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 ANSWER TO AMICUS CURIAE BRIEFS

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The Central Contra Costa Sanitary District ("Sanitary District") files this response to the amicus briefs filed by the following amici: Cal Fire, Local 2881, et al.; Orange County Attorneys' Association, et al.; Peralta Retirees Association, et al.; Association of California Administrators; and Los Angeles County Retirees Association. The Sanitary District addresses the arguments by amici most pertinent to those raised by the District in its briefing in this case.

I. NO AMICUS BRIEF ADDRESSES THE SANITARY DISTRICT'S CENTRAL CONTENTION THAT THE DEFINITION OF "COMPENSATION EARNABLE" DID NOT CLEARLY INCLUDE THE PAY ITEMS AT ISSUE IN THIS CASE.

No brief addresses the Sanitary District's central contention that the legislative definition of "compensation earnable" never included, or at least was ambiguous as to, the pay items at issue here: vacation cash outs, terminal pay, call back pay, and pension enhancements. Accordingly, the legislature had the authority to clarify the law, as it has done on a number of occasions when it has acted to prohibit abuses that have arisen over time. (See Sanitary District Opening Brief, filed May 4, 2018, at pp. 30-32; Sanitary District Reply Brief, filed August 22, 2018, at pp. 16-23.)

Moreover, no brief addresses the application of *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171 ("*REAOC*"), and federal contracts clause law (relied upon in *REAOC*), which require "clear" and "unequivocal" evidence of legislative intent before the Court finds that the legislature has created a vested right. Under *REAOC*, the unclear definition of "compensation earnable" could never give rise to vested rights in the pay items at issue here. (See Sanitary District Opening Brief, at pp. 28-29; Reply Brief at 10-13.)

In fact, the brief filed by Cal Fire and other unions impliedly accepts the Sanitary District's contention that the legislature never determined that

the pay items at issue would be included in "compensation earnable." According to the Cal Fire brief, it was the retirement board policies that did so. The Cal Fire brief argues that CERL contemplates the existence of different rules for different pension systems, that the retirement boards must exercise discretion over interpretation of "compensation earnable" and that their discretionary decisions create vested rights. (Cal Fire Amicus Brief, filed September 24, 2018, at pp. 20-22.) These contentions are legally incorrect as shown by the District's briefing. Retirement board policies do not create vested rights. (Sanitary District Opening Br. at pp. 29-30; Reply Br. at pp. 26-29.)

As briefed by the Sanitary District, CERL only gives the retirement boards the authority to establish regulations "not inconsistent" with CERL. (Gov. Code 31525 ["The board may make regulations not inconsistent with this chapter."]) Case law confirms that the authorized legislative body establishes benefits and not a retirement board. (See *Oden v. Bd. of Admin.* (1994) 23 Cal.App.4th 194, 201 [Under PERL, "public agencies are not free to define their employee contributions as compensation or not compensation ... the Legislature makes those determinations"].) This principle was confirmed in a series of cases in which local law authorized pension benefits. (See *City of San Diego v. Haas* (2012) 207 Cal.App.4th 472, 495 [applying *REAOC*, "only the City Council has the power to grant employee benefits, and [the retirement board] exceeds its authority when it attempts to 'expand pension benefits' beyond those the City Council has granted"]; *City of San Diego v. San Diego City Employees' Retirement System* (2010) 186 Cal.App.4th 69, 79-80 ("The scope of the board's power as to benefits is limited to administering the benefits set by the City").

Although the Sanitary 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: "For all of these reasons, we

reject appellants' argument that the Boards possess *Guelfi* discretion—that is, the ability to include additional pay items in compensation earnable, unmoored by the language of CERL." (*Alameda County Deputy Sheriffs' Assn. v. Alameda County Employees' Retirement Assn.* (2018) 19 Cal.App.5th 61, 96.)

Some briefs argue that pension statutes must be liberally construed in favor of employees, but that case law is distinguishable. It assumes that the legislature has created a vested right. This Court has stated that "such construction must be consistent with the clear language and purpose of the statute." (*Ventura County Deputy Sheriffs' Assn. v. Bd. of Retirement* (1997) 16 Cal.4th 483, 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 Plaintiff Unions the benefits they seek in this case.

