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Case No. S247095

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ALAMEDA COUNTY DEPUTY SHERIFFS' ASSOCIATION, et al.,
Plaintiffs and Appellants,

v.

ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASSN. AND BD. OF THE ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASSN., et al.
Defendants and Respondents,

and

THE STATE OF CALIFORNIA,
Intervener and Respondent.

On Review From The Court of Appeal For The First Appellate District, Division Four, Civil No. A141913

After An Appeal From The Superior Court For The State Of California, County of Contra Costa, Case No. MSN12-1870
Hon. David B. Flynn (Ret.), Judge

APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF AND AMICUS BRIEF OF THE CALIFORNIA BUSINESS ROUNDTABLE IN SUPPORT OF RESPONDENTS

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APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF

The California Business Roundtable is a nonpartisan organization comprised of the senior executive leadership of major employers throughout the State, with a combined workforce of over 750,000 employees. For more than 40 years, the Roundtable has identified the issues critical to a healthy business climate and provided the leadership needed to strengthen California's economy and create jobs.

The Roundtable believes that California cannot foster a healthy business climate and stronger economy without pension reform. The State's pension plans are dangerously underfunded. Unless California makes serious changes, pensions will consume an ever-larger share of the budget, forcing State and local governments to increase taxes and cut essential services, such as building infrastructure and maintenance, that are the backbone of the economy. It is therefore in everyone's interest—businesses, public employers and employees, and California citizens—for the State to take steps necessary to ensure that its pension plans remain solvent.

The Public Employees' Pension Reform Act, Gov. Code § 7522 et seq., was a good first step toward achieving that goal. But the Act is

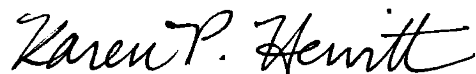
threatened by the judicially created California Rule, which restricts the Legislature's power to adopt sensible, forward-looking pension reform. Under the California Rule, once a public employee has started working, the State can never reduce the rate at which that employee earns pension benefits for future services. In other words, the California Rule creates a one-way ratchet: the rate at which employees earn pension benefits for future services can go up, but can never go down.

The Roundtable agrees with the State of California that the Pension Reform Act's prohibitions on "pension spiking" do not violate the California Rule. As the State has explained, public employees never had a contractual right to engage in the pension-spiking practices at issue, because those practices "were never consistent with prior law." California's Opening Br. at 28. If the Court finds that the Act runs afoul of the California Rule, however, the Court should hold that the Rule unconstitutionally restricts the Legislature's power over pensions. Because the respondents do not make this argument, the Roundtable's brief fills that gap by explaining why the Court should reject the California Rule and overrule the cases that adopted it. *See Fisher v. City of Berkeley*, 37 Cal. 3d 644, 654 & n.3 (1984) (deciding an "extremely significant issue[] of public policy" that was first raised by an amicus).

For these reasons, the Roundtable respectfully requests permission to file the attached brief in support of the respondents. *See* Cal. R. Ct. 8.520(f). The Roundtable confirms that no party or party's counsel authored this brief in whole or in part, or made a monetary contribution to fund its preparation or submission. *See* Cal. R. Ct. 8.520(f)(4)(A). The Roundtable acknowledges that the Laura and John Arnold Foundation has made a monetary contribution to fund the brief's preparation and submission. *See* Cal. R. Ct. 8.520(f)(4)(B).

Dated: September 21, 2018

Respectfully submitted,



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QUESTIONS PRESENTED

Under the California and Federal Contract Clauses, statutes create contractual rights only when the Legislature clearly intended to do so. This case presents two questions about that bedrock principle.

1. Under the judicially created California Rule, pension statutes—and only pension statutes—create a highly restrictive set of contractual rights regardless of whether the Legislature intended to create them. Should the Court reject this anomalous pension rule and overrule the cases that adopted it?

2. California law has always prohibited "pension spiking"—i.e., the process of artificially inflating an employee's income in the years immediately preceding retirement for the purpose of boosting that employee's retirement benefits. For several years, however, many county boards of retirement allowed employees to engage in certain types of pension spiking. In 2012, the Legislature clarified that these practices were indeed unlawful. Did the Legislature unconstitutionally impair a contractual right?

INTRODUCTION

In 2011, the Little Hoover Commission warned that "California's pension plans [were] dangerously underfunded." Little Hoover

Comm'n, *Public Pensions for Retirement Security* (2011) (cover letter of Chairman Daniel W. Hancock) (hereinafter, "Little Hoover Comm'n"). The Commission explained that "[p]ension costs to state and local governments [were] rising at a pace that ha[d] grown unmanageable for public agencies," and that the "money coming in [was] nowhere near enough to keep up with the money that will need to go out." *Id.* at 25, 38. The Commission predicted that, unless the State immediately implemented "aggressive reforms," "the problem will get far worse, forcing counties and cities to severely reduce services and layoff employees to meet pension obligations." *Id.* (cover letter). Indeed, the Commission predicted that governments across the State would "be forced to sacrifice schools, public safety, libraries, parks, roads and social services—core functions of government—and the public jobs that go with them, to pay the benefits that have been overpromised to current workers and retirees." *Id.* at 43.

Since the Commission issued these warnings, the situation has only worsened. A recent study examined 14 California jurisdictions and found that, from 2002–03 to 2017–18, these jurisdictions were forced to increase pension contributions by more than *400%* on average. Joe Nation, *Pension Math: Public Pension Spending and Service Crowd*

Out in California, 2003–2030, at x (2017) (hereinafter, "Nation Report"), https://goo.gl/9sgcLj. And to pay for the skyrocketing costs, these jurisdictions were forced to cut important programs, such as "social, welfare and educational services, as well as … libraries, recreation, and community services." *Id.* at xi. In some cases, these jurisdictions even had to jeopardize public safety—for example, in large part because of rising pension costs, the City of Vallejo was forced to slash employment in its police department from 221 to 143, and in its fire department from 122 to 94. *Id.* at 60.

Yet even these drastic measures were not enough to keep pension debt under control. Between 2008 and 2015, debt for these pension systems soared from $11.8 billion to nearly $120 billion—an increase of more than *900%*. *Id.* at 84.

Several local governments cracked under the strain. In 2013, the City of Loyalton stopped funding its pension plan altogether, which led the California Public Employees' Retirement System (CalPERS) to slash pension payments to the City's retirees by 60%. 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, https://goo.gl/8dyAyC. In 2014, the East San Gabriel Valley Human

Services Consortium also stopped funding its pension plan, which led CalPERS to slash pension payments to the Consortium's retirees by 63%. Stephanie K. Baer, *Their Pensions Were Cut By CalPERS. Now These San Gabriel Valley Retirees Worry About Losing Their Homes*, San Gabriel Valley Tribune, Mar. 17, 2017, https://goo.gl/Gakhap. And several other cities—including San Bernardino, Stockton, and Vallejo—went bankrupt in large part due to out-of-control pensions. *See In re City of San Bernardino*, 566 B.R. 46, 48 (Bankr. C.D. Cal. 2017); *In re City of Stockton*, 542 B.R. 261, 266 (B.A.P. 9th Cir. 2015); *In re City of Vallejo*, 408 B.R. 280, 288 (B.A.P. 9th Cir. 2009).

Ominously, the situation is still deteriorating. Between now and 2029–30, pension contributions will likely rise between 73% and 113% on average. Nation Report at x. At that point, State and local governments could be spending more than *one-sixth* of their total budgets on pensions alone. *Id.*

In 2012, the Legislature passed the Public Employees' Pension Reform Act, Gov. Code § 7522 et seq., to help fix these problems. But this Act—and other reforms like it—are threatened by the judicially created California Rule. Under this Rule, all pension statutes give public employees an unalterable contractual right "to earn, through

continued service, additional pension benefits in an amount reasonably comparable to those available when [they began working]." *Legislature v. Eu*, 54 Cal. 3d 492, 530 (1991). In other words, once employees have started working, the State can never reduce the rate at which they earn pension benefits for future services. For the rest of these employees' working lives, they will continue earning pension benefits at least at the same rate as they did on their very first day—no matter how dire the State's fiscal circumstances.

As explained above, the Roundtable agrees with the State of California that the Pension Reform Act's prohibitions on pension spiking do not violate the California Rule. *See* California's Opening Br. at 28. But even if those prohibitions did violate the Rule, they should be upheld and the Rule should be rejected as fatally and unconstitutionally flawed. The Rule violates the bedrock principle that statutes create contractual rights only when the Legislature clearly intended to do so. The Rule also violates black-letter contract law by creating contractual rights that violate the reasonable expectations of the parties. And the Rule violates longstanding constitutional law by assuming that every contractual impairment automatically violates the California and Federal Contract Clauses. Together, these legal flaws

infringe on the Legislature's sovereign right and duty to protect public employers, public employees, and California citizens.

In addition to these legal flaws, the California Rule lacks persuasive or precedential value. The Rule was initially adopted without anything resembling full consideration. Moreover, the Rule has been almost uniformly rejected by federal and state courts—including by several courts that previously accepted it. And the Rule has had—and will continue to have—devastating economic consequences. Thus, this Court should reject the California Rule and overrule any cases adopting it.

