

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 14-1208

IN RE: CITY OF DETROIT, MICHIGAN,
Debtor

POLICE AND FIRE RETIREMENT SYSTEM OF THE CITY OF DETROIT;
GENERAL RETIREMENT SYSTEM OF THE CITY OF DETROIT,
Appellants

v.

CITY OF DETROIT, MICHIGAN
Appellee

On Direct Appeal from the United States Bankruptcy Court
for the Eastern District of Michigan
No. 13-53846 (Hon. Steven W. Rhodes)

**BRIEF OF AMICI CURIAE
NATIONAL CONFERENCE ON PUBLIC EMPLOYEE RETIREMENT
SYSTEMS AND TEXAS ASSOCIATION OF PUBLIC EMPLOYEE
RETIREMENT SYSTEMS IN SUPPORT OF APPELLANTS AND IN
SUPPORT OF REVERSAL**

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 14-1208

Case Name: In re: City of Detroit

Name of counsel: James E. Thompson III

Pursuant to 6th Cir. R. 26.1, National Conference on Public Employee Retirement Systems
and Texas Association of Public Employee Retirement Systems
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on May 1, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/James E. Thompson III

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

STATEMENT OF IDENTITY



The National Conference on Public Employee Retirement Systems (“NCPERS”) is the largest national non-profit public pension advocacy organization, representing over 500 governmental pension funds having in excess of \$2 trillion in assets. NCPERS was founded in 1941 to protect the pensions of public employees by representing public pension organizations on Capitol Hill, providing trustee education and providing essential pension information to trustees, administrators and public officials.¹

The Texas Association of Public Employee Retirement Systems (“TEXPERS”) is a non-profit association that provides educational and legislative advisory services to the trustees, administrators, professional service providers and employee groups that manage the retirement money of police, firefighters, municipal and district employees throughout the state of Texas.² TEXPERS’ member systems represent over 300,000 active and retired participants and have approximately \$22 billion in assets.

Through education and advocacy, Amici are dedicated to preserving the integrity of state and local retirement systems and to educating the public about common state law issues regulating these plans. This case has the potential to


¹ General information concerning NCPERS as well as specific data regarding its activities can be found at its website, www.ncpers.org


² General information concerning TEXPERS as well as specific data regarding its activities can be found at its website, www.texpers.org

jeopardize the financial security of the member plans of Amici, to create uncertainty in the national financial markets, to jeopardize the retirement benefits of plan members and to open the floodgates for municipalities across the country to misuse the federal bankruptcy process to avoid state constitutional guarantees whenever difficult issues arise in their budgetary processes. As advocates for state and local retirement systems and the millions of Americans whose financial security depends upon them, Amici have a direct stake in the outcome of this litigation.³

³ This brief was not authored in whole or in part by any party's counsel. No person other than the amici curiae contributed any money that was intended to fund the preparation or submission of this brief. Notice of intent to file this brief was sent to all parties on April 30, 2014 and no opposition was received.


SUMMARY OF ARGUMENT

This appeal presents issues regarding the ability of a municipality to reduce or eliminate constitutionally protected pension benefits through Chapter 9 bankruptcy. It also presents issues related to whether, and under what circumstances, the federal government may interfere with powers reserved under the United States Constitution to the States and, more importantly, to the people. 

Michigan's Constitution, like the constitutions of Texas⁴ and many of Amici's other constituent members⁵, prohibits the diminishment or impairment of municipal pensions under any circumstances. Impairing state constitutional guarantees through a federal process raises issues of federalism which have a national scope under the Tenth Amendment to the United States Constitution. The question before this Court is whether, and in what manner, voters in the States may choose to protect through their constitutions the retirement benefits earned by their public employees. A ruling in this case allowing an unelected "emergency manager" to slash the constitutionally protected retirement benefits of state workers would pave the way to bankruptcy court for any municipality simply 

⁴ Texas Constitution, Article 16, Section 66.


⁵ Many states have constitutional provisions protecting against diminishing, impairing, encumbering or diverting public sector retirement funds for any reason or purpose whatsoever. Based on a recent survey, approximately 25 states have some form of constitutional provisions protecting these public retirement funds or such protections have been otherwise legislatively or judicially created. See, for example, Alabama Constitution, Article V, Section 138.03; New Hampshire Constitution, Part 1, Article 36; New Mexico Constitution, Article XX, Section 22; South Carolina Constitution, Article X, Section 16. Likewise, many states consider membership in a state employee retirement system as a contractual relationship subject to statutory and constitutional protections which may be judicially enforced. See, for example, Alaska Constitution, Article XII, Section 7; Arizona Constitution, Article XXIX; Louisiana Constitution, Article X, Section 29.

seeking to avoid difficult budgetary decisions by balancing its budget on the backs  of its retirees. Where the people have spoken by prohibiting such interference with earned pension benefits, the federal courts should not be used as a vehicle to violate the express will of the people.

