SUPREME COURT OF CALIFORNIA
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Case No. S247095

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ALAMEDA COUNTY DEPUTY SHERIFF'S ASSOCIATION et al.,
Petitioners 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.

After a Decision by the Court of Appeal, First Appellate District, 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)

ANSWER TO PETITIONS FOR REVIEW

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I.
INTRODUCTION

The petitions for review fail to show that review is necessary under California Rule of Court 8.500(b). In fact, neither the State of California nor Central Contra Costa Sanitary District even cite the rule. Rather, the petitions largely set forth petitioners' various disagreements with the Court of Appeal's decision, laying out a litany of supposed errors that they want this Court to correct, without identifying a compelling reason to grant review.

The Court of Appeal's 70-page decision is detailed and thorough. Most importantly, it is largely correct. The opinion distills thousands of pages of record and lays out 35 years of legal history under the County Employees Retirement Law of 1937 (CERL), Government Code section 31450 *et seq.*, to rightly conclude that Assembly Bill 197, Statutes 2012, chapter 297, enacted a significant change in the law, which affected legacy employees' vested rights.[1] This interpretation of CERL and AB 197 is consistent with settled California law, particularly this Court's decision in *Ventura County Deputy Sheriffs' Association v. Board of Retirement* (1997) 16 Cal.4th 483 (*Ventura*), and it reaches the sensible conclusion that (1) reducing pensions by excluding certain payments from benefit calculations implicates vested pension rights, and (2) employees are entitled to the inclusion of leave cash-outs promised to them in post-*Ventura* settlement agreements.

To the extent there is an issue satisfying rule 8.500(b) here, it is whether, under the Contract Clause, a comparable advantage must be provided to offset disadvantages before pension modifications will be considered reasonable. But the State and the Sanitary District are not raising

[1] AB 197 was passed immediately after Assembly Bill 340, Statutes 2012, chapter 296, which enacted the California Public Employees' Pension Reform Act of 2012, slightly amending and superseding similar changes AB 340 made to CERL.

that as an issue for this Court to address. (See State of California Petition for Review at p. 7 (hereafter State's Petition); Central Contra Costa Sanitary District Petition for Review at pp. 8-9 (hereafter Sanitary District's Petition).) And because the Court is already taking up this question in *Marin Association of Public Employees v. Marin County Employees' Retirement Association* (2016) 2 Cal.App.5th 674 (*MAPE*) and *CAL FIRE Local 2881 v. California Public Employees' Retirement System* (2016) 7 Cal.App.5th 115, there is no need to also grant review in this case. Indeed, the one conflict that the State and the Sanitary District emphasize time after time is between the decision here and the *MAPE* and *CAL FIRE Local 2881* decisions, which are further along in the review process, with merits briefing complete in *CAL FIRE Local 2881*. Thus, the Court already has clear vehicles for addressing the true outliers—*MAPE* and *CAL FIRE Local 2881*—and it need not also grant review here in order to address the state of the "California Rule."

In particular, the Court can adopt the comprehensive and largely correct decision in this case by transferring *MAPE* back and directing that panel to decide the case consistent with *Alameda County Deputy Sheriff's Association v. Alameda County Employees Retirement Association* (2018) 19 Cal.App.5th 61 (*Alameda County DSA*). If necessary, the Court could also weigh in more specifically on the question of whether comparable advantages must be provided for any pension reduction in *CAL FIRE Local 2881*, which is fully briefed, or it could grant and hold *Alameda County DSA* to address that issue in *MAPE*. But it would be unnecessarily duplicative and a waste of this Court's and the litigants' resources to also grant review here and order full briefing, particularly when the lower court decision was so comprehensive.

The union respondents who are party to this Answer (the Unions) therefore ask that the petitions for review be denied or that the Court pursue

one of these alternative means of addressing the issues, without clogging the Court's docket with redundancy.

II.
FACTUAL AND PROCEDURAL HISTORY

The Court of Appeal decision lays out in detail the complex factual and procedural history of this case. Although they repeatedly fault the lower court's legal conclusions, the State and Sanitation District do not dispute any of its factual findings.

A. The History of CERL and the County Settlement Agreements

The Court of Appeal begins by detailing the history of CERL, which governs the pension systems here, recognizing two key facts underlying this case.

