No. 13-1933

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

_____

MAINE ASSOCIATION OF RETIREES*, et al.*,
***Plaintiffs – Appellants*,**

MAINE EDUCATION ASSOCIATION*, et al.*,
***Plaintiffs*,**

v.

BOARD OF TRUSTEES OF THE MAINE PUBLIC EMPLOYEES RETIREMENT SYSTEM*, et al.*,
***Defendants – Appellees*.**

_____

On Appeal from the United States District Court for the District of Maine

_____

BRIEF OF THE MAINE HERITAGE POLICY CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

_____

Gregory G. Katsas, Bar No. 39342
Craig I. Chosiad, Bar No. 1161336
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
(202) 879-3939
ggkatsas@jonesday.com

Counsel for Amicus Curiae
Maine Heritage Policy Center

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Maine Heritage Policy Center has no parent corporation and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

STATEMENT OF IDENTITY AND INTEREST OF *AMICUS*

The Maine Heritage Policy Center ("MHPC") is a research and educational organization whose mission is to formulate and promote public policies based on the principles of free enterprise, limited government, individual freedom, and traditional American values. MPHC pursues this mission by providing research and policy recommendations to the Maine Legislature, nonpartisan legislative staff, the Maine executive branch, the state's media, and the broad policy community. MHPC is a nonprofit, nonpartisan, tax-exempt organization. MHPC was actively involved in promoting the pension reforms challenged in this appeal.[1]

ISSUE ON APPEAL

By statute, the State of Maine provides certain pension benefits to retired state workers and public school teachers. Also by statute, these benefits have been increased to account for inflation. In 2011, in response to a severe financial crisis facing its pension system, the Maine legislature by statute reduced the extent of these future cost-of-living increases. The question presented is whether this statutory change constituted an unconstitutional impairment of contracts.

---

[1] The parties have taken no position on the filing of this brief, which is accompanied by an appropriate motion for leave to file. No counsel for a party authored this brief in whole or in part, and no such counsel or party contributed money intended to fund preparing or submitting this brief. Preparation of the brief was funded by the Laura and John Arnold Foundation, a private foundation with offices in New York City and Houston, Texas.

STATEMENT OF THE CASE

1. By statute, the Maine Public Employees Retirement System ("MePERS") provides pension benefits to retired state employees and public school teachers. 5 M.R.S. § 17001 *et seq.* The governing statute provides for an automatic "increase in retirement benefits" to account for inflation. *Id.* § 17806. Whenever there is an annual increase in the Consumer Price Index ("CPI"), as measured on July 1 of a particular year, there is also a corresponding "increase in retirement benefits" beginning in September of that year. *Id.* § 17806(1)(A). Until recently, these cost-of-living increases were "up to a maximum annual increase of 4%." *See id.*

Following the 2008 financial collapse, the Maine pension system was in crisis. The pension fund had lost some $2.1 billion in the market crash, and the state's pension debt had grown to some $4.1 billion. Projections indicated that, absent adjustment, state pension costs alone would balloon to approximately $750 million by 2020—almost 20 percent of the entire state budget. These projected costs would rival those for Medicaid and exceed those for all of the state's colleges combined. These problems were well-documented, and the Plaintiffs do not dispute any of them here. **[any good cites for this?]**

In response to the crisis, the Maine legislature in 2011 adopted the modest but important reforms challenged in this lawsuit. Those reforms did not reduce the amount of actual pension benefits of any retiree, either now or in the future.

Instead, they merely reduced the extent to which future benefits will be increased to account for inflation. P.L. 2011, ch. 380, §§ T-10, T-21, JA __, (codified at 5 M.R.S.A. § 17806).[2] Thus, whereas the old law limited the cost-of-living increases to 4 percent of the entire retirement benefit, the new law limits those increases to 3 percent of the retirement benefit up to $20,000, adjusted for inflation. *Id.* § T-10 (codified at 5 M.R.S.A. § 17806(1)(A)). The 2011 amendments also suspended automatic cost-of-living increases for three years, *id.* § T-21, JA__, but did not prevent special appropriations for such increases, as were made in 2012 and may be made in 2013 and 2014, *see* Add. 10 n.6. These modest adjustments in the rate of increase in benefits were supported by two-thirds supermajorities in both Houses of the Maine legislature, and the Governor signed them into law on June 20, 2011. These adjustments reduced the state's pension debt by some $1.7 billion (or 40 percent). **[any good cites?]**

2. Plaintiffs represent the interests of retirees who receive pension benefits through MePERS. Plaintiffs contend that the 2011 amendments, as applied to individuals who retired prior to the date of their enactment, constitute an unconstitutional impairment under the Contract Clause of the United States Constitution, which provides that "[n]o state shall * * * pass any * * * Law

[2] Citations to the Joint Appendix will be abbreviated "JA"; those to the Appellants' Addendum will be abbreviated "Add." Citations to "P.L." refer to Maine Session Laws in accordance with Uniform Maine Citations (2012).

impairing the Obligation of Contracts" (Art. I, § 8, cl. 1). Plaintiffs filed suit to enjoin the enforcement of those amendments against such pre-2011 retirees.

