No. S239958

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CAL FIRE LOCAL 2881 (formerly known as CDF Firefighters), et al.,

Petitioners and Appellants,

vs.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM (CalPERS),

Defendant and Respondent

and

THE STATE OF CALIFORNIA,

Intervener and Respondent

On Review From The Court Of Appeal For The First Appellate District, Division Three, Civil No. A142793

After an Appeal from the Superior Court For The State of California, County of Alameda, Case No. RGI2661622, Honorable Evelio Grillo, Presiding Judge

APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF ASSOCIATION OF CALIFORNIA SCHOOL ADMINISTRATORS IN SUPPORT OF INTERVENER AND RESPONDENT STATE OF CALIFORNIA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

FEDERAL CASES

STATE CASES

TABLE OF AUTHORITIES
(Continued)

Pages

STATE CODES/STATUTES

REPORTS

APPLICATION TO FILE AMICUS CURIAE BRIEF

Pursuant to California Rules of Court, Rule 8.520(f), the Association of California School Administrators ("ACSA"), requests leave to file the *amicus curiae* brief submitted herewith in partial support of Intervener and Respondent State of California. Petitioner and Appellants, Cal Fire Local 2881, et al. filed their Reply Brief on the Merits on January 22, 2018.

I. INTEREST OF AMICUS CURIAE

ACSA – a voluntary professional membership association of over 18,000 public school administrators – represents most of the school and district administrators who are directly responsible for providing high quality education to the more than six million children attending public schools in California. With regard to the pension systems impacting public school employees, ACSA members have multiple interests which they must balance. For example, superintendents and others in top leadership positions are tasked with operating our public schools, which necessarily includes finding ways to contain costs (including pension costs) and maximize funds available to operate programs that benefit students. On the other hand, school administrators are members of CalPERS and CalSTRS, and, as public employees who earn pension benefits, they are interested in stability and certainty with regard to those benefits.

The Court of Appeal decision in this case correctly decides that "airtime" is not a vested right protected by the contracts clause of the California Constitution, and therefore the legislative elimination of "airtime" effective 2013 did not violate the Constitution. However, the Court of Appeal went further, and appears to have abandoned long-standing precedent limiting the extent to which benefits may be modified or eliminated so long as employees are left with a "reasonable pension." ACSA has an interest in this Court's review of this case, given

the importance to every ACSA member of clearly articulated rules related to the modification or elimination of pension benefits.

II. NEED FOR FURTHER BRIEFING

ACSA believes additional briefing is necessary to address matters not fully addressed by the parties.

In support of Intervener and Respondent State of California, ACSA will address practical and fiscal considerations which complicate any effort to charge public employees the full cost of "airtime." (See Gov. Code § 20909.) ACSA will additionally argue that the elimination of "airtime" causes no disadvantage to employees, let alone a disadvantage which courts are bound to protect, and thus the Legislature's elimination of the right to purchase "airtime" does not substantially impair a vested right.

In contrast to the argument advanced by the Intervener and Respondent State of California, however, ACSA will also argue that federal and state precedents under the Contract Clause of the United States and California Constitutions require a court analyzing a claimed impairment of vested rights to consider the "rights and duties of the contracting parties," an approach more consistent with the analytic framework outlined by the Court of Appeal in *Alameda County Deputy Sheriff's Assn.* v. *Alameda County Employees' Retirement Assn.* (2018) 19 Cal.App.5th 61 [227 Cal.Rptr.3d 787, 831-832] than the approach outlined by the Court of Appeal in *Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.* (2016) 2 Cal.App.5th 674.

For the foregoing reasons, *amicus curiae* Association of California School Administrators respectfully requests that the Court accept the attached brief for filing.

Respectfully submitted,

ATKINSON, ANDELSON, LOYA, RUUD & ROMO

Dated: February 21, 2018

By: _____

Anthony P. De Marco
Joshua E. Morrison
Attorneys for ASSOCIATION OF CALIFORNIA SCHOOL ADMINISTRATORS, Amicus Curiae

AMICUS CURIAE BRIEF

I. "AIRTIME" IS NOT A VESTED PENSION BENEFIT, AND ITS ELIMINATION DOES NOT IMPAIR VESTED RIGHTS

"The contractual basis of a pension right is the exchange of an employee's services for the pension right offered by the statute." (*Claypool v. Wilson* (1992) 4 Cal.App.4th 646, 662; Accord, *In re Retirement Cases* (2003) 110 Cal.App.4th 426, 447.)

