Case No. S239958

IN THE SUPREME COURT OF CALIFORNIA

CAL FIRE LOCAL 2881,

Petitioners and Appellants,

v.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM (CALPERS),

Defendant and Respondent,

and

THE STATE OF CALIFORNIA

Intervenor and Respondent.

After a Decision by the Court of Appeal
First Appellate District, Case No. A142793
Alameda County Superior Court, Case No. RG12661622
The Honorable Evelio Martin Grillo, Presiding Judge

APPLICATION TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF OF HOWARD JARVIS TAXPAYERS ASSOCIATION AND VENTURA COUNTY TAXPAYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

Pursuant to California Rules of Court, rule 8.520(f), Howard Jarvis Taxpayers Association ("HJTA") and Ventura County Taxpayers Association ("VCTA") request leave to file the attached *amici curiae* brief in support of Respondents California Public Employees' Retirement System (CalPERS) and the State of California.[1]

HJTA is a nonprofit public benefit corporation comprised of over 200,000 California taxpayers dedicated to the protection of Proposition 13 and the advancement of taxpayers' rights, including the right to limited taxation, the right to vote on tax increases, and the right of economical, equitable and efficient use of taxpayer dollars.

VCTA is a non-partisan, nonprofit organization that advocates for the rights of Ventura County taxpayers. It promotes the wise use of public funds, opposes waste, advises public officials regarding issues of concern to taxpayers, and recommends positions that will best serve the taxpayers' interests.

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[1] No party or counsel for any party authored this brief, participated in its drafting, or made any monetary contributions intended to fund the preparation or submission of the proposed brief. Thomas Layton, a private citizen and California taxpayer, made a monetary contribution intended to partially fund the preparation of the proposed brief. *Amici* certify that no other person or entity other than *amici* and their counsel authored or made any monetary contribution intended to fund the preparation or submission of the brief. Cal. Rules of Court, rule 8.520(f)(4).

Amici are interested in this case because it raises an important issue affecting California taxpayers. The Union's conception of the so-called "California Rule" threatens fundamental constitutional protections of California citizens. If the Court were to affirm the Union's version of the rule it would squelch reform efforts and doom state and local budgets. The proposed brief will assist the Court by addressing the constitutional infirmities of the Union's position, the incongruence of treating stand-alone pension statutes as part of a "contract" in the context of collective bargaining, and the ramifications of the rule on state and local government.

Respectfully submitted,

Dated: February 21, 2018

Benbrook Law Group, PC

By: /s/ Bradley A. Benbrook
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AMICI CURIAE BRIEF

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the Union's conception of the so-called "California Rule," no pension benefit provided to public employees through a statute can ever be withdrawn without replacement of a "comparable" benefit. In other words, the Union posits a *constitutional right* that a public pension can only get better and never worse over the course of one's employment. And furthermore, under this rule it is the obligation of the judiciary to tell the Legislature that it is barred from engaging in any pension reform, even if the Legislature determines that the non-public employee citizens are unfairly suffering as a result of prior legislatures' mistakes.

Not surprisingly, a rule as extreme as the Union posits has a dubious heritage. As the Governor points out, the Union's version of the rule doesn't exist, and we summarize further below the rickety foundation on which the supposed rule is built.

Amici emphasize in this brief that the Union's version of the rule would imperil fundamental constitutional principles designed to protect the freedom and well-being of the mere citizens who pay for these pensions. Namely, the supposed rule undermines basic notions of state sovereignty and representative government: In essence, the rule assumes that powerful political players can obtain legislative victories to enrich

themselves that can never be reformed. Judicial promotion of such a regime would further raise serious separation of powers concerns.

We also highlight the incongruence of treating stand-alone pension statutes as a "contract" or "part" of a contract (as claimed here) given the prevalence of collective bargaining agreements that already cover pension rights. Since, as the Union concedes, basic contract rules apply to any assertion that a statute creates contract rights, those basic principles torpedo any claim that Government Code § 20909's "air time" provisions created a contract.

Finally, we emphasize the policy consequences of turning a blind eye to reform efforts. As State and local budgets have to spend more money paying for rich pension benefits, private-sector citizens pay ever-higher taxes and fees while also getting *fewer* services and crumbling infrastructure. In the meantime, their fellow citizens who are fortunate enough to retire from public service in their 50s are starting a second career—or double-dipping while still working for the state as a "consultant."