In place of the California Rule, this Court should give pension benefits the same constitutional protection as salary—no more, no less. In the absence of a written contract, such as a collective-bargaining agreement,[1] employees would have a contractual right to any benefits that they have earned through past services, while giving employers the freedom to prospectively modify the rate at which employees earn benefits for future services.

---

[1] If an employee is a party to a collective-bargaining agreement, courts will examine that agreement to determine the employee's contractual rights. *See Sonoma Cty. Org. of Pub. Emp. v. Cty. of Sonoma*, 23 Cal. 3d 296, 304 (1979) (in bank). For simplicity, this brief analyzes the rights that employees have apart from such an agreement.

To be sure, treating pension benefits like salary would give State and local governments the ability to reduce the rate at which employees earn benefits for future services. For example, a local government could increase future employee contributions, reduce the rate at which employees accrue benefits for future services, or in the most dire circumstances, potentially stop offering benefits for future services. Yet governments desperately need this flexibility. As the Little Hoover Commission explained, the problems with public pensions "cannot be solved without addressing the pension liabilities of current employees," and governments cannot address those liabilities without "the authority to restructure future, unearned retirement benefits." Little Hoover Comm'n at v. The Court should use this case to restore that authority.

BACKGROUND

A. The Contract Clauses

When public employees provide services to their employer, any applicable pension statutes "become a part of the contemplated compensation for those services, and so in a sense a part of the contract of employment itself." *O'Dea v. Cook*, 176 Cal. 659, 661–62 (1917). As a result, changes to a pension statute must comply with the

California and Federal Contract Clauses. *See Allen v. Bd. of Admin.*, 34 Cal. 3d 114, 119 (1983) ("*Allen II*").

The California Contract Clause provides that a "law impairing the obligation of contracts may not be passed." Cal. Const. art. I, § 9. Likewise, the Federal Contract Clause provides that "[n]o State shall … pass any … Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10. Because these clauses contain "parallel proscription[s]," *Allen II*, 34 Cal. 3d at 119, courts "apply the same analysis to claims brought under [each clause]," *Retired Emp. Ass'n of Orange Cty., Inc. v. Cty. of Orange*, 610 F.3d 1099, 1102 (9th Cir. 2010). *See also, e.g.*, *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805, 826–31 (1989) (in bank); *City of Torrance v. Workers' Comp. Appeals Bd.*, 32 Cal. 3d 371, 376–77 (1982) (in bank).

To determine whether a statute violates the Contract Clauses, courts ask two basic questions. First, they ask whether the State has impaired "an existing contractual relationship." *Torrance*, 32 Cal. 3d at 377. That requires examining whether a contract exists; if so, what rights it has created; and whether the State has altered any of those rights. *See id.*; *accord Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 472–73 (1985).

Second, if an impairment exists, courts ask whether it "exceeds constitutional bounds." *Torrance*, 32 Cal. 3d at 377; *accord Nat'l R.R.*, 470 U.S. at 472. That requires examining whether the impairment is "substantial," whether it is justified by a "legitimate public purpose," and whether it is reasonable and necessary. *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411–12 (1983); *accord Calfarm*, 48 Cal. 3d at 830–31.

When performing this analysis, courts rarely find that a statute has created contractual rights. As this Court has explained, statutes create contractual rights only "when the statutory language or circumstances accompanying its passage *clearly* evince a legislative intent to create [them]." *Retired Emp. Ass'n of Orange Cty., Inc. v. Cty. of Orange*, 52 Cal. 4th 1171, 1187 (2011) (ellipsis and quotation marks omitted; emphasis added). Likewise, the U.S. Supreme Court has explained that, "absent some *clear* indication that the legislature intends to bind itself contractually, the presumption is that a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Nat'l R.R.*, 470 U.S. at 465–66 (emphasis added).

This clear-statement rule applies to questions about a contract's existence and its scope. Thus, "[a] court charged with deciding whether private contractual rights should be implied from legislation … should proceed cautiously both in identifying a contract within the language of a statute and in defining the contours of any contractual obligation." *Retired Emp. Ass'n*, 52 Cal. 4th at 1188–89.

B. The California Rule

Because public employees have a contractual right to all pension benefits they have earned, any modification to those benefits should be analyzed under the ordinary Contract Clause rules described above. Instead of applying the usual rules, however, this Court has created a separate rule for analyzing pension modifications—the California Rule.

The California Rule deviates from ordinary Contract Clause analysis in three fundamental ways. First, the Rule eliminates the long-standing principle that statutes create contractual rights only "when the statutory language or circumstances accompanying its passage *clearly* evince a legislative intent to create [them]." *Retired Emp. Ass'n*, 52 Cal. 4th at 1187 (emphasis added). To the contrary, the Rule requires courts to hold that pension statutes create contractual rights without *any*

evidence of legislative intent. *See, e.g.*, *Allen v. City of Long Beach*, 45 Cal. 2d 128, 131–33 (1955) (in bank) ("*Allen I*").

Second, rather than examining the text of a particular pension statute, the California Rule automatically reads several terms into the contractual relationship between public employers and their employees, terms which have not been enacted into law by the Legislature nor incorporated into any collective-bargaining agreement. To begin, the Rule creates for employees a contractual right to pension benefits "upon acceptance of employment." *Dryden v. Bd. of Pension Comm'rs*, 51 P.2d 177, 178 (Cal. Ct. App. 1935), *opinion adopted*, 6 Cal. 2d 575 (1936). The Rule also creates for employees the "right to earn future pension benefits through continued service." *Eu*, 54 Cal. 3d at 528 (emphasis omitted). And finally, the Rule requires that any modifications to the employee's pension benefits—including modifications to benefits that have not yet been earned—must "bear some material relation to the theory of a pension system and its successful operation" and that any "disadvantage to employees" be offset by "comparable new advantages." *Allen I*, 45 Cal. 2d at 131.

Third, the California Rule differs from ordinary Contract Clause analysis by failing to require an analysis of whether an impairment

"exceeds constitutional bounds." *Torrance*, 32 Cal. 3d at 377. Courts applying the Rule rarely ask whether a contractual impairment is "substantial," whether it is justified by a "legitimate public purpose," or whether it is reasonable and necessary. *Energy Reserves*, 459 U.S. at 411–12. Instead, courts simply conclude that any impairment necessarily violates the Contract Clauses. *See, e.g.*, *Eu*, 54 Cal. 3d at 528–34.

In effect, the California Rule creates a one-way ratchet—once an employee has started working, the State can increase the pension benefits that it offers in exchange for future services, but can never reduce them. *See* Amy B. Monahan, *Statutes as Contracts? The "California Rule" and Its Impact on Public Pension Reform*, 97 Iowa L. Rev. 1029, 1046–69 (2012).

C. Pension Spiking And The Pension Reform Act

This case involves the County Employees' Retirement Law, Gov. Code § 31450 et seq., which establishes a pension system for the employees of any California county that chooses to participate. Each county's system is managed by its own retirement board. Gov. Code § 31520. Among other things, these boards are responsible for calculating the pension of each retiring employee.

A retiring employee's pension typically depends on the employee's years of service, age at retirement, and final compensation. To determine an employee's final compensation, the retirement board must determine how much total compensation the employee received during their final compensation period, and then subtract any compensation (such as overtime pay) that is not pension-eligible (i.e., pensionable). Gov. Code § 31461.

Under this system, a current employee can increase their pension benefits by increasing the amount of pensionable compensation that they receive during the final compensation period. As a result, some employees try to artificially inflate the pensionable compensation that they receive during that period—a ploy known as "pension spiking."

As the State of California has explained, pension spiking comes in many different forms. For example, some employees "volunteer[ed] for thousands of hours of 'standby' shifts in their final year of employment." California's Opening Br. at 12. Other employees "were allowed to include in their final compensation cashouts of hundreds of unused leave hours from multiple years." *Id.* And "[m]anagers were sometimes given unexplained payments on the eve of their retirement specifically to enhance their pensions." *Id.*

Although state law has long prohibited these practices, several retirement boards (including the boards in Alameda, Contra Costa, and Merced counties) have allowed employees to use them. In such counties, pension spiking developed into a serious problem. *See* Little Hoover Comm'n at 35–36.

In 2012, the Legislature passed the Public Employees' Pension Reform Act, Gov. Code § 7522 et seq., to clarify that state law did not permit such pension-spiking schemes. Specifically, the Act clarified that pensionable compensation does not include:

- payments determined by a retirement board "to have been paid to enhance a member's retirement benefit," *id.* § 31461(b)(1);
- payments for unused leave (such as vacation or sick leave) "in an amount that exceeds that which may be earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid," *id.* § 31461(b)(2);
- payments for "additional services rendered outside of normal working hours," *id.* § 31461(b)(3); and
- payments made "at the termination of employment, except those payments that do not exceed what is earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid," *id.* § 31461(b)(4).

In response to the Pension Reform Act, the retirement boards in Alameda, Contra Costa, and Merced counties adopted new policies that largely prohibited the pension-spiking practices described above.

D. The Decisions Below

After the retirement boards changed their policies, various public employees and public-employee unions in Alameda, Contra Costa, and Merced counties (together, the "unions") petitioned for writs of mandate challenging the constitutionality of the Pension Reform Act. The unions alleged that they had a contractual right to pension benefits based on the boards' pre-Act policies, and that the Act unconstitutionally impaired that right. The trial court largely denied the petitions.