This Court has observed: "'Pension annuities ... are in the nature of compensation for the services previously rendered for which full and adequate compensation was not received at the time of the rendition of such services. They are in effect pay withheld to induce long-continued and faithful services.'" (*Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852 (citation omitted).)

Pension benefits are, therefore, a form of deferred compensation whereby employees offer present service for a future pension benefit. As "airtime" is unrelated to service, it is not a pension benefit. Further, eliminating the right to purchase "airtime" causes no disadvantage the courts are bound to protect, and does not substantially impair a vested right.

A. The Ability To Purchase "Airtime" Is Not A Pension Benefit As It Is Unrelated To Service

The ability to purchase "airtime" (see Gov. Code § 20909) is not a pension benefit at all, as it uniquely allows for the accumulation of service credit unrelated to any form of public service.

Recognizing that the right to purchase "airtime" is out of step with the traditional exchange of service for a pension, Appellant struggles to analogize "airtime" to other forms of deferred compensation or methods of earning service credit. (AOB, p. 12.) These comparisons are inapt.

Appellant contends "the right to secure additional service credit is

not unusual," and analogizes "airtime" to provisions of the PERL authorizing service credit for prior military service, various forms of paid leave (holidays, sick leave, vacation, paid leaves of absence), and a retirement incentive plan for judicial branch state employees. (AOB, p. 12.) These examples are unavailing as they, in contrast to "airtime," all derive from some form of public service.

With respect to prior military service, the Legislature has specifically encouraged public service, including military service, by authorizing CalPERS members to "receive credit for public service." (Gov. Code §§ 21020 et seq. and 21032.) The employee must actually perform public service in order to obtain service credit, however, and is able to obtain credit only for the "period of time an employee served" in one of the specified forms of public service. (See, e.g., Gov. Code § 21020(a).)

With respect to paid leave, the various forms of paid leave noted by Appellants (including holidays, sick leave, vacation, and paid leaves of absence) (see Gov. Code § 20898) are incidental forms of leave provided during the employee's period of active service, and thus are part and parcel of that active service.

With respect to retirement incentives for judicial branch state employees, such incentives are offered as an inducement to forego additional years of anticipated service, and thus substitute for service the employee would otherwise perform, but has foregone at the request of the employer. Moreover, such incentives are extended to judicial branch employees only when authorized by "formal action" of the Chief Justice, and only when the Chief Justice determines that "the best interests of the state would be served by encouraging the retirement of judicial branch state employees." (Gov. Code § 20902.5.)

The California Court of Appeal, First District has observed that occasional retirement incentives of this type are clearly "different in kind"

from more traditional forms of vested benefits. (*Creighton v. Regents of University of California* (1997) 58 Cal.App.4th 237.) Thus, in *Creighton*, the court of appeal explained: "But even if, as appellants insist, VERIP-III [a retirement incentive offered to certain employees of the University of California] *is* a retirement benefit, it is different *in kind* from the benefits governed by the *Kern-Betts* line of cases, none of which concerned a one-time, special, elective incentive offered to eligible employees during a short, specified 'window' period, in response to specific financial exigencies." (*Id.* at pp. 243-244.)

Appellant counters that "airtime" is tied to actual service, because employees were allowed to purchase "airtime" only after providing five (5) years of service. (ARB, p. 13.) But five (5) years of service is the minimum amount of service generally required to qualify for either a service retirement (see, e.g., Gov. Code § 21060(a)) or disability retirement (see, e.g., Gov. Code § 21150) under the PERL. Thus, this requirement merely served to ensure that employees could not purchase service credit (i.e. "airtime") without first satisfying the five (5) year minimum service requirement.

Appellants also argue "[t]he purchase of service credits is, on a practical level, indistinguishable from deferred compensation because it actually results in a change to employees' pension formulas." (AOB, p. 28.) This claim is inaccurate. The purchase of "airtime" does not enable an employee to retire earlier than the otherwise-applicable minimum retirement age. Service retirement remains generally available only to employees who have attained 50 years of age and five years of credited service (see Gov. Code § 21060), and neither of these requirements is impacted by an employee's purchase of "airtime."

Rather, the sole impact of a purchase of "airtime" is an increase in service credit, which serves to increase the periodic pension payments the

employee will receive during retirement. This change in no way adjusts the basic pension formula, but, rather, merely increases one component of that formula (years of credited service), resulting in a larger pension payment in retirement. (see RAB, p.13 — discussing the pension formula applicable to Cal Fire Local 2881 members.)