The district court granted summary judgment to the defendants on the ground that there were no contractual rights to be impaired. As the district court explained, under settled federal and Maine law, a legislature must speak with unmistakable clarity in order to create contract rights by statute. Add. 14-15. The court carefully reviewed the various pre-2011 statutory provisions applicable to MePERS retirees, including the different provisions applicable to pre-1999 retirees (Add. 20-24) and post-1999 retirees (Add. 18-19). The court correctly concluded that none of those statutory provisions unmistakably created contract rights constitutionally protected against impairment.

ARGUMENT

At bottom, Plaintiffs' constitutional challenge rests on the premise that their members, prior to the 2011 amendments, enjoyed constitutionally protected contract rights against Maine or MePERS. No individual, however, alleges that he or she negotiated or signed any individual employment contract. Nor do the union plaintiffs contend that they negotiated or signed any collective-bargaining agreement on behalf of some or all of their members. To the contrary, Plaintiffs contend that the *contract* rights inhered in the *statutes* by which Maine provides pension benefits. Such a claim, however, is strongly disfavored.

For decades, the Supreme Court has warned against reading statutes to create contract rights subject to constitutional protection against impairment. The reasons for that caution are obvious: statutory schemes—particularly those as complex and expensive as a public-sector pension scheme—routinely and necessarily are amended over time, in order to adapt to changing problems and conditions; and one legislature should not lightly be presumed to contract away its successors' sovereign prerogative to make such important and necessary statutory changes. Accordingly, the Supreme Court has held that legislatures must speak with unmistakable clarity in order to create by statute contract rights that are constitutionally protected against impairment. In the public-sector pension context in particular, both this Court and the Maine Supreme Judicial Court have applied this Supreme Court precedent to reject claims that statutory pension schemes and provisions—including the very statutory provision at issue here—created contract right subject to the constraints of the Contract Clause.

In this case, plaintiffs' impairment argument focuses on the version of M.R.S. § 17801 in effect prior to 1999, which the parties refer to as "Former Section 17801." That provision states that "[n]o amendment to this Part [of the Maine pension statute] may cause any reduction in the amount of benefits that would be due to a member based on creditable service, earnable compensation, employee contributions, pick-up contributions, and the provisions of this Part on

the date immediately preceding the effective date of the amendment." 5 M.R.S.A. § 17801 (1989) (JA 146). As the district court explained, Former Section 17801 does not unmistakably create any contract right to lifetime cost-of-living increases in pension benefits, because a statutory amendment reducing such increases in future years would not cause a "reduction in the amount of benefits that would be due" on the date the amendment was enacted. Thus, Former Section 17801 cannot support any Contract Clause to the 2011 amendments. Even more clearly, Former Section 17801 cannot support any challenge by post-1999 retirees because, as the district court further explained, Former Section 17801 was repealed in 1999, and is thus entirely inapplicable to those retirees.

I. Legislatures Must Speak With Unmistakble Clarity To Create Contract Rights By Statute

A. The Principle Of Unmistakability Protects State Sovereignty By Preventing Past Legislatures From Binding Their Successors

"In order to deem a state legislative enactment a contract for purposes of the Contract Clause, there must be a clear indication that the legislature intends to bind itself in a contractual manner." *Parker v. Wakelin*, 123 F.3d 1, 5 (1st Cir. 1997). As the Supreme Court has explained, "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 legislature shall ordain otherwise.'" *Nat'l R.R. Passenger*

Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 465-66 (1985) ("*Amtrak*") (quoting *Dodge v. Board of Educ.*, 302 U.S. 74, 79 (1937)). In *United States v. Winstar Corp.*, 518 U.S. 839 (1996), the Supreme Court described this rule as the "unmistakability doctrine" and traced its origins to the decisions of Chief Justice Marshall. *Id.* at 873-75 (plurality opinion); *see also id.* at 924-25 (Rehnquist, C.J., dissenting).

