IN THE SUPREME COURT OF ARIZONA

THE HONORABLE KENNETH FIELDS (ret.), a retired state court judge; and THE HONORABLE JEFFERSON LANKFORD (ret.), a retired state court judge, on behalf of themselves and others similarly situated,

Plaintiffs/Appellees,

v.

THE ELECTED OFFICIALS' RETIREMENT PLAN; BRIAN TOBIN; RICHARD PETRENKA; GREGORY FERGUSON; LAUREN KINGRY; JEFF MCHENRY; and RANDIE STEIN, are all named in their official capacities as Members of the Board of Trustees of the Elected Official Retirement Plan of the State of Arizona; and THE STATE OF ARIZONA,

Defendants/Appellants.

Arizona Supreme Court
No. CV-13-0005-T/AP

Court of Appeals
Division One
No. 1 CA-CV 12-0748

MARICOPA County
Superior Court
No. CV2011-017443

PLAINTIFFS/APPELLEES' RESPONSE TO AMICUS BRIEFS OF (1) GOVERNOR BREWER, AND (2) ANDY BIGGS AND ANDREW M. TOBIN

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INTRODUCTION

The amicus brief of Andy Biggs, President of the Arizona State Senate, and Andrew M. Tobin, Speaker of the Arizona House of Representatives (collectively, "**the Legislators**"), and the amicus brief of Governor Janice Brewer confirm that this Court must construe Article XXIX, § 1(C) to ensure that it does not conflict with the other provisions of Article XXIX, and so that both of its clauses are given effect.

To avoid the Pension Impairment Clause's absolute prohibition against diminishing or impairing pension benefits, amici argue that the Court should graft a Contract Impairment Clause analysis onto that clause. But doing so would render that clause superfluous, and is inconsistent with the fact that Section 1(C) does two separate things—it confirms that (1) ***membership*** in a public retirement system is contractual and subject to the significant (but perhaps qualified) protection of the Contract Impairment Clause,[1] and (2) public retirement system ***benefits*** are entitled to additional unqualified protection. The history of Article XXIX confirms that it was intended to provide a "higher level of protection"—indeed a "guarantee[]"—to retirees.[2]

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[1] This Court has never interpreted Arizona's Contract Impairment Clause.

[2] Separate Appendix to Answering Brief at APP090-91.

Moreover, amici's arguments are based on the fallacy that the Plan is actuarially unsound and that the 1998 Formula is "flawed." Neither is the case. The Plan is actuarially sound as required by law, and the "dotcom" bubble and great recession, rather than the 1998 Formula, primarily caused the decrease in the Plan's funding ratio.

Ultimately, it is remarkably disingenuous for amici to ask this Court to bless their actions and rewrite Article XXIX given that the Legislature knew before SB1609's passage that it was unconstitutional,[3] and acknowledged that fact by considering a constitutional amendment that would specifically allow alterations to the 1998 Formula, *see* H.C.R. 2060, 2d Reg. Sess. (2012). Instead of making their case to the voters, who have the ultimate say, amici enacted SB1609 and now ask this Court to engage in remarkable judicial activism to save it. The Court, however, must enforce the unambiguous language of Article XXIX as written.

ARGUMENT

I. The Provisions in Article XXIX, When Construed Harmoniously, Establish That While the State Has Broad Leeway to Fund the Plan to Ensure Actuarial Soundness and Manage It in the Interests of Plan Beneficiaries, It May Not Diminish or Impair Benefits

As the Legislators (at 6) and Governor Brewer (at 1-2) correctly note, courts must construe a constitutional amendment harmoniously as a whole, *Ruiz v. Hull*,

[3] APP133 (133:2-15); *see also* APP064.

191 Ariz. 441, 448 ¶ 24, 957 P.2d 984, 991 (1998) ("This court must interpret the [constitutional] Amendment as a whole and in harmony with other portions of the Arizona Constitution."), while also making sure that "[e]ach word, phrase and sentence . . . be given meaning so that no part will be void, inert, redundant or trivial," *City of Phoenix v. Yates*, 69 Ariz. 68, 72, 208 P.2d 1147, 1149 (1949). Yet rather than harmonize the provisions of Article XXIX, amici's interpretation ***creates a conflict*** between those provisions and ***disregards*** the Pension Impairment Clause's unambiguous language that "public retirement system benefits shall not be diminished or impaired."

