSC was on average or in total, or how much such ARSC purchases were expected to net in total. Furthermore, as mentioned time and again, if ARSC was underpriced then CalPERS was (and remains) free to change the inputs into the actuarial estimate to more closely reflect the expected outlay to which a pensioner would be entitled after an ARSC purchase.

Even assuming amici's arguments about the impact of ARSC on state funds are correct, the Public Employees' Pension Reform Act of 2013 ("PEPRA") was clearly overbroad, in violation of the California Rule. (Assem. Bill No. 340 (2011-2012 Reg. Sess.).) It removed the ability to purchase ARSC from multiple pension systems in the State. As Amicus Californians for Retirement Security note, there are healthy retirement systems all throughout California (pp. 17–19) whose members were deprived of their vested right to purchase ARSC in direction violation of the California Rule.

Furthermore, as Amicus Deputy Sheriffs' Association of Alameda County point out, the impairment was permanent, and was not "a temporary measure, during which time the vested contract rights are not lost but merely deferred for a brief period, interest running during the deferment." (p. 23, citing *Olson v. Cory* (1980) 27 Cal.3d 532, 539 [citation omitted].)

D. The California Rule Was Not an Accident, Contrary to Amici's Briefing

Amici argue that the California Rule does not warrant *stare decisis* deference because it was a mistaken, not well-thought out dictum that was taken too seriously. (*See, e.g.,* Amicus League of California Cities, at p. 37;

Amicus PRI, at pp. 52–56; Amicus California Business Roundtable, at pp. 45–47.) They present three arguments on this theme, all of which fail.

First, amici adopt the analysis of the court of appeal in *Marin Association of Public Employees v. Marin County Employees Retirement Association* (2016) 2 Cal.App.5th 674, concerning whether this Court meant “must” when it said “must.” (Amicus League of California Cities, at p. 37; Amicus PRI, at p. 52.) Petitioners’ merits briefing and the filings of amici adequately address these arguments. (Petitioners’ Opening Br. at pp. 45–47; Petitioners’ Reply Br., at pp. 24–27; Amicus California State Teachers’ Retirement System, at pp. 9–21; Amicus Orange County Attorneys Association, at pp. 16–24; Amicus Los Angeles Police Protective League, at pp. 10–17; Amicus Amalgamated Transit Union Local 1225, at pp. 18–21; Amicus Californians for Retirement Security, at pp. 12–17; Amicus American Federation of State, County and Municipal Employees, at pp. 25–27; Amicus Deputy Sheriffs’ Association of Alameda County, at pp. 17–20.)

Second, Amicus California Business Roundtable claims that the Court in *Allen v. City of Long Beach* (1955) 45 Cal.2d 128 did not have the issues clearly presented to it back when it announced the California Rule over fifty years ago. To support this argument, Amicus cites to briefing before this Court in *Allen* that they believe demonstrates that the California Rule was poorly thought out. (p. 46.) They claim that “[the parties] simply assumed—without any analysis whatsoever—that *Kern* [*v. City of Long Beach* (1947) 29 Cal.2d 848]'s holding about the modification of *already-earned* pension benefits applied to the modification of *unearned* pension benefits." (*Ibid.*).[3]

That is incorrect. The issues in the *Allen* case and the *Allen* Petitioners' arguments for why the Court should find for them were apparent on the face of the briefs – a point ironically buried in Amicus California Business Roundtable's brief. Amicus neglected to credit the *Allen* Petitioners with the arguments they made. The *Allen* Petitioners were not hiding the fact that this was a novel case. Rather, like good advocates working with the material that the common law provides, they explained why this Court's precedent contained concepts and terms that logically would apply to the question of first impression before the Court in *Allen*. (*See, e.g.*, Pet'n for Hearing, Civil Nos. 19866 and 19867, at pp. 27–28, 37–38, 41–42 (Cal. Feb. 11, 1955).) They explicitly invited this Court to take up the novel question presented in part because they believed that lower courts were misconstruing the dictum in the *Kern* case given the "principles announced by [this Court] in the *Wallace* [*v. City of Fresno* (1954) 42

[3] Amicus cited to three filings in this historic case but did not provide this Court or the parties with any archival briefing. Petitioners found only the Petition for Hearing and the Stipulation in the California State Archives, which they have provided for the Court's convenience. (*See* Petitioners' Request for Judicial Notice.)

Cal.2d 180] case." (*See id.* at pp. 41–42.) Amicus therefore is wrong to say that the parties "simply assumed—without any analysis whatsoever—that *Kern*'s holding about the modification of *already-earned* pension benefits applied to the modification of *unearned* pension benefits." (Amicus California Business Roundtable, at p. 46.)

Third, Amicus League of California Cities makes a similar claim about *Betts v. Board of Administration* (1978) 21 Cal.3d 859. The League claims that defendants in the case "offered no justification for the change" from a fluctuating to a fixed pension. (pp. 39–40.) As the court of appeal in *Betts* noted, the law was passed as an "urgency measure," that was "necessary for the immediate preservation of the public peace, health, or safety" and that was designed to achieve "actuarial soundness by January 1, 2002" in the pension system. (*Betts v. Board of Admin. of Pub. Emp. Ret. Sys.* (1978) 143 Cal.Rptr. 87, 91, 92–93, vacated sub. nom. *Betts. v. Bd. of Admin.* (1978) 21 Cal.3d 859.)

This Court eventually held in *Betts* that these were clearly insufficient justifications for significantly impairing a vested pension right. Nevertheless, they are just as clearly *attempts* to justify the law, contrary to Amicus's claims.

In sum, amici have given short shrift to the precision and thoroughness of past litigators, judges, justices, and legislators of California. But the decisions of these individuals, the arguments they made, and the words they chose mean something. Amici have failed to adduce evidence to support a contrary conclusion.

