No. S247095

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ALAMEDA COUNTY DEPUTY SHERIFF'S 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

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1021, *et al.*,
Interveners

BUILDING TRADES COUNCIL OF ALAMEDA COUNTY, *et al.*
Interveners and Appellants

On Review From The Court Of Appeal For the First Appellate District, Division One, 1st Civil No. A141913

After An Appeal From the Superior Court For The State of California, County of Contra Costa, Case Number MSN12-1870, Hon. David B. Flinn

APPLICATION TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS/PETITIONERS ALAMEDA COUNTY DEPUTY SHERIFF'S ASSOCIATION, *ET AL.* ON BEHALF OF CAL FIRE, LOCAL 2881, *ET AL.*

Filed Concurrently with **AMICUS CURIAE BRIEF OF CAL FIRE, LOCAL 2881, *ET AL.***

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APPLICATION TO FILE AMICI CURIAE BRIEF

TO THE HONORABLE CHIEF JUSTICE TANI G. CANTIL-SAKAUYE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Rules of Court, Rule 8.520(f), the below amici curiae respectfully ask for leave to file the attached amicus brief in support of Plaintiffs/Petitioners Alameda County Deputy Sheriffs' Association, *et al.*

AMICI CURIAE

Amici are nineteen labor unions and organizations. Amici labor unions represent more than 100,000 public employees and retirees. Most serve as their members' exclusive bargaining representative. The individuals represented by these organizations rely on strong protection of pension rights, which are threatened by the outcome of this lawsuit.

CAL FIRE, Local 2881 is the exclusive bargaining representative for approximately 6,000 fire-fighting personnel employed by the State of California and the California Department of Forestry and Fire Protection. It represents these public employees in their negotiations with their employer for wages, working conditions, and post-employment benefits. CAL FIRE, Local 2881 is a party in *CAL FIRE Local 2881 et al. v. CalPERS et al.* [Case No. S239958], which is fully briefed and pending before this Court and which may be impacted by the outcome in this case.

The California Correctional Peace Officers Association ("CCPOA") is the exclusive bargaining representative for approximately 28,000 correctional peace officers employed by the State of California and its Department of Corrections and Rehabilitations. CCPOA represents its members on all matters relating to wages, hours, and other terms and conditions of their employment.

The Peace Officers Research Association of California ("PORAC") is a professional federation of local, state, and federal law enforcement associations. It represents over 65,000 public safety members in over 900 associations, predominately in the State of California. Most of PORAC's member associations are exclusive bargaining representatives.

The California Statewide Law Enforcement Association is the exclusive bargaining representative for approximately 7,000 state-employed peace officers (including Special Agents of the Department of Justice, Park Rangers, and Investigators of the Departments of Motor Vehicles and Alcohol and Beverage Control) and non-sworn law enforcement related classifications (including Criminalists, Non-Sworn Investigators, and Communications Operators). It similarly represents its members on all matters relating to wages, hours, and other terms and conditions of their employment.

The San Francisco Police Officers' Association ("SFPOA") is the exclusive bargaining representative for approximately 2,200 sworn peace

officers employed by the City and County of San Francisco. It negotiates on their behalf with respect to wages, hours, working conditions, and post-employment benefits.

The San Jose Police Officers' Association ("SJPOA") is the exclusive bargaining representative for approximately 1,100 sworn peace officers employed by the City of San Jose. It negotiates on their behalf with respect to wages, hours, working conditions, and post-employment benefits.

The Fresno Deputy Sheriffs' Association is the exclusive bargaining representative for approximately 500 deputy sheriffs and related law enforcement classifications including Dispatchers, Deputy Coroners, and Community Service Officers employed by the County of Fresno. It represents those members on all matters relating to wages, hours, and other terms and conditions of their employment, including pensions.

The Deputy Sheriffs' Association of Santa Clara County is the exclusive bargaining representative for approximately 500 Santa Clara County Deputy Sheriffs in their labor relations with the County of Santa Clara. It represents its members on all matters relating to wages, hours, and other terms and conditions of their employment.

The Marin Professional Firefighters, International Association of Fire Fighters, Local 1775 is the exclusive bargaining representative for approximately 400 firefighters employed by 11 local and county

governments fire departments and districts. It represents these firefighters on all matters relating to wages, hours, and other terms and conditions of their employment.

The Association of California State Supervisors is a labor organization representing approximately 8,000 state-employed Managers, Supervisors, and Confidential employees across the State. The Association educates and represents its members in disputes and in the enforcement of its members' workplace rights.

The San Francisco Municipal Executives' Association is the exclusive bargaining representative for approximately 1,000 managers employed throughout the government of the City and County of San Francisco, and represents its members on all matters relating to wages, hours, and other terms and conditions of their employment.

The San Francisco Deputy Probation Officers' Association is the exclusive bargaining representative for approximately 220 probation officers in the San Francisco Adult and Juvenile Probation Departments, and represents its members on all matters relating to wages, hours, and other terms and conditions of their employment.

The Sunnyvale Public Safety Officers' Association is the exclusive bargaining representative for approximately 200 public safety officers in the Department of Public Safety for the City of Sunnyvale. It represents its

members on all matters relating to wages, hours, and other terms and conditions of their employment.