When construed as cohesive framework, Article XXIX provides significant protections to pensioners by establishing that (1) the State must fund the Plan through contributions and investment earnings to ensure actuarial soundness, (2) the State may not raid its assets for purposes other than pension benefits, (3) in general, public retirement system membership is a contractual relationship, and (4) retirement benefits in particular may not be diminished or impaired.

A. Section 1(A)'s Requirement That the Plan Be Funded Through Contributions and Investment Earnings to Ensure Actuarial Soundness Must Be Construed Harmoniously with Section 1(C)

Section 1(A) states that public retirement systems "shall be funded with [1] contributions and [2] investment earnings" using generally accepted actuarial methods and assumptions. The Legislators argue (at 7, 12-13) that this provision

does not generally prohibit "other sources of funding" to improve funding status. Similarly, Governor Brewer contends (at 2-3) that Section 1(A) authorizes the State to eliminate any "unsound provisions" of the Plan to ensure actuarial soundness. Amici are mistaken for at least two reasons.

First, by stating that public retirement systems "shall be funded" only through contributions and investment earnings, Section 1(A) necessarily precludes funding from other sources. *See Champlin v. Sargeant*, 192 Ariz. 371, 374 ¶ 16, 965 P.2d 763, 766 (1998) ("[T]he expression of one or more items of a class indicates an intent to exclude omitted items of the same class."). In other words, nothing in Section 1(A) says that public retirement systems may be funded with anything but "contributions and investment earnings," i.e., cutting benefits to solve funding issues is not permitted.

Second, the Pension Impairment Clause explicitly governs cutting benefits, and says it is prohibited. Decisively, that clause does ***not*** say: "*subject to Section 1(A)*, public retirement system benefits shall not be diminished or impaired." Thus, even if amici were correct that Section 1(A) confers broad powers to ensure actuarial soundness, the Pension Impairment Clause places a limit on those powers. Put another way, Section 1(A) gives the State many options to increase funding for contributions to improve the health of the Plan, such as through increased taxes, increased judicial fees, municipal fees, etc. But the

Pension Impairment Clause constitutionally forecloses one option: diminishing or impairing pension benefits. There is nothing inconsistent between these two provisions, and the Court should reject amici's request to write the Pension Impairment Clause out of the constitution, or to add to it language that is not there. *See Ruiz*, 191 Ariz. at 448 ¶ 24, 957 P.2d at 991 (amendments interpreted "as a whole"); *Yates*, 69 Ariz. at 72, 208 P.2d at 1149 (courts must give effect to "[e]ach word, phrase, and sentence").

The Court may also quickly dispose of Governor Brewer's argument (at 3-4) that Section 1(A) somehow requires this Court to revisit *Yeazell v. Copins*, 98 Ariz. 109, 113, 402 P.2d 541, 543-44 (1965). Aside from its holding that public retirement systems create contractual relationships, Article XXIX did not codify any other aspect of *Yeazell*. Pensioners' right to not have their benefits diminished or impaired arises from the Pension Impairment Clause, not *Yeazell*.

B. Section 1(B)'s Prohibition Against Raiding Plan Assets Also Cannot Override the Pension Impairment Clause's Prohibition Against Diminishing or Impairing Benefits

The Court must also construe Section 1(B) and Section 1(C) in harmony, requiring it to reject the Legislators' assertion (at 8-11, 13) that the State may manage system assets in a manner that would benefit all Plan beneficiaries by diminishing or impairing benefits for certain beneficiaries.

Section 1(B) states that Plan assets "are separate and independent trust funds and shall be invested, administered and distributed as determined by law solely in the interests of" Plan members and beneficiaries. The Legislators concede (at 9) that this provision was intended to prevent raiding of the pension funds "for any other purpose than serving the interests of the members," but argue (at 8) that the "determined by law" language gives the State free reign to make changes to the Plan so long as those changes are for the benefit of all Plan beneficiaries.

That phrase, however, simply confirms that the management of the Plan is subject to other provisions of law, such as the Pension Impairment Clause's prohibition against diminishing or impairing benefits. In other words, the State has discretion to manage assets in any way that is in the interests of Plan members—including myriad options for improving Plan funding status—except as otherwise provided in the Pension Impairment Clause.

