Case No. S247095 No Filing Fee (Gov. Code § 6103)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ALAMEDA COUNTY DEPUTY SHERIFFS' ASSOCIATION, et al.,
Plaintiffs and Appellants

vs.

ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION; MERCED COUNTY EMPLOYEES' RETIREMENT ASSOCIATION BOARD OF RETIREMENT OF THE MERCED COUNTY EMPLOYEES' RETIREMENT ASSOCIATION, et al.,
Defendants and Respondents,

STATE OF CALIFORNIA,
Intervenor

On Review of a Decision by the Court of Appeal, First Appellate District, Division Four, Case No. A141913; Contra Costa County Superior Court, Case No. MSN12-1870, (coordinated with Alameda County Superior Court Case No. RG12658890 and Merced County Superior Court Case No. CV003073); Hon. David B. Flinn (Ret.), Judge

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RESPONDENTS MERCED COUNTY EMPLOYEES' RETIREMENT ASSOCIATION (MCERA) AND MCERA BOARD OF RETIREMENT'S ANSWER BRIEF

NOSSAMAN LLP
*Ashley K. Dunning (SBN 185014)
Peter H. Mixon (SBN 116867)
Natasha Saggar Sheth (SBN 282896)
Jennifer Meeker (SBN 260138)
50 California Street, 34th Floor
San Francisco, CA 94111
Telephone: (415) 398-3600
Facsimile: (415) 398-2438

Attorneys for Respondents MCERA and MCERA Board of Retirement

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50 California Street, 34th Floor
San Francisco, CA 94111
Telephone: (415) 398-3600
Facsimile: (415) 398-2438

Attorneys for Respondents MCERA and MCERA Board of Retirement

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I. INTRODUCTION AND SUMMARY OF POSITION

In this case, the legal questions to be resolved as to Respondents the Merced County Employees' Retirement Association ("MCERA") and its Board of Retirement ("MCERA Board") (collectively, "MercedCERA") are straightforward:

(1) Prior to the legislative amendments enacted on January 1, 2013, did the definition of "compensation earnable" in section 31461 of the County Employees Retirement Law of 1937 (Gov. Code[1] § 31450, et seq.; "CERL") clearly demonstrate a legislative intent to include certain specific items of compensation paid to an employee for services rendered outside of normal working hours —such as standby, on-call and similar pay items ("On-Call Pay")—such that exclusion of those items prospectively as required by Assembly Bill ("AB") 340 (2011-2012 Reg. Sess.) ("AB 340"), and its trailer bill AB 197 (2011-2012 Reg. Sess.) (collectively, "AB 197"), resulted in an unconstitutional modification of members' vested rights?

(2) If not, should equitable estoppel nonetheless be invoked to prevent MercedCERA from implementing AB 197?

As to the first question, the answer is no. Contrary to the conclusion set forth in the Court of Appeal's decision in *Alameda County Deputy Sheriff's Assn. et al. v. Alameda County Employees' Retirement. Assn. et al.* (2018) 19 Cal.App.5th 61 (review granted March 28, 2018, S247095) ("*Alameda*"), there was no legislative intent—either express or implied—mandating inclusion of On-Call Pay in compensation earnable under CERL. The underpinning of the Court of Appeal's decision is therefore

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1 All statutory references hereafter are to the Government Code, unless otherwise noted.

flawed, and the decision suffers from four fundamental defects in its assessment of the constitutionality of the legislative amendments to the definition of "compensation earnable" enacted in 2013 that are the subject of this Court's review (hereinafter, "compensation earnable amendments" or "CE amendments").[2]

First, the lower court wrongly concluded that the CE amendments excluding On-Call Pay from retirement allowance calculations were clearly and substantively "change[s] in [the] law" that governed the contract rights of legacy members under the prior definition of compensation earnable.

Second, the Court of Appeal assumed, without analysis, that the CE amendments resulted in a "severe" impairment, warranting a vested rights balancing test, rather than simply constituting a "minimal alteration," as contemplated by this Court in *Allen v. Bd. of Admin.* ((1983) 34 Cal.3d 114, 119), which "end[s] the inquiry at its first stage." The Court of Appeal also improperly rejected the Legislature's intent to address pension "spiking" abuse with legislation designed to be consistent with the theory and successful operation of a defined benefit plan. Instead, the Court of Appeal erroneously remanded with direction to the trial court that focused on the "financial stability" of particular public pension plans.

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2 To avoid undue confusion as a result of this litigation, MercedCERA does not adopt the State's use of the term "pensionable compensation" in its Opening Brief, because the Public Employees' Pension Reform Act of 2013 ("PEPRA") (§§ 7522-7522.74) uses that defined term as an *alternative* to "compensation earnable," and "pensionable compensation" applies only to "new members" governed by section 7522.34. Section 7522.34 contains a much more extensive list of pay items that are required or permitted to be excluded from final compensation calculations than does section 31461. For example, pensionable compensation may not include *any* leave accruals, whether "earned" and "payable" during employment, or not. (§ 7522.34, subd.(c)(5).)

Third, the test set forth by the Court of Appeal for determining constitutionality impermissibly shifts the burden of proof, requiring that the State (or whomever is defending the constitutionality of the statute) produce "compelling evidence" to justify the amendments where no comparable new advantage was provided, rather than assuming the constitutionality of the legislation and requiring the challenging parties to present a clear case of impairment.

Fourth, the lower court's test for constitutionality would result in an untenable county-by-county determination of the constitutionality of a generally applicable CERL statute based on the finances of each specific county retirement system and the financial particulars of affected members—directly contradicting years of precedent that explicitly provides that an employer's claims of financial need is an insufficient basis to deprive an individual of a vested public pension right. In addition, the county-by-county assessment deprives the Legislature of its authority to establish more uniform rules applicable to the "reciprocal"[3] statutory defined benefit plans it has created and that are integrally tied to one another under State law.

In sum, the prior definition of "compensation earnable" did not evidence a legislative intent mandating that On-Call Pay be included therein;

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3 Under the Public Employees' Retirement Law ("PERL") (§§ 20000-22980.89) applicable to the California Public Employees Retirement System ("CalPERS"), the State Teachers' Retirement Law (Ed. Code §§ 22000-27602) applicable to the State Teachers' Retirement System ("CalSTRS"), as well as CERL, members of all of those systems have the right to join reciprocal county, state and school retirement systems and have their highest "compensation earnable" and "final compensation" used to determine the benefits received from each of them. (See generally, Gov. Code §§ 31830, 31835, 20350, 20351, 20638; Ed. Code §§ 22115-22115.5.)

thus the 2013 CE amendments prospectively excluding those items from future benefits determinations should be deemed constitutional as a matter of law as to every legacy member in all twenty county systems operating under CERL. For the reasons discussed below, California Supreme Court precedent best supports concluding that CE amendments are constitutional because they are at most "minimal" alterations of the applicable statute and their implementation as to members who had not yet retired is consistent with the theory and successful operation, as well as the integrity of, a defined benefit public pension plan. Further, the implementation of the CE amendments by retirement boards to avoid a real or perceived pension "abuse" caused by the artificial inflation of retirement benefits beyond that which is ordinarily earned by members during normal working hours of their employment (so-called "spiking") is consistent with the boards' proper role as fiduciaries who prudently administer the retirement systems they govern for the overall benefit of all members and beneficiaries thereof. (Cal. Const., art. XVI, sec. 17; *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1063-64.)

In upholding the constitutionality of the CE amendments, this Court should follow California constitutional precedent that has long permitted the Legislature (or, as to matters within their authority, retirement boards) to make modifications to the retirement benefit rights of active (currently employed) members as to their prospective accruals, so long as those changes are both reasonable in comparison to existing rights, and consistent with the theory and successful operation of the defined benefit retirement system. Thus, this Court should uphold the constitutionality of the CE amendments, while declining Intervenor State of California's ("State") invitation to substantially weaken the constitutional protections of public

defined benefit plan members' rights in California, as well as declining Petitioners' (and the appellate court's) invitation to substantially harden the Court's interpretation of the federal and state constitutions' respective Contract Clause application to prospective changes by statute or retirement boards in defined benefit retirement accrual rights that is not advantageous to all retirement system members in California.

With respect to the second question regarding estoppel, MercedCERA does not take a position, except to urge that estoppel should not be applied to individuals who first joined MCERA after the lower court issued its decision in *Alameda* and MercedCERA implemented it. As discussed below, the MCERA Board, by Resolution adopted on February 8, 2018, acted to implement the Court of Appeal's decision so as to reinstate the inclusion of some terminal pay[4] in its retirement allowance calculations for current MCERA members. MercedCERA did not, however, permit those non-statutory benefits to be provided to any individuals who were not already MCERA members as of that date, and for the reasons described below, California law does not support forcing it to do so.

II. RELEVANT BACKGROUND

A. The Legislature Enacts Pension Reform Legislation.

In 2012, after a year of study by a Joint Conference Committee on Public Employees' Pensions, the Legislature passed and the Governor signed AB 197.

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4 "Terminal pay" refers to the cash-out of an employee's unused leave at the time of retirement or other termination of employment beyond the amount the employee earned during a 12 month period and could receive in cash during employment.

Most of the legislative changes to public pension plans in California resulting from AB 197 occurred as a result of enactment of the new article in the Government Code called PEPRA (§§ 7522-7522.74). With few exceptions, PEPRA applies only to "new members."[5] The legislative amendments to CERL section 31461 through AB 197 apply only to individuals who are not PEPRA members (so-called "legacy members"[6]).

AB 197, by its express terms, sought to be "consistent with and not in conflict with," prior case law clarifying CERL retirement board authority to exclude certain pay items when determining a member's compensation

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5 The term "new members" is defined in section 7522.04, subdivision (f), as, generally stated, individuals who first join public retirement systems in California on or after January 1, 2013 ("PEPRA members"). The provisions of PEPRA requiring new, lower, defined benefit formulas (§§ 7522.20, 7522.25), longer final compensation periods (§ 7522.48), and mandatory payment of "at least 50 percent of normal costs" by members (§ 7522.30) apply only to PEPRA members. PEPRA provisions that apply to all retirement system members, such as the prohibition on nonqualified service credit purchases (§ 7522.46) and felony forfeiture provision (§ 7522.72) are currently subject to judicial review. (See e.g., *Cal FIRE Local 2881 v. California Public Employees' Retirement System* (2016) 7 Cal.App.5th 115 (S239958); and *Hipsher v. Los Angeles County Employees Retirement Association* (2018) 24 Cal.App.5th 740, 234 Cal. Rptr. 3d 564.)