Appellant also equates the elimination of "airtime" to a retroactive divestment of accumulated service credit. (AOB, p. 28.) It is nothing of the sort, as "airtime," in contrast to normally accumulated service credit, is not based on actual service, and was eliminated only prospectively, not retroactively (i.e. "airtime" already purchased prior to January 1, 2013 remains on the books).

B. The Elimination of "Airtime" Causes No Disadvantage To Employees — Or At Least No Disadvantage That The Courts Are Bound To Protect.

Eliminating the ability to purchase "airtime" does not result in any disadvantage to employees. Because "airtime" was intended to be purchased at the employee's sole expense, employees have a clear alternative — they can obtain the same benefit at their own expense by purchasing a commercially-available annuity.

As discussed above, "airtime" is not a pension benefit earned through years of service. Rather, "airtime" is a commodity (service credit) available for purchase in the same manner as many other commercial transactions.

Yet, while both Appellants and Respondents acknowledge that purchases of "airtime" were intended to be revenue neutral, with all costs borne by the employee (AOB, p. 13; RAB, p. 15), the record below makes clear that CalPERS has been unable to accurately assign a value to the cost of "airtime," and, as a result, has historically sold "airtime" to employees at up to 40% below the true cost. (See RAB, p. 51.)

Even if CalPERS adjusts the cost of purchasing "airtime" (e.g. a 38% increase — See RAB, p. 51), the fact remains that the employee will always have better information regarding their educational goals, future employment, and retirement plans than will CalPERS, and, thus, the employee will always be at an advantage in determining when CalPERS has underpriced the cost of purchasing "airtime" as applied to that employee. For this reason, if the right to purchase "airtime" is restored, it is inevitable that a significant numbers of employees purchasing "airtime" will do so at a discount, despite CalPERS' best efforts.

The parties cite to an *Actuarial Cost Analysis: California Public Employees' Pension Reform Act of 2012* (August 31, 2012), prepared by CalPERS, which makes this very point, noting that the cost charged to employees for "air time" is "an estimate that includes assumptions with respect to the age at retirement, salary at retirement, age at death, and the retirement system's investment returns." (ARB, pg. 44.) CalPERS specifically notes that "service purchases on a present value method . . . increase the risk to the employer in the form of higher volatility in employer rates if events do not occur as expected." (ARB, pg. 44.)

In short, by selling a commodity ("airtime") whose ultimate value (a periodic payment in retirement) depends on variables (namely "salary at retirement") outside CalPERS' knowledge or control (but likely within the employees' knowledge or control), CalPERS will inevitably bear, and ultimately pass on to employers in the form of higher contributions, the risk that the amount charged to the employee for their purchase of "airtime" is insufficient to cover the true cost.

This Court has held that "fiscal considerations," even where "not examined by the parties," may appropriately inform this court's analysis of claimed impairments of vested pension rights. (*Allen v. Board of Administration* (1983) 34 Cal.3d 114, 125 ("*Allen II*".) Here, because the

financial risk to the CalPERS system, and the resulting financial risk to employers, is at odds with the Legislature's intent (i.e. that employees bear the true cost of "air time") and because "airtime" is not a pension benefit, the elimination of this benefit is both reasonable and bears a material relation to the theory and successful operation of a pension system.

The advantage or disadvantage resulting from an alteration of pension rights is measured from the perspective of the affected employee. (*Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438.) When viewed from the perspective of an individual employee, every purchase of "airtime" fits within one of the following three possibilities: (1) the employee pays more than the true cost of "airtime"; (2) the employee pays the true cost of "airtime"; or (3) the employee pays less than the true cost of "airtime." In the first two cases, the elimination of "airtime" causes no arguable detriment, as the employee can simply purchase a commercially available annuity at a comparable (or lesser) expense on the open market, and will receive the same benefit (i.e. periodic payments in retirement).

With respect to employees in the third category, the only arguable detriment is in the loss of their ability to purchase, at a discount, a benefit the Legislature only intended to be sold at full price. This is not a benefit that was anticipated when the Legislature first authorized "airtime," and its removal is not a detriment this Court should protect against.

As discussed in *Allen II, supra*, a legislative decision "'to confine beneficiaries to the gains 'reasonably to be expected from the contract' and to withhold 'unforeseen advantages' which had no relation to the real theory and objective of the [statutory scheme] . . . is not the repudiation of a debt, not an impairment of the contract.'" (*Allen II, supra*, at p. 122 (citation omitted).) Similarly, "[t]he 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.'" (*Allen II, supra*, at p. 120.) Likewise, "[l]aws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of a contract.'" (*Allen II, supra*, at p. 124 (citing to *City of El Paso v. Simmons* (1965) 379 U.S. 497, 515).)