II. NO AMICUS BRIEF ADDRESSES THE SANITARY DISTRICT'S OTHER CENTRAL CONTENTION — THAT THE COURT OF APPEAL IMPROPERLY APPLIED EQUITABLE ESTOPPEL IN THIS CASE.

No amicus brief addresses the Sanitary District's arguments that equitable estoppel does not apply in this case. 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 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. (Sanitary District Opening Br. at pp. 19, 47; Reply Br. at pp. 30.)

But even if this were not true, the Court of Appeal's 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."

In summary, no amicus brief argues that equitable estoppel should apply here, and for good reason.

The two issues addressed above, that the Legislature had the authority to clarify the definition of "compensation earnable" and that equitable estoppel cannot apply here, should dispose of this case. Since no vested rights are at issue, the Court need not reach the proper test to be applied if the Legislature in fact modified a vested right. However, the Sanitary District addresses below two key issues involved should the Court reach that question.

III. NO AMICUS BRIEF ADDRESSES THE SANITARY DISTRICT'S DEMONSTRATION THAT THE "COMPARABLE NEW ADVANTAGE" REQUIREMENT NULLIFIES THIS COURT'S STATEMENT THAT AN EMPLOYEE HAS ONLY THE RIGHT TO A "SUBSTANTIAL OR REASONABLE PENSION."

A number of the briefs go through a lengthy explanation of the test to be used in contract clause analysis to determine the legality of a modification. For example, the Peralta and Community College retiree association's brief recites a 10 factor analysis to assess the legality of any modification. (Peralta Retirees Organization, filed September 21, 2018, at pp. 22-30.)

But in the end, this analysis is an empty exercise, because these briefs also argue for the strict requirement of a "comparable new advantage" for any disadvantage. This requirement effectively prevents any modification of any significance. Under this approach, the state is handcuffed from making any meaningful modifications. (See Answering Brief Of Central Contra Costa Sanitary District In Response To Opening Brief Filed By Alameda County Deputy Sheriffs' Assn. et al., filed July 19, 2018, at pp. 21-25; Reply at pp. 14-15.)

This Court repeatedly has stated that public pensions may be modified so long as a "substantial or reasonable pension" remains. As originally stated in *Kern v. City of Long Beach*: "[t]he employee does not have a right to any fixed or definite benefits, but only to a *substantial or reasonable pension.* There is no inconsistency therefore in holding that he has a vested right to a pension but that the amount, terms and conditions of the benefits may be altered." (*Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 854-855 [emphasis added].) [1]

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[1] See also *Packer v. Bd. of Retirement* (1950) 35 Cal.2d 211, 218 ("*Packer*") ["any one or more of the various benefits offered ... may be wholly eliminated prior to the time they become payable, provided ... the employee

Where this Court has found modifications to be unwarranted, the modification has either destroyed or drastically reduced the pension, or lacked a sufficient rationale. For example, in *Kern*, the modification did not leave a "substantial or reasonable" pension because it essentially abolished the pension system on the eve of the plaintiff's retirement. (*Id.* at 855-856.)

Imposing the requirement of a comparable new advantage for every disadvantage would effectively nullify the rule in *Kern*, which acknowledges the state's sovereign powers to modify contracts. Moreover, it would contravene the constitutional rule that a limitation on the government's reserved power cannot be "construed to destroy the reserved power in its essential aspects." (*City of El Paso v. Simmons* (1965) 379 U.S. 497, 509; see also *U.S. Trust Co. of N.Y. v. N.J.* (1977) 431 U.S. 1, 23, n. 20 ["[A] state is without power to enter into binding contracts not to exercise its police power in the future."].)

