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,

and

The State of California,

Intervenor and Respondent.

Case No. S247095

First Appellate District, Division Four, Case No. A141913
Contra Costa County Superior Court, Case No. MSN12-1870
Hon. David B. Flynn (Ret.), Judge

INTERVENOR AND RESPONDENT STATE OF CALIFORNIA'S CONSOLIDATED ANSWER TO AMICI CURIAE BRIEFS

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INTRODUCTION

Intervenor and Respondent State of California respectfully submits this answer to the amici briefs supportive of the unions' position.

ARGUMENT

I. AMICI SUPPORTIVE OF THE UNIONS FAIL TO EXAMINE, LET ALONE ANALYZE, THE REASONABLE EXPECTATIONS OF EMPLOYEES HERE

None of the amici briefs filed by the various unions, Association of California School Administrators (ACSA), or the Los Angeles County Employees' Retirement System (LACERA) address the arguments of the State and Central Contra Costa Sanitary District regarding the threshold issue of whether what the unions claim was promised was in fact promised. Indeed, while dedicating substantial portions of their briefs to the sanctity of contracts, they ignore the most fundamental issue in any contractual analysis—what was actually promised.

In particular, they do not specifically dispute any of the following:

- AB 197 could not have impaired the CCCERA settlement agreement because no compensation earned after September 30, 1997 falls within the agreement's scope. (17 CT 4744; *Alameda County Deputy Sheriffs' Association v. Alameda County Employees' Retirement Assn.* (2018) 19 Cal.App.5th 61, 126, fn. 26 ["we recognize that the Post-Ventura Settlement Agreement in Contra Costa only applied to retirees"].)

- The unions have failed to identify any promise to legacy employees that was affected, let alone impaired, by Government Code section 31461, subdivision (b)(1). (44 CT 12881-12882.)[1]
- While Government Code section 31461, subdivision (b)(2) was unequivocally enacted to put an end to the practice of "straddling," the unions fail to identify any promise that legacy employees would be able to use straddling to spike their pensions at the end of their careers. (See, e.g., 44 CT 12851-12852 ["The Court finds no evidence as to Alameda County which establishes [] an implied contract to allow multiple years of vacation accrual to be added to, and thus spike, 'final compensation'"].)
- Neither the ACERA settlement agreement nor Merced CERA settlement agreement *address*, let alone promise, the pensionability of payments excluded under Government Code section 31461, subdivision (b)(3). (44 CT 12878 ["The Alameda settlement did not make specific reference to items such as 'on call pay,'"]; *id.* [noting that on-call pay is "at issue" in Merced County only because of a "stipulation" filed by the parties before the State's intervention, as opposed to any specific promises].)
- Nowhere does the ACERA settlement agreement or ACERA handbook promise that unused leave cashouts payable only upon retirement will be pensionable, in conflict with Government Code

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[1] The Court of Appeal points out that, under the auspices of subdivision (b)(1), "ACERA reportedly excluded from compensation earnable . . . various one-time payments, employee of the month payments, and 'Share the Savings' payments." (*Alameda County*, *supra*, 19 Cal.App.5th at p. 111, fn. 20.) But there is no evidence that such payments were properly excluded under subdivision (b)(1). Nor is there any evidence that ACERA ever promised that any of these payments would be pensionable going forward. (See State's Reply Br. 10-11.)

section 31461, subdivision (b)(4). (See 44 CT 12852; State's Answer Br. 23-27.)

Of course, some unions claim that requiring them to actually demonstrate that AB 197 impairs a contract is too heavy a burden. (See, e.g., ACDSA Reply Br. 8-11.) If the court can find no impairment, the unions suggest, it is simply because they did not have the chance to add enough information to the nearly 14,000-page Clerk's Transcript. These claims lack merit. In fact, the trial court, which held multiple hearings spanning nearly 18 months, interspersed with numerous rounds of briefings, made detailed findings about what was and was not promised. (See, e.g., 44 CT 12851-12852 ["The Court finds no evidence as to Alameda County which establishes [] an implied contract to allow multiple years of vacation accrual to be added to, and thus spike, 'final compensation'"].)

