No. 15-302

In the Supreme Court of the United States

NEW JERSEY EDUCATION ASSOCIATION, *et al.*,
Petitioners,

v.

NEW JERSEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

MOTION FOR LEAVE TO FILE AND BRIEF OF NEW JERSEY PUBLIC EMPLOYEES' RETIREMENT SYSTEM, NEW JERSEY TEACHERS' PENSION AND ANNUITY FUND, AND NEW JERSEY POLICE AND FIREMEN'S RETIREMENT SYSTEM AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE

The Boards (individually, "PERS," "TPAF," and "PFRS") respectfully move to leave of Court to file this Amicus Brief.

The Boards obtained consent from Petitioners on November 23, 2015 (on file with Clerk). Because the Boards are regulated government entities whose actions require certain procedures and approval, and because of the recent Thanksgiving Holiday, the Boards did not formally resolve to file an amicus brief until November 30. That day, the Boards notified the State of its request to file an amicus brief. On December 1, the State denied the Boards' request without explanation (on file with Clerk).

The Boards are trustees of the Retirement Systems, whose assets are held in trust by virtue of common law, state statute, and federal tax law. They are charged by the New Jersey Legislature with the general responsibility for the proper operation of the Retirement Systems, and have a duty to protect the interests of all members and beneficiaries of the Retirement System and their "financial integrity." *See Mount v. Trustees of the Public Employees' Retirement System*, 133 N.J. Super. 72, 86 (App. Div. 1975); *see also* Interest of Amici, *infra*.

This petition implicates the unique rights and duties of the Boards, as statutory and common law trustees of the respective Retirement Systems, to collect contributions owed for the benefit of the members and beneficiaries. The Boards seek to highlight the important federal issues created by the New Jersey Supreme Court. The Boards further seek

to provide important information about the serious financial condition of the funds, held in trust by the Boards, that are at the heart of this dispute.

Respectfully submitted,

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INTEREST OF AMICI CURIAE[1]

The Boards (individually, "PERS," "TPAF," and "PERS") are trustees of the Retirement Systems, whose assets are held in trust by virtue of common law, state statute, and federal tax law. All three Boards are required to hold assets in a tax exempt trust under section 501 of the Internal Revenue Code. The assets of the Retirement Systems are for the exclusive benefit of members and beneficiaries. *E.g.,* N.J. Stat. Ann. § 18A:66-97. Chapter 78, codified in pertinent part at N.J. Stat. Ann. § 43:3C-9.5(c), mandates payment by the State of the "annual unfunded accrued liability contribution" for each Retirement System "as determined by the applicable board of trustees in consultation with the system's or fund's actuary." L. 2011, c. 78 ("Chapter 78").

The Boards are charged by the New Jersey Legislature with the general responsibility for the proper operation of the Retirement Systems. *See* N.J. Stat. Ann. §§ 43:15A-32 (PERS); 18A:66-61 (TPAF); 43:16A-13 (PFRS). As fiduciaries, the Boards have a duty to protect the interests of all members and beneficiaries of the Retirement System and its "financial integrity." *See generally Mount v. Trustees of the Public Employees' Retirement System*, 133 N.J. Super. 72, 86 (App. Div. 1975).

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[1] Amici provided notice to all parties of its intent to file this brief. Petitioners consented to Amici's request to file this brief and Respondents denied consent. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

This petition implicates the unique rights and duties of the Boards, as statutory and common law trustees of the respective Retirement Systems, to collect contributions owed for the benefit of the members and beneficiaries. To that extent, the Boards have a direct interest in the outcome of this appeal. Given the Boards' special statutory and common law role to insure adequate funding of the Retirement Systems, the Boards have a separate and distinct interest in this matter and believe their participation as amicus curiae will assist the Court.

