

STATE OF MICHIGAN  
IN THE SUPREME COURT

Appeal from the Court of Appeals  
(Murphy, C.J., and O'Connell and Beckering, JJ.)

WAYNE COUNTY EMPLOYEES RETIREMENT  
SYSTEM and WAYNE COUNTY RETIREMENT  
COMMISSION,

Docket No. 147296

Plaintiffs-Counterdefendants-  
Appellees,

Court of Appeals No. 308096

v

Wayne County Circuit Court  
LC No. 10-013013-AW  
Hon. Michael F. Sapala

CHARTER COUNTY OF WAYNE,

Defendant-Counterplaintiff-Appellant,

and

WAYNE COUNTY BOARD OF COMMISSIONERS,

Defendant-Appellant.

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**DEFENDANTS-APPELLANTS WAYNE COUNTY AND WAYNE COUNTY BOARD OF  
COMMISSIONERS' REPLY TO BRIEF OF *AMICUS CURIAE* NATIONAL  
CONFERENCE ON PUBLIC EMPLOYEE RETIREMENT SYSTEMS (NCPERS)**



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## I. INTRODUCTION

NCPERS' *amicus* brief is misleading because it is based entirely on the flawed assertion that the protections of Const 1963, art 9, § 24 apply to all public pension "benefits." Yet, even a cursory reading of art 9, § 24 reveals that it does not apply to *all* "benefits" offered by public retirement systems. Rather, it only protects "accrued financial benefits." As this Court made clear in *Studier*<sup>1</sup> and *In re Advisory Opinion*<sup>2</sup> – two cases which NCPERS fails to discuss, or even cite – "accrued financial benefits" are financial benefits that grow over time and are earned in the year service is rendered. 13th checks are neither. Their distribution is discretionary, their amounts fluctuate from year to year, and the decision whether or not to even provide one to a retiree in a given year does not even begin to occur until after that former employee has retired.

This renders *all* of the out-of-state cases that NCPERS discusses entirely superfluous because they address the impairment of *vested or accrued pension benefits*. In Michigan, pension rights attach, or "vest," once an employee has a right to receive that benefit, and no one is entitled to discretionary bonus checks from the IEF. See *Advisory Opinion*, 490 Mich at 314-315. NCPERS even suggests that the 2010 ordinance somehow violates US Const, art I, § 10, the prohibition against the impairment of contracts, but Retirement Ordinance § 141-32 has always explicitly provided that the 13th checks that the Retirement Commission may decide to issue from year to year are completely discretionary (including their amounts), and none of the Wayne County collective bargaining agreements suggest otherwise. NCPERS' *amicus* brief simply fails to persuade on all fronts.

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<sup>1</sup> *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642; 698 NW2d 350 (2005).

<sup>2</sup> *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295; 806 NW2d 683 (2011).

## II. ARGUMENT

### A. *Studier* and *In re Advisory Opinion* make clear that the 2010 ordinance does not involve “accrued financial benefits.”

NCPERS’ entire brief flows from its preliminary assertion that “Article IX, §24 provides that ‘benefits’ of each public pension plan and retirement system ‘shall be a contractual obligation’ that ‘shall not be diminished *or* impaired.” (NCPERS brief, p 5 (emphasis in brief)). That is not what art 9, § 24 says. Article 9, § 24 only protects “accrued financial benefits”:

The *accrued financial benefits* of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.

Financial benefits<sup>3</sup> arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.

In *Studier*, this Court examined the term “accrued financial benefits” and explained that art 9, § 24 “only protects those financial benefits that increase or grow over time.” *Id.* at 654. In addition, this Court stressed that “accrued” financial benefits “consist only of those ‘[f]inancial benefits arising on account of service rendered in each fiscal year.’” *Id.* at 655, quoting Const 1963, art 9, § 24.