The holding in *Allen II* was "premised upon the discrepancy between the theoretical objective and the actual operation of the legislators' statutory pension scheme." (*Allen II, supra*, at p. 123.) In contrast, "[t]here was no suggestion in *Betts*, for example, that the statutory scheme for pension enhancement of constitutional officers, like Betts, was not operating as originally designed." (*Ibid.*)

Here, as in *Allen II*, the statutory scheme authorizing purchase of "airtime" was demonstrably not operating as originally designed, as CalPERS was manifestly unable to accurately establish a purchase price consistent with the legislative intent that employees pay the true cost. Moreover, the right to purchase "airtime" at a discount to its true cost is a windfall benefit the courts are not bound to protect.

C. Elimination Of "Airtime" Is Not A Substantial Impairment

The same result applies under long-standing federal case law applicable to an alleged impairment of rights under the Contract Clause. The United States Supreme Court has adopted a three-step process for analyzing alleged impairment of rights under the Contract Clause. (*Energy Reserves Group, Inc. v. Kansas Power and Light Co.* (1983) 459 U.S. 400.)

The court in *Rue-Ell Enterprises, Inc. v. City of Berkeley* (1983) 147 Cal.App.3d 81 summarized the three-step analytical process developed in *Energy Reserves* as follows:

> The Supreme Court in *Energy Reserves* described a three-step process for analyzing impairment claims. The first step is to determine whether the state law has "operated as a substantial impairment of a contractual relationship." . . . [T]he next [second] step is to determine whether the state, in justification, has "a significant and legitimate public purpose behind the regulation . . ., such as the remedying of a broad and general social or economic problem." . . . [T]he third inquiry is whether the adjustment of the rights and duties of the contracting parties is based upon "reasonable conditions" and is "of a character appropriate to the public purpose justifying [the legislation's] adoption.

Rue-Ell, supra, at pp. 87-88 (emphasis added) (citations omitted); (Accord, *Barrett v. Dawson* (1998) 61 Cal.App.4th 1048, 1054-1055.)

A "state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment." (*Energy Reserves, supra*, 459 U.S. at p. 411.) Likewise, as applied to pension rights, this Court has recognized: "[n]ot every change in a retirement law constitutes an impairment of the obligations of contracts . . .'[m]inimal alteration of contractual obligations may end the inquiry at its first stage.'" (*Allen II, supra*, at p. 119) (citations omitted); Accord, *United Firefighters of Los Angeles City v. City of Los Angeles* (1989) 210 Cal.App.3d 1095, 1109 (citing to *Energy Reserves, supra*, in the context of a alleged impairment of pension benefits).

Here, as in *Energy Reserves* and *Allen II*, there is no impairment, let alone a substantial impairment, and, thus, the inquiry should end at the first step.

II. THE COURT DOES NOT NEED TO REACH THE ISSUE OF WHETHER EMPLOYEES ARE ENTITLED ONLY TO A "SUBSTANTIAL OR REASONABLE" PENSION - BUT IF THE COURT DOES REACH THIS ISSUE, THE TEST OUTLINED IN THE *ALAMEDA* DECISION STRIKES THE RIGHT BALANCE.

The Court of Appeal noted that the "overarching issue" in this case is whether Government Code section 20909 should be read "to bestow upon plaintiffs and other CalPERS members a vested contractual right to purchase airtime service credit." (Slip Opinion at p. 4.) The Court correctly concluded that Section 20909 created neither an implicit nor express vested right to purchase airtime service credit, and therefore the statutory elimination of this option in 2012 did not violate the contracts clause of the California Constitution. (Slip Opinion at p. 7-10). Because eliminating employees' ability to purchase airtime does not involve a vested right, there can be no question of an "impairment" of a vested right. As there is no impairment under any theory, there is no need for this Court to revisit the analytical framework traditionally applied when considering an alleged impairment of pension benefits.

While the Court of Appeal acknowledges that the conclusion that there is no vested contractual right is sufficient to resolve this case (Slip Opinion at p. 12), it nevertheless goes on to consider whether the Legislature could lawfully eliminate the option to purchase "airtime" even if it thereby impaired a vested right. In doing so, the Court of Appeal chose to follow the recent opinion of their First Appellate District colleagues in *Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.* (2016) 2 Cal.App.5th 674, which focuses on the question of whether an impairment of a vested right is reasonable given fiscal pressures on the pension system, and concludes the impairment was permissible as

employees are simply entitled to "a substantial or reasonable pension" not to "any fixed or definite benefits." (*Id.* at pp. 701-702). Because an impairment analysis is unnecessary to the resolution of this case, and because this Court has already decided to review the decision in *Marin*, we urge the Court not to reach the issue of the "California Rule" as articulated in *Allen v. City of Long Beach* (1955) 45 Cal.2d 128 ("*Allen I*")[1] and subsequent decisions.