The interest of Amici is further established by the decision of the New Jersey Supreme Court itself. The court acknowledged the "staggering" "loss of public trust due to the broken promises" caused by the State's failure to keep its "promises." App. 46a. It also acknowledged that "the present level of the pension systems' funding is of increasing concern" and that the "need" of the State to get "its financial house in order" was "compelling" and "plain." App. 42a, 49a-50a. The interest of Amici is also established by the dissent, which noted that the decision will "let the pension fund run dry," App. 59a, and concluded that "the solvency of the pension system is in great peril." App. 88a.

SUMMARY OF ARGUMENT

The Court should grant the Petition and answer the question of whether the New Jersey Supreme Court's decision that the State did not create constitutionally-enforceable contract rights when it agreed to provide adequate funding for its employees' pension plans violated the federal Contracts Clause. There are three "legal" reasons and one "policy" reason which make this Court's resolution so important.

First, there is a now-deepened split between federal circuits as well as the New Jersey Supreme Court as to the basic structure of a federal Contracts Clause analysis. This Court has stated that, under the Contracts Clause, "whether a contract was made is a federal question," except for certain background issues as to general contract rules of validity, construction, and enforcement. The First, Eighth, and Ninth Circuits have all taken this statement to heart. Nevertheless, the Fourth Circuit and the New Jersey Supreme Court have ruled that the Supreme Court merely permits federal review of what these jurisdictions continue to believe is fully a question of state law. The Court should grant certiorari to resolve this split of authority.

Second, this Court has separately held that, in determining or reviewing a Contracts Clause claim, there must be independent federal review of state law, even when a state's highest court has purported to announce that law. This obligation compels Supreme Court review particularly when, as here, the Supreme Court is the only Article III court that could potentially protect the federal rights in question.

Third, the court's decision would leave in place the consideration Petitioners' provided for the supposedly unenforceable contract, i.e., increased contributions. Absent the agreement, Petitioners who had vested in the plan would have a contractual right to benefits based on previous contributions rates. Since the state court decision left the required contribution increases in place, it constitutes a separate violation of the Contracts Clause.

Fourth, the financial stakes here are enormous. This is a case about a contractual obligation to adequately fund benefits which are concededly contractual obligations of the State regardless of this case. The funding shortfall, involving billions of dollars per year, is alarming even to the New Jersey Supreme Court. Failure to resolve this issue now may make it difficult to impossible for the State to ever make good on its acknowledged contractual duties. Indeed, this failure may be seen as an impetus to ultimately abrogate the State's constitutionally-mandated contractual pension obligations that the Retirement Systems are set up to pay.

ARGUMENT

I. The Court Should Grant Certiorari to Resolve a Split over Whether to Apply State or Federal Law in Determining the Existence of a Contract for Contract Clause Purposes

There is currently a circuit split between the First, Eighth and Ninth Circuits, on one hand, and the Fourth Circuit, on the other, in determining whether a court should look to state or federal law in determining whether a contract exists for purposes of the contract clause.

The First, Eighth, and Ninth Circuits, following the Supreme Court's express command in *General Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992), have each held that federal law governs in deciding whether a contract exists. *See Nat'l Educ. Ass'n-Rhode Island ex rel. Scigulinsky v. Ret. Bd. of Rhode Island Employees' Ret. Sys.*, 172 F.3d 22, 28 (1st Cir. 1999) ("whether a

contract exists for Contract Clause purposes is a federal question") (citing *General Motors*); *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 437 (8th Cir. 2007) ("whether a contract was made is a federal question for purposes of Contract Clause analysis") (quoting *General Motors*); *Nev. Employees' Ass'n v. Keating*, 903 F.2d 1223, 1227 (9th Cir. 1990) ("Federal law, not Nevada law, controls whether the state statutes at issue create contractual rights protected by the contract clause") (citations omitted).