First, this Court's decision in *Ventura* was a sea change in how CERL systems understood the benefits they needed to provide, and it led to significant confusion and litigation over what must be included in the calculation of pension benefits. (*Alameda County DSA*, *supra*, 19 Cal.App.5th at pp. 77-81.) *Guelfi v. Marin County Employees' Retirement Association* (1983) 145 Cal.App.3d 297 had been the guiding standard for determining pension benefits under CERL, holding that compensation had to be received by all employees in the same grade or class for it to be "compensation earnable" under Government Code section 31461 and thus be included in the calculation of pension benefits.[2] (*Id.* at pp. 303-306; *Alameda*

[2] As this court explained in *Ventura*, determining pension benefits under CERL is a three-step process. (*Ventura*, *supra*, 16 Cal.4th at pp. 490-491, 493-494.) First, it must be determined if remuneration is "compensation" under Government Code section 31460, which generally means it must be a cash payment. Then, it must be determined if the "compensation" meets the definition of "compensation earnable" in Government Code section 31461, after which it is used to calculate "final compensation" under Government Code sections 31462 or 31462.1, based on the applicable time period used to

County DSA, *supra*, 19 Cal.App.5th at pp. 77-78.) This effectively excluded from CERL pensions many pay items beyond base pay—e.g., for particular services or special skills—and longevity or other additional compensation that was not received by all employees in the same job classification.[3]

However, *Ventura* upended CERL systems' understanding of how pensions should be calculated by finding that, except for overtime, all cash payments—items of "compensation" under Government Code section 31460—must be included as "compensation earnable" and included in the calculation of benefits, "even if not earned by all employees in the same grade or class." (*Ventura*, *supra*, 16 Cal.4th at p. 487; *Alameda County DSA*, *supra*, 19 Cal.App.5th at pp. 79-80.) *Ventura* found virtually all of the pay items at issue there to be required components of employees' pension benefits, including pay items as diverse as bilingual pay, uniform allowances, educational incentive pay, pay for being on call during meal periods, pay in lieu of taking accrued leave, holiday pay, motorcycle bonuses, field training officer bonuses, and longevity bonuses that could be taken as leave or cashed out. (*Ventura*, *supra*, 16 Cal.4th at pp. 487, 488-489 & fns. 2-13.) In doing so, *Ventura* overturned *Guelfi*, but only to the extent *Guelfi* was inconsistent

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calculate pension benefits. (*Ventura*, *supra*, 16 Cal.4th at pp. 490-491; see also *Guelfi*, 145 Cal.App.3d at p. 303.)

[3] At the same time, *Guelfi* also stated that CERL retirement systems were not precluded from including these payments in pension calculations, only that CERL did not require them to do so. (*Guelfi*, *supra*, 145 Cal.App.3d at p. 307, fn. 6.) It was based on this, and the Legislature's endorsement of this understanding of CERL, that the Unions argued below that the retirement boards had discretion, within the confines of CERL, to include the pay items disputed here as "compensation earnable." (See Stats. 1992, ch. 45, § 3 [legislative declaration that CERL "conferred upon the county retirement boards the duty and power to determine which of the items of compensation paid to county employees who are members of the county retirement associations or systems would constitute 'compensation earnable'"].)

with the finding that most of the disputed pay items were required to be included in the calculation of pension benefits. (*Id.* at p. 505.)

Second, in the wake of *Ventura*, there was significant confusion about how the decision affected counties other than Ventura, and waves of litigation washed over CERL systems throughout the state. (*Alameda County DSA*, *supra*, 19 Cal.App.5th at pp. 81-82.) This led to the significant and involved proceedings in *In re Retirement Cases* (2003) 110 Cal.App.4th 426, which coordinated numerous post-*Ventura* lawsuits across the state before the San Francisco Superior Court. However, in some counties, including the ones here, the governing retirement boards reached settlements with employees and retirees who sought to have *Ventura* applied to them before *In re Retirement Cases* was resolved.[4] (*Alameda County DSA*, *supra*, 19 Cal.App.5th at p. 81.)

In each of the three counties here the settlement agreements or policies enacted contemporaneously with the settlements established more specific definitions or categories of pay that would be included as "compensation earnable." (*Alameda County DSA*, *supra*, 19 Cal.App.5th at pp. 82-83.) Among others, this included so-called "terminal pay"—accrued leave cashed out upon retirement—up to specific amounts, which varied by county. (*Ibid.*) Each settlement agreement was also court-approved and involved employers as parties to the agreement, in addition to employees, retirees, and unions.[5] (*Ibid.*) Finally, as a result of these benefits being in place, the retirement

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[4] The settlement agreements were entered into in 1999 and 2000, more than three years before *In re Retirement Cases* was resolved when this Court denied review of that decision in October 2003. (See *In re Retirement Cases*, *supra*, 110 Cal.App.4th 426.)

[5] In Merced County, the settlement agreement was also subject to litigation in Superior Court to interpret the meaning of the settlement, and the trial court found the settlement to be consistent with *Ventura* and the parties' intent at the time they settled. (*Alameda County DSA*, *supra*, 19 Cal.App.5th at p. 83.)

boards notified retirement system members of the benefits' availability, actively encouraged their use—including that members "maximize" these benefits—and accounted for them in actuarial calculations. (See, e.g., 1 C.T. 0158-0159; 5 C.T. 1258-1259, 1344-1345, 1352-1360; 16 C.T. 4729, 4730; 17 C.T. 5079, 5082, 5101-5153, 5160-5162; 24 C.T. 7092, 7106, 7138, 7139.)

