Case No. S239958

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CAL FIRE LOCAL 2881, 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 No. RG12661622
(Hon. Evelio Grillo)

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

Beth Heifetz,
pro hac vice forthcoming
G. Ryan Snyder,
pro hac vice forthcoming
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001-2113
Telephone: 202-879-3939
Facsimile: 202-626-1700

*Karen P. Hewitt, SBN 145309
JONES DAY
4655 Executive Drive, Suite 1500
San Diego, CA 92121-3134
Telephone: 858-314-1200
Facsimile: 844-345-3178
kphewitt@jonesday.com

Counsel for Amicus Curiae California Business Roundtable

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF

The California Business Roundtable is a nonpartisan organization comprised of the senior executive leadership of the 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 Act's elimination of the statutory offer to sell airtime does not violate the California Rule. There is no evidence that the Legislature intended to make this offer irrevocable, and the option to purchase airtime does not qualify as a "pension right" because it is not deferred compensation for an employee's services. *See* Intervener and Resp't State of California's Answer Br. on the Merits at 11–12. 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: February 14, 2018

Respectfully submitted,

Karen P. Hewitt

Karen P. Hewitt, SBN 145309
JONES DAY
4655 Executive Drive, Suite 1500
San Diego, CA 92121-3134
Telephone: 858-314-1200
Facsimile: 844-345-3178
kphewitt@jonesday.com

Beth Heifetz,
pro hac vice forthcoming
G. Ryan Snyder,
pro hac vice forthcoming
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
Telephone: 202-879-3939
Facsimile: 202-626-1700

Counsel for Amicus Curiae California Business Roundtable

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. In 2004, the Legislature offered public employees the option to purchase airtime, but did not say that the offer was irrevocable. In 2012, the Legislature revoked that offer. 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 (2018) (hereinafter, "Nation Report"), available at 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, available at 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. 20, 2017, available at 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 Act's elimination of the statutory offer to sell airtime does not violate the California Rule. *See* Intervener and Resp't State of California's Answer Br. on the Merits at 11–12. But even if eliminating the airtime offer did violate the Rule, the Court should affirm the decision below because the Rule is 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. Adopting this approach would give employees 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.

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. Airtime and the Pension Reform Act

This case involves the Public Employees' Retirement Law, Gov. Code § 20000 et seq., which establishes a pension system for employees of the State and participating local public agencies. That pension system is administered by CalPERS.

CalPERS calculates pensions using a three-factor formula. The first factor is the employee's "service credit," which is the number of years the employee worked for a qualifying employer. The second factor is the employee's "final compensation," which is the employee's highest average pay rate for either 12 or 36 consecutive months of employment. And the third factor is the "benefit factor," which is the rate at which employees earn pension benefits. *See generally* CalPERS, *Service & Disability Retirement* (updated Dec. 14, 2017), https://goo.gl/GYcoQh.

To calculate an employee's pension, CalPERS multiplies these three factors and then makes several adjustments. *Id.* For example, if an employee had served for 30 years, had a final salary of $100,000, and had earned pension benefits at a rate of 2%, the employee would receive a yearly pension of $60,000.

Starting in 2004, state law offered public employees the option of buying up to five years of additional service credit (commonly referred to as "airtime") from CalPERS. Under Government Code § 20909(a), "[a] member who has at least five years of credited state service, may elect ... to make contributions pursuant to this section and receive not less than one year, nor more than five years ... of additional retirement service credit." Members could make this purchase "at any time prior to retirement by making the contributions as specified in Sections 21050 and 21052." Gov. Code § 20909(b). In turn, section 21052 provided that the cost of airtime had to be "an amount equal to the increase in employer liability." *Id.* § 21052. In other words, purchasing airtime increased a member's future pension benefits, but the cost of those benefits "was to be borne entirely by the purchasing member and not by the state." *Cal Fire Local 2881 v. CalPERS*, 7 Cal. App. 5th 115, 121 (2016).