In contrast, the Fourth Circuit, ignoring *General Motors* and instead relying on prior precedent, held that "the issue of whether a contract right exists is governed by state law, while federal law governs a determination that a contract has been impaired under the Contract Clause." *Kestler v. Bd. of Trustees of N. Carolina Local Governmental Employees' Ret. Sys.*, 48 F.3d 800, 803 (4th Cir. 1995) (citing *Koch v. Yunich*, 533 F.2d 80, 86 (2d Cir. 1976), *and Baker v. Baltimore County, Md.*, 487 F.Supp. 461 (D. Md. 1980), *aff'd*, (table) 660 F.2d 488 (4th Cir. 1981)). It is unclear whether the Second Circuit's statement in *Koch* that contract rights are determined "by the statutory or contractual terms thereof" stands for the broad proposition given in *Kestler*, and, even if it does, whether that broad proposition is still valid in the Second Circuit after *General Motors*.

Despite citing to *General Motors*, the New Jersey Supreme Court expressly found that the existence of a contract for purposes of the federal Contracts Clause was a question of state law, because "the premise for performing a contract impairment analysis is the existence of a valid enforceable contract under state

law." App. 18a (also citing *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938), and *San Diego Police Officers' Ass'n v. San Diego City Employees' Ret. Sys.*, 568 F.3d 725, 737 (9th Cir. 2009)); *see also* App. 44a (recognizing that federal courts have an independent duty to independently evaluate the question of whether a contract exists, *see* § II, *infra*, but claiming that the question is nevertheless one of state law). Thus, the Court rephrased the existence-of-a-contract question by "turn[ing] to New Jersey law that pertains to the legal enforceability of the purported statutory contractual right to Chapter 78's required annual pension payments." *Id.* at 22a. This follows the position of the Fourth Circuit and rejected the position of the First, Eighth, and Ninth Circuits. *See generally* App. 83a-84a (dissent); Pet. 16, 22.

This was in error. Yes, since state-law contracts are themselves creatures of state law, underlying questions of contract formation and meaning will sometimes turn on the state-law backdrop against which the alleged contract was made. *General Motors*, 503 U.S. at 187 (citing *Brand*, 303 U.S. at 100, and *Appleby v. City of New York*, 271 U.S. 364, 380 (1926)). Thus, "state laws are implied into private contracts regardless of the assent of the parties only when those laws affect the validity, construction, and enforcement of contracts" generally, *id.* at 189 (citing *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19, n. 17, 97 S. Ct. 1505, 1516, n. 17, 52 L. Ed. 2d 92 (1977)).

But, as *U.S. Trust* explained, a state's ability to enter into fiscal contracts for purposes of the Contracts Clause is a resolved question of federal law: "Whatever the propriety of a State's binding itself to a future

course of conduct in other contexts, the power to enter into effective financial contracts cannot be questioned." 431 U.S. at 24. *U.S. Trust* expressly held that while "financial obligation could be regarded in theory as a relinquishment of the State's spending power, since money spent to repay debts is not available for other purposes," this can never be a defense to a Contracts Clause claim. *Id.* And *Winstar v. United States*, 518 U.S. 839, 875 (1996), held that it was federal "unmistakability" doctrine, rather than state contract law, that "served the dual purposes of limiting contractual incursions on a State's sovereign powers and of avoiding difficult constitutional questions about the extent of state authority to limit the subsequent exercise of legislative power." (Citations omitted).

The New Jersey Supreme Court held that the State's purported inability to enter into an effective financial contract gave it a defense to a federal Contracts Clause claim. According to the court, under New Jersey law the "State cannot by contract or statute create a binding and legally enforceable financial obligation above a certain amount that applies year to year without voter approval." App. 24a. *See also* 76a-78a (dissent); Pet. 20-23. This result conflicts with *U.S. Trust*.

The New Jersey Court was not saying Chapter 78 was invalid. The court made clear that the law is constitutional and remains "in effect, as interpreted." App. 49a. Their ruling was thus not a declaration of whether the government had the power to enact the law in question, which ***might*** be a question of state law. *But see Am. Exp. Travel Related Servs. Co. v. Kentucky*, 641 F.3d 685, 693 n.3 (6th Cir. 2011)

("Whether or not the [challenged state law] complied with the procedural requirements dictated by the Kentucky Constitution does not affect the legislation's validity under the federal Constitution."). The court instead merely interpreted the law at issue as not creating valid, enforceable contract rights. App. 41a.

