No. 18-1545

In the
Supreme Court of the United States

TRACY GUERIN, Director of the Washington State Department of Retirement Systems,
Petitioner,

v.

MICKEY FOWLER, LEISA MAURER, AND A CLASS OF SIMILARLY SITUATED INDIVIDUALS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL CONFERENCE ON PUBLIC EMPLOYEE RETIREMENT SYSTEMS (NCPERS) IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED IN THE PETITION[1]

1. If a State's statutorily created pension system allows government employees to transfer their accumulated pension contributions into a different pension plan, do the employees have a constitutional right to a particular method for calculating interest on the contributions at the time of transfer?

2. Does the Eleventh Amendment provide a state immunity from a claim in federal court for money damages, when the claim is framed as a request for an injunction ordering the State to provide compensation to Plaintiffs?

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[1] NCPERS amicus brief in support of jurisdiction addresses only the second issue relating to Eleventh Amendment immunity.

SUPREME COURT RULE 29.6
CORPORATE DISCLOSURE STATEMENT

The National Conference on Public Employee Retirement Systems pursuant to Supreme Court Rule 29.6 files this "Corporate Disclosure Statement" and states that as a not-for-profit trade association that it has no parent company, has no stock, and as a consequence no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED IN THE PETITION . . i

SUPREME COURT RULE 29.6
CORPORATE DISCLOSURE STATEMENT . . . ii

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

1. THE ACCEPTANCE OF JURISDICTION BY THIS COURT IS WARRANTED WHERE THE NINTH CIRCUIT'S DECISION STRIKES AT THE HEART OF CORE STATE INTERESTS PROTECTED BY PRINCIPLES OF FEDERALISM AND THE ELEVENTH AMENDMENT.. 3

   A. Background behind Eleventh Amendment immunity and federalism concerns implicated in this case. 3

   B. The Ninth Circuit decision threatens the autonomy of state pension plans and directly implicates Eleventh Amendment concerns . . 8

CONCLUSION. 15

TABLE OF AUTHORITIES

CASES

Alden v. Maine,
527 U.S. 706, 119 S. Ct. 2240, 144, L. Ed. 2d 636 (1999). 6, 7

Barroga v. CALPERS,
2012 WL 5337326 (E.D. Cal. 2012) 13

Bd. of Trs. of Univ of Ala. v. Garrett,
531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001). 6, 7

Chisholm v. Georgia,
2 U.S. 419 (1793). 4

Clark v. Barnard,
108 U.S. 436, 2 S. Ct. 878, 27 L.Ed. 780 (1883) . 5

Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.,
527 U.S. 666, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999). 5

Commonwealth of Pa. Public School Emp.'s Ret. Sys. v. Citigroup,
2011 WL 1937737 (E.D. Pa. 2011) 14

Edelman v. Jordan,
415 U.S. 651 (U.S. 1974) . . . . . *passim*

Ernst v. Rising,
427 F.3d 351 (6th Cir. 2005). 9, 15

Feinstein v. Lewis,
477 F.Supp. 1256 (S.D.N.Y. 1979), *aff'd* 622 F.2d 573 (2d Cir. 1980) 7

Fitzpatrick v. Bitker,
427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (1976). 5

Fowler v. Guerin,
899 F.3d 1112 (9th Cir. 2018). 1, 9

Glenn v. California Dep't of Education,
799 Fed. Appx. 499 (9th Cir. 2018) 15

Hair v. Tenn. Consol. Ret. Sys.,
790 F.Supp. 1358 (M.D.Tenn.1992) 14

Hall v. Elected Officials' Retirement Plan,
241 Ariz. 33, 383 P. 3d (2016) 13

Hans v. Louisiana,
134 U.S. 1, 10 S. Ct 504, 33 L.Ed. 842 (1890) . . . 4

Hughes Aircraft Co. v. Jacobson,
525 U.S. 432 (1999). 12, 13

Hutto v. South Carolina Ret. Sys.,
773 F.3d 536 (4th Cir. 2014). 9, 15

JMB Grp. Trust IV v. Pa. Mun. Ret. Sys.,
986 F.Supp. 534 (N.D.Ill.1997) 13, 14

Jones v. Pub. Emp't Ret. Pensions Div.,
2011 WL 6003122 (D.N.J. November 29, 2011) 14