B. The Disputed Pay Items: Leave Cash-Outs, "Terminal Pay," On-Call Pay, and Retirement "Enhancements"

In 2012, the Legislature enacted AB 197, changing the terms of Government Code section 31461 to exclude certain types of payments from "compensation earnable." (Stats. 2012, ch. 296; Stats. 2012, ch. 297.)

The legislation added a new subdivision (b) to the statute, identifying for the first time types of payments that would not be "compensation earnable," including (1) "compensation determined by the [retirement] board to have been paid to enhance a member's retirement benefit;" (2) "[p]ayments for unused vacation [or other leave] . . . in an amount that exceeds that which may be earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid;" (3) "[p]ayments for additional services rendered outside of normal working hours;" and (4) "[p]ayments made at the termination of employment, except those payments that do not exceed what is earned and payable in each 12-month period during the final average salary period." (Gov. Code, § 31461, subd. (b); *Alameda County DSA, supra*, 19 Cal.App.5th at pp. 84-85.)

As a result, the retirement boards here announced that they would exclude certain pay items from the calculation of pension benefits, and the Unions sued as a result, claiming the new exclusions imposed by AB 197 impaired vested pension rights of legacy employees, who were members of

the retirement systems before the new changes were made.[6] (*Alameda County DSA*, *supra*, 19 Cal.App.5th at pp. 85-86.)

Specifically at issue here are (1) in service cash payments in lieu of taking vacation or other paid leave—i.e., leave cash-outs; (2) "terminal pay," or leave cash-outs made at retirement and which are not available in service; (3) on-call, standby, and similar payments; and (4) payments supposedly made to "enhance" pension benefits.

After the trial court issued a mixed decision, both sides appealed, and the Court of Appeal largely ruled in the Unions' favor. It held that CERL does not impose limits on the amount of leave that can be cashed out in service and considered "compensation earnable," including that CERL, even as amended, does not require that pensionable leave cash-outs be limited to leave that is accrued during the final compensation period. (*Alameda County DSA*, *supra*, 19 Cal.App.5th at pp. 98-100.) With regard to on-call pay and pension "enhancements," the court found that these were entirely new exclusions that potentially impaired vested rights, and it remanded for the trial court to conduct a more detailed vested rights analysis. (*Id.* at pp. 109-110, 111-112, 122-123.) Finally, it held that "terminal pay" is not "compensation earnable" under the decision in *In re Retirement Cases* (2003) 110 Cal.App.4th 426, but that because the terminal pay benefits here were created as the result of the retirement boards' authority to settle litigation, and given the uncertain post-*Ventura* environment in which those settlements were made, legacy employees were entitled to the continued pension benefit under the doctrine of estoppel. (*Id.* at pp. 124-130.)

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[6] In the case of Contra Costa County, legacy employees for purposes of the inclusion of terminal pay as "compensation earnable" does not include employees who became members of that retirement system after January 1, 2011, since the Contra Costa Employees' Retirement Association eliminated the ability for new members hired after that date to claim terminal pay. (*Alameda County DSA*, *supra*, 19 Cal.App.5th at p. 82, fn. 5.)

III.
ARGUMENT

A. Petitioners Do Not Establish that the Requirements for Review Have Been Met

Between the State and Sanitation District, petitioners identify no fewer than seven issues they want the Court to review. While there is some overlap in the questions concerning how Government Code section 31461, subdivision (b)(2) should be interpreted and the application of estoppel, the bulk, if not all, of the issues raised are either legally settled or not issues of significance that need to be addressed by this Court.

While petitioners do not make this explicit, the only ground they seem to be relying on is the idea that review is necessary to secure uniformity of decision or to settle an important question of law under rule 8.500(b)(1). Thus, it is telling that they return repeatedly to the conflict between this decision and the *MAPE* and *CAL FIRE Local 2881* decisions. (See, e.g., State's Petition, pp. 26-27, 29; Sanitary District's Petition, pp. 11, 25-27, 29.) This conflict arises only because *MAPE* and *CAL FIRE Local 2881* deviate so significantly from existing public pension case law, and given the plain error in those cases, the discrepancy between them is not a reason to grant review of this case.