The court's result predictably turns the Contracts Clause (and the Supremacy Clause) on its head, subjugating the federal constitutional right to state prerogatives. According to the court, the "Contracts Clause reasonable-and-necessary analysis implicated in this case would require the Judiciary to exercise authority that is exclusively granted to the political branches. In this setting, the application of a Contracts Clause analysis by the Judiciary would cause a violation of our Constitution's separation-of powers principles." App. 54a. Or, in other words, the requirements of the federal Constitution must be ignored because they are preempted by state law.

This is not how either the Contracts Clause or the federal constitution operates. Even the Fourth Circuit, the lone Circuit that New Jersey's decision agrees with, understood this premise. In *Baltimore Teachers Union, Am. Fed'n of Teachers Local 340, AFL-CIO v. Mayor & City Council of Baltimore*, 6 F.3d 1012, 1016 n.5 (4th Cir. 1993), that Circuit noted that a statute which the city claimed "authorized [it] unilaterally to contravene the terms of its contracts" would be the equivalent of saying that that there was no contract, and "would almost certainly violate the Contract Clause itself." So, the New Jersey decision not only takes the Fourth Circuit's side in a circuit split, it does so in a way that ignores limitations the Fourth Circuit uses to mitigate

potential damage to the constitutional structure that otherwise would result from that position.

II. This Court Should Grant Review To Perform the Necessary Independent Analysis of State Law Required by the Constitution and this Court's Prior Decisions

Even if the question of whether a contract existed was solely one of state law, the Supreme Court should not defer to the determination of the New Jersey Supreme Court. *See also* App. 83a (dissent); Pet. 18-20. Instead, this case falls into an exception to the general rule that the Supreme Court accepts state court interpretations of state law. This exception, which applies when a federal right is inextricably intertwined with state law, *see generally NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 455–458 (1958); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964), applies in all Contracts Clause cases. *Appleby v. City of New York*, 271 U.S. 364, 380 (1926); *see also General Motors*, 503 U.S. at 187 (citing *Appleby*). Otherwise, a state's self-interest would interfere with the federal right in question, *see U.S. Trust*, 431 U.S. at 24 (noting that "money spent to repay debts is not available for other purposes"); *cf. id.* at 26 ("complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake").

Supreme Court review is particularly important, when, like here, it is the only court capable of effectively providing federal vindication of the Constitutional right. *See* N.J. Stat. Ann. § 43:3C–9.5(c)(2) ("The Superior Court, Law Division

shall have jurisdiction over any action … to enforce the contractual right set forth in this subsection. The State … shall not assert sovereign immunity in such an action."); *see also Mincey v. Arizona*, 437 U.S. 385, 402 (1978) (Marshall, J., concurring) (Supreme Court has less discretion to decline to review state court decisions when other forms of Article III review are foreclosed).

There is no need to re-hash at this stage the error made by the New Jersey Supreme Court in interpreting New Jersey law in light of the well-written dissent in this case. As the dissent noted, "the majority construes the State Constitution's Debt Limitation Clause in an unprecedented way that is at odds with the intent, history, and jurisprudence of the Clause," while "eviscerat[ing the] protection of public contractual rights" found in prior decisions of that court. App. 68a; *see also* App. 31a n.6 (majority opinion, expressly rejecting other state's similar interpretations of their Debt Limitation Clauses).[2] Even prior ***dissents*** seeking to expand the power of the New Jersey Debts Limitation Clause "would have excluded from the Clause's reach 'labor agreements, leases, and any other arrangement or transaction that does not require the State's contractual borrowing of