The unmistakability doctrine serves several critical purposes. Most importantly, it protects state sovereignty, by ensuring that legislatures do not bind their successors through inadvertence. *See, e.g., Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) ("'sovereign power . . . governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms'" (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 ((1982)); *Nat'l Educ. Ass'n–R.I. v. Ret. Bd. of the R.I. Emps. Re. Sys.*, 172 F.3d 22, 27 (1999) ("*NEA*") ("policy reasons for protecting legislative power against implied surrender are too obvious to warrant much elaboration"); *Parker*, 123 F.3d at 5 ("legislatures should not bind future legislatures from employing their sovereign powers in the absence of the clearest intent to create vested rights protected under the Contract Clause"). The doctrine also likely comports with legislative intent, because "[t]he principal function of a legislature is not to make contracts, but to make laws that establish the policy of

the state." *Amtrak*, 470 U.S. at 466. Moreover, it preserves needed flexibility for legislatures to adapt governing rules to changed economic or other circumstances. *See, e.g.*, *id.* ("to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body"). Finally, it "avoid[s] difficult constitutional questions about the extent of State authority to limit the subsequent exercise of legislative power." *Winstar*, 518 U.S. at 875 (plurality op.).

These principles apply with full force in the context of state pension statutes. In fact, the need for flexibility is particularly acute because pension schemes must remain actuarially sound over the course of several decades. State workers operate in "a special employment environment," in which "sound policy reasons" require "maximizing the states' flexibility vis-à-vis the retirement benefits that it offers to public employees." *McGrath v. R.I. Ret. Bd.*, 88 F.3d 12, 19 (1st Cir. 1996). Accordingly, applying the unmistakability doctrine, this Court repeatedly has held that "pension statutes [are] subject to modification for payments not yet made, unless the government's intent to create a contract is clear and definite." *NEA*, 172 F.3d at 27; *see, e.g.*, *Parella v. Ret. Bd. of the R.I. Emps. Ret. Sys.*, 173 F.3d 46, 60-61 (1st Cir. 1999); *Parker*, 123 F.3d at 5-6. Similarly, in construing the very pension provision at issue here, the Supreme Judicial Court of Maine has held that, "[u]nder time honored rules of construction, a statute will not be presumed to

create contractual rights, binding future legislatures, unless the intent to do so is clearly stated." *Spiller v. State*, 627 A.2d 513, 515 (Me. 1993) (citing *Amtrak*, 470 U.S. at 465-66).

B. Both The Existence And The Terms Of A Statutory Contract Must Be Set Forth In Unmistakably Clear Terms

The unmistakability doctrine governs not only the threshold determination whether a statute creates any contract rights, but also any ensuing determination regarding the terms of those rights. *See*, *e.g.*, *Parker*, 123 F.3d at 7-8 (courts must "'proceed cautiously both in indentifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligation'" (quoting *Amtrak*, 470 U.S. at 466)). Of course, in determining whether a legislature has manifested an intent to contract with the requisite unmistakable clarity, "statutory language is the primary focus of the inquiry." *Id.* at 8; *see also Amtrak*, 470 U.S. at 466 ("In determining whether a particular statute gives rise to a contractual obligation, 'it is of first importance to examine the language of the statute.'" (quoting *Dodge*, 302 U.S. at 78). In addition, "circumstances" surrounding the enactment may also shed light on legislative intent. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.14 (1977).

Under these principles, statutes create contract rights subject to protection against impairment in only extremely limited situations. For example, in *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938), the Supreme Court held that a

tenure law for teachers granted a contractual right to continued employment because the governing statute was expressly and repeatedly "couched in terms of contract"—the Court stressed that "the word 'contract' appear[ed] ten times in section 1, defining the relationship; eleven times in section 2, relating to the termination of the employment by the employer; and four times in section 4, stating the conditions of termination by the teacher." *Id.* at 105. Similarly, in *United States Trust Company*, the Court held that a statute affording certain protections to a state's bondholders created contract rights because the statute expressly undertook to "covenant and agree" with another state and with the bondholders. *See* 431 U.S. at 18. Moreover, having determined that "[t]he intent to make a contract is clear from the statutory language," the Court further examined the "circumstances" surrounding its enactment to confirm that "the purpose of the covenant was to invoke the constitutional protection of the Contract Clause against repeal." *Id.*

In contrast, both this Court and the Supreme Judicial Court of Maine have held that Former Section 17801—the provision invoked by plaintiffs here—did not create contract rights as alleged in other cases. In *Spiller*, the Maine court, applying the unmistakability doctrine, held that Former Section 17801 created no contract rights in favor of recently-hired employees who had not yet satisfied the service requirements to qualify for a pension. *See* 627 A. 2d at 515-17. The court

noted that other states deem employees to have contractually protected pension rights from the initial date of their employment, but it rejected that rule as unsupported by the text of Former Section 17801. *See id.* at 516-17. Similarly, in *Parker*, this Court held that Former Section 17801 created no contract rights in favor of long-term employees who had satisfied the service requirements to qualify for a pension, but not yet retired, when the allegedly impairing legislation was enacted. *See* 123 F.3d at 8-9. The Court explained that the statutory promise to pay benefits "due a member" on the date of enactment did not unmistakably extend to current employees, because "'due' could easily be read to mean currently payable," and no pension benefit is currently payable to employees. *See id.* at 8.[3]