The Superior Court Professional Employees' Association of the County of Santa Clara is the exclusive bargaining representative for approximately 350 employees of the Superior Court of California, County of Santa Clara. It represents its members on all matters relating to wages, hours, and other terms and conditions of their employment.

The Sacramento County Professional Accountants Association is the exclusive bargaining representative for all nonsupervisory, professional accountants employed by the County of Sacramento. It represents its members on all matters relating to wages, hours, and other terms and conditions of their employment.

The City of Fremont Employees' Association is the exclusive bargaining representative for approximately 200 public servants employed by various departments in their labor relations with the City of Fremont. It represents its members on all matters relating to wages, hours, and other terms and conditions of their employment.

The Redwood City Management Employees' Association is the exclusive bargaining representative for all managers employed throughout the government of the City of Redwood City. It represents its members on all matters relating to wages, hours, and other terms and conditions of their employment.

The Burlingame Police Officers' Association is the exclusive bargaining representative for all peace officers up to the rank of sergeant employed by the Burlingame Police Department. It represents its members on all matters relating to wages, hours, and other terms and conditions of their employment.

The California State Retirees is the largest association representing former employees of the state government, with over 36,000 members. It coordinates and represents its members' collective interests on issues affecting retirees' health benefits and pensions.

INTEREST OF AMICI CURIAE

Amici are all either exclusive bargaining representatives, labor unions, associations of bargaining representatives, or associations representing the interests of public sector retirees. They were formed and operate for the benefit of their members, and – by maintaining and improving the level of professionalism in the public workplace – for the benefit of society at large.

Their members have the right, under this Court's precedent, to earn vested rights in the terms of their pensions. These rights have existed for decades. Amici's members have relied on these rights when deciding to pass up more lucrative private sector employment to remain in public service and when their representatives made trade-offs during negotiations between pension offers and salary offers.

The decision on appeal has uprooted these reliance interests, and amici's brief argues that the reasoning below should be overturned because it misstates and misapplies this Court's past pension law decisions.

No party other than amici and counsel for amici authored the proposed brief in whole or in part, or made a monetary contribution intended to fund the preparation and submission of the proposed brief.

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AMICUS CURIAE BRIEF

I.

INTRODUCTION

For the best part of six decades, this Court has interpreted the Contracts Clause in the California Constitution to create vested contract rights in the pension benefits promised to public employees at the time they begin public service. Accordingly, once promised, changes to pension benefits are strictly limited and any change to promised pension benefits that results in a detriment to the employee must generally be offset with "comparable advantages." This rule is known as the California Rule. It has been widely understood and accepted, and followed in multiple other states, and it has been relied on for decades by pension systems, public employers and the employees who base life-altering decisions on their anticipated pension.

Only recently, in a series of decisions emanating from the First District Court of Appeal, of which this matter is the third, has a new theory sprung forth – one which suggests everyone misinterpreted this Court's precedents all along and that public employee pensions may be freely impaired with few limitations or consequences.

This Court should reject this *nouvelle thèorie* and the chaos it would inject into pension systems and labor relations. Doing so would only marginally impact the Public Employees' Pension Reform Act of 2012. The

lion's share of that law applies only to new employees. And those lawful provisions have already generated billions of dollars of savings for public entities.

The Court should reaffirm the California Rule and forbid the application of Assembly Bill ("AB") 197 (2011-2012 Reg. Sess.) to members of the three county retirement systems at issue who were already employed at the time of its passage and had acquired vested contract rights in the pension benefits they were promised.

AB 197 amended the definition of "compensation earnable" in the County Employees Retirement Law ("CERL") applicable to, *inter alia*, the Counties of Alameda, Merced, and Contra Costa. This change detrimentally impacted the members of those CERL systems who had been promised pensions based on calculations of "compensation earnable" adopted by the various Retirement Boards. These Retirement Boards had exercised their discretion – as they were constitutionally required to do – when interpreting language that the legislature had left ambiguous. And employees who relied on these interpretations as binding offers received vested rights in them when they chose to begin and continue their public service.

Applying AB 197's change to the definition of "compensation earnable" to these employees violates the Contract Clause of the California Constitution, and therefore this Court should find for Plaintiffs/Petitioners Alameda County Deputy Sheriffs' Association, *et al.*

II.

THE CALIFORNIA RULE REMAINS WELL-REASONED, CLEAR, AND PERSUASIVE PRECEDENT

The California Rule protects public employees' vested rights in the pension benefits offered to them when they begin working. (See Cal. Const. Art I, § 9; *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131 ["*Allen I*"].) If government wants to make a detrimental change to these contractual rights, it must show that such a change is "reasonable and necessary to serve an important public purpose," (*U.S. Trust Co. v. New Jersey* (1977) 431 U.S. 1, 25), and it must further show that any change "bear[s] a material relation to the theory and successful operation of a pension system" and that any change "resulting in a disadvantage to employees[] must be accompanied by comparable new advantages." (*Allen v. Bd. of Admin.* (1983) 34 Cal.3d 114, 120 ["*Allen II*"]. See also *Legislature v. Eu* (1991) 54 Cal.3d 492, 529-530; *Olson v. Cory* (1980) 27 Cal.3d 532, 540-541; *Betts v. Bd. of Admin.* (1978) 21 Cal.3d 859, 863-864; *Miller v. State* (1977) 18 Cal.3d 808, 816; *Abbot v. City of Los Angeles* (1958) 50 Cal.2d 438, 447-448; *Allen I, supra*, 45 Cal.2d at p. 131.)[1]

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[1] See Appendix 1 for a partial list of the many court of appeals decisions that have relied on and reinforced these cases over the decades, found in an excerpt from CAL FIRE, Local 2881's Opening Brief (pp. 46 – 47, n.10), in *CAL FIRE Local 2881, et al. v. CalPERS, et al.* [Case No. S239958].