E. Statutory *Stare Decisis* and Legislative Reliance

Although amici and Petitioners here disagree about the wisdom of the California Rule,[4] this Court's original reasoning behind it is – at this point – not the only question at issue. The reliance interests of legislators, local governments, and employees are all involved.

As Amicus California Business Roundtable has expressed clearly in other circumstances, the Rule of Law matters. Businesses in the Roundtable, like natural persons, value predictability and the knowledge that default rules will apply. This is especially true in situations where laws set the baselines from which sophisticated contracting parties can deviate if they so choose. (*See* California Business Roundtable, *California Competitiveness Project, Executive Summary*, p.5, available at http://www.cbrt.org/wp-content/uploads/2012/03/ccp_exec_summary.pdf [complaining that "by a large margin, . . . California's regulatory environment is the most costly, complex, *and uncertain* in the nation,"

[4] Amicus California Business Roundtable erroneously claimed that Petitioners "do not defend the merits of the California Rule" (p. 44, citing to Petitioners' Opening Brief, at pp. 47–50.) Petitioners explained the value and the creation of the California Rule in their Opening Brief (pp. 23–35) and in their Reply Brief (pp. 23–27), and were not required to repeat whatever talisman the California Business Roundtable was looking for.

emphasis added].)[5] It turns out that Amicus *is* willing to ignore the value of predictability and the Rule of Law, but only when the agreements that ended up incorporating the default terms result in contracts containing terms with which it disagrees. (*See also* Amicus Howard Jarvis Taxpayers Association, at p. 40.)

Amici frame this as a question of constitutional *stare decisis* that this Court *must* weigh in on to correct. But the California Rule is better understood functionally as a binding rule of statutory interpretation, grounded in concerns of constitutional avoidance. It is therefore more akin to statutory stare decisis – holdings that courts are especially careful not to overrule after the legislature has had multiple opportunities to weigh in. (*Kimble v. Marvel Entertainment, LLC* (2015) 135 S.Ct. 2401, 2409–2410 (“Absent special justification, [decisions interpreting statutes] are balls tossed into [the legislature’s] court, for acceptance or not as that branch elects.”)

The California Rule gave explicit instructions to parties bargaining over public pensions as to the baseline for pension rights: unless the legislature reserves the right to change them in the future, pensioners may

[5] The Little Hoover Commission has also issued a report examining “what changes could be made in the regulatory process to improve transparency and accountability, *consistency and predictability*” in California. (*Better Regulation: Improving California’s Rulemaking Process*, p.2, available at http://www.lhc.ca.gov/sites/lhc.ca.gov/files/Reports/209/Report209.pdf [emphasis added].)

rely on pension statutes as a promise that will not be rescinded unless the requirements of the California Rule are met. As this Court stated in *City of Torrance v. Workers' Comp. Appeals Bd.* (1983) 32 Cal.3d 371, 378–379 (citation omitted), "Ordinarily, 'all applicable laws in existence when an agreement is made, which laws the parties are presumed to know and to have had in mind, necessarily enter into the contract and form a part of it, without any stipulation to that effect, as if they were expressly referred to and incorporated.'"

Amici spend a great deal of ink attempting to blot out the fact that the California Legislature is a sophisticated body that knows how to, and has, contracted around the California Rule. The California Rule has created the baseline, and therefore has defined how intent is to be found in pension statutes. This argument vitiates, *inter alia*, the following amici's claims:

1) There must be clearly expressed intent to create a contract in *the language of* a pension statute. (*See* Amicus PRI, at pp. 45, 34, 37, 40 ["If the California legislature wishes to grant public employees a right to benefits that is unalterable for the entire term of employment, it is capable of clearly stating its intent to do so."].

2) The California Rule is invalid because it does not include a review of "*actual* legislative intent." (*See* Amicus League of California Cities, at p. 27 [emphasis added].).

3) The California Rule stripped the Legislature of the power to set and change the terms and conditions of public employment. (*See* Amicus California Business Roundtable, at p. 33.)

Therefore, when the Legislature created section 20909 knowing of this baseline but refusing to contract around it, it agreed to let its employees hold open the option to purchase ARSC from the State (at the actuarially-calculated price then offered) one time, any time after five years of service, before they retired. This was a part of the larger pension promise that their employer made to them on their first day of employment. A promise that included the assurance that they would be able to accrue a pension at their current rate or at any subsequently-offered higher rate. These promises were valuable. Part of the ongoing consideration that employees gave to their employer (every time they went to work) was in exchange for the State's promise that it would not detrimentally alter their pension for as long as they remained employed.

There is no rule against the Legislature declaring that certain pension rights are not vested, are conditionally vested, or never vest. Petitioners do not dispute that the following would be constitutional:

- The Legislature could have created a new title/chapter/article in the Government Code with instructions that all pension rights located in that title/chapter/article are subject to legislative repeal. (*See McGrath v. Rhode Island Ret. Bd.* (1st Cir. 1996) 88 F.3d 12, 17, fn. 8 [“An explicit reservation easily can be understood as a legislative effort to avoid creating a contractual obligation in the first place, for when the state expressly reserves the power to withdraw or reconfigure the promise of a pension, a state employee who thereafter accepts employment will be hard-pressed to assert a reasonable basis for relying on the original promise.”].) The California Legislature did not do so for section 20909.

- The legislature could have created a new title/chapter/article with instructions that all pension rights defined in that title/chapter/article may be subject to repeal after a formal rulemaking by an executive branch/administrative agency under the Administrative Procedure Act, Cal. Gov. Code §11340 *et seq*. The California legislature did not do so for section 20909.
- The Legislature could have defined a particular section or subsection of the pension law as not creating vested rights. (*See Int'l Assn. of Firefighters v. City of San Diego* (1983) 34 Cal.3d 292, 302–303; Cal. Gov. Code § 21052 [permitting amendments to the cost of ARSC].) The California Legislature did not do so for section 20909.
- The Legislature could enable local government entities to make identified pension rights not vest in particular circumstances. (*See* San Jose Municipal Code § 3.28.710 subd. (B) [reserving the right to raise the contribution amount of Tier 2 members]. *See also Int'l*

Assn. of Firefighters, *supra*, 34 Cal.3d at 303.) The California Rule *did not* create a constitutional prohibition on local government employers writing into their pension contracts an explicit reservation to rescind particular benefits using identified processes under well-defined circumstances.