The Court of Appeal affirmed in part, reversed in part, and remanded. Regarding two pension-spiking practices (treating "leave cash-outs" and "terminal pay" as pensionable), the court held that state law had never authorized them. As a result, the Pension Reform Act did not impair any contractual rights by virtue of clarifying that these practices were unlawful. *See Alameda Cty. Deputy Sheriffs' Ass'n v. Alameda Cty. Emp. Ret. Ass'n*, 19 Cal. App. 5th 61, 100–04 (2018). The court held, however, that the doctrine of equitable estoppel

required the retirement boards to treat terminal pay as pensionable "to the limited extent such pay was designated as pensionable" before the Act's passage. *Id.* at 126–29.

Regarding two other pension-spiking practices (treating pay "outside of normal working hours" and "enhancement payments" as pensionable), the court held that state law *had* previously authorized them, and that the Act *may* have impaired contractual rights by eliminating these practices. *See id.* at 109–113. The court then remanded the case to the trial court to determine in the first instance whether the Act violated the California and Federal Contract Clauses. *Id.* at 123.

STANDARD OF REVIEW

This Court reviews de novo whether a statute violates the Contract Clauses. *See Bd. of Admin. v. Wilson*, 52 Cal. App. 4th 1109, 1129 (1997).

ARGUMENT

I. THE CALIFORNIA RULE IS FATALLY FLAWED AND SHOULD BE REJECTED.

The unions argue that the Pension Reform Act is unconstitutional because it violates the California Rule. *See, e.g.*, Alameda County Deputy Sheriffs' Association Answer Br. at 41–47; Public Employees

Union Answer Br. at 26–49. This Court should reject that argument and the California Rule itself.

A. The California Rule Unconstitutionally Restricts The Legislature's Power To Reform Pensions.

The California Constitution vests "[t]he legislative power … in the California Legislature." Cal. Const. art. IV, § 1. It is the Legislature, therefore, that "possesses the ultimate authority to establish or revise the terms and conditions of state employment." *Prof'l Engineers in Cal. Gov't v. Schwarzenegger*, 50 Cal. 4th 989, 1015 (2010). As a result, the "authority to set salaries has traditionally been viewed as a legislative function, with ultimate authority residing in the legislative body." *Pac. Legal Found. v. Brown*, 29 Cal. 3d 168, 188 (1981).

Although the California Constitution vests the Legislature with ultimate authority over the terms and conditions of state employment, the judicially created California Rule makes it virtually impossible for the Legislature to control pension benefits for current employees. Indeed, the Rule bars the Legislature from *ever* reducing the rate at which current employees earn pension benefits for future services, no matter how small the change nor how dire the circumstances. *See Allen I*, 45 Cal. 2d at 131. That restriction on the Legislature's authority is unconstitutional and should be rejected.

1. *The California Rule Creates Contractual Rights Without Any Evidence Of Legislative Intent.*

As explained above, statutes create contractual rights only "when the statutory language or circumstances accompanying its passage clearly evince a legislative intent to create [them]." *Retired Emp. Ass'n*, 52 Cal. 4th at 1187 (ellipsis and quotation marks omitted). There are two reasons for this clear-statement rule. First, this Court has recognized that "the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the governmental body." *Id.* at 1185–86 (brackets omitted). Thus, because the Legislature rarely uses a statute to create contractual rights, it makes sense to require clear evidence before concluding that the Legislature did so in any particular case. *Accord Nat'l R.R.*, 470 U.S. at 466.

Second, this Court has recognized that "constru[ing] laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body." *Retired Emp. Ass'n*, 52 Cal. 4th at 1185–86. A legislative policy reflected in a statute may be changed; a contractual obligation generally may not. If courts are too quick to conclude that a statute creates contractual rights, therefore, both the Legislature and the

public may be "blindsided by unexpected obligations." *Id.* at 1188–89; *accord Nat'l R.R.*, 470 U.S. at 466.

To avoid blindsiding the Legislature and the public, this Court "presume[s] that a statutory scheme is not intended to create private contractual or vested rights," and imposes "the burden of overcoming that presumption" on the "person who asserts the creation of a contract with the state." *Retired Emp. Ass'n*, 52 Cal. 4th at 1186. Moreover, these rules apply "both in identifying a contract within the language of a statute and in defining the contours of any contractual obligation." *Id.* at 1188 (quoting *Nat'l R.R.*, 470 U.S. at 466).

The case in which this Court formally adopted the California Rule—*Allen v. City of Long Beach*—failed to apply these bedrock principles. *Allen I* held that public employees have a contractual right to continue earning future pension benefits through continued service, and that any reduction to those future benefits should be offset with "comparable new advantages." 45 Cal. 2d at 131. But *Allen I* reached both conclusions without even *mentioning* the Legislature's intent, much less finding that "the statutory language or circumstances accompanying its passage clearly evince[d] a legislative intent to create

private rights of a contractual nature." *Retired Emp. Ass'n*, 52 Cal. 4th at 1187 (ellipsis and quotation marks omitted).

Since *Allen I* was decided, this Court has applied the California Rule on multiple occasions. *See Betts v. Bd. of Admin.*, 21 Cal. 3d 859 (1978); *Allen II*, 34 Cal. 3d 114; *Eu*, 54 Cal. 3d 492. Like *Allen I*, however, these decisions do not mention the clear-statement rule or discuss any evidence of legislative intent. Instead, they rely wholly on *Allen I*'s *ipse dixit* that public employees have a contractual right to continue earning pension benefits for future services. Thus, these decisions have simply repeated *Allen I*'s error.

By judicially creating contractual rights without any evidence that the Legislature intended to do so, the California Rule has caused the precise problems that ordinary Contract Clause analysis was designed to prevent: namely, the Rule "limit[s] drastically the essential powers" of the Legislature by making it virtually impossible to change the rate at which public employees earn pension benefits for future services. *Retired Emp. Ass'n*, 52 Cal. 4th at 1185–86. And that has caused an explosion in pension costs and debt that has "blindsided" the Legislature and the public. *See infra* at Part I.B.3 (describing the

California Rule's devastating economic consequences). The California Rule should be rejected on this ground alone.

2. *The California Rule Creates Contractual Rights That Violate The Reasonable Expectations Of Public Employers And Employees.*

Not only does the California Rule create contractual rights without any evidence of the Legislature's intent, those rights violate the reasonable expectations of public employers and employees. The Rule should be rejected on this ground as well.

Ordinarily, courts can read implied terms into a contract only if those terms are consistent with the reasonable expectations of the parties. *See, e.g.*, *Kashmiri v. Regents of Univ. of Cal.*, 156 Cal. App. 4th 809, 832 (2007) (analyzing whether a term was part of an implied-in-fact contract by "look[ing] to the reasonable expectation of the parties"); *Sappington v. Orange Unified Sch. Dist.*, 119 Cal. App. 4th 949, 954–55 (2004) (rejecting the claim that a school district had to offer retirees free medical insurance because the retirees lacked a "reasonable expectation" of such coverage); *Binder v. Aetna Life Ins. Co.*, 75 Cal. App. 4th 832, 852 (1999) (holding that implied terms must be "reasonable under the circumstances" (quoting Restatement (Second) of Contracts § 204 (1981)).

Here, public employers and employees would reasonably expect pension benefits to be treated like salary. At their core, salary and pension benefits are both "a promise of compensation in exchange for an employee's service." *Moro v. State*, 351 P.3d 1, 20 (Or. 2015). The only real difference is timing: "salary is compensation paid to the employee every two weeks or at the end of each month," whereas "a pension is compensation paid to the employee at retirement." *Id.* Given the similarity of pension benefits and salary, reasonable employers and employees would expect the same basic rules to govern both. *See Kern v. City of Long Beach*, 29 Cal. 2d 848, 855 (1947) (holding that the contractual right to pension benefits arises at the same time as the "contractual duty to make salary payments" and that an employer cannot refuse to pay pension benefits "any more than it can refuse to make the salary payments which are immediately due").

The rules governing salary are simple. When employees provide services, they acquire a contractual "right to the payment of salary which has been earned." *Id.* at 853. But employees do *not* acquire a contractual right to continue earning the same salary in the future. On the contrary, public employees "have no vested right in any particular measure of compensation or benefits," which "may be modified or

reduced by the proper statutory authority." *Butterworth v. Boyd*, 12 Cal. 2d 140, 150 (1938). Indeed, in the absence of a collective-bargaining agreement, employees do not even have a "contractual right to continue in employment beyond the time[,] or contrary to the terms and conditions[,] fixed by law." *Miller v. California*, 18 Cal. 3d 808, 813 (1977); *accord Mississippi ex rel. Robertson v. Miller*, 276 U.S. 174, 178–79 (1928) (applying the same rules under federal law).

In the absence of the California Rule, therefore, public employers and employees would reasonably expect employees to have a contractual right to receive pension benefits that they had already earned through past service. But the parties would *not* expect employees to have a contractual right to continue earning pension benefits at the same rate in the future. Instead, they would expect that the employer could change the rate at which employees earn those benefits in the same way that the employer can change the employees' salary.

