No. S247095

In the Supreme Court of California

Alameda County Deputy Sheriff's Association, et al.,
Plaintiffs and Appellants

vs.

Alameda County Employees' Retirement Assn. and Bd. of the Alameda County Employees' Retirement Assn. et al.,
Defendants and Respondents;

State of California,
Intervener;

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

Affirming in Part and Reversing in Part a Writ of Mandate
Contra Costa County Superior Ct. Case No. MSN12-1820
(Coordinated with Alameda County Superior Ct. Case No. RG12658890 and Merced County Superior Ct. Case No. CV003073)
Honorable David B. Flinn (Ret.), Judge Presiding

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS LEAGUE OF CALIFORNIA CITIES

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no entities or persons that must be listed in this certificate under California Rules of Court, rule 8.488.

DATED: September 20, 2018

COLANTUONO, HIGHSMITH & WHATLEY, PC

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

To the Honorable Chief Justice Tani Cantil-Sakauye and Associate Justices of the California Supreme Court:

Pursuant to California Rules of Court, rule 8.520(f), the League of California Cities (the "League"), respectfully requests permission to file the attached amicus curiae brief. This application is timely made within 30 days of the filing of the last of the reply briefs on the merits.

Counsel for the League have reviewed the parties' briefs and believe additional briefing would assist the Court. The League represents the interests of California cities, nearly all of which provide pension benefits to their employees, and is therefore uniquely situated to present helpful analysis of this case.

The League writes to offer an alternative legal framework for decision, and to urge the Court to reverse the lower court and to affirm the State's power to regulate pension plans to prevent abuses. The League further writes in support of the long-standing principle that estoppel cannot be used to prevent a government from enforcing the law.

IDENTITY OF AMICUS CURIAE AND STATEMENT OF INTEREST

The League is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the

quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the state. The Committee monitors litigation of concern to municipalities and identifies cases of state or national significance. The Committee has identified this case as of such significance.

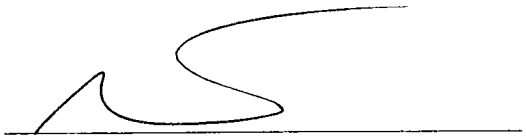
The League has a substantial interest in this case because the cities it represents are public employers, with a first-hand understanding of both the vital role that pensions play in ensuring an able and stable workforce and the current, precarious state of California's pension systems. Although few California cities provide pensions regulated under the County Employees Retirement Law of 1937 (CERL), the issues here are equally relevant to the Public Employees Retirement Law (PERL) governing most City pensions. California cities are also faced with increased pension costs that threaten vital services. A reexamination of the law governing the regulation and modification of pension benefits is necessary to confirm the State's regulatory power to curb abuses.

CONCLUSION

The League respectfully requests the Court to grant this application for leave to file an amicus curiae brief.

DATED: September 20, 2018

COLANTUONO, HIGHSMITH & WHATLEY, PC



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INTRODUCTION

"The practice known as 'pension spiking,' by which public employees use various stratagems and ploys to inflate their income and retirement benefits, has long drawn public ire and legislative chagrin." (*Marin Association of Public Employees v. Marin County Employees' Retirement Association* (2016) 2 Cal.App.5th 674, 679, review granted Nov. 22, 2016 (S237460) ("*Marin*").) The costs of pension spiking are borne almost entirely by public employers — and thus taxpayers — not employees. (CCCSD Op. Br. at p. 23; 18 C.T. 5086 at p. 3.)

In 2012, the Governor and Legislature responded to growing public outrage over pension excesses by enacting AB 340 and AB 197, the Public Employee Pension Reform Act of 2013 (together, "AB 197" or "PEPRA"), to curb several pension-spiking practices. Local pension boards, including the Contra Costa County Employees' Retirement Association, the Alameda County Employees' Retirement Association, and the Merced County Employees' Retirement Association (collectively, "Retirement Boards") began implementing AB 197. (16 CT 4730–4731; 1 CT 188;

41 CT 12132–12135.) Claiming violations of employees' vested rights, public employees and their unions (collectively, "Unions") challenged the Retirement Boards' actions as violating the Contracts Clauses of our state and federal Constitutions.