- The Legislature could have enabled individuals to trade off pension benefits for salary increases later, or changed public pensions to a defined contribution system allowing individuals to allocate their retirement savings to investments of their choice. (*See* Amicus California Business Roundtable, at pp. 60–61) It has instead retained a defined benefit pension model with a CalPERS-managed investment portfolio.
- The Legislature could have permitted individuals to waive their pension rights in exchange for a higher take-home salary. (*See* Amicus California Business Roundtable, at p. 60.) For some aspects of the pension calculation, it has done so. (*See* Cal. Gov. Code §§ 21076, 21076.5 [creating a second-tier option with lower contribution rates and lower benefits].)

And these are not new, groundbreaking legal theories that the Legislature has never considered. The Legislature has a free hand in determining which pension rights vest for new employees and when. It has, in fact, acknowledged the California Rule and reserved these rights. (*See*, *e.g.*, *Int'l Assn. of Firefighters*, *supra*, 34 Cal.2d at 302–303; Cal. Gov. Code. § 21052; Amicus CalSTRS, p. 3 [citing to legislative counsel's digest of AB 1469 and Education Code section 22002.5, which both acknowledge the California Rule].)

Amici argue that the contrary should be true, and that a pension right may be withdrawn unless the Legislature has issued a "clear statement" that it is "irrevocable". Petitioners have not been able to find any[6] instance in the state or county retirement laws in which the Legislature has explicitly stated that a pension right is "irrevocable." Therefore, if this Court were to adopt Amicus California Business Roundtable's theory that such irrevocability must be clearly expressed (pp. 15, 21), there would be no vested rights in the entirety of the pension pantheon that are irrevocable with respect to current employees. This is an untenable reversal of the California Rule, the wrongheadedness of which is clearly demonstrated by the absurd results it would create.

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[6] The closest Petitioners could find is one section of CERL that explicitly states that pensioners and employees have a vested right arising in a *mechanism* that ensures that their pensions can be paid. (Cal. Gov. Code. § 31699.4. ["The assets in the [San Bernardino County] postemployment health benefits fund shall be irrevocably held for the exclusive purposes of providing health benefits to employees of the participating public agencies, and to defray the reasonable expenses of administering the fund."].)

1. Repealing Section 20909 Was Not Necessary, and Other Legislative Fixes that Do Not Violate Stare Decisis Are Available

Even assuming amici were correct in their description of section 20909's outsized impact on the State's pension system, (*see, e.g.*, Amicus PRI, at pp. 36, 49; Amicus City of Pacific Grove, at p. 8), there were ways to address these impacts that did not violate the California Rule. Under *U.S. Trust*, it is entirely proper for this Court to take a gimlet-eyed view towards the California Legislature's self-serving actions here – including reviewing legislative and policy paths not taken in order to ensure that the repeal of the vested right was truly reasonable and necessary. (431 U.S. at 29–30 & fn. 28, 29.) Some of these potential constitutional paths that were not taken are:

1) If ARSC was priced incorrectly, (Amicus PRI, at p. 49; Amicus Association of California School Administrators, at p. 11), then CalPERS can readjust the price without violating the California Rule.

2) If CalPERS' actuaries' errors fall hard on small cities, (Amicus City of Pacific Grove, at pp. 9, 15), the Legislature can provide for ways in which to share all or part of this burden with other cities or state-wide without violating the California Rule. (Accord. *id.* at 16 ["[T]he law must provide for equitable adjustment."])

3) If, for example, CalPERS is requiring local entities pulling out of CalPERS to pay a large one-time fee that they are unable to afford, (Amicus League of California Cities, at pp. 49, 51–52), CalPERS or the Legislature could permit cities to set up a compromise payment plan. (*See* Cal. Gov. Code § 20575.) Amicus League of California Cities is exactly right that "*[t]he legislature* must be permitted to identify and resolve problems before pension systems enter into this 'death spiral'" (*see* Amicus League of California Cities, at p. 52 [emphasis added]), and they can do so without violating the California Rule.

4) If, for example, cities are looking for ways to meet their pension obligations, they need look no further than Amicus League of California Cities for a list of potential policy options. (*See* League of California Cities Retirement System Sustainability Study and Findings (Jan. 2018), available at http://www.cacities.org/Resources-Documents/Policy-Advocacy-Section/Hot-Issues/Retirement-System-Sustainability/League-Pension-Survey-(web)-FINAL.aspx.) These recommendations include: increasing funding, establishing trusts, issuing bonds, cutting services, prepaying for liabilities, and bargaining with employees (*id.* at 5–6), all without violating the California Rule.

And, most importantly, as discussed *supra* section III.E, every vested pension right that the Legislature has drafted over the past decades could have contained conditions and reservations that put employees on notice that those rights were not vested, and that they could not rely on the California Rule's requirements to limit impairment.

F. Legislatures May Bind Future Legislatures

Amici argue that the California Rule unconstitutionally permits current legislatures to bind the hands of future legislatures, but their proposed reading of this rule is incorrect as a matter of law, and, in any event, proves far too much. This is another instance in which amici attempt to smuggle in their policy disagreements with past legislative actions, and must over-read precedent to do so. If *any* right is vested and protected by the Contract Clause, then by definition a past legislature has bound the hands of a future legislature. Every pension law on the books in California, to the extent it creates vested rights, proves amici wrong.