Kaho'ohanohano v. State,
114 Hawai'i 302, 162 P. 3d (2007) 13

Kentucky Retirement Systems v. E.E.O.C.,
554 U.S. 135, 128 S. Ct. 2361, 171 L. Ed. 2d 322 (2008) 6

Kimel v. Fla. Bd. of Regents,
528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000) 6, 7

L.A. Branch NAACP v. L.A. Unified Sch. Dist.,
714 F.2d 946 (9th Cir. 1983) 15

Lapides v. Bd. of Regents,
535 U.S. 613, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002) 5

Louisiana Municipal Association v. State,
893 So. 2d 809 (La. 2005) 13

McGinty v. New York,
251 F.3d 84 (2d Cir. 2001) 9, 15

Mello v. Woodhouse,
755 F.Supp. 923 (D.Nev.1991) 14

Mitchell v. L.A. Cmty. Coll. Dist.,
861 F.2d 198 (9th Cir. 1988) 15

Mo. State Emps.' Ret. Sys. v. Credit Suisse, N.Y. Branch,
2010 WL 318652 (W.D.Mo. Jan. 21, 2010) 14

Pennhurst State School & Hosp. v. Halderman,
465 U.S. 89 (U.S. 1984) 3, 5, 6, 8

Port Authority Trans-Hudson Corp. v. Feeney,
495 U.S. 299 (1990) 5

Public Emp. Ret. Ass'n of N.M. v. Clearlend Sec.,
2012 WL 2574819 (D.N.M. June 29, 2012) 14

Pub. Sch. Ret. Sys. of Missouri v. State Street Bank & Trust Co.,
640 F.3d 821 (8th Cir. 2011). 9, 15

Quern v. Jordan,
440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979). 6

R.I. Broth. of Corr. Officers v. R.I.,
264 F. Supp. 2d 87 (D.R.I. 2003) 14

Teachers' Retirement System v. Genest,
154 Cal. App. 4th, 65 Cal. Rptr. 3d (3d Dist. 2007) 13

Tex. Cty. and Dist. Ret. Sys. v. Wexford Spectrum Fund, L.P.,
953 F. Supp. 2d 726 (W.D. Texas, July 9, 2013) 14

Tradigrain v. Mississippi State Port Authority,
701 F.2d 1131 (5th Cir. 1983). 13

U.S. v. S.C.,
445 F.Supp. 1094 (D.S.C.1977) 14

Washington Federation of State Employees v. State,
107 Wash. App. 241, 26 P. 3d (2001) 13

West Virginia Inv. Mgmt. Bd. and Consol. Pub. Ret. Bd. v. The Variable Life Ins. Co.,
2010 WL 2944847
(S.D.W.V. July 26, 2010) 14, 15

CONSTITUTION

U.S. Const. amend. XI . . . . . *passim*

STATUTES

29 U.S.C. §1002(32) 7

29 U.S.C. §1003(b) 7

OTHER MATERIALS

Bradford R. Clark, *The Eleventh Amendment & the Nature of the Union*, 123 Harv. L. Rev. 1817 (2010). 4

Olivia S. Mitchell, David McCarthy, Stanley C. Wisniewski, and Paul Zorn, *Developments in State and Local Pension Plans,* in *Pensions in the Public Sector*, edited by Olivia S. Mitchell & Edwin C. Hustead (University of Pennsylvania Press, 2001). 11

Alicia H. Munnell, State and Local Pensions: What Now? (Brookings Institution Press, 2012) 11

C. Warren, *The Supreme Court in United States History* (rev.ed.1973). 4

WEBSITES

The Evolution of Public Pension Plans: Past, Present and Future (NCPERS, 2008), https://www.ncpers.org/files/Evolution%20of%20Public%20 Pensions_2d.pdf 12

GAO Report to the Committee on Finance, U.S. Senate, *State and Local Government Retiree Benefits*, January 2008, https://www.gao.gov/assets/280/271576.pdf 12

