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

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

v.

ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASSN. AND BD. OF THE ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASSN., et al.,
Defendants and Respondents,

STATE OF CALIFORNIA
Intervenor,

CENTRAL CONTRA COSTA SANITARY DISTRICT,
Real Party in Interest.

AFTER A DECISION BY THE COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION FOUR, CASE NO. A141913, CONTRA COSTA COUNTY SUPERIOR CT. CASE NO. MSN12-1870 (COORDINATED WITH ALAMEDA SUPERIOR CT. CASE NO. RG12658890 AND MERCED SUPERIOR CT. CASE NO. CV003073)

CENTRAL CONTRA COSTA SANITARY DISTRICT'S REPLY BRIEF ON THE MERITS

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The Central Contra Costa Sanitary District ("District") files this reply brief in response to the answer briefs on the merits filed by (2) Public Employees Union, Local 1, et al. ("Unions"), and (1) Alameda County Deputy Sheriffs' Association, et al. ("Alameda Sheriffs"), Plaintiffs and Appellants.[1]

I. INTRODUCTION AND SUMMARY OF ARGUMENT

As demonstrated in the District's opening brief, CERL never authorized the spiking practices addressed by AB 197. In enacting AB 197, the Legislature was clarifying that it never intended these practices – which benefited retirees in the Alameda, Contra Costa and Merced retirement systems over others – to provide pensions based on more than the annual pay they regularly earned during normal work hours. The answer briefs filed by the Unions and Alameda Sheriffs do not show otherwise.

The Unions and Alameda Sheriffs claim that before enactment of AB 197, the disputed pay items were included in "compensation earnable" in accordance with this Court's decision in *Ventura County Deputy Sheriffs' Assn. v. Bd. of Retirement* (1997) 16 Cal.4th 483, and post *Ventura* settlements and policies. They argue that AB 197 changed CERL by narrowing the definition of "compensation earnable" thus impairing vested rights. The Alameda Sheriffs make similar arguments.

But *Ventura* never reached the issues presented by this case. *Ventura* addressed whether "compensation earnable" under CERL included only pay

[1] On May 4, 2018, the State, District and Alameda Sheriffs, the three Petitioners in this case, filed opening briefs. On July 19, 2018, the State and District filed answer briefs to the Alameda Sheriffs' opening brief, and the Alameda Sheriffs and the other Unions filed answer briefs to the State and District opening briefs. The State and District opening and answer briefs addressed many of the arguments made by the Alameda Sheriffs. Accordingly, this brief primarily responds to the answer brief filed by the Unions, and where applicable, the District will refer to its opening brief and answer brief, rather than repeat arguments already made.

earned by all members of the same job classification, such as longevity, bilingual pay and others. *Ventura* did not analyze whether "compensation earnable" included the specific pay items at issue here: on-call pay for work beyond "normal working hours," pension "enhancements," leave cash-outs that included pay beyond that "earned and payable" in the final compensation period, or "terminal pay" paid only upon retirement.

The post *Ventura* settlements also do not control this case. As a threshold matter, the settlement agreement entered into by CCCERA (the District is an employer member of CCCERA and thus addresses only the CCERA agreement) was with retirees who retired before September 30, 1997, and not with active employees, and specifically stated that it could not be offered as evidence "in any other action or proceeding." That ends the matter as to the CCCERA settlement, leaving only the CCCERA policies as a basis for a claim of vested rights.

But retirement board policies do not create vested rights. The Unions and Alameda Sheriffs continue to rely on footnote 6 of *Guelfi v. Marin County Employees' Retirement Assn.* (1983) 145 Cal.App.3d 297, 307, but this footnote was only dicta, and after *Ventura* overruled *Guelfi*, no Court has relied on it. Here, the Court of Appeal rightfully held that only the state legislature, and not a retirement board, has the authority to define "compensation earnable" under CERL. Policies not in conformity with CERL are ultra vires and cannot be a basis for relief.

But even if AB 197 did effect a change in the definition of "compensation earnable," no vested rights were affected. In enacting AB 197, the Legislature was acting in a regulatory capacity, the alterations were minimal, the alterations were only prospective, and a reasonable and substantial pension remained.

Finally, equitable estoppel cannot be used here to thwart the intent of the Legislature in ending these abuses. Equitable estoppel will not lie when

a public entity has no authority to grant a benefit and, in any event, here there was no evidence of the required reasonable reliance by the affected employees.

For these reasons, this Court should overturn the decision of the Court of Appeal and uphold AB 197 in all respects.

II. ARGUMENT

A. The Unions Rely On Incorrect Legal Standards In Connection With Identification Of And Modification Of Vested Rights.

The Unions contend that there is no requirement to show "clear" and "unequivocal" legislative intent to create vested rights, that employees' pension benefits may be modified only if disadvantages are accompanied by comparable new advantages, and that pension benefits must be liberally construed in favor of employees and retirees. They mischaracterize the legal standards applicable here.

1. The *REAOC* Standard Applies Here, Requiring Clear And Unequivocal Legislative Intent To Create A Vested Right, Not A Standard That Presumes That The Legislature Intended To Create A Vested Right.

The Unions contend that they need not show a "clear" and "unequivocal" legislative intent to create a vested right because the standard articulated by this Court in *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171 ("*REAOC*") does not apply to pension benefits. They argue that "the intent to create a vested right is inherent in the offering of a pension benefit, because it is understood that the benefit is deferred compensation and 'an indispensable part' of the employment contract." (Unions' Answer Br. at pp. 27-28, citations omitted.) They contend that this Court has "never required that petitioners demonstrate that an employer or pension statute 'clearly and unequivocally' express an

intent to create vested pension rights." (Unions' Answer Br. at pp. 28-29.) They are wrong.