The United States Supreme Court has recently addressed this same issue in *Shuette v. Coalition to Defend Affirmative Action*, 572 U.S. ___ (2014). In *Shuette*, the United States Supreme Court reversed this Court and held that the people of Michigan could express their will on an issue, in that case banning discrimination, and that such an expression of the will of the people would not be disturbed by the federal judiciary.

ARGUMENT

A. The Importance of Constitutional Protections for Public Service Employee Pensions

The people of Michigan have stated loudly and clearly that they do not want  the accrued pension benefits of employees of the state or its political subdivisions diminished or impaired. Article IX, §24 of the Michigan Constitution provides in no uncertain terms that “[t]he accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof and which shall not be diminished or impaired thereby.”

By adding Article IX, § 24 to their constitution, the people of Michigan voted to make public employee pensions a sacrosanct guarantee. This choice was a basic exercise of their democratic power. The voters chose to remove from the hands of politicians they did not trust the option of reducing or diminishing public employee pensions. As it turns out, their mistrust was well placed. The reductions of public employee pensions currently being proposed by the Emergency Manager are exactly the type of impairments of pensions the people of Michigan prohibited when they added Article IX, §24 to their constitution.

In amending their constitution, the voters recognized that politicians are not always the best stewards of the cities and towns they manage. Politicians too often bend to the winds of the current political landscape without considering the effects current policies may have on future generations. To ensure that bad political decisions would not jeopardize the future of public service, the people of Michigan decided to constitutionally protect that future by restricting the ability of the government to impair or diminish public pensions.

In this particular case, the bankruptcy court has given unprecedented power to an un-elected government official, the Emergency Manager for the City of Detroit. When Michigan voters inserted Article IX, §24 into their constitution, they could not in their wildest dreams have imagined that an un-elected government official could use the federal bankruptcy process to override the will



of the people. If this ruling is allowed to stand, it would violate the basic foundation of a republican form of government.


The people of Michigan have faith in their constitution. They have faith in the protections it provides and they have faith that the federal government will not interfere with it in the absence of an important and overriding federal interest. In a case like this, where there is no federal issue on the table, interference by the federal court will cause the people to lose faith in their own constitutions and in the system of federalism instilled by the Founding Fathers.



B. The Importance of Principles of Federalism

The Tenth Amendment to the United States Constitution states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” This federal structure serves to define the powers and responsibilities of the States and the National Government. The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States. This balance is essential to ensuring that States function as political entities in their own right. *Bond v. United States*, 564 U.S. ____ (2011) (slip op. at 9).

States have the right to decide how to manage their internal affairs absent an overriding interest of the federal government. The right of a state to function as a separate political entity necessarily concerns matters of how to manage and pay its


state and local government employees. This is an essential operation of state and local government and one in which the federal government should not interfere, particularly when no federal government interest has been implicated. In this case, there has been no allegation that the people of Michigan have violated the United States Constitution or have acted contrary to any federal law. There is no question  that the enactment of Article IX, §24 of the Michigan Constitution was a valid exercise of the democratic rights of the people of Michigan.


Similarly, in *Shuette*, the people of Michigan amended their constitution by adding Article I, §26, which prohibited government officials from granting certain preferences in a wide range of actions and decisions. The question before the United States Supreme Court in *Shuette* was whether, and in what manner, voters in the States may choose to restrict the power of government officials. “Save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs.” *Shuette* (slip op. at 18)(quoting *Sailors v. Board of Ed. Of County of Kent*, 387 U.S. 105, 109 (1967)). The Supreme Court ruled that, “[b]y approving Proposal 2 and thereby adding §26 to their State Constitution, the Michigan voters exercised their privilege to enact laws as a basic exercise of their governmental power.” *Shuette* (slip op. at 15). The Supreme Court recognized that a bedrock principle of state sovereignty is the ability of the voters to place restrictions on their own

government officials. “There is no authority in the Constitution of the United States or in this Court’s precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters.” *Shuette* (slip op. at 18).

There is also no question about what Article IX, §24 of the Michigan Constitution means. The highest court in the State of Michigan has already made that clear. The Supreme Court of Michigan ruled that Article IX, §24 “unambiguously prohibit[s] the state and its political subdivisions from diminishing or impairing” accrued pensions. *Studier v. Mich. Pub. Sch. Emps.’ Ret. Bd.*, 698 N.W.2d 350, 355 (Mich. 2005). Interpretations of state law by the highest court in a state are binding on the federal judiciary. In fact, no Michigan court has ever held that Article IX, §24 protection does not apply in bankruptcy. And, Michigan’s Attorney General filed a statement with the bankruptcy court in this case explicitly stating that Michigan’s constitutional protection of public pensions is broader than that afforded ordinary contracts and that public pensions are not subject to discharge by exigency, including in a Chapter 9 proceeding.