NASRA, Composition of Public Retirement System Boards, https://www.nasra.org/files/Topical%20Reports/Governance%20and%20Legislation/Board%20Governance%20Policies/Board%20Composition.pdf 11

https://www.nasra.org/accounting 11

https://www.nasra.org/governance 10

NCPERS, www.ncpers.org 2

INTEREST OF THE *AMICUS CURIAE* [2]

The National Conference on Public Employee Retirement Systems (hereinafter NCPERS) is a not for profit national trade association focused on the preservation, growth and stability of public pension plans and funds. The decision of the Ninth Circuit Court of Appeals in *Fowler v. Guerin*, 899 F.3d 1112 (9th Cir. 2018) as it relates to Eleventh Amendment immunity undermines and frustrates these goals.

NCPERS is the largest national non-profit public pension advocacy organization, representing over 500 state, territorial, county and municipal pension funds having assets totaling nearly $3 trillion. NCPERS member pension funds collectively serve as fiduciaries on behalf of nearly twenty two million active and retired public employees and their survivors, including teachers, firefighters, law enforcement officers, judges and all varieties of public servants.

NCPERS was founded in 1941 to protect the pensions of public employees by representing public pension organizations on Capitol Hill, providing trustee

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[2] As required by Supreme Court Rule 37.2 (a), counsel certifies that he has received the written consent of both parties to file this brief. As required by Supreme Court Rule 37.6, counsel certifies that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than the *amicus curiae*, their members or undersigned counsel made a monetary contribution to the preparation or submission of this brief.

education and providing essential pension information to trustees, administrators and public officials.[3]

The *amicus* and its member funds representing significant assets and millions of citizens have an interest in this matter and will be adversely affected by the decision rendered by the Ninth Circuit in this case. The Ninth Circuit's decision weakens governmental retirement systems by stripping states of their Eleventh Amendment Immunities and introducing uncertainty, contrary to long established precedent dating back to the adoption of the Eleventh Amendment in 1795.

SUMMARY OF ARGUMENT

The Eleventh Amendment immunity issue presented in this case merits review in this Court.[4] The Ninth Circuit's decision strikes at the heart of core state interests protected by principles of federalism and the Eleventh Amendment. The Ninth Circuit decision below creates a conflict with the Second, Fourth, Sixth and Eight Circuits, which threatens the autonomy of state pension plans and risks unleashing a wave of new litigation against state retirement systems, contrary to longstanding precedent.

The creation of a new substantive rule, contrary to longstanding practice, is problematic enough. The

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[3] General information concerning NCPERS as well as specific data regarding its activities can be found at its website: www.ncpers.org.

[4] NCPERS takes no position concerning the other issue raised in the petition.

Ninth Circuit compounded the problem by applying its new rule retrospectively.

ARGUMENT

1. THE ACCEPTANCE OF JURISDICTION BY THIS COURT IS WARRANTED WHERE THE NINTH CIRCUIT'S DECISION STRIKES AT THE HEART OF CORE STATE INTERESTS PROTECTED BY PRINCIPLES OF FEDERALISM AND THE ELEVENTH AMENDMENT.

A. Background behind Eleventh Amendment immunity and federalism concerns implicated in this case

"[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (U.S. 1984). According to Justice Powell, "[s]uch a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment." *Id.* Notwithstanding Justice Powell's admonition in *Pennhurst*, the Ninth Circuit's decision below strikes at the heart of Eleventh Amendment and longstanding principles of federalism that date back over 200 years.

As recognized by Justice Rehnquist in *Edelman v. Jordan*, 415 U.S. 651, 660 (U.S. 1974):

> The right of the Federal Judiciary to summon a State as defendant and to adjudicate its rights and liabilities had been the subject of deep

> apprehension and of active debate at the time of the adoption of the Constitution; but the existence of any such right had been disclaimed by many of the most eminent advocates of the new Federal Government, and it was largely owing to their successful dissipation of the fear of the existence of such Federal power that the Constitution was finally adopted.