The standard articulated in *REAOC* applies to any claim of vested contract rights for public employees arising under the California constitution. *REAOC* made no distinction between pension benefits and other types of retirement benefits. Relying on a line of federal and state contracts clause decisions, this Court stated; "From these cases, we conclude generally that legislation in California may be said to create contractual rights when the statutory language or circumstances accompanying its passage 'clearly "... evince a legislative intent to create private rights of a contractual nature enforceable against the [government body]."' (*REAOC, supra,* 52 Cal.4th at p. 1187, quoting *Valdes v. Cory* (1983) 139 Cal.App.3d 773, 786.)

The cases *REAOC* relied upon included pension cases. (*REAOC* at pp. 1186-1188.) For example, in *Walsh v. Bd. of Admin.* (1992) 4 Cal.App.4th 682, 697, a pension case, the Court of Appeal found no pension impairment, stating: "Thus it is presumed that a statutory scheme is not intended to create private contractual or vested rights and a person who asserts the creation of a contract with the state has the burden of overcoming that presumption." [2]

The Courts of Appeal also have applied the *REAOC* standard in pension cases. (See *Deputy Sheriffs' Assn. of San Diego County v. County of San Diego* (2015) 233 Cal.App.4th 573, 578 ["The party asserting a contract clause claim has the burden of 'mak[ing] out a clear case, free from

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[2] In finding no contract impairment, *Walsh* explained: "In the 1974 urgency legislation the Legislature did not eliminate Walsh's retirement benefits; rather, it confined his benefits to those consistent with the basic eligibility provisions of the LRL by repealing provisions which would have made him eligible for extraordinary benefits. This action would, on its face, appear to be consistent with the Legislature's reserved power to limit retirement benefits under the LRL." (4 Cal.App.4th at p. 702.)

all reasonable ambiguity,' [that] a constitutional violation occurred."]; *Hipsher v. Los Angeles County Employees Retirement Assn.* (2018) 24 Cal.App.5th 740, 751 ["An appellant who claims the calculation of his retirement benefits violates his vested contractual rights under the state contract clause has the burden of "'mak[ing] out a clear case, free from all reasonable ambiguity,' a constitutional violation occurred."]; *Cal Fire Local 2881 v. California Public Employees' Retirement System (2016)* 7 Cal.App.5th 115, 126, review granted April 12, 2017, S239958 ["there is nothing in either the text of the statute (§ 20909), or its legislative history, that unambiguously states an intent by the Legislature to create a vested pension benefit"].)

In requiring "clear" evidence of legislative intent, *REAOC* relied on the leading federal case, *National R. Passenger Corp. v. A.T.& S.F.R. Co.* (1985) 470 U.S. 451, 466, for the statement that: "Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body." (*REAOC, supra,* 52 Cal.4th at pp. 1185-1186.) Courts nationwide have relied on this statement of principle to ensure that there is clear and unequivocal legislative intent before finding a vested right to pension benefits. (See e.g., *Berg v. Christie* (N.J. 2016) 225 N.J. 245, 254; 137 A.3d 1143, 1147 [stating in connection with a pension COLA benefit: "Although both plaintiff retirees and the State advance plausible arguments on that question, the lack of such unmistakable legislative intent dooms plaintiffs' position."] In fact, *REAOC* specifically relied on *Parker v. Wakelin* (1st Cir. 1997) 123 F.3d 1, 2, in which the the Court concluded: "Finding no unmistakable intent on the part of the Maine legislature to create private contractual rights against the reduction of pension benefits prior to the point at which pension benefits may

actually be received, we hold that the Maine amendments do not violate the Contract Clause with regard to any of the plaintiffs."

The cases cited by the Unions are distinguishable not only because no party raised the "clear" and "unequivocal" standard, but because, unlike here, these cases did not address an ambiguous definition of "compensation earnable." (See Unions Answer Br. at p. 29, citing *Betts v. Bd. of Admin.* (1978) 21 Cal.3d 859 [replacement of fluctuating benefit with fixed benefit]; *Pasadena Police Officers Assn. v. City of Pasadena* (1983) 147 Cal.App.3d 695 [charter limits on COLA increases].) Judicial Decisions are not authority for issues not addressed. (See *Santisas v. Goodin* (1998) 17 Cal.4th 599, 620 ["An appellate decision is not authority for everything said in the court's opinion but only 'for the points actually involved and actually decided.'"].)

The Unions contend that ambiguities must be resolved in favor of the pensioner, but *Ventura* stated that "such construction must be consistent with the clear language and purpose of the statute." (*Ventura, supra,* 16 Cal.4th at p. 490; see also *Barrett v. Stanislaus County Employees Retirement Assn.* (1987) 189 Cal.App.3d 1593, 1603 ["this rule of liberal construction is applied for the purpose of effectuating obvious legislative intent and should not blindly be followed so as to eradicate the clear language and purpose of the statute and allow eligibility for those for whom it was obviously not intended"].)

Here, there is no "clear language" that grants the Unions the benefits they seek.

2. There Is No Requirement For A Comparable New Advantage For Any Disadvantage.

The Unions argue that AB 197's changes to the definition of "compensation earnable" were not permissible because AB 198 did not offer a "comparable new advantage" for every disadvantage. (Unions' Answer Br. at pp. 31-34.) This Court need not reach this argument -- because AB 197

did not violate any vested rights -- but this argument has been rejected by the Courts of Appeal as an inaccurate reading of this Court's Contracts Clause jurisprudence.

a. Four Appellate Courts Have Rejected The Requirement Of A "Comparable New Advantage" For Every Disadvantage.

Four appellate courts of this state agree that there need not be a "comparable new advantage" for every disadvantage involved in a pension modification: *Hipsher, supra,* 24 Cal.App.5th 740, 753; *Alameda County Deputy Sheriff's Assn. v. Alameda County Employees Retirement Assn.* (2018) 19 Cal.App.5th 61, 121; *Cal Fire, supra,* 7 Cal.App.5th 115, 128; *Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.* (2016) 2 Cal.App.5th 674, 697, review granted November 22, 2016, S237460.