As the Supreme Court held in *U.S. Trust*, a state "*could* bind itself in the future exercise of the taxing and spending powers." (*U.S. Trust*, *supra*, 431 U.S. at 24 [emphasis added].) Unlike in the eminent domain situation,[7] the State is perfectly within its rights to bind itself for the purpose of entering an agreement. (*Id.* at p. 24, fn. 21.) Therefore, amici grudgingly admit, as they must, that legislatures are actually constitutionally permitted

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[7] In which the State is unable to sign away its sovereign right – a right that is limited by the State's obligation to provide fair compensation for abrogated value.

to bind the hands of future legislatures. (*See* Amicus PRI, at pp. 29, 56; Amicus Howard Jarvis Taxpayers Association, at pp. 19–20.)

Once again: The Legislature is aware of the California Rule; it can contract around the California Rule; it is aware that it can contract around the California Rule; and it has contracted around the California Rule.

Amici would undoubtedly have preferred if the Legislature had reserved the right to rescind these contractual terms *carte blanche*, but that is not the path it chose. Amici have now turned to the Court for a second bite at the apple. The fact that the Legislature has chosen to bind future legislatures in situations in which amici wish they had not does not mean that the California Rule is forcing these decisions unconstitutionally.

G. *Stare Decisis* Respects Individuals' Reliance

Since 1992, over a decade before ARSC was created, individual public sector employees have had a constitutionally-defined right to rely on pension boards to act in their best interest. (Cal. Const. art. XVI, § 17(b) ["A retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty."]; *City of Oakland v. Pub. Employees' Ret. Sys.* (2002) 95 Cal.App.4th 29, 40 ["PERS has a fiduciary duty to provide timely and *accurate* information to its members."]; *In re Application of Smith* (March 31, 1999) PERS Precedential Decision No. 99–01, at *6 ["[CalPERS's] duty to inform and deal fairly with members also requires that the information conveyed be complete and unambiguous”]. *See also* Amicus Los Angeles County Employees Retirement Association, at pp. 17–18.) Therefore, even if the judiciary finds that CalPERS’s public guidance (claiming that a benefit has vested) is not a binding administrative interpretation that receives deference, (Joint Appx., at pp. 233–236), it is relevant to the reasonableness of employee’s reliance and expectation.

If the Legislature wants to put future employees on notice that certain future pension rights vest conditionally, the California Rule leaves them entirely free to do so.

H. *Stare Decisis* Respects Unions’ and Employee Organizations’ Reliance

As Amicus Los Angeles County Employee Retirement Association (“LACERA”) explained, there are a number of entities responsible for investing pension funds so as to pay back individual employees and pensioners. These entities have also relied – and continue to rely – on the California Rule to provide stability with which they can plan and implement decades-long investment strategies. (Amicus LACERA, at pp. 16–17.)

Additionally, unions and employee organizations are regularly in negotiations with management where both sides must make trade-offs between particular offers. The knowledge that pension rights are protected by the California Rule impacts the comparative value of these offers.

Amicus Orange County Attorneys' Association gave concrete examples of recent trade-offs it made in order to get the County of Orange to switch to a new pension formula, which include: (a) various reductions in medical coverage, (b) an increase in the employee's normal contribution rate, (c) an additional employee contribution, (d) elimination of a lump sum equal to approximately 1% of salary, and (e) foregoing salary increases for two years. (pp. 14–15 & fn. 8)

Therefore, Amicus League of California Cities' unsupported contention that the California Rule has "proven incompatible with the collective bargaining process" is not reflected in practice. (p. 35.) Nor is Amicus California Business Roundtable's nebulous and unsupported claim that employers will have "an incentive" to cut employees' salaries or terminate them. (p. 61.)

IV.
AMICI APPLY THE WRONG BLACK LETTER CONTRACT LAW

As Petitioners explained in their prior briefing (Petitioners' Reply Br., at pp. 19–20), the pension offer that the State makes on the first day of employment is best understood as a unilateral option contract. The employee accepts the terms of the option and receives a vested right to undertake long-term performance under the terms of the contract. While the employee is providing his/her performance, his/her employer is required to hold the option open under the initial terms it offered. (*See McGrath v.*

Rhode Island Ret. Bd. (1st Cir. 1996) 88 F.3d 12, 17, citing *Betts v. Board of Admin.* (1978) 21 Cal.3d 859 [identifying pension plans as an "implied-in-fact unilateral contract"]; *Transp. Workers Union of Am., Local 290 v. Se. Penns. Transp. Auth.* (3d Cir. 1998) 145 F.3d 619, 623–624, citing Restatement of Contracts (Second) § 45(1) ["[W]hen an offeror invites an offeree to accept by rendering a performance a unilateral contract is formed when performance begins."].)

Amicus PRI misunderstands which kind of options contract is at issue, claiming that "acceptance and consideration" in this case are only provided when an individual employee seeks to purchase ARSC. (Amicus PRI, at p. 39 & fn. 8.)

Not so. The option to purchase a pension benefit at cost is valuable. The State's explicit offer of the option to purchase such credit "at any time" after 5-years of service but before retirement was an option that was conditioned only on the employee continuing to work. (*See* Cal. Gov. Code § 20909(b).) Individual employees provide work to the State with the understanding that they would be able to exercise this option and reap its benefit at a time most convenient to the member during this period. The length that these options were held open depended on the choices of each individual.

When priced properly, this option is more stable and less expensive than a market-provided annuity of equal cost would be. The State is able to offer the benefit at a lower cost than the private market because the State is not seeking to make a profit through the exchange.[8] These facts also dispose of Amicus PRI's claim that beneficiaries receive no value from converting savings into defined benefits (which, if true, would also mean that no one would ever purchase a commercial annuity). (*See* Amicus PRI, at pp. 41–43.)

The Contract Clause does not limit the terms of pension or employment contracts that can be entered into. The Legislature decided to give employees the option to convert their savings into ARSC one time during their employment (after five years of service) when it was most convenient for the employee. There is nothing in the terms of this contract that is unconscionable or contrary to public policy, and therefore the State created a valid contract comprised of these terms.