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[2] Ironically, the purpose of the Debt Limitations Clause was to prevent future generations being saddled with paying for financial obligations incurred by present legislatures. *See Lonegan v. State,* 174 N.J. 435, 444-45 (2002) ("*Lonegan I*"). Yet that is expressly what the court held the Debt Limitations Clause mandates today. App. 49a-50a ("That the State must get its financial house in order is plain. The need is compelling in respect of the State's ability to honor its compensation commitments…."); *see also* App. 2a (describing the funding shortfall as "alarming"); §§ IV and Conclusion, *infra.*

funds.'" App. 71a (citation omitted). And while the Appropriations Clause normally requires legislatures, not courts, to fund legal obligations (like in practically every other jurisdiction in America), courts in New Jersey have recognized that that "Clause must bow to certain constitutional rights, and particularly to federal rights that have a privileged status under the Supremacy Clause." App. 72a.

Of course, the New Jersey Supreme Court is not bound by its prior decisions. But when a state court comes up with a novel theory, contrary to the decisions of other jurisdictions dealing with the same issue (*see* App. 31a n.6), irregularly applied, and fortuitously defeating a federal constitutional right, such a ruling deserves scrutiny. *See Barr*, 378 U.S. at 149 ("state procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review") (citations omitted). Otherwise, the promise of federal review of federal Constitutional rights becomes illusory.

III. The Court's Finding that the Law was Binding on Petitioners but not the Government Creates a Separate Contracts Clause Violation

Although the State was deemed to not enter into a "binding" contract, App. 40a, the court did not hold Chapter 78 unconstitutional. It did not void the contract or in any way release the Petitioners of the obligation they agreed to as consideration, above and beyond their previous contractual obligations, in order to persuade the State to enter into Chapter 78. Instead, the court, using the language of the existence of a contract, merely released the State from its own

contractual obligations. App. 49a; *but see U.S. Trust*, 431 U.S. at 24 n.22 ("A number of cases have held that a State may not authorize a municipality to borrow money and then restrict its taxing power so that the debt cannot be repaid.") (Stringcite omitted).

If the Government's contractual obligation is void, then by law, any Chapter 78 contractual obligations of the employees are void as well. *See Gennert v. Wuestner*, 53 N.J. Eq. 302, 305, 31 A. 609, 611 (Ch. 1895) ("the contract is wholly void, and incapable of ratification, and must be entirely ignored, in dealing with the business transactions between the parties, precisely as though no such writing had ever existed"); *First Am. Title Ins. Co. v. Lawson*, 177 N.J. 125, 137, 827 A.2d 230, 237 (2003) ("it is considered 'null from the beginning' and treated as if it does not exist for any purpose") (citation omitted).

Since the State has not released the employees from this obligation, it violates the Contracts Clause, as it abrogates the terms of the State's ***previous*** contract with vested employees regarding the required contribution rates necessary to obtain vested pension benefits. Under *N.J. Education Ass'n v. State*, 412 N.J. Super. 192 (2010), vested government employees have a contractual right "to receive benefits as provided under the laws governing the retirement system or fund upon the attainment of five years of service credit in the retirement system or fund." *Id.* at 215 (quoting N.J. Stat. Ann. § 43:3C–9.5(b)) (emphasis omitted); *see also Berg v. Christie*, 436 N.J. Super. 220, 255 (App. Div. 2014) (legislature "created a contractual right to pension benefits"). The "laws governing the retirement system" include employees' mandatory contribution

amounts. *See, e.g.,* N.J. Stat. Ann. § 43:15A-25; *see also Opinion of the Justices*, 364 Mass. 847, 860 (1973) (protection of "rights and benefits" in retirement statute "mean[s] the practical effect of the whole complex of provisions") (footnote omitted). Absent the consideration of the State's promised contributions, Chapter 78's requirement of increased contributions from vested employees violates the Contracts Clause.