The *Marin* Court conducted a scholarly review of this Court's prior rulings on the standard that governs modification of pension benefits for public employees, concluding that "since 1983, the 'must' formulation has never been reiterated by the Supreme Court, which has instead uniformly employed the 'should' language from the 1955 *Allen* decision." (*Marin, supra,* 2 Cal.App.5th at pp. 697-699.) And the *Marin* Court noted that this Court's 1983 decision in *Allen* actually found "the reduction was not constitutionally improper," without evaluating any comparable advantage (*id.* at p. 699), making the term "must" dicta. The *Marin* Court stated, "we cannot conclude that *Allen v. Board of Administration* in 1983 was meant to introduce an inflexible hardening of the traditional formula for public employee pension modification." (*Id.* at p. 699.)

The most recent decision to reject the requirement of a comparable new advantage is *Hipsher, supra,* 24 Cal.App.5th 740, which rejected a vested rights challenge to a new law that required pension forfeiture upon

conviction of a felony tied to public employment. Relying on *Marin*, the Court stated: "Thus, a modification of vested pension rights need not invariably be accompanied by a comparable new advantage." (*Id.* at p. 754.)

b. This Court Has Continuously Stated That Employees Have Only The Right To A Substantial and Reasonable Pension.

The Unions argue that the State and district "largely ignore" the precedent that requires a "comparable pension advantage" to existing employees. (Unions' Answer Br. at p. 32.) To the contrary, in its response to the Alameda County Sheriffs' Opening Brief on the Merits, the District reviewed decades of Supreme Court precedent. That review demonstrated that this Court has repeatedly stated that public pensions may be modified so long as a "substantial or reasonable pension" remains. Where the Court has found modifications to be unwarranted, the modification did not satisfy this standard. Rather, the modification either drastically reduced or destroyed the pension or no sufficient rationale was offered. (See District's Answering Brief On The Merits To Opening Brief filed by Alameda County Sheriff's Association at pp. 21-23.)

Moreover, the requirement of a comparable new advantage for every disadvantage must be rejected for an additional reason. The requirement would eliminate the general rule that pensions may be modified so long as a "substantial" or "reasonable" pension remains. Under the Unions' approach, the state is handcuffed from making any meaningful modifications. (See District's Answering Brief On The Merits To Opening Brief Filed by Alameda County Sheriff's Association at pp. 24-25.)

B. AB 197 Did Not Change The Definition of "Compensation Earnable."

In its opening brief, the District demonstrated that AB 197 did not change, but rather clarified, the law. The Legislature regularly takes action

to clarify pension law when abuses emerge, in particular the manipulation of pay into the final compensation period in an effort to boost pensions. (District Opening Br. at pp. 30-31.) [3]

The District also demonstrated that this Court's opinion in *Ventura County Deputy Sheriffs' Assn. v. Bd. of Retirement* (1997) 16 Cal.4th 483 never addressed, much less found, that these pay items were "compensation earnable." (District Opening Br. at pp. 34-36, 42-43.) But the Unions nonetheless strain to find approval in *Ventura* for the spiking practices at issue here. It does not exist.

1. *Ventura* Does Not Require "On-call Pay" To Be Pensionable.

AB 197, section 31461(b)(3), excludes from "compensation earnable" "Payments for additional services rendered outside of normal working hours, whether paid in a lump sum or otherwise." This definition excludes "On-call Pay. As established in the District's opening brief, On-call Pay was never "compensation earnable" because it was pay for time in excess of "the average number of days ordinarily worked by persons in the same grade or class of positions during the period . . . ." (District Opening Br. at pp.41-42.)

The Unions contend that section 31461(b)(3) changed the law, because *Ventura* specifically found that certain payments for being on call during meal periods were "compensation earnable" and thus pensionable. (Unions' Answer Br. at pp. 38-39.)

But the Unions reliance on *Ventura* is misplaced. Even the Court of Appeal here refused to rely on *Ventura* for this point, concluding that "there is no specific analysis in the opinion regarding On-call Pay as a component

[3] The Unions contend that, if AB 197 did not change the law, it would require retirement systems to recalculate benefits for those already retired before its enactment. (Unions Br. at p. 53.) No retirement system has proposed this, making this argument a red herring.

of compensation earnable" and therefore "the bases and parameters for this conclusion are not readily apparent." (*Alameda, supra,* 19 Cal.App.5th at p. 108.)

And in fact, the Unions read too much into *Ventura,* which actually supports the *exclusion* of On-call Pay from compensation earnable. As pointed out in the District's opening brief, *Ventura* stated that PERL and CERL should be read similarly with regard to "compensation earnable," and PERL excludes pay for "additional services rendered outside of normal working hours" -- which includes On-call Pay. (District Opening Br. at pp. 42-43.) In response, the Unions contend that *Ventura* was not addressing exclusions from "compensation earnable" when it so held, but only inclusions. (Unions' Br. at p. 39, citing *Alameda*, supra, 19 Cal.App.5th at p. 109).

But *Ventura* did not distinguish between *inclusions* and *exclusions* from "compensation earnable." Rather, this Court stated: "Since we have no reason to think that the Legislature intended that the same specifically defined term take on a different meaning in computing the pension of a county employee, the construction of 'compensation earnable' should be consistent under CERL, the 1931 State Employee Retirement Act, and PERL, which is the successor to the 1931 act." (*Ventura, supra*, 16 Cal.4th at pp. 504-505.) As for the 1993 amendments to PERL, which further defined "compensation earnable," this Court stated that they did not change the definition, but rather clarified it. (*Id.* at p. 505.)