The League writes to encourage the Court to evaluate these Contract Clause claims under the three-factor test of *Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234 (*"Allied Structural Steel"*) for regulatory actions under the State's police power, rather than the "comparable advantage" test the Unions assert. It does so for two reasons:

First, the State is not a party to these local pension contracts, and enacted AB 197 pursuant to its police power to remedy abuses in local pension systems. State finances and contractual obligations are not in issue. Therefore, the Legislature's findings as to the necessity of regulation are entitled to some deference from courts.

Second, the comparable advantage test has no place here, as the regulation is intended to prevent tactics that unlawfully "spike" pensions beyond those to which employees are entitled for their

service. These regulations seek to preserve a substantial and reasonable pension benefit for the benefit of employees and their dependents — as may not be the case if the ample and growing unfunded liabilities of California's pension systems are not addressed by the modest, prudent changes contested here.

When *Allied Structural Steel* is applied here, it is apparent AB 197 does not violate the Contracts Clause. AB 197 serves the "significant and legitimate public purpose" of curbing pension abuse. It does not impair any reasonable contractual expectations but merely limits employees to gains they could lawfully obtain under their contracts. Amendments of Government Code section 31461 codify earlier case law defining "compensation earnable." If AB 197 did modify pension rights (which the League does not concede), any such modification was reasonable and justified by the remedial legislative purpose.

The League additionally writes to urge the Court to reject the lower court's application of estoppel. Estopping the Retirement Boards to enforce state law ignores longstanding, fundamental

principles of law, and puts a fiscal straitjacket on government. It cannot serve the common weal.

ARGUMENT

I. THIS COURT SHOULD APPLY *ALLIED STRUCTURAL STEEL* TO THE UNIONS' CONTRACT CLAUSE CLAIMS

This Court has adopted the U.S. Supreme Court's three-factor test for Contract Clause challenges to police power regulations. (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 827–829 [citing *Allied Structural Steel, Energy Reserves Group v. Kansas Power & Light* (1983) 459 U.S. 400 ("*Energy Reserves*"), and *Exxon Corp. v. Eagerton* (1983) 462 U.S. 17].) This three-factor test ("the *Allied Structural Steel* test") provides the analysis when, as here, the State acts in its regulatory capacity and is not party to the contracts in question.

As this Court recognized in *Calfarm Ins. Co v. Deukmejian, supra*, 48 Cal.3d 805, *Allied Structural Steel* is the United States Supreme Court's leading case interpreting the federal Contract Clause. (*Id.* at p. 827–828.) California courts have applied *Allied*

Structural Steel to Contract Clause claims in many contexts, including pensions. (E.g., *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 307 [applying *Allied Structural Steel* to modification of pension benefits]; *United Firefighters of Los Angeles City v. City of Los Angeles* (1989) 210 Cal.App.3d 1095, 1115 [same].) Even *Allen v. Board of Administration* (1983) 34 Cal.3d 114 ("*Allen II*"), on which the Unions so heavily rely, cites *Allied Structural Steel*. (*Id.* at p. 119.) Analysis of the case at bar should apply its three-factor test.

The Unions argue this Court must also apply a "comparable advantage" test whenever regulations modify public employee pension benefits. (ACDSA Op. Br. at pp. 10–11; ACDSA Ans. Br. at p. 27; Unions Ans. Br. at pp. 31–32.) The comparable advantage test was created to ensure public agencies that are party to a pension contract do not arbitrarily reduce pension benefits. (*Allen II, supra,* 45 Cal.2d at p. 131.) Here, however, the regulation addresses tactics that unlawfully "spike" an employee's public pension beyond that to which her service entitles her. There is no need to show a

comparable advantage when a pension modification prevents or remedies misconduct. (*Hipsher v. Los Angeles County Employees Retirement Association* (2018) 24 Cal.App.5th 740, 754, grant and hold review ordered Sep. 12, 2018 (S250244) ("*Hipsher*").) The regulations challenged here seek to preserve a substantial and reasonable pension for employees and their dependents and are not a "disadvantage" for which any comparable advantage need be provided.

