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7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF ORANGE

10 ORANGE COUNTY ATTORNEYS  
ASSOCIATION,

11 Petitioner,

12 v.

13 COUNTY OF ORANGE; BOARD  
14 OF SUPERVISORS OF THE  
COUNTY OF ORANGE,

15 Defendant.

Case No.: 30-2013-00638110-CU-WM-CJC

Complaint Filed: March 15, 2013

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

Date: February 14, 2014

Time: 1:30 PM

Dept.: C25

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19 The California State Association of Counties (CSAC) the California Special Districts  
20 Association (CSDA) submit this amicus curiae brief in support of the County of Orange  
21 and the Board of Supervisors of the County of Orange.  
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1 **I. NATURE OF AMICI CURIAE INTEREST**

2 CSAC is a non-profit corporation, consisting of the 58 California counties, 20 of  
3 which belong to retirement systems governed by the County Employees Retirement Law  
4 of 1937 (“CERL” or “37 Act,” Gov. Code, § 31450 et seq.). While all of CSAC’s  
5 member counties are subject to the provisions of the Public Employees' Pension Reform  
6 Act of 2013 (PEPRA), the 37 Act Counties in particular have a significant interest in the  
7 issue pending before this Court, since it directly impacts the authority of counties to  
8 control their own municipal affairs and to establish and provide compensation for their  
9 employees.

10 CSDA is a non-profit corporation representing over 1000 individual special  
11 districts statewide. CSDA’s members provide a wide range of important governmental  
12 services to rural and suburban communities throughout the state, including water  
13 distribution and treatment, fire suppression and emergency services, park and recreation,  
14 sewage collection and treatment, security and police protection, among others. Many  
15 special district members of CSDA participate in the CERL retirement system. Therefore  
16 the issues presented in this case significantly affect these member districts and the powers  
17 of their elected Boards of Directors over retirement issues affecting their employees and  
18 budget issues confronting such districts.

19 For thirty years, counties have had specific statutory authority to provide a portion  
20 of the contributions required to be paid by a member (the so-called “employer pickup”),  
21 as well as the authority to repeal the pickup at any time post impasse. PEPRA did not  
22 amend that provision, despite adding or amending various other provisions addressing  
23 employee and employer contributions to the retirement system. Thus, PEPRA must be  
24 read in the context of the Legislature’s decision to leave that statutory authority in place.  
25 Absent explicit language of intent to abrogate, this Court must find that the authority  
26 counties have had for decades governs this issue.

1           Petitioner’s interpretation of PEPRA would give authority to control the salary paid  
2 to a county’s employees to any entity other than the Board of Supervisors. Yet that  
3 interpretation would be unconstitutional. If the county cannot impose a repeal of the  
4 employer pickup after exhausting all required meet and confer obligations and impasse  
5 procedures, Petitioner essentially has veto authority over salary issues, which is a power  
6 exclusively within the authority of the Board of Supervisors. This would run afoul of both  
7 Article XI, Section 1(b) and Article XI, Section 11(a) of the California Constitution.

8       **II. A BRIEF REVIEW OF THE RELEVANT STATUTES**

9       County Employees Retirement Law of 1937

10           The CERL was enacted “to recognize a public obligation to county and district  
11 employees who become incapacitated by age or long service in public employment and its  
12 accompanying physical disabilities by making provision for retirement compensation and  
13 death benefit as additional elements of compensation for future services and to provide a  
14 means by which public employees who become incapacitated may be replaced by more  
15 capable employees to the betterment of the public service without prejudice and without  
16 inflicting a hardship upon the employees removed.” (Gov. Code, § 31451.) Each 37 Act  
17 county has a board of retirement (Gov. Code, § 31520), which has specified fiduciary  
18 responsibilities. (Gov. Code, § 31520.2.)

19           The 37 Act systems offer defined benefit plans under which the sponsoring  
20 governmental unit undertakes to provide a stipulated set of benefits to employees who  
21 meet certain age and service requirements. Retirement benefits to members of the 37 Act  
22 retirement systems are funded from three sources: (1) investment income (Gov. Code,  
23 § 31595), (2) employee contributions, and (3) county and special district contributions.  
24 Actuarial evaluations are required to set the rates of contribution, and must be done any  
25 time retirement benefits are increased. (Gov. Code, §§ 7507, 31453.)