As Justice Kennedy wrote for the majority in *Shuette*, “[o]ur constitutional system embraces...the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to shape the course of their own times.” Here, much like in *Shuette*, Michigan voters acted in concert and statewide to seek consensus and adopt a policy that protects public employee pensions from

diminishment or impairment by the government. In the federal system, States govern themselves through the enactment of positive law, responding to the initiative of those who seek a voice in shaping their own times. State and local retirement plans in every state in the nation were created and are modified on a state by state basis. Every state's right to self determination would be jeopardized if the bankruptcy court's decision is upheld. 

Importantly, Congress has not only not regulated the area of state and local pension plans, it has expressly declined to do so. While private sector pension plans are subject to federal regulation through the Employee Retirement Income Security Act of 1974 (ERISA), state and local governmental plans are creatures of state constitutional, statutory and case law. These plans are accountable to the legislative and executive branches of the state, independent boards of trustees that include employee representatives, and ultimately the taxpaying public. These plans are part and parcel of the internal workings of state government. In ERISA, Congress noted as much, declining to apply ERISA to the States due to federalism concerns.⁶ 

In sum, state and local public employee pensions are integral parts of the compensation of state and local government officials. Congress has determined not to regulate in this area, making it clear that there is no important federal

⁶ See 29 U.S.C. § 1003(b)(1), 1321(b)(2)

interest at stake. The people of Michigan have declared in their constitution that public employee pensions are not to be diminished or impaired. The Supreme Court of Michigan has decreed unambiguously that the constitutional protections so afforded are inviolable.

The bankruptcy court – and any other federal court – has no authority to substitute its will for that of the people of Michigan under these circumstances. Such is the express holding of *Shuette*.


C. The Importance of Security and Stability of Public Pensions


According to the United States Census Bureau, there are more than twenty million working and retired state and local government employees in the United States.⁷ Retired public employees live in virtually every city and town in the nation. Nationally, state and local pensions support 2.9 million jobs and \$443 billion in economic activity. In Michigan alone, 301,626 residents received \$5.9 billion in pension benefits from state and local retirement plans in 2009.⁸


Collectively, public pension plans hold more than \$3 trillion in assets and distribute more than \$240 billion in benefits annually to over nine million retirees,

⁷ U.S. Census Bureau's "Number and Membership of State and Locally Administered Defined Benefit Pension Systems by State and Level of Government" for Fiscal Year 2012, a copy of which can be found here: <http://www.census.gov/govs/retire/>

⁸ Boivie, I. 2012. "Pensionomics: Measuring the Economic Impact of DB Pension Expenditures." Washington, DC: National Institute on Retirement Security. www.nirsonline.org

beneficiaries and other recipients.⁹ The average pension benefit of a public service retiree is roughly \$20,000.00 (\$19,000.00 in Michigan).

These payments are steady and continuous and provide a robust economic stimulus to local economies throughout the nation. Public pension funds and the benefits they distribute make important contributions to the local, state and national economies. In Michigan, it is estimated that the economic impact of state and local pensions accounted for 72,000 jobs and contributed \$9.2 billion to the state economy in 2009.¹⁰ The uncertainty arising from unilaterally reducing pension payments would have a devastating impact on the Michigan economy. Similar statistics apply throughout the country. 

Likewise, the assets of these plans are an important source of liquidity and stability for the nation's financial markets. Because of the long-term nature of their liabilities, public pension funds provide a long-term source of funds to the nation's capital markets. Public pension plans account for over 1/6 of the ownership of the U.S. stock market.¹¹ Creating instability within these funds would have a ripple effect on the entire U.S. economy. 

The bankruptcy court's ruling makes it possible for local governments to underfund or stop funding their pension plans. Even a constitutional guarantee

⁹ U.S. Census Bureau's "National Summary of State and Locally Administered Defined Benefit Pension Systems Finances" for Fiscal Year 2012, a copy of which can be found at: <http://www.census.gov/govs/retire/>

¹⁰ Boivie, I. "Pensionomics: Measuring the Economic Impact of DB Pension Expenditures." Washington, DC: National Institute on Retirement Security. www.nirsonline.org

¹¹ Brown, J., Pollet, J., Weisbenner, S., "The Investment Behavior of State Pension Plans." National Bureau of Economic Research, <http://www.nber.org/aging/rrc/papers/onb09-12.pdf>

could not secure the pension plans from budget shifting and mismanagement by local government officials. This looming uncertainty has the potential to impact the national economy.

Amici and their member plans support the reliability and the fairness of paying earned public pensions to deserving public servants. Permitting such earned and protected benefits to be discharged under these circumstances is unjustified and unconstitutional.

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court reverse the bankruptcy court's decision that the City of Detroit is eligible to discharge accrued pension benefits as a Chapter 9 debtor.



Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 2,327 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), respectively, because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in Times New Roman 14-point font.

/s/ James E. Thompson III
James E. Thompson III

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2014, the foregoing *Brief of Amici Curiae National Conference on Public Employee Retirement Systems and Texas Association of Public Employee Retirement Systems in Support of Appellants and in Support of Reversal* was electronically filed with the Court via the Court's appellate CM/ECF system, and a copy of the brief was served on all counsel of record by operation of the CM/ECF system on the same date.

/s/ James E. Thompson III
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