Nor do the briefs provide any argument that the alleged promises were authorized under CERL. According to some unions, that is because whatever CERL required ultimately does not matter here. (See Peralta Retirees Organization et al. Br. 13 [arguing law on public employees' pension rights "is grounded in the law of contracts, and not as the Respondents seem to believe, in statutory analysis"]. But it is well-established that a CERL employee only acquires "a right to a pension to be calculated *as mandated by CERL*." (*In re Retirement Cases* (2003) 110 Cal.App.4th 426, 453, italics added; see also *Claypool v. Wilson* (1992) 4 Cal.App.4th 646, 662 ["The contractual basis of a pension right is the exchange of an employee's services for the pension right *offered by the statute*," italics added].) Retirement boards have no authority "to expand pension benefits beyond those that the [legislative body] has granted." (*City of San Diego v. Haas* (2012) 207 Cal.App.4th 472, 495, quotations omitted; *Oden v. Bd. of Administration* (1994) 23 Cal.App.4th 194, 201

["Statutory definitions delineating the scope of [Public Employees' Retirement System] compensation cannot be qualified by bargaining agreements"].)

Taking a different approach, Cal Fire Local 2881 maintains that where the Legislature may have left "certain questions unanswered," retirement boards are free to create vested pension rights that, while not necessarily authorized by statute, are prospectively immune from legislative modification. (Cal Fire Local 2881 Br. 34.) But, as the Court of Appeal correctly noted, this argument misapprehends the law here. "[E]ven prior to [AB 197], the plain language of CERL excluded terminal pay from compensation earnable for pension purposes." (*Alameda County*, *supra*, 19 Cal.App.5th at p. 103.) Any promise to treat cashouts payable only upon retirement as "final compensation" would have been contrary to CERL, and therefore invalid. (*Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1181.) Contrary to the unions' assertion, such invalid promises could not have given rise to vested rights. (See *Alameda County*, *supra*, 19 Cal.App.5th at p. 105; see also *City of Huntington Beach v. Board of Administration* (1992) 4 Cal.4th 462, 472.)

Moreover, because the settlement agreements, policies, and handbooks expressly promised that final compensation would be calculated pursuant to CERL's requirements, the parties themselves clearly intended to treat any pay item as pensionable only if doing so was consistent with CERL. (E.g., 23 CT 6774 [requiring ACERA to "apply the New Definitions to the calculation of Retirement Allowances to be paid to all Members whose effective dates of retirement occur on or after October 1, 1997" "consistent[ly] with CERL"]; see also 24 CT 7094 ["If conflict arises between this handbook and the CERL, the decision will be based on the CERL"]; 24 CT 7165 [defining "vested benefits" as only those "guaranteed under the 1937 Act County Employees Retirement Law".)

In sum, while the amici unions urge that this Court consider employees' "reasonable expectations," they disregard the most reliable indicators of those expectations here—what was actually promised as well as what was actually authorized by the governing statute.

II. AMICI SUPPORTIVE OF THE UNIONS MISAPPLY THIS COURT'S PRECEDENT

The amici unions, ACSA, and LACERA recite the same argument made by the other unions that in 1955 this Court established a "California Rule" invalidating any and all pension modifications not offset by comparative new advantages—unless, of course, the modification benefits the employee. (E.g., ACSA Br. 8; LACERA Br. 8.) However, this argument rests primarily on three cases, all of which involved a government's attempt to entirely eliminate a "fluctuating" pension and replace it with a "fixed" one. (*Allen v. City of Long Beach* (1955) 45 Cal.2d 128 (*Allen I*); *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438; *Betts v. Board of Administration* (1978) 21 Cal.3d 859.) Even if this Court were to determine that AB 197's exclusions amounted to a substantial impairment of legacy employees' vested rights, none of the three cases relied upon by the unions would control here. Unlike here, the changes in *Allen I*, *Abbott*, and *Betts* resulted in severely reducing the deferred compensation that employees had long been earning and were on the cusp of receiving. Unlike here, the changes were not materially related to the successful operation of the pension system or justified by compelling reasons. Finally, unlike here, there was no effort to apply the changes on a prospective basis only. (See State's Reply Br. 25-26.)