Again, this harmonious reading of Sections 1(B) and 1(C) obviates the conflict created by the Legislators' proposed interpretation, which would improperly elevate Section 1(B) over Section 1(C).

C. The Court Must Give Effect to Both Clauses of Section 1(C), Which Each Serve a Different Purpose and Provide a Different Level of Protection to Different Rights

Governor Brewer's argument (at 5-8) that the Court should incorporate the three-part test used in Contract Impairment Clause cases to determine whether the

State has impermissibly "diminished or impaired" benefits likewise fails to read Article XXIX harmoniously. As set forth in Pensioners' Answering Brief (at 48-49), reading the Pension Impairment Clause as merely repeating the first clause of Section 1(C) would improperly render it superfluous. *E.g.*, *Yates*, 69 Ariz. at 72, 208 P.2d at 1149; *cf. Matcha v. Winn*, 131 Ariz. 115, 120, 638 P.2d 1361, 1366 (App. 1981) ("[J]udicially read[ing] out of [a] statute that which is so clearly present" constitutes "judicial legislation of the rankest sort.").

Critically, such a reading ignores that the two clauses in Section 1(C) refer to two different sets of rights: the first clause protects all rights associated with "***[m]embership***," which go beyond the right to specific pension benefits, while the Pension Impairment Clause gives heightened and particularized protection to the narrower class of "public retirement system ***benefits***." Ariz. Const. art. XXIX § 1(C) (emphasis added). For example, the vesting statute, A.R.S. § 38-810.02 (B), confers rights attendant to membership in the Plan that are protected under the Contract Impairment Clause, but does not confer benefits subject to the Pension Impairment Clause. Thus, the Legislature may amend A.R.S. § 38-810.02(B) so long as it satisfies the Contract Impairment Clause, whereas it may never diminish or impair a benefit—such as the 1998 Formula—that is subject to the additional, enhanced protection of the Pension Impairment Clause. This reading of Section 1(C) gives effect to both of the clauses, rendering neither superfluous.

More fundamentally, there is no reason for this Court to disregard established principles of constitutional interpretation and add exceptions to the Pension Impairment Clause. *See, e.g.*, *Cain v. Horne*, 220 Ariz. 77, 80 ¶ 10, 202 P.3d 1178, 1181 (2009) (courts follow the plain language of constitutional provisions as written when the language is clear).

Indeed, the Court's emphasis on textual interpretation was a fact known to the Legislature when it drafted Article XXIX and referred it to the voters. *See Daou v. Harris*, 139 Ariz. 353, 357, 678 P.2d 934, 938 (1984) ("We presume that the legislature, when it passes a statute, knows the existing laws."). If the Legislature had intended to create exceptions to the second clause's unambiguous mandate that "public retirement system benefits shall not be diminished or impaired," it should have expressly done so. But it did not, meaning the Court should not "add language . . . that the legislature [and voters] expressly excluded." *See State v. Thompson*, 204 Ariz. 471, 481, 65 P.3d 420, 430 (2003) (J. Ryan, concurring in part and dissenting in part); *see also In re Estate of Gordon*, 207 Ariz. 401, 405 ¶ 19, 87 P.3d 89, 93 (App. 2004) (where meaning is plainly apparent from the language, courts "simply are not authorized to add anything . . . unless an absurdity would otherwise result").

Tellingly, nowhere in the Proposition 100 voter pamphlet or other history of Article XXIX is there any suggestion that either the Legislature or Arizona voters intended to create any exceptions to the Pension Impairment Clause.

II. The History of Article XXIX Confirms That Arizona Voters Intended to Protect Pensioners by Absolutely Prohibiting the State from Diminishing or Impairing Benefits—Including the 1998 Formula

Contrary to the Legislators' argument (at 14-16) and Governor Brewer's argument (at 6-7), the history (and plain text) of Article XXIX make clear that it was not enacted merely to codify existing law and prevent raiding of the pension funds. Rather, that amendment was designed to provide retirees "a higher level of protection"[4] by, among other things, prohibiting the diminishment or impairment of benefits such as the 1998 Formula—something that was "consistent" with Arizona's practice of not diminishing benefits.[5]

Pensioners do not dispute that the first clause in Section 1(C) codifies the holding in *Yeazell*, 98 Ariz. at 113, 402 P.2d at 543-44, that membership in public pensions are contracts rather than gratuities, as well as its progeny, *Fund Manager,*

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[4] APP091.