IV. The Cost of Failing to Adequately Fund Pensions is Astronomical to the Public and to Petitioners

Ultimately, study after study confirms that funding discipline boils down to simple math. For example, the National Institute on Retirement Security (NIRS), a non-profit research and education organization established to promote informed policymaking on the subject of retirement security, studied the lessons to be learned from well-funded public plans during the Great Recession. *Lessons from Well-Funded Public Pensions: An Analysis of Six Plans that Weathered the Financial Storm*, Peng & Boivie, NIRS (June 2011) ("NIRS Report").[3] According to the NIRS, the most fundamental principle is "ensuring that the plan sponsors pay the entire amount of the annual required contribution (ARC) each year, because anything short of a full ARC payment will have a negative impact on the plan's funding ratio in the long run." *See* NIRS Report at 6. If contributions are less than the full actuarially determined contribution (ARC) the unfunded liability will continue to grow. "If this occurs

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[3] http://www.nirsonline.org/index.php?id=613&option=content&task=view

repeatedly, the problem is likely to worsen over time – the funded status of the plan will continue to deteriorate and each year the contribution will escalate." *Id.* In other words, failure to pay the full annual required contribution each year "only shifts costs into the future" until an eventual day of reckoning. *Id.*

For this reason, the first recommendation by a 2013 National Pension Funding Task Force established by eleven national associations representing state and local governments was to base pension funding policy on the "actuarially determined contribution." *Pension Funding: A Guide for Elected Officials; Report from the Pension Funding Task Force 2013* issued by the NGA, NCSL, CSG, NACo, NLC, USCM, ICMA, NCTR, NASACT, GFOA, NASRA. ("National Pension Task Force Report") at 6.[4] Likewise, the National Association of State Retirement Administrators (NASRA) released a recent study regarding the experience of state retirement plans over the past decade confirming that:

> Countless studies document the importance of making consistent and adequate contributions to fund pension benefits. In general, these studies find that adequate contributions play a vital role in the long-term funding condition of public pension plans. Moreover, as a matter of simple

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[4] http://www.naco.org/sites/default/files/documents/Pension FundingGuide.pdf ; *see also Center for State & Local Government Excellence, Issue Brief, The Funding of State and Local Pensions: 2013-2017* (June 2014) at 1, at http://slge.org/publications/the-funding-of-state-and-local-pensions-2013-2017

> mathematics, just as a failure to consistently and fully pay one's mortgage will increase its long-term cost, so also will a failure to pay the ARC increase the long-term cost of funding a pension plan.

Annual Required Contribution Experience of State Retirement Plans, FY 01- FY 13, NASRA ("NASRA's March 2015 Report") at 2.[5] Unfortunately, NASRA's March 2015 Report concluded that a small handful of states have "conspicuously failed to adequately fund their pension plans." *Id.* at 3. The two "outliers" identified by NASRA are New Jersey and Pennsylvania. *Id.* at 8. Indeed, New Jersey only contributed 38% of its annual required contribution (ARC) from FY '01 to FY '13, the lowest percent of ARC contributed among 112 state public pension plans. *Id.* at 14. By contrast, most states and local governments made a "good-faith effort" to fund all or most of their required contributions since 2001. *Id.* at 1. The evidence leads to the following inevitable conclusion:

> [P]lans operating under a legal structure in which the ARC must be paid are more likely to receive their required contribution, which is vital to the long term success of a pension plan.

Id. at 11. The NASRA March 2015 Report reiterates that any allocation short of the full ARC means the funded liability "will grow and require greater contributions in future years," at a greater cost, within more challenging budgetary constraints, and worsening

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[5] http://www.nasra.org/files/JointPublications/NASRA_ARC_Spotlight.pdf

intergenerational equity for future taxpayers. *Id.* at 1, 8.