6 The term "legacy members" refers to individuals who are not PEPRA members and thus were permitted to retain most preexisting statutory provisions applicable to them. (§ 7522.04, subd. (f).) Generally stated, legacy members are individuals who were members of public retirement systems in California before PEPRA became effective on January 1, 2013 and who do not have a "break in service of more than six months" between that membership service and their public employment in another covered public retirement system. (*Ibid.* [definition of "new members"]; see generally, *Lear v. Bd. of Retirement* (2000) 79 Cal.App.4th 427, and *San Diego County Employees Retirement Assn. v. County of San Diego* (2007) 151 Cal.App.4th 1163 [discussing rights of returning deferred, reciprocal and redepositing members who do not have a "break in the continuity of service" under applicable CERL statutes and thus retain certain of their "legacy" rights].)

earnable. (§ 31461, subd. (c).) Under the prior version of section 31461, "compensation earnable" was defined as follows:

> the average compensation as determined by the board,[7] for the period under consideration upon the basis of the average number of days ordinarily worked by persons in the same grade or class of positions during the period, and at the same rate of pay. . . . Compensation, as defined in Section 31460, that has been deferred shall be deemed "compensation earnable" when earned, rather than when paid.

(1995 Cal. Legis. Serv. Ch. 558 (S.B. 226).)

With the CE amendments, the Legislature moved the prior definition of "compensation earnable" to a new subdivision (a) of section 31461 and added subdivision (b), making explicit that when retirement boards "determine" compensation earnable, certain types of payments must or may be excluded. Specifically, subdivision (b) of section 31461 now provides, in pertinent part, that compensation earnable does not include:

> (1) Any compensation determined by the board to have been paid to enhance a member's retirement benefit under that system. [ ]
>
> (2) Payments for unused vacation, annual leave, personal leave, sick leave, or compensatory time off, however denominated, whether paid in a lump sum or otherwise, in an amount that exceeds that which may be earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid.
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> (3) Payments for additional services rendered outside of normal working hours, whether paid in a lump sum or otherwise.

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[7] "Board" means the board of retirement. (§ 31459.1.)

> (4) Payments made at the termination of employment, except those payments that do not exceed what is earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid.

AB 197 also added subdivision (c) to section 31461, explaining:

> The terms of subdivision (b) are intended to be consistent with and not in conflict with the holdings in *Salus v. San Diego County Employees Retirement Association* (2004) 117 Cal.App.4th 734 and *In re Retirement Cases* (2003) 110 Cal.App.4th 441.[8]

(Emphasis added.) Notably, the Legislature did not identify this Court's holding in *Ventura County Deputy Sheriffs' Assn. v. Bd. of Retirement* (1997) 16 Cal.4th 483 ("*Ventura*") as a decision with which it sought to be consistent.

B. MercedCERA's Challenges in "Determining" Compensation Earnable Under Section 31461.

1. The Post-*Ventura* Settlement Agreement and Judicial Interpretation of the Same.

Prior to the enactment of AB 197, the definition of "compensation earnable" was dramatically altered by this Court in *Ventura*. There, the Court held that, with the exception of overtime, various pay items made "over and above the basic salary," even if not earned by all employees in the same grade or class, must be included in the employee's compensation earnable. (*Ventura, supra*, 16 Cal.4th 483, 487.) As acknowledged by the Court of Appeal, this "landmark" decision "dramatically altered" the CERL

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8 The intended citation is to *In re Retirement Cases* (2003) 110 Cal.App.4th 426 (not 441).

pension landscape. (*Alameda*, 19 Cal.App.5th at p. 79.) Because the Ventura County retirement system was the only county system before the Court in *Ventura*, left open was the question whether the holding applied retroactively to other counties and CERL systems. Thus, after *Ventura,* "numerous writ petitions were filed statewide on behalf of CERL member-employees." (*Id.* at p. 80.) By settlement agreement dated June 14, 2000, MercedCERA resolved the class action that had been filed to challenge its implementation of *Ventura* ("post-*Ventura* settlement agreement").[9] (5 CT, 1324-1336.) MercedCERA's post-*Ventura* settlement agreement was approved by a judgment rendered on August 11, 2000 in Judicial Council Coordination Proceeding No. 4049, in San Francisco Superior Court ("JCCP"). (34 CT, 9886-9887.) Cases that had not resolved by settlement in the JCCP continued to be coordinated on appeal, resulting in *In re Retirement Cases* (2003) 110 Cal.App.4th 426 (one of the two cases the Legislature referenced in the CE amendments).

MercedCERA's post-*Ventura* settlement agreement provides in pertinent part as to MCERA members retiring on and after October 1997, that MCERA would include within compensation earnable the vacation and other leave accrued in members' final compensation period, up to "a maximum of 160 hours of annual leave, a maximum of one-year's leave accrual, or the number of annual leave hours actually included in the Member's vacation pay-off, whichever is less." (5 CT, 1330.)

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9 *American Federation of State, County, and Municipal Employees, Local 2703, AFL-CIO et al. v. Retirement Board, Merced County Employees' Retirement Association, et al.,* Merced County Superior Court Case No. 138795.

In December 2006, after investigation of anticipated artificial inflation of retirement benefits by, in particular, the Merced County Chief Administrative Officer ("CAO") and resulting further analysis of the post-*Ventura* settlement agreement, the MCERA Board commenced a declaratory relief action in Merced County Superior Court ("*Baker*")[10], seeking a judicial interpretation of whether the 160 hour "cap" on pensionable accrued leave in MercedCERA's post-*Ventura* settlement agreement included both the leave that members earned and was payable during their final compensation period (typically limited to 40 or 80 hours per year by memorandum, but in the case of County CAO that year, was raised to a permitted leave cash out of 360 hours) as well as up to 160 hours of terminal pay that was not permitted to be cashed out (i.e., "payable") during employment. (10 CT, 2701-2707.) The MCERA Board sought such judicial guidance as a prudent administrator of MCERA, concerned that the manner in which combining the in-service cash-outs of leave, along with substantial terminal pay, resulted in artificially inflated retirement allowances that did not appear to be consistent with the "maximum" threshold expressed in the post-*Ventura* settlement agreement. Nor would the resulting retirement allowance reasonably reflect the amount the CAO earned during his county employment, but rather would substantially "spike" his lifetime benefit.

However, in a decision rendered after trial in *Baker*, the superior court disagreed with the MCERA Board's interpretation and concluded that MercedCERA's post-*Ventura* settlement agreement required MercedCERA to include in retirement allowance determinations all annual cashable leave

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10 *Board of Retirement of MCERA v. Baker et al.,* Merced County Superior Court Case No. 149970 (Sept. 21, 2007) ("*Baker*").

from the final compensation period, plus up to an additional 160 hours of leave provided in terminal pay (or the member's maximum annual leave accrual, whichever is less) if that leave had been accrued and remained available for a payoff at termination, even as to special cashouts permitted as the Board observed in that instance (the "*Baker* decision").[11] (10 CT, 2701-2707.) The *Baker* decision was not appealed, and MercedCERA implemented the post-*Ventura* settlement agreement in accordance with it.

2. AB 197 Mandated Prospective Adjustments.

With the Legislature's enactment of AB 197 just over five years later, the compensation earnable topic arose again for MercedCERA. On November 8, 2012, the MCERA Board took action to implement the CE amendments, effective January 1, 2013. (41 CT, 12129-12130.) Again acting as prudent administrator of the retirement system, the MCERA Board determined that AB 197 operates to "exclude various payments from the definition of compensation earnable, including payments for unused vacation, annual leave, personal leave, sick leave, and compensatory time off, as well as payments made at the termination of employment, except what may be earned and payable in each 12-month period during the final average salary period." (41 CT, 12129.) Accordingly, the MCERA Board determined that pay pursuant to pay codes 350, 351 and 352 that are

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11 The State's spurious characterization in its Opening Brief (p. 11) of MercedCERA having "flouted CERL's clear limitations, ignoring explicit warnings from their legal counsel" has no basis in the record. Further, the State's attack therein (p. 21) on MercedCERA for its alleged "failure to follow the settlement agreement's plain language," and characterization of the Merced County Superior Court as having "misunderstood" "misconstrued," and "ignored," the applicable law is unwarranted and inconsistent with the record of the MCERA Board's careful and prudent administration of the retirement system and compliance with judicial guidance when doing so.

applicable to vacation and sick leave payoff, would be "includable [in compensation earnable] only to the limited extent that such pay was earned and payable during the member['s] final compensation period, but was not taken [in time off] during that period." (41 CT, 12135.) The MCERA Board further determined that the CE amendments must be enforced as to all legacy MCERA members who retired on or after its effective date of January 1, 2013. (41 CT, 12134-12135.)

Thereafter, on November 29, 2012, the court of appeal issued its published decision in *City of Pleasanton v. Bd. of Admin. of California Public Employees' Retirement System* ((2012) 211 Cal.App.4th 522, 539-40) ("*City of Pleasanton*"), holding that the statutory exclusion from "compensation earnable" in the Public Employees' Retirement Law ("PERL") of "payments for services rendered outside of normal working hours," reasonably resulted in CalPERS' exclusion of On-Call Pay from the retirement allowance considered in that case. Two weeks later, on December 13, 2012, the MCERA Board took further action to implement the provision in AB 197 that included the same statutory exclusions for On-Call Pay as the court analyzed in *City of Pleasanton.* (41 CT, 12132-12135.) Thus, in its second action implementing AB 197, the MCERA Board determined that such payments, as reflected in its On-Call Pay codes 301, 302, 306, 307 and 408, must also be excluded prospectively from retirement allowance calculations as to legacy members who retire on or after January 1, 2013. (*Ibid.*)

C. Procedural History of the Legal Challenges to AB 197's Mandated Prospective Adjustments.

On December 6, 2012, a group of unions and certain individual plaintiffs initiated an action against MercedCERA pertaining to the

constitutionality of the CE amendments, and MercedCERA's implementation of the same, in the Merced County Superior Court (Case No. CV003073). (5 CT, 1189-1200.)

On January 7, 2013, the trial court issued a stay prohibiting MercedCERA from implementing AB 197, pending determination of its constitutionality ("Stay Order"). (5 CT, 1417-1419.) Later, the action initiated against MercedCERA was coordinated with other pending actions pertaining to the constitutionality of the CE amendments against Contra Costa County Employees' Retirement Association ("CCCERA") and the Alameda County Employees' Retirement Association ("ACERA") in Contra Costa County Superior Court Case No. MSN12-1870.

On May 12, 2014, following a Statement of Decision issued by the Contra Costa County Superior Court in the consolidated proceedings, a judgment was issued as to MercedCERA in the trial court which provided, in pertinent part, that "The Stay Order entered in this action on or about January 7, 2013 shall dissolve on the sixty-first (61st) day following entry of this Judgment." (44 CT, 12946-12947.) The trial court decision was subsequently appealed, which stayed the writ of mandate issued against MercedCERA. Thus, sixty-one days later, beginning July 12, 2014, MercedCERA implemented AB 197 for the first time and only as to MCERA legacy members retiring after that date. MercedCERA implemented the CE amendments by no longer collecting member or employer contributions for On-Call Pay items (MCERA pay codes 301, 302, 306, 307 and 408) or for Vacation Payoff (MCERA pay code 350/VPO only), and by not including On-Call Pay items and Vacation Payoffs in the retirement allowance calculations of all MCERA members who retired on and after July 12, 2014.