Amicus PRI claims that under this theory of the contract employees would not be entitled to increases in pension benefits that are granted after they begin employment. (p. 44.) They are mistaken. The initial contract includes a pension offer promising that employees are entitled to subsequent beneficial changes, and consideration is provided for this

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[8] Annuities purchased through private companies must cost more than publicly-provided at-cost annuities because companies must still make at least a 'normal profit.' (Contra Amicus Association of California School Administrators, at pp. 11–13.)

contractual term every day the employee works. (Accord. *Cnty. of Orange v. Ass'n of Orange Cnty. Deputy Sheriffs* (2011) 192 Cal.App.4th 21.)

V.

CALIFORNIA PUBLIC EMPLOYEES ARE NOT A NEFARIOUS, UNDIFFERENTIATED, ANTI-DEMOCRATIC DEEP STATE

Some amici's briefs advocate for their policy preferences, including weakened public sector unions, lower taxation, and fewer government services. In our democratic system, amici may express and advocate for their policy preferences,[9] but they have not demonstrated why the legislative and executive branches are not the branches best suited to hear out these claims.

A. Non-Public Employee Citizens Are Not a Discrete and Insular Minority

Amicus Howard Jarvis Taxpayers Association cites to the famous John Hart Ely analysis of Footnote 4 in *United States v. Carolene Products Co.* (1938) 304 U.S. 144, 152, in an apparent attempt to argue that public sector unions are so powerful that those who are not public sector

[9] It is, therefore, no surprise that Amicus PRI was able to find "some commentators to question" whether some states should declare bankruptcy. (Amicus PRI, at pp. 17–18, citing Maria O'Brien Hylton, *Combating Moral Hazard: The Case for Rationalizing Public Employee Benefits* (2012) 45 Ind. L. Rev. 413, 444 [claiming that the size of the pension problem has "left commentators wondering about the possibility of bankruptcy as a viable solution" and then citing to two newspaper articles]. Accord. U.S. Const. 1st Amend ["Congress shall make no law . . . abridging the freedom of speech."].)

employees or pensioners constitute a special class worthy of heightened scrutiny when laws are passed that do not benefit them. (pp. 26–27.) Amicus City of Pacific Grove joins the parade, claiming that CalPERS Board is "dominated by" parties favoring retirees but presenting no argument as to why the membership, powers, and procedures of the Board are beyond the control of the Legislature or normal political organizing and pressure. (p. 16.)

It goes without saying that amici cite no precedent finding that 'non-public-employee citizens' constitute a "discrete and insular minority" that has been structurally denied the protection of "political processes ordinarily to be relied upon to protect" them. (*See Carolene Products, supra*, 308 U.S. at 152, fn. 4.)

Even leaving aside evidence concerning the recent political and judicial threats to – and losses suffered by – public sector unions, Amicus Howard Jarvis Taxpayers Association's argument fails on its face: the 'minority' amici identify is actually an overwhelming majority that could out-vote the total number of public sector employees even if only a small fraction of them voted.

There has been no evidence presented that these employees have acted or would act to in any way frustrate the democratic expression of the citizens of California on these topics. Amici are therefore free to voice their policy arguments through either our State's representative or its (famously vibrant) direct democratic channels.

VI.
AMICI PRESENT INCOMPLETE SURVEYS OF SOCIAL SCIENCE DATA AND ANECDOTES

Respondents' amici set the stage for their argument that the California Rule warrants destruction by presenting a number of statistics and anecdotes about California governmental entities in financial distress. The Court should not rely on these statistics, seeing as Respondents' amici failed to abide by the rules for requesting judicial notice. (California Rules of Court, Rule 8.252.)

This is a word-count-limited brief before a judicial tribunal, and as such it is not the proper forum in which Petitioners can or should identify all of the assumptions and simplifications behind each and every statistic from non-peer-reviewed publications cited by amici. But seeing as amici's briefs are before this Court, Petitioners believe it is worth calling this Court's attention to a few major classes of simplifications, head-fakes, and buried assumptions sprinkled throughout these briefs.

Contrary to amici's use of the following facts and statistics, the sky is not falling on California:

1. Using Nominal Dollars: Many of the statistics amici cite use nominal dollars instead of real dollars[10] to express changes that have occurred or will occur over decades. Merely keeping up with inflation since 2002 would have required the State to increase the nominal value of pension disbursements by double digit percentages. (*See* Joe Nation, Ph.D., *Pension Math: Public Pension Spending and Service Crowd Out in California, 2003-2030*, Working Paper No. 17-023, SIEPR (October 2, 2017), at p. 77 [“Nation Working Paper”].) The decision to use nominal instead of real dollars can have an especially dramatic effect on statistics presented as percentages. For example, if the State’s past contributions from 2002 were adjusted to be presented in 2018 dollars,[11] the 73% nominal increase Amicus California Business Roundtable cites, (p. 54.), actually translated to only a 28% real increase in value.

2. Inviting Extrapolation from Two Points: More generally, describing changes over time can be misleading if there are only two points of comparison offered. Depending on the starting point, this can

[10] “Real dollars” are theoretical dollar measures that economists use in order to compare purchasing power across time more accurately. They strip out the effects of inflation. “Nominal dollars,” on the other hand, do not compensate for inflation, and therefore over-exaggerate how much prices have increased (in times of inflation). (*See* Federal Reserve Bank of Minneapolis, CPI Calculator Information, available at https://www.minneapolisfed.org/community/financial-and-economic-education/cpi-calculator-information.)
[11] With 35% Consumer Price Index inflation estimated by the Bureau of Labor Statistics. (*Id.* at p. 54.)

dramatically over-exaggerate trends when early sharp increases have largely smoothed out or leveled off. Specifically, in the public pension context, 2002 was the first year of real contributions after the pension holidays[12] of the late 1990s and early 2000s (had the years 1999–2000 been used, much larger but harder-to-credit percentages could have been wrangled from the numbers). The Nation Working Paper chose 2002 as the initial point of comparison, and explains this decision only by claiming that it will give the reader a "longer term perspective." (p. 1, fn. 4.) Since 2002, there have been significant percentage increases in the amount contributed by employers, but citing only these two data points invites extrapolation assumptions about the size of changes going forward that is not warranted. The dramatically different percentages increases that appear in the Nation Working Paper between the 2002–2018 and the 2018–2030 time-periods bear this out.[13]

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[12] "Pension holidays" are times when the employer declines to contribute money into a pension system for the year because it is overfunded. PEPRA made it significantly more difficult for a governmental employer to declare a pension holiday. (Cal. Gov. Code § 7522.52.)