It is urgent that the Court clarify once and for all that the supposed "California Rule" does not exist.

BACKGROUND ON THE "CALIFORNIA RULE"

In a 2012 law review article, Professor Amy B. Monahan demonstrates that the entire "California Rule" doctrine can be traced to a single sentence in this Court's decision a century ago in *O'Dea v. Cook*, 176 Cal. 659 (1917), where a widow sued the city of San Francisco over its modification of death benefits provided to police officers' families. *See* Amy B. Monahan, *Statutes as Contracts? The "California Rule" and Its Impact on Public Pension Reform*, 97 Iowa L. Rev. 1029, 1051–53 (2012).

Before *O'Dea*, this Court had held that public employee benefits were subject to change at the state's discretion—in 1885, it proclaimed that "it is well settled that salaried public offices, created by the legislature, are not held by contract or grant. The legislature has full control over them, unless restricted by the constitution, and may abolish them altogether, or impose upon them new duties, or reduce their salaries." *Miller v. Kister*, 68 Cal. 142, 144 (1885). Four years later, in *Pennie v. Reis*, this Court again emphasized that "[a] public officer . . . has no contract by which he can have or hold either his office or his salary against the legislative will." 80 Cal. 266, 269 (1889).[2]

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[2] *Pennie* was affirmed by the U.S. Supreme Court, which held a similar line: the state's provision of pension benefits "was subject to change or revocation at any time, at the will of the legislature" and "[t]here was no contract on the part of the state that its disposition should

This Court began to change course three decades later in *O'Dea*, when it observed that "where . . . services are rendered under . . . a pension statute, the pension provisions become a part of the contemplated compensation for those services, and so *in a sense* a part of the contract of employment itself." 176 Cal. at 661–62 (emphasis added).

O'Dea's dictum that pension provisions "in a sense" become "part of the contract of employment" lay dormant for nearly twenty years, until an appellate court relied on *O'Dea* to resuscitate a widow's claim that was time-barred under Los Angeles' municipal pension regulations. *Dryden v. Bd. of Pension Comm'rs*, 51 P. 2d 177 (Cal. Ct. App. 1935). In the course of its analysis, the Court of Appeal observed (dicta, again) that "pension provisions of the city charter" "are an indispensable part of [a public employee's] contract, and that the right to a pension becomes a vested one upon acceptance of employment by an applicant." *Id.* at 178 (citing *O'Dea*). That decision, standing alone, wouldn't have been a big deal, but this Court granted a further hearing in the case and adopted the Court of Appeal's opinion wholesale. *Dryden v. Bd. of Pension Comm'rs*, 6 Cal. 2d 575, 579 (1936). As Professor Monahan put it, "[a]s a result, that unfortunate bit of dictum ended up becoming the dictum of the California

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always continue as originally provided." *Pennie v. Reis*, 132 U.S. 464, 471, (1889).

Supreme Court, which profoundly impacted the future development of the law in this area." Monahan, *supra*, 97 Iowa L. Rev. at 1054.

After *O'Dea* and *Dryden*, the idea that pension provisions were an "indispensable" part of a public employment contract gained traction—yet the pension could be modified. In *Kern v. City of Long Beach*, 29 Cal. 2d 848 (1947), this Court held that a public employee "may acquire a vested contractual right to a pension" that "is not rigidly fixed." *Id.* at 855. So while "an employee does not have a right to any fixed or definite benefits," he is assured "a substantial or reasonable pension." *Id.* at 855. (Notably, in *Kern* the City of Long Beach was attempting to jettison its pension obligations altogether. *See* Section I(B) below.) In *Wallace v. City of Fresno*, 42 Cal. 2d 180 (1954), the Court explained that, under *Kern*, a public pension system is entitled to "make reasonable modifications and changes before the pension becomes payable and that until that time the employee does not have a right to any fixed or definite benefits but only to a substantial or reasonable pension." *Id.* at 183.

The Court built on *Wallace*'s "reasonable modification" standard the following year in *Allen v. City of Long Beach*, 45 Cal. 2d 128 (1955). While the *Allen* court recognized that "[a]n employee's vested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments in accord with

changing conditions and at the same time maintain the integrity of the system," *id.* at 131, it added a new twist that has occupied much of the parties' briefing: "To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages."[3] *Id.* This set the foundation for the competing conceptions of the "California Rule" that are now before the Court.