On January 8, 2018, the Court of Appeal issued its opinion in *Alameda,* affirming the trial court's determination that subdivision (b)(4) of section 31461, enacted with the CE amendments pertaining to terminal pay, "did not amount to a change in existing CERL law, because . . . CERL has always required that compensation must be *payable* during the final compensation period to be included in compensation earnable." (*Alameda*, 19 Cal.App.5th at p. 102, emphasis in original.) However, the appellate court invoked equitable estoppel to require MercedCERA's legacy members to continue receiving terminal pay in their final compensation determinations, regardless of when that time was earned and payable, in accordance with MCERA's post-*Ventura* settlement agreement, as interpreted in *Baker*. (*Id.* at pp. 128-29.)

As to subdivision (b)(3) of section 31461 upon which MCERA based its exclusion of On-Call Pay, the appellate court concluded that, prior to the CE amendments, "legacy members were previously entitled to the inclusion of on-call pay in the calculation of their pension benefits (to the extent the related on-call duty was part of their regular work assignment)," and thus this amendment constituted a change in the law. (*Id.* at p. 109.)

In light of these conclusions, the appellate court remanded the case to the trial court to determine whether the vested pension rights of legacy members had been impacted, directing that "the trial court should recognize that—since no corresponding new advantages have been provided with respect to the detrimental changes to compensation earnable effected by PEPRA—the application of the detrimental changes to legacy members can only be justified by *compelling* evidence establishing that the required changes 'bear a material relation to the theory ... of a pension system,' and its successful operation." (*Id.* at p. 123, emphasis in original.) The

appellate court also instructed the parties and trial court that "if the justification for the changes is the financial stability of the specific CERL system, the analysis must consider whether the exemption of legacy members from the identified changes would cause that particular CERL system to have 'difficulty meeting its pension obligations' with respect to those members." (*Ibid.*)

D. MercedCERA's Next Steps Following *Alameda.*

Following the appellate court's ruling, MercedCERA took steps to apply the CE amendments in accordance with the decision, but also to act consistent with its fiduciary responsibilities to preserve the assets of MCERA to pay only statutorily-permitted benefits to its future members. Thus, MercedCERA decided it should not include terminal pay in the retirement allowance calculations of both PEPRA members and legacy members who join MCERA with reciprocity after the Board implemented the Court of Appeal's decision. (MercedCERA Board Resolution No. 2018-1.)[12] MercedCERA determined that such members may be excluded from the "estoppel" class that the lower court described because they were not parties to the post-*Ventura* settlement agreement before they joined MCERA and thus should not have a reasonable expectation of receiving that benefit. (*Id.*; see also MercedCERA Board Resolution No. 2018-3.[13])

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12 MercedCERA Board Resolution No. 2018-1, Resolution Implementing First District Court of Appeal Decision Regarding Vacation Payoffs, dated February 8, 2018, available at: https://www.co.merced.ca.us/DocumentCenter/View/17896/ATTACHMENT-Resolution-2018-01?bidId (last visited June 21, 2018).

13 MercedCERA Board Resolution No. 2018-3, Clarification of Resolution No. 2018-1, dated March 22, 2018, available at: https://www.co.merced.ca.us/DocumentCenter/View/18845/Resolution-2018-03 (last visited June 21, 2018).

MercedCERA further resolved to begin including the On-Call Pay items where applicable to active legacy members as compensation earnable only if so directed by the trial court on remand or following a ruling from this Court so requiring. (MercedCERA Board Resolution No. 2018-1.)

III. STANDARD OF REVIEW

MercedCERA adopts the Standard of Review articulated in the State's Opening Brief, filed May 7, 2018.

IV. ARGUMENT

A. The Court of Appeal's Decision is Flawed in at Least Four Respects.

The lower court concluded that the CE amendments "modified CERL and therefore potentially impacted the vested pension rights of legacy members in two distinct ways—by removing certain on-call and related payments from pensionable compensation and by allowing CERL boards to look to the intent behind particular items of compensation that would otherwise be deemed compensation earnable to determine whether they nevertheless constitute impermissible 'enhancement' benefits." (*Alameda*, 19 Cal.App.5th at p. 122.) The appellate court then concluded that the constitutionality of these amendments "must be judged independently in each of the Three Counties,[14] so that the impact of applying the changes to legacy members can be evaluated in the context of each county's particular CERL system[,]" and remanded the case to the trial court to make this determination. (*Id.* at p. 123.)

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14 The "Three Counties" being Merced, Alameda, and Contra Costa Counties.

Specifically, the court set forth the following test for determining whether the vested rights of legacy members in each of the Three Counties have been unconstitutionally impaired:

> since no corresponding new advantages have been provided with respect to the detrimental changes to compensation earnable effected by PEPRA—the application of the detrimental changes to legacy members can only be justified by *compelling* evidence establishing that the required changes 'bear a material relation to the theory ... of a pension system,' and its successful operation. Moreover, this analysis must focus on the impacts of the identified disadvantages on the specific legacy members at issue. And, if the justification for the changes is the financial stability of the specific CERL system, the analysis must consider whether the exemption of legacy members from the identified changes would cause that particular CERL system to have "difficulty meeting its pension obligations" with respect to those members.

(*Alameda*, 19 Cal.App.5th at p. 123, internal citations omitted, emphasis in original.)

The Court of Appeal's decision suffers from at least four fundamental flaws that are discussed in detail below.

1. The CE Amendments Did Not Materially Modify, But Instead Were "Consistent With," the Pre-AB 197 Definition of Compensation Earnable in CERL.

The Court of Appeal properly recognized that "[a]s all of the parties to this dispute acknowledge, whether the changes to section 31461 effected by AB 197 unconstitutionally impair the vested pension rights of legacy members [] depends, at least as an initial matter, on whether those changes actually modified CERL, or were merely clarifying amendments and thus

declarative of existing law. If no substantive changes were made, it is difficult to argue that the legislation impermissibly impacted vested rights." (*Alameda*, 19 Cal.App.5th at p. 96.) AB 197 did not make substantive changes to the definition of compensation earnable because the meaning of the former law was far from clear. Nothing in the former law required the inclusion or exclusion of On-Call Pay in compensation earnable determinations until AB 197 was enacted. This ambiguity forced the MCERA Board, like other CERL boards, to interpret the statute and exercise its discretion in calculating the members' compensation earnable by either including or excluding this pay item. Because CERL boards exercised discretionary authority over On-Call Pay, it cannot form part of the contractual pension obligation owed to legacy members. In other words, former section 31461 did not "clearly '...evince a legislative intent to create private rights of a contractual nature enforceable against [a CERL retirement board],'" with respect to On-Call Pay items. (*Retired Employees Assn. of Orange County v. County of Orange* (2011) 52 Cal.App.4th 1171, 1187, quoting *Valdes v. Cory* (1983) 139 Cal.App.3d 773, 786, other internal quotations omitted.)

a) CERL Boards Had Some Discretion to "Determine" a Member's "Average Compensation" For Time "Ordinarily Worked" by "Others in the Same Class or Grade" at the "Same Rate of Pay."

For more than three decades, the meaning of "compensation earnable" has shifted back and forth as the Legislature made statutory changes and the courts issued conflicting opinions on the meaning of this term. (See *Alameda*, 19 Cal.App.5th at pp. 77-83.)

Initially, in *Guelfi v. Marin County Employees' Retirement Assn.* (1983) 145 Cal.App.3d 297 ("*Guelfi*") (disapproved on various grounds by *Ventura, supra,* 16 Cal.4th 483, 496-505), the court held inter alia that certain items of pay (overtime and educational incentive pay) were excluded from compensation earnable under section 31461 because not all employees in the same grade or class of this position qualified for this pay. (*Id.* at pp. 303-306.) For the next seventeen years, CERL systems endeavored to comply with this holding by excluding pay items that were not earned by all employees in the same grade or class.

This practice came to a screeching halt with this Court's decision in *Ventura*. As the lower court recognized, "the CERL pension landscape was dramatically altered in 1997 by the Supreme Court's landmark decision in *Ventura* ...." (*Alameda*, 19 Cal.App.5th at p. 79.) There, this Court held that "'with the exception of overtime pay, items of "compensation" paid in cash, even if not earned by all employees in the same grade or class, must be included in compensation earnable ....'" (*Ventura, supra,* 16 Cal.4th 483, 487.) The *Ventura* Court expressly overruled *Guelfi* on this point. (*Id.* at p. 506.)

Although the Court in *Ventura* provided guidance on the meaning of the "average compensation" language in section 31461 as not requiring that cash be received by everyone in the same position to be "compensation earnable," but also as excluding overtime payments, the Court did not provide certainty on other aspects of the statute's meaning. (See *Id.* at p. 493 [section 31461 is "ambiguous in some respects."].) Thus, significant questions remained regarding the specific types of pay that CERL boards of retirement could properly exclude from a member's final compensation,

and further litigation ensued. (See, e.g., *In re Retirement Cases*, *supra,* 110 Cal.App.4th 426.)

In response to that litigation, CERL boards began interpreting section 31461, and exercising their discretion, to exclude certain specific items of pay from compensation earnable. Lower courts of appeal consistently upheld exclusions that CERL boards determined were consistent with the statutory "compensation earnable" and "final compensation" definitions and resulted in prudent administration of a successful defined benefit plan by system fiduciaries. (*In re Retirement Cases*, *supra,* 110 Cal.App.4th 426, 447-48.; see also *Salus v. San Diego County Employees Retirement Assoc.* (2004) 117 Cal.App.4th 734, 740 [finding that post-retirement payments for unused leave are not part of an employee's final compensation because "[t]here is nothing in CERL which suggests the Legislature intended pensions should vary so widely on the basis of accrued and unused leave, rather than on the basis of age, years of service and salary."]; see also, *Shelden v. Marin County Employees Retirement Assn.* (2010) 189 Cal.App.4th 458, 465 [upholding retirement board's exclusion from compensation earnable of non-regular overtime under section 31461.6, though refusing to address the retirement system's argument that section 31461 itself also permitted the retirement board's exclusion of that pay item] ("*Shelden*"); see also, *Stevenson v. Bd. of Retirement* (2010) 186 Cal.App.4th 498, 510 [upholding retirement board's interpretation of section 31461 that "grade or class of positions" was that of "investigator," rather than "narcotics investigator" for purposes of determining that overtime certain narcotics investigators regularly worked was not "compensation earnable"].)