The California Rule upends those reasonable expectations. Under that Rule, employees have the "right to earn future pension benefits through continued service." *Eu*, 54 Cal. 3d at 528 (emphasis omitted). And those future pension benefits must be "substantially

equivalent" to the benefits that the employers were entitled to earn on their first day of work. *Id.* That would be like giving employees a contractual right to continue earning the same salary from the day they started work until the day they retired—a right that employees may wish to have, but could not reasonably expect in the absence of a written contract to that effect.

The California Rule becomes even less reasonable when one considers that public employers have other mechanisms to affect their employees' pensions. And if exercised, these mechanisms would be far less attractive to current employees.

As explained above, a retiring employee's pension typically depends on the employee's (1) years of service, (2) final compensation, and (3) age, which determines the rate at which the employee earns pension benefits. The California Rule prohibits employers from changing the rate at which employees earn pension benefits, but freely allows employers to control how many years their employees work and the salary that they receive. Thus, the California Rule allows employers to *indirectly* control pensions by reducing their employees' final salary or by terminating those employees earlier than they otherwise would. *See Miller*, 18 Cal. 3d at 811.

This makes no sense at all. If public employers can change the salaries of their employees—or even fire them—as a way of controlling pensions, it is reasonable to expect that they should be able to achieve the same result directly by changing the rate at which employees earn future pension benefits. Because the California Rule violates these reasonable expectations, this Court should reject it.

3. *The California Rule Fails To Recognize That Not All Contractual Impairments Violate The California And Federal Contract Clauses.*

The California Rule is also legally flawed because it assumes that every impairment of a pension right constitutes a violation of the California and Federal Contract Clauses. But that stretches the Contract Clauses beyond their well-defined limits.

The U.S. Supreme Court has consistently instructed that "the prohibition against impairing the obligation of contracts is not to be read literally." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 502 (1987); *accord Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428 (1934). This Court has agreed, explaining that "the proscription is not an absolute one and is not to be read with literal exactness like a mathematical formula." *Torrance*, 32 Cal. 3d at 377 (quotation marks omitted). Indeed, reading the Contract Clauses that

way would be "destructive of the public interest" by preventing the State from exercising its "sovereign right … to protect the lives, health, morals, comfort and general welfare of the people." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978); *accord Torrance*, 32 Cal. 3d at 377.

Accordingly, a finding of impairment does not end the constitutional analysis. Instead, it "merely moves the inquiry to the next and more difficult question—whether that impairment exceeds constitutional bounds." *Torrance*, 32 Cal. 3d at 377; *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 21 (1977). And to answer that question, courts must examine whether the impairment is "substantial," whether it is justified by a "legitimate public purpose," and whether it is reasonable and necessary. *Energy Reserves*, 459 U.S. at 411–12; *accord Calfarm*, 48 Cal. 3d at 830–31.[2]

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[2] The Alameda County Deputy Sheriffs' Association argues that an impairment is "necessary" only if it is "temporary." Answer Brief on the Merits at 54. Not so. Although "the limited duration of a relief measure" is a "factor[] to be assessed in determining the reasonableness of an impairment," it "cannot be regarded as essential in every case." *U.S. Tr. Co.*, 431 U.S. at 22 n.19; *see also, e.g.*, *Calfarm*, 48 Cal. 3d at 831 (holding that a contractual impairment did not violate the Contract Clauses even though it was not temporary).

The California Rule, however, completely ignores the "more difficult question" of whether an impairment exceeds constitutional bounds. Instead, the Rule provides that any impairment of a pension right *automatically* violates the Contract Clause. For example, in *Legislature v. Eu*, this Court stated that an initiative measure "must be deemed an impairment … of the vested pension rights of incumbent legislators," 54 Cal. 3d at 530, and then concluded—without any analysis of whether the impairment exceeded constitutional bounds—that the initiative was "unconstitutional under the federal contract clause." *Id.* at 534. Other decisions have taken the same approach. *See, e.g.*, *Betts*, 21 Cal. 3d 859; *Allen I*, 45 Cal. 2d 128. Thus, when it comes to pensions, the California Rule apparently—and erroneously—reads the Contract Clause with the "literal exactness [of] a mathematical formula." *Torrance*, 32 Cal. 3d at 377 (quotation marks omitted).

On this point, the California Rule is an extreme outlier. To begin, very few courts agree that public employees have a contractual right to continue earning pension benefits for future services. *See infra* § I.B.2. But even the courts that *do* take that view generally recognize that an impairment of a pension right violates the Contract Clause only if the impairment is "substantial" and is not "reasonable and necessary to

serve a legitimate public purpose." *Lenander v. Wash. State Dep't of Ret. Sys.*, 377 P.3d 199, 210 (Wash. 2016) (en banc).

To be sure, this Court has—on one occasion—held that the impairment of a pension right did not violate the Contract Clauses. *See Allen II*, 34 Cal. 3d at 119. But the California courts have largely treated *Allen II* as a one-off deviation from the California Rule rather than a meaningful limitation on it. Thus, to the extent the Rule imposes a ban on any impairment of pension rights, it should be rejected.

B. Stare Decisis Cannot Save The California Rule.

The unions do not defend the merits of the California Rule; instead, they rely entirely on stare decisis. *See, e.g.*, Public Employees Union Answer Br. at 49–51. But the doctrine of stare decisis is "flexible" and "should not shield court-created error from correction." *In re Estate of Duke*, 61 Cal. 4th 871, 893 (2015) (quotation marks omitted). That is particularly true in cases like this one, where "the error in the prior opinion is related to a matter of continuing concern to the community at large." *Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal. 4th 85, 93 (1995) (brackets and quotation marks omitted). For the reasons given below, stare decisis cannot save the California Rule.

1. *The California Rule Was Not Well Reasoned.*

This Court has demonstrated an increased willingness to overrule past decisions that were not well reasoned. *See Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Ass'n*, 55 Cal. 4th 1169, 1180 (2013). Here, the California Rule emerged from a series of cases that spent little time identifying, much less addressing and weighing, the arguments for and against the Rule. As a result, it is not entitled to stare-decisis effect.

As noted above, this Court adopted the California Rule in *Allen I*. There, one of the questions presented was whether the City could prospectively modify the rate at which public employees earned pension benefits for future services, specifically by raising the required employee contribution from 2% to 10%. 45 Cal. 2d at 130. That was a novel question—the Court had previously held that public employees had a contractual right to the benefits that they had *already earned*, but the Court had never addressed whether employees had a contractual right to benefits they had *not yet earned*. *See Kern*, 29 Cal. 2d at 855.

But the parties did not treat the question as novel. On the contrary, they 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. *See* Pet'n for Hr'g, Civil Nos. 19866 and 19867, at 20 (Cal. Feb. 11, 1955) (arguing that the Court of Appeal's decision conflicted with "the principles announced by this court" in *Kern* and its progeny); Answer to Pet'n for Hr'g, Civil Nos. 19866 and 19867, at 35 ("The City is seeking to uphold the validity of the amendment under the rule announced by this court in the *Kern* case[.]").

After simply assuming that public employees had a contractual right to continue earning pension benefits for future services, the parties stipulated that the case could be decided *without merits briefing or oral argument*. Stipulation, Civil Nos. 19866 and 19867 (Apr. 27, 1955). As a result, the parties *never* analyzed whether public employees had a contractual right to continue earning pension benefits at the same rate. Because the Court "was not aided by any argument or presentation of authorities" on this question, the resulting decision has less precedential weight. *Becker v. Superior Court*, 151 Cal. 313, 316 (1907).

The *Allen I* decision likewise "discloses little or no consideration given to the point," which also reduces its precedential value. *See* 9 Witkin, Cal. Proc. 5th Appeal § 535 (2008). *Allen I* held that "[a]n employee's vested contractual pension rights may be modified" only if

the modifications "bear some material relation to the theory of a pension system and its successful operation," and offset any "disadvantage to employees" with "comparable new advantages." 45 Cal. 2d at 131. But *Allen I* did not even *attempt* to explain why employees had a "vested contractual pension right[]" to benefits that they had *not yet earned.* Although that was the key issue in the case, *Allen I* did not devote even a single sentence to the matter.[3]

Because *Allen I* resolved this question without any discussion, the decision did not explain why it was departing from the long-standing rule that statutes create contractual rights only when the Legislature clearly intends to do so. That clear-statement rule had existed for decades, yet *Allen I* disregarded it without any explanation.

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[3] To be sure, *Allen I* cited three prior cases when announcing this new test. 45 Cal. 2d at 131 (citing *Kern*, *Packer v. Bd. of Ret.*, 35 Cal. 2d 212 (1950), and *Wallace v. City of Fresno*, 42 Cal. 2d 180 (1954)). But none of those cases were on point. As explained above, *Kern* established the test for modifying pension benefits that employees had already earned, but did not say anything about unearned benefits. 29 Cal. 2d at 855. Likewise, *Wallace* involved an amendment that terminated "all pension rights upon conviction of a felony after retirement"—in other words, it too involved the elimination of pension benefits that employees had already earned. 42 Cal. 2d at 185. And *Packer* actually held that the statutory modification at issue "was *not* an unconstitutional impairment of [a contractual] obligation." 35 Cal. 2d at 219 (emphasis added). Thus, none of these cases support *Allen*'s holding that public employees have a contractual right to continue earning pension benefits for future services.