Not only must CERL and PERL be interpreted similarly on this issue, On-call Pay is akin to overtime, which according to *Ventura*, and admitted by the Unions, is not pensionable. The Unions' own arguments demonstrate as much. They argue that On-call Pay is pay for "being available to return to work when necessary." (Unions' Answer Br. at p. 39.) Thus, On-call Pay is pay for time spent "being available" which by definition is beyond the

"average number of days ordinarily worked by persons in the same grade or class of positions during the period . . . . " (Former Gov. Code § 31461.) Accordingly, it would be inconsistent to exclude from "compensation earnable" pay for overtime work yet include pay for being On-call.

Finally, the Unions admit that "at worst, pre AB 197 CERL was ambiguous as to this exclusion and therefore should be construed in employees' favor." (Unions' Answer Brief at p. 39.) This concession is fatal to the Unions' argument. As demonstrated in the District's opening brief, and *supra*, under this Court's decision in *REAOC*, Plaintiffs have the "heavy" burden of proving a vested right by "clear" and "unequivocal" evidence. Because the Unions admit that CERL was ambiguous on this issue, this admission ends the argument at the outset. As stated in *Parker v. Wakelin* (1st Cir. 1997) 123 F.3d 1, 9 (relied upon in *REAOC*, *supra,* 52 Cal.4th at 1188-1189), where the statutory language "remains at best ambiguous," the court "cannot find the legislature as a whole unmistakably intended to create contract rights." Similarly, the New Jersey Supreme Court recently concluded: "In this setting, any ambiguity spells failure for claims that the Legislature created a contractual right to COLAS. The intent to contract must be unmistakable." (*Berg v. Christie, supra,* 225 N.J. 245, 272.) The District agrees with the section of the brief filed by the Merced County Employees' Association which demonstrates that there was never a vested right to inclusion of On-call Pay in "compensation earnable." (See Merced Answer Br. at pp. 31-32 [definition was an "ambiguous morass"].)

2. *Ventura* Does Not Require Pension "Enhancements" To Be Pensionable.

AB 197, section 31461(b)(1), excludes from "compensation earnable" "[a]ny compensation determined by the board to have been paid to enhance a member's retirement benefit" and may include "in kind" benefits converted

to cash, "one-time" payments to a member, and payments made "solely due to termination" of employment but received by a member while employed.

The Court of Appeal erroneously held that section 31461(b)(1) was so broad that it could encompass virtually any type of pay item and held that it potentially violated vested rights. (*Alameda, supra*, 19 Cal.App.5th at p. 113.) Similarly, the Unions contend that, under *Ventura*, the pension "enhancements" prohibited by new section 31461(b)(1) were always pensionable because they were "cash remuneration that was not overtime" or "payments in lieu of in-kind benefits." (Unions' Answer Br. at p. 41.) But, like the Court of Appeal, the Unions misapprehend the scope of this section.

As demonstrated in the State's opening brief, the authority given to retirement boards in section 31461(b)(1) to ferret out pension "enhancements" is limited to determining whether payments to individual *members* were made for the purpose of pension spiking. (State's Opening Br. at pp. 28-30.) This section focuses on compensation "previously provided in kind to the *member*," one- time payments "made to a *member* but not to all similarly situated members in the *member*'s grade or class," payments made solely due to "the termination of the *member's* employment . . . ." (Gov. Code § 31461(b)(1)(A)-(C) [emphasis added].)

This intent is confirmed by the Legislature's requirement that there be due process before depriving an individual member of the benefit. Government Code section 31542 requires the retirement board to "establish a procedure for assessing and determining whether an element of compensation was paid to enhance a member's retirement benefit." (Gov. Code § 31542(a).) This procedure is followed by the opportunity for judicial review. (Gov. Code § 31542(b).) Confirming that the authority to eliminate "enhancements" was designed to apply to an individual member, and not employees as a group (who normally would be covered by collective bargaining agreements), this section carves out compensation received

"pursuant to a collective bargaining agreement that was subsequently-deferred or otherwise modified as a result of a negotiated amendment of that agreement." (Gov. Code § 31452(c).)

Contrary to the Unions' contentions, there was nothing in *Ventura* that authorized pension "enhancements." *Ventura* addressed benefits provided in a "memorandum of agreement" with a union, not extraordinary payments made to individuals. (*Ventura*, *supra*, 16 Cal.4th at p. 488 [1992 memorandum of agreement with plaintiff association].) *Ventura* did address "cash payments made in lieu of providing" in-kind advantages, and suggested that such payments are pensionable. (*Id.* at p. 497.) But nothing in that discussion indicates that those payments would have been pensionable had they been converted to cash specifically to enhance an individual employee's pension. Accordingly, *Ventura*'s holding does not encompass the payments excluded under subdivision (b)(1).

In its opening brief the District pointed out that section 31461(b)(1) was not completely new, but an extension of retirement board authority, already in existence under CERL, to exclude pension payments where the member caused his or her final compensation to be improperly increased or otherwise overstated at the time of retirement. (See Gov. Code § 31539(1).) The Unions argue that this section is significantly different because it focuses on the individual's manipulation of final compensation. But individuals cannot inflate final compensation without the participation of the employer, making such a distinction meaningless. In fact, the case in which CCCERA invoked this section involved approval of the alleged inflated compensation by the governing board of the employer. (See *Nowicki v. CCCERA* (N.D. Cal., June 27, 2017) 2017 WL 2775040, No. 17-cv-00629-SI [Order Granting Defendants' Motions to Dismiss Complaint and Granting Leave to Amend].)

In summary, section 31461(b)(1) is addressed to "enhancements" provided to individuals, *Ventura* did not address such enhancements, and the section simply confirms already existing authority under CERL to correct individual abuses under the system.

3. *Ventura* Does Not Require All Leave Cash-outs To Be Pensionable.

AB 197, section 31461(b)(2), states that "compensation earnable" does not include: "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."