Tellingly, the Legislature expressly *endorsed* the judicial interpretations of section 31461 in *In re Retirement Cases* and *Salus* (but arguably not the analyses in *Shelden* and *Stevenson*, which it does not reference) when it adopted AB 197. As subdivision (c) of section 31461 provides: "The terms of subdivision (b) are intended to be consistent with and not in conflict with" the *In re Retirement Cases* and *Salus* decisions. The Legislature also did not cite this Court's interpretation of section 31461 in *Ventura.* This omission is glaring, and it should be afforded due consideration by this Court as it assesses the meaning of the former definition of compensation earnable and the constitutionality of the Legislature's CE amendments. (See *Tyler v. State of California* (1982) 134 Cal.App.3d 973, 977 ["law is well established that ... where a statute is unclear, a subsequent expression of the Legislature bearing upon the intent of the prior statute may be properly considered in determining the effect and meaning of the prior statute."].) In short, the Legislature appears not to have agreed with all aspects of this Court's expansive construction of pre-AB 197 section 31461 in *Ventura.*

Notably, the Legislature eliminated most of *Ventura*'s expansive interpretation, but only as to PEPRA members who now receive "pensionable compensation" pursuant to section 7522.34. For example, that definition requires the exclusion therefrom of many pay items that *Ventura* directly required be included, such as all "employer-provided allowance . . . including, but not limited to, one made for housing, vehicle, or uniforms." (§ 7522.34, subd. (c)(7).) Thus, the Legislature clearly had the relevant constitutional prescriptions in mind as it narrowly tailored the CE amendments in a manner tied to the existing language in section 31461, and consistent with the case law it referenced interpreting this language in

the amended statute, but did not exclude pay items for legacy members beyond those, as it did for PEPRA members in section 7522.34. (See *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180 [presumption of constitutionality afforded to legislative acts is particularly appropriate when the Legislature has enacted a statute "with the relevant constitutional prescriptions clearly in mind."].)

However, as the Court of Appeal noted, none of these judicial decisions interpreting section 31461 dealt directly with On-Call Pay. Nevertheless, continuing litigation over other similar items only reinforced the uncertainty faced by CERL Boards as described in *Ventura*. And, with the benefit of hindsight, and considering the analysis in *City of Pleasanton*, a reasonable reading of pre-AB 197 section 31461 is that On-Call Pay is provided at less than the "normal rate" paid to others in the position for simply being on standby and available to work. (*City of Pleasanton, supra,* 211 Cal.App.4th 522, 539-540.)[15] Thus, just as overtime was deemed in *Ventura* not to constitute compensation earnable because it is paid at more than the "normal rate paid to others in the same grade or class of positions," so too could pre-AB 197 section 31461's language reasonably have been determined not to include On-Call Pay because it reflects a payment that is not for services that are "ordinarily worked by persons in the same grade or class of positions during the period, and at the same rate of pay." The Legislature enforced that exclusion with the CE amendments, just as it mandated the exclusion of terminal pay that *In re Retirement Cases* held

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15 Further, as the lower court also observed, the "Legislature's intent in adding the restriction to CERL" in AB 197 was to apply it in the same manner as CalPERS applies that language in the PERL. (*Alameda*, 19 Cal.App.5th at p. 110.)

"need not" be included in pre-AB 197 compensation earnable determinations. (*In re Retirement Cases*, *supra*, 110 Cal.App.4th at pp. 474-76.)

Instead of affording deference to the Legislature's attempt to amend section 31461 to address both real or perceived abuses resulting from the inclusion of On-Call Pay in compensation earnable, the Court of Appeal conducted a de novo review of the meaning of pre-AB 197 law as it applied to On-Call Pay. Effectively ignoring the Legislature's statement that it intended to implement the holdings of *Salus* and *In re Retirement Cases*, the Court of Appeal instead turned to *Ventura* for guidance, as well as the overtime case, *Shelden*, that expressly did *not* rule on the meaning of section 31461. (See *Shelden, supra,* 189 Cal.App.4th 458, 465.)

Beginning with its review of *Ventura*, the Court of Appeal went through a complex analysis of the reasoning underlying that decision. The court observed, "although it can be inferred from *Ventura* that the on-call pay at issue in that case—pay for being on call during meal periods—constituted compensation earnable pre-PEPRA, even if it was not earned by all employees in the same grade or class, *the bases and parameters for this conclusion are not readily apparent*." (*Alameda,* 19 Cal.App.5th at pp. 106-107, emphasis added.) The court then noted that "although *Ventura*'s discussion of CERL's pre-PEPRA treatment of on-call pay is helpful as far as it goes," a more comprehensive analysis was necessary to "resolve the present dispute." (*Id.* at p. 107.) The court next turned to *Shelden*—though the relevance of the *Shelden* decision is debatable— to support its holding that certain overtime payments were properly excluded only because they were not "regularly worked" under a different provision of the CERL (section 31461.6) that describes Fair Labor Standards Act overtime

under Section 201 and following of Title 29 of the United States Code as being included in compensation earnable. Completing its analysis, the appellate court concluded that "the pre-PEPRA version of section 31461—as informed by both *Ventura* and *Shelden*—leads us to the conclusion that on-call, standby and similar payments were includable in compensation earnable prior to AB 197 to the extent that they constituted remuneration for on-call services provided by an employee as part of his or her regular work assignment." (*Id.* at pp. 107-108.)

MercedCERA does not concede to the Court of Appeal's reasoning on this point. But even if this Court were to conclude that certain On-Call Pay was includable in compensation earnable before AB 197, it is clear that these provisions of the CERL were an ambiguous morass, insufficient to create contract rights to have the inclusion of On-Call Pay in compensation earnable of future retirees protected by the United States and California Constitutions. The appellate court did not look to the words of the statute *itself* in discerning its meaning. Instead, the court traced decades of judicial precedent, drawing out strings of reasoning from cases that could not provide direct resolution of the question. Even then, the court did not definitively conclude from the plain language of section 31461, following twenty years of judicial interpretations, that On-Call Pay must be included in compensation earnable prior to January 1, 2013.

Under long-standing California law, "'[p]ublic employment gives rise to certain obligations which are protected by the contract clause of the Constitution ....'" (*Olson v. Cory* (1980) 27 Cal.3d 532, 538, quoting *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852-853.) While there is a presumption that a statutory scheme is generally not intended to create private contractual or vested rights, in California "there is a strong

preference for construing governmental pension laws as creating contractual rights for the payment of benefits, and when feasible to do so such laws should be construed as guaranteeing full payment to those entitled to its benefits ...." (*Bd. of Admin. v. Wilson* (1997) 52 Cal.App.4th 1109, 1131, emphasis added.) Thus, an intent to contract for pension benefits may be implied from statutes. (See, e.g., *id.* at p. 1133 [PERS statutes set up a retirement system to pay the pension rights of public employees and actuarial soundness of the system is necessarily implied in the total contractual commitment].) Nevertheless, statutes granting constitutionally protected contract rights still must "contain[] an unambiguous element of exchange of consideration ...." (*Retired Employees Assn. of Orange County, supra*, 52 Cal.4th 1171, 1186.) And a court charged with deciding the private contractual rights that may arise from legislation should proceed cautiously "in defining the contours of any contractual obligation." (*Id.* at p. 1187.) Thus, there is a "requirement of a '*clear showing*' that [the] legislation was intended to create *the asserted contractual obligation*[.]" (*Id.* p. 1188-89, emphasis added.)

Neither the Appellants nor the Court of Appeal has made a "clear showing" that On-Call Pay was unambiguously included within the definition of compensation earnable. To the contrary, as discussed above, twenty years of jurisprudence still has not provided a definitive reading of the statute that purportedly grants the plaintiffs a "vested" contract right with respect to inclusion of On-Call Pay in the determination of their retirement allowances.

With the CE amendments, the Legislature sought to clear up some of this ambiguity by statutorily expressing exclusions that were addressed, though not entirely resolved by, *In re Retirement Cases* and *Salus*. Thus, a

better interpretation of the Legislature's act was that the CE amendments did not make substantive changes to the law, but instead were clarifying amendments "declarative of existing law," and sufficiently "consistent with" prior language that remains in subdivision (a) of section 31461 that it did not impact any vested rights. (See *Alameda*, 19 Cal.App.5th at p. 96; § 31461(c).)

As noted, AB 197 retained the existing definition of "compensation earnable" in section 31461 for so-called "legacy" members, but placed it in a subdivision (a). It then added a new section 31461, subdivision (b), which specifically addresses some of the pay items that had been publicly criticized as the basis for substantial "spiking" of benefits in CERL retirement systems and thus constituted "abuses" that undermined the integrity of the retirement systems, such as the inclusion of On-Call Pay and other pay items that could be manipulated by either an employer or an employee to be paid in excessive amounts during a final compensation period and thereby forever increasing the member's retirement allowance beyond that which was "ordinarily worked by persons in the same grade or class of positions during the period, and at the same rate of pay." (§ 31461(a).)

Moreover, the "compensation earnable" definition in section 31461 always has required that the "average compensation" thereunder be (i) "determined" by the retirement board; (ii) calculated "upon the basis of the average number of days ordinarily worked by persons in the same grade or class of positions during the period," and (iii) determined with reference to those who worked "at the same rate of pay." Those three predicates to inclusion in, and exclusion from, compensation earnable remain in subdivision (a) of section 31461 after AB 197. With the amendments to

section 31461 enacted by AB 197, the Legislature made explicit that when retirement boards "determine" items that are to be included in, and excluded from, compensation earnable, certain specific types of payments may no longer be included because they are not "ordinarily worked by persons in the same grade or class," or not made to those who receive "the same rate of pay." Those types of more specifically excluded payments are now described in subdivision (b) of section 31461.

CERL retirement boards always have been, and still remain, bound to "determine" whether the pay provided by their employer plan sponsors falls within the "average compensation" that was "ordinarily worked by others" at the "same rate of pay," or not. Through the CE amendments, the Legislature now has stated in subdivision (b)(3) of section 31461 that when a payment is for extra services "rendered outside of normal working hours," that payment is not for services "ordinarily worked" by others in the same grade or class and the retirement board is not to include any such amounts in compensation earnable for final compensation periods occurring on or after January 1, 2013, clarifying the previous ambiguity in the statute, and attempting to ensure uniformity across the state and county pension plans.

This exercise of retirement board discretion and authority does not create vested contractual benefit rights. Instead, it merely implements statutory provisions and therefore is analogous to the circumstance presented in *International Assn. of Firefighters v. City of San Diego* (1983) 34 Cal.3d 292 ("*International Assn. of Firefighters*"). In *International Assn. of Firefighters*, the Court distinguished the line of vested rights cases which found impairment, noting:

> What distinguishes each of these cases from the one before us is the nature of the contractual rights which became vested in plaintiff's members upon their acceptance of employment. In the cases relied upon by plaintiff, employees' vested contractual rights were modified by amendment of the controlling provisions of the retirement system in question to reduce (or abolish) the net benefit available to the employees.

(*Id.* at p. 302, emphasis added.) The Court in that case distinguished those vested rights-impairment cases from the facts presented in *International Assn. of Firefighters* in which, upon actuarial advice, the retirement board included for the first time an inflation factor when determining employee contribution rates. Observing the plaintiff's reliance on a municipal code provision requiring that a safety member's rate of contribution "shall be based on age . . . at the time of entrance into the system," the Court observed,

> Plaintiff would have us construe that provision to mean that such a member's rate of contribution is fixed forever at the level of his initial contribution. That construction seems unreasonable. To 'base' is not to 'fix permanently.'

(*Id.* at p. 303, emphasis added.)