See Taylor v. Bd. of Ed., 31 Cal. App. 2d 734, 746 (1939) (recognizing the clear-statement rule); *New Jersey v. Yard*, 95 U.S. 104, 116 (1877) (same). Because *Allen I* "departed from an established general rule without discussing the contrary authority, its weight as precedent is diminished." *Riverisland*, 55 Cal. 4th at 1180.

Later cases have done nothing to shore up *Allen I*'s weaknesses. These cases faithfully apply the California Rule, but do not explain why employees have a contractual right to continue earning pension benefits for future services. *See, e.g.*, *Betts*, 21 Cal. 3d 859; *Allen II*, 34 Cal. 3d 114; *Eu*, 54 Cal. 3d 492. These decisions have simply "enabled the thinking engendered by [the California Rule] to survive by default." *De Burgh v. De Burgh*, 39 Cal. 2d 858, 867 (1952). As a result, they do nothing to increase the California Rule's precedential value.

2. *The California Rule Has Been Widely Rejected.*

This Court has also demonstrated an increased willingness to overrule prior decisions when they are "contrary to the general law as reflected in other cases, including out-of-state cases before and after the decision." *Fluor Corp. v. Superior Court*, 61 Cal. 4th 1175, 1223 (2015). When examining whether a decision is "contrary to the general law," this Court looks at cases that "have expressly acknowledged, but

declined to follow," that decision, and at cases that have "implicitly rejected" it. *Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 46 Cal. 3d 287, 297 (1988).

Both federal and state courts have widely rejected the California Rule. As explained above, the Rule has three key components: (1) pension statutes automatically create contractual rights without any evidence of legislative intent; (2) those contractual rights include the right to continue earning pension benefits in the future without any decrease in the rate of accrual, and (3) any impairment of those rights automatically violates the Contract Clauses. *See supra* at 26–28. Outside of California, both federal and state courts have almost uniformly rejected one or more of these three components.[4]

Federal courts have rejected the claim embodied in the California Rule that pension statutes create contractual rights without any evidence of legislative intent. For example, the Eleventh Circuit held

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[4] The cases discussed in this section involved the Federal Contract Clause or another State's Contract Clause. As this Court has recognized, the California and Federal Contract Clauses are "parallel proscription[s]," *Allen II*, 34 Cal. 3d at 119, and other States' Contract Clauses "are interpreted essentially identically and given the same effect" as the Federal Contract Clause. 16B Am. Jur. 2d Constitutional Law § 753. Thus, all of these provisions should be interpreted in the same way.

that, when examining whether a pension statute creates contractual rights, courts must "proceed cautiously both in identifying a contract ... and in defining the contours of any contractual obligation.'" *Taylor v. City of Gadsden*, 767 F.3d 1124, 1133 (11th Cir. 2014). The First Circuit has done likewise. *See Parker v. Wakelin*, 123 F.3d 1, 7–8 (1st Cir. 1997).

In addition, the Eleventh Circuit has rejected the claim contained in the California Rule that employees have a contractual right to continue earning pension benefits for future services. In *Taylor*, the plaintiffs argued that the Alabama legislature made an "implied promise not to raise the employee contribution rate once a firefighter becomes eligible for retirement benefits." 767 F.3d at 1134. The court could "find neither hide nor hair of such a promise" in the Alabama Code, and concluded that the alleged right did not exist. *Id.* at 1134–36.

Non-California state courts have likewise rejected essential elements of the California Rule. For example, several state courts have rejected the claim that courts can define the scope of an employee's pension rights without examining legislative intent. *See, e.g.*, *Moro*, 351 P.3d at 24, 36; *Justus v. State*, 336 P.3d 202, 210 (Colo. 2014) (en banc). Other state courts have rejected the claim that employees acquire

a contractual right to pension benefits on their first day of employment. *See, e.g.*, *Jones v. Cheney*, 489 S.W.2d 785, 791 (Ark. 1973); *Pineman v. Oechslin*, 488 A.2d 803, 808 (Conn. 1985). And other state courts have rejected the claim that the state cannot reduce the rate at which employees earn pension benefits for future services. *See, e.g.*, *Moro*, 351 P.3d at 37, *Scott v. Williams*, 107 So. 3d 379, 389 (Fla. 2013).

All told, California stands nearly alone among States in its acceptance of all of the elements of the California Rule. Of the 35 states that have addressed whether a modification of pension benefits violates the Contract Clause, at least 14 states have *expressly* rejected one or more elements of the Rule, and at least 19 states have *implicitly* rejected one or more elements of it. *See* Appendix. In contrast, only two states—other than California—appear to accept all elements of the Rule. *See Calabro v. City of Omaha*, 531 N.W.2d 541, 551 (Neb. 1995); *Pub. Emp. Ret. Bd. v. Washoe Cty.*, 615 P.2d 972, 974–75 (Nev. 1980). Although not controlling, the "clear consensus of these out-of-state cases strongly calls into question the validity" of the California Rule. *Moradi-Shalal*, 46 Cal. 3d at 298 (reaching the same conclusion about

an erroneous precedent that had been expressly rejected by eight courts, implicitly rejected by nine, and adopted by only two).[5]

Most striking of all, at least five states originally adopted the entire California Rule before later modifying or overruling their prior decisions. *See Justus*, 336 P.3d at 210 (Colorado); *Madden v. Contributory Ret. Appeal Bd.*, 729 N.E.2d 1095, 1098 (Mass. 2000); *Moro*, 351 P.3d at 36 (Oregon); *Booth v. Sims*, 456 S.E.2d 167, 184–85 (W. Va. 1995), *modified* (Mar. 24, 1995); *Wash. Educ. Ass'n v. Wash. Dep't of Ret. Sys.*, 332 P.3d 439, 444 (Wash. 2014). For example, in

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[5] Seven states have adopted constitutional provisions that expressly protect pension benefits. *See* Alaska Const. art. XII, § 7; Ariz. Const. art. XXIX, § 1; Haw. Const. art. XVI, § 2; Ill. Const. art. XIII, § 5; La. Const. art. X, § 29; Mich. Const. art. IX, § 24; N.Y. Const. art. V, § 7. Even in these states, however, many courts have held that the legislature did not clearly intend to make future pension benefits untouchable. For example, the Hawaii Supreme Court held that "the legislature could reduce [pension] benefits … as to persons already in the system in so far as their future services were concerned." *Everson v. State*, 228 P.3d 282, 299 (Haw. 2010) (brackets, emphasis, and quotation marks omitted). In addition, the Louisiana Supreme Court has held that, until employees are eligible for retirement, "the details of a contributory retirement system, such as rate of contribution, benefits, length of service, and age requirements could be modified to the prejudice of the employee." *Smith v. Bd. of Tr. of La. State Emp. Ret. Sys.*, 851 So. 2d 1100, 1107 (La. 2003). And notwithstanding Michigan's constitutional protection of pensions, the Michigan Supreme Court held that the "form or availability of *future* pension benefits for state employees is not governed by [the state constitution]." *AFT Mich. v. State of Michigan*, 866 N.W.2d 782, 806 n.24 (Mich. 2015).

1996, the Oregon Supreme Court adopted the California Rule, holding that the right to pension benefits "vest[s] on acceptance of employment … with vesting encompassing not only work performed but also work that has not yet begun." *Or. State Police Officers' Ass'n v. State*, 918 P.2d 765, 773 & n.14 (Or. 1996) (citing *Allen I*, 45 Cal. 2d 128). But in 2015, the court "disavow[ed] the reasoning" in *Oregon State Police Officers' Association*. *Moro*, 351 P.3d at 36. The court held that "the standard of clear and unmistakable contractual intent applies to both the question of whether there is an offer to form a contract and also to whether a particular provision is a term of that offer." *Id.* at 24. And the court held that pension benefits could be "changed prospectively … for work that is yet to be performed." *Id.* at 37. The Court should reach the same conclusion here.

3. *The California Rule Has Had Devastating Economic Consequences For Public Employers, Public Employees, And All California Citizens.*

This Court has also demonstrated an increased willingness to reconsider prior cases that have had "adverse social and economic consequences." *Moradi-Shalal*, 46 Cal. 3d at 301. That is certainly the case here. The California Rule has made it virtually impossible for the State to reform its pension system, which has led to a looming fiscal

crisis. And the Rule has actively harmed public employees—by limiting their ability to negotiate the ideal compensation package, by effectively preventing them from investing their retirement savings in something other than a government pension fund, and by giving employers an incentive to cut employees' salary or even terminate them. That provides yet another reason why this Court should reject the California Rule.