II. AB 197 DOES NOT VIOLATE THE CONTRACTS CLAUSE UNDER *ALLIED STRUCTURAL STEEL*

Allied Structural Steel's test first asks whether the State has, in fact, substantially impaired a contractual relationship. (*Energy Reserves, supra,* 459 U.S. at p. 411.) The severity of the impairment and the level of judicial scrutiny rise in tandem. (*Ibid.*) Substantial impairment justifies relief; complete destruction of contractual expectations is not required. (*Ibid.*)

Conversely, regulation that merely restricts a party to gains it reasonably expected does not substantially impair a contract. (*Ibid.*)

For example, in *City of El Paso v. Simmons* (1965) 379 U.S. 497, the Texas legislature imposed a new statute of limitations on a 19th century statute that was being abused in ways unforeseen and unintended when it was adopted. The U.S. Supreme Court upheld the new statute, stating: "laws 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." (*Id.* at p. 515.) Thus, when a statute might confer unintended and unearned windfalls, amendment is permissible to realign it with the parties' reasonable expectations. (*Southern California Gas Co. v. City of Santa Ana* (9th Cir. 2003) 336 F.3d 885, 895.)

In determining the extent of impairment, a relevant factor is whether the complainant entered a regulated industry or market. The U.S. Supreme Court observed a century ago: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." (*Hudson Water Co. v. McCarter* (1908) 209 U.S. 349, 357.) This Court,

similarly, has held that contracts in highly regulated industries are subject to the "reasonable exercise of the state's police power." (*Calfarm Ins. Co. v. Deukmejian, supra,* 48 Cal.3d at p. 830.)

If a court finds a challenged regulation substantially impairs a contract, it next looks for "a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem." (*Energy Reserves, supra,* 459 U.S. at pp. 411–412.) A legitimate public purpose demonstrates the State is exercising its police power — not its contracting power. (*Ibid.*) The public purpose need not address an emergency or a temporary concern. (*U.S. Trust Co. of New York v. New Jersey* (1977) 431 U.S. 1, 22, fn. 19.)

Allied Structural Steel's third prong asks whether an adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is appropriate to the legislation's asserted purpose. (*Energy Reserves, supra,* 459 U.S. at pp. 412–413.) Unless the State is itself a contracting party, courts "properly defer to legislative judgment as to the necessity and

reasonableness of a particular measure." (*Ibid.*) The rationale for this rule is apparent – judicial oversight of State economic legislation is more necessary when the State is self-interested and less so when it acts as a disinterested regulator.

A. THE STATE IMPAIRS NO CONTRACTUAL RELATIONSHIP HERE

i. THE LEGISLATURE NEVER CLEARLY AND UNEQUIVOCALLY EXPRESSED INTENT TO CREATE CONTRACTUAL RIGHTS IN COUNTY EMPLOYEES

Intent to create private rights by legislation must be "clearly and unequivocally expressed." (*Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1186–1197 ("*REAOC*"), quoting *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.* (1985) 470 U.S. 451, 466.) This is the "unmistakability" doctrine. (*United States v. Winstar* (1996) 518 U.S. 839, 860.) A claimant who contends calculation of his retirement benefit violates California's contract clause must "'make out a clear

case, free from all reasonable ambiguity,' a constitutional violation occurred. [Citation.]" (*Hipsher, supra,* 24 Cal.App.5th at p. 751.)

> The judicial determination whether a particular resolution was intended to create private contractual or vested rights or merely to declare a policy to be pursued until the legislative body shall ordain otherwise requires sensitivity to "the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the [government]. [Citation.] 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 p. 1185.)

> 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.

(*Id.* at p. 1186.)

The Legislature never clearly and unequivocally endorsed the spiking practices at issue here — through CERL or otherwise. Government Code section 31461's definition of "compensation earnable" is too general to reflect clear and unequivocal intent to permanently allow these spiking practices. The many disputes between employees and retirement boards over CERL's definition of "compensation earnable" demonstrate this section was open to interpretation before the Legislature adopted PEPRA in 2013. (E.g., *Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4th 483 ("*Ventura*") [interpreting "compensation earnable" in Gov. Code, § 31461]; *Salus v. San Diego County Employees Retirement Assn.* (2004) 117 Cal.App.4th 734 ("*Salus*"); *In re Ret. Cases. Eight Coordinated Cases* (2003) 110 Cal.App.4th 426 ("*Ret. Cases*").) When statutory language is ambiguous, courts across the nation have refused to find the unmistakable intent necessary to create a

constitutionally protected contract. (E.g. *Parker v. Wakelin* (1st Cir. 1997) 123 F.3d 1, 9 [cited by *REAOC, supra*, 52 Cal.4th at 1188–1189]; *Berg v. Christie* (N.J. 2016) 225 N.J. 245, 272 ["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."].) No clear language in CERL allows the spiking practices contested here.