While the rule posited by the Union—no changes ever, even prospectively, for future service—sounds implausible on its face, it is all the more so given the government's ability to alter every other aspect of public employment compensation. For example:

- Ordinary compensation and other employee benefits can be

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[3] The "comparable new advantages" requirement was more or less invented out of whole cloth. The *Allen* Court cited *Wallace* and *Packer v. Bd. of Retirement*, 35 Cal. 2d 212 (1950), but neither case provides sturdy support for that proposition. *Wallace* simply observed that, in *Packer*, the "[pension] modification eliminated a benefit for an employee's widow but made other changes which were advantageous to the employee." 42 Cal. 2d at 185. And in *Packer*, while the Court compared a modified plan with the original plan (and observed that the revised plan "embraced both advantages and disadvantages"), it did not purport to set in stone a balancing requirement. 35 Cal. 2d at 214, 218–19. *See* Monahan, *supra*, 97 Iowa L. Rev. at 1060 n.195 (discussing *Packer* and the "comparable new advantages" requirement).

changed prospectively.[4]

- Tenure rules can be changed.[5]

- Terms of civil service can be changed at any time.[6]

Professor Sasha Volokh has explained how this imbalance, where pension benefits are privileged over salary and other employment benefits, yields a disguised form of deficit spending:

> [G]overnments, free from ERISA regulations that govern private employers, find it easier to promise generous pensions and then underfund them, leaving future generations to pick up the bill. Underfunded public employee pensions are thus a form of deficit spending. [¶] . . . [T]he fact that pensions are protected actually makes it easier for governments to credibly promise generous pensions to their employees, knowing that (outside of a cataclysmic event like municipal bankruptcy) later generations won't be able to undo the terms.

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[4] *See, e.g.*, *Butterworth v. Boyd*, 12 Cal. 2d 140, 150 (1938) ("It is well settled that public employees have no vested right in any particular measure of compensation or benefits, and that these may be modified or reduced by the proper statutory authority.")

[5] *Miller v. State of California*, 18 Cal. 3d 808, 814 (1977) (based on "long and well settled principles," "the power of the Legislature to reduce the tenure of plaintiff's civil service position and thereby to shorten his state service, by changing the mandatory retirement age was not and could not be limited by any contractual obligation.").

[6] *Miller*, 18 Cal. 3d at 814 ("Nor is any vested contractual right conferred on the public employee because he occupies a civil service position since it is equally well settled that '[t]he terms and conditions of civil service employment are fixed by statute and not by contract.'" (quoting *Boren v. State Personnel Bd.*, 37 Cal. 2d 634, 641 (1951)); *see also Hinchliffe v. City of San Diego*, 165 Cal. App. 3d 722, 725 (1985) ("The public employee . . . can have no vested contractual right in the *terms* of his or her employment, such terms being subject to change by the proper statutory authority.").

Alexander Volokh, *Overprotecting Public Employee Pensions: The Contract Clause and the California Rule* 17 (Reason Foundation 2014). Here, of course, the State cannot file for bankruptcy protection, so there is no doomsday relief option.

Perhaps the most surprising thing about the Union's conception of the California Rule is that it has been taken seriously for so long. But limiting principles always apply to constitutional rules, and this case is an excellent opportunity to re-affirm those principles.

The Governor's brief does a masterful job in explaining why the outlier view of the California Rule does not exist. We write separately to stress, in a little more detail, the constitutional infirmities and policy ramifications of the Union's position.

ARGUMENT

I. The Union's Version Of The "California Rule" Would Undermine Important Structural Constitutional Principles.

A. The Legislature's Role As The Policy-Making Body On Behalf Of All Citizens Is Generally Incompatible With The Notion Of Unalterable, Legislation-Based "Contracts."

When a plaintiff asserts a contract clause violation arising from a legislature's modification of a prior enactment, California courts follow the federal courts in imposing a heavy burden at the outset. This Court unanimously reaffirmed in *Retired Emps. Ass'n of Orange Cnty., Inc. v.*

Cnty. of Orange, 52 Cal. 4th 1171 (2011), that courts must *presume* statutes do not form a contract unless the intention to create one is "clearly and unequivocally expressed." *Id.* at 1185–86 (citing *Nat'l R.R. Passenger Corp. v. A.T. & S.F.R. Co.*, 470 U.S. 451 (1985)). In *National R.R. Passenger*, Justice Thurgood Marshall explained on behalf of a unanimous Court that this deeply entrenched presumption arises from the fundamental nature of legislative role:

> For many decades, this Court has maintained 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." This well-established presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state. Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body. Indeed, "'[t]he continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation.'"