In other contexts as well, this Court has applied the unmistakability doctrine to reject alleged contract rights to statutory pensions. For example, in *NEA*, the Court upheld the wholesale elimination of pension benefits for retired officials of teachers' unions in Rhode Island. *See* 172 F.3d at 27-29. In reviewing the relevant prior statutes, the Court held that neither a promise to fully fund previously existing pension benefits, nor the "vested" status of the union officials, established

[3] The determination whether a state statute creates contract rights for purposes of the Contract Clause of the Federal Constitution is a federal question, but a state court's decision on that question is nonetheless entitled to "respectful consideration and great weight." *See Parker*, 123 F.3d at 8. Here, because *Spiller* and *Parker* adopted entirely consistent approaches in construing Former Section 17801 for Contract Clause purposes, the decisions are mutually reinforcing.

the necessary "clear statement" to create rights immune from future revision. *See id.* at 28 Similarly, in *Parella*, the Court applied the unmistakability doctrine to conclude that retired legislators had no constitutionally protected contract right to a pension under the governing Rhode Island statutes. *See* 173 F.3d at 60-62. *See also R.I. Laborers' Dist. Council v. R.I.*, 145 F.3d 42, 44 (1st Cir. 1998) (no unmistakable contractual intent when state "offer[ed] financial compensation" to employees in exchange for furthering their education); *R.I. Bhd. of Corr. Officers v. R.I.*, 357 F.3d 42, 46 (1st Cir. 2004) (no unmistakable contractual intent when state required employees to remain employed for specified period and to sign forms "containing the time constraints for completing educational programs").

C. Plaintiffs Understate The Force Of the Unmistakability Doctrine

Plaintiffs do not dispute that the unmistakability doctrine governs both the question whether Former Section 17801 creates any contract rights and, if so, whether those rights extend to the prior statutes regarding cost-of-living increases. However, Plaintiffs contend that unmistakability may be shown through a textually unbounded inquiry into "circumstances" such as "the relationship between the parties, trends in relevant jurisprudence, and the legislative history of the statute in question." Br. at 15. That understates the force of the doctrine.

As to the party relationships, Plaintiffs acknowledge binding precedent that Former Section 17801 creates no contract rights in favor of recently-hired state

employees (*Spiller*) or long-term state employees (*Parker*). Plaintiffs nonetheless argue that retirees must have such rights, because *Parella*, in a citation parenthetical, characterized *Parker* as having described Former Section 17801 as an "anti-retroactivity provision." Br. at 16-17; *see* 173 F.3d at 60. But as the district court explained, *Parella*'s parenthetical description of *Parker* is "at best, dicta" (Op. 17): Former Section 17801 was not at issue in *Parella*, which held that the challengers there—who *were* retirees—had *no* contract rights under the Rhode Island statutes at issue. *See* 173 F.3d at 60-62. Moreover, *Parker* expressly reserved the question whether Former Section 17801 "ever gives rise to a contractual relationship," because the provision did "not clearly do so" for the employees in question. *See* 123 F.3d at 9. And because the existence of a contract must be shown from "a close analysis of the statutory provision at issue," *id.* at 7; *see also Amtrak*, 470 U.S. at 466, it cannot be inferred from the mere fact of past or present employment. For example, in *NEA*—another case involving plaintiffs who had retired before the allegedly infringing legislation was enacted—this Court rejected a Contract Clause claim because the governing "clear statement rule" required more than just a past "employer-employee relationship" between the state and the Plaintiffs. *See* 172 F.3d at 28-29.

Plaintiffs further err in contending that unmistakability may be established by "trends in relevant jurisprudence," by which they mean out-of-state decisions.

The constitutional question here turns on whether the *Maine* legislature has created contract rights with unmistakable clarity, and decisions construing different pension statutes in effect in other states simply have no bearing on that question. To be sure, in *NEA*, this Court observed, as one possibly relevant consideration, that pensions are now "often conceived and crafted more as deferred compensation than as gifts." *See* 172 F.3d at 28. However, in the very next breath, it explained that "pensions can still be created (and withdrawn) without contract," as reflected in recent Supreme Court decisions. *See id.* And it therefore held that any trends in out-of-state decisions did *not* supply the requisite "clear statement" as to the governing Rhode Island pension law. *See id.* at 29. To our knowledge, no decision—of this Court or any other—has used jurisprudential "trends" from one state to establish that the statutes of another state create contract rights with the requisite degree of unmistakability. At best, therefore, the "trends in relevant jurisprudence" consideration is minimally relevant.