Similarly, as a matter of statutory construction, this Court has long held that a general rule may not be eviscerated by a proviso to that rule. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735-736 [rejecting petitioner's interpretation because it "ascribes an unreasonably expansive meaning to the second sentence — the proviso" which "virtually read the first sentence out of the section"].) Accordingly, this Court should decline to adopt an exception that would eliminate the touchstone of its jurisprudence

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retains the right to a *substantial pension.*"]; *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131 ("*Allen*") ["[M]odifications *must be reasonable*, and it is for the courts to determine upon the facts of each case what constitutes a permissible change." (emphasis added)]; *Miller v. State of Cal.* (1977) 18 Cal.3d 808, 816 [until a pension becomes payable "the employee does not have a right to any fixed or definite benefits but only to a *substantial and reasonable pension.*" (emphasis added)]; *Betts v. Bd. of Admin.* (1978) 21 Cal.3d 859, 863 ("*Betts*") ["The employee does not obtain, prior to retirement, any absolute right to fixed or specific benefits, but only to a '*substantial or reasonable pension.*'" (emphasis added).)

regarding benefits for service not yet rendered — the "substantial or reasonable pension" standard.

In fact, applying the equivalent benefit test often makes no sense. As recently explained in *Hipsher v. Los Angeles County Employees Retirement Assn.* (2018) 24 Cal.App.5th 740, 754: "Indeed, it would be anomalous to suggest that the Legislature must reward an employee for conviction of a job-related felony by providing a new comparable advantage in the context of a section 7522.72 forfeiture." Similarly, the changes at issue here eliminated the unearned windfalls that resulted from pension spiking. It makes no sense to grant an "equivalent" benefit once it became clear that the premises relied upon in granting the original benefit were flawed. It also makes no sense when the need to change a benefit arises out of economic concerns. Granting an equivalent benefit in either case would merely perpetuate the problem the legislature is seeking to address.

IV. THE ARGUMENT THAT A COMPARABLE NEW ADVANTAGE REQUIREMENT IS REQUIRED FOR RETIREMENT SYSTEM PLANNING IGNORES THE HISTORICAL REALITY THAT BENEFITS AND RETURNS HAVE NEVER BEEN STATIC.

The brief filed by the Los Angeles Employees Retirement System contends that the comparable new advantage rule is crucial for its investment and planning decisions because it provides consistency. This brief ignores the historical facts. In reality, the funding of pension benefits has always involved changes in planning and investment decisions by the retirement systems. These costs, however, pale in comparison with the burden placed on employers to fund the current level of benefits.

Over time, the pension formulas have been changed, with employees receiving more valuable pensions, without requiring commensurate increases in their employee contributions. As a result the unfunded liabilities have increased, and employers have been required to foot the bill.

For example, the 3% @ 50 benefit formula for public safety employees was first made available in 2000. At the time, CalPERS asserted that the benefit would have no cost to employers because the plans were super-funded. (Little Hoover Commission, Public Pensions For Retirement Security, February 2011 ["Little Hoover Report"], at p. 13.) That assumption turned out to be wrong for a number of reasons. [2]

First, people are living longer, so actuarial mortality tables needed to be adjusted to reflect a longer pay-out period for pensions. Second, markets lost an enormous amount of their value due to recessions in 2001 and 2008 that were far more severe and prolonged than all but a few expected. Third, it appears that investment returns, even after the recession, will not live up to the assumptions accepted at the time (8% annual growth). And fourth, retirees now outnumber active employees, in part because the number of public employees has not grown at nearly the rate it had previously, and because the baby-boomers are aging but living longer. As a result, pension systems have developed large unfunded liabilities, which in turn have resulted in higher costs for public employers. (Little Hoover Report at 25-28).

In 2011, the Hoover Commission stated that: "In another five years, when pension contributions from government are expected to jump 40 to 80 percent and remain at those levels for decades ... there will be no debate about the magnitude of the problem." (Little Hoover at 22.) It stated:

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[2] In 1999, AB 400 authorized state and local agencies to offer the 3% at 50 pension formula for safety personnel. The Little Hoover Commission reported: "The changes were allowed to be applied retroactively, putting in motion a bidding war among government agencies, particularly at the local level, to retain and attract talent by boosting retirement benefits." (Little Hoover Report at p.13.) "In 2001, the Legislature passed AB 616, allowing local agencies to increase pension formulas for miscellaneous employees to as high as 3 percent at 60, sparking another bidding war." (*Id.* at p. 14.)