Even if the Retirement Boards did generally accept these spiking practices, *Salus* and *Ret. Cases* establish they were unlawful before AB 197. *Ret. Cases* held termination pay received upon retirement was not "final compensation" for purposes of pension calculations under Government Code section 31461. (110 Cal.App.4th at p. 476.) *Salus* held post-termination payments for accrued leave were not "final compensation" under that section, either. (117 Cal.App.4th at p. 740.) And, despite the Unions' reliance on it, *Ventura* never found the pay items challenged here to be "compensation earnable." As the Court of Appeal noted here, *Ventura* does not analyze whether on-call pay is pensionable.

(*Alameda County Deputy Sheriff's Assn. v. Alameda County Employees' Retirement Assn.* (2018) 19 Cal.App.5th 61, 108, review granted Mar. 28, 2018 (S274095).) Nothing in *Ventura* addresses pension enhancement payments to individuals, only benefits provided under a collective bargaining agreement. (*Ventura, supra,* 16 Cal.4th at p. 488.) Finally, *Ventura* does not address the timing of leave cash-outs or how many hours of leave-cash-out final, pensionable compensation may include — only whether such cash-outs are pensionable "compensation" under CERL at all. (*Id.* at pp. 497–498.)

AB 197 is the latest in a long line of statutes curbing pension abuses. (E.g., *Prentice v. Bd. of Admin.* (2007) 157 Cal.App.4th 983, 990, fn. 4 [requirement that pensionable payments be set forth in "publicly available pay schedules" "was a matter of clarification"]; *Hudson v. Bd. of Admin.* (1997) 59 Cal.App.4th 1310, 1322 [legislation excluding settlement compensation on retirement from pension calculus]; *Pomona Police Officers' Assn. v. City of Pomona* (1997) 58 Cal.App.4th 578, 587–588 & fn. 5 [1994 amendments generally prohibited conversion of in-kind benefits to cash because "the

retirement conversion option is simply an attempt to convert excluded compensation into included compensation for retirement purposes at no substantial cost" to the employer but at great expense to PERS].)

AB 197 defined "compensation earnable" consistently with earlier cases to curb pension-spiking. Legislative action to prohibit unanticipated abuses of a pension system is not a change in the law under the Contracts Clause. (*Hudson v. Bd. of Admin.*, 59 Cal.App.4th at p. 1322 ["Our consideration of the surrounding circumstances can indicate that the Legislature made material changes in statutory language in an effort only to clarify a statute's true meaning" (citations omitted)].)

ii. ABSENT STATUTORY AUTHORIZATION, THE RETIREMENT BOARDS CANNOT CREATE VESTED RIGHTS

The Legislature, not the Retirement Boards, determines final, pensionable compensation. (Gov. Code, § 31461.) CERL governs the inclusion of pay items in pensionable compensation. (*Ret. Cases, supra*, 110 Cal.App.4th at p. 454.) Retirement Boards have no

authority to substitute local definitions of "compensation earnable" for CERL's definition. (*City of Pleasanton v. Bd. of Admin.* (2012) 211 Cal.App.4th 522, 544 [board's fiduciary duty "does not authorize an order compelling [it] to pay greater benefits" than 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."].) Because, as *Salus* and *Ret. Cases* concluded, CERL already prohibited the spiking practices at issue here, the Retirement Boards' policies allowing those practices cannot create vested rights.

An employee is contractually entitled to a substantial and reasonable pension, not to the inclusion of any particular pay item in the pension calculation. (*Marin, supra,* 2 Cal.App.5th at p. 680.) "The contract clause does not protect expectations that are based on 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.) Thus, a retirement board's

mistaken classification of an employee as a safety officer was the "equivalent of attempting to form an unauthorized contract" and could not be protected by the contract clause. (*Id.* at pp. 871–872.) And, this Court explained in *REAOC*, "the law does not recognize implied contract terms that are at variance with the terms of the contract as expressly agreed or as prescribed by statute." (52 Cal.4th at p. 1181.)

