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11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

12 **COUNTY OF SAN BERNARDINO**

13 **SAN BERNARDINO COUNTY**
14 **PUBLIC ATTORNEYS**
15 **ASSOCIATION,**

16 **Petitioner,**

17 **v.**

18 **COUNTY OF SAN BERNARDINO;**
19 **BOARD OF SUPERVISORS OF THE**
20 **COUNTY OF SAN BERNARDINO,**

21 **Respondents.**

22 **Case No. CIVDS1304516**

23 **[PROPOSED] AMICUS CURIAE BRIEF BY**
24 **CALIFORNIA STATE ASSOCIATION OF**
25 **COUNTIES AND CALIFORNIA SPECIAL**
26 **DISTRICTS ASSOCIATION**

27 **DATE: January 10, 2014**

28 **TIME: 8:30 a.m.**

DEPT: S35

JUDGE: Hon. David Cohn

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1 The California State Association of Counties (CSAC) the California Special Districts
2 Association (CSDA) submit this amicus curiae brief in support of the County of San
3 Bernardino and the Board of Supervisors of the County of San Bernardino.

4 **I.**

5 **NATURE OF AMICI CURIAE INTEREST**

6
7 CSAC is a non-profit corporation, consisting of the 58 California counties, 20 of
8 which belong to retirement systems governed by the County Employees Retirement Law
9 of 1937 (“CERL” or “37 Act,” Gov. Code, § 31450 et seq.). While all of CSAC’s
10 member counties are subject to the provisions of the Public Employees' Pension Reform
11 Act of 2013 (PEPRA), the 37 Act Counties in particular have a significant interest in the
12 issue pending before this Court, since it directly impacts the authority of counties to
13 control their own municipal affairs and to establish and provide compensation for their
14 employees.
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16
17 CSDA is a non-profit corporation representing over 1000 individual special
18 districts statewide. CSDA’s members provide a wide range of important governmental
19 services to rural and suburban communities throughout the state, including water
20 distribution and treatment, fire suppression and emergency services, park and recreation,
21 sewage collection and treatment, security and police protection, among others. Many
22 special district members of CSDA participate in the CERL retirement system. Therefore
23 the issues presented in this case significantly affect these member districts and the powers
24 of their elected Boards of Directors over retirement issues affecting their employees and
25 budget issues confronting such districts.
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1 For thirty years, counties have had specific statutory authority to provide a portion
2 of the contributions required to be paid by a member (the so-called “employer pickup”),
3 as well as the authority to repeal the pickup at any time post impasse. PEPRA did not
4 amend that provision, despite adding or amending various other provisions addressing
5 employee and employer contributions to the retirement system. Thus, PEPRA must be
6 read in the context of the Legislature’s decision to leave that statutory authority in place.
7 Absent explicit language of intent to abrogate, this Court must find that the authority
8 counties have had for decades governs this issue.
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10
11 Petitioner’s interpretation of PEPRA would give authority to control the salary
12 paid to a county’s employees to any entity other than the Board of Supervisors. Yet that
13 interpretation would be unconstitutional. If the county cannot impose a repeal of the
14 employer pickup after exhausting all required meet and confer obligations and impasse
15 procedures, Petitioner essentially has veto authority over salary issues, which is a power
16 exclusively within the authority of the Board of Supervisors. This would run afoul of
17 both Article XI, Section 1(b) and Article XI, Section 11(a) of the California Constitution.
18

19 20 **II.**

21 **A BRIEF REVIEW OF THE RELEVANT STATUTES**

22 County Employees Retirement Law of 1937

23 The CERL was enacted “to recognize a public obligation to county and district
24 employees who become incapacitated by age or long service in public employment and
25 its accompanying physical disabilities by making provision for retirement compensation
26 and death benefit as additional elements of compensation for future services and to
27 provide a means by which public employees who become incapacitated may be replaced
28 by more capable employees to the betterment of the public service without prejudice and

1 without inflicting a hardship upon the employees removed.” (Gov. Code, § 31451.)
2 Each 37 Act county has a board of retirement (Gov. Code, § 31520), which has specified
3 fiduciary responsibilities. (Gov. Code, § 31520.2.)

4 The 37 Act systems offer defined benefit plans under which the sponsoring
5 governmental unit undertakes to provide a stipulated set of benefits to employees who
6 meet certain age and service requirements. Retirement benefits to members of the 37 Act
7 retirement systems are funded from three sources: (1) investment income (Gov. Code, §
8 31595), (2) employee contributions, and (3) county and special district contributions.
9 Actuarial evaluations are required to set the rates of contribution, and must be done any
10 time retirement benefits are increased. (Gov. Code, §§ 7507, 31453.)