Id. at 660, *citing* 1 C. Warren, *The Supreme Court in United States History* 91 (rev.ed.1973). The Eleventh Amendment, the first constitutional amendment adopted after the Bill of Rights, was passed by Congress in 1794, and promptly ratified by the states in 1795 in reaction to this Court's decision in *Chisholm v. Georgia*, 2 U.S. 419 (1793).[5]

The Eleventh Amendment provides that, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Amendment

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[5] Justice Bradley recognized that the *Chisholm* decision "created such a shock of surprise throughout the country" that at "the first meeting of Congress thereafter," the Eleventh Amendment was "almost unanimously proposed" and promptly adopted. *Hans v. Louisiana*, 134 U.S. 1, 11, 10 S. Ct 504, 505, 33 L.Ed. 842 (1890). Indeed, just one day after *Chisholm* was decided, Representative Sedgwick of Massachusetts introduced a broadly worded proposal to create the Eleventh Amendment. Bradford R. Clark, *The Eleventh Amendment & the Nature of the Union*, 123 Harv. L. Rev. 1817, 1887 (2010). Both Federalists and Antifederalists supported the Eleventh Amendment to overturn *Chisholm* and "restore" their preferred construction. *Id.*

prohibits federal courts from hearing suits brought against a nonconsenting state by either its own citizens or citizens of another state. *Lapides v. Bd. of Regents*, 535 U.S. 613, 616, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002). The Eleventh Amendment's prohibition applies not only to states, but also to state agencies, such as state retirement systems, which are arms of the state. *Pennhurst*, 465 U.S. at 99.

Of course, states are free to waive their Eleventh Amendment protections and consent to suit in federal court. *See, e.g., Pennhurst*, 465 U.S. 99; *Clark v. Barnard*, 108 U.S. 436, 447, 2 S. Ct. 878, 882-883, 27 L.Ed. 780 (1883). Such waiver, however, must be unequivocal and is applied narrowly. *See, e.g.*, *Edelman v. Jordan*, 415 U.S. 651, 673, 94 S. Ct. 1347, 1360–1361, 39 L. Ed. 2d 662 (1974); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675–76, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999)(indicating that state consent is "construed narrowly and exists only where the State 'makes a "clear declaration" that it intends to submit itself' to a court's jurisdiction."). To constitute a waiver of Eleventh Amendment immunity in federal court, the state statute "must specify the State's intention to subject itself to suit in *federal court*." *See e.g., Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 306 (1990)(emphasis in original).

Likewise, Congress has the power to abrogate the Eleventh Amendment immunity by using its enforcement powers under the Fourteenth Amendment. *See, e.g., Fitzpatrick v. Bitker*, 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (1976). The Court

has consistently required an unequivocal expression of congressional intent in order to overturn the "constitutionally guaranteed immunity of the several states." *Quern v. Jordan*, 440 U.S. 332, 342, 99 S. Ct. 1139, 1146, 59 L. Ed. 2d 358 (1979).[6]

Recognizing that the Eleventh Amendment is a jurisdictional and "explicit limitation on the judicial power of the United States," the *Pennhurst* court explained that Eleventh Amendment defenses may be raised at any point in a proceeding. *Id.*, 465 U.S. at 119. This only serves to reinforce the deep policy issues that relate to the merits and procedure of litigation against state retirement plans. *See, e.g., Edelman v.*

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[6] By way of example, the Court has held that the ADEA does not abrogate a state's Eleventh Amendment immunity. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000); *see also Bd. of Trs. of Univ of Ala. v. Garrett*, 531 U.S. 356, 360 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001)(holding that Title I of the ADA does not abrogate states' 11th Amendment immunity); *Alden v. Maine,* 527 U.S. 706, 119 S. Ct. 2240, 144, L. Ed. 2d 636 (1999)(holding that FLSA does not abrogate 11th Amendment immunity). By contrast, the Eleventh Amendment is not implicated where suit is brought by the federal government, or the EEOC, as was the case in *Kentucky Retirement Systems v. E.E.O.C.*, 554 U.S. 135, 128 S. Ct. 2361, 171 L. Ed. 2d 322 (2008).

In the *Kentucky* case, which was is believed to be the last time that this Court accepted certiorari jurisdiction in a case involving a state pension plan as a party, the Court explained that it granted the writ, "[i]n light of the potentially serious impact of the Circuit's decision upon pension benefits provided under plans in effect in many States…." *Id*. at 554 U.S. 141. The Ninth Circuit case below implicates the same practical concerns, separate and apart from its constitutional infirmities and federalism implications.