The number and complexity of the issues raised in this case have obfuscated the critical fact that California public employees, their representatives, and their employers have – for decades – relied on and assumed the continuing viability of these protections. This reliance interest shows up in decisions as macro as the relative costs of trading off current salary for pension improvements during negotiations, and as micro as the decision to continue showing up to work and passing on a potential new opportunity with another employer. These expectations have been consistently respected and encouraged by this Court, and this Court should continue to do so in this case.

There are three main reasons why the California Rule forbids the application of AB 197's narrower definition of "compensation earnable" to employees who were already members of the three CERL systems at issue when AB 197 became law.

First, while narrow exceptions allowing government to impair contract rights have been recognized, albeit never before by this Court in the pension context, the general "necessary to serve an important public purpose" concept articulated in *U.S. Trust* (431 U.S. at p. 25) must, in the CERL pension-law context, be applied in a county-by-county manner – because each of the 20 county retirement associations governed by CERL is itself a separate retirement system. (See *United Auto., Aerospace, Agr. Implement Workers of Am. Int'l Union v. Fortuño* (1st Cir. 2011) 633 F.3d

37, 46, citing *Energy Reserves Grp. v. Kansas Power and Light Co.* (1983) 459 U.S. 400, 410 n.11 and *Mercado-Boneta v. Administracion del Fondo de Compensacion al Paciete* (1st Cir. 1997) 125 F.3d 9, 15 [asking whether a "more moderate course would serve [the legislature's] purposes equally well" and whether the act "was tailored appropriately to its purpose"].) The California Legislature sledgehammer (as opposed to scalpel) approach failed to adequately tailor AB 197 to the conditions of each county retirement system.

Second, the Legislature failed to discharge its obligation to provide a "comparable new advantage" when its change disadvantaged current employees' pensions. (*See Allen II, supra*, 34 Cal.3d at p. 120.)

Lastly, contrary to the Government Parties' briefing,[2] the California Rule treats pension rights as "deferred compensation," with a similar structure to an offer in a unilateral options contract. (See Restatement of Contracts, 2nd § 45.) Under such an arrangement, the employee accepts the employer's offer of future consideration by beginning and continuing performance.

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[2] For the purposes of this brief, "Government Parties" include the State as Intervener and Respondent; the Central Contra Costa Sanitary District as Real Party in Interest and Respondent; and the Alameda County Employees' Retirement Association, the Contra Costa County Employees' Retirement Association, and the Merced County Employees' Retirement Association (and their respective Boards) as Defendants and Respondents.

As applied here, the right to this deferred compensation accrues every day an employee tenders continuing performance by showing up to work – beginning on the first day of employment. Despite the Government Parties' attempts to redefine when this deferred compensation is "earned," the California Rule clearly understands the exchange public employees make. These employees tender performance by joining *and remaining* in public employment in reliance on the promise that – in the future – they will be able to take advantage of the pension benefits currently on offer, but for which they are currently ineligible.

A. The "Necessity" Prong Requires A Showing For Each Local Pension System Affected

Under the overarching Contract Clause analysis, a legislature can only impinge on a contractual obligation if it can show that the changes are both "reasonable and necessary to serve an important public purpose." (*United States Trust Co. v. New Jersey* (1977) 431 U.S. 1, 25.) The "necessity" prong, as applied to the state's county retirement systems, requires a system-by-system analysis to determine whether the particular proposed changes are necessary.

CERL contemplates individual retirement funds managed by independent, constitutionally-credentialed Retirement Boards. (Cal. Const. Art. 16, § 17; Gov. Code § 31450 *et seq.*) Despite seeming to be a universally applicable law, CERL is essentially a repository of laws of

varying applicability. Many sections of CERL apply to multiple specified counties,[3] dozens of CERL sections apply to only one county,[4] and some sections apply to counties that fall within particular bands defined by population.[5] In fact, there is only one CERL county that currently does not have a statutory carve out in the text of CERL (whether by population, "class," or name): Mendocino County (34th Class).[6]

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[3] See Gov. Code §§ 31485.11 (Alameda and Merced); 31522.3 (San Diego, Sacramento, and Kern); 31529.9 (Orange, San Diego, San Bernardino, Contra Costa, Kern, San Joaquin, and Santa Barbara); 31621.9 (San Mateo and Stanislaus); 31641.01 (Sacramento and Contra Costa); 31657 (Los Angeles, Orange, San Bernardino, Kern, and Santa Barbara); 31874.6 (Sonoma and Imperial); 31522.5 (Orange and San Bernardino).