11 Public Employees’ Pension Reform Act of 2013

12 PEPRA made substantial and wide-ranging changes to the public employee
13 pension laws in California, including the CERL. PEPRA applies to almost all public
14 employers and pension plans. (Gov. Code, § 7522.02.) It addressed a number of topics,
15 including:

- 16 • Restrictions on supplemental defined benefit plans (Gov. Code, § 7522.10)
- 17 • Limits on employer contributions on compensation above a set cap (Gov. Code, §§
18 7522.42, subd. (a), 7522.10, subd. (f)(2))
- 19 • Limits on employer contributions to defined contribution plans for employees
20 (Gov. Code, § 7522.10, subds (f)(1) and (g))
- 21 • New retirement formulas for new members (Gov. Code, §§ 7522.20, 7522.25)
- 22 • Cost sharing and limits on employer paid member contributions (i.e., “employer
23 pick-ups”)(Gov. Code, §§ 7522.30, 31631, 31631.5)
- 24 • New final average earning calculations for new members (Gov. Code, § 7522.32)
- 25 • New rules on working after retirement (Gov. Code, § 7522.56)
- 26 • New rules for defining pensionable compensation and compensation earnable
27 (Gov. Code, §§ 7522.35, 31461)

- 1 • Elimination of the ability to purchase credits or “airtime” (Gov. Code, § 7522.46)
- 2 • New authority for 1937 Act Boards to address pension spiking (Gov Code, §§
- 3 31542, 31542.5, 31543)

4 Given this comprehensive list of reforms, the purpose of PEPRRA is clear: to
5 reduce the overall pension liability of, and cost to, public employers.

6 Meyes-Milias-Brown Act

7 Cities, counties, and most special districts are covered by the Meyers-Milias-
8 Brown Act (“MMBA,” Gov. Code, §§ 3500-3510). The MMBA is unique among the
9 State’s bargaining laws because it permits each local employer to draw up its own
10 reasonable rules and regulations. (Gov. Code, § 3507; *International Brotherhood of*
11 *Electric Workers v. City of Gridley* (1983) 34 Cal.3d 191.) The purpose of the MMBA is
12 to promote full communication and improve relations between public employers and their
13 employees by providing a reasonable method of resolving disputes on wages, hours, and
14 other terms and conditions of employment. (Gov. Code, § 3500.) All matters relating to
15 employment conditions and employee/employer relations are within the scope of
16 representation, and thus subject to meet and confer obligations. (*Claremont Police*
17 *Officers Ass’n v. City of Claremont* (2006) 39 Cal.4th 623, 630.)

18 When the parties are unable to reach agreement, the public agency can implement
19 its last, best and final offer after exhaustion of impasse procedures. Impasse procedures
20 under the MMBA have largely been governed by local rules. (Gov. Code, § 3505.)
21 Recently, the Governor signed AB 646 (Stats. 2011, ch. 680, § 2), which amended the
22 MMBA to require new mandatory fact finding after impasse. (Gov. Code, § 3505.4.)
23 However, the ability to impose after completion of the fact finding remains part of the
24 MMBA. (Gov. Code, § 3505.7.)

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III.

**PEPRA DID NOT CHANGE THIRTY YEARS OF STATUTORY AUTHORITY
ALLOWING COUNTIES TO IMPOSE A REPEAL OF THE EMPLOYER
PICKUP AFTER IMPASSE**

Government Code section 315281.2 was adopted in 1983. (Stats. 1983, ch. 558, § 2.) In the intervening thirty years, the provision has only been amended twice. The first amendment, made in 1989, deleted a “sunset” provision under which the section would have been repealed on its own terms on January 1, 1990. (Stats. 1989, ch. 202, § 1.) The second amendment, made in 1997, deleted language that stated the county may agree to pay any portion of the contributions required to be paid by a member upon “recommendation of the board of retirement.” (Stats. 1997, ch. 223, § 1.) Thus for thirty years, counties have had explicit statutory authority to pick up a portion of the employee’s required contribution, and the ability to repeal that pickup at any time after completing impasse procedures. Counties have, through these intervening years, relied upon their statutory authority in providing the pickup with the understanding that they were not creating any vested rights, and that they had the authority to later rescind their decisions.

PEPRA made significant changes to the CERL in order to reduce pension obligations. There is no indication, however, that PEPRA intended to make changes to the long-standing authority to repeal the employer pickup. PEPRA made no changes to section 31581.2, and even subsequent “clean-up” bills leave the county’s authority to repeal the employer pickup in place.¹

Petitioner nevertheless urges an interpretation of section 31631 that would

¹ Assembly Bill 1380, which becomes effective on January 1, 2014, would add language to Government Code section 31581.2 to clarify that it does not apply to members who are subject to Government Code section 7522.30 (barring counties from picking up employee contributions for new members). The bill makes no changes, however, to the ability to impose a repeal of an existing employer pickup after impasse, lending even more weight to the argument that the Legislature did not intend to remove a county’s authority to repeal an employer pickup after impasse.

1 essentially repeal section 31581.2 or render it meaningless. Yet this Court has an
2 obligation to interpret section 31631 so that it harmonizes with section 31581.2. Indeed,
3 the Court may only find an implied repeal “when no rational basis exists to harmonize the
4 two potentially conflicting statutes, and the statutes are irreconcilable, clearly repugnant,
5 and so inconsistent that they cannot operate concurrently.” (*People v. Acosta* (2002) 29
6 Cal.4th 105, 122.) In order to overcome the strong presumption against implied repeal,
7 Petitioner would have to show that the two provisions are “irreconcilable, clearly
8 repugnant, and so inconsistent that the two cannot have concurrent operation. The courts
9 are bound, if possible, to maintain the integrity of both statutes if the two may stand
10 together.” (*Stone Street Capital, LLC v. California State Lottery Com.* (2008) 165
11 Cal.App.4th 109, 119, citing *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17
12 Cal.4th 553, 569.)