Although state law offered to sell employees airtime, it did *not* prohibit the Legislature from revoking that offer. And it did *not* provide that employees had a contractual right to purchase airtime at any point before retirement.

In 2010, CalPERS released a study concluding that it had been consistently underpricing airtime. J.A. 000312–000321. Indeed, the report concluded that CalPERS needed to raise the price of airtime between 12% and 38%, depending on the retiree group at issue. *Id.* at 000317.

In 2012, the Legislature passed the Public Employees' Pension Reform Act, Gov. Code § 7522 et seq., to address several problems with California's pension system. One of the Act's reforms was to provide that, after January 1, 2013, "[a] public retirement system shall not allow the purchase of nonqualified service credit." Gov. Code § 7522.46. A short time later, the Legislature passed legislation that specifically required CalPERS to stop selling airtime. *Id.* § 20909(g). These statutes did not affect purchases of airtime that took place *before* January 1, 2013—CalPERS continued to include such airtime in its pension calculations.

D. The Decisions Below

In December 2012, a putative class of public employees petitioned for a writ of mandate compelling CalPERS to continue selling airtime. These employees (referred to collectively as the petitioners) alleged that they had a contractual right to purchase airtime at any point before retirement, and that the Pension Reform Act unconstitutionally impaired that right. The trial court denied the petition.

The Court of Appeal affirmed. The court began by recognizing that the petitioners had "the 'heavy burden' of demonstrating that 'the statutory language and circumstances accompanying its passage clearly evince a legislative intent to create private rights of a contractual nature enforceable against the State.'" *Cal Fire*, 7 Cal. App. 5th at 126 (ellipsis omitted) (quoting *Retired Emp. Ass'n*, 52 Cal. 4th at 1189). The court then held that "there is nothing in either the text of the statute (§ 20909), or its legislative history, that unambiguously states an intent by the Legislature to create a vested pension benefit." *Id.* The court therefore held that the petitioners had failed to carry their burden of proving that section 20909 created a contractual right to purchase airtime.

The court next held that, even if the petitioners had a contractual right, the Pension Reform Act was not an unconstitutional impairment. The court explained that, under the California Rule, the Legislature could modify an employee's pension rights if those modifications "bear some material relation to the theory of a pension system and its successful operation." *Id.* at 128 (quoting *Betts v. Bd. of Admin.*, 21 Cal. 3d 859, 864 (1978)). And here, the Act was "materially related to the theory and successful operation of a pension system because [it] restricted the pension system to providing retirement benefits based on work performed, which is the primary purpose of a pension system." *Id.* at 129. Thus, the court concluded that the Pension Reform Act did not unconstitutionally impair a contractual obligation.

STANDARD OF REVIEW

This Court reviews de novo whether a statute violates the Contract Clauses. *See Am. Nurses Ass'n v. Torlakson*, 57 Cal. 4th 570, 575 (2013).

ARGUMENT

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

The petitioners argue that the Pension Reform Act is unconstitutional because it violates the California Rule. *See* CAL FIRE

Br. at 21–22. 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 or 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 that 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 that conclusion 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*, 21 Cal. 3d 859; *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 creating contractual rights without any evidence of legislative intent, the California Rule has caused the precise problems that ordinary Contract Clause analysis was designed to prevent. 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 The Parties.*

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.

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, CalPERS calculates pensions by multiplying three factors: the employee's "service credit" (i.e. the number of years the employee worked for a qualifying employer), the employee's "final compensation" (i.e., the employee's highest average pay rate), and a "benefit factor" (i.e., the rate at which the employee earned pension benefits). *See supra* at 28–29. 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.