Finally, legislative history could rarely if ever supply the requisite degree of unmistakability. To our knowledge, no case has ever relied on legislative history to do so. To be sure, the Supreme Court did consult legislative history as part of its unmistakability analysis in *United States Trust Co.*, but the contractual obligation in that case was "clear from statutory language," and the Court used legislative history only to reinforce that conclusion. *See* 431 U.S. at 17-18. Moreover, in the

decades since *United States Trust* was decided, the Supreme Court increasingly has stressed the primacy of text over legislative history—even in contexts where there is no clear-statement requirement. *See, e.g.*, *Connecticut National Bank v. Germain*, 503 U.S. 249, 253 (1992). And in other contexts where there *is* some form of clear-statement requirement, the Court rarely if ever finds legislative history sufficient to satisfy the requirement. *See, e.g.*, *United States v. R.L.C.* , 503 U.S. 291, 310 (1992) (Scalia, J., concurring) (rule of lenity); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) (Eleventh Amendment abrogation). Like the other "circumstances" invoked by Plaintiffs, legislative history is at best marginally relevant in determining whether the governing statute creates contract rights with unmistakable clarity.

II. No Maine Statute Creates A Constitutional Entitlement To Lifetime Cost-Of-Living Increases In Public Pensions

Plaintiffs contend that the Contract Clause prevented the Maine legislature from prospectively reducing the maximum cost-of-living increase in state pensions from four percent to three percent, from capping the amount of the pension benefit subject to future cost-of-living increases at $20,000, and from prospectively suspending cost-of-living increases between 2011 and 2013. As the district court correctly concluded, this claim must fail because no Maine statute gives retirees an immutable lifetime entitlement to cost-of-living increases in their public pensions under pre-2011 terms, much less does so with unmistakable clarity.

A. Pre-1999 Retirees Have No Contractual Entitlement To Lifetime Cost-Of-Living Increases In Their Pensions

Plaintiffs rest their claimed contractual entitlement on Former Section 17801. Prior to its repeal on October 1, 1999, that provision read as follows:

> **Amendment not to cause reduction in benefit**
>
> No amendment to this Part may cause any reduction in the amount of benefits which would be due to a member based on creditable service, earnable compensation, employee contributions, pick-up contributions and the provisions of this Part on the date immediately preceding the effective date of the amendment.

5 M.R.S.A. § 17801 (1989), JA__. Because the benefits of each retiree are governed by the law in effect on the date of the retirement, *see* 5 M.R.S.A. § 17853, Former Section 17801 continues to govern Maine employees and public school teachers who retired prior to October 1, 1999. However, that provision conferred no contractual entitlement to lifetime cost-of-living increases under the statutory terms in effect before 2011.

1. Nothing in the text of Former Section 17801 created such a remarkable contractual entitlement. Most significantly, nothing in Section 17801 "expressly authorize[d] a contract or expressly state[d] that benefits are contractual" (*Parella*, 173 F.3d at 60)—in marked contrast to statutes that have been found to create rights constitutionally protected against future impairment. *See, e.g.*, *Brand*, 303

U.S. at 105 (statute repeatedly "couched in terms of contract"); *United States Trust Co.*, 431 U.S. at 18 (statute undertook to "covenant and agree" with bondholders).

Plaintiffs describe Former Section 17801 as an "anti-retroactivity provision" that created contractual entitlements under *Parella*. Br. 16-17. Even assuming that were correct, *but see* Section I.C *supra*, the controlling question is not whether Former Section 17801 created *any* contractual entitlements for pre-2011 retirees, but whether the provision created a contractual entitlement to lifetime cost-of-living increases under pre-2011 terms. *Parella* does not even arguably address that question. *See* 173 F.3d at 60-62. And the necessary "close analysis of the statutory provision at issue" (*Parker*, 123 F.3d at 7) does not show an unmistakable intention to create such extraordinary lifetime benefit increases.

As explained above, Former Section 17801 operated to prevent any "reduction in the amount of benefits which would be due to a member" on June 20, 2011. To prevail on their Contract Clause claim, plaintiffs would have to show—with unmistakable clarity—that the 2011 adjustments to the cost-of-living increases constituted (1) a "reduction" (2) in the "amount of benefits" (3) that would be "due" to a member on June 20, 2011. Plaintiffs cannot make any of these necessary showings.