1. The Primary Conflict Identified by Petitioners Is With MAPE and CAL FIRE Local 2881, But Those Cases Deviate Significantly from this Court's Precedent

Like *Alameda County DSA*, *MAPE* also addresses changes made to CERL by AB 197, including the exclusion of on-call or standby payments as "outside normal working hours" under Government Code section 31461, subdivision (b)(3), and payments in lieu of employer health insurance, excluded as retirement enhancements under subdivision (b)(1). (*MAPE*, *supra*, 2 Cal.App.5th at pp. 687-688.) However, *MAPE* spends little time addressing the language of CERL and instead focuses the bulk of its

discussion on when pensions can be reduced under the Contract Clause.[7] (*Alameda County DSA, supra*, 19 Cal.App.5th at p. 119 [*MAPE* "eschewed analysis of the many issues of statutory construction" that *Alameda County DSA* addressed].) Instead of concluding, as the lower court here did, that the AB 197 reductions could have unconstitutionally impaired vested rights, *MAPE* found against employees by creating unprecedented new authority for pension benefits to be reduced without any comparable advantage being provided

According to *MAPE*, "short of actual abolition, a radical reduction of benefits, or a fiscally unjustifiable increase in employee contributions," modifications can be made to pension benefits, including pension reductions, as long as the employee is left with a "reasonable" pension. (*Id.* at p. 702.) So long as benefits are not "destroyed," the change is permissible, and "there are acceptable changes aplenty" that do not violate the Contract Clause because employees will still be left with "reasonable" benefits. *(MAPE, supra,* 2 Cal.App.5th at p. 702 [citing reduction of pension from two-thirds to one-half of an employee's salary as reasonable change]; *cf. Alameda County DSA, supra,* 19 Cal.App.5th at p. 122 [finding that only reasonable modifications, as defined by this California Supreme Court cases, are

[7] Given the near immediate jump to the constitutional question, *MAPE* clearly found that AB 197 changed the law and thereby reduced vested pension benefits. (See *MAPE*, *supra*, 2 Cal.App.5th at pp. 689-690 [crux of appeal is whether AB 197's reduction of pension formula impairs vested rights].) In that regard, it is consistent with *Alameda County DSA*'s reading of CERL and AB 197: adding new pay exclusions to the statute for the first time unequivocally reduces pension benefits. Thus, it is disingenuous for the Sanitation District to imply that *Alameda County DSA* conflicts with the *MAPE* statutory analysis, since the true conflict stems from *MAPE*'s incorrect understanding of the pension precedent. (See Sanitation District's Petition at pp. 26-27 [claiming that the Court of Appeal's decision on on-call pay and pension "enhancements" conflicts with *MAPE*].)

permissible and that the burden to justify changes is substantive if no comparable new advantages are given].)

This holding is at odds with decades of case law and explicit statements by this Court that pension reductions "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 v. Bd. of Admin.* (1983) 34 Cal.3d 114, 120.) The Court has alternatively phrased this as a requirement that modifications "must" or "should" be offset by comparable advantages, but in all cases it has treated the offsetting advantage as a requirement, and the lower courts have followed suit. (See, e.g., *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131; *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 447-448, 455; *Betts v. Bd. of Admin.* (1978) 21 Cal.3d 859, 864-865, 867-868; *Olson v. Cory* (1980) 27 Cal.3d 532, 541; *Legislature v. Eu* (1991) 54 Cal.3d 492, 529-530; see also, e.g., *Protect Our Benefits v. City and County of San Francisco* (2015) 235 Cal.App.4th 619, 628-629; *United Firefighters of Los Angeles City v. City of Los Angeles* (1989) 210 Cal.App.3d 1095, 1102-1104; *DeCelle v. City of Alameda* (1963) 221 Cal.App.2d 528, 536-537.)

Nevertheless, relying significantly on sources outside the record and not cited by the parties, *MAPE* determined that public employee pensions were a "ticking time bomb" and a "staggering" fiscal crisis in the making that justified reinterpreting precedent to allow for significant reductions in pension benefits. (See *MAPE supra*, 2 Cal.App.5th at pp. 681-682.) In doing so, *MAPE* crossed the line from simply deciding the law to advocating for it. The decision quite literally attempts to implement the notion that "[t]he state must exercise its authority—*and establish the legal authority*—to reset overly generous and unsustainable pension formulas for both current and future workers." (*MAPE, supra*, 2 Cal.App.5th at pp. 681-682, quoting Little

Hoover Com., Public Pensions for Retirement Security (2011) p. 53, emphasis added.)

In light of its clear deviation from precedent, the conflict with *MAPE* is to be expected, but it is not reason to review the Court of Appeal decision here: rather, *MAPE* is the aberration, and to restore uniformity to the law and reaffirm this Court's pension precedent it is *MAPE* that should be reversed.

The other case cited by petitioners, *CAL FIRE Local 2881* is not a CERL case, but that court adopted the reasoning in *MAPE* as an additional justification for finding against the employees. (*CAL FIRE Local 2881*, *supra*, 7 Cal.App.5th at pp. 130-131.) Addressing whether legacy employees have a vested right to purchase service credit for pension purposes, the court first found that there was no legislative indication that the additional service credit was intended to be a vested benefit. (*Id.* at p. 126.) The court went on, however, to find that even if it were protected by the Contract Clause, the Legislature has the power to modify or eliminate vested pension rights and there is no requirement that a comparable benefit be provided in return. (*Id.* at pp. 127 [claiming that "California law is quite clear that the Legislature may indeed modify or eliminate vested pension rights in certain cases"], 130 ["We agree with [the conclusion in *MAPE*] and . . . reject plaintiff's claim that, absent proof that CalPERS members were granted a comparable advantage, the Legislature's elimination of the airtime service credit must be deemed constitutionally barred"], citing *MAPE*, *supra*, 2 Cal.App.5th at p. 699.)