The Retirement Boards continued to include termination pay and leave cash-outs in final compensation calculations under settlement agreements even after *Salus* and *Ret. Cases* found those items not pensionable. The Unions therefore cannot argue a vested right to such treatment to the extent that treatment is "prescribed by statute." (*REAOC, supra*, 52 Cal.4th at p. 1181.)

iii. COUNTY PENSIONS ARE HIGHLY REGULATED AND SUBJECT TO REASONABLE LEGISLATIVE MODIFICATION

County pensions are highly regulated and, therefore, employees could not reasonably expect no future regulations would affect their pensions. In highly regulated fields, reasonable

contractual expectations include the potential for reasonable regulatory change. (*Calfarm Ins. Co. v. Deukmejian*, *supra*, 48 Cal.3d at pp. 830–831.) The California Constitution authorizes the Legislature to determine the authority of counties which, unlike cities, are subdivisions of the State. (Cal. Const., art. XI, §§ l, subds. (a)–(b); Cal. Muni. Law Handbook (Cont.Ed.Bar 2018) §§ 1.2, 1.3.)

CERL is a comprehensive regulatory scheme of 18 articles, spanning Government Code sections 31450 to 31899.9, and covering 363 pages in West's Annotated Codes. County pensions are expressly subject to CERL. The Unions cannot exclude such pensions from the State's regulatory power through a settlement agreement with the Retirement Boards to which the State was not party. (*Hudson Water Co. v. McCarter* (1908) 209 U.S. 349, 357.)

The Legislature has amended CERL repeatedly over the years, defeating any reasonable expectation CERL is static. For example, the Legislature redefined "compensation earnable" in 1937 and 1947. (*Ventura*, *supra*, 16 Cal.4th at pp. 502–503.) In 1998, the Legislature adopted Government Code section 31461.5 to clarify that "salary

bonuses and any other compensation payment" are not pensionable. (Stats. 1998, ch. 129, § 1.) In 2000, the Legislature adopted Government Code section 31461.6 to clarify the extent to which overtime pay is pensionable. (Stats. 2000, ch. 966, § 3.)

In adopting AB 197, the Legislature acted as a regulator to address abuses. It regulated the conduct of County retirement boards and County employees, not the State's own contracts and employees. Such a law, which imposes generally applicable rules of conduct to advance a broad social interest, raises limited concern under the Contracts Clause. (*United States Trust Co. v. New Jersey* (1971) 431 U.S. 1, 22–24; *Energy Reserves, supra,* 459 U.S. at p. 412, n. 13; *Exxon Corp. v. Eagerton, supra,* 462 U.S. at p. 190.) Such legislation is "sharply distinguishable" from measures which only reduce a state's own contractual obligations. (*Exxon Corp. v. Eagerton, supra,* 462 U.S. at p. 192.)

AB 197 limits pensions under CERL to "those gains reasonably to be expected from the contract." (*City of El Paso v. Simmons, supra,* 379 U.S. at p. 515.) It did not change the pension

status of specific pay items; rather, it codified cases concluding those items are not pensionable. (Gov. Code, § 31461, subd. (c).) There can be no reasonable expectation of entitlement to a pension-spiking scheme that improperly increases a pension beyond that an employee earned by service. The Contracts Clause does not protect unlawful windfalls. (*Southern California Gas Co. v. City of Santa Ana, supra,* 336 F.3d at p. 895.)

iv. ANY CONTRACTUAL RIGHT HERE IS SUBJECT TO CERL AND THEREFORE CERL AMENDMENTS CANNOT IMPAIR IT

The United States Supreme Court has recognized that contracts made in highly regulated industries often reflect extensive regulation by providing that their terms are subject to present and future law. (*Energy Reserves, supra,* 459 U.S. at p. 416.) The Supreme Court found the deliberate incorporation of a statutory scheme highly relevant to determination whether parties' reasonable contractual expectations were impaired. (*Ibid.*)

Similarly, California courts have repeatedly held that, when a contract states it is subject to an identified statute, statutory

amendments that modify the parties' obligations do not violate the Contract Clause. For example, *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 556 ("*Hermosa Beach*") held an initiative to ban oil drilling did not violate the Contract Clause as to an oil and gas lease agreement between the city and a developer because the agreement was expressly subject to the city's ordinances. (*Id.*) Similarly, *Interstate Marina Development Co. v. County of Los Angeles* (1984) 155 Cal.App.3d 435, 447–448 concluded a rent control ordinance did not violate the Contract Clause as to apartment buildings on land the county had leased to landlords because the lease was expressly subject to all county ordinances.