[13] Assuming their statistics are correct: there was an increase from 3.9% to 11.4% in the percentage of the budget dedicated to pension costs since 2002, while further increases would be to either 13.9% or, in the worst case scenario, 17.5%. (Nation Working Paper at p. x) This reflects a projected 22% to 54% *future* increase in terms of amount spent (and a 2.5–6.1% absolute increase over the projected 14 years). This compares to a reported 192% increase in terms of amount spent (and a 7.5% increase overall) in the *past* measured years. (*Ibid.*)

3. Selectively Reporting Facts from Anecdotes: Amici present anecdotes of local governments and public entities that have been forced to go bankrupt or have taken steps that resulted in pension defaults, and argue that these are the fruits of the California Rule. These local governments have all taken unique paths to wind themselves into their different financial situations. Amici's stories (that these examples prove that it is a moral necessity to indiscriminately put more of a burden on current and past public employees) are overly simplistic. For example:

- City of Loyalton: By all accounts, Loyalton did stop paying the state pension manager the amount that the fund requires in order to keep disbursing funds to Loyalton's pensioners. (Amicus California Business Roundtable, p. 19 [citing Phil Willon, *This Tiny Sierra Valley Town Voted To Pull Out of CalPERS. Now City Retirees Are Seeing Their Pensions Slashed*, L.A. Times (Aug. 6, 2017), available at http://www.latimes.com/politics/la-pol-ca-loyalton-calpers-pension-problems-20170806-htmlstory.html].) But Amicus fails to note that the article it cites explains that Loyalton has four pensioners and one full-time employee. (Willon (Aug. 6, 2017).) The City once gave an employee a 5% raise that was "mysteriously switched" to almost 50% after the vote, and no one noticed for years. At the same time, a county grand jury accused Loyalton and its managers of mismanagement, and the FBI was called in to untangle the City's finances after its City bookkeeper was arrested and charged with embezzlement. (*Ibid.*) As for its relationship with CalPERS, the City refused to pay the CalPERS rate of $3,500 per month, but after CalPERS stopped disbursing pensions to its former employees, the City decided to pay its retired employees directly at a cost of $5,000 per month. (*Ibid.*) In short, the California Rule is not a main cause of the City of Loyalton's distress. Although voters, regulators, and prosecutors have a number of other political and legal options that they can explore against city managers, elected officials, and city employees, the Court would be forgiven for thinking (based on Amicus's brief) that the California Rule was a sufficient, necessary, and main cause to Loyalton's current problems.

- Trinity Waterworks: Trinity Waterworks asked to leave CalPERS. (*See* Amicus League of California Cities, p. 50, citing Adam Ashton, *Public workers from two more towns expected to lose CalPERS pensions*, Sacramento Bee (Sept. 13, 2017), available at http://www.sacbee.com/news/politics-government/the-state-worker/article172960601.html.) But according to its district manager, Trinity is not actually in long-term financial trouble—it has left CalPERS because it is shifting its business model to one that relies on contractors, "meaning it did not have new public employees." (Ashton (Sept. 13, 2017).) It was in the process of trying to put together a lump sum payment to CalPERS, but had yet to do so at the time of the article cited. (*Ibid.*) There was no indication in the article that Trinity would be unable to satisfy CalPERS if the fund was willing to set up a payment plan.

- City of Vallejo: Vallejo cut its police department staffing from 221 to 143. (Amicus California Business Roundtable, at p. 19, citing Nation Working Paper, at p. 60.) But Amicus California Business Roundtable's brief does not mention that a 1% increase in sales tax in Vallejo is expected to pull that number halfway back (up to 171) in 2018. (Nation Working Paper, at p. 60.) And despite blaming Vallejo's bankruptcy (a decade ago) on pensioners, (Amicus California Business Roundtable, at p. 20), in *In re Vallejo* (9th Cir. 2009) 408 B.R. 280, 286, fn. 7, the Ninth Circuit noted that Propositions 13 and 218 had a large impact on causing the City's temporary bankruptcy (which was due to a cash flow problem), and said that the City never actually contacted its retirees during the bankruptcy proceeding.[14] (*Id*. at 298, fn. 25)

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[14] In fact, in none of the three municipal bankruptcies amici cite did the municipalities decide that it was necessary to reduce pensions to exit bankruptcy. (*See* Amicus American Federation of State, County and Municipal Employees, at pp. 34–35.) Furthermore, the fact that only three out of the many thousands of municipalities throughout California even considered this drastic step shows how overwrought amici's claims of

Again, these are all examples in which, to a varying degree, local municipalities and government entities are reckoning with the decisions of their leaders. But amici have presented only part of the stories behind these entities' various situations, exaggerated their dire straits and the limited options they face, and ultimately shifted far too much of the blame onto the shoulders of the California Rule.

4. Conflating Total Unfunded Liability with Future Unfunded Liability: Amici present the benefits of their reduced California Rule formulations as though they will allow employers to significantly reduce their unfunded pension obligations. They attempt to draw a line between 'retroactive' pension rights and 'prospective' pension rights. They admit that 'retroactive' pension rights are already earned (and therefore are protected by the Contract Clause such that they cannot be touched even under amici's new formulations). But for 'prospective' pension rights, they claim that these are not yet earned and therefore should be subjected to some sort of divestment. (*See* Amicus League of California Cities, at p. 45 [attempting to distinguish *Legislature v. Eu* (1991) 54 Cal.3d 492 based on its unsupported claim that the case turned on whether the pensions destroyed included 'retroactive' destruction].)