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 Contract Clauses.*

The California Rule is also legally flawed because it assumes that every impairment of a pension right automatically violates 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.[1]

---

[1] The petitioners argue that an impairment is "necessary" only if it is "responsive to an emergency" and "temporary." CAL FIRE Reply Br. at 34–38. Not so. Although "the existence of an emergency and the limited duration of a relief measure are factors to be assessed in determining the reasonableness of an impairment, ... they cannot be regarded as essential in every case." *U.S. Tr. Co.*, 431 U.S. at 23 n.19; *see also, e.g.*, *Calfarm*, 48 Cal. 3d at 831 (holding that a contractual

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 concluded that an initiative measure "must be deemed an impairment ... of the vested pension rights of incumbent legislators." 54 Cal. 3d at 530. The Court 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 did not violate the Contract Clauses even though it was not temporary).

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).

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 treated *Allen II* as a one-off deviation from the California Rule. *See* CAL FIRE Reply Br. at 35 ("[T]he necessity defense has been rejected by every California court presented with it as justification for the impairment of vested contract rights."). To the extent the California Rule imposes a literal ban on the impairment of pension rights, the Rule should be rejected.

B. Stare Decisis Cannot Save The California Rule.

The petitioners do not defend the merits of the California Rule; instead, they rely entirely on stare decisis. CAL FIRE's Br. 47–50. 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 was developed in 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.[2]

---

[2] 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. Thus, none of these cases support *Allen*'s holding that public

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. *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.

---

employees have a contractual right to continue earning pension benefits for future services.

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 26–27. Outside of California, both federal and state courts have almost uniformly rejected one or more of these three components.[3]

[3] The cases discussed in this section involved the Federal Contract Clause or another State's Contract Clause. Although these

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

---

cases did not directly involve the California Contract Clause, they remain highly relevant. As this Court has recognized, the California and Federal Contract Clauses are "parallel proscription[s]." *Allen II*, 34 Cal. 3d at 119. Likewise, 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.

Non-California state courts have likewise rejected key parts of the California Rule. For example, several state courts have rejected the Rule's 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 Rule's 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 Rule's 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 the full 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 appear to accept the entire 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).[4]

Most striking of all, at least five states originally adopted the entire California Rule before later modifying or overruling their prior

---

[4] 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).

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 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 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.*[5]

The cost of the State's own pension plans—CalPERS and the California State Teachers' Retirement System (CalSTRS)—has increased even more rapidly. In 2002–03, California contributed $1.6 billion to these plans. *Id.* at 10. In 2017–18, the State needed to contribute $8.5 billion—an increase of more than *400%. Id.* And by 2029–30, the State will likely need to contribute between $16 billion and $19.6 billion, depending on its investment returns. *Id.* In other words, the State will likely be contributing between *900%* and *1,125%* more than it was in 2002–03. *See id.*

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

---

[5] 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: Facts at a Glance for Fiscal Year 2016-17*, at 1 (last viewed on Jan. 29, 2018), https://goo.gl/Tw8MwM.

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 unfunded liabilities of $105.9 billion to $180.4 billion, depending on their investment returns. *Id.*[6]

Once again, CalPERS and CalSTRS are no better off. Between 2008 and 2016, California's unfunded liability for these plans spiked from $5.2 billion to $97.2 billion. *Id.* at 12. And by 2029, the unfunded liability for these plans will likely be between $83 and $128 billion, depending on investment returns. *Id.* at 12–13. For perspective, a $128 billion unfunded liability would be equal to a debt of more than *$9,300 per California household*. *Id.* at 13.

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

[6] 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 much higher estimates of pension debt.

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 (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 the State of California. In 2002–03, the State was spending 2.1% of its budget on pensions. *Id.* at 10. By 2017–18, that figure had more than tripled to 7.1%. *Id.* To fund that increase, the State had to cut $6 billion from its 2017–18 budget, most of which came from social services and higher education. *Id.* at 13–14. And by 2029–30, the State will likely be spending between 9.3% and 11.4% of its budget on pensions—almost 450% more than in 2002. *Id.*

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.* 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.