This Court analyzed both of these features of an “accrued financial benefit” in *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295; 806 NW2d 683 (2011). At issue in that case was a statute that, among other things, eliminated a longstanding tax exemption for public pensions. This Court examined whether a tax exemption

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<sup>3</sup> This Court has made clear that the “[f]inancial benefits” referred to in the second clause of art 9, § 24 are “accrued financial benefits.” *Studier*, 472 Mich at 654-655 (“Thus, because the second clause only requires the state and its political subdivision to set aside funding for ‘financial benefits arising on account of services rendered in each fiscal year’ to fulfill their contractual obligation of paying for ‘accrued financial benefits,’ it reasonably follows that ‘accrued’ financial benefits consist only of those ‘financial benefits arising on account of service rendered in each fiscal year . . . .”).

could be considered an “‘accrued financial benefit’ of a pension plan. *Id.* at 313. The Court found that it could not, because a pension-tax exemption “does not ‘grow over time’”:

During a state employee’s working years, his or her pension-tax exemption, as opposed to the pension itself, cannot be said to be growing or accumulating because it does not even “come into existence” or “vest” until after the employee has retired and begins to collect his or her pension benefits. That is, one does not have a right to a tax exemption until one has received the funds that are subject to the exemption. Absent those funds, there is no tax exemption. And once a retiree has begun to receive his or her pension benefits, the tax exemption itself still does not “grow over time,” but remains fixed. Therefore, a tax exemption is not an “accrued financial benefit.” [*Id.* at 314-315.]

The Court further concluded that a pension-tax exemption was not a benefit that arose “on account of service rendered in each fiscal year,” as required by the second clause of Const 1963, art 9, § 24:

The second clause of Const 1963, art 9, § 24 states, “Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.” This clause confirms that a tax exemption is not an “accrued financial benefit” protected by § 24 because it would be impossible to fund a tax exemption, as opposed once again to the pension itself, in the year that the service was rendered in light of the fact that an exemption’s value is entirely a function of the tax rate of the taxpayer at the time that the exemption is actually taken—something that obviously cannot be known at the time the services themselves are rendered. [*Id.* at 315.]

The Court explained that rather than being an accrued financial benefit, the tax exemption was “simply a postdistribution effect of the accrued financial benefits that have otherwise been paid in full.” *Id.* at 318 (citations and some internal quotation marks omitted).

Despite basing its entire brief on a claimed violation of art 9, § 24, NCPERS does not even mention, let alone address, either *Studier* or *In re Advisory Opinion*. Instead, NCPERS merely asserts in conclusory fashion that “the IEF benefit is also protected as a key component of the ‘retirement system.’” (NCPERS brief, p 6). But the 13th check payments made with funds in the IEF are no different than the benefits at issue in *Studier* and *In re Advisory Opinion*. Like

the pension-tax exemption in *In re Advisory Opinion*, 13th checks do not “increase or grow over time.” What this Court said about pension-tax exemptions in *Advisory Opinion* applies equally here. During a county employee’s “working years,” the 13th check “cannot be said to be growing or accumulating because it does not even ‘come into existence’ . . . until after the employee has retired.” *In re Advisory Opinion*, 490 Mich at 314. Nor does the 13th check “grow over time” in retirement. As the Court of Appeals acknowledged – and as the parties do not dispute – 13th check payments *fluctuate from year to year, at times even decreasing*. *Wayne Co Employees Ret Sys v Wayne Co*, 301 Mich App 1, 18-19; 863 NW2d 279 (2013). For example, in 2002, the average 13th check was \$2,938. It went up to \$2,953 in 2003, but then down to \$2,380 in 2004, and down even further each of the next three years. *Id.*

Additionally, 13th checks do not arise “on account of service rendered in each fiscal year,” as required by the second paragraph of art 9, § 24. The Court’s decision in *In re Advisory Opinion* is particularly instructive on this point. There, the Court concluded that a benefit cannot be one that arises “on account of service rendered in each fiscal year” unless it can be “fund[ed] . . . in the year that the service was rendered.” *In re Advisory Opinion*, 490 Mich at 315. The Court reasoned that pension-tax exemptions did not meet this requirement because they are a function of “the tax rate of the taxpayer at the time that the exemption is actually taken,” as opposed to when the employee’s services are actually rendered. *Id.* Thus, it is “impossible to fund a tax exemption, as opposed . . . to the pension itself, in the year that the service was rendered.” *Id.* The same analysis applies to 13th checks. By their very nature, they cannot be funded in the year service was rendered because the discretionary decision whether to even make a 13th check distribution in a given year is not made until *after the employee retires*. This is in contrast to the employee’s regular pension, which is calculated and funded during his or her working years.