[5] Arizona State Senate, *Fact Sheet for SCR1009* (43rd Leg., 2d Reg. Sess. (1998)) (emphasis added) (hereinafter "SCR1009 Fact Sheet"), available at http://www.azleg.gov/FormatDocument.asp?inDoc=legtext/43leg/2r/summary/s.1009scr.fin.htm&session_ID=52 (last visited May 25, 2013); *see also* APP090 (legislative council analysis stating that Proposition 100's rules were "***consistent with current law and practices***" (emphasis added)).

PSPRS v. City of Phoenix, 151 Ariz. 487, 728 P.2d 1237 (App. 1986), which holds that such membership rights are governed by the Contract Impairment Clause.

The Pension Impairment Clause, however, provides additional, absolute protection to pension ***benefits***—protection "***consistent***" with the Legislature's "practice" of not diminishing or impairing pension benefits promised in perpetuity. Amici simply ask the Court to ignore that the SCR1009 Fact Sheet did not merely say it was "codify[ing] existing law," but also noted that at least some of the changes were "***consistent with current practices***."[6]

The history and text of Article XXIX also do not support the Legislators' argument that the only other purpose of Article XXIX was to prevent legislative raiding of pension fund assets. If that had been the goal, Section 1(B) would have sufficed. The voters, however, enacted all three sections of Article XXIX.

Furthermore, the Legislators' citation (at 15) to the committee testimony of Senator Spitzer, SCR1009's sponsor, actually shows that the intent of the measure was not just (1) "to prohibit the fund's assets to be used and/or borrowed to subsidize other state programs," but was also (2) "***to protect and secure . . . benefits.***"[7] Senator Spitzer reiterated this goal in the Proposition 100 voter

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[6] SCR1009 Fact Sheet; *see also* APP090.

[7] Arizona House of Representatives (43rd Leg., 2d Reg. Sess.), *Minutes of Committee on Government Operations* (Mar. 18, 1998) at 2 (emphasis added), Appendix A to the Legislators' Separate Appendix.

pamphlet by stating that the measure was necessary to "***guarantee[] that [pensioners'] retirement benefits will not be impaired***."[8]

Moreover, in expressing his intent to protect pension benefits through Article XXIX, Senator Spitzer suggested that he was specifically thinking of protecting permanent base benefit increases under the 1998 Formula:

> I am proud to have successfully sponsored legislation to provide a cost of living increase to retirees consistent with both equity and sound accounting principles.
>
> ***It is critical to this State that*** both current employees and ***retirees be guaranteed that their retirement benefits will not be impaired***.[9]

At the very least, Senator Spitzer's statement establishes that the Legislature and voters were aware that retirees were receiving permanent benefit increases when they enacted the specific, absolute protection for that benefit.

III. Contrary to Governor Brewer's Arguments, SB1609 Violates the Contract Impairment Clause

A. Pensioners Have a Contractual Right to the 1998 Formula

Although Governor Brewer largely relies on the arguments made by EORP and the State of Arizona in their opening briefs, her summary arguments (at 9) that Pensioners have no contractual right to the 1998 Formula are incorrect.

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[8] APP090 (emphasis added).

[9] *Id.*

Her assertion that Pensioners have no contractual right to the 1998 Formula because it "would render the plan actuarially unsound," is groundless because soundness is irrelevant to the first prong of the Contract Impairment Clause inquiry. *See, e.g.*, *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992).

Her second and fourth arguments—that the Legislature did not bind itself to the 1998 Formula and retained the right to change the formula—ignore the history of A.R.S. § 38-818. The Legislature enacted the first benefit increase formula in 1990, but promised to give increases for only five plan years, "[e]ffective July 1, 1990 and July 1 of each year thereafter ***through July 1, 1994***." *See* 1990 Ariz. Sess. Laws, Ch. 236, § 4 (2d Reg. Sess.). By including a sunset for that formula, the Legislature ensured that it could diminish or eliminate the formula after July 1, 1994.

In 1996, the Legislature reenacted the formula with some modifications, but did so ***without a sunset***, stating that permanent benefit increases were to be provided "[e]ffective July 1, 1996 and ***July 1 of each year thereafter[.]***" 1996 Ariz. Sess. Laws, Ch. 198, § 1 (2d Reg. Sess.). By promising increases under this formula in perpetuity, the Legislature only retained the ability to enhance the formula. *See Thurston v. Judge's Ret. Plan*, 179 Ariz. 49, 51, 876 P.2d 545, 547 (1994) ("[W]hen the amendment is beneficial to the employee . . . it automatically becomes part of the contract by reason of the presumption of acceptance.").