The primary problem with the California Rule is its impact on pension costs. Over the past 15 years, those costs have soared—for example, the Nation Report examined 14 California jurisdictions and found that pension costs during that period rose by more than *400%* on average. Nation Report at x. And they are still rising. Between now and 2029–30, costs are expected to increase another 73% if the pension systems reach their investment targets, and 113% if they miss those targets by as little as 2%. *Id.* at 77. That means that, if investment returns are lower than expected, total pension costs in 2029–30 could be nearly *900%* higher than they were in 2002–03. *Id.*[6]

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[6] For years, pension systems have struggled to hit their investment targets. To take one major example, between 2008 and 2017, CalPERS has assumed an investment return of 7.5875%, but earned only 6.091%. *See* CalPERS, *Investment & Pension Funding:*

The cost of many county systems—such as the Alameda County Employees' Retirement Association (ACERA)—has increased at a similar pace. In 2002–03, Alameda County contributed $80 million to ACERA. *Id.* at 18. In 2017–18, these contributions are expected to reach roughly $346 million—an increase of more than *300%*. *Id.* And by 2029–30, Alameda County will likely need to contribute between $433 million and $639 million, depending on its investment returns. *Id.* at 18–19. In other words, Alameda County will likely be contributing between *400%* and *nearly 700%* more than it was in 2002–03. *See id.*[7]

Despite this rapid increase in contributions, pension systems are falling further and further into debt. Between 2008 and 2015, the 14 jurisdictions studied in the Nation Report saw their unfunded liabilities rise from $11.8 billion to nearly $120 billion—an increase of more than *900%*. *Id.* at 84. And by 2029, those jurisdictions will likely have

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Facts at a Glance for Fiscal Year 2016-17, at 1 (last viewed on Sept. 21, 2018), https://goo.gl/Tw8MwM.

[7] ACERA is less likely to meet its investment targets than most pension plans. For starters, ACERA's target is 7.60%, which is "higher than the rates now in use by other California public sector plans." Nation Report at 17. In addition, ACERA assumes it will reach that goal after deducting investment and administrative expenses, as well as 50% of any earnings over 7.60% in a given year. *Id.* As a result, ACERA is implicitly assuming that its "investment returns will average 9.35% per year." *Id.*

unfunded liabilities of $105.9 billion to $180.4 billion, depending on their investment returns. *Id.*[8]

Once again, many of the county pension systems are no better off. Between 2008 and 2016, ACERA's unfunded liability spiked from $1.3 billion to $2.0 billion. *Id.* at 20. And by 2029, ACERA's unfunded liability will likely be between $1.1 billion and $3.5 billion, depending on investment returns. *Id.* For perspective, a $3.5 billion unfunded liability would be equal to a debt of more than *$5,600 per Alameda County household. Id.* at 21.

The California Rule gives governments only one option to rein in pension costs—reduce pension benefits for new employees. As the Little Hoover Commission explained, however, the problems with public pensions "cannot be solved without addressing the pension liabilities of *current* employees," and governments cannot address those liabilities without "the authority to restructure future, unearned

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[8] Most pension systems measure their debt on an actuarial basis, which assumes that the system will earn its expected investment return. *See* Nation Report at 4. Although this brief takes the same approach, many prominent economists believe that systems should measure their debt on a market basis, which assumes that the system will earn a return that matches the yield on 20-year U.S. Treasury bonds. Adopting a market-based approach would result in even higher estimates of pension debt.

retirement benefits." Little Hoover Comm'n at v (emphasis added). That is *precisely* what the California Rule forbids.

This rising tide of pension costs and debt is directly harming California citizens. The Little Hoover Commission predicted that, "[w]ithout new revenue or reducing pension obligations, governments will have to pull heavily from other parts of their budgets to afford the bill." *Id.* at 24. And over the past few years, that is precisely what State and local governments have been doing.

In 2002–03, the governments studied in the Nation Report were spending 3.9% of their budget on pensions. Nation Report at x. By 2017–18, however, that figure had risen to 11.4%. *Id.* To make room for this increased pension spending, "governments have reduced social, welfare and educational services, as well as ... libraries, recreation, and community services." *Id.* at xi. And by 2029–30, these governments could see pension spending eat up 17.5% of their total budget—more than *one-sixth* of all spending—which would force them to cut important services still further. *Id.*

The same is true of many counties, such as Alameda. In 2002–03, Alameda County was spending 5.1% of its budget on pensions. *Id.* at 21. By 2017–18, that figure had almost tripled to 13.4%. *Id.* To fund

that increase, Alameda County had to cut $214 billion from its 2017–18 budget, most of which came from the Public Assistance, Public Protection, and Health Care portions of the budget. *Id.* And by 2029–30, Alameda County will likely be spending between 11.4% and 16.8% of its budget on pensions. *Id.* at 22.

These "crowd out" effects can be even more painful in smaller jurisdictions. For example, the City of Vallejo saw its pension contributions zoom from 3.1% of operating expenses in 2003–04 to 15.2% in 2017–18. *Id.* at 58. To pay for that astronomical increase and other rising costs, the City had no choice but to slash its workforce. From 2004 to 2014, the City cut employment in its police department from 221 to 143, and in its fire department from 122 to 94. *Id.* at 60. And by 2029–30, the City will likely be spending between 23.7% and 27.3% of its total budget on pensions—an increase of *665% to 781%.* *Id.* at 61. That could force the City to cut the police and fire departments by another 33%, or cut the budget by 12% across the board. *Id.* at 61. Quite literally, the City has been forced to put pensions ahead of solving crimes and putting out fires.

The California Rule does more than wreak havoc on governmental budgets and jeopardize public health and safety—it also

harms the very public employees it was meant to protect. The Rule does so in at least three ways.

First, the California Rule limits public employees' ability to negotiate the ideal compensation package. Most jobs involve a mix of compensation, such as salary, pension benefits, and health benefits. *See* Alexander Volokh, *Overprotecting Public Employee Pensions: The Contract Clause and the California Rule*, The Federalist Society 13 (2013). And the ideal mix is always changing—for example, employees may wish to receive a higher percentage of their overall compensation as pension benefits when long-term interest rates are high and a lower percentage when those rates are low. *See* Jeremy Bulow, *The "California Rule" and Public Pensions*, Stanford Institute for Economic Policy Research 5–7 (2017), https://goo.gl/udKGgN. But the California Rule makes it impossible for employees to trade an increase in salary for a decrease in their future pension earnings, even when they prefer to do so.

Second, the California Rule effectively prevents public employees from investing their retirement savings as they see fit. Some employees may feel comfortable investing all (or most) of their retirement savings in a government pension plan. But others might

not—they might have a different tolerance for investment risk than the plan's trustees, might want to diversify their assets, or might fear that the pension plan is headed for bankruptcy and wish to invest in something more solvent. *See* Jack M. Beermann, *The Public Pension Crisis*, 70 Wash. & Lee L. Rev. 3, 5 (2013); Bulow, *supra* at 7–8. These employees, therefore, would have a strong incentive to reduce the rate at which they earn pension benefits in exchange for a higher current salary, which they could then invest in other assets. Yet again, the California Rule makes it impossible for employees to make that trade.

Third, the California Rule gives public employers an incentive to cut employees' salary or even terminate them. When the budget is squeezed, State and local governments have few choices to control costs other than cutting salaries and laying off employees. Nation Report at 86; *supra* at 58. Thus, as pension contributions put more and more strain on the budget, public employees will find themselves increasingly harmed by a rule that forces their employers to put pension contributions above all else.

4. ***The Unions' Arguments For The California Rule Lack Merit.***

The unions try to bolster the California Rule in several ways, but their attempts fall woefully short.

The unions first argue that the California Rule should be preserved because it has existed for "decades." Public Employees Union Answer Br. at 50. Although courts generally give more stare-decisis effect to longstanding precedents, that is not an absolute rule—particularly for precedents that were not well reasoned, have been widely rejected, and have had devastating economic consequences. *See supra* §§ I.B.1–I.V.3. For example, this Court has previously overruled a 56-year-old precedent, *Sierra Club v. San Joaquin Local Agency Formation Comm'n*, 21 Cal. 4th 489, 510 (1999); a 46-year-old precedent, *People v. Cahan*, 44 Cal. 2d 434, 445 (1955); and a 23-year-old precedent, *Phelan v. Superior Court*, 35 Cal. 2d 363, 370 (1950). Likewise, the Colorado and Oregon Supreme Courts recently overruled precedents that had adopted the California Rule, even though they were also longstanding. *See Justus*, 336 P.3d at 210 (overruling 53- and 55-year-old precedents); *Moro*, 351 P.3d at 36 (overruling a 19-year-old precedent). Thus, the California Rule's age "should not shield [this] court-created error from correction." *Duke*, 61 Cal. 4th at 893 (quotation marks omitted).

The unions also argue that the California Rule has "engendered reliance" and is "the backdrop against which the Legislature, hundreds

of pension systems, related laws, employers, and employees all operate." Public Employees Union Answer Br. at 50. But that argument fails for several reasons.

First, even if the California Rule is rejected, employees will still have contractual rights to benefits that they have already earned through past services. *See supra* § I.A.2. That will mitigate disruption to employees.