> "Across the state, governments will be forced to sacrifice schools, public safety, libraries, parks, roads and social services – core functions of government – and the public jobs that go with them, to pay the benefits that have been overpromised to current workers and retirees." (*Id.* at 43.)

That prediction has come true.

CalPERS is only 68% funded and more and more, cities and other public employers are being called upon to make up the difference.[3] Based on recent rate hikes, local government employers owe CalPERS $5.3 billion this year, and that amount will almost double to $10.1 billion in 2024." ("California Pension Contributions to Double by 2024 – Best Case," California Policy Center, Jan. 31, 2018.) Statewide, the public employer contribution "will double, from $31 billion in 2018 to $59 billion by 2024." (*Ibid.*) These kinds of changes have occurred over only the last twenty years.

In summary, the argument that pension benefits must be static to support long term investment and planning ignores historical reality and the detriment of inflexibility to employers.

V. EXISTING LAW PERMITS MODIFICATION TO ELIMINATE WINDFALLS, AND UNFORESEEN ADVANTAGES AND DISADVANTAGES.

The brief filed by the California School Administrators properly acknowledges that the pension spiking involved in this case can be eliminated based on this Court's statements that the legislature has the authority to eliminate unforeseen advantages and burdens. (Association of California School Administrators Br., filed September 21, 2018, at 15-16.) The Sanitary District agrees with the School Administrators that *Lyon v. Flournoy* (1969) 271 Cal.App.2d 774 provides the proper analysis here.

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[3] See CalPERS 2016-2017 Comprehensive Annual Financial Report For Fiscal Year Ending June 30, 2017, p. 4.

This Court has stated: "An employee's vested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system." (*Betts, supra*, 21 Cal.3d at 864.) As stated in *Allen v. Bd. of Admin.:* "Constitutional decisions 'have never given a law which imposes unforeseen advantages or burdens on a contracting party constitutional immunity against change.'" (34 Cal.3d 114, 120 [citations omitted].)

Based on this doctrine, *Lyon v. Fluornoy* (1969) 271 Cal.App.2d 774, found no constitutional impairment in a law that severed the tie between retired legislator's pensions and current legislators' salaries (which had increased three-fold), and instead gave retirees an annual cost of living increase. The court explained that: "To pay them allowances based upon the new . . . salary would hand them a bonanza far outstripping their expectations for cost-of-living increases, dwarfing their relatively modest contributions and demanding enlarged appropriations of general tax funds to maintain the retirement system's solvency." (*Id.* at 786.)

Here, the record shows that abuses arose under CERL resulting in unforeseen advantages and burdens. CCCERA and other retirement systems adopted policies that permitted employees to move compensation into the final compensation period in order to increase their pensions. As a result, pensions no longer reflected the employee's actual earnings, differed widely based on the amount of vacation, sick and other leave banked by the employee, and were costly to employers. CCCERA's actuaries reported that it was the employers, not the employees, who were paying for these additional benefits.

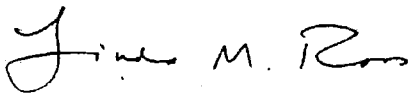
VI. CONCLUSION

No amicus brief attacks the Sanitary District's central contentions that (1) there are no vested rights at issue in this case because the definition of

"compensation earnable" never "clearly" included the pay items addressed here and (2) equitable estoppel cannot apply because the retirement boards had no power to create vested rights. A ruling that adopted those contentions would end this case. However, if this Court does address the standard for modification for vested rights, it should reject a rigid requirement of a "compensable new advantage," and find instead that the legislative changes at issue were authorized because they eliminated unforeseen advantages and burdens.

Respectfully submitted,

Dated: November 8, 2018 RENNE PUBLIC LAW GROUP



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CERTIFICATION OF WORD COUNT

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

The foregoing brief contains 3,177 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,

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Case Name: *Alameda Co. DSA, et al. v. ACERA, et al. - Case No. S247095*
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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.

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I declare, under penalty of perjury that the foregoing is true and correct. Executed on November 8, 2018, in San Francisco, California.

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