In 1998, it did so by adopting the 1998 Formula, *see* 1998 Ariz. Sess. Laws, Ch. 264, § 1 (2d Reg. Sess.), which became part of the contract between Pensioners and the State. Accordingly, the history of A.R.S. § 38-818 confirms that the Legislature bound itself to the 1998 Formula, and cannot now change it.

Governor Brewer's third argument also fails because SB1609 reduced and impaired Pensioners' non-contingent benefit. As set forth in the Answering Brief (at 44-47), there was nothing contingent about Pensioners' right to have their payments calculated under the 1998 Formula given that they had performed all services necessary to earn their benefits and there was no event "which may not happen." *See Thurston*, 179 Ariz. at 50, 876 P.2d at 546.

B. Governor Brewer's Argument That a Significant and Legitimate Purpose Justifies SB1609 Rests on the Fallacies That the Plan Is Actuarially Unsound and the 1998 Formula Is Flawed

1. The Plan Is Not Actuarially Unsound

Governor Brewer's assertion (at 17) that a funding ratio below 80% indicates that the Plan is in trouble is incorrect, as demonstrated by the testimony of EORP's actuary.[10] A recent Issue Brief from the American Academy of Actuaries titled "The 80% Pension Funding Standard Myth," also confirms that the 80% standard is a myth, and that whether a plan is healthy or not depends on a variety of factors, among which are the "[s]ize of the pension obligation relative to

[10] APP169-APP170 (36:10-37:13).

the financial size . . . of the plan sponsor" and "[f]unding or contribution policy" for the plan. *Id.* at 2-3, available at http://actuary.org/files/80%25_Funding_IB_FINAL071912.pdf (last visited May 29, 2013).

In this case, the financial size of the State is large—its annual budget is several billion dollars. More importantly, the funding and contribution policy of the Plan requires employers to make contributions to ensure the Plan's health. *See* A.R.S. § 38-810(C). There is absolutely no evidence that employers cannot pay increased contribution rates in the future. Indeed, Governor Brewer's assertion (at 13) that SB1609 will save the State and counties $54.8 million over 30 years—less than $2 million per year—demonstrates that employers are capable of making the necessary contributions. Likewise, her citation (at 18) to *In re City of Stockton*, 478 B.R. 8 (Bankr. E.D. Cal. 2012), a case in which the employer was ***bankrupt***, is a far cry from the situation here.

2. The 1998 Formula Is Not "Flawed" and Has Not Primarily Caused the Decrease in the Plan's Funding Ratio

There is also no evidence that the 1998 Formula in place for over a decade is the primary cause of the decline in the Plan's funding ratio. In fact, the Plan's own documents say the "2000-2002 asset value losses [i.e., the tech bubble] were, by far, ***the major cause*** of the Plan's funding ratio erosion," and that "***other factors***

also contributed albeit to a far lesser extent."[11] The Legislature also experimented with essentially the same formula as the 1998 Formula for five Plan years from 1990-1994, and necessarily concluded that it did not harm the Plan because it reinstituted that formula in 1998. Indeed, when proposing Article XXIX to the people, Senator Spitzer noted that the 1998 Formula was "consistent with both equity and ***sound accounting principles***."[12]

Other factors confirm the minimal role played by the 1998 Formula in the funding ratio of the plan:

- For four years (FY 1998-FY 2001), the State and County employers made no contributions even though permanent increases were awarded in each of those years.[13]
- Governor Brewer concedes (at 10) that the "dotcom" bubble and great recession played a major impact on the Plan's funding ratio.
- The actuarial projections relied upon by the State confirm the limited impact of SB1609: the elimination of the 1998 Formula has a marginal impact on employer contribution rates, reducing the peak unsubsidized rate from approximately 45% to 40%.[14]
- The Milliman Report, after suggesting revisions to numerous assumptions (such as the assumption that the active management of fund assets would allow the Plan to consistently beat the market) recommended only a reduction from 8.5% to 7.5% of the assumed

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[11] EX. 4 at 2 (EOF1059) (emphasis added).