Jordan, 415 U.S. 651, 678 (1974)("The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court.")(internal citations omitted).

Importantly, Congress has unambiguously and repeatedly decided not to micromanage the operation of governmental pension plans. When the Employee Retirement Income Security Act of 1974 (ERISA) was adopted, Congress excluded coverage of state and local retirement systems, like Washington State's Retirement System, based on strong federalism concerns.[7] *See, e.g., Feinstein v. Lewis*, 477 F.Supp. 1256, 1261 (S.D.N.Y. 1979), *aff'd* 622 F.2d 573 (2d Cir. 1980)(setting forth a detailed discussion of the legislative history and Congressional intent behind ERISA).[8] The Ninth Circuit's decision below threatens to upend not only long established Eleventh Amendment precedent but also clear Congressional intent not to regulate governmental pension plans established and maintained by the states.

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[7] 29 U.S.C. §§1002(32), 1003(b).

[8] One is left to wonder, where Congress has specifically exempted governmental plans from ERISA, why the Ninth Circuit has seen fit to intercede in an area that this Court has decided is shielded by Eleventh Amendment immunities. *See, e.g., Kimel*, *Garrett*, *Alden*, *supra*.

B. The Ninth Circuit decision threatens the autonomy of state pension plans and directly implicates Eleventh Amendment concerns

Core Eleventh Amendment concerns are directly implicated when the Ninth Circuit ignored *Edelman* and *Pennhurst* and allowed a claim for retrospective monetary relief to proceed in federal court. Despite the warning of the *Pennhurst* court, the Ninth Circuit's holding threatens to "emasculate the Eleventh Amendment" when applied to governmental pension plans, created by state law, to serve state employees, using contributions of state funds. As described by Justice Powell in *Pennhurst*, the "narrow and questionable exception" improperly relied upon by the Ninth Circuit threatens to "swallow the general rule" if the Ninth Circuit's decision below is not reconsidered. *Id*. at 116.

After the Washington State Retirement System's petition for rehearing and rehearing *en banc* was denied, Judge Bennett issued a scathing dissent. According to Judge Bennett:

> The ruling here strikes at the very heart of the federalism interests the Eleventh Amendment was designed to protect. Not just Washington, but its sister states as well, will no doubt read this decision for what it is—an invitation to plaintiffs with money claims against states to press those claims in federal court, the Eleventh Amendment

> notwithstanding. We should have taken this case en banc to withdraw that invitation.

Fowler v. Guerin, 918 F.3d 644, 650 (9th Cir. 2019).

The Court should accept jurisdiction and resolve the Ninth Circuit's conflict with the Second, Fourth, Sixth and Eighth Circuits, each of which has concluded that suits against state retirement systems are barred by the Eleventh Amendment. *McGinty v. New York*, 251 F.3d 84, 100 (2d Cir. 2001); *Hutto v. South Carolina Ret. Sys.*, 773 F.3d 536, 552 (4th Cir. 2014); *Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005); *Pub. Sch. Ret. Sys. of Missouri v. State Street Bank & Trust Co.*, 640 F.3d 821, 833 (8th Cir. 2011)(denying diversity jurisdiction based on holding that state retirement system was arm of the state of Missouri under 11th Amendment analysis).

As described by the Fourth Circuit in *Hutto,* the South Carolina Retirement System was properly shielded by the Eleventh Amendment where: 1) the State is ultimately responsible for any shortfalls; 2) the operation of the retirement system is highly regulated by statute; 3) the State Treasurer is the custodian of and accountable for retirement system trust funds; 4) the state agency that makes investment decisions is comprised of state officials or state-appointees; 5) the retirement system is considered a state agency; and 6) the retirement system's jurisdiction is statewide.