If this Court does opt to revisit its analytical framework for considering claimed impairment of vested pension rights, the framework recently set forth in *Alameda County Deputy Sheriff's Assn.* v. *Alameda County Employees' Retirement Assn.* (2018) 19 Cal.App.5th 61 [227 Cal.Rptr.3d 787] should be applied rather than the framework announced in *Marin, supra.*

More specifically, while the *Alameda* court agrees with the conclusion in *Marin* that there is no "absolute need for comparable new advantages when pension rights are eliminated or reduced," (*Alameda, supra,* Slip Opinion at p. 59; 227 Cal.Rptr.3d 787, 831) it further observes "that the *Marin* court improperly relied on its general sense of what a reasonable pension might be, rather than acknowledging that . . . an employee's right to a reasonable pension can only be judged in the context of the balancing analysis established by *Allen I.*" (*Id.,* Slip Opinion at p. 60; [227 Cal.Rptr.3d 787, 831-832].) In other words, the impact of a change in vested pension benefits cannot properly be analyzed without weighing the impact on the individual employee against the broader societal concerns

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[1] "To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages." (*Allen I, supra*, at p. 131.)

(e.g. "total pension system collapse") which arguably justify the impairment of vested rights. When no comparative new advantages are provided to the employee, the corresponding burden to demonstrate the changes are necessary for the successful operation of the pension system is substantially increased.

In fact, the three-part test announced in *Energy Reserves, supra*, requires a court considering a claimed impairment of rights under the Contract Clause to consider "whether the adjustment of the rights and duties of the contracting parties is based upon 'reasonable conditions' and is 'of a character appropriate to the public purpose justifying [the legislation's] adoption.'" (*Rue-Ell, supra*, at p. 88, citing to *Energy Reserves, supra*, at p. 411.) Moreover, where a governmental entity acts to impair a contract, the government generally bears the burden of "assert[ing] a compelling interest for the impairment." (*California Teachers Assn. v. Cory* (1984) 155 Cal.App.3d 494, 510-512, fn. 14.)

In light of these factors, it is not clear how this Court could consider a claimed impairment of vested pension rights without weighing the impact of the claimed impairment on the individual employee, as urged by the Court of Appeal in *Alameda, supra*.

III. CONCLUSION

For the reasons set forth above, *amicus* Association of California School Administrators requests that the Court uphold the Court of Appeal's determination that the Legislature did not unlawfully impair vested pension rights when it took action to eliminate the option provided under Government Code section 20909 to purchase "airtime" service credit.

Respectfully submitted,

ATKINSON, ANDELSON, LOYA, RUUD & ROMO

Dated: February 21, 2018

By: _____

Anthony P. De Marco
Joshua E. Morrison
Attorneys for ASSOCIATION OF CALIFORNIA SCHOOL ADMINISTRATORS, Amicus Curiae

CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.504(D)(1)

Pursuant to California Rules of Court Rule 8.504(d)(1), I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 13 points and contains 4,804 words.

Dated: February 21, 2018

Joshua E. Morrison, Esq.

PROOF OF SERVICE
[C.R.C. 8.212(C)]

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and am not a party to the within action; my business address is 12800 Center Court Drive South, Suite 300,Cerritos, California 90703-9364.

On February 21, 2018, I served the following document(s) described as **APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF ASSOCIATION OF CALIFORNIA SCHOOL ADMINISTRATORS IN SUPPORT OF INTERVENER AND RESPONDENT STATE OF CALIFORNIA** on the interested parties in this action as follows:

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Coalition of Santa Monica City Employees;
Antioch Police Officers' Association;
Los Angeles Police Protective League;
Ventura County Deputy Sheriffs' Association;
California Association of Highway Patrol; and
Garden Grove Police Association

☒ **BY OVERNIGHT COURIER:** I enclosed the document(s) in an envelope or package provided by an overnight delivery carrier and addressed it to the parties shown herein. I placed the envelope or package at my place of employment in accordance with regular business practices for collection and overnight delivery.

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

Executed on February 21, 2018, at Cerritos, California.

Jeannie K. Curtiss