Although the petitioners do not dispute that "the state's pension systems have hundreds of billions of dollars of unfunded liabilities," they criticize the State for "fail[ing] to explain how section 20909 contributes to this problem." CAL FIRE Reply Br. at 28. But CalPERS plainly concluded that public employees had been underpaying for airtime, J.A. 000317, which increases the State's unfunded liabilities. While airtime is not the sole or primary driver of the State's pension problems, it is a perfect illustration of the havoc wreaked by the California Rule—according to the petitioners, the State cannot make even a minor adjustment to pensions without running afoul of the Contract Clauses.

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), available at 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 Petitioners' Arguments For The California Rule Lack Merit.*

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

The petitioners first argue that the California Rule should be preserved because it is "longstanding." CAL FIRE Br. at 48. 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. 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 petitioners also argue that the California Rule "provides a workable standard that lower courts have applied consistently." CAL FIRE Br. at 50. But it is unsurprising that lower courts have consistently applied the Rule—they are, after all, bound by this Court's precedent. And the fact that the Rule is "workable" for courts does not mean it is correct, nor does it mean it is workable for public employers, public employees, and California citizens, who have to live with the devastating economic consequences described above. *See supra* at Part I.B.3.

Finally, the petitioners argue that the California Rule has "generated substantial reliance among public entities and their employees." CAL FIRE Br. at 49. But that argument fails for several reasons.

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

Second, as a practical matter, the California Rule has generated reliance 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. At that point, these governments will 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, available at 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 can lead to catastrophic losses. *See* Nathan Bomey & John Gallagher, *How Detroit Went Broke*, Detroit Free Press, Sept. 15, 2013, available at 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, available at 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 petitioners' reliance argument cannot save the California Rule.[7]

* * *

The California Rule is wrong on the merits, was not well reasoned, has been widely rejected, and will have devastating economic

[7] 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.").

effects. The Rule is deeply destructive and should be rejected along with the cases that adopted it.

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 revoking the option to purchase airtime.

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 an irrevocable right to purchase airtime. Under this Court's precedent, "it is presumed that a statutory scheme is not intended to create private contractual or vested rights," and the petitioners have "the burden of overcoming that presumption." *Retired Emp. Ass'n*, 52 Cal. 4th at 1186.

The petitioners cannot carry that burden regarding the elimination of the option to purchase airtime. As the State of California has explained, Gov. Code § 20909 offered to sell airtime in exchange for payment. *See* Intervener and Resp't State of California's Answer Br. on the Merits at 25. And it is black-letter contract law that "offers are revocable until accepted." *T.M. Cobb Co. v. Superior Court*, 36 Cal. 3d 273, 281 (1984). Thus, the Legislature could freely revoke the offer to sell airtime.

To be sure, it is possible for the Legislature to make an irrevocable offer. *See* Restatement (Second) of Contracts § 25. But here, "nothing in either the text of the statute (§ 20909), or its legislative history ... unambiguously states" that the Legislature's offer to sell airtime was irrevocable. *Cal Fire*, 7 Cal. App. 5th at 126. And nothing in the surrounding chapter on service credits does either. *See* Gov. Code, Title II, Division 5 (Personnel), Part 3 (Public Employees Retirement System), Chapter 11 (Service Credit). That is not at all surprising—as the petitioners conceded in their opening brief, "[p]ension statutes have *rarely, if ever*, explicitly stated that a vested right is being created or promised not to modify or eliminate whatever is offered." CAL FIRE Br. at 32 (emphasis added).