The Court of Appeal found that CERL had never limited the amount of cashed out leave that could be included in compensation earnable and that, despite the enactment of the above section regarding leave cash outs, AB 197 made no change in that regard.

But as ruled correctly by the trial court, and as the District showed in its opening brief, (1) CERL had never permitted unlimited amounts of accumulated and cashed out leave to be included in final compensation and (2) AB 197 confirmed that cashed out leave, for pension purposes, was limited to amounts both "earned" and "payable" in the final compensation period – in other words what the employee normally would have been able to earn and receive during the employee's final year. (District Opening Br. at pp. 32-40.)

To counter this argument, the Unions contend that *Ventura* specifically found that payments in lieu of vacation and other leave were remuneration paid in cash that must be included as compensation earnable. (Unions' Answer Br. at p. 43.) They boldly argue that there is *no limit* on how much accumulated leave can be counted for pension purposes so long

as the employer permits it to be cashed out. (Unions' Answer Br. at p. 44-45 [even "letting an employee cash out all accrued leave at any point in the employee's career" would "still have been paid as cash and therefore [be] 'compensation'".]

But the Unions do not address the District's demonstration that *Ventura* never reached the issue here. (District Opening Br. at p. 34, n. 7.) Even the Court of Appeal recognized that: "Indeed, given the limited facts disclosed, it is not impossible that a *Ventura* employee could have accrued the maximum number of annual leave hours permitted to be converted into cash in the same final compensation period as the actual cash-out." (*Alameda, supra,* 19 Cal.App.5th at p. 99.)

Moreover, in making their contentions, the Unions confuse a one-time cash out of accrued leave with its inclusion in "compensation earnable." The first is a one-time payment of compensation to the employee, whereas the second boosts a pension, and thus pays a percentage of that cashed out vacation to an employee over and over for the employee's entire retirement, which can be 30 years or more. The Unions repeat the mistake made by the Court of Appeal, which also confused "compensation" under section 31460 with "compensation earnable" as defined by section 31461. (District Opening Br. at pp. 34-35.) "Compensation" may be amounts paid in cash, but "compensation earnable" focuses on an additional issue – the compensation earned during the final compensation period. They are not the same.

Ventura addressed disparities that resulted from additional pay for special skills or experience and accumulated leave, but *Ventura* never addressed the issue of timing. Accordingly, contrary to the contention of the Unions, *Ventura* never approved of the disparities that resulted from some employees being credited with large amounts of accumulated vacation or sick leave, moved into and cashed out in the final compensation period, thus

giving them a larger pension than similarly paid employees who did not bank their leave.

Finally, the Unions attack the legislative history presented by the State and District, which showed that the last sentence of section 31461 was enacted to prevent moving compensation into the "final year of employment" in an effort to "increase" final compensation. (District Opening Br. at pp. 36-37, citing SCT 127.) Like the Court of Appeal the Unions rely on statements in *Ventura* and *In re Retirement*, arguing that this sentence referred only to deductions to fund deferred compensation pans. (Unions' Br. at pp. 45-46.) *Ventura* and *In re Retirement* may have been discussing deferred compensation plans, but the larger issue present here – moving compensation from prior periods into the final compensation period – was not present in those cases and they therefore they did not address the legislative history cited by the State and District. (*See Ventura, supra,* 16 Cal.4th at 495 [finding that employer contributions to an employee's deferred compensation plan were not pensionable]; *In re Retirement* (2003) 110 Cal.App.4th 426, 475 [rejecting argument that reference to "deferred compensation" entitled employees to inclusion of terminal pay that was paid only upon retirement].) For that reason, neither case had reason to review the legislative history that shows the broader purpose of that section.

C. AB 197 Did Not Impair Vested Rights.

The Unions argue that AB 197's exclusions were not previously part of CERL and reduced pension benefits. They argue that the exclusions impaired those benefits because no offsetting advantage was required, and because the changes were not necessary to maintain the integrity or successful operation of the retirement systems in the three counties. (Unions' Answer Br. at p. 47.)

1. To The Extent There Was Any Change, the Legislature Was Acting In A Regulatory Capacity And Did Not Substantially Impair Any Rights.

As stated above, AB 197 clarified the law. But even if AB 197 did not simply clarify the law, any modifications to CERL did not constitute a substantial impairment of vested rights. The Legislature created CERL, but CERL governs only county retirement systems. The state and its employees are not members and the state's own fiscal interests are not at stake. Accordingly, when the state Legislature amends CERL, it acts in a regulatory capacity pursuant to its police power, and amendments to that regulated system do not constitute a substantial impairment of vested rights. (See District's Answering Brief On the Merits To Opening Brief filed By Alameda County Sheriff's Association at pp. 14-16.) Accordingly, the arguments made by the Unions and Alameda Sheriffs regarding "saving money is not a valid purpose justifying contract impairment" are irrelevant here. (Alameda Sheriffs' Br. at pp. 43-44, 47-52.)

There was no substantial impairment of vested rights for the additional reason that AB 197 operated only prospectively. It did not affect the pension of anyone who retired before its effective date. Accordingly, under a "deferred compensation" theory, properly applied, there was no substantial impairment. (See District's Answering Brief On The Merits To Brief Filed by Alameda County Sheriff's Association at pp. 16-19.)

2. There Was No Substantial Impairment Because AB 197 Preserved A "Substantial Or Reasonable" Pension.

The Unions argue that AB 197's changes to the definition of "compensation earnable" were not permissible because they did not offer a "comparable new advantage" for every disadvantage. (Unions' Answer Br. at pp. 31-34.) But as demonstrated supra that argument has been rejected rightfully by the Courts of Appeal as an inaccurate reading of this Court's

Contracts Clause jurisprudence. Here, the modifications made by AB 197 satisfy Contracts Clause requirements because they were "minimal' and more than preserved a "substantial or reasonable" pension. (See District's Answering Brief On The Merits To Opening Brief Filed By Alameda County Sheriff's Association at pp. 25-26.)