Here, all of the relevant agreements, policies, and handbooks regarding employee pension benefits provide that CERL governs the calculation of pensions. (State Reply Br. at p. 18, citing 23 CT 6769–6770 [definitions of "compensation earnable" and "final compensation" in the ACERA settlement agreement required to "be interpreted consistently with CERL"]; 24 CT 7094 ["If conflict arises between this handbook and the CERL, the decision will be based on

the CERL ... and not on information contained in this handbook"]; 24 CT 7099 [ACERA administers "the pension plan in accordance with the CERL"].) These are the very documents the Unions cite to argue employees have a vested, contractual right to inclusion of the disputed items in pensionable compensation. (Unions Ans. Br. at p. 18, citing 23 CT 6770.) CERL's definitions of "compensation earnable" and "final compensation" are inherent terms of any vested right that may arise. As such, any amendment to CERL is part and parcel of the contract itself, and cannot impair it. (*Hermosa Beach, supra*, 86 Cal.App.4th at p. 558.)

B. AB 197 SERVES A LEGITIMATE PURPOSE TO CURB PENSION SPIKING

AB 197 is the Legislature's response to public outrage over pension spiking. (State Op. Br. at p. 12.) Employees were using terminal pay, leave cash-outs, and on-call pay to increase pensionable compensation by tens of thousands of dollars. (State Op. Br. at p. 12.) In 2011, the Little Hoover Commission advised the Governor and Legislature that pension-spiking practices were

"widespread throughout local government," generating "public outrage that cannot continue to be ignored." (*Marin, supra,* 2 Cal.App.5th at p. 682, quoting Little Hoover Com., Public Pensions for Retirement Security (Feb. 2011), at pp. 36, vi.) It urged the State to "exercise its authority — and establish the legal authority — to reset overly generous and unsustainable pension formulas for both current and future workers." (*Id.* at pp. 681–682, quoting Little Hoover Com., *supra,* at p. 53.)

Of the amendments to Government Code section 31461, *Marin* stated: "[t]here is no dispute that the purpose of this change was to curtail pension spiking." According to AB 340's author, California's pension systems were "tainted" by employees who had "taken advantage of the system," in part due to CERL's "very broad and general definition of 'compensation earnable.'" (*Marin, supra,* 2 Cal.App.5th at p. 682, fn. 2.) PEPRA was intended to "address these abusive practices" by "eliminat[ing]" the "ability for employees to manipulate their final compensation calculations." (*Ibid.*)

AB 197's legislative history similarly explains the intent of Government Code section 31461, subdivision (b) to "[rein] in pension spiking by current members of the system to the extent allowable by court cases that have governed compensation earnable in that system since 2003." (*Ibid.*; Supplemental Clerk's Transcript 114–116.) The statute states "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 Assn.* (2004) 117 Cal.App.4th 734 and *In re Retirement Cases* (2003) 110 Cal.App.4th 426." (Gov. Code, § 31461, subd. (c).)

Government Code section 31461, subdivision (b)'s exclusions were enacted to curb pension-spiking schemes the Little Hoover Commission criticized and *Salus* and *Ret. Cases* found unlawful. The Legislature adopted subdivision (b)(1) of that section to target use of irregular, ad hoc payments to spike pensions. (State Op. Br. at p. 30.) Basing a pension on one-time payments rather than compensation for ongoing service contradicts the fundamental theory of a pension system. (*MacIntyre v. Retirement Board of City and County of San*

Francisco (1941) 42 Cal.App.2d 734, 736.) It also threatens pension-system solvency by disconnecting payouts from funding.