[12] APP090 (emphasis added).

[13] APP120-APP124 (95:6-99:20); APP046-APP047 (response to interrogatory 7 (showing increases in past years)).

[14] *See* APP068-APP069 (comparing the two scenarios).

rate of return. Critically, in taking into consideration the 1998 Formula, the actuary assessed the ***hypothetical*** past impact of the 1998 Formula on the Plan, ***not the actual impact***.[15] Moreover, EORP actually only reduced the assumed rate of return to 8.25%.[16]

3. Governor Brewer's Reliance on Legislative Findings and Speculative Stochastic Reports Is Misplaced

Governor Brewer's reliance (at 11-13) on the Legislature's findings and statements of individual legislators to establish that SB1609 served a legitimate public purpose is misplaced because those findings are not entitled to absolute deference. *Cf. U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 25-26 (1977) ("complete deference to a legislative assessment of reasonableness and necessity is not appropriate"). Similarly, her reliance (at 14-15) on highly speculative projections of future contributions ignores that those projections are unreliable due to the cyclical nature of business cycles,[17] and the fact that EORP does not have "the slightest idea" how the market will perform in the future.[18]

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[15] *See* EX. 38 (Milliman Actuarial Report) at 33, 37, 39-41 (estimating impact of 1998 Formula over 10-year period preceding report based on a "recommended asset mix" that in turn was "[b]ased on the returns for representative market indices," rather than actual returns obtained by the Plan).

[16] APP056.

[17] 4/10/2012 Trial Tr. at 84:16-25.

[18] *Id.* at 243:18-244:9.

4. Governor Brewer's Citation to Other Plans Is Unhelpful Given Key Differences Between the Plans

Contrary to Governor Brewer's argument (at 15-19), this Court should not take the other PSPRS plans into consideration in deciding this case because there are key differences between the plans, chief among them the difference in funding mechanisms. The employer contributions to the Plan are heavily subsidized by judicial fees,[19] *see* A.R.S. § 38-810(B), but there are no similar provisions for the other PSPRS plans. Accordingly, the actual, subsidized employer contribution rates for the Plan are less than the contribution rates for the other PSPRS plans, meaning that the Plan is more affordable and that there are additional available options for improving the Plan's health.

Another key difference is that there is currently legislation pending that would close the Plan, *see* HB 2608, 1st Reg. Sess. (2013), which would save the State a significant amount of money that could then be used to improve the funding status of the Plan for existing members and retirees. There is no similar legislation to close either of the other two PSPRS plans, placing them in a significantly different situation for purposes of a Contract Impairment Clause analysis.

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[19] APP116-APP117 (87:15-88:6); *see also* APP161-APP162 (196:25-197:11 (FY 2012 unsubsidized rate was 32.99%, but because of judicial fees the State and counties only had to pay 17.96%)).

Lastly, the record shows there are very few members receiving benefits from EORP—the 2011 report identified only 990 individuals.[20] Those individuals were approximately 70 years old, and received an average annual pension of approximately $43,000. The Plan is not a problem for the State.

C. The Record Confirms That SB1609 Was Neither Reasonable Nor Necessary

Governor Brewer's lone argument in addition to those made by EORP and the State (at 24-25)—that the Court should not take into consideration events occurring after the enactment of SB1609 to determine whether that measure was reasonable and necessary—is baseless, especially given that the trial court never even ruled on Pensioners' Contract Impairment Clause claims. There is no rule in Arizona restricting a Contract Impairment Clause analysis to events occurring before the passage of the legislation at issue. *Baker v. ADOR*, 209 Ariz. 561, 105 P.3d 1180 (App. 2005), cited by Governor Brewer, sets forth no such rule, and neither does *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), a case that does not even have anything to do with the Contract Impairment Clause and instead involves the Equal Protection Clause.

Furthermore, events since the passage of SB1609 are highly relevant because they confirm that the Legislature failed to adequately analyze or pursue

[20] EX. 7 at EOF1343, attached hereto.

options other than SB1609. To the extent the Court determines that a Contract Impairment Clause analysis is appropriate, the Court should remand to the trial court so that it may assess all of the relevant evidence—including events occurring since SB1609's passage—before making its findings and rulings.