First, the 2011 amendments did not result in any "reduction" in pension benefits. As the district court explained, the amendments "did not actually *reduce*

the dollar amount of benefits received by any class member." Add. 21 ("withholding an increase is not within the standard dictionary definition of 'reduction'"); *see also State v. Spaulding*, 1998 ME 29, ¶ 7, 707 A.2d 378, 379 n.2 (endorsing use of dictionary definitions). The unions respond that the cost-of-living increases are themselves "benefits" within the meaning of Former Section 17801, so that a "reduction" in the rate of increase in the benefits also qualifies as a "reduction" in benefits. Br. 20-21, 25. They rely on the general definition of a "benefit" as "any payment made, or required to be made, to a beneficiary." 5 M.R.S. § 17101(b). But as the district court explained, that definition on its face "could reasonably exclude annual upward adjustments that are yet to be determined and may range from anywhere" between zero and four percent. Op. 22. Moreover, the statutory provision specifically addressing the "cost-of-living adjustment" describes the adjustment not as a separate retirement "benefit," but as merely a formula to provide for an "increase in retirement benefits." *Id.* § 17806(1)(A); *see also id.* § 17806 (providing for "[c]ost-of-living adjustments to the retirement benefits being paid to retired state employees, teachers, or beneficiaries"). Specific provisions qualify general ones, *see, e.g., Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992), so the cost-of-living increases must be understood in these terms—not as benefits, but as increases to benefits.

For these reasons, it is at least textually arguable that reducing the cost-of-living increase does not qualify as reducing pension benefits.

Contextual considerations reinforce this conclusion. Prior to 2009, the calculation of cost-of-living-adjustments under 5 M.R.S.A. § 17806 would have unambiguously required an absolute reduction in benefits in years when the annual change in the CPI was negative. *See* P.L. 2009, ch. 433, §§ 3-4 (amending § 17806 to eliminate possibility of downward adjustments), JA__. Thus, under the Plaintiffs' proposed interpretation, Former Section 17801 would *not* have protected against an absolute *reduction* in benefits paid, but *would* have protected against a less-than-expected *increase* in benefits paid. That absurd consequence undercuts their position even more. *See, e.g.*, *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 454-55 (1989); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 509 (1989).

Second, the 2011 amendments did not affect any "benefits" within the meaning of Former Section 17801. As explained above, cost-of-living increases under Section 17806 are best understood not as separate retirement "benefits," but as "adjustments to the retirement benefits." 5 M.R.S. § 17806. Moreover, Former Section 17801 protects "benefits" that are "based on creditable service, earnable compensation, employee contributions, pick-up contributions and the provisions of this Part." Cost-of-living increases are "based on" inflation—not on service,

compensation, or contributions. Add. 22. Plaintiffs contend that the adjustments are based on "the provisions of this Part" (Br. 22), but that simply begs the question whether they qualify as "benefits."

Third, the 2011 amendments, in prospectively adjusting future cost-of-living increases, did not affect any benefits "due" immediately prior to the date of its enactment. As this Court held in *Parker*, the word "due"—as used specifically in Former Section 17801—can mean "payable in the future" rather than "currently payable." *See* 123 F.3d at 8. As the district court explained, under that definition, cost-of-living increases are not "due" until "September of the year in which the amount of the adjustment is actually made." Add. 21; *see* 5 M.R.S. § 17806(1)(A) ("whenever there is a percentage increase in the [CPI] from July 1st to June 30th, the board shall automatically make an equal percentage increase in retirement benefits, beginning in September").

In response, Plaintiffs invoke the 1968 edition of *Black's Law Dictionary*, in which the third definition of "due" states that "[a] debt is often said to be due . . . whether the time for payment has or has not arrived." *Black's Law Dictionary* 589 (4th rev. ed. 1968). That very same dictionary, however, fatally undercuts the Plaintiffs' position in at least three different ways. It adopts "currently payable" as the *preferred* definition: "in the absence of any qualifying expressions, the word 'due' is restricted to the first of these meanings," namely "that the debt or claim in

question is now (presently or immediately) matured and enforceable." *Id.* Moreover, it highlights "considerable ambiguity" on the question whether "due" means "presently payable," *id.*—which makes neither of the competing definitions unmistakably clear. Finally, it states that "[t]he word 'due' always imports a fixed and settled obligation or liability," *id.*—so it cannot possibly denote a liability *of uncertain amount*. Plaintiffs argue that the "payable in the future" definition is compelled here, because otherwise *no* pension benefits would be "due" until the date of payment, and Former Section 17801 thus "would have little meaning" even as applied to retirees Br. 24. That conclusion does not follow, however, because "due" could readily mean a debt of *fixed* amount payable *in the future*, which would cover core pension benefits but not future cost-of-living increases, which simply cannot be determined as of the employee's retirement date. In any event, none of this changes the holding in *Parker* that the word "due," as used in Former Section 17801, "could easily be read to mean currently payable." 123 F.3d at 8.