Second, and more significantly, the California Rule has led public employees to rely on promises that public employers *will not be able to keep*. Over time, increasing pension costs will force State and local governments to cut essential services and could eventually drive them into bankruptcy. *See supra* § I.B.3. And in bankruptcy, these governments may be forced to reduce the rate at which employees earn pension benefits for future services, or even eliminate benefits that employees have already earned. *See, e.g.*, *In re City of Detroit*, 524 B.R. 147, 179–80 (Bankr. E.D. Mich. 2014) (confirming a bankruptcy plan that reduced the rate at which active employees earned pension benefits, reduced already-earned benefits by 4.5%, and eliminated cost-of-living increases); Hilary Russ, *Judge Affirms Central Falls, R.I. Bankruptcy Plan*, Reuters, Sept. 6, 2012, https://goo.gl/6mERYC (explaining that,

after Central Falls went bankrupt, it reduced pensions for current retirees by 25% for the first five years and up to 55% after that). As this Court has recognized, the Contract Clauses are "intended to preserve practical and substantial rights, not to maintain theories." *San Francisco Taxpayers Ass'n v. Bd. of Supervisors*, 2 Cal. 4th 571, 583–84 (1992). Thus, the Court should not allow stare decisis to encourage further reliance on pension rights that may be more theoretical than real.

Third, overruling the California Rule now, rather than waiting for retirement systems to go bankrupt, will actually *protect* the pension benefits that employees have already earned. When retirement systems go deeply into debt, history shows that they often take on increasing levels of risk in an attempt to dig themselves out. And often times, those strategies do not pay off. Retirement systems might invest in riskier assets, only to see increased losses when the market declines. Or the government might sell pension obligation bonds, which has led to significant losses. *See* Nathan Bomey & John Gallagher, *How Detroit Went Broke*, Detroit Free Press, Sept. 15, 2013, https://goo.gl/SNViYh (explaining that Detroit sold $1.4 billion in bonds in 2005, but lost $2.8 billion on the deal); Mary Williams Walsh, *How Plan to Help City Pay Pensions Backfired*, N.Y. Times, Sept. 3, 2012, https://goo.gl/QPpmpv

(explaining that Stockton sold $125 million in bonds in 2007, and had to go into bankruptcy when the strategy failed). If public employers had the option to prospectively reduce benefits *before* the plan is deeply underwater, they could avoid these risks and the harmful impact on employees.

To be sure, overruling the California Rule would cause some disruption to public employees who thought that they would continue earning pension benefits at the same rate until they retired. But the alternative is far worse. Thus, the unions' reliance argument cannot save the California Rule.[9]

* * *

The California Rule is wrong on the merits, was not well reasoned, has been widely rejected, and will have devastating economic effects. The Rule is deeply destructive and should be rejected along with the cases that adopted it.

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[9] If this Court nonetheless finds that the California Rule has engendered too much reliance to reject it outright, the Court could keep the Rule in force for current employees but refuse to apply it to all new hires. *See Johnson v. Dep't of Justice*, 60 Cal. 4th 871, 888 (2015) ("[T]he federal and state Constitutions do not prohibit an appellate court from restricting retroactive application of an overruling decision on grounds of equity and public policy.").

II. UNDER ORDINARY CONTRACT CLAUSE ANALYSIS, THE PENSION REFORM ACT IS CONSTITUTIONAL.

Instead of applying the California Rule, this Court should apply the same analysis to pension benefits that it applies to other contractual rights. Using that analysis, the Pension Reform Act did not violate the Contract Clause by prohibiting pension spiking.

A. The Pension Reform Act Does Not Impair a Contractual Right.

When conducting an ordinary Contract Clause analysis, the first question that a court must ask is whether the State has impaired "an existing contractual relationship." *Torrance*, 32 Cal. 3d at 377. To answer that question, the court must determine whether a contract exists; if so, what its terms are; and whether the State has altered any of those terms. *See id.*; *accord Nat'l R.R.*, 470 U.S. at 472–73.

As an initial matter, once an employee "has accepted employment and performed work for a public employer," an implied contractual relationship exists. *White v. Davis*, 30 Cal. 4th 528, 566 (2003); *accord Robertson*, 276 U.S. at 178–79. Thus, the question is about the scope of the contract—namely, whether it includes a right to the pension-spiking practices at issue here. Under this Court's precedent, "it is presumed that a statutory scheme is not intended to

create private contractual or vested rights," and the unions have "the burden of overcoming that presumption." *Retired Emp. Ass'n*, 52 Cal. 4th at 1186.

The unions cannot carry that burden. The Pension Reform Act prohibited certain types of pension spiking, such as payments determined by a retirement board "to have been paid to enhance a member's retirement benefit," Gov. Code § 31461(b)(1); payments for unused leave "in an amount that exceeds that which may be earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid," *id.* § 31461(b)(2); and payments for "additional services rendered outside of normal working hours," *id.* § 31461(b)(3). As the State of California has thoroughly explained, however, the Act merely clarified that these pension-spiking practices were *already unlawful*. *See* California's Opening Br. at 28–40. Thus, employees "never acquired vested rights to enhance their pensions contrary to [the Act's] prohibitions because the pension-spiking practices at issue were never consistent with prior law." *Id.* at 28. Because employees lacked a contractual right to spike their pensions, the Pension Reform Act did not violate the Contract Clauses.

B. Even If The Pension Reform Act Impaired A Contractual Right, That Impairment Would Not Violate The California Or Federal Contract Clauses.

If the Court concludes that the unions had a contractual right to spike their pensions, the Court should nevertheless hold that the impairment of that right does not "exceed[] constitutional bounds." *Torrance*, 32 Cal. 3d at 377; *accord Nat'l R.R.*, 470 U.S. at 472. There are two reasons for such a holding: first, any impairment is not substantial, and second, any impairment is reasonable and necessary to serve a legitimate public purpose.

As explained above, an impairment violates the Contract Clauses only if it is "substantial." *Energy Reserves*, 459 U.S. at 411–12; *accord Calfarm*, 48 Cal. 3d at 830–31. In addition, laws that "restrict a party to those gains reasonably to be expected from the contract" do not qualify as substantial impairments. *City of El Paso v. Simmons*, 379 U.S. 497, 515 (1965). Thus, such contracts are "not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of a contract." *Id.*

Here, the elimination of pension spiking would not qualify as a substantial impairment. As the State of California has explained, eliminating pension spiking "did not meaningfully alter the basic

conditions under which [employees] could earn a pension." California's Opening Br. at 48 (quotation marks omitted). An employee's pensionable compensation still includes "base salary, limited cashouts of unused leave, and premium payments." *Id.* It still includes "[c]ompensation both earned and payable during the final compensation period." *Id.* And "the definition of the final compensation period and the defined benefit formula applicable to legacy employees remain the same." *Id.* At most, the elimination of pension spiking has simply restricted employees "to those gains reasonably to be expected from the[ir] contract" with the State." *City of El Paso*, 379 U.S. at 515. Such a change does not violate the California or Federal Contract Clauses.

Moreover, even a substantial impairment does not violate the Contract Clauses if it is "reasonable" and necessary to serve a "legitimate public purpose." *Energy Reserves Grp.*, 459 U.S. at 411; *accord Calfarm*, 48 Cal. 3d at 830–31. As the State has explained, pension-spiking loopholes "allow[] employees to game the system and inflate their pensions in ways never completed by the Legislature, with heavy multi-decade financial repercussions for county taxpayers." California's Opening Br. at 50. Eliminating these loopholes is therefore

reasonable and "necessary to reducing manipulation of [county pension] systems, ensuring that like payments (standby pay and overtime pay) [are] treated consistently, and ultimately protecting county taxpayers from abusive practices." *Id.*

CONCLUSION

The California Rule has delivered a strong one-two punch: first, it caused State and local governments to be blindsided by unexpected pension obligations, and second, it robbed them of the only tools they had to deal with the problem. As long as the California Rule exists, the State's pension crisis cannot be solved.

Moreover, there is no reason to hold on to the California Rule. It is inconsistent with settled constitutional and contractual principles, was adopted with little consideration, has been widely rejected by other courts, and has had catastrophic economic consequences. As such, the Roundtable respectfully requests that this Court reject the California Rule and overrule the cases that adopted it.

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APPENDIX

The California Rule has three key components: (1) pension statutes automatically create contractual rights without any evidence of legislative intent; (2) those contractual rights include the right to continue earning pension benefits in the future without any decrease in the rate of accrual, and (3) any impairment of those rights automatically violates the Contract Clauses. *See supra* at 26–28. As explained below, of the 35 states that have addressed whether a modification of pension benefits violates the Contract Clause, at least 14 have *expressly* rejected one or more elements of the Rule, and at least 19 have *implicitly* rejected one or more elements of it.