As *Studier* and *In re Advisory Opinion* make abundantly clear, art 9, § 24 does not protect all pension “benefits.” It only protects “accrued financial benefits.” Because the 2010 ordinance does not involve accrued financial benefits, NCPERS’ arguments are entirely misplaced.

**B. The out-of-state cases discussed by NCPERS are inapposite because they presume that the benefits at issue are accrued or vested.**

NCPERS spends a significant portion of its *amicus* brief discussing cases from foreign jurisdictions that it claims support a finding that the 2010 ordinance violates art 9, § 24. Those cases, however, are inapplicable here because they all assume impairment of *vested or accrued benefits*, which 13th checks are not.

As discussed, *In re Advisory Opinion* makes clear that benefits only “vest” once an employee has a right to receive that benefit. See *In re Advisory Opinion*, 490 Mich at 314-315. When it comes to 13th checks, only some retirees are even eligible for them, while several groups of retirees are not (and, of course, none are entitled to them). (See Wayne County’s Brief on Appeal, p 7). And each year the Retirement Commission has the discretion to not even issue 13th checks. (*Id.* at 7-8). Thus, *Studier* and *In re Advisory Opinion* require the conclusion that the 2010 ordinance does not affect accrued or vested benefits.

This renders NCPERS’ out-of-state cases entirely irrelevant, because all of them involved accrued or vested benefits. For example, NCPERS’ lead case, *Fields v Elected Officials’ Retirement Plan*, 320 P3d 1160 (Ariz, 2014), involved a pension benefit increase formula that under Arizona law was considered to be a “*vested*” benefit. *Id.* at 1167 (“[T]he right to a pension becomes vested upon acceptance of employment.’ After such vesting, ‘[the pension] contract cannot be unilaterally modified nor can one party to a contract alter its terms without the assent of the other party.’ Because future increases under § 38-818 fall within the meaning of ‘benefit’ under Article 29 [of the Arizona Constitution], they are part of the contract of

employment and are not contingent.”) (citations omitted).<sup>4</sup> Similarly, the COLA benefits at issue in *Claypool v Wilson*, 4 Cal App 4th 646; 6 Cal Rptr 2d 77 (Cal App, 1992) (which Wayne County cited for its discussion of the “exclusive benefit” rule), and *Teacher Ret Bd v Genest*, 154 Cal App 4th 1012; 65 Cal Rptr 3d 326 (Cal App, 2007), were found to be “vested” benefits. The same can be said about each and every one of the foreign cases cited in NCPERS’ brief. Thus, none of them have any bearing on the 2010 ordinance’s validity.

**C. NCPERS suggests that the 2010 ordinance also impairs contracts in violation of US Const, art I, § 10, but this new issue is not argued by Plaintiffs and lacks merit because the 2010 ordinance explicitly provides that 13th checks are discretionary.**

NCPERS even goes so far as to suggest that the County’s amendment of its retirement ordinance violates the federal impairment-of-contract prohibition contained in US Const, art I, § 10, invoking *US Trust v New Jersey*, 431 US 1; 97 S Ct 1505; 52 L Ed 2d 92 (1977) (See NCPERS brief, p 18). But once again, there simply is no merit to such a claim. As an initial matter, Plaintiffs have not raised the specter of US Const, art I, § 10 in this Court, and thus NCPERS improperly seeks to inject a new issue here. See *People v Hermiz*, 462 Mich 71, 76; 611 NW2d 783 (2000) (“Absent exceptional circumstances, amicus curiae cannot raise an issue that has not been raised by the parties.”) (opinion by Taylor, J.).<sup>5</sup>

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<sup>4</sup> It is also worth noting, contrary to NCPERS’ assertion that the Arizona Constitution is “substantially similar” to Const 1963, art 9, § 24, the Court in *Fields* specifically distinguished art 9, § 24, finding its protections to be “narrower” because they apply only to “accrued” benefits. *Id.* at 1166 (“[U]nlike narrower protections found in other states’ constitutions, the protection afforded by the Arizona Pension Clause extends broadly and unqualifiedly to ‘public retirement system benefits,’ not merely benefits that have ‘accrued’ . . .”), citing Const 1963, art 9, § 24.