Similarly here, both prior to the CE amendments, and after, CERL retirement boards had and continue to have the responsibility to "determine" "average compensation," "upon the basis of" payments to others in the same grade or class for days "ordinarily worked" by them at the "same rate of pay." (§ 31461.) Just as this Court held in *International Assn. of Firefighters* that "[t]o 'base' is not to 'fix permanently," so too

here, to "determine" under section 31461 is not to "fix permanently"—or to grant as a vested right— as to all individuals who join the retirement system under a particular interpretation of the statute. Indeed, employers will necessarily pay employees in different amounts and under varying conditions over the course of any particular employee's career. And CERL boards may change in how they understand or interpret those payments to have been made over time, so long as those changes are made "according to the guiding language contained in [the statute]." (*Guelfi, supra,* 145 Cal.App.3d 297, 305.) CERL boards should have the legal authority to refine their view, or even change their minds prospectively on such matters, as the law is clarified and circumstances of particular payments may change. (See, e.g., *Crumpler v. Bd. of Admin.* (1973) 32 Cal.App.3d 567, 586 [retirement system may change its determination of what constitutes a "safety" member and apply that classification change prospectively only because their prior interpretation was not erroneous].) As the court in *Crumpler* held, "Petitioners' contention that the board is forever precluded from reclassifying them because they have a vested right to be classified as local safety members is devoid of merit." (*Id.* at p. 585.)

With its amendments to section 31461 under AB 197, the Legislature confirmed exclusions—to be applied to individuals retiring after January 1, 2013—that could at least arguably have been determined by CERL retirement boards to have been excludable all along under the prior statutory definition. There is no support for the proposition that, simply because a CERL board previously exercised its discretion to interpret the ambiguous meaning of section 31461 to include certain pay codes in retirement allowance calculations based on the scant judicial guidance available at the time, future trustees of the retirement system may

never revisit that conclusion as to prospective determinations of compensation earnable applicable to any members then employed. That is simply not the law in California with regard to the manner in which the exercise of discretion by retirement system trustees operates. Discretion is a grant of authority to the administrative body that, when exercised within statutory boundaries in a non-arbitrary fashion, may not be compelled one way or the other. (See *Barrett v. Stanislaus County Employees' Retirement Assn.* (1987) 189 Cal.App.3d 1593, 1613 ["When a statute imposes upon an administrative body discretion to act under certain circumstances, mandate will not lie to compel the exercise of such discretion in a particular manner."]; *San Diego City Firefighters v. Bd. of Admin. of San Diego City Employees' Retirement System* (2012) 206 Cal.App.4th 594, 621 ["The [Retirement] Board does not pass laws; it administers the retirement program created by [the legislative body.]"].)

Further, the pay items to be included in compensation earnable always were required to be "ordinarily worked by persons in the same grade or class." Thus, for the Legislature to state through AB 197 that "payments for additional services rendered outside of normal working hours," are not to be included in compensation earnable is entirely consistent with the existing concept that the pensionable pay items are to be only for services that are "ordinarily worked" by others. Neither this amendment to section 31461, nor MercedCERA's implementation of it, violated the statutorily-based vested rights of MCERA members.

Following the Legislature's clarification, the MCERA Board made a proper conclusion within the scope of its pre-existing statutory authority that the On-Call Pay should not be included in retirement allowance calculations for compensation earnable periods of all of its members who

are subject to that provision for periods occurring on and after January 1, 2013. (41 CT, 12129-12135.) Significantly, because the implementation was *prospective* only, the MCERA Board had not yet exercised its authority and responsibility to "determine" compensation earnable for legacy members subject to the CE amendments because they had not yet even applied to retire. (See § 31672.1 [providing that an employee meeting certain criteria and wishing to voluntarily retire may do so "upon filing with the board a written application, setting forth the date upon which the employee desires his or her retirement to become effective which shall not be more than 60 days after the date of filing the application."].) Thus, a member's right to have the Board of Retirement make such a compensation earnable determination consistent with then applicable statutes had not yet arisen. (See *Flethez v. San Bernardino County Employees Retirement Assn.* (2017) 2 Cal.5th 630, 644–45.)

In addition, because of the Stay Order discussed *supra*, MercedCERA did not implement these exclusions until July 12, 2014.

b) The CE Amendments Harmonized Aspects of the Compensation Earnable Definition Under CERL with the Corresponding Definition Under PERL and Education Code to Ensure Greater Uniformity Among Reciprocal Systems.

The CE amendments make explicit certain exclusions from the CERL "compensation earnable" definition that had been explicit for state and other county employees who are governed by PERL since the mid-1990s. When the Legislature made these same amendments to the PERL definition of "compensation earnable" in the 1990s, it applied them to *all* members of CalPERS at that time, including legacy employees. That language in PERL

has been construed and upheld as constitutional—thus, not impairing vested rights—in numerous published decisions since then.[16] The Legislature includes similar limitations on "creditable compensation" for members of CalSTRS[17], which were once again recently upheld in *Baxter v. California State Teachers' Retirement System* (2017) 18 Cal.App.5th 340 (upheld the retirement board's exclusion from retirement allowances calculated under the California Education Code of payments made to teachers who taught a sixth period, even though the teachers and school district had negotiated a collective bargaining agreement to include that period in a "normal workday" for retirement purposes).

The Legislature has never intended to establish static, more favorable, compensation earnable rules for county employees governed by CERL than it provides for other county and state employees in CalPERS governed by PERL or teachers in CalSTRS governed by the Education Code. Indeed, this Court stated in *Ventura* that provisions in CERL and PERL defining

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16 Four court of appeal decisions interpreting section 20636 of PERL have upheld the Legislature's amendments to the "compensation earnable" definition in section 20023 and subsequent amendments to the definition, determining that they were simply clarifications of existing law and did not impair vested rights of legacy PERS members to plan benefits in effect before the legislative amendments. (See, e.g., *Pomona Police Officers' Assoc. v. City of Pomona* (1997) 58 Cal.App.4th 578; *Hudson v. Bd. of Admin.* (1997) 59 Cal.App.4th 1310; *Prentice v. Bd.of Admin.* (2007) 157 Cal.App.4th 983; and *Molina v. Bd. of Admin.* (2011) 200 Cal.App.4th 53.)

17 One of its definitions of "creditable compensation" states that the limitations therein reflect "sound principles that support the integrity of the retirement fund. Those principles include, but are not limited to, consistent treatment of compensation throughout a member's career, consistent treatment of compensation among an entire class of employees, consistent treatment of compensation for the position, preventing adverse selection, and excluding from compensation earnable remuneration that is paid to enhance a member's benefits. . . . " (Ed. Code §22119.2, subd. (f).)

"compensation earnable" for county and state employees are to be interpreted "consistently" with one another. (*Ventura, supra,* 16 Cal. 4th 483, 504.) With respect to compensation earnable in particular, because reciprocal systems are to use the highest final compensation when determining the retirement allowances provided by each, it is consistent with the theory and successful operation of a defined benefit plan that those determinations be as consistent with one another as possible. (*O'Connor v. State Teachers' Retirement System* (1996) 43 Cal.App.4th 1610, 1622-23) [court deferred to CalSTRS' board's exclusion of non-regular pay from retirement allowance calculations and its understanding of proper implementation of defined benefit statutes].)

The Legislature also has consistently sought to prevent artificial or purposeful inflation (so-called "spiking") of public employees' retirement benefits, which the challenged amendments to CERL also seek to address. The specific legislative clarifications to CERL at issue in this case for legacy members further those objectives. Moreover, retirement boards should have the authority to implement them. (*Lexin v. Superior Court* , *supra*, 47 Cal.4th 1050, 1063-64 [discussing the constitutional fiduciary obligation of retirement boards who are "charged with administering the . . . pension fund in a fashion that preserves its long-term solvency . . . [and] [c]onsistent with that central mission, the . . . Board has a range of ancillary obligations, including but not limited to providing for actuarial services, determining member eligibility for and ensuring receipt of benefits, and minimizing employer contributions. . . . To carry out these duties, the Board is granted the power to make such rules and regulations as it deems necessary."].)

2. Even If This Court Deems the CE Amendments To Be More Than "Minimal" Modifications, They Did Not Impair Vested Rights Because the Legislature Never Promised Inclusion of On-Call Pay Such that Mandatory Exclusion Might Be a "Severe" Modification, and Its Exclusion From CE is Consistent With the Theory and Successful Operation of a Defined Benefit Retirement Plan.

Having determined that the CE amendments made modifications to the definition of compensation earnable, excluding pay items that it concluded were required by statute to be included prior to AB 197, the Court of Appeal then stated that the court would address "whether legacy members possess a vested right to the calculation of their pension benefits under the prior version of section 31461 with respect to on-call pay." (*Alameda*, 19 Cal.App.5th at p. 110.) However, the court then appeared to assume, without analysis, that the specific items in dispute were in fact "severe" impairments to vested rights that legacy members had earned prior to retirement, as would be required under *Allen v. Bd. of Admin.*, *supra,* 34 Cal.3d 114, 119, to continue the vested rights analysis. This conclusion is flawed.

a) The Legislature Never Required the Inclusion In Compensation Earnable of On-Call Pay By County, But No Other, Statutory Defined Benefit Plans in California.

Prior to retirement, legacy members have a vested right to participate in the retirement system "mandated by CERL and intended by the Legislature." (*In re Retirement Cases*, *supra*, 110 Cal.App.4th 426, 453.) The right to participate in the pension system mandated by CERL, however, does not include a right to have specific pay items that were never explicitly mandated by statute to be included in retirement allowance

calculations continually included in them, even in the face of legislative clarification that they are to be excluded. (See, e.g., *Flethez*, *supra*, 2 Cal.5th 630, 644–45 [finding that members do not have a "vested" right to disability retirement during their employment, only to have their CERL retirement board make the correct "eligibility-to-benefits determination" if they become permanently incapacitated from performing their usual job duties while they are retirement system members].)

Similarly, here, the pre-AB 197 "plan in effect" when legacy employees were hired did not explicitly mandate On-Call Pay to be included in retirement allowance calculations. (See, e.g., *Lyon v. Flournoy* (1969) 271 Cal.App.2d 774, 783 ["[I]t is necessary to perceive the terms of the contract and to utilize those terms to measure the claimed impairment."]; *Pasadena Police Officers Assn. v. City of Pasadena* (1983) 147 Cal.App.3d 695, 710-711 [increase in employee contribution rate as a result of adjustment of actuarial assumptions in accordance with preexisting authority did not violate employees' vested rights].) Indeed, prior to AB 197, section 31461 used only general and ambiguous language regarding that which is "ordinarily worked" by those in the "same grade or class" as being part of the compensation earnable "determined" by the retirement board.

The court below concluded—after four pages of legal analysis of cases that were not directly on point—that "on-call, standby and similar payments were includable in compensation earnable prior to AB 197 to the extent that they constituted remuneration for on-call services provided by an employee as part of his or her regular work assignment[,] . . . not limited to those on-call premiums received by employees in the same group or class." (*Alameda,* 19 Cal.App.5th at pp. 107-08.) To suggest, based on the court's analysis of *Ventura* and *Shelden,* discussed above, that the

Legislature intended to require that conclusion as to CERL systems and thus "fix" that definition as to employees who had just commenced service, and to deprive itself and retirement boards of the authority to address real and perceived abuses of compensation earnable determinations prospectively, belies credulity.