These same considerations are commonplace with regard to the composition and design of state retirement systems. According to a study performed by

the (National Association of State Retirement Administrators (NASRA)[9]:

> The median public retirement system board size is nine. The composition of public retirement system boards varies widely in terms of constituent groups that are represented; whether members are appointed, elected, or serve ex-officio; and what knowledge and experience, if any, are required.
>
> Most public retirement system boards include participant representatives, most often trustees who are active (working) employees and members of the retirement system. Many boards also have one or more retiree representatives and one more ex-officio members. These tend to be state treasurers, budget officers, superintendents of public education, etc., or designees of such officials.
>
> Most boards also have trustees who are both elected and appointed. Governors appoint most trustees who are appointed; legislatures or legislative leaders make some appointments, as do representatives of certain participant groups, such public school teachers or firefighters. Elected members predominantly are active and retired members of the system,

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[9] https://www.nasra.org/governance

elected by their fellow participant group members.[10]

State retirement systems generally publish comprehensive annual financial reports and are audited in compliance with governmental accounting standards and generally accepted accounting principles (GAAP) promulgated by the Governmental Accounting Standards Board (GASB).[11] *See generally*, *Alicia H. Munnell, State and Local Pensions: What Now?* (Brookings Institution Press, 2012) at p. 16-18.

While governmental plans were exempted by Congress from ERISA, nevertheless, substantially similar fiduciary requirements have been imposed by the state legislatures across the country, which are colloquially known as mini-ERISA statutes. *See generally,* Olivia S. Mitchell, David McCarthy, Stanley C. Wisniewski, and Paul Zorn, *Developments in State and Local Pension Plans,* in *Pensions in the Public Sector*, edited by Olivia S. Mitchell & Edwin C. Hustead (University of Pennsylvania Press, 2001) at p. 33-34. Thus, state retirement systems are highly regulated, but not by Congress or the federal courts.[12]

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[10] For a breakdown of board structure by state: https://www.nasra.org/files/Topical%20Reports/Governance%20and%20Legislation/Board%20Governance%20Policies/Board%20Composition.pdf

[11] https://www.nasra.org/accounting

[12] To the extent that state court judges and members of state legislatures are participants in their state retirement systems, they have a vested interest in making sure that they are properly administered on behalf of the millions of state employees are retirees.

Unlike defined contribution plans which are prevalent in the private sector, historically the vast majority of governmental employees participate in a defined benefit plan. *The Evolution of Public Pension Plans: Past, Present and Future* at p. 4 (NCPERS, 2008)[13]. As such, the governmental plan sponsor is responsible for investment losses and the accrued pension benefit payable at normal retirement age is legally guaranteed by state law. *Id*. at p.7.

"Pension and other retiree benefits for state and local government employees represent liabilities for state and local governments and ultimately a burden for state and local taxpayers." GAO Report to the Committee on Finance, U.S. Senate, *State and Local Government Retiree Benefits*, January 2008 at 1.[14] "Both government employers and employees generally make contributions to fund state and local pension benefits. States follow statutes specifying contribution amounts or determine the contribution amount each legislative session. However many state and local governments are statutorily required to make yearly contributions based either on actuarial calculations or according to a statutorily specified amount." *Id*. at 8.

As this Court held in *Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432 (1999), in a defined benefit plan the employer must cover any underfunding that may occur from the plan's investments. *Id*. at 440. This

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[13] https://www.ncpers.org/files/Evolution%20of%20Public%20Pensions_2d.pdf

[14] https://www.gao.gov/assets/280/271576.pdf

principle has been cited with approval concerning state retirement plans. *See Washington Federation of State Employees v. State*, 107 Wash. App. 241, 26 P. 3d 1003 (2001); *Hall v. Elected Officials' Retirement Plan*, 241 Ariz. 33, 383 P. 3d 1107 (2016). Similarly, even without reference to *Hughes*, the state's financial guarantee of a public employee retirement system is generally recognized as a governing principle of state and local government retirement law. *See, e.g.*, *Teachers' Retirement System v. Genest*, 154 Cal. App. 4th, 65 Cal. Rptr. 3d 326 (3d Dist. 2007); *Louisiana Municipal Association v. State,* 893 So. 2d 809 (La. 2005); *Kaho'ohanohano v. State,* 114 Hawai'i 302, 162 P. 3d 696 (2007).