This holding suffers from the same fundamental flaw afflicting *MAPE*: it is not California pension law. Thus, any conflict that exists with *CAL FIRE Local 2881* is similarly not a reason to review *Alameda County DSA* but instead to right *CAL FIRE Local 2881*. As discussed next, because the Court already has the opportunity to correct *MAPE* and *CAL FIRE Local*

2881, it would not be appropriate to duplicate those efforts by also reviewing this case.

2. The Court Can Address the Errors in *MAPE* and *CAL FIRE Local 2881* Without Granting Review Here

As the State and Sanitation District point out repeatedly, the Court has already granted review in MAPE and CAL FIRE Local 2881. However, they draw the wrong conclusion from that fact: because review has already been granted, the Court need not grant review here to create uniformity or to settle important questions of law.

MAPE and CAL FIRE Local 2881 are the outliers, given their departure from existing precedent. At the same time, they both raise questions about whether the Contract Clause requires that a comparable advantage be provided in order to offset disadvantages, and merits briefing in CAL FIRE Local 2881 is already complete. (See *CAL FIRE Local 2881*, supra, 7 Cal.App.5th 115, review granted April 12, 2017, S239958.) Even with regard to the more mundane questions of how CERL and AB 197 should be interpreted, this Court will have the opportunity to address those issues in MAPE if need be, making review and briefing of those issues in this case unnecessary.

The Court has several options beyond granting review and ordering briefing here. First, the Court could effectively adopt the Alameda County DSA decision by transferring MAPE back to its panel under California Rule of Court 8.528(d) with instructions to decide that case consistent with Alameda County DSA. (See, e.g., *American Airlines, Inc. v. Superior Court* (2003) 114 Cal.App.4th 881, 887 [case transferred back to Court of Appeal with directions].) Since the decision here is largely correct and extremely comprehensive in laying out the law and its reasoning, it encompasses all of the legal issues that the Court might possibly address and eliminates the need for the Court to also weigh in. Instead, the problems in MAPE could be

quickly and decisively resolved simply by endorsing the lower court's decision here.

Second, if the Court felt it necessary to weigh in more specifically about the one issue of importance here—the status of the "comparable advantage" requirement—it could decide that issue in *CAL FIRE Local 2881*, and order that *MAPE* be decided consistent with *Alameda County DSA* and *CAL FIRE Local 2881*. That way, the Court could address the state of California's pension case law and provide even more specific direction to the *MAPE* panel, resolving any inconsistency between *CAL FIRE Local 2881*, *MAPE*, and *Alameda County DSA* on this issue. Particularly because briefing is complete in *CAL FIRE Local 2881*, it will decide that case long before either *MAPE* or *Alameda County DSA*.

Finally, another option for the Court is to grant review and hold Alameda County DSA while MAPE is briefed and decided. (Cal. Rules of Court, rule 8.512(d).) Especially given the duplicative nature of the cases and the fact that *Alameda County DSA* is the decision that is consistent with case law, the Court could directly address the errors in *MAPE* and achieve uniformity through that decision alone, with a later remand for any proceedings to occur in *Alameda County DSA* in light of *MAPE*. Again, this would avoid unnecessarily duplicative briefing and preserve the resources of litigants and the Court.

Thus, to the extent this case raises important issues of law, the Court has several options short of review and full briefing to address them. Although the Unions who are party to this Answer agree with the Alameda County Deputy Sheriffs' Association that the Court meant what it said when it declared that "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," they

disagree that review is necessary here to address that question. (*Allen v. Bd. of Admin., supra*, 34 Cal.3d at p. 120.) There is simply no need for duplicative briefing in this case to address issues that are already before the Court, particularly when the lower court's decision was so comprehensive and largely correct.

3. The State's Attempt to Create an Unsettled Question of Law Ignores Firmly Established Precedent

In an effort to conjure up an issue for this Court to address, the State insists that the Court has never addressed whether employees "have vested rights to the inclusion in their future final compensation of specific pay items that they have not yet earned during their final compensation period." (State's Petition, p. 25; see also State's Petition, p. 7 [proposing issue of whether Legislature can exclude future compensation from pension benefits].) There are at least two reasons this is wrong and not a basis for granting review.