Strikingly, although New Jersey has only contributed 38% of its ARC for the past decade, the New Jersey Retirement Systems were very well funded at the turn of this century. According to their 2000 valuations, on June 30, 2000 PERS was 114% funded[6], TPAF was 110% funded[7], and PFRS was 113% funded.[8] The PERS July 1, 2014 valuation makes the point that since July 2000, the funded ratio on a market value basis has decreased by 87.9% for the State Plan.[9] The funded ratio for the PFRS State Plan decreased during the same period by 68.4%.[10]

The July 1, 2014 PERS valuation warns that:

> As of June 30, 2014, the ratio of market value of assets to the prior year's benefit payment is 6.5. This is an approximate indication of the number of years that the assets can cover benefit

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[6] http://www.state.nj.us/treasury/pensions/epbam/exhibits/ann-rpts/pers01.pdf (at 18).

[7] http://www.state.nj.us/treasury/pensions/epbam/exhibits/ann-rpts/tpaf01.pdf (at 17).

[8] http://www.state.nj.us/treasury/pensions/epbam/exhibits/ann-rpts/pfrs01.pdf (at 15).

[9] http://www.nj.gov/treasury/pensions/pdf/financial/2014pers.pdf (at 19).

[10] http://www.nj.gov/treasury/pensions/pdf/financial/2014pfrs.pdf (at 22).

> payments, excluding future State and member contributions, and investment income.[11]

TPAF current assets can only cover benefit payments for approximately 7.4 years:

> As of June 30, 2014, the ratio of market value of assets to the prior year's benefit payments decreased to 7.4…This is a simplistic measure of the number of years that the assets can cover benefit payments, excluding: investment income, State and member contributions, and future increases in those payments.[12]

The TPAF actuary made the following stark warning that, absent increased overall contributions, the stability of the Retirement Systems would be placed in jeopardy:

> This valuation reflects deviations from the anticipated State contributions for the fiscal years ending June 30, 2014 and June 30, 2015 incorporated in the 2013 valuation. These contribution amounts are much less than the expected phased-in contributions, representing no more than 18% of the full statutory contributions. ***Continued funding at these levels would put TPAF at significant risk of insolvency within a relatively short period of time***. (emphasis in original)

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[11] *See* n. 9, *supra*, at p. 19.

[12] http://www.nj.gov/treasury/pensions/pdf/financial/2014tpaf.pdf at 13.

Significantly, employee contributions to the Retirement Systems have increased as required under Chapter 78, but rather than improve the soundness of the Retirement Systems' funding, the State has used them to merely offset their own contributions. *See* n. 9, *supra,* at 4; n. 12, *supra* at 3 and 8.

It is useful to compare the recommendations of the 2013 National Pension Task Force with New Jersey's experience over the past decade. The first task force recommendation was to base funding on the actuarially determined contribution. Ideally, pension funding policies should also:

- Build funding discipline into the funding policy to ensure that promised benefits can be paid;
- Maintain intergenerational equity so that the cost of employee benefits is paid by the current generation of taxpayers;
- Manage employer costs as a consistent percentage of payroll;
- Require clear reporting on how and when plans will be fully funded.

See National Pension Task Force Report at 6. Yet, unless the trial court's order below is enforced, New Jersey will fail to comply with any of these National Pension Task Force recommendations.

Importantly, the funding discipline codified into law by Chapter 78 has been applied successfully to the local governments that participate in the Retirement Systems. For this reason, the funded ratio for local employers is substantially better than the funded ratio

for the state component of the Retirement Systems. The NASRA March 2015 report graphically illustrates the differences as follows, comparing the State Plan with its local counterparts in New Jersey:

PLAN	**WEIGHTED ARC EXPERIENCE FY 01- 13**	**SHORTFALL IN THOUSANDS**
PERS-LOCAL	85.2%	($794,790)
PERS-STATE	17.8%	($4,643,925)
PFRS-LOCAL	73.7%	($1,949,362)
PFRS-STATE	20.2%	($2,475,906)
TPAF-STATE	16.3%	($13,418,291)

NASRA March 2015 Report at 56. (The report's shortfall data is already stale as the funding deficiencies continue to increase since 2013).