And in fact, the lower court recognized that AB 197 "evinces an intent on the part of the Legislature to treat the two retirement systems [i.e., those operating under CERL and CalPERS, which operates under PERL] similarly with regard to on-call pay." (*Id.* at p. 109.) Significantly, systems operating under CERL and PERL have always been required to be calculated "upon the basis of the average number of days ordinarily worked by persons in the same grade or class of positions during the period, and at the same rate of pay." (*Ventura, supra*, 16 Cal. 4th 483, 491 [noting the amendments to PERL since 1993 were not deemed substantive changes in law].)

b) Any Modification to Members' Vested Rights By the CE Amendments Was Consistent with the Theory and Successful Operation of Defined Benefit Plan.

Moreover, the Court of Appeal, assuming that vested rights had been impacted, implicitly concluded that the CE amendments amounted to a "severe impairment," rather than a "minimal alteration," (*Allen v. Bd. of Admin., supra*, 34 Cal. 3d 114, 119) determining that "*compelling* evidence" needed to be offered "establishing that the required changes 'bear a material relation to the theory of a pension system,' and its successful operation[,]" "since no corresponding new advantages have been provided with respect to the detrimental changes to compensation earnable effected by PEPRA[.]" (*Alameda*, 19 Cal.App.5th at p. 123, emphasis in original.)

However, as this Court has recognized, "[n]ot every change in a retirement law constitutes an impairment of the obligations of contracts[.]" (*Allen v. Bd. of Admin.*, *supra*, 34 Cal.3d 114, 119.)

> The constitutional prohibition against contract impairment does not exact a rigidly literal fulfillment; rather, it demands that contracts be enforced according to their 'just and reasonable purport'; not only is the existing law read into contracts in order to fix their obligations, but the reservation of the essential attributes of continuing governmental power is also read into contracts as a postulate of the legal order. [Citations.] The contract clause and the principle of continuing governmental power are construed in harmony; although not permitting a construction which permits contract repudiation or destruction, the impairment provision does not prevent laws which restrict a party to the gains 'reasonably to be expected from the contract.' [Citations.] Constitutional decisions 'have never given a law which imposes unforeseen advantages or burdens on a contracting party constitutional immunity against change.' [Citations.]

(*Id.* at pp. 119–20.)

"Thus, a finding that there has been a technical impairment is merely a *preliminary step* in resolving the more difficult question whether that impairment is permitted under the Constitution." (*Id.* at p. 119, emphasis added.) "An attempt must be made 'to reconcile the strictures of the Contract Clause with the 'essential attributes of sovereign power,' ... For example, '[m]inimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation." (*Ibid.*, internal citation omitted.)

Here, the appellate court, having determined that there was a technical impairment jumped to the conclusion that the impairment was severe, thereby triggering further examination of the "evidence establishing that the required changes 'bear a material relation to the theory of a pension system,' and its successful operation." (*Alameda*, 19 Cal.App.5th at p. 123.)

As discussed above, legacy members did not have a contractual right based on statute to have specific additional pay items included in the calculation of their future compensation earnable determined at the time of their retirement. But even if the prior law did create such a contract right, any impairment was only "minimal" because the meaning of the former statute was so uncertain that it did not create a reasonable reliance interest, meaning affected legacy members could not reasonably expect that they could always increase their retirement benefits by including payments for work rendered outside of normal or ordinary working hours. (See, e.g., *Allen v. Bd. of Admin., supra*, 34 Cal.3d 114, 119–20 ["the impairment provision does not prevent laws which restrict a party to the gains 'reasonably to be expected from the contract.' Constitutional decisions 'have never given a law which imposes unforeseen advantages or burdens on a contracting party constitutional immunity against change.'"].)

Accordingly, as any alteration to an alleged vested right was minimal, there was no need to provide any comparable new advantages. But, in any case, MercedCERA, as a CERL Board, has no authority to create or grant new benefits to members; the scope of its authority "is limited to administering the benefits set by the legislative body." (*City of San Diego v. San Diego City Employees' Retirement System* (2010) 186 Cal.App.4th 69, 79-80 ["The granting of retirement benefits is a legislative action within

the exclusive jurisdiction of the [legislative body]. [Citation.] . . . The scope of the [retirement] board's power as to benefits is limited to administering the benefits set by the [legislative body]."]; *Daily v. City of San Diego* (2013) 223 Cal.App.4th 237, 253 [a public retirement board *administers* a retirement plan, "it cannot *create* a benefit."(emphasis in original)].)

Implementation of the CE amendments as to a defined benefit plan was also entirely reasonable because the Legislature sought to address and prevent a widespread practice of artificial pension inflation by employer and employee end of career compensation (as had occurred within the context leading to *Baker*) that was characterized as an "abusive practice."[18] It can hardly be disputed that such purpose bears a material relation to the theory of a defined benefit pension system and its successful operation—notwithstanding any analysis of the financial health of any single pension plan. (*See Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131; *Wallace v. City of Fresno* (1954) 42 Cal.2d 180, 186 ["the primary purpose of

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18 ""According to the author [of AB 340], 'California's public pension systems' " "have been tainted by a few individuals who have taken advantage of the system. This is in part due to [CERL's] very broad and general definition of 'compensation earnable'....' [¶] ... [¶] The author concludes, 'This measure will address these abusive practices....' Supporters state, 'AB 340 would eliminate the current ... ability for employees to manipulate their final compensation calculations....' " (Assem. Com. on Public Employees, Retirement and Social Security, Analysis of Assem. Bill No. 340 (2011–2012 Reg. Sess.) as amended April 25, 2011, p. 4; Sen. Com. on Public Employment and Retirement, Analysis of Assem. Bill No. 340, (2011–2012 Reg. Sess.) as amended June 22, 2011, pp. 4–5 [same].)" (*Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.* (2016) 2 Cal.App.5th 674, 682, n.2; review granted with further action deferred pending consideration and disposition of a related issue in *Alameda*, March 28, 2018, S237460.)

modifications should be to safeguard the pension system and carry out its beneficent purposes."].) As the Second District Court of Appeal recently concluded when upholding the constitutionality of a generally applicable PEPRA felony forfeiture provision, an "important public purpose" that may be served with such legislation is "ensuring the integrity of public pension systems." (*Hipsher v. Los Angeles County Employees Retirement Assn.* (2018) 24 Cal.App.5th 740, 234 Cal. Rptr. 3d 564, 571.) Significantly there, the court used a *qualitative* assessment of what ensures the "integrity" of public pension systems, rather than relying on the *quantitative* test that the lower court created in *Alameda*, as discussed further *infra.* (*Id.*, 234 Cal. Rptr. at pp. 571–75.)

Here, the CE amendments further the important public purpose of enhancing the integrity of public pension systems by preventing the manipulation of pay during the final years of employment that results in the payment of lifetime retirement benefits to members that are disproportionate to the amount the member earned in regular compensation during his or her career. Because a member's "defined benefit" is intended to be reflect some set portion of the compensation that individual and others in their class and grade of positions received during employment (as opposed to limited to their own contributions as occurs in a defined contribution plan), limiting the inclusion of payments made for services rendered outside normal working hours furthers that purpose. (See, e.g, *California Teachers Assn. v. Cory*, (1984) 155 Cal.App.3d 494, 516, n.1 (dis. opn. of Regan, J. [explaining difference between defined benefit plan and defined contribution plan].)

Further, as a matter of law, it should be deemed not credible (or relevant on an individualized basis) that CERL system members were

induced into remaining in public employment on the condition that such members would indefinitely be able to include On-Call Pay items in their final compensation determinations or otherwise to artificially inflate their pensions. (See, e.g., *Packer v. Bd. of Retirement of Los Angeles County Peace Officers' Retirement System* (1950) 35 Cal.2d 212, 215 ["one of the primary purposes of offering a pension, as additional compensation, is to induce competent persons to enter and remain in public service"]; *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 856 [same].)

At this juncture, both the State's invitation to make material prospective changes in "benefit formulas" for current members and the appellate court's allusion to changes potentially permitted to shore up the "financial stability" of public pension funds warrant discussion because, MercedCERA submits, this case does not need to effect any change in California's case law precedent on vested rights to uphold the constitutionality of the CE amendments.

Rather, in CERL, the Legislature already has made clear that certain "optional" enhanced defined benefit formulas that boards of supervisors and governing bodies of districts may have adopted may be rescinded only as to new hires. (§ 31483.) Thus, the Legislature has unmistakably intended that certain aspects of retirement plans, such as the defined benefit formula[19] promised to them when they enter retirement system membership are not to be diminished during their service for that employer under CERL. (*Retired Employees Assn. of Orange County, supra*, 52 Cal.App.4th 1171, 1187.) For this reason, CERL retirement systems have

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19 In CERL, the defined benefit formulas for legacy members are set forth in sections 31676.01-31676.19 (general members) and section 31664-31664.2 (safety members).

numerous levels or "tiers" of benefits that are calculated based on the "tier in effect" when individuals were first hired or that were granted during their employment. (See, generally, *County of Orange v. Assn. of Orange County Deputy Sheriffs* (2011) 192 Cal.App.4th 21; *Aquilino v. Marin County Employees' Retirement Assn.* (1998) 60 Cal.App.4th 1509 [court concluded that member's redeposit of withdrawn contributions plus interest entitled the member to his original "tier in effect" when he started employment with the county because his service was "as if unbroken" under CERL service continuity provisions].) This case need not impact that precedent, which is grounded in decades of California case law.[20]

Instead, this case is about whether the Legislature's previously ambiguous and vague "definition" of "compensation earnable" in CERL was so "fixed" and rigid such that the Legislature retained no authority to amend it to mandate or permit the prospective exclusion of certain extra-regular salary pay items from the retirement allowance calculations of public employees who retired in the future only. Indeed, those very pay items presumably change throughout an employee's career (e.g., employees may or may not receive the pay year after year). The question before this Court is narrow, and that is whether such pay items are constitutionally protected from ever being excluded from prospective compensation earnable determinations, either by the Legislature or a retirement board.

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20 Of note, as a result of the post-*Ventura* settlement agreement entered into by the CERL system in Los Angeles County, the Legislature enacted an optional compensation earnable statute applicable only to the "county of the first class," i.e, Los Angeles County. (§ 31461.45.) Even that statute, however, had to be enacted by the local board of supervisors in order to be effective. Thus, it should not be deemed to provide any indicia of legislative intent as to CERL systems whose county board of supervisors did not adopt such an optional provision.

The answer to this question is no, and that answer, upholding the constitutionality of the CE amendments and finding no impairment of vested rights, is consistent with the applicable Supreme Court precedent in California. (See, e.g. *International Assn. of Firefighters, supra,* 34 Cal.3d 292; *see also Allen v. Bd. of Admin., supra,* 34 Cal.3d 114, 119.)