Government Code section 31461, subdivision (b)(2) ensures employees cannot inflate pensions by cashing out more leave than accrued in the final pay period. This provision was enacted to address, inter alia, "straddling." (State Op. Br. at p. 33.) Straddling is a pension-spiking technique by which employees designate a final compensation period that includes two fiscal years, and cash out unused leave in each of the years. (State Op. Br. at p. 13.) This allows an employee to claim twice the amount of leave cash-out in their final pay period. (State Op. Br. at p. 13.)

Subdivision (b)(3) bars an employee from inflating final compensation by volunteering for "standby" shifts in her final year of work. (State Op. Br. at p. 12.) As with the long-standing bar on including overtime pay in final compensation, standby pay has never been pensionable because it is not pay for regularly scheduled working hours. (*Shelden v. Marin Cty. Employees Ret. Assn.* (2010) 189

Cal.App.4th 458, 463–464 [overtime not pensionable because outside normally scheduled working hours].)

C. EVEN IF AB 197 MODIFIED CONTRACTUAL RIGHTS, ITS MODIFICATIONS WERE JUSTIFIED BY THE LEGISLATURE'S REMEDIAL PURPOSE

Courts should defer to the Legislature's findings when it regulates economic activity to which the State is not itself a party. In such cases, no self-interest justifies abandoning the deference courts generally afford legislation. (*Energy Reserves, supra,* 459 U.S. at pp. 412–413.)

The modifications challenged here are reasonable because they are prospective, even though the pay items they affect were never pensionable. No retiree lost benefits under AB 197. (*Marin, supra,* 2 Cal.App.5th at p. 708 ["The Legislature's change to the definition of compensation earnable was expressly made purely prospective by [AB 197]"].) Employees who had not yet retired in 2013 had not yet earned any of the challenged payments. (*United States v. Larionoff* (1977) 431 U.S. 864, 879 [prospective pay reductions

do not violate the Contract Clause, "even if that reduction deprived members of benefits they had expected to be able to earn"].)

Moreover, there is no need for a corresponding benefit to employees if a pension modification curbs abuse. As *Hipsher, supra,* 24 Cal.App.5th 740 held, it would be "anomalous" to suggest the Legislature must provide a comparable advantage when regulating misconduct. (*Id.* at p. 754.) *Hipsher* addressed Government Code section 7522.72, a statute responding to scandal in the City of Bell by imposing a partial pension forfeiture on one convicted of a work-related felony. That court found such forfeitures "material to the successful operation of public pension funds." (*Id.* at p. 756.) If a pension can be forfeited for misconduct, the Legislature may also clarify "compensation earnable," a far less severe modification, without comparable advantage. The greater includes the lesser, as the theory is unchanged.

III. THE COURT OF APPEAL ERRED TO ESTOP THE RETIREMENT BOARDS FROM APPLYING AB 197 TO LEGACY EMPLOYEES

"[E]stoppel will not be applied against the government if to do so would effectively nullify 'a strong rule of policy, adopted for the benefit of the public.'" (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493 ("*Mansell*").) Courts may estop a public agency "only in those special cases where the interests of justice clearly require it." (*Id.*, at p. 495, fn. 30.) Moreover, as to public agencies, a court must "go beyond the ordinary principles of estoppel" and carefully examine the result to follow to ensure no harm to the public interest. (*Poway Royal Mobilehome Owners Assn. v. City of Poway* (2007) 149 Cal.App.4th 1460, 1471.) When avoiding injustice and public policy conflict, estoppel applies only if "the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." (*City of South San Francisco v. Cypress Lawn Cemetery Assn.* (1992) 11 Cal.App.4th 916, 923 ("*So. San Francisco*").)

Courts have repeatedly refused to apply estoppel to allow employees to avoid statutory pension requirements. Even while acknowledging the unique importance of pension rights, this Court concluded "no court has expressly invoked principles of estoppel to contravene directly any statutory or constitutional limitations." (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 28.) *Medina v. Board of Retirement, supra,* 112 Cal.App.4th at p. 869, refused to estop a retirement board from ceasing to erroneously classify plaintiffs as safety officers. Similarly, *Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567, 584, rejected estoppel because:

> Public interest and policy would be adversely affected if petitioners, despite the discovery of the mistaken classification, were required to be continued to be carried as local safety members when all other contract members of the retirement system throughout the state performing like duties and functions are classified as miscellaneous members.