[4] See, e.g., Gov. Code §§ 31458.3, 31459.1, 31461.1, 31461.4, 31461.45 (Los Angeles [1st Class]); 31468 subd. (l), 31470.6, 31470.10, 31470.25 (Orange [2nd Class]); 31470.2 subd. (a), 31470.3, 31470.6, 31484 (San Diego [3rd Class]); 31470.6, 31484.8, 31485.11, 31485.16 (Alameda [4th Class]); 31468 subd. (l), 31470.6, 31522.5, 31522.7, 31699.1-31699.10 (San Bernardino [7th Class]); 31470.2 subd. (b), 31470.6, 31485.18, 31522.3, (Sacramento [8th Class]); 31470.6, 31484.9, 31520.11, 31520.12 (Contra Costa [9th Class]); 31469.5, 31470.6, 31484.5, 31485.10 (San Mateo [10th Class]); 31676.15 subd. (d) (Fresno [12th Class]); 31468 subd. (l), 31485, 31511-31511.11 (Ventura [13th Class]); 31522.3, 31529.9, 31552.5, 31657, 31678.1 (Kern [14th Class]); 31468 subds. (i), (j), (k), 31522.3, 31529.9 (San Joaquin [15th Class]); 31470.11; 31470.12; 31486-31486.12; 31520.3 (Santa Barbara [16th Class]); 31469.8, 31484.6, 31522.3 (Marin [18th Class]); 31874.6 (Sonoma [19th Class]); 31499.10-31499.19, 31621.9 (Stanislaus [20th Class]); 31468 subd. (k) (Tulare [21st Class]); 31484.7, 31485.11, 31499-31499.9 (Merced [25th Class]); 31874.6 (Imperial [32nd Class]).

[5] Gov. Code §§ 31470.6 (pop. 500,000+); 31558.5 (pop. 500,000 – 2,000,000, 2,000,000+); 31664.3 (pop. 2,000,000+); 31681 (pop. 2,000,000+); 31692 (pop. 5,000,000+); 31894.1-31894.3 (pop. 6,000,000+). There is only one county (Los Angeles) with a population currently greater than 2,000,000. (Gov. Code § 28020.)

[6] For a list of counties, their assigned class numbers, and their defined populations, see Gov. Code § 28020.

In an example with particular relevance to this case, the Legislature even created a special definition for "compensation earnable" – the very concept at issue here – for one county (Los Angeles). (Gov. Code §§ 31461.1; 31461.4; 31461.45; and 31462.3.)

This differential treatment makes sense when considering the different circumstances facing the many counties in California, including:

- their unique labor-relations history,
- the labor markets from which they are hiring employees,
- their relative size and tax-base, and
- how well their Retirement Board has managed the pension fund's resources.

These carve outs (placed directly into the text of CERL) have created an environment in which the "necessity" analysis can and must be performed based on the circumstances of each individual pension system.

As a primary matter, because this is not a comprehensive legislative legal framework premised on the concept of general-applicability, there is no danger that the judiciary will introduce a fracture into a generally-applicable law by performing such a system-by-system treatment. So many sections of CERL apply to only a subset of CERL counties, that each pension system is, in essence, already operating under its own *sui generis* county-retirement law. Contrary to Respondent Merced County Employees' Retirement Association's argument, this is not a situation that would lead to

an "inappropriate" or "impermissible" inconsistency in the "application of a single state statute." (Amicus Br. at p. 53, citing *Irvin v. Contra Costa County Employees' Retirement Assn.* (2017) 13 Cal.App.5th 162, 172.)

Therefore, the required "necessity" cannot be found in generic claims either that the *state's completely separate* pension system (the Public Employees' Retirement System) is underfunded, or that public pension systems generally are underfunded. (See Central Contra Costa Sanitary District Op. Br. at p. 58; State of California Ans. Br. at p. 54.) A better tailored justification is required, and as will be discussed in Section II.D below, none has been provided for the challenged sections of AB 197.

B. This Court's Long Line Of Unbroken Precedent Requires Detrimental Changes To Be Accompanied By Comparable New Advantages

This Court should reject the myriad invitations it has received to redefine what everyone, including this Court, has understood the California Rule to require for at least the past six decades: comparable new advantages when a change results in a disadvantage to employees.

The Government Parties' and First District Court of Appeal's arguments justifying their attempts to strike-out this "comparable new advantages" requirement fail linguistically, logically, and historically.

First, as has been well-briefed by Service Employees International Union, Local 1021, *et al.* and Building Trades Council of Alameda County, *et al.* ("Union Interveners") and the Alameda County Deputy Sheriffs'

Association ("ACDSA"): for over sixty years everyone understood that the California Rule *required* detrimental changes in pensions to be accompanied by "comparable new advantages." (Union Interveners' Ans. Br. at pp. 31-34; ACDSA Ans. Br. at pp. 41-47.) This has been (and must remain) the law of the land around which significant reliance interests have been built.

But then, in 2016, the First District Court of Appeal's *Marin Association of Public Employees, et al. v. Marin County Employees' Retirement Association, et al.* (2016) 2 Cal.App.5th 674 ("*MAPE*") decision[7] hacked away over a half-century of California Rule precedent by arguing that this Court does not mean what it says. The *MAPE* decision (currently pending review in this Court) stated that this Court's decisions merely *recommended* that "comparable new advantages" be provided. (*Id.* at pp. 697-700.)

That is incorrect.