13 Despite this high hurdle, Petitioner makes no effort to either reconcile its
14 interpretation of section 31631 with section 31581.2, or to provide an explanation as to
15 why section 31581.2 is impliedly repealed by section 31631. In fact, Petitioner does not
16 even cite to 31581.2 in its Points and Authorities in Support of its Petition, and only
17 briefly mentions section 31581.2 in its supplemental brief to make a tangential point.
18 (Petitioner’s Supp. Br., p. 6.) By contrast, Respondents provide this Court with a
19 reasonable and rational interpretation that reconciles and leaves intact the long-standing
20 policy of the State found in section 31581.2, and also explains how sections 31631 and
21 31631.5 work separately to control different aspects of the member contribution issue.
22 Thus this Court should adopt the County’s interpretation of the statute, and affirm its
23 authority to impose a repeal of the employer pickup.

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IV.

**AN INTERPRETATION OF PEPRA THAT AUTHORIZES VETO POWER
OVER EMPLOYEE COMPENSATION ABROGATES THE AUTHORITY OF
THE BOARD OF SUPERVISORS AND IS UNCONSTITUTIONAL**

Two key sections in Article XI of the California Constitution are relevant to this Court's decision on how to interpret Government Code section 31631:

- Section 1(b), which gives the governing body of each California county the plenary authority to provide for the compensation of county employees; and
- Section 11(a), which prohibits the State legislature from delegating to a private person the power to interfere with local budget authority or to perform other municipal functions.

Both section 1(b) and section 11(a) were added to the Constitution by a vote of the people of the State of California and were enacted "to prohibit the granting to private agencies, as distinguished from public agencies, the power to control in **any degree** the property or improvement work of a local subdivision or municipality, or to levy local taxes or assessments, or to perform **any** municipal function." (*In re Pfahler* (1906) 150 Cal. 71, 88; Cal. Const., art. 11, ann., historical notes.) (Emphasis added.)

The Constitution expresses a policy in favor of "home rule." It specifically directs in Section 1(b) that counties have the power to provide for the compensation of their employees, and in Section 11(a) that the power to "interfere" with county money, or to perform municipal functions, cannot be delegated to a private party.

Yet this is precisely the result if the Court adopts the interpretation advocated by Petitioner. Prohibiting the County from imposing its decision to eliminate the employer pickup would take the authority for setting that portion of the employees' salary away from the Board of Supervisors and places it into the hands of a third party. Under this erroneous interpretation, the Board would be divested of its power and duty under the Constitution to decide economic issues. The decision about whether the employer pickup is more or less deserving than other pressing public needs that require governmental

1 funding is no longer the Board's to make. Instead, the decision is contingent on whether
2 an MOU is approved by a third party, which is not responsible to the electorate to balance
3 competing fiscal priorities and preserve economic stability within the County. This
4 essentially allows employee associations to establish public agencies' fiscal priorities,
5 usurping the counties' constitutional duty and the will of the people of the State of
6 California that its elected officials maintain control over "municipal functions," including
7 making budgetary decisions and determining compensation for public employees. The
8 Legislature simply does not have the power under the California Constitution to compel
9 an unwilling county to make this payment. (*County of Sonoma v. Superior Court*
10 (*Sonoma County Law Enforcement Assn.* (2009) 173 Cal.App.4th 322; *County of*
11 *Riverside v. Superior Court* (2003) 30 Cal.4th 278.)

12 In order to avoid this constitutional problem, the Court should adopt the
13 reasonable interpretation advocated by Respondents and conclude that Government Code
14 section 31631 does not prevent a county from repealing its decision to provide an
15 employer pickup, consistent with Government Code section 31581.2. (*Metromedia, Inc.*
16 *v. City of San Diego* (1982) 32 Cal.3d 180, 906.) Indeed, this Court is required to resolve
17 any ambiguity in Government Code section 31631 in a manner that is consistent with
18 constitutional requirements. (*Rowe v. Superior Court* (1993) 15 Cal.App.4th 1711,
19 1723.)

21 V.

22 CONCLUSION

23 If Government Code section 31631 is interpreted as requiring an MOU in order to
24 eliminate the employer pickup, it would impliedly repeal thirty years of statutory
25 authority to the contrary, an outcome strongly disfavored in California law. More
26 importantly, it would run afoul of both Article XI, Section 1(b) and Article XI, Section
27 11(a) of the California Constitution, which grant County Boards of Supervisors home
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1 rule authority over this issue. The Court should therefore deny the Petition for Writ of
2 Mandate and confirm that the County retains the ability to repeal the employer pickup
3 following completion of impasse procedures.

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DATED: December __, 2013

By: _____
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