National R.R. Passenger, 470 U.S. at 455–56 (citations omitted).

Likewise, in *Taylor v. Bd. of Educ.*, 31 Cal. App. 2d 734 (1939), a case on which this Court relied in *Retired Employees*, 52 Cal. 4th at 1186, the court rejected a claim that the legislature could not revise teacher-tenure statutes:

> In our opinion, the sovereign power vested in the Legislature to enact laws for the betterment of common schools is one which cannot be bartered away. The exercise of such power at one time does not mean that future Legislatures may not, in the light of experience, declare a different policy. If such is not the law, there is no hope for progress, and future legislators, in determining educational policies concerning the tenure of teachers, must follow in trodden paths.

Taylor, 31 Cal. App. 2d at 746 (quoting *Campbell v. Aldrich*, 79 P. 2d 257 (Or. 1938)).

Indeed, much to the frustration of many elected officials, their policies can be undone: "It is the general rule that one legislative body cannot limit or restrict its own power or that of subsequent Legislatures and that the act of one Legislature does not bind its successors." *Ex parte Collie*, 38 Cal. 2d 396, 398 (1952).

This rule is fundamental to preserving representative democracy. "[T]hat one legislature cannot abridge the powers of a succeeding legislature" and "one legislature is competent to repeal any act which a former legislature was competent to pass" is a foundational principle that "can never be controverted." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810). Put simply, a statute is "alterable when the legislature shall please to alter it." *Marbury v. Madison*, 1 Cranch 137, 177 (1803). *See Newton v. Comm'rs*, 100 U.S. 548, 559 (1880) (in cases involving "public interests" and "public laws," "there can be . . . no irrepealable law"). Were it

otherwise, powerful political interests could sneak through "vested" contract rights in legislation that does not "clearly and unequivocally" create such rights, thereby diminishing accountability and opportunities for reform in the interest of the general population.

Moreover, if courts were *not* bound to presume that the legislature is preserving its fundamental authority to adjust policy for the benefit of the citizens at large, but rather could freely pick the statutes that create vested contract rights among beneficiaries—and thereby limit the legislature's authority—that would raise grave separation of powers concerns. Monahan, *supra*, 97 Iowa L. Rev. at 1076 ("Courts that bind legislatures, absent clear indication that a legislature intended to bind itself in perpetuity, are infringing on legislative power.").

B. Even When Vested Contract Rights Are Created By Statute, Reasonable Exercise Of The "Reserved" Sovereign Power Does Not Violate The Contract Clause.

In the rare case when a legislative enactment *does* create vested contract rights, courts grant legislators leeway to continue acting in the interest of the citizenry at large.

In *Allen v. Bd. of Admin.*, 34 Cal. 3d 114 (1983) ("*Allen II*"), this Court relied heavily on the general principles set out in *City of El Paso v. Simmons*, 379 U.S. 497 (1965), and *Home Building & Loan Ass'n v.*

Blaisdell, 290 U.S. 398 (1934), and stressed that "[t]he reservation of the essential attributes of continuing governmental power is also read into contracts as a postulate of the legal order. The contract clause and the principle of continuing governmental power are construed in harmony . . . ." *Allen II*, 34 Cal. 3d at 120 (citations omitted). In short, "[t]he State has the 'sovereign right . . . to protect the . . . general welfare of the people.'" *City of El Paso*, 379 U.S. at 508 (quoting *East New York Savings Bank v. Hahn*, 326 U.S. 230, 232–33 (1945)).

To be sure, this reserve power is limited. The Contract Clause prevents the State from reneging on its deals such that a contracting party loses all benefit of the contract. *See, e.g., U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 22 (1977) (while "[t]he States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed," "private contracts are not subject to unlimited modification under the police power.").

But that is not at issue here. It is critical to remember that the Union claims only that the rights created by Government Code § 20909 were "*part* of the contemplated compensation for [employees'] services and so in a sense a *part* of the contract of employment." AOB at 24 (quoting *O'Dea*, 176 Cal. at 661–62) (emphasis added). The Union cannot dispute

that its members still retain a reasonable—indeed a very generous—pension.