3. The Court of Appeal Impermissibly Shifted the Burden of Proof Onto the Legislature, Employers or Retirement Boards to Defend AB 197's Constitutionality.

"[T]here is also a presumption at play in these proceedings that the amendments to section 31461 effected by AB 197 are constitutional: 'If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations imposed by the Constitution are to be construed strictly, and are not to be extended to include matters not covered by the language used.'" (*Alameda*, 19 Cal.App.5th at p. 90 (citing *California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 253).) "An appellant who claims the calculation of his retirement benefits violates his vested contractual rights under the state contract clause has the burden of making out a clear case, free from all reasonable ambiguity, a constitutional violations occurred." (*Hipsher, supra*, 234 Cal. Rptr. 3d 564, 571, internal citation and quotations omitted.) Even where the rights at issue are vested—which they are not here—"the court inquires into the scope of the Legislature's power to modify the contractual right. Legislative deference is broad, as even a substantial contractual impairment may be constitutional if it is reasonable and necessary to serve an important public purpose." (*Ibid.*, internal citation and quotations omitted.)

Despite having recognized that the Legislature's action in enacting AB 197 is presumed to be constitutional and, further, that the unions here who claim that application of AB 197 to the calculation of their retirement benefits violates their vested contractual rights have the burden of "'making out a clear case'" that such a constitutional violation has occurred, (*Hipsher, supra*, 234 Cal. Rptr. 3d at p. 571 (citing *Deputy Sheriffs' Assn. of San Diego County v. County of San Diego* (2015) 233 Cal.App.4th 573, 578)), the Court of Appeal nonetheless appeared to shift that burden of proof when setting out its test for determining the constitutionality of the CE amendments at issue.

Specifically, after concluding that AB 197 modified CERL in certain respects, the appellate court directed that the retirement boards and/or the Legislature seeking to defend the constitutionality of the statute must "justify" the "detrimental" changes to legacy members by providing "*compelling* evidence establishing that the required changes 'bear a material relation to the theory ... of a pension system,' and its successful operation." (*Alameda,* 19 Cal.App.5th at p. 123, emphasis in original.) This burden-shifting onto the Legislature and the CERL retirement boards to support the legality of the statutory amendments is not supported by the law—especially where, as here, the challengers have not made a "clear case" that any constitutional violation occurred; indeed, the Court of Appeal made no such finding.

4. The County-by-County Constitutionality Assessment of the CE Amendments Contemplated by The Court of Appeal is Untenable.

In addition to improperly shifting the burden to prove constitutionality onto the Legislature or retirement system, the lower court

also set an impermissibly high bar to justify minor modifications to the pension laws by the Legislature. The appellate court provided that any analysis of the constitutionality of statutory changes affecting the pension of legacy members "must focus on the impacts of the identified disadvantages on the specific legacy members at issue."[21] (*Alameda,* 19 Cal.App.5th at p. 123.) And, the court stated "if the justification for the changes is the financial stability of the specific CERL system, the analysis must consider whether the exemption of legacy members from the identified changes would cause that particular CERL system to have 'difficulty meeting its pension obligations' with respect to those members." (*Ibid.*) Notably the court recognized that, under this test, relatively minor modifications would be impermissible, whereas more severe impairments would be upheld:

> the fact that the modifications here at issue may be relatively modest looking at a system's pension costs as a whole may actually argue in favor of finding an impairment, as the continuation of such benefits solely for legacy members may not have a significant impact on the system, especially if such benefits have been already actuarially accounted for and treated as pensionable.

(*Ibid.*)

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21 In setting forth this "test," the appellate court cited to this Court's decision in *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438. Notably, however, *Abbott* contemplated that "it is advantage or disadvantage to the particular employees whose own contractual pension rights, *already earned*, are involved which are the criteria by which modifications to pension plans must be measured[.]" (*Id.* at p. 449, emphasis added.) Here, it is undisputed that the changes in question are prospective only, for members who have not yet retired, and they have not yet "earned" the pay items in dispute that they may, or may not, receive during their final compensation periods.

Such an outcome is not contemplated by the law or the precedent outlined by this Court. The test for judging pension modifications is a balancing one: "[a]n attempt must be made 'to reconcile the strictures of the Contract Clause with the essential attributes of sovereign power[.] For example, minimal alteration of contractual obligations may end the inquiry at its first stage." (*Allen v. Bd. of Admin.*, *supra*, 34 Cal.3d 114, 119, internal citation omitted.) This guidance directly contradicts the outcome contemplated by the lower court's decision, wherein the more extreme the modification of benefits for current members in order to actually have a significant positive financial "impact" on the retirement system, the more likely the substantial benefit change is to be deemed constitutional, and a modest modification would likely lead to a finding of unconstitutional impairment. That analysis turns California's constitutional protection of public pension benefits on its head.

The Court of Appeal's test in *Alameda* results in a county-by-county assessment of constitutionality based on the "identified disadvantages on the specific legacy members at issue" and the "financial stability of the specific CERL system" (*Alameda*, 19 Cal.App.5th at p. 123), suggesting that the AB 197 amendments could be deemed to be constitutional in one CERL system, but not in another, or constitutional as to one legacy member, but not another, based on the equities and reasonable expectations established as to each. However, "[s]uch inconsistency in the application of a single state statute is inappropriate, if not impermissible." (*Irvin v. Contra Costa County Employees' Retirement Assn.* (2017) 13 Cal.App.5th 162, 172.) Indeed, even the lower court recognized the importance of having consistent interpretations of the same statutory provisions across CERL retirement systems when it concluded that it is "unwise" for courts

to defer to the statutory interpretation of a single CERL board. (*Alameda*, 19 Cal.App.5th at p. 92 (citing *Irvin, supra,* 13 Cal.App.5th at pp. 172-73).) Yet, the court's proposed analysis will only foster more variability and unpredictability across the twenty CERL systems in the state.

The absurdity of this approach becomes even more apparent when considering its application to retirement system members who may work five years for Merced County and thus earn service credit in MCERA, and then another five years for Contra Costa County and thus earn additional service credit in CCCERA, and a final five years for an employer in CalPERS. To conclude that the exclusion of On-Call Pay items from that individual's compensation earnable would be constitutional as to service rendered for the CalPERS employer and, hypothetically speaking, for the service credit earned in CCCERA, but not as to the time in MCERA is nonsensical, given that ultimately all of those "reciprocal" systems will pay retirement allowances based on the highest "compensation earnable" that the member earned while at just one of those systems. (See §§ 31830, 31835, 20350, 20351, 20638.) Moreover, to suggest that the inclusion in, or exclusion from, compensation earnable of On-Call Pay will impact the financial stability of a multi-billion dollar public retirement system is absurd as well. The Court of Appeal's new "test" for constitutionality should be rejected.

B. Estoppel Should Not Apply to Post-*Alameda* Reciprocal Members Who Were Not Parties to MCERA's Post-*Ventura* Settlement Agreement.

With respect to the second question at issue in this brief, regarding the Court of Appeal's finding that MCERA legacy members are entitled, pursuant to the principles of equitable estoppel, to include terminal pay in

their final compensation up to 160 leave hours as prescribed by MercedCERA's post-*Ventura* settlement agreement, MercedCERA asserts that, pursuant to the appellate court's guidance, estoppel should not be applied to allow new entrants to MCERA who join through reciprocity as legacy members after *Alameda* to receive these non-statutory benefits.

These reciprocal members who first join MCERA after the lower court's decision in *Alameda* were, (i) not parties to the MCERA post-*Ventura* Settlement Agreement before they joined MCERA, (ii) could not be said to have relied on any "misrepresentations" by MercedCERA because the Board took the prudent step of stopping those extra payments after AB 197, and (iii) could not be deemed subject to *Alameda* because they were not "legacy members" of MCERA when the decision was rendered. Thus, they have no reasonable expectation of receiving the specified benefit. (*City of San Diego v. Haas* (2012) 207 Cal.App.4th 472 [individuals who joined the retirement system after lower benefits under the plan were negotiated, but before they were included in the plan document, had no vested right to receive the earlier higher benefits because that expectation was unreasonable].) In light of the lower court's conclusion that terminal pay is statutorily excluded from compensation earnable and final compensation determinations, providing the non-statutory benefit would result in a windfall to new reciprocal members who had no reasonable expectation of receiving, or statutory entitlement to, such a non-statutory benefit. (*Allen v. Bd. of Admin.*, *supra*, 34 Cal.3d 114, 119; see also *Lyon v. Flournoy*, *supra*, 271 Cal.App.2d 774.)

This Court should determine that MCERA legacy members gaining status solely through reciprocity after *Alameda* should not be permitted to rely upon equitable estoppel as the legal basis upon which to receive up to

160 hours of terminal pay in their final compensation, when they had no reasonable expectation of receiving that benefit under statute or the post-*Ventura* settlement agreement. And the MercedCERA Board prudently so decided.

V. CONCLUSION

MercedCERA administers statutory benefits authorized by the Legislature. MercedCERA itself does not have the authority to create new vested retirement benefits unless that authority is provided by statute, nor does it have the power to create vested rights with respect to a particular compensation earnable determination before a member's retirement.

Section 31461 has provided a definition of "compensation earnable" that is applicable to all CERL systems unless the Legislature makes special optional legislation available for a particular board of supervisors' adoption. When a CERL system operates under the general definition in section 31461, and the board of retirement adopts policies to implement that general definition over time, this Court should not conclude that either the Legislature or the Board thereby has created a constitutionally protected vested right applicable to those who have not yet retired that would require continued inclusion of specific pay items that the guiding language of former section 31461 did not clearly require to be included. Further, when the Legislature enacted the CE amendments, MercedCERA was required under both the California Constitution (Art. III, section 3) and section 31461 to "determine" compensation earnable in accordance therewith.

With the CE amendments, the Legislature made explicit that it does not intend compensation earnable—for public employees subject to CERL just like public employees subject to PERL and the Education Code—to include certain pay items that would artificially inflate a member's lifetime

retirement allowance beyond the pay for time "ordinarily worked" and at the "same rate of pay." The Legislature also intended to provide retirement boards with greater authority to limit such artificial inflation of benefits, on the theory that such inflation of benefits undermines the integrity and successful operation of a defined benefit plan by affording a lifetime retirement allowance in excess of the ordinary and regular pay that a member receives during employment. The legislative clarifications to the definition of "compensation earnable" in section 31461 are sufficiently consistent with the prior definition and, importantly, are presumed to be constitutional, unless a challenger can make a "clear case" that a constitutional violation has occurred. Here, no such showing has been made.

This Court should affirm the constitutionality of the compensation earnable amendments, facially and as applied by MercedCERA.