First, the question the State is raising is whether future pay can be excluded from pension benefits simply because the employee has not yet been paid that money. The Court long ago settled this question when it said that upon acceptance of employment, employees "acquire[] a vested right to a pension based on the system then in effect." (*Miller v. State of California* (1977) 18 Cal.3d 808, 817.) It would be a modification of the employee's vested rights to change the terms of that system, and it does not matter that the benefit has not fully matured or that the final pension amount has not yet been calculated. (See *ibid.*; *Carman v. Alvord* (1982) 31 Cal.3d 318, 325.) Nothing about this issue is novel or unsettled, and there is no need to take it up.

Second, the State is simply arguing against precedent and seeking to have the Court adopt a rule from other jurisdictions. (See State's Petition, p. 24, citing *United States v. Larionoff* (1977) 431 U.S. 863, 879; *Taylor v. City*

of Gadsden (11th Cir. 2014) 767 F.3d 1124, 1135.) But there is no basis in the principles of stare decisis for such a significant shift in this state's law, nor does the State even make an attempt to justify such a radical turn. (See *Sacramento Bank v. Alcorn* (1898) 121 Cal. 379, 382 ["These decisions, which have been uniform, establish a conclusion which has become a rule of property, and . . . it should not be disturbed."]; *Bock v. Oakland* (1937) 19 Cal.App.2d 115, 117 ["where a decision of a court of last resort has been acted on for a long period of time, as here, it ought not, and as a rule will not be disturbed where contractual relations or rights are resting upon the decision"].) California law on this issue is clear, and the reliance on this body of precedent is significant. Thus, there is no reason to reconsider it.

B. The Court of Appeal Decision Correctly Interpreted CERL and AB 197, Faithfully Applying this Court's *Ventura* Decision

The State and the Sanitary District's petitions are replete with claims about how the lower court was wrong. In fact, the Court of Appeal's supposed errors seem to be the primary reason they claim review is necessary. For example, they fault the court for its interpretation of CERL, its reading of *Ventura*, and its understanding of the new language added by AB 197. But simply being incorrect is not reason enough to grant review. At the same time, the petitions are wrong in their characterization, and there are ample reasons to find the lower court read the statutes correctly.

1. The Court Correctly Found that AB 197 Changed the Law Regarding Payments for Services "Outside Normal Working Hours" and Retirement "Enhancements"

For all their criticisms of the lower court, petitioners devote little energy to demonstrating the error. This is most glaring in their discussion of on-call and standby type payments that were excluded under section 31461, subdivision (b)(3), and so-called retirement "enhancements" that were excluded under subdivision (b)(1).

For example, the State asserts without citation that "[n]othing in the prior statutory text supports treating pay as pensionable so long as it is for work that was part of an individual employee's regular work assignment." (State's Petition at p. 22.) But this ignores the Court's statement in *Ventura* that "[w]ith the exception of overtime pay, items of 'compensation' paid in cash, even if not earned by all employees in the same grade or class, must be included in the 'compensation earnable' and 'final compensation' on which an employee's pension is based." (*Ventura*, *supra*, 16 Cal.4th at p. 487.) More directly, *Ventura* found that pay for employees being on call during meal periods was "compensation earnable." (*Id.* at pp. 488, fn. 5, 505.)

Following the Court's precedent, the lower court in this case thoroughly analyzed on-call payments and rightly concluded that regularly scheduled work of this nature was "compensation earnable," even if not earned by everyone in the same grade or class, and that AB 197 changed the law, implicating vested rights. (*Alameda County DSA*, *supra*, 19 Cal.App.5th at pp. 108-109.)

With regard to retirement "enhancements," the Court of Appeal thoroughly addressed this issue as well, and neither the trial court nor the Court of Appeal disagreed with the Unions that this was an entirely new restriction imposed by AB 197. (*Alameda County DSA*, *supra*, 19 Cal.App.5th at pp. 110-111.) Accordingly, and since various payments such as cash in lieu of health insurance were excluded from pension benefits because of this new provision, the court found that there was a potential impairment of vested rights and remanded for the trial court to conduct the appropriate analysis. (*Id.* at p. 113.) Again, the State and Sanitation District neither demonstrate that the court's conclusion was incorrect nor that this is an important issue warranting review. (See State's Petition, pp. 22-23; Sanitation District's Petition at pp. 25-26.)

2. The Court's Interpretation of "Earned and Payable" Is Consistent with CERL

The State and the Sanitary District cite the Court of Appeal's interpretation of section 31461, subdivision (b)(2) as yet another example of how they believe the court erred and an issue that this Court should review. (See, e.g., Sanitary District's Petition, p. 18 [arguing that the court "stretched *Ventura* beyond its limits"].) But the court's reasoning is consistent with CERL and *Ventura*, and even if petitioners are correct, the end result is that AB 197 impaired legacy employees' right to the inclusion of leave cash-outs, which helps the Unions' position, not petitioners. In other words, this is neither an area where uniformity has been disrupted nor a legally significant question—it is simply the petitioners arguing that the court got it wrong.