Cal Fire Local 2881 invokes the analysis in *Olson v. Cory* (1980) 26 Cal.3d 532, but that case is also inapposite. As the Orange County Attorneys Association et al. (OCAA) note, *Olson* turned on the absence of "reason or justification for the state action" (OCAA Br. 31; see *Olson*,

supra, 26 Cal.3d at pp. 539, 541), not solely (as Cal Fire Local 2881 maintains) on the absence of comparable new advantages. And while other unions and LACERA rely heavily on a statement in *Allen v. Board of Administration* (1983) 34 Cal.3d 114 (*Allen II*) (e.g., LACERA Br. 8-9), Peralta Retirees Organization et al. affirms that this statement is merely dicta, just as the courts concluded in *Hipsher v. Los Angeles Cty. Employees Ret. Ass'n* (2018) 24 Cal.App.5th 740, 753-754, review granted Sept. 12, 2018 (S250244), and *Marin Assn. of Public Employees v. Marin Cty. Employees' Ret. Assn.* (2016) 2 Cal.App.5th 674, 698-699, review granted Nov. 22, 2016 (S237460). (See Peralta Retirees Organization Br. 41 ["While *Allen II* . . . describe[s] the balancing test of disadvantageous changes versus comparable new advantages, it is evident that [it did not get] to the point of needing to analyze and determine if a disadvantage had been balanced by a comparable advantage"].)

The amici unions cite other appellate authority, but those cases do not control here, and their inflexible approach diverges from the more flexible approach adopted by this Court and more recent court of appeal decisions. (See, e.g., *Miller v. State of California* (1977) 18 Cal.3d 808, 816 [until pension becomes payable, "the employee does not have a right to any fixed or definite benefits but only to a substantial or reasonable pension"]; *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 855 ["There is no inconsistency . . . in holding that [an employee] has a vested right to a pension but that the amount, terms and conditions of the benefit may be altered"]; *Hipsher*, *supra*, 24 Cal.App.5th at p. 754 ["a modification of vested pension rights need not invariably be accompanied by a comparable new advantage"]; *Alameda County*, *supra*, 19 Cal.App.5th at p. 120; *Cal Fire Local 2881 v. California Public Employees' Retirement System* (2016) 7 Cal.App.5th 115, 131, review granted April 12, 2017 (S239958); *Marin*, *supra*, 2 Cal.App.5th at p. 699.)

A further error committed by the amici unions is to simply presume that heightened scrutiny applies to the State's enactment of AB 197, even though there is no allegation in any of the operative petitions that the State is impairing any of its *own* financial obligations or advancing its own financial self-interest. Significantly, the State does not employ any of the employees affected by AB 197. Nor is it a party to contracts between the CERL retirement boards and their members. (State's Reply Br. 28.) Its finances are therefore unaffected by AB 197. In the absence of this financial self-interest, "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." (*RUI One Corp. v. City of Berkeley* (9th Cir. 2004) 371 F.3d 1137, 1147.)

Recognizing that they cannot prevail under this deferential standard, the unions insist that "heighted scrutiny" applies here because "the state is exercising its power to impair its own contractual obligation," and "the state's *financial* self-interest is at issue." (OCAA Br. 17, 18.) But neither of the reasons OCAA offers in support of this contention has any merit.

First, OCAA claims that because counties are legal subdivisions of the State, all of the counties' financial obligations are really just the State's financial obligations. (OCAA Br. 19-20.) This is incorrect (and would be news to county and state governments alike). A county government's pension obligations are legally separate and distinct from the state government's pension obligations, and the cases relied upon by OCAA (OCAA Br. 20) do not suggest otherwise. Reducing a CERL county's pension obligations thus has no "effect on the State's bottom line" (OCAA Br. 18).

Second, OCAA argues that *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296 demonstrates that a state law like AB 197 may be subject to heightened scrutiny, even if state government is not a party to the contract impaired by the law. (See OCAA

Br. 18-20.) OCAA's reliance is misplaced. To be sure, the statutory provision subject to heightened scrutiny in *Sonoma County Organization* impaired contracts between local government agencies and their employees. (See *supra*, 23 Cal.3d at p. 302 [noting law in question invalidated "any agreement by a local agency to pay a cost-of-living increase [in 1978-1979 fiscal year] in excess of that granted to state employees"].) But while the State was not a party to the impaired contracts, the State had a significant financial interest in the contracts because it was helping to directly fund them. (See *id.* at p. 319 ["Notably, the act provides for the distribution of more than $5 billion in state funds to local agencies"]; *id.* at p. 308, fn. 11 [statute's "underlying purpose is to limit the payment of state funds . . . to local agencies granting wage increases"].) Thus, the overturned state law specifically governed how state funds were used.[2]

In contrast, here, "the state's financial self-interest" is not at issue because the State has no direct financial interest in the agreements between CERL retirement boards and their members. The State is not directly funding CERL members' pension benefits, and so AB 197—unlike the law at issue in *Sonoma County Organization*—does not regulate how state funds are expended. In these circumstances, deference to the Legislature's judgment is warranted.