Accordingly, it is easy enough to connect the dots that dedicated funding discipline results in necessary ARC contributions and healthier retirement systems. The State of New Jersey, however, has only contributed 38% of the ARC when the weighted average ARC experience for the Retirement Systems is calculated. *Id.* at 8,14. The weighted ARC experience for PERS-Local and PFRS-Local are 85.2% and 73.7%, respectively. *Id.* at 56. By contrast, the State contribution has only been 17.8% for PERS-State, 20.2% for PFRS-State, and 16.3% for TPAF. *Id.* The "predictable result of this underfunding was a precipitous decline in the funding level" of the Retirement Systems. *Id.* at 8.

The trial court understood that there is no other way to read Chapter 78 except as a direction to the court to find a contractual right to "timely" payment of the pension contributions "to help ensure that the retirement system is securely funded." App. 96a; *see also* App. 80a (dissent, noting similar). The public interest is served not only by timely contributions by the Defendants, but also by the timely and prudent investment of pension assets.

Finally, the defined benefit retirement systems also have inherent structural advantages compared to defined contribution and other plan designs. Through the use of longevity risk pooling, the maintenance of a well-diversified portfolio using a long term investment horizon, and low fees and professional management, the Retirement Systems are able to capture structural advantages that are otherwise unavailable. *See Still a Better Bang for the Buck, An Update on the Economic Efficiencies of Defined Benefit Pensions, National Institute on Retirement Security* (Dec. 2014). Proper utilization of this benefit, of course, requires adequate funds to invest and manage in the first instance.

CONCLUSION

The payment of pension benefits is unquestionably a contractual obligation of the State. *See* App. 50a n.11 ("there is no question that individual members of the public pension systems are entitled to this delayed part of their compensation upon retirement"). If the Defendants are not compelled to comply with Chapter 78 it is unclear how long the Retirement Systems will be able to maintain these efficiencies and structural cost advantages which serve the public interest. The State's obligation, however, is not dependent on the

actuarial soundness of the fund, *compare with Crosby v. City of Gastonia*, 635 F.3d 634, 645 (4th Cir. 2011) (no Contracts Clause violation for failure to make payment when payment obligation was expressly dependent on the availability of funds in the plan). So, even under the court's decision, the State would be constitutionally obligated to appropriate the necessary funds to pay benefits at some point. Yet the risk that they may simply decide to renege on their promises has been seen in other jurisdictions. *See, e.g., In re Pension Reform Litig.,* 2015 IL 118585 (rejecting state's attempt to reduce pension benefits as "reasonable and necessary" due to financial stress from underfunding); *Moro v. State*, 357 Or. 167 (2015) (same); *Andrews v. Anne Arundel Cty.*, 931 F. Supp. 1255 (D. Md. 1996) aff'd, 114 F.3d 1175 (4th Cir. 1997) (same); *Cherry v. Baltimore*, No. CIV.A. MJG-10-1447, 2012 WL 4341446 (D. Md. Sept. 20, 2012) (same), *vacated on other grounds*, 762 F.3d 366 (4th Cir. 2014); *but see In re City of Detroit,* 524 B.R. 147 (Bankr. E.D. Mich. 2014) (reducing pension benefits in bankruptcy due in part to underfunding). And here, the court provides a roadmap for the State to insulate impairment from even a "reasonable and necessary" inquiry by simply claiming that the State can never have a contractual duty to make an appropriation without voter approval.

The Court should grant the petition for Certiorari and reverse the decision of the New Jersey Supreme Court. In doing so, it should again make clear that the determination of whether a particular, validly-passed statute creates a contract is a question of federal law. Alternatively, it should declare that the New Jersey Supreme Court cannot interpret its Debt Limitations and Appropriations Clauses—clauses which are

common to many states—in a way that would defeat Petitioners' constitutional rights and leave the pension plans in question severely underfunded despite the State's bargained-for promise of adequate funding.

Respectfully submitted,

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