The Union relies heavily on *Kern*, which illustrates these principles. In that case, the city amended its charter to repeal employees' rights to any pension. When a 20-year employee sought his retirement (and pointed out that he had paid into the system along the way), the city tried to fall back on its reserve powers to modify pensions. This Court's resolution of the issue demonstrates why this is an easy case:

> The rul[e] permitting modification of pensions is a necessary one since pension systems must be kept flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system and carry out its beneficent policy. The permissible scope of changes in the provisions need not be considered here, because the respondent city, with a minor exception, has repealed all pension provisions.
>
> Thus . . . an employee may acquire a vested contractual right to a pension but that this right is not rigidly fixed by the specific terms of the legislation in effect during any particular period in which he serves. The statutory language is subject to the *implied qualification* that the governing body may make modifications and changes in the system. The employee does not have a right to any fixed or definite benefits, but only to a *substantial or reasonable* pension. There is no inconsistency therefore in holding that he has a vested right to a pension but that the amount, terms and conditions of the benefits may be altered.

Kern, 29 Cal. 2d at 854. Here, by contrast, a controversial "part" of the supposed pension system was removed, and a far-more-than-reasonable pension remains intact for every one of the Union's members.

The ability to permissibly modify contracts also depends on a finding that the modification is "necessary to serve an important public purpose." *U.S. Trust Co.*, 431 U.S. at 25. The Governor's brief chronicles the many reasons why the reforms in the PERL were urgently needed, and we highlight in Section III below the risks associated with maintaining the one-way pension ratchet required by the Union's conception of the "California Rule."

We focus here on the importance of deferring to the Legislature's judgment, at least when it comes to acting for the benefit of the citizens as a whole rather than the benefit of a favored minority, *see* below. The Union spends page after page mocking the notion that budgetary concerns are "external" to the proper analysis here, AOB at 37–44, and even suggests that a finding of CalPERS' *insolvency* is required to show a modification is "necessary." *Id.* at 41. In essence, the Union argues for heightened constitutional scrutiny of pension modifications—a modern-day version of *Lochner*ism for public employees.

But the United States Supreme Court has rejected the notion that courts are the proper arbiters of the legislature's policy determinations:

"Once we are in this domain of the reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.'" *City of El Paso,* 379 U.S. at 508–09.

C. That Politically-Dominant Public Employee Unions Regularly Obtain Supposed Legislative Pension Contracts Strongly Increases These Constitutional Concerns.

Recognizing the State's retained power to govern by enacting reforms—and the judiciary's power to enforce structural constitutional limits—is all the more urgent when, as here, the purported legislative "contract" was obtained by a politically powerful group, rather than through traditional public-contract bargaining. Indeed, the United States Supreme Court has stressed that "the scope of the State's reserved power depends on the nature of the contractual relationship with which the challenged law conflicts." *U.S. Trust*, 431 U.S. at 22–23. And "[i]t is the motive, the policy, the object that must characterize the legislative act, to affect it with the imputation of violating the obligation of contracts." *City of El Paso*, 379 U.S. at 509 (citation omitted).

In the normal public contract setting, of course, a representative of the government sits across the table from a private party and attempts to negotiate the best deal possible for the State. Indeed, California law imposes many restrictions aimed at ensuring that the financial interests

of the State are protected. *See, e.g.*, Pub. Contract Code § 10180 (State Contract Act generally requires the award of contracts to the "lowest responsible bidder"); *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 173 (1994) (setting forth purpose of the state's competitive bidding process, citing Pub. Contract Code § 100).

The terms on which the State obtains public employment are a different matter. In the collective bargaining process, public employee unions sit across the table from government agents appointed by the politicians that the Union helped elect. The FPPC has documented that public employee unions are the single most powerful political block in California in terms of political donations. In 2010, the California Fair Political Practices Commission measured all campaign and lobbying reports from 2000-2009 and identified the 15 largest political spenders, whose collective political expenditures totaled $1 billion. Cal. Fair Political Practices Comm'n, *Big Money Talks: California's Billion Dollar Club* at 11 (March 2010). The top two contributors were public employee unions (the California Teachers Association and the California State Council of Service Employees (SEIU)), who collectively spent $319 million. *Id.*

Others have documented the public employee unions' rise to political dominance in the State. *See, e.g.*, Steven Greenhut, *Plunder! How*