III. THE CONTRACT CLAUSES PROTECT EMPLOYEES' REASONABLE EXPECTATIONS BY DISTINGUISHING UN-ACCRUED COMPENSATION FROM ACCRUED COMPENSATION

To attack the State's position on modifying pension rights, the amici unions rely on a straw man. According to the unions, if this Court agrees

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[2] Significantly, "salary increases to employees of local entities which d[id] *not* seek assistance from the state surplus or loan funds" did not fall within the scope of the law in question. (*Sonoma County Organization*, *supra*, 23 Cal.3d at p. 308, fn. 11, italics added.)

with the State and does not invariably require comparative new advantages to offset even the most minimal diminution in future pension benefits, then the Court is effectively licensing *limitless* reductions to pension benefits whenever a state or local government pleases. (E.g., OCAA Br. 29 [claiming that State is suggesting that governments have "ability to freely make meaningful reductions in net pension benefits so long as they do not destroy the pension benefit altogether"].) LACERA adds that "constant[]," unconstrained reductions to pension benefits will make the system "extremely difficult" to administer effectively. (LACERA Br. 10-11.)

This is a false choice and mischaracterizes the State's argument. The State has never argued that the contract clauses do not strictly limit reductions to compensation that has been accrued and deferred. Rather, the State's argument is that a different, looser standard applies to un-accrued compensation, at least where no contract clearly and unequivocally applies to such compensation. (State's Opening Br. 40-46; State's Answer Br. 36-41; State's Reply Br. 17-20.)

Applying different standards to accrued and un-accrued compensation ensures the protection of employees' reasonable expectations. (See California Business Roundtable Br. 37-41.) As employees provide labor, they accrue compensation on the terms provided, and some of that compensation is deferred for later payment. (*Miller*, *supra*, 18 Cal.3d at p. 815, quoting *Kern*, *supra,* 29 Cal.2d at p. 855.) Compensation deferred in this way is protected against reduction under the contract clauses. (*Ibid.*) And the longer that an employee works, the more deferred compensation is accumulated.

However, a public employee has no reasonable expectation that the terms of compensation applying to *future* (not-yet-performed) labor will be rigidly frozen for the duration of their career. (See, e.g., *Maryland State Teachers Assoc., Inc. v. Hughes* (D.Md. 1984) 594 F.Supp. 1353, 1364

["legitimate expectations . . . did not include an immutable, unalterable pension plan as to *future* benefits to be earned pro rata by *future* employment service"].) To treat a deferred compensation statute as placing even the un-accrued, not-yet-deferred compensation of a public employee beyond the reach of the state for the duration of the employee's career "would be a significant, unprecedented change that goes beyond any known theory of deferred compensation." (Monahan, *Statutes as Contracts? The "California Rule" and Its Impact on Public Pension Reform* (2012) 97 Iowa L. Rev. 1029, 1061.)

Moreover, here, employees "agreed to have their 'compensation earnable' and 'final compensation' calculated pursuant to CERL" (*In re Retirement Cases*, *supra*, 110 Cal.App.4th at pp. 453-454), which "is subject to the implied qualification that the [Legislature] may make modifications and changes to the system." (*Kern*, *supra*, 29 Cal.2d at p. 855; see also *Marina Plaza v. Cal. Coastal Zone Conservation Comm'n* (1977) 73 Cal.App.3d 311, 324 [promise to comply with law means that a party will "comply with existing as well as future law"].) Thus, by amending CERL to eli minate the pensionability of not-yet-earned pay items only, AB 197 did not impair any employee's reasonable expectations.