Under the new subdivision (b)(2), payments for cashed-out leave "in an amount that exceeds that which may be earned and payable in each 12-month period during the final compensation period, regardless of when reported or paid" are excluded from "compensation earnable." (Gov. Code, § 31461.) Like the other exclusions, this was added to section 31461 by AB 197 and is entirely new to CERL. (See Stats. 2012, ch. 297, § 2.)

Long before AB 197, *Ventura* found that leave cash-outs are "compensation earnable" that must be included in pension calculations, and it did not find any limitation in CERL on how much leave could be cashed out. (*Ventura*, *supra*, 16 Cal.App.4th at pp. 488-489, fns. 6, 11, 12, 497-498, 505.) The Court specifically discussed payments for leave and found that paid leave did not become "compensation" until it was received as cash, either as a payout or because the employee was paid while on leave. (*Id.* at pp. 497-498.)

Following this reasoning, the Court of Appeal held that subdivision (b)(2) likewise did not impose a restriction on when leave needed to have been accrued or how much leave could be included as "compensation

earnable." (*Alameda County DSA*, *supra*, at p. 100.) The new provision excludes payments for leave if the amounts exceed that which may be "earned and payable" in each 12-month period, but payments are "earned and payable" when the employee is capable of receiving cash—in other words, when the relevant employer policy or collective bargaining agreement permits the employee to cash out leave, in whatever amount the policy or agreement permits. There is no "payment" otherwise and nothing is earned or payable without the actual ability to receive cash. So this new provision does not dictate how much the payments can be or how much leave can be "earned and payable," and it does not stand for the restriction the State and the Sanitary District seem to think it does.

But even if the State and the Sanitary District are correct that subdivision (b)(2) added a new restriction on the amount of leave that can be cashed out and included as "compensation earnable," the upshot is that AB 197 changed CERL to exclude in-service leave cash-outs that were previously permitted. In other words, the logical conclusion of petitioners' position is that AB 197 also reduced legacy employees' vested pension rights by excluding cash-outs and is subject to the Contract Clause's impairment analysis, including the question of whether an offsetting advantage was provided. If anything, this fortifies the Unions' position throughout this litigation, because it supports their argument that vested rights have been impaired.

Finally, missing from the cries that the decision will lead to "spiking" is a failure to acknowledge that workers cannot cash out any accrued leave unless the employer has agreed to permit it. Leave cash-outs are fundamentally a form of compensation, which is set by the employer, either directly or through collective bargaining. Nothing about CERL restricts the employer's control over any of this compensation, including the employer's ability to limit leave cash-outs only to leave accrued during a specific time

period, or to place a "cap" on leave accruals. Thus, it is particularly ironic that the Sanitary District complains about the leave cash-outs it provides to employees, which it presumably does for the same reason as the county did in *Ventura*—to reward them for their service and to provide an incentive for them to work rather than taking vacation. (*Ventura*, *supra*, 16 Cal.4th at p. 498; *Alameda County DSA*, *supra*, 19 Cal.App.5th at p. 101.) If leave cash-outs are onerous, then the Sanitary District can propose eliminating the benefit, but otherwise it is hard to see its complaints as anything other than hypocrisy and bad faith.[8]

Especially for this reason, there is no important question of law presented in how subdivision (b)(2) should be interpreted. "[I]f it is seen as problem, the public employers can always negotiate to stop offering the benefit," without the need for this Court to also weigh in. (*Alameda County DSA*, *supra*, 19 Cal.App.5th at p. 101.)

C. The Court of Appeal Correctly Applied Longstanding Principles of Equitable Estoppel, Making Review of that Issue Unnecessary

This Court has long recognized "the unique importance of pension rights" to public employees, and that estoppel is appropriate where those employees were "induced to accept and maintain employment on the basis of expectations fostered by widespread, long-continuing misrepresentations" concerning their future pension rights. (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 28.) As correctly determined by the Court of Appeal, the "terminal pay" benefit presents those exact circumstances, such that "the

[8] It should also be noted that the Sanitary District, as an employer, adhered to its settlement agreement without protest until the Legislature changed the law through AB 197 and the Unions initiated the underlying litigation in this case. The Sanitary District made the actuarially determined employer contributions for the terminal pay benefits at issue without challenging the legality of the benefits and the obligation to make the required contributions. Now, at this late date, it asks this Court to relieve it of its obligations under that settlement.

injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify" the incidental impact on public policy. (*Alameda County DSA*, *supra*, 19 Cal.App.5th at p. 126, quoting *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 496-497.)

The court engaged in the balancing test called for by this Court's precedent and, after considering the equities under the unique circumstances here, held that employees and retirees are entitled to what they were promised in the post-*Ventura* settlement agreements. This is consistent with the Court's precedent, and the *sui generis* circumstances mean that the decision will have limited precedential value in future cases. Accordingly, there is no reason to grant review on this issue.