The decisions of this Court have, at times, used the word "should" to indicate "must" in relation to the "comparable new advantages" prong. (Union Interveners' Ans. Br. at pp. 31-34; ACDSA Ans. Br. at pp. 41-47.) However, there is no evidence, after a thorough review of these cases, to

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[7] The First District Court of Appeal later double-downed in this error in its decisions currently under review in *CAL FIRE, Local 2881, et al. v. California Public Employees' Retirement System* [S239958] and in this case.

lead this Court to conclude that it has repeatedly published a mere suggestion that pension cuts be accompanied by comparable new advantages.

As a preliminary matter, this Court is constitutionally required to state the law, and is not in the business of publishing policy suggestions or advisory opinions. (See Cal. Const. Art. III, § 1; Art. VI, §§ 10, 11; *People ex rel. Lynch v. Superior Court* (1970) 1 Cal.3d 910, 912.)

Additionally, in order for the 'suggestion' interpretation of the California Rule to be true, proponents would have to convince this Court to reject the plain language and logic of its past cases. This Court clearly used the word "must" (*Allen II, supra*34 Cal.3d at p. 120) in a decision written by the same justice who, not five years before, used "should" while deciding that the pension change at issue could not be lawfully implemented *exactly because* no comparable new advantage was provided to the petitioner. (*Betts v. Bd. of Admin.* (1978) 21 Cal.3d 859, 867-868.) This *Betts* decision fits snugly within a string of this Court's precedent in which this Court has definitively justified its rejection of proposed changes based on the fact that such changes did not provide comparable new advantage. (*Legislature v. Eu* (1991) 54 Cal.3d 492, 533; *Olson v. Cory* (1980) 27 Cal.3d 532, 541.) In fact, Government Parties and other opponents of the California Rule have not identified *any* instances since this Court's *Allen I* decision in 1955 in which this Court has upheld a

detrimental pension change that did not have offsetting comparable new advantages.

And yet the State has attempted to undermine this commonsense interpretation by introducing incorrect and irrelevant facts, and by contorting the decisions' reasoning in order to claim that they show *anything but* that offsetting comparable new advantages are required.

For example, in its Answer Brief, the State claims that the *Betts* decision does not require "comparable new advantages" for all detrimental changes to pensions. (State Ans. Br. at p. 49.) It attempts to support this argument by claiming that, in *Betts*, this Court actually decided the case based on a lack of sufficient justification for the pension change (thereby, on the State's theory, violating a freeform "reasonableness" test). (*Id.* at p. 49.) In the State's characterization of the decision, the Legislature had *only* tried to justify its change by saying that it was a comparable new advantage for a benefit conferred 11 years earlier.

This demonstrates the State's need to jump to radical explanations to support its theory, when the precedent's plain language leads to a much more straightforward conclusion. The text of the *Betts* opinion means what it says: that there were no comparable new advantages provided, and that therefore, naturally, the pension amendment violated the California Rule. This Court concluded:

> the 1974 amendment to section 9359.1 cannot constitutionally be applied to petitioner, because the amendment withdraws benefits to which he earned a vested contractual right while employed. No "comparable new advantages" to petitioner appear in the plan which can offset the detriment he has suffered by replacement of a * * * "fluctuating" system of benefit computation with a "fixed" system. Petitioner is therefore entitled to have his basic retirement allowance computed on the basis of section 9359.1 as it read when he left office in 1967.

(*Betts*, *supra*, 21 Cal.3d at 867-868.)

Further undermining the State's argument is the fact that the decision on appeal in *Betts* clearly shows that the change to the pension program at issue "raise[d] questions of fundamental fairness as well as financial prudence," and that the amendment under review was passed as the state was attempting to "preserve the financial integrity" of the pension fund. (*Betts v. Bd. of Admin. of Pub. Emp. Ret. Sys.* (1978) 143 Cal.Rptr. 87, 93, vacated sub nom. *Betts v. Bd. of Admin.*, 21 Cal.3d 859.)

The State then attempts to undermine the language in *Olson v. Cory* (1980) 27 Cal.3d 532, which also required "comparable new advantages." The State again claims that the decision rested on the 'unreasonableness' of the change, because the defenders of the law at issue in *Olson* had offered no justification for the changes to pension benefits, and that therefore the "comparable new advantage" language in that opinion was mere *dicta*. (State Ans. Br. at 49; State Reply Br. at p. 26.)

But the quote the State relies on about the state's failure to offer any "reason or justification for the state action" was pulled from a completely separate part of the *Olson* opinion that concerned the *employment contracts* of judges, which – unsurprisingly – never mentioned the "comparable new advantages" requirement of the California Rule. In that 'employment' portion of the opinion, this Court held that judges who remained employed were to be given the cost-of-living increases that were offered when they entered office, because taking the position was done "in consideration of – at least in part – salary benefits then offered by the state for that office." (*Olson*, 27 Cal.3d at 539.) Judges entering office or electing to enter into a new term after the change to the cost-of-living law could have the change legally applied to them for those terms. (*Id.* at p. 540.)

When considering *this* change in the law, this Court held the state had "offer[ed] no reason or justification for the state action," and therefore had "fail[ed] to even approach their burden of demonstrating the impairment of [the judges'] rights [was] warranted by an 'emergency' serving to protect a 'basic interest of society.'" (*Id.* at p. 639.)