As the State has argued, and the California Business Roundtable affirms, the differential treatment of accrued and un-accrued compensation is well-established in federal jurisprudence. (See, e.g., *United States v. Larionoff* (1977) 431 U.S. 864, 879; *Taylor v. City of Gadsden* (11th Cir. 2014) 767 F.3d 1124, 1135.) This Court must use that approach to analyze impairment under the U.S. Contract Clause. Furthermore, to avoid inconsistency in determining whether a statute violates the parallel provision of the California Constitution, the analysis under the two provisions should be the same. (See *Allen II*, *supra*, 34 Cal.3d at p. 119-

125 [adjudicating claims under the federal and state contract clauses using the same standard].)

This approach is also consistent with how the high courts of other states have addressed this issue. (See, e.g., *Moro v. State* (Or. 2015) 351 P.3d 1, 37 [rejecting claim that pension benefits cannot be "changed prospectively . . . for work that is yet to be performed"]; *AFT Michigan v. Michigan* (Mich. 2014) 846 N.W.2d 583, 594 [legislature "may properly attach new conditions for earning financial benefits which have not yet accrued"]; *Scott v. Williams* (Fla. 2013) 107 So.3d 379, 388-389 [legislature has authority "to amend a retirement plan prospectively, so long as any benefits tied to service performed prior to the amendment date are not lost or impaired"]; *Madden v. Contributory Retirement Appeal Bd.* (Mass. 2000) 729 N.E.2d 1095, 1099-1100 [applying new pension regulation only to teacher's service post-dating regulation was "consistent" with teacher's "reasonable expectations" and "a reasonable modification to the teacher retirement system"].)

The unions warn that clarifying this distinction in California will result in a parade of horribles. (See Peralta Retirees Organization Br. 12 [suggesting that pensions will become a "roulette wheel" if this Court does not apply the unions' "California Rule" to un-accrued compensation].) But in Massachusetts, Oregon, and other places that recognize this line, pension benefits remain substantial. Nor have state and local governments in any of these states sought to cut pensions every year, as the unions and LACERA predict would happen here in California. Cutting pension benefits is politically unpopular. And local governments that have to compete with one another for the best workers have powerful incentives to offer the most generous pension benefits that are affordable. Indeed, even when the

bankruptcy process has permitted some cities in California to cut pension benefits, those cities have elected not to do so.[3]

The unions' proposed "California Rule" is not needed to protect public employee pensions from unfair reductions contrary to employees' reasonable expectations. And by divesting the Legislature of its "essential powers" to regulate county retirement systems and safeguard their integrity (*Retired Employees Assn., supra*, 52 Cal.4th at p. 1185, it would erode, and ultimately destroy, the State's power to protect and promote the welfare of its citizens.

CONCLUSION

For the reasons stated here and in its briefs on the merits, this Court should reverse the judgment of the Court of Appeal as to any limitation on AB 197's application to legacy employees.

Dated: November 8, 2018

Respectfully submitted,

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[3] Mendel, *Why Bankrupt San Bernardino Didn't Cut Pensions* (May 2, 2016) Calpensions.com < https://calpensions.com/2016/05/02/why-bankrupt-san-bernardino-didnt-cut-pensions/ > [as of Nov. 8, 2018].

CERTIFICATE OF COMPLIANCE

I certify that the attached CONSOLIDATED ANSWER TO AMICI CURIAE BRIEFS uses a 13-point Times New Roman font and contains 3,380 words.

Dated: November 8, 2018

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PROOF OF SERVICE

Alameda County Deputy Sheriffs' Association, et al. v. Alameda County Employees' Retirement Assn., et al.

Case No. S247095

I am employed in the Office of Governor Edmund G. Brown Jr. I am over the age of 18 years and not a party to this matter. My business address is State Capitol, Suite 1173, Sacramento, CA 95814. On November 8, 2018, I served the State of California's CONSOLIDATED ANSWER TO AMICI CURIAE BRIEFS by the methods indicated below:

☑ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed to the four courts involved in this appeal as set forth below. I am readily familiar with the office's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

☑ by causing TrueFiling to e-serve this document on all the email addresses listed on TrueFiling for this appeal, including the parties listed below at the email addresses indicated.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on November 8, 2018, at Sacramento, California.

ALEXANDER RITCHIE

SERVICE LIST

Alameda County Deputy Sheriffs' Association, et al. v. Alameda County Employees' Retirement Assn., et al.

Case No. S247095

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