3. AB 197 Relates To Pension System Integrity And Successful Operation.

The Unions further argue that "there has been no showing that the exclusions are necessary to maintain the integrity of the retirement systems or for their successful operation." (Unions' Answer Br. at pp. 48-49.) To the contrary, the State's opening brief detailed the integrity issues presented by the three retirement systems' expansive interpretations of "compensation earnable." These interpretations were contrary to the policies of other CERL systems, created inequities among similarly situated employees, and destroyed confidence in the systems. (State's Opening Br. at pp. 11-12, 49-51; see also District Opening Br. at p. 57.)

Moreover, as demonstrated in the District's answering brief to the opening brief filed by the Deputy Sheriffs, in enacting AB 197, the Legislature was acting in a regulatory capacity. The State is not a member of CERL, and therefore has no financial interest here. Accordingly, this Court must grant substantial deference to the Legislature's determination that AB 197 was "reasonable and necessary" to the operation of the CERL systems. (District's Answering Brief to Opening Brief filed by Alameda County Deputy Sheriffs Assn. at pp. 28-29.)

4. The District Is Not Asking This Court To Overturn Its Pension Precedent.

The Unions contend that the State and Sanitary District are asking this Court to overturn its pension law precedent. (Unions' Answer Br. at pp. 49-53.) That is not true.

First, as shown above, as to whether a "comparable new advantage" is required, the Court of Appeal decisions in the cases of *Marin*, *Cal Fire*, *Alameda* and most recently *Hipsher* agree that this Court never erected a rigid requirement that prevented modification. Moreover, also shown above, such a rigid requirement would contradict this Court's determination that modifications are permitted so long as they leave a "reasonable" or "substantial" pension.

Second, there is nothing irregular about examination of the standards applicable to pension legislation. As this Court has previously observed: "The nature of the common law requires that each time a rule of law is applied, it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice." (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 394.) Accordingly, it is an essential part of this Court's role to review the standards applicable to changes in pension legislation.

Even the case law cited by the Unions acknowledges that this Court must continually provide guidance in connection with constitutional interpretation. (See *Golden Gateway Ctr. v. Golden Gateway Tenants Assn.* (2001) 26 Cal.4th 1013, 1022 ["In the hopes of clarifying *Robins* and providing some guidance as to the scope of the free speech rights guaranteed by the California Constitution, we now answer some of the questions left open by *Robins*."].)

D. The Retirement Boards Did Not Have the Authority To Create Vested Rights To Terminal Pay.

The Court of Appeal found that retirement boards do not have the authority to expand the pay items included within "compensation earnable." (*Alameda, supra,* 19 Cal.App.5th at pp. 95-96.) The Alameda Sheriffs and the Unions contend, however, that under footnote 6 of *Guelfi v. Marin County Employees' Retirement Assn.* (1983) 145 Cal.App.3d 297, 307, the

retirement boards in fact had such authority, and thus had the power to include terminal pay in compensation earnable.[4] (Unions' Answer Br. at pp. 53-57; Alameda Sheriffs Answer Br. at pp. 34-36.)

1. The Unions Reliance On *Guelfi* Is Misplaced.

Although the District disagrees with much of the appellate court's ruling in this case, on this issue the appellate court was correct, ruling that retirement boards have no such discretion.

As held by the Court of Appeal in this case, any reliance on *Guelfi* is misplaced. *Guelfi*'s footnote 6 is dicta; *Guelfi*'s holding was limited to upholding a board policy that *excluded* (not included) pay items from compensation earnable, and *Guelfi* itself was overruled by the California Supreme Court in *Ventura*. (*Ventura, supra*, 16 Cal.4th at p. 505.)

The reliance by the Unions and Alameda Sheriffs on other pre-*Ventura* statutes and case law is equally misplaced. The Unions argue that, in 1992, the Legislature explicitly adopted *Guelfi*'s discussion of retirement board discretionary authority when it repealed former Government Code § 31460.1. (Unions Answer Br. at p. 55.) But after *Ventura*, decided in 1997, any reference to *Guelfi* was out of date, and in any event, the legislative history to this repeal actually shows that the when the Legislature wanted to grant authority over "compensation earnable" it knew how to do so. When the Los Angeles Employees Retirement System construed section 31460.1 to include flexible benefits in pensionable compensation – which had the effect of increasing pensions – the Legislature amended the law by enacting section 31461.1 to permit the county to disallow it. (See *Howard Jarvis Taxpayers*

[4] Footnote 6 stated that "[n]othing in this opinion should be taken as barring either the inclusion of uniform allowance, education incentive pay and overtime in the calculation of benefits should the Board decide to do so." (*Guelfi, supra,* 145 Cal.App.3d at p. 307, n. 6.).

Association v. Board of Supervisors of Los Angeles County, (1996) 41 Cal.App.4th 1363, 1367.)

The Unions argue that county retirement systems must have authority over compensation earnable "in light of counties' express constitutional authority to provide for their employees' compensation" citing Cal Const., art. XI, sec. 1. (Unions Answer Br. at p. 55.) But this section pertains to county authority *as an employer* to control employee compensation and does not pertain to *county retirement systems*, independent entities that may have multiple employers as members, and that are subject to CERL. (See *Traub v. Bd. of Retirement* (1983) 34 Cal.3d 793, 798 [retirement board is independent agency under CERL, not agent of county].) The Alameda Sheriffs claim that retirement board constitutional authority under art. XVI, sec. 17, authorizes the boards to determine what is "compensation earnable" (Alameda Sheriffs Answer Br. at p. 36), but this overbroad assertion has been rejected. (See *City of Pleasanton v. Bd. of Admin.* (2012) 211 Cal.App.4th 522, 544 [board's fiduciary duty "does not authorize an order compelling [the board] to pay greater benefits" than the statute allows.]; *City of San Diego v. San Diego City Employees' Retirement System* (2010) 86 Cal.App.4th 69, 79-80 [board could not invalidate limits on "granting of retirement benefits" which "is a legislative action within the exclusive jurisdiction of the City."].)