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financial emergency are. It also reveals how important public entities believe the inviolability of public pension rights are to their ability to attract and retain competent public servants.

But through PEPRA the Legislature has already removed from the employers a significant amount of the burden of paying for these 'prospective' pension rights, by reducing the pension formulas for new employees, and it did so without violating the California Rule.

Amicus Californians for Retirement Security helpfully explains these complexities. (p. 21.) A major portion of the unfunded liability that amici point to as the inevitable result of upholding the California Rule is for 'already-accrued benefits' that have been earned by employees' and pensioners' past work, and which would remain inviolable (as already-earned compensation) under even amici's theories of how to creatively reinterpret public employees' contracts. (*Ibid.*) Their sleight-of-hand here greatly over-exaggerates the upside of abandoning the California Rule.

5. Examples of Current Policy Priorities Reflected in Spending Decisions: Nowhere in amici's briefing have they mentioned California's $6.1 billion budget surplus expected this year, the State's significant rainy day fund,[15] or why the government cannot use some of these resources to help prefund some of the underfunded public pension commitments. In the meantime, cost estimates for California's High Speed Rail project have

[15] Expected to swell to $13.5 billion this year if the Governor's budget is accepted. (John Myers, *Gov. Jerry Brown proposes topping off California's rainy-day fund in his new state budget*, L.A. Times (January 10, 2018), available at http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-jerry-brown-budget-1515601158-htmlstory.html.)

been raised regularly, now sitting at over $77 billion. (Erin Baldassari, *High speed, high cost: Bullet train price tag reaches $77.3 billion, four years behind schedule*, The Mercury News (Mar. 9, 2018,) available at https://www.mercurynews.com/2018/03/09/high-speed-high-cost-bullet-train-price-tag-surges-20-35-percent/.)

There is no constitutional reason to believe Californians shouldn't have a high speed rail, but there is a constitutional reason to look askance at that the government's self-serving pleas of poverty and its selective purse-opening when pensioners and employees return to seek what they've earned. (*See U.S. Trust*, *supra*, 431 U.S. at 29–30 & fn. 28, 29.)

Likewise, the twin tunnels project helping redirect water from the Sacramento River Valley recently received a highly-publicized cash infusion from the Metropolitan Water District. (Dale Kasler and Ryan Sabalow, *Southern California water agency backs 2 Delta tunnels in breakthrough vote*, The Sacramento Bee (April 10, 2018), available at http://www.sacbee.com/latest-news/article208504514.html.) As of June 30, 2016, the Metropolitan Water District's pension was funded at 70.3%. (CalPERS, Miscellaneous Plan of the Metropolitan Water District of Southern California (July 2017), at p. 5, available at https://www.calpers.ca.gov/docs/actuarial-reports/2016/metropolitan-water-district-of-southern-california-miscellaneous-2016.pdf.)

“A governmental entity can always find a use for extra money, especially when taxes do not have to be raised.” (*U.S. Trust, supra*, 431 U.S. at 26.)

6. Papering Over the Benefit Employers Already Received: Amicus California Business Roundtable brings up the decrease in sworn police officers in Vallejo and blames it on the California Rule. (pp. 18–19.) Looking at that concrete example, to the extent the City of Vallejo derived value in past years from having a fully-staffed police department, that value only existed because the City of Vallejo was willing to offer terms of employment that enticed people into public service. The California Rule was a part of contract law that applied to these police officers’ pension contracts when they initially signed up, and they have been performing their part of the option contract every day that they have shown up to work.

* * *

Again, Petitioners cannot address all of the statistics cited in the numerous amicus briefs, whether or not they comply with this court’s rules concerning requests for judicial notice. This section merely shows that amici’s certainty in predicting impending doom assumes that this Court is willing to view their statistics with too much credulity.

A. Additional Relevant Context About Public Pension Recipients

The great majority of state and local funds in California do not to go towards paying pensions. “In 2014 – 2015 . . .[the State’s] pension contributions represented 2.29% of total state revenues." (Marc Joffe, *Comparing Federal and California State Retirement Exposures*, California Policy Center (June 2, 2016), available at https://californiapolicycenter.org/comparing-federal-california-state-retirement-exposures/.) The cost of pensions to the public fisc is relative in proportion to the amount of Californians who have provided and are providing public service. Furthermore, pensions are redistributive – like all government transfers, they largely reallocate rather than destroy value.

Over 650,000 people currently receive benefits from CalPERS alone, with over 560,000 of those beneficiaries currently living in California. (CalPERS, *CalPERS Economic Impacts in California, 2016* (July 2017), at p. 7.) Total CalPERS membership is over 1.8 million, (*id.* at p. 3) which constitutes approximately five percent of the population of California. (*Quick Facts, California*, U.S. Census Bureau, available at https://www.census.gov/quickfacts/CA [estimating population July 1, 2017 at 39,536,653]) Amici explain that the cost of CalPERS is expected to expand to either to 9.3% (baseline estimate) or 11.4% (alternate estimate) of the State's *operating budget* (using the operating budget number rather than the larger total revenue measure, which includes total general funds and special funds). (*See* Amicus California Business Roundtable, at p. 58, citing Nation Working Paper, at pp. 13–14.) Even assuming the worst case scenario, 11.4% is not unconstitutionally out of proportion to the percent of California residents who directly receive this expenditure.