Plaintiffs may well have colorable arguments on these various textual points, but they cannot possibly show, as they must, that Former Section 17801 not only means what they say, but does so with unmistakable clarity.

2. Nothing in the extra-textual "circumstances" of this case unmistakably confers upon retirees a contractual right to lifetime cost-of-living increases in their pension benefits. The Plaintiffs cite legislative history, their members' status as

retirees, and the supposed trend in out-of-state caselaw. As explained above, these considerations rarely if ever should carry much weight. In any event, none of them does so here.

First, Plaintiffs point to legislative history supposedly highlighting the importance of protecting "presently vested rights," as reinforced by general statements of legislative intent such as a desire "to encourage qualified persons to seek public employment," 5 M.R.S.A. § 17050, and an acknowledgment "that the State owes a great debt to its retired employees for their years of faithful and productive service," *id.*§ 17051. Br. 17-20. These generalized statements are worlds apart from the sort of clear contractual language the Supreme Court has found necessary to trigger application of the Contracts Clause. *See*, *e.g.*, *Brand*, 303 U.S. at 105 (statute uses the word "contract" at least 25 times); *United States Trust Co*., 431 U.S. at 18 (interstate agreement used the phrase "covenant and agree"). Moreover, the Maine Supreme Judicial Court has squarely held that the highly generalized statements in Sections 17050 and 17051 "do not create contractual rights." *Spiller*, 627 A. 2d at 516. Finally, whatever else they may suggest about contractual rights in general, the legislative materials cited by Plaintiffs do not remotely address the specific question of cost-of-living increases.

Second, citing *Parella* and *NEA*, Plaintiffs again invoke the mere status of their members as retirees. Br. 27-28. We have already shown why that

consideration should have little weight in addressing the controlling question of whether the governing statutes establish contract rights with unmistakable clarity. *See* Section I.C, *supra*. In any event, the relevant passages at most bear in very general terms on the question whether retirees may have any constitutionally protected pension rights. *See Parella*, 173 F.3d at 61 ("[w]ithout deciding the question," *NEA* considered whether "hypothetical plaintiffs' status as employees of the state * * * could * * * serve as evidence that the state intended its pension promises to be binding and unenforceable"). Nothing in those decisions remotely addresses cost-of-living increases to pension benefits, much less the specific question whether Former Section 17801 unmistakably affords a lifetime contractual right to those benefits.

Finally, Plaintiffs cite a putative "trend in jurisprudence" supposedly reflected in recent decisions from Maryland, Rhode Island, and New Hampshire. Br. 28-31. This argument is particularly insubstantial. To begin with, the decisions cited by Plaintiffs were rendered in 2007 or later, and thus could not possibly shed light on the intent of Maine's legislature when it passed Former Section 17801 in 1975 or modified it in 1985. Moreover, despite acknowledging that some courts outside of Maine "treat state pension plans as a form of unilateral contract" regardless of the governing statutory text (Br. 28), this Court has rejected that approach, in renouncing "abstract contract theory in favor of performing a

close analysis of the statutory provision at issue." *Parker*, 123 F.3d at 7. Similarly, the Maine Supreme Judicial Court has acknowledged expansive approaches that imply contract rights based on an employer-employee relationship, but was "unpersuaded by the reasoning of those jurisdictions." *Spiller*, 627 A.2d at 516-17 ("Our retirement statute contains no language expressing an intent to create such rights and we decline to imply them in the absence of such language."). Moreover, that court reaffirmed the continuing vitality of *Spiller* just last year, despite expressly acknowledging the "more liberal approach" followed in other states. *Budge v. Town of Millinocket*, 55 A. 3d 484, 489-90 (2012).

The "circumstances" cited by Plaintiffs do not establish an unmistakable intent to create a contract right to lifetime cost-of-living increases in pension benefits.

B. Post-1999 Retirees Have No Contractual Entitlement To Lifetime Cost-Of-Living Increases In Their Pensions

1. As shown above, Former Section 17801 did not confer upon retirees any contractual entitlement to lifetime cost-of-living increases in their pension benefits. Accordingly, none of the retirees here can sustain a Contracts Clause challenge. Moreover, the claims of individuals who retired after October 1, 1999 fail for an entirely independent reason. On that date, Former Section 17801 was repealed and replaced with an entirely rewritten successor provision. Because "the retirement system law in effect on the date of termination [*i.e.*, retirement] shall govern the

member's service retirement benefit," 5 M.R.S.A. § 17853, the statutory or putative contract rights of individuals who retired after October 1, 1999 are governed not by Former Section 17801, but by the current version of Section 17801. The district court "readily conclude[d]"—and correctly so—that Former Section 17801 applies only to those who retired before October 1, 1999. Add. 18. Moreover, as the district court further explained, the current version of Section 17801("Current Section 17801") creates no arguable contract right to lifetime cost-of-living increases.