26       Public Employees’ Pension Reform Act of 2013

27           PEPRA made substantial and wide-ranging changes to the public employee  
28 pension laws in California, including the CERL. PEPRA applies to almost all public

1 employers and pension plans. (Gov. Code, § 7522.02.) It addressed a number of topics,  
2 including:

- 3 • Restrictions on supplemental defined benefit plans (Gov. Code, § 7522.10)
- 4 • Limits on employer contributions on compensation above a set cap (Gov. Code, §§  
5 7522.42, subd. (a), 7522.10, subd. (f)(2))
- 6 • Limits on employer contributions to defined contribution plans for employees  
7 (Gov. Code, § 7522.10, subds (f)(1) and (g))
- 8 • New retirement formulas for new members (Gov. Code, §§ 7522.20, 7522.25)
- 9 • Cost sharing and limits on employer paid member contributions (i.e., “employer  
10 pick-ups”)(Gov. Code, §§ 7522.30, 31631, 31631.5)
- 11 • New final average earning calculations for new members (Gov. Code, § 7522.32)
- 12 • New rules on working after retirement (Gov. Code, § 7522.56)
- 13 • New rules for defining pensionable compensation and compensation earnable  
14 (Gov. Code, §§ 7522.35, 31461)
- 15 • Elimination of the ability to purchase credits or “airtime” (Gov. Code, § 7522.46)
- 16 • New authority for 1937 Act Boards to address pension spiking (Gov Code, §§  
17 31450, 31542.5, 31543)

18 Given this comprehensive list of reforms, the purpose of PEPRA is clear: to reduce the  
19 overall pension liability of, and cost to, public employers.

20 Meyes-Milias-Brown Act

21 Cities, counties, and most special districts are covered by the Meyers-Milias-  
22 Brown Act (“MMBA,” Gov. Code, §§ 3500-3510). The MMBA is unique among the  
23 State’s bargaining laws because it permits each local employer to draw up its own  
24 reasonable rules and regulations. (Gov. Code, § 3507; *International Brotherhood of*  
25 *Electric Workers v. City of Gridley* (1983) 34 Cal.3d 191.) The purpose of the MMBA is  
26 to promote full communication and improve relations between public employers and their  
27 employees by providing a reasonable method of resolving disputes on wages, hours, and  
28 other terms and conditions of employment. (Gov. Code, § 3500.) All matters relating to

1 employment conditions and employee/employer relations are within the scope of  
2 representation, and thus subject to meet and confer obligations. (*Claremont Police*  
3 *Officers Ass'n v. City of Claremont* (2006) 39 Cal.4th 623, 630.)

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

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

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

26 PEPRA made significant changes to the CERL in order to reduce pension  
27 obligations. There is no indication, however, that PEPRA intended to make changes to  
28 the long-standing authority to repeal the employer pickup. PEPRA made no changes to

1 section 31581.2, and even subsequent “clean-up” bills leave the county’s authority to  
2 repeal the employer pickup in place.<sup>1</sup>

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

16 Despite this high hurdle, Petitioner makes no effort to either reconcile its  
17 interpretation of section 31631 with section 31581.2, or to provide an explanation as to  
18 why section 31581.2 is impliedly repealed by section 31631. By contrast, Respondents  
19 provide this Court with a reasonable and rational interpretation that reconciles and leaves  
20 intact the long-standing policy of the State found in section 31581.2, and also explains  
21 how sections 31631 and 31631.5 work separately to control different aspects of the  
22 member contribution issue. Thus this Court should adopt the County’s interpretation of  
23 the statute, and affirm its authority to impose a repeal of the employer pickup.

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26 <sup>1</sup> Assembly Bill 1380, which became effective on January 1, 2014, would add language to Government Code section  
27 31581.2 to clarify that it does not apply to members who are subject to Government Code section 7522.30 (barring  
28 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 **IV. AN INTERPRETATION OF PEPRA THAT AUTHORIZES VETO POWER OVER**  
2 **EMPLOYEE COMPENSATION ABROGATES THE AUTHORITY OF THE**  
3 **BOARD OF SUPERVISORS AND IS UNCONSTITUTIONAL**

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

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

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

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

21 Yet this is precisely the result if the Court adopts the interpretation advocated by  
22 Petitioner. Prohibiting the County from imposing its decision to eliminate the employer  
23 pickup would take the authority for setting that portion of the employees' salary away  
24 from the Board of Supervisors and places it into the hands of a third party. Under this  
25 erroneous interpretation, the Board would be divested of its power and duty under the  
26 Constitution to decide economic issues. The decision about whether the employer pickup  
27 is more or less deserving than other pressing public needs that require governmental  
28 funding is no longer the Board's to make. Instead, the decision is contingent on whether

1 an MOU is approved by a third party, which is not responsible to the electorate to balance  
2 competing fiscal priorities and preserve economic stability within the County. This  
3 essentially allows employee associations to establish public agencies' fiscal priorities,  
4 usurping the counties' constitutional duty and the will of the people of the State of  
5 California that its elected officials maintain control over "municipal functions," including  
6 making budgetary decisions and determining compensation for public employees. The  
7 Legislature simply does not have the power under the California Constitution to compel  
8 an unwilling county to make this payment. (*County of Sonoma v. Superior Court*  
9 (*Sonoma County Law Enforcement Assn.* (2009) 173 Cal.App.4th 322; *County of*  
10 *Riverside v. Superior Court* (2003) 30 Cal.4th 278.)

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

18 **V. CONCLUSION**

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

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Dated: February \_\_\_\_, 2014

Respectfully submitted,

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