Later, in the section of the *Olson* decision addressing the reduction in judges' pension benefits, this Court explained, as plain as day, what it had held two years before in *Betts*: "Since no new comparable or offsetting benefit appeared in the modified plan, we held the 1976 statute unconstitutionally impaired the pensioner's vested rights." (*Id.* at p. 541,

[referencing *Betts*, *supra*, 21 Cal.3d at p. 864].) And in the next paragraph, this Court held: "Again, we conclude that defendants have failed to demonstrate justification for impairing these rights *or that comparable new advantages were included* and that [the pension law] as amended is unconstitutional as to certain judicial pensioners." (*Ibid.* [emphasis added].) The rulings in *Betts*, *Olson* and the other cases discussed fit this case, too.

The various panels of the First District Court of Appeal and the Government Parties in this action have had multiple opportunities to try to bolster their radical reinterpretation of the past sixty years of pension law. Though their arguments are at times imaginative, they cannot get around the plain fact that this Court's precedent unequivocally shows that this Court meant what it said: "any modification of vested pension rights must be reasonable, must bear a material relation to the theory and successful operation of a pension system, and, *when resulting in disadvantage to employees, must be accompanied by comparable new advantages*." (*Allen II*, *supra*, 34 Cal.3d at p. 120 [emphasis added].)

C. Pension Terms Are Similar To Offers Of Unilateral Option Contracts, Performance Of Which Begins On The First Day Of Employment

Pensions promises are compensation offered in exchange for employees agreeing to begin work and for continuing to provide consideration to the state over an extended period of time. (*Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 856 [finding one of "primary

objectives" of pensions is to "induce competent persons to enter and remain in public employment"].)

A similar kind of agreement is contemplated in the Second Restatement of Contracts, section 45, which states that:

> (1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it. (2) The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.

(See also *Newberger v. Rifkind* (1972) 28 Cal.App.3d 1070, 1076-1077; *State v. Agostini* (1956) 139 Cal.App.2d 909, 914 ["[I]f an offer for a unilateral contract is made, and *part of* the consideration requested in the offer is given *or tendered* by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is first conditional on the full consideration being offered or tendered."] (emphasis added).)

Reliance on the pension offer accrues every day that a public employee tenders performance. Under the California Rule, as it has been understood for decades, all parties know the baseline: unless the employer explicitly indicates that certain pension rights are revocable, those rights vest on the first day of employment. Even if an employee cannot take advantage of a particular pension right at that moment, their decision to

show up and continue working every day is consideration given to their employer in exchange for being able to take advantage of the offered pension right at or before their retirement, according to the terms of the offered pension right. As this Court held in *Kern*:

> While payment of these benefits is deferred, and is subject to the condition that the employee continue to serve for the period required by the statute, the mere fact that performance is in whole or in part dependent upon certain contingencies does not prevent a contract from arising, and the employing governmental body may not deny or impair the contingent liability any more than it can refuse to make the salary payments which are immediately due.

(*Supra,* 29 Cal.2d at p. 855.)

The State's argument that employees are not entitled to pension rights that they have not yet "earned" mistakes the contractual relationship between employers and employees. (See State Reply Br. at pp. 17-19, 23-24 n.10, 29.) Although the employee may not have worked the actual time that will qualify as their 'highest-earning period' for the actual salary upon which their pension calculation will be based, they have nevertheless earned – through their continual performance of their job duties – the right to apply these pension terms to *that* period and *that* salary when such a time arrives.

This is reflected not only in the reliance of individual employees. The comparative protection of pension terms above and beyond salary and

other benefits is reflected in the relative value that both employers and labor unions place on these compensation offers when they trade them off while negotiating terms and conditions of employment. (See Proposed Brief of Amicus Orange County Attorneys' Association, *et al.* in Support of Petitioners and Appellants, at pp. 11-12.)

D. To The Extent AB 197 Detrimentally Changed Pensions, The Legislature Failed To Comply With The California Rule

Amici agree with Union Interveners that the benefits at issue in this litigation were compensation earnable before the passage of AB 197, and that the right to continue defining these benefits as compensation earnable vested for all employees before the passage of AB 197. (Union Interveners' Ans. Br. at pp. 41-42, 47-49.)

The law therefore violated the Contracts Clause of the California Constitution and the California Rule because, *inter alia*, it was not shown to be "necessary" and did not provide "comparable new advantages" despite detrimentally impacting these employees' pension rights.

The blanket windfall the Legislature gave CERL retirement systems (through those parts of section AB 197 that were applied to those who began work before it took effect), is not nearly particularized enough to justify the abrogation of contractual obligations it caused state-wide. The Government Parties have identified no legislative findings and no

differential treatment for any CERL system, no matter how healthy, well-funded, or unique.

This lack of legislative finding should serve to invalidate the language of AB 197 as applied to all county systems. But even assuming that this legislation is able to survive such a facial challenge, a more specific question is before this Court: This Court must decide whether there are sufficient legislative findings to justify AB 197's changes as "necessary" as applied to the three county systems at issue. That has also not been demonstrated. (See Union Interveners' Ans. Br. at pp. 48-49.)

Lastly, as stated above, the California Rule requires "comparable new advantages" to accompany any detrimental change to vested pension rights. No party has claimed (much less put on evidence to support) that the Legislature provided comparable new advantages to individuals detrimentally impacted by the changes of AB 197.