D. Governor Brewer's Reliance on Two Trial Court Decisions from South Dakota and Minnesota Is Misplaced

Putting aside the precedential value of trial court decisions or even the propriety of citing them,[21] out-of-state cases may be particularly unhelpful when they have different constitutional provisions, statutes, and common law governing the treatment of pension benefits. *See* A. Monahan, *Public Pension Plan Reform: The Legal Framework*, Univ. of Minnesota Law School, Legal Studies Research Paper Series, Research Paper No. 10-13 at 27 (2007) (summarizing different state approaches and establishing wide variation in pension plan laws), available at http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1573864_code702020.pdf?abstractid=1573864&mirid=5 (last visited May 29, 2013).

That is precisely the case with both *Tice v. State of South Dakota*, Civil No. 10-225 (Sixth Judicial Circuit of S.D. Apr. 11, 2012) (mem.) and *Swanson v. State of Minnesota*, No. 62-CV-10-05285 (Second Judicial District of Minnesota

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[21] *See* ARCAP 28(c) (prohibiting citation to memorandum decisions except in limited circumstances); S.D. Codified Laws § 15-26A-87.1(E) (same); Minn. Stat. § 480A.08 (2012) (unpublished opinions are not precedential).

June 29, 2011) (mem.). *Tice* concluded that the plaintiff had no contractual right to a COLA provision under South Dakota law because unlike other states (such as Florida), South Dakota has no statute or constitutional provision creating contract rights in pension plans. *Tice* at *10-17 & n.8. Article XXIX, § 1(C) of the Arizona Constitution makes clear that "membership in a public retirement system is a contractual relationship subject to [Arizona's Contract Impairment clause.]" *See also Yeazell*, 98 Ariz. at 113, 402 P.2d at 543-44. Accordingly, *Tice* is inapplicable.

Likewise, *Swanson* has no bearing on this case because the Minnesota trial court applied Minnesota law to hold that there was no explicit contractual right created by the COLA statute at issue, and thus there was no basis for the Contract Impairment Clause claim. *Swanson*, at *3, 16-21. But Arizona treats membership in a public pension plan as a contractual relationship, rendering *Swanson* inapplicable as well.

CONCLUSION

The Court should reject the arguments advanced by Governor Brewer and the Legislators because they ask the Court to construe Article XXIX so that its provisions conflict, rendering the second clause of Section 1(C) superfluous, and also base their arguments on the fallacy that the Plan is actuarially unsound.

. . .

Respectfully submitted this 30th day of May, 2013.

OSBORN MALEDON, P.A.

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RETIREES AND BENEFICIARIES

Attained Ages	Males		Females		Total	
	No.	Annual Pension Benefits	No.	Annual Pension Benefits	No.	Annual Pension Benefits
Under 25	1	$ 16,085	1	$ 16,085	2	$ 32,170
25-29	0	0	0	0	0	0
30-34	0	0	0	0	0	0
35-39	2	21,190	2	20,492	4	41,682
40-44	5	68,111	0	0	5	68,111
45-49	6	92,945	3	49,915	9	142,860
50-54	10	443,988	12	284,647	22	728,635
55-59	44	1,964,605	35	1,664,633	79	3,629,238
60-64	103	6,239,002	65	3,393,506	168	9,632,508
65-69	107	5,156,927	45	1,865,961	152	7,022,888
70-74	113	5,695,514	59	1,779,454	172	7,474,968
75-79	109	5,417,930	55	1,943,627	164	7,361,557
80-84	67	2,861,608	47	1,426,815	114	4,288,423
85-89	35	1,209,990	47	1,317,494	82	2,527,484
90-94	4	120,992	10	347,792	14	468,784
95-99	2	26,436	1	15,920	3	42,356
100 and Over	0	0	0	0	0	0
Totals	608	$29,335,323	382	$14,126,341	990	$43,461,664

Pension Being Paid		Number	Annual Pensions	Average Pensions
Retired Members	Service Pensions	785	$36,226,250	$46,148
	Disability Pensions	16	1,353,130	84,571
Totals		801	37,579,380	46,916
Survivors of Members	Spouses	186	5,808,961	31,231
	Children with Guardians	3	73,323	24,441
Total		189	5,882,284	31,123
Total Pension being Paid		990	$43,461,664	$43,901

	Average Age	Average Service	Average Age at Retirement
Normal retired members	70.5	14.5	61.1
Disability retired members	69.0	11.5	57.7
Spouse beneficiaries	76.1	13.3	57.8