Accordingly, it is no surprise that federal district courts around the country have routinely dismissed suits involving state plans based on Eleventh Amendment immunities. In some instances, the state retirement system was a defendant. In other instances, the state retirement system was a plaintiff initially removed to federal court until remanded for lack of diversity jurisdiction.[15] Undersigned counsel has counted more than two dozen district court cases, from every federal circuit. *See generally*, *Barroga v. CALPERS*, 2012 WL 5337326 (E.D. Cal. 2012)(dismissing case against CALPERS on 11th Amendment grounds); *JMB Grp. Trust IV v. Pa. Mun.*

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[15] *See generally, Tradigrain v. Mississippi State Port Authority*, 701 F.2d 1131, 1132 (5th Cir. 1983)("the analysis of an agency's status is virtually identical whether the case involves a determination of immunity under the eleventh amendment or a determination of citizenship for diversity jurisdiction").

Ret. Sys., 986 F.Supp. 534, 538 (N.D.Ill.1997)(holding Pennsylvania Municipal Retirement System was an arm of the state); *Mo. State Emps.' Ret. Sys. v. Credit Suisse, N.Y. Branch*, 2010 WL 318652, at *6 (W.D.Mo. Jan. 21, 2010)(remanding on 11th Amendment grounds); *Mello v. Woodhouse*, 755 F.Supp. 923, 930 (D.Nev.1991)(Nevada Public Employees' Retirement Board determined to be an arm of the state); *Jones v. Pub. Emp't Ret. Pensions Div.*, 2011 WL 6003122 *2 (D.N.J. November 29, 2011)(dismissing NJ PERS on 11th Amendment grounds); *Public Emp. Ret. Ass'n of N.M. v. Clearlend Sec.*, 2012 WL 2574819 (D.N.M. June 29, 2012)(remanding case where NM PERA was an arm of the state for diversity purposes); *Commonwealth of Pa. Public School Emp.'s Ret. Sys. v. Citigroup*, 2011 WL 1937737 (E.D. Pa. 2011)(granting motion to remand on 11th Amendment grounds where plan was an arm/alter ego of the state); *R.I. Broth. of Corr. Officers v. R.I.*, 264 F. Supp. 2d 87 (D.R.I. 2003) (holding 11th Amendment barred claims against R.I. involving pension and related benefits); *U.S. v. S.C.*, 445 F.Supp. 1094, 1099-1100 (D.S.C.1977)(finding the South Carolina State Retirement System functioned as an alter ego of the state); *Hair v. Tenn. Consol. Ret. Sys.*, 790 F.Supp. 1358 (M.D.Tenn.1992)(plaintiff failed to meet burden of establishing jurisdiction where evidence indicated a judgment against that system would come out of state funds); *Tex. Cty. and Dist. Ret. Sys. v. Wexford Spectrum Fund, L.P.*, 953 F. Supp. 2d 726 (W.D. Texas, July 9, 2013)(holding that retirement system was an alter ego of the state and not a citizen for diversity of jurisdiction); *West Virginia Inv. Mgmt. Bd. and Consol. Pub. Ret. Bd. v. The Variable Life Ins. Co.*, 2010 WL 2944847 (S.D.W.V. July 26,

2010)(granting motion to remand on 11th Amendment grounds).

Similarly, the Ninth Circuit not only creates conflict with *Hutto* (4th Cir), *Ernst* (6th Cir.), *Public School Retirement System of Missouri* (8th Cir.) and *McGinty* (2d Cir.), but within the Ninth Circuit as well. *See generally*, *Glenn v. California Dep't of Education*, 799 Fed. Appx. 499 (9th Cir. 2018) (dismissing claims against CALSTERS under 11th Amendment); *Mitchell v. L.A. Cmty. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir. 1988)(setting forth factors to determine whether a state governmental agency is an arm of the state subject to Eleventh Amendment immunity); *L.A. Branch NAACP v. L.A. Unified Sch. Dist.*, 714 F.2d 946, 950 (9th Cir. 1983)(California Department of Education is a state agency subject to Eleventh Amendment immunity).

If the Ninth Circuit decision below is permitted to stand, it risks upending settled law and overturning longstanding precedent.

CONCLUSION

For the above and foregoing reasons, *amicus curiae* urges that the Petition for Writ of Certiorari be granted on the issue of Eleventh Amendment immunity.

Respectfully submitted,

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