Dated: July 19, 2018

Respectfully submitted,

NOSSAMAN LLP

By /s/ *Ashley K. Dunning*
Ashley K. Dunning
Attorneys for Respondents
Merced County Employees' Retirement Association and Board of Retirement

CERTIFICATE OF COMPLIANCE

California Rules of Court, Rule 8.520(c)(1)

Pursuant to California Rules of Court, Rule 8.204 and 8.520(c)(1), the foregoing RESPONDENTS MERCED COUNTY EMPLOYEES' RETIREMENT ASSOCIATION (MCERA) AND BOARD OF RETIREMENT OF MCERA'S ANSWER BRIEF is double-spaced and was printed in proportionately spaced 13-pt. Times New Roman type. It is 50 pages long (inclusive of footers but exclusive of the cover page, tables, the Certificate of Compliance, and the Certificate of Service); it contains 13,939 words.

Executed this 19th day of July, 2018, at San Francisco, CA 94111.

/s/ Ashley K. Dunning
Ashley K. Dunning

PROOF OF SERVICE

I am employed in the City of San Francisco, State of California. I am over 18 years of age and not a party to this action. My business address is Nossaman LLP, 50 California Street, 34th Floor, San Francisco, CA 94111.

On the date below I served a true copy of the following document(s):

RESPONDENTS MERCED COUNTY EMPLOYEES' RETIREMENT ASSOCIATION (MCERA) AND BOARD OF RETIREMENT OF MCERA'S ANSWER BRIEFS

on the interested parties to said action by the following means:

[X] (By U.S. Mail) On the same date, at my said place of business, Original enclosed in a sealed envelope, addressed as shown on the attached service list was placed for collection and mailing following the usual business practice of my said employer. I am readily familiar with my said employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service, and, pursuant to that practice, the correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, on the same date at San Francisco, California.

SERVICE LIST

Party	Address
Attorneys for Respondents and Respondents Alameda County Employees' Retirement Association, Contra Costa County Employees' Retirement Association and their Boards of Retirement	Harvey L. Leiderman May-Tak Chin Reed Smith LLP 101 Second Street, Suite 1800 San Francisco, CA 94105-3659 hleiderman@reedsmith.com mchin@reedsmith.com
Defendants and Respondents Alameda County Employees' Retirement Association and Board of Alameda County Employees' Retirement	Robert L. Gaumer 475 14th Street, Suite 1000 Oakland, CA 94612-1916 rgaumer@acera.org

Association	
State of California; Dominic Ciotola	Anthony P. Obrien Office of the Attorney General 1300 I Street, Suite 125 Sacramento, CA 95814 Email: Anthony.obrien@doj.ca.gov Rei R. Onishi Office of Governor Edmund Brown Jr. State Capitol, Suite 1173 Sacramento, CA 95814 Rei.onishi@gov.ca.gov
Attorneys for Intervenors IAFF Local 3546; Michael Mohun; David Atkin; Contra Costa County Deputy District Attorneys Association; Paul Graves; and Gary Koppel	Christopher E. Platten Wylie, McBride, Platten & Renner 2125 Canoas Garden Ave., Suite 120 San Jose, CA 95125 cplatten@wmprlaw.com
Attorney for Intervenors and Appellants Public Employees Union, Local No. 1; International Federation of Professional and Technical Engineers, Local 21; David M. Rolley; Peter J. Ellis; Susan Guest	Arthur W. Liou Leonard Carder, LLP 1330 Broadway, Suite 1450 Oakland, CA 94612 Aliou@leonardcarder.com
Attorney for Intervenor and Appellant United Chief Officers Association	Robert J. Bezemek Law Offices of Robert J. Bezemek 1611 Telegraph Ave., Suite 936 Oakland, CA 94612-2140 rjbezemek@bezemeklaw.com
Attorney for Real Party In Interest and Respondent Central Contra Costa Sanitary District	Linda M. Ross Renne Public Law Group 350 Sansome Street, Suite 300 San Francisco, CA 94104 nlross@publiclawgroup.com
Attorney for Intervenor and Appellant Rodeo-Hercules Fire Protection District; Central	Richard D. Pio Roda Kenton Alm Meyers, Nave, Riback, Silver & Wilson 555 12th Street, Suite 1500

Contra Costa Sanitary District	Oakland, CA 94607 rpioroda@meyersnave.com kalm@meyersnave.com
Attorney for Intervenors and Appellants Contra Costa County, Contra Costa County Fire Protection District, Housing Authority of the County of Contra Costa, In-Home Supportive Services Public Authority, Contra Costa Local Agency Formation Commission, Children and Families First Commission	Thomas Geiger Deputy County Counsels 651 Pine St., 9th Floor Martinez, CA 94553 thomas.geiger@cc.cccounty.us
Attorney for Intervenor and Appellant Superior Court of California, County of Contra Costa	Lyle R. Nishimi Judicial Council of California 455 Golden Gate Avenue San Francisco, CA 94102-3688 Lyle.Nishimi@jud.ca.gov
Attorneys for Intervenor and Appellant East Contra Costa County Fire Protection District	Diane M. Hanson Hanson Bridgett 425 Market Street, 26th Floor San Francisco, CA 94105 domalley@hansonbridgett.com
Intervenor and Appellant	Byron, Brentwood, Knightsen Union Cemetery District Barbara Fee P.O. Box 551 Brentwood, CA 94513 ucemetery@yahoo.com
Attorney for Intervenor and Appellant Rodeo Sanitary District	Carl P.A. Nelson Bold, Polisner, Maddow, Nelson & Judson, PC 500 Ygnacio Valley Road, Suite 325 Walnut Creek, CA 94596 cuanelson@bumnj.com
Attorney for Intervenor and Appellant San Ramon Valley Fire Protection District	William Dale Ross Law Offices of William D. Ross 400 Lambert Ave. Palo Alto, CA 94306 wross@lawross.com

	Robert Leete 1500 Bollinger Canyon Road San Ramon, CA 94583 rleete@srvfire.ca.gov
Attorney for Intervenor and Appellant Contra Costa Mosquito & Vector Control District	Martin Snyder Snyder, Cornelius & Hunter 399 Taylor Blvd., Suite 102 Pleasant Hill, CA 94523 mtsnyder@schlawfirm.com Craig Downs 155 Mason Circle Concord, CA 94520 cdowns@contracostamosquito.com
Intervenor and Appellant	Moraga/Orinda Fire Protection District Sue Casey 33 Orinda Way Orinda, CA 94563 scasey@mofd.org
Attorney for Intervenors and Appellants American Federation of State, County and Municipal Employees, Local 512, AFL-CIO; American Federation of State, County and Municipal Employees, Local 2700, AFL-CIO; American Federation of State, County and Municipal Employees, Local 2703; Merced County Sheriffs Association, an Affiliate of International Brotherhood of Teamsters, Local 856; Hasani Tabari; Daniel Lister; Jeffrey Miller; Sandra Gonzalez-Diaz, and Mary McWatters	Robert Bonsall, Esq. Beeson, Tayer & Bodine 520 Capitol Mall, Suite 300 Sacramento, CA 95814 rbonsall@beesontayer.com
Attorneys for Plaintiffs and Appellants Alameda County Deputy Sheriffs' Association, Jon Rudolph, James D. Nelson, Darlene Hornsby, Robert	David E. Mastagni Isaac Stevens Mastagni, Holstedt, Amick, et al. 19121 Street Sacramento, CA 95811 istevens@mastagni.com

Brock, Rocky Medeiros	
Attorney for Intervenors and Appellants Service Employees International Union, Local 1021; Amy Dooha; Building Trades Council of Alameda County; Mike Harteau, and Peter Barta	Anne I. Yen Vincent A. Harrington, Jr. Weinberg, Roger & Rosenfeld 1001 Marina Village Pkwy, #200 Alameda, CA 94501 ayen@unioncounsel.com vharrington@unioncounsel.com
Attorneys for Intervenors and Appellants Locals 512 and 2700 of the American Federation of State, County and Municipal Employees AFL-CIO	Andrew H. Baker Beeson, Tayer & Bodine 483 Ninth Street, 2nd Floor Oakland, CA 94607 T (510) 625-9700 F (510) 625-8275 abaker@beesontaver.com
Intervenor and Appellant – Pro Per	Mark Friedman, CEO First 5, Alameda County Children & Families Commission 1115 Atlantic Avenue Alameda, CA 94501 mark.friedman@first5eec.org
Attorney for Intervenor and Appellant Housing Authority of County of Alameda; County of Alameda	Brian E. Washington Andrea Weddle Office of the County Counsel County of Alameda 1221 Oak Street, Suite 450 Oakland, CA 94612-4226 brian.washington@acgov.org Andrea.weddle@acgov.org
Attorney for Intervenor and Appellant Livermore Area Recreation and Park District	Rod A. Attebery, Esq. Neumiller & Beardslee 509 West Weber Avenue, 5th Floor Stockton, CA 95201-3020 ratteberv@neumiller.com
Intervenor and Appellant	Sheila Jordan Superintendent of Schools Alameda County Office of Education 313 W. Winton Avenue Hayward, CA 94544 sjordan@acoe.org

Intervenor and Appellant	Patricia Sweeten Executive Officer Alameda County Superior Court 1225 Fallon Street, Room 209 Oakland, CA 94612 psweeten@alameda.courts.ca.gov
Attorney for Intervenor and Appellants Physicians' and Dentists' Organization of Contra Costa	William Ira Corman Bogatin Corman & Gold 1330 Broadway, Suite 800 Oakland, CA 94612 wcorman@bcgattorneys.com
Attorneys for Plaintiffs and Appellants Contra Costa County Deputy Sheriffs Association; Ken Westermann; Sean Fawell	Rockne Anthony Lucia Timothy Keith Talbot Rains Lucia Stern S. Phalle & Silver PC 2300 Contra Costa Blvd., Suite 500 Pleasant Hill, CA 94523-3973 rlucia@rlslawyers.com ttalbot@rlslawyers.com
Attorneys for Plaintiff and Appellant United Professional Fire Fighters of Contra Costa County, Local 1230	W. David Holsberry McCracken, Stemerman & Holsberry 595 Market Street, Suite 800 San Francisco, CA 94105 wdh@msh.com
Attorney for Intervenor and Appellant Probation Peace Officers Association of Contra Costa County	Rockne A. Lucia, Jr. Rains Lucia Stern S. Phalle & Silver PC 2300 Contra Costa Blvd., Suite 500 Pleasant Hill, CA 94523-3973 rlucia@rlslawyers.com
Interested Entity/Party – Pro Per	Wright Lassiter, III, CEO Alameda County Medical Center 1411 East 31st Street Oakland, CA 94602 wlassiter@acmedctr.com
Attorney for Intervenor and Respondent State of California, and Intervenor and Appellant Dominic Ciotola	Anthony Paul O'Brien Office of the Attorney General 1300 "I" Street, Suite 125 Sacramento, CA 95814 Anthonhy.obrien@doj.ca.gov
Attorney for Intervenor and Appellant Bethel Island Municipal Improvement	David J. Larsen Silver & Wright LLP 5179 Lone Tree Way

District	Antioch, CA 94531 dlarsen@dlarsenlaw.com
Via U.S. Mail Only	California Supreme Court 350 McAllister Street, Rm. 1295 San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: July 19, 2018

Rica Ureta