Therefore, AB 197 must be struck down as violating the Contract Clauses of the California Constitution.

III.

RETIREMENT BOARDS HAVE THE POWER TO RAISE CERTAIN PENSION BENEFITS ABOVE CERL'S STATEWIDE PROVISIONS AND SUBSEQUENT REDUCTIONS MUST COMPLY WITH THE CALIFORNIA RULE

Retirement Boards have explicit constitutional obligations, and – to the extent the Legislature has not occupied the field – they are required to

use their best judgment when managing the resources of their pension funds and making decisions concerning their assets. (Cal. Const. Art. XVI, § 17 subd. (a); Gov. Code § 31520 ["Except as otherwise delegated ... the management of the retirement system is vested in the board of retirement ..."].) To the extent these Retirement Boards offer pensions above the state-wide floor (without explicitly reserving the right to change these benefits), employees who are then-working receive vested rights in these terms that are protected by the California Rule.

The Legislature has the power to set the terms of pensions in CERL systems, including the power to explicitly define certain rights as not vested. However, to the extent the Legislature leaves certain questions unanswered, it is the responsibility of the Retirement Boards to interpret those ambiguities to the best of their abilities. These interpretations receive substantial deference under *Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12.

In the exercise of this discretion, the Retirement Board has the power to exceed benefit levels set by the Legislature, in much the same way that the state has the power to exceed the protections of the federal Fair Labor Standards Act. (See *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 841-841.) And unless the Retirement Board explicitly reserves the right to revoke its official interpretation, then employees can earn vested rights in that interpretation by signing up for and continuing to work. (See

Sonoma County Organization of Public Employees v. County of Sonoma (1979) 23 Cal.3d 296, 317 [finding that local laws can be given effect even when technically in conflict with state laws].)

Therefore, if the original legislative language is unclear, and the Retirement Board exercises its discretion in good faith, then the Legislature must clear the hurdles of the California Rule if it seeks to amend the law later in a manner that adversely affects vested pension rights. This is true whether or not the current legislation is meant to 'clarify' that a past Legislature did not intend to give the Retirement Board the discretion to adopt a particular interpretation when it passed its textually-ambiguous prior law.

That is what occurred with the compensation items at issue in this litigation, (Union Interveners' Ans. Br. at pp. 47-53), and therefore AB 197 is unconstitutional unless it complies with the California Rule. And as was stated *supra* Section II.D, it clearly did not do so when changing the definition of "compensation earnable" for these three CERL systems, and therefore must be struck down.

IV.

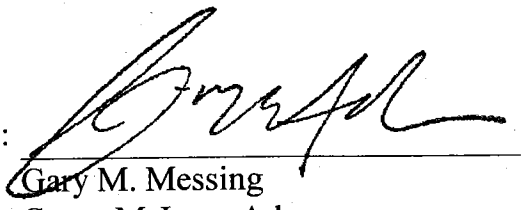
CONCLUSION

Therefore, this Court should invalidate AB 197 to the extent it requires the Retirement Boards to reduce the amount of compensation they consider "compensation earnable" for employees hired on or before AB

197's effective date. The Legislature's attempt to forbid such "compensation earnable" from being counted has impaired vested pension rights a) without sufficiently showing that such a change is reasonable or necessary, b) without providing comparable new advantages, and c) without showing that these changes bear some material relation to the theory of a pension system and its successful operation.

Dated: September 24, 2018

MESSING ADAM & JASMINE LLP

By: 

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APPENDIX I

APPENDIX I

No. S239958

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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

Petitioners and Appellants,

v.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM (CalPERS)

Defendant and Respondent,

and

THE STATE OF CALIFORNIA,

Intervener and Respondent.

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

After An Appeal From the Superior Court For The State of California, County of Alameda, Case Number RG12661622, Hon. Evelio Grillo, Presiding Judge

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OPENING BRIEF ON THE MERITS

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pensions. (*Allen v. City of Long Beach, supra,* 45 Cal.2d at p. 131 [city charter amendment "substantially decreases plaintiffs' pension rights without offering any commensurate advantages,"]; *Abbott, supra,* 50 Cal.2d at p. 455 [invalidating charter amendments that reduced pension payments to pensioners previously employed]; *Betts, supra,* 21 Cal.3d at pp. 867-868; *Olson v. Cory, supra,* 27 Cal.3d at p. 541; *Eu, supra,* 54 Cal.3d at p. 529—but see *Marin Association of Public Employees, supra,* 2 Cal.App.5th 674 [determining that this Court meant "should" when it used "must" and holding that "'should' does not convey imperative obligation, no more compulsion than 'ought' [...] 'should' is a 'recommendation, not ... a mandate,'" and permitting retirement board to cease including certain premiums in pension calculations].)

Betts instructs about the Contracts Clause restricting legislative power. *Olson v. Cory* highlights that a statute may be constitutional to some employees but unconstitutional to others depending upon what rights existed during the employees' employment. Petitioners do not dispute the validity of repeal as applied to new employees, but contend that any reductions that are applied to existing employees violate the Contracts Clause.