The Retirement Boards lacked authority to calculate retirement benefits as the settlement agreements provide. Estoppel cannot compel an unlawful act or preserve an ultra vires contract. (*City of Santa Cruz v. Pacific Gas & Elec. Co.* (2000) 82 Cal.App.4th 1167, 1177.) "[N]either the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public." (*Smith v. Governing Bd. of Elk Grove Unified School Dist.* (2004) 120 Cal.App.4th 563, 568.)

The practical effect of an estoppel here is to rewrite Government Code section 31461 to allow some to continue pension spiking that statute and rational pension policy forbid to others. Allowing any employees to continue these practices would nullify the State's policy against pension abuse — a "strong rule of policy, adopted for the benefit of the public." (*Mansell, supra,* 3 Cal.3d 462, 493.) Such an estoppel harms the public's interest in a fair and equitable pension system. (*Poway Royal Mobilehome Owners Assn. v. City of Poway, supra,* 149 Cal.App.4th at p. 1471.) Free use of estoppel

in this context could undermine pensions entirely -- an ironic application of a rule intended to preserve parties' expectations.

No injustice justifies estoppel here. Application of AB 197 merely prevents unlawful pension spiking. Absent injustice, estoppel does not preclude enforcement of statutes. (*So. San Francisco, supra,* 11 Cal.App.4th at p. 923.)

CONCLUSION

The League respectfully asks this Court to reverse. When the State acts in its regulatory capacity, and not as a contracting party, it is entitled to such judicial deference as generally applies to legislation. The appropriate rule of decision here is *Allied Structural Steel's* three-factor test for Contracts Clause claims when the State has no interest in the contested contracts. Application of the "comparable advantage" test the Unions assert does not aid analysis here.

AB 197 was intended to serve the "significant and legitimate public purpose" of curbing pension abuse. It does not impair reasonable contractual expectations but merely limits employees to

gains they could lawfully obtain by contract. The amendments of Government Code section 31461 codify earlier case law. If AB 197 did modify pension rights (which the League does not concede), any such modification was reasonable and justified by the Legislature's remedial purpose.

The League also asks this Court to affirm the long-standing principle that estoppel cannot prevent a government from enforcing the law. Estoppel here would harm the public interest in a fair, equitable and sustainable pension system.

For all these reasons, the League urges this Court to reverse the Court of Appeal and to affirm the trial court's ruling denying the writs for which the Unions prayed.

DATED: September 20, 2018

COLANTUONO, HIGHSMITH & WHATLEY, PC

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520(b) and 8.204(c), the foregoing Brief of Amicus Curiae contains 5,116 words, including footnotes, but excluding the caption page, tables, Certificate of Interested Entities or Persons, the Application for Leave to File, and this Certificate. This is fewer than the 14,000-word limit set by rules 8.520(b) and 8.204(c). In preparing this certificate, I relied on the word count generated by Word version 14, included in Microsoft Office Professional Plus 2010.

DATED: September 20, 2018

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PROOF OF SERVICE

Alameda County Deputy Sheriff's Assn., et al. v.
Alameda County Employees' Retirement Assn., et al.
California Supreme Court Case No. S247095
First Appellate District, Division Four, Case No. A141913
Contra Costa County Superior Court Case No. MSN12-1820
Coord. with Alameda County Superior Court Case RG12658890 and
Merced County Superior Court Case No. CV003073

I, Ashley A. Lloyd, declare:

I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 420 Sierra College Drive, Suite 140, Grass Valley, California 95945-5091. My email address is: ALloyd@chwlaw.us. On September 21, 2018, I served the document(s) described as **APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS LEAGUE OF CALIFORNIA CITIES** on the interested parties in this action addressed as follows:

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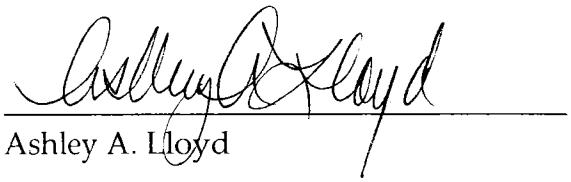
I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 21, 2018, at Grass Valley, California.



Ashley A. Lloyd

SERVICE LIST

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