The Unions and Alameda Sheriffs also contend that *Ventura* somehow preserved the dicta in *Guelfi*'s footnote 6. (Unions Answer Br. at p. 56; Alameda Sheriffs' Br. at pp. 36-37.) But *Ventura* described *Guelfi* not to endorse it, but to overrule it. (*Ventura*, supra, 16 Cal.4th at p. 505.)

Finally, the Unions attempt to argue that *In re Retirement Cases* and *Salus* "do not erode *Guelfi*'s finding of retirement board discretion." (Union Answer Br. at p. 57.) Because the question in those cases was whether "compensation earnable" *required* inclusion of terminal pay, the Unions argue that neither case contradicted *Guelfi*'s footnote 6 – that retirement

boards nevertheless had discretion to include terminal pay if they so decided. But the reasoning in these cases demonstrates that these decisions definitively interpreted CERL to preclude the inclusion in "compensation earnable" of terminal pay. (*In re Retirement Cases, supra,* 110 Cal.App.4th at p. 474; *Salus v. San Diego Employees Retirement Assn.* (2004) 117 Cal.App.4th 734, 740.)

2. Under CERL Only The Legislature Has The Authority To Determine What Constitutes Compensation Earnable.

General legal principles confirm that retirement boards have no authority to expand the definition of "compensation earnable." (District Opening Br. at pp. 29-30.) Accordingly, because the Legislature, and not a retirement board, determines pension benefits, unauthorized board policies do not create vested rights. "The contract clause does not protect expectations that are based upon contracts that are invalid, illegal, unenforceable, or which arise without the giving of consideration." (*Medina v. Bd. of Retirement* (2003) 112 Cal.App.4th 864, 871; see also *San Diego City Firefighters v. Bd. of Admin.* (2012) 206 Cal.App.4th 594, 609 [resolution granting retirement benefit was void because it conflicted with City charter requirement that pension benefits be enacted by ordinance].) Arguing that handbooks can create vested rights, the Alameda Sheriffs rely on two cases involving the Regents of the University of California, but in those cases, unlike here, the Regents had the authority to promise the benefits. (See *Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 815 [student fees]; *Requa v. Regents of University of California* (2012) 213 Cal.App.4th 213, 217 [retiree medical benefits].)

For these reasons, retirement boards do not have the authority to define what is "compensation earnable" under CERL. Accordingly, retirement board policies do not create vested rights.

E. Estoppel Does Not Apply Here.

1. Estoppel May Not Be Applied to Expand an Agency's Statutory Authority.

The Court of Appeal held, correctly, that CERL had never permitted the inclusion of terminal pay in pensionable compensation. (*Alameda, supra,* 19 Cal.App.5th at pp. 103, 125.) The court erred, however, in concluding that the implicit authority of retirement boards to settle litigation included the authority to override statutory requirements.

As a threshold matter, the CCCERA *Paulson* case settlement was not with active employees, but only with those already retired. And if there was any doubt about the settlement's effect here, the agreement specifically stated it was not to apply in any other litigation. (District Opening Br. at pp. 19, 47.)[5]

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[5] The Contra Costa County Employees' Association argues in its Answer Brief that the decision to extend the *Paulson* settlement to active employees was guided by *Irby v. Board of Retirement of the Contra Costa Employees' Retirement Assn.* (Sept. 25, 1995, A068135), an unpublished court of appeal decision in an unrelated matter which required the Board to grant equal retirement benefits to different groups of employees. But Board records and minutes demonstrate that the Board had adopted its erroneous policies even before entering into the *Paulson* settlement. (28 C.T. 8301, 8310; Schneider Decl., Exhs. 5, 6, 1997, 1998 CCCERA policies; 29 C.T. 8266, Schneider Decl., Exh. 14, 2010 Minutes: "The Board policy, on CCCERA's website, was implemented in 1997 and last revised in January 1998. There have been no changes to the policy since that date.")

Moreover, in 2009, fiduciary counsel for the Board advised the Board that the *Paulson* settlement was not binding for members who retired after September 30, 1997, and made no reference to *Irby*: "While the *Paulson* settlement bound the Retirement Board to this practice with respect to members who retired on or before September 30, 1997, it did not bind the Board with respect to members who have retired after that date. Thus, for members retiring after September 30, 1997 case law indicates that cash outs payable only at termination ought not be included in final compensation." (17 C.T. 4955, Jt. Stip., Exh. E [October 21, 2009 memorandum at 7].)

But even if this were not true, the Court of Appeal's striking conclusion contravened an unbroken line of cases holding that equitable estoppel may not be applied to alter statutory requirements or override the limits the Legislature has imposed on the authority of administrative agencies. (*Boren v. State Personnel Bd.* (1951) 37 Cal.2d 634, 643; *Martin v. Henderson* (1953) 40 Cal.2d 583, 589-590; *McGlynn v. State of California* (2018) 21 Cal.App.5th 548, 561-562, review granted June 27, 2018; *City of Pleasanton v. Bd. of Admin.* (2012) 211 Cal.App.4th 522, 542-543; *City of Oakland v. Oakland Police & Fire Retirement System* (2014) 224 Cal.App.4th 210, 233-234; *Medina v. Bd. of Retirement* (2003) 112 Cal.App.4th 864, 869-871; *Fleice v. Chualar Union Elementary School Dist.* (1988) 206 Cal.App.3d 886, 893.) Indeed, as this Court made clear in *Longshore v. County of Ventura* (1974) 25 Cal.3d 14, 28, "no court has expressly invoked principles of estoppel to contravene directly any statutory or constitutional limitations."