The unbroken line of this Court's decisions has been supplemented over the past sixty years by many court of appeal decisions representing

virtually all the appellate districts which have uniformly understood that the comparable new advantages test is a constitutional mandate.[10]

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[10] See, e.g., *Wilson*, *supra*, 52 Cal.App.4th 1109, 1137 [disadvantage to employees "must" be accompanied by comparable new advantages—invalidating legislation substituting in-arrears financing of pension system in place of actuarial-based funding]; *Frank*, *supra*, 56 Cal.App.3d 236 [disadvantages to employees "must" be accompanied by comparable new advantages and invalidating exclusion of industrial disability benefits for custodial employee]; *Lyon v. Flournoy* (1969) 271 Cal.App.2d 774 [reiterating "must" standard but finding that a retiree's widow was not entitled to increased calculation based upon legislator salary level that occurred only after the retiree's retirement]; *DeCelle v. City of Alameda* (1963) 221 Cal.App.2d 528 [modification of pension system precluding pension upon such discharge was detrimental to employee]; *United Firefighters of Los Angeles City*, *supra*, 210 Cal.App.3d 1095 [3% cap on pension cost of living adjustments was unconstitutional as applied to employees hired prior to enactment of charter amendment]; *Pasadena Police Officers' Association*, *supra,* 147 Cal.App.3d 695 [amendments substantially reducing cost of living benefits of pension plan were invalid, notwithstanding that they purported to be prospective only]; *Teachers Retirement Bd. v. Genest, supra,* 154 Cal.App.4th 1012 [legislation reducing state's obligation to fund retirees' supplemental benefit maintenance account was unconstitutional impairment of contract]; *Abbott v. City of San Diego* (1958) 165 Cal.App.2d 511 [benefits subsequently obtained by other employees cannot operate to offset detriments imposed on those with existing pension rights]; *Chapin v. City Commission of Fresno* (1957) 149 Cal.App.2d 40 [ordinance changing method of computing retirement benefits resulted in substantial disadvantage not accompanied by comparable new advantages invalid]; *Wisley v. City of San Diego* (1961) 188 Cal.App.2d 482 [increases in rate of employee contributions held unreasonable where not accompanied by new pension advantage]; *Ass'n of Blue Collar Workers*, *supra*, 187 Cal.App.3d 780 [requirement that employees pay for past, unfunded liability in fund for past service imposed detriment without corresponding advantage and unconstitutionally impaired obligation of contract]; *Amundsen v. Public Employees' Retirement System* (1973) 30 Cal. App. 3d 856 [where disadvantage under amendments was accompanied by comparable advantages of decreased employee contributions and substantially higher pension upon retirement, no unconstitutional impairment]; *Protect Our Benefits, supra,* 235 Cal.App.4th at p. 630 ["[t]his diminution in the

No comparable pension advantage was offered to existing employees when section 20909 was repealed so, under all of these authorities, the repeal of section 20909 was unconstitutional.

E. *Stare Decisis* Principles Weigh Heavily Against Overruling *Allen v. City Of Long Beach* And Its Progeny

Neither CalPERS nor the Attorney General has thus far advocated for this Court to abandon or modify its vested rights cases. In the appellate court, CalPERS took no position on the merits of the case. The Attorney General disputed only whether the right to purchase additional service credit was a pension benefit subject to vested rights protections.

But unprompted by the parties, the court of appeal offered a secondary justification for its ruling: that even if the right to purchase additional service credit was a pension benefit, the Legislature maintained the power to eliminate the right without providing any comparable advantage to adversely affected employees. (Slip Op. at pp. 12-15.) In so doing, it relied on *Marin Association of Public Emp*loyees and that panel's re-, or de-, construction of this Court's pension rulings.

Stare decisis anchors our nation's legal system, providing "a fundamental jurisprudential policy that prior applicable precedent [of an appellate court] usually must be followed [by that court] even though the

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supplemental COLA cannot be sustained as reasonable because no comparable advantage was offered to pensioners or employees in return"].

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

Pursuant to California Rules of Court Rule 8.504(d)(1), I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 13 points and contains 6,184 words.

Dated: September 24, 2018

MESSING ADAM & JASMINE LLP

By: _____
Gregg McLean Adam

00057088-4

PROOF OF SERVICE

Alameda County Deputy Sheriff's Association v. Alameda County Employees' Retirement Association
Case No. S247095

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 235 Montgomery St., Suite 828, San Francisco, CA 94104.

On September 24, 2018, I served true copies of the following document(s) described as **APPLICATION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS/PETITIONERS ALAMEDA COUNTY DEPUTY SHERIFF'S ASSOCIATION, ET AL. ON BEHALF OF CAL FIRE, LOCAL 2881, ET AL.**; and **AMICUS CURIAE BRIEF OF CAL FIRE, LOCAL 2881, ET AL.** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the four courts involved in this appeal as listed in the Service List and placed the envelopes for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Messing Adam & Jasmine LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at San Francisco, California.

BY ELECTRONIC TRANSMISSION: I served the document(s) on the person listed in the Service List by submitting an electronic version of the document(s) to TrueFiling, through the user interface at https://www.truefiling.com.

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

Executed on September 24, 2018 at San Francisco, California.

Kelli R. Bremer

00058965-1

SERVICE LIST

Alameda County Deputy Sheriff's Association v. Alameda County Employees' Retirement Association

Case No. S247095

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