B. Even If The Pension Reform Act Impaired A Constitutional Right, That Impairment Would Not Be Substantial.

Even if the petitioners had a contractual right to purchase airtime, the impairment of that right would not "exceed[] constitutional bounds." *Torrance*, 32 Cal. 3d at 397; *accord Nat'l R.R.*, 470 U.S. at 472. A contractual 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. And 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 loss of the option to purchase airtime is not a substantial impairment. As explained above, between 2004 and 2012, state law gave employees the option to purchase airtime from CalPERS. *See*

Gov. Code § 20909(a). But state law also provided that employees who bought airtime had to pay "an amount equal to the increase in employer liability." *Id.* § 21052. In other words, the cost of airtime "was to be borne *entirely* by the purchasing member and not by the state." *Cal Fire*, 7 Cal. App. 5th at 121 (emphasis added). Given that the option to purchase airtime was never intended to bestow a monetary benefit on public employees, the loss of that option cannot be a substantial impairment.

As a practical matter, the ability to purchase airtime functioned as a monetary benefit only because CalPERS was selling airtime for less than it was worth. But the petitioners cannot rely on CalPERS's error to prove that the alleged impairment was substantial. At best, the option to purchase airtime gave state employees a benefit that they were never supposed to get. Because the Pension Reform Act simply eliminated that windfall, the Act is "not subject to attack under the Contract Clause," even if it "technically alter[s] an obligation of a contract." *El Paso*, 379 U.S. at 515.

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 onto 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.

Dated: February 14, 2018

Respectfully submitted,

Karen P. Hewitt

Karen P. Hewitt, SBN 145309
JONES DAY
4655 Executive Drive, Suite 1500
San Diego, CA 92121-3134
Telephone: 858-314-1200
Facsimile: 844-345-3178
kphewitt@jonesday.com

Beth Heifetz,
pro hac vice forthcoming
G. Ryan Snyder,
pro hac vice forthcoming
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
Telephone: 202-879-3939
Facsimile: 202-626-1700

Counsel for Amicus Curiae California Business Roundtable

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 26–27. 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, 747 (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, 1346 (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 (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 12,837 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: February 14, 2018

Karen P. Hewitt

Karen P. Hewitt, SBN 145309
JONES DAY
4655 Executive Drive, Suite 1500
San Diego, CA 92121-3134
Telephone: 858-314-1200
Facsimile: 844-345-3178
kphewitt@jonesday.com

Counsel for Amicus Curiae California Business Roundtable

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 February 16, 2018, I served a copy of the amicus letter 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:

Gary Marc Messing
Gregg Mclean Adam
Messing Adam & Jasmine LLP
235 Montgomery Street, Suite 828
San Francisco, CA 94104
Counsel for Petitioners, CAL FIRE Local 2881, Shaun Olsen, Monty Phelps, Sam Davis, and Paul Van Gerwen

Preet Kaur
CalPERS
P.O. Box 942707
Sacramento, CA 94229

Gina Michelle Ratto
Wesley E. Kennedy
Lincoln Plaza North
400 Q Street
Sacramento, CA 95811
Counsel for Respondent, California Public Employees' Retirement System (CalPERS)

Rei R. Onishi
Peter Andrew Krause
State Capitol
Suite 1173
Attn: Legal Affairs
Sacramento, CA 95814
Counsel for Respondent, State of California

Steven H. Silver
Rains Lucia Stern St. Phalle & Silver, P.C.
1428 Second Street, Suite 200
Santa Monica, CA 90401
Counsel for Real Parties in Interest, Los Angeles Police Protective League, Ventura County Deputy Sheriffs' Association, California Association of Highway Patrol, Garden Grove Police Association, California Statewide Law Enforcement Agency, Orange County Employees' Association, Los Angeles County Professional Peace Officers' Association, Association for Los Angeles Deputy Sheriffs, Deputy Sheriffs' Association of Santa Clara, Fresno Deputy Sheriffs' Association, Coalition of Santa Monica City Employees, Antioch Police Officers' Association

California Court of Appeal
Clerk's Office
First Appellate District, Division Three
350 McAllister Street
San Francisco, CA 94102-7421

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

Executed on February 16, 2018, at San Diego, California.

Rebecca Kjos