<sup>5</sup> This is not the only time NCPERS attempts to raise a new issue before this Court. NCPERS also suggests that the caps on IEF payments, which even the Court of Appeals upheld, are somehow unconstitutional. See NCPERS brief, p 12 (“By extension, Wayne County’s caps on IEF payments . . . ‘diminish or impair’ benefits under Const 1963, art IX, § 24.”). As indicated, it is highly improper for an amicus to seek to inject new issues in a case. See *Young v Wierenga*, Footnote continued on next page . . .

Moreover, NCPERS' new claim ignores the fact that there is no contractual right to 13th checks – either in the retirement ordinance itself or in the collective bargaining agreements (CBAs) of Wayne County's employees. As *Studier* explains,<sup>6</sup> a legislative act must clearly intend to create a contractual right in order for it to exist. *Studier*, 472 Mich at 659-660. *Studier* makes clear that, “absent some clear indication that the legislature intends to bind itself contractually, the presumption is that a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the next legislature shall ordain otherwise.” *Id.* at 661 (citations omitted). Thus, no legislative contract exists when the legislation at issue fails to “use terms typically associated with contractual relationships, such as ‘contract,’ ‘covenant’ or ‘vested rights.’” *Id.* at 664.

Just as with the statute at issue in *Studier*, the pre-amendment versions of Wayne County Retirement Ordinance § 141-32, which the 2010 ordinance amended, did not use any terms such as “contract,” “covenant,” or “vested rights” that could give rise to the legislative creation of a contract. Indeed, as even Plaintiffs admit, §141-32 has *always* included language providing that 13th check distributions are completely discretionary. The Court of Appeals acknowledged this as well, along with the fact that none of the Wayne County employee CBAs contain any language “requiring disbursement of a 13th check.” *Wayne County*, 301 Mich App at 34 (noting the “discretionary distribution language that has always been part of the IEF ordinance and the

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314 Mich 287, 299; 23 NW2d 92 (1946) (“The issues are controlled by the parties in the case, and new issues raised by amicus curiae do not control.”). In any event, as already explained in its other briefing (and as the Court of Appeals recognized), Wayne County is not only entitled to make structural design changes to its retirement system, but the IEF payments that are now capped by the 2010 ordinance are *not* accrued financial benefits protected by art 9, § 24. (See, e.g., Wayne County's Reply Brief, pp 1-3 and Wayne County's Brief on Appeal, pp 23-33).

<sup>6</sup> The analysis in *Studier* applies to both US Const, art I, § 10 and Const 1963, art 1, § 10, which both provide almost identical protection against impairment of the obligation of contracts. See *id.* at 659.

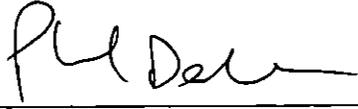
lack of any CBA language requiring disbursement of a 13th check"). As a result, there is simply no basis for finding there to be a contractual obligation to make 13th check payments.

### III. CONCLUSION

NCPERS fails to provide any arguments to advance Plaintiffs' cause. *Studier* and *In re Advisory Opinion* make clear that the 2010 ordinance does not diminish or impair accrued financial benefits, and it certainly does not involve the impairment of a statutorily-created government contract. The 2010 ordinance was a lawful exercise of the Wayne County Commission's legislative power and this Court should reverse the Court of Appeals' decision and uphold the 2010 ordinance.

Respectfully submitted,

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Dated: September 2, 2014

DETROIT 9731-34 1324192