Current Section 17801 establishes a list of contractual commitments to public employees, but cost-of-living increases are specifically excluded from that list. It provides that "the protections established under the provisions listed" in Subsection (1)(B)(1) "constitute solemn contractual commitments of the State protected under the contract clauses" of the Federal and Maine Constitutions. 5 M.R.S.A. § 17801(1)(B). In turn, Subsection (1)(B)(1) states that the contractual "commitment provided by this section applies to the protections listed under the specific following provisions." The enumerated list that follows identifies six specific provisions of the Maine pension law. Included on the list is Section 17806(4), which provides that new retirees will become eligible for a cost-of-living adjustment within 12 months of their retirement. *See* 5 M.R.S.A. § 17801(1)(B)(1)(b) (citing 5 M.R.S.A. § 17806(4)). However, the list does not

include any provisions addressing the amount or timing of future cost-of-living increases. In particular, it does not include Section 17806(1)(A), which had previously set forth the maximum cost-of-living increase of four percent, and which now sets forth the maximum increase of three percent on a benefit up to $20,000. Moreover, Current Section 17801 confirms that statutory provisions not specifically enumerated in the list of contractually protected benefits are *not* so protected. It states that Subsection (1), which confers the contractual entitlements, "does not apply to any provision of this Part not specifically identified in subsection 1" and that "[a]ny provision not specifically identified in subsection 1 may be increased, decreased, [or] otherwise changed or eliminated by the Legislature as to any member regardless of whether the member has or has not met any creditable service requirement for eligibility to receive a service retirement benefit." 5 M.R.S.A. § 17801(2).

2. In response to all of this, Plaintiffs do not seek to predicate any Contract Clause claims on Current Section 17801. Instead, they contend that Former Section 17801 somehow continues to apply to state employees who retired after October 1, 1999. They reason that the 1999 amendments to Section 17801 were designed to respond to *Parker*'s holding that that Former Section 17801 created no contract rights for current employees. They note that Section 17801 speaks of "members" but not "retirees," and they assert that benefits due to retirees "were

already protected under *Parker*." Br. 32-33. From this, they conclude that Current Section 17801 governs only the contractual rights of employees or members, whereas Former Section 17801 continues to govern the rights of retirees.

This reasoning is unsound at every turn. To begin with, *Parker* did not decide that retirees (as opposed to employees) enjoyed contractual rights under Former Section 17801. To the contrary, *Parker* expressly reserved that question, *see* 123 F.3d at 9 ("[w]e need not decide whether the statute ever gives rise to a contractual relationship"), and neither *NEA* nor *Parella* even arguably decided it. *See Parella*, 173 F.3d at 61 (noting reservation of same issue in *NEA*). Moreover, as the district court explained, excluding retirees from the protection of Current Section 17801 would be entirely "nonsensical"—and entirely unnecessary insofar as the Maine pension statutes often "refer to 'member' when it is apparent that 'beneficiary' [or 'retiree'] would have been the more appropriate term." Add. 22 n.17; *see, e.g.*, 5 M.R.S.A. § 17804 ("A full month's benefit shall be paid to the beneficiary or estate of the recipient for the month in which the *member* dies." (emphasis added)); *id.* § 17853 (referring to "*member*'s service retirement benefit" (emphasis added)). Finally, regardless of the scope of or motivation for Current Section 17801, the simple fact remains that Former Section 17801 was "repealed and replaced" on October 1, 1999, 5 M.R.S.A. § 17801 Historical and Statutory Notes (2002), and thus does not apply to individuals who retired after that date.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

/s/ Gregory G. Katsas
Gregory G. Katsas, Bar No. 39342
Craig I. Chosiad, Bar No. 1161336
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939
ggkatsas@jonesday.com

Counsel for Amicus Curiae
Maine Heritage Policy Center

Dated: December 2, 2013

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains _____ words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman.

Dated: December 2, 2013

CERTIFICATE OF SERVICE

I certify that on December 2, 2013, the foregoing document was filed on the CM/ECF system, which served the document on all parties or their counsel.

/s/ Craig I. Chosiad
Craig I. Chosiad

Counsel for Amicus Curiae
The Maine Heritage Policy Center