Additionally, amici treat pension disbursements as if the disbursed money disappears from the State into a black hole. (*See, e.g.*, Amicus Howard Jarvis Taxpayers Association, at pp. 31–37; Amicus California Business Roundtable, at pp. 56–57; Amicus PRI, at pp. 20–21; Amicus League of California Cities, at pp. 18–23.) Rather, pension payments are an important part of our state's economy, and permit retirees to exchange billions of dollars for services and goods provided by home builders, medical providers, and companies large and small who cater to retired Californians and their families. (*See* CalPERS Economic Impacts in California, 2016 (July 2017) CalPERS, at pp. 2, 8.) These activities generate over a hundred thousand jobs and $750 million dollars of property and sales tax revenue each year (not to mention the state income tax that pensioners pay). (*Id.* at pp. 2, 7, 9.)

Whether or not pensions should be bigger or smaller for future public servants is a matter that can and should be debated by policymakers. But amici's briefing presents public servants as free-loading leeches who provided comparatively little value during their employment and are now pensioners simply burning money and destroying utility.

This tendency to demonize recipients of past promises is not new. And courts have skeptically viewed self-serving arguments by local and state governments claiming that they have other plans for money they have already promised elsewhere. (*U.S. Trust*, *supra*, 431 U.S. at pp. 29–30.) It is easy to point to concrete new plans that are not currently feasible in an attempt to avoid past commitments with diffuse positive – or neutral – effects. But lives are built around such commitments, and not just the lives of people who are in public service or who have already retired from public service.

VII.
OTHER STATES' DECISIONS ARE NOT PERSUASIVE IN THIS CONTEXT AND ARE CERTAINLY NOT CONTROLLING

Amici claim that this Court should follow the actions of other state and federal courts to hold that the California Rule does not apply. To support this point, Amicus California Business Roundtable drafted an appendix laying out what it believes the law is in a number of states, and claimed that only two states currently apply the California Rule as California does. (pp. 71–77, 51–52.)

As a preliminary matter, it is not clear why other states' decisions on a question such as this are relevant. (Contra Amicus League of California Cities, at p. 29 [presenting other states' case-law concerning how those states have decided to define legislative intent in pension contexts].) The California Rule has set the baseline from which parties are free to deviate. The fact that other states have set other baselines is not dispositive or persuasive authority for how the California Constitution's Contract Clause should be interpreted.

But more fundamentally, judge-made law is rarely completely on all-fours between one state and another. That is one of the features of our federalist system. (*New State Ice Co. v. Liebmann* (1932) 285 U.S. 262, 311 ["It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory[.]"].) There are innumerable different pension systems under which individuals have accrued rights in the United States, and at least fifty different supreme courts that are responsible for determining the line between which legislative actions violate the states' various Contract Clause and which do not. The futility of Amicus's efforts to categorize exactly which states embrace exactly which elements of the California Rule precisely as this Court has interpreted them is evident from a careful reading of its appendix.

For example, in Amicus California Business Roundtable's appendix:

- Amicus claims, (p. 73), that the *Baker v. Oklahoma Firefighters Pension & Retirement System* (Okla. 1986) 718 P.2d 348 case sets the applicable test when, as Amicus CalSTRS explains (p. 13, fn. 4), the Oklahoma Supreme Court revisited pension law in 1995 in *Taylor v. State & Education Employees Group Insurance Program* (Okla. 1995) 897 P.2d 275, 279, [holding that disadvantages to employees must be "offset by new advantages"].

- The Kentucky case cited is pre-*Allen I*, from 1942. (Amicus California Business Roundtable, at p. 75, citing to *City of Louisville v. Bd. of Educ.* (Ky. 1942) 163 S.W.2d 23.) Furthermore, the Attorney General of the Commonwealth filed a lawsuit against the Governor this month alleging that the recent bill reducing pensions violated the Kentucky Constitution by "breaking the 'inviolable' contract the Commonwealth made with its public employees." (Verified Complaint, *Kentucky ex. rel. Beshear v. Bevin* (Franklin Co., April 11, 2018) No. 18-CI-00379, at p. 4, copy available at https://www.scribd.com/document/376109053/Pension-Reform-Lawsuit.)
- The South Dakota case is pre-*Allen v. City of Long Beach*, from 1953. (p. 77, citing *Tait v. Freeman* (S.D. 1953) 57 N.W.2d 520.)
- The Utah case is pre-*Allen v. City of Long Beach*, from 1952. (p. 77, citing to *Hansen v. Pub. Emp. Ret. Sys. Bd. of Admin.* (Utah 1952) 246 P.2d 591.)
- Amicus's description of Kansas's decision in *Denning v. Kan. Pub. Emp. Ret. Sys.* (Kan. 2008) 180 P.3d 564 in no way precludes a reading of the case that is consistent with the contours of the California Rule. (p. 72)
- In the Wyoming case Amicus cited, "[t]he dispositive issue . . . is whether [appellants] complied with the notice requirements

mandated by the Wyoming Governmental Claims Act." (at p. 77, citing *Peterson v. Sweetwater Cnty. Sch. Dist. No. One* (Wyo. 1996) 929 P.2d 525, 529).

VIII.
CONCLUSION

Amici have presented no new arguments that would support this Court overruling the California Rule or determining that ARSC was not a vested pension right that was improperly revoked in violation of such a rule. Therefore, this Court should remand with instructions to invalidate Government Code section 7522.46 as applied to individuals employed before the passage of PEPRA.

DATED: April 23, 2018

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CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.504(d)(1)

Pursuant to California Rules of Court Rule 8.504(d)(1), I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 13 points and contains 12,819 words.

DATED: April 23, 2018

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PROOF OF SERVICE

CAL FIRE Local 2881, et al. v. CalPERS (State of California)
California Supreme Court, Case No. S239958

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 235 Montgomery St., Suite 828, San Francisco, CA 94104.

On April 23, 2018, I served true copies of the following document(s) described as **PETITIONERS AND APPELLANTS' CONSOLIDATED ANSWER TO AMICI CURIAE** and **MOTION FOR JUDICIAL NOTICE; DECLARATION OF YONATAN L. MOSKOWITZ** on the interested parties in this action as follows:

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BY HAND DELIVERY

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 23, 2018 at San Francisco, California.

Kelli R. Bremer

Kelli R. Bremer

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