The Union asserts that each and every one of these cases is somehow factually distinguishable. But the Union's efforts fail. *Boren* was decided 67 years ago. The Union cannot point to a single appellate decision suggesting that the broad rule established in *Boren* has been narrowed in any manner, or in any factual context. To the contrary, as noted, this rule has been faithfully followed until the Court of Appeal decision in this case.

The Court of Appeal contravened that rule by concluding that Board's general administrative power included the power to settle cases. But the suggestion that the power to settle litigation includes the sweeping and unprecedented power to abrogate Legislative enactments finds no support in the law. Indeed, this Court has rejected the argument that statutory law may be abrogated by contract. (*San Diego County v. California Water & Tel. Co.* (1947) 30 Cal.2d 817.) And that principle applies to a contract taking the form of a settlement agreement. (See *Summit Media LLC v. City of Los*

Angeles (2012) 211 Cal.App.4th 921, 934-937; *League of Residential Neighborhood Advocates v. City of Los Angeles* (9th Cir. 2007) 498 F.3d 1052, 1055-56; see also *Tuthill v. City of San Buenaventura* (2014) 223 Cal. App. 4th 1081, 1088 ["Equity, however, may not be used to find liability where the result would nullify a contrary statute. '[A] court of equity will never lend its aid to accomplish by indirect means what the law or its clearly defined policy forbids to be done directly'"].)

The Union plainly failed to sustain its burden of establishing estoppel against the Board. Accordingly, the Court should reverse the Court of Appeal on this issue.

2. The Court of Appeal Erred in Concluding that the Unions Established the Evidentiary Elements Required For Equitable Estoppel To Apply Here.

As demonstrated in the District's opening brief, the Unions failed to prove the prerequisites for equitable estoppel, including that their members were "ignorant of the true state of the facts," particularly given that they were represented by attorneys with vast experience in pension law. (District's Opening Br. at pp. 51-52.) The Unions attempt to dismiss the importance of the employees being represented by highly experienced counsel. But as this Court as explained, the law "particularly' disfavors estoppels 'where the party attempting to raise the estoppel is represented by an attorney at law.'" (*Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1316, quoting *Kunstman v. Mirizzi* (1965) 234 Cal.App.2d 753, 757; *Castaneda v. Dept. of Corrections & Rehabilitation* (2013) 212 Cal. App. 4th 1051, 1066–67, [in rejecting estoppel claim, court noted that "[i]t is significant that [plaintiff] was represented by a team of lawyers with 74 years of combined legal experience"]; *Abers v. Rohrs* (2013) 217 Cal.App.4th 1199, 1210, ["It was the responsibility of the homeowners' counsel to determine the legal

requirements for serving their petition to vacate, and they could not reasonably rely on their opponents to apprise them when that effort fell short"].)

Contrary to the Union's assertions, the alleged mistake here is one of law, not fact: the legal import of *Ventura* and other cases addressing terminal pay. And critically, equitable estoppel cannot be based on a legal misrepresentation. This is because the party seeking estoppel is "chargeable with a knowledge of the law," and thus cannot "be heard to say that he was *deceived* by any contention of [the other party], as to the *law* governing" the issue in question. (*Steinhart, supra,* 47 Cal.4th at p. 1315, original italics.) Accordingly, on this ground alone, the Court of Appeal decision regarding estoppel should be overturned.

Moreover, the Unions' claim that the employees detrimentally relied on representations made by the Board are completely unsupported. As this Court has explained, "[t]he essence of an estoppel is that the party to be estopped has by false language or conduct 'led another to do that which he [or she] would not otherwise have done and as a result thereof that he [or she] has suffered injury.'" (*State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 5, 16; see also *Steinhart v. County of Los Angeles, supra,* 47 Cal.4th at p. 1315.)

The Unions, parroting language from the Court of Appeal decision, assert that "there is no doubt that the government's extraordinary conduct here encouraged reliance by thousands of public employees over many years, and that, as a result, employees in the three counties believed their pension benefits included terminal pay." (Unions' Answer Br. at p. 61.) But there is no factual support to back up such bold statements.

Neither the Court of Appeal nor the Union can point to any evidence showing that a single employee took any action that he or she would otherwise not have taken based on any representation by the Board or District

about whether terminal pay was pensionable. (See *Steinhart, supra,* 47 Cal. 4th at p. 1318 ["The representation, whether by word or act, to justify a prudent man in acting upon it, must be plain, not doubtful or matter of questionable inference. *Certainty* is essential to all estoppels. [Citation.]", quoting *Wheaton v. Insurance Co.* (1888) 76 Cal. 415, 429–430.) Again, this conclusion is an independent basis for reversing the Court of Appeal decision.

III. CONCLUSION

This Court should reverse the Court of Appeal. This Court should hold that AB 197 is legal in all respects and that equitable estoppel does not apply here.

Respectfully submitted,

Dated: August 22, 2018

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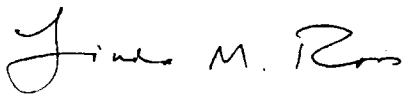

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CERTIFICATION OF WORD COUNT

(California Rules of Court, Rule 8.204(c)(1))

The foregoing brief contains 7574 words (including footnotes, but excluding the table of contents, table of authorities, certificate of service, and this certificate of word count), as counted by the Microsoft Word processing program used to generate the brief.

Respectfully submitted,

Dated: August 22, 2018

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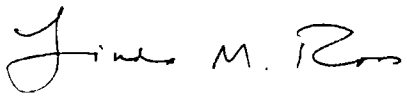

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I am not a party to the within action, am over 18 years of age. My business address is 350 Sansome Street, Suite 300, San Francisco, California 94104.

On August 22, 2018, I served the following document(s):

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I declare, under penalty of perjury that the foregoing is true and correct. Executed on August 22, 2018, in San Francisco, California.

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