I. STATES THAT HAVE EXPRESSLY REJECTED ONE OR MORE ELEMENTS OF THE CALIFORNIA RULE

- Arkansas, *see Jones v. Cheney*, 489 S.W.2d 785, 790–91 (Ark. 1973) (acknowledging the California Rule's claim that employees obtain contractual rights to their pension benefits "upon the acceptance of employment," but holding that the employee at issue acquired contractual rights only "when he fulfilled the service requirements created by the Act");
- Colorado, *see Justus v. State*, 336 P.3d 202, 210 (Colo. 2014) (en banc) (overruling prior decisions that had adopted the California Rule and holding that pension statutes are "subject to the presumption that the legislature does not intend to bind itself contractually and does not intend to create a

contractual right unless the legislature provides a clear indication of its intent to be bound");

- Connecticut, *see Pineman v. Oechslin*, 488 A.2d 803, 808 (Conn. 1985) (acknowledging the California Rule, but holding that "a [pension] statute does not create vested contractual rights absent a clear statement of legislative intent");

- Kansas, *see Denning v. Kan. Pub. Emp. Ret. Sys.*, 180 P.3d 564, 570 (Kan. 2008) (acknowledging the California Rule's claim that "changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages," but holding that "there may be times when pension system changes are necessary for the greater good, even if an individual employee or retirant may suffer some marginal disadvantage" (quotation marks omitted));

- Maine, *see Budge v. Town of Millinocket*, 55 A.3d 484, 489 (Me. 2012) ("Nearly twenty years ago, we aligned our jurisprudence with that of courts reluctant to conclude that a legislative enactment creates a contractual obligation without language expressing an intent to create such rights. In doing so, we rejected a more liberal approach known as the California Rule.");

- Massachusetts, *compare Opinion of the Justices*, 303 N.E.2d 320, 327–28 (Mass. 1973) (accepting the California Rule's claim that an employee acquires contractual rights to his pension benefits when he "becomes a member [of the retirement system] by entering the [State's] employment," and that the member "is entitled to have the level of rights and benefits then in force preserved in substance in his favor without modification downwards"), *with Madden v. Contributory Ret. Appeal Bd.*, 729 N.E.2d 1095, 1098 (Mass. 2000)

(approving a pension-benefit reduction that was not offset by a comparable new advantage);

- New Jersey, *see Spina v. Consol. Police & Firemen's Pension Fund*, 197 A.2d 169, 173, 175 (N.J. 1964) (citing *Allen I*, but holding that employees do not have contractual rights to their pension benefits because "the terms and conditions of public service in office or employment rest in legislative policy rather than contractual obligation");

- Ohio, *see State ex rel. Horvath v. State Teachers Ret. Bd.*, 697 N.E.2d 644, 653, 654 (Ohio 1998) (acknowledging the California Rule, but holding that courts must "begin with a presumption that, absent a clearly stated intent to do so, statutes do not create contractual rights that bind future legislatures");

- Oklahoma, *see Baker v. Okla. Firefighters Pension & Ret. Sys.*, 718 P.2d 348, 351–53 (Okla. 1986) (acknowledging that "[s]ome jurisdictions have expressed the view that … the contract regarding retirement comes into existence and provides protectible interests at the time of employment," but holding that "under Oklahoma law the right to the retirement pension benefits … becomes absolute at the time those benefits become payable to those eligible");

- Oregon, *see Moro v. State*, 351 P.3d 1, 24, 36 (Or. 2015) (disavowing the reasoning of a prior decision that had adopted the California Rule and holding that "the standard of clear and unmistakable contractual intent applies to both the question of whether there is an offer to form a contract and also to whether a particular provision is a term of that offer");

- Pennsylvania, *see Harvey v. Ret. Bd.*, 141 A.2d 197, 200, 203 & n.2 (Penn. 1958) (acknowledging the California Rule's claim that any modification of a pension statute must "result in new advantages to employe[e]s which offset any disadvantages imposed," but holding that employees who are not eligible for retirement "may be subject to legislation which changes the terms of the retirement contract if the change is a reasonable enhancement of the actuarial soundness of the retirement fund");

- Tennessee, *see Blackwell v. Quarterly Cty. Court*, 622 S.W.2d 535, 543 (Tenn. 1981) (acknowledging the California Rule, but holding that "the Pennsylvania rule … is more in accord with the public interest requiring a reasonable amount of flexibility on the part of the public employer and with the legislative policies referred to above");

- Washington, *compare Bakenhus v. City of Seattle*, 296 P.2d 536, 540 (Wash. 1956) (adopting the California Rule), *with Wash. Educ. Ass'n v. Wash. Dep't of Ret. Sys.*, 332 P.3d 439, 444 (Wash. 2014) (clarifying that, "when analyzing whether a law impairs public pension contracts," courts "will apply the same three-part test governing all public contracts" including whether the impairment is "substantial" and "is reasonable and necessary to serve a legitimate public purpose"); and

- West Virginia, *see Booth v. Sims*, 456 S.E.2d 167, 184 (W. Va. 1995), *modified* (Mar. 24, 1995) (overruling a prior decision that had adopted the California Rule and holding that "[c]hanges can be made with regard to employees with so few years of service that they cannot be said to have substantially relied to their detriment" on their pension benefits).

II. STATES THAT HAVE IMPLICITLY REJECTED ONE OR MORE ELEMENTS OF THE CALIFORNIA RULE

- Alabama, *see Bd. of Tr. of Policemen's & Firemen's Ret. Fund v. Cary*, 373 So. 2d 841, 843 (Ala. 1979) (per curiam) (holding that employees acquire contractual rights to their pension benefits only after completing the service requirement);

- Delaware, *see Petras v. State Bd. of Pension Tr.*, 464 A.2d 894, 896 (Del. 1983) (holding that employees acquire contractual rights to their pension benefits only "upon fulfillment of the eligibility requirements");

- Florida, *see Scott v. Williams*, 107 So. 3d 379, 389 (Fla. 2013) (holding that the legislature could "prospectively alter[] benefits for future service performed");

- Georgia, *see Borders v. City of Atlanta*, 779 S.E.2d 279, 287 (Ga. 2015) (approving a prospective increase in employee contributions);

- Idaho, *see McNichols v. Pub. Emp. Ret. Sys.*, 755 P.2d 1285, 1286 (Idaho 1988) (holding that "the legislature can prospectively reduce the rate at which public employees earn retirement benefits");

- Iowa, *see Grandia v. City of Oskaloosa*, 405 N.W.2d 849, 852 (Iowa 1987) (holding that employees acquire contractual rights to their pension benefits only after completing the service requirement);

- Kentucky, *see City of Louisville v. Bd. of Educ.*, 163 S.W.2d 23, 25 (Ky. 1942) (holding employees acquire contractual rights to their pension benefits only after becoming a beneficiary);

- Maryland, *see City of Frederick v. Quinn*, 371 A.2d 724, 726 (Md. 1977) (holding that employees acquired contractual rights to their pension benefits "as they were proratedly earned, just as the employees' rights to their salary vested as it was earned");

- Minnesota, *see Christensen v. Minneapolis Mun. Emp. Ret. Bd.*, 331 N.W.2d 740, 751 (Minn. 1983) (holding that the state can impair pension contracts if there is a "significant and legitimate public purpose behind the legislation," and if the modification is reasonable and necessary);

- Missouri, *see Atchison v. Ret. Bd. of Police Ret. Sys.*, 343 S.W.2d 25, 34 (Mo. 1960) (holding that employees acquire contractual rights to their pension benefits only after becoming beneficiaries);

- New Hampshire, *see Am. Fed'n of Teachers v. State*, 111 A.3d 63, 69 (N.H. 2015) (holding that, when examining whether a pension statute creates contractual rights, courts must "proceed cautiously both in identifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligation");

- New Mexico, *see Pierce v. State*, 910 P.2d 288, 301 (N.M. 1995) (refusing to interpret pension statutes "to imply private contractual rights enforceable against the State");

- North Carolina, *see Faulkenbury v. Teachers' & State Emp. Ret. Sys.*, 483 S.E.2d 422, 428 (1997) (holding that employees acquire contractual rights to their pension benefits only after completing the service requirement);

- Rhode Island, *see Retired Adjunct Professors v. Almond*, 690 A.2d 1342, 1347 (R.I. 1997) (holding that "[t]here is nothing in [the pension statute] that

compels the conclusion that the General Assembly intended such benefits to be contractual");

- South Carolina, *see Layman v. State*, 630 S.E.2d 265, 268 (S.C. 2006) (holding that "contractual rights are created by statute only when they are expressly found in the language of the legislation");

- South Dakota, *see Tait v. Freeman*, 57 N.W.2d 520, 522 (S.D. 1953) (holding that employees acquire contractual rights to their pension benefits only when they retire);

- Utah, *see Hansen v. Pub. Emp. Ret. Sys. Bd. of Admin.*, 246 P.2d 591, 596 (Utah 1952) (holding that employees acquire contractual rights to their pension benefits only when they "complete[] every condition required of [them] precedent to the receipt of [the] pension");

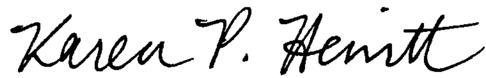
- Wisconsin, *see Ass'n of State Prosecutors v. Milwaukee Cty.*, 544 N.W.2d 888, 889 (Wis. 1996) (holding that employees have a property interest, not contractual rights, to their pension benefits); and

- Wyoming, *see Peterson v. Sweetwater Cty. Sch. Dist. No. One*, 929 P.2d 525, 530 (Wyo. 1996) (holding that employees have a property interest, not contractual rights, to their pension benefits).

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 12,735 words, excluding the cover, the tables, the signature block, and the certificates. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: September 21, 2018



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CERTIFICATE OF SERVICE

I, Rebecca Kjos, declare:

I am a citizen of the United States and employed in San Diego County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 4655 Executive Drive, Suite 1500, San Diego, CA 92121-3134. On September 21, 2018, I served a copy of the Application for Permission to file Amicus Brief and Amicus Brief of the California Business Roundtable in Support of Respondents by placing the document in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below:

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

Executed on September 21, 2018, at San Diego, California.

Rebecca Kjos