1. Estoppel Is Appropriate to Prevent Injustice Under the Unique Circumstances of this Case

The doctrine of equitable estoppel "rests firmly upon a foundation of conscience and fair dealing," and there is no question that "equitable estoppel may be applied against the government where justice and right require it." (*City of Long Beach*, *supra*, 3 Cal.3d at pp. 488, 493.) It is a tool of equity allowing a court to avoid injustice—injury resulting from justifiable reliance induced by another party's conduct. (*Id.* at p. 489.) In the context of public employee pensions, this occurs where "employees were induced to accept and maintain employment on the basis of expectations fostered by widespread, long-continuing misrepresentations," and the circumstances indicate "an extremely narrow precedent for application in future cases"—as was the case here. (*Longshore, supra*, 25 Cal.3d at p. 28; *City of Long Beach, supra,* 3 Cal.3d at p. 500.)

Specifically, "[t]he government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to

uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy . . . .” (*Id.* at pp. 496-497.) Accordingly, cases in which estoppel has been applied against the government involve not only a determination as to whether the traditional elements of estoppel are present, but an additional balancing of two competing principles—the traditional principle of equity favoring the avoidance of manifest injustice and the principle seeking to preserve the public interest. (*Id.* at pp. 495-496.) “The tension between these twin principles makes up the doctrinal context in which concrete cases are decided.” (*Id.* at p. 493.)

This is necessarily a fact-intensive inquiry, and each case will turn on its specific circumstances and the relevant equitable considerations. The Court of Appeal here carefully considered the elements of estoppel and weighed the injustice that would result, consistent with this Court’s precedent. It found estoppel appropriate based on extraordinary circumstances involving an “impressive combination of governmental acts encouraging reliance” by thousands of public employees that is “not likely to recur.” (*City of Long Beach, supra,* 3 Cal.3d at p. 498.)

The misrepresentations to the public employees in this case came from both the employers and retirement systems, were open and affirmative, and lasted for more than a decade. Significantly, all were founded upon court-approved settlement agreements executed in response to litigation arising from this Court’s decision in *Ventura,* a case that greatly expanded what retirement associations understood CERL required to be included as “final compensation.” (*Alameda County DSA*, *supra*, 19 Cal.App.5th at pp. 77-81.) Additionally, in Merced, misrepresentations continued following a superior court judgment affirming members’ continued receipt of the benefits promised to them in the settlement agreement.

Accordingly, and as correctly articulated by the Court of Appeal, “[i]t is beyond doubt that this is a case in which there have been widespread and

long-continuing misrepresentations by both employers and the Boards regarding the ability of legacy members to include terminal pay in pensionable compensation." (*Alameda County DSA*, *supra*, 19 Cal.App.5th at p. 127.)

This is not a case in which the retirement boards utterly lacked the power to enter into the promises they did. The long-term misrepresentations as to the inclusion of terminal pay were memorialized by court-approved settlement agreements between the affected employees, employers, and the retirement boards. These agreements were executed pursuant to the retirement boards' "broad administrative mandate" to administer their respective systems, defray reasonable expenses attendant to that administration, and "assure prompt delivery of benefits" to their participants and their beneficiaries, and their statutory discretionary authority to determine the components of "compensation earnable." (*Alameda County DSA*, *supra*, 19 Cal.App.5th at pp. 125-126; Cal. Const. Art. XVI, § 17.)

And as the court described in detail, the "unprecedented" circumstances confronting the retirement boards included:

> a Supreme Court ruling greatly expanding the types of pay items that they had previously understood to be includable in compensation earnable; litigation by CERL members statewide, seeking to reap the benefits of the *Ventura* decision; the prospect of significant and ongoing costs of litigation; the lingering (albeit incorrect) notion that CERL boards possessed discretion under *Guelfi* to include additional pay items, over and above those mandated by *Ventura*, in compensation earnable;[9] and the

[9] Also notable is that at the time, other appellate decisions had repeated *Guelfi*'s notion that CERL granted retirement boards the discretion to confer pension benefits over and above those articulated by statute. (See *Howard Jarvis Taxpayers' Association v. Board of Supervisors of Los Angeles County* (1996) 41 Cal.App.4th 1363, 1373-1374; *County of Marin Association of Firefighters v. Marin County Employees Retirement Association* (1994) 30 Cal.App.4th 1638, 1646, quoting *Guelfi*, *supra*, 145 Cal.App.3d at p. 305.)

> constitutional requirement that they promptly and efficiently deliver benefits to their members.

(*Alameda County DSA*, *supra*, 19 Cal.App.5th at p. 126.)

Consistent with precedent, the Court of Appeal rightly concluded that estoppel was necessary to prevent a significant injustice, and that any effect on public policy is limited because these long-standing misrepresentations were brought about by an "unprecedented situation" confronted by the Boards, resulting in any "precedent by allowing estoppel" in these circumstances to be narrowed because the facts presented here are "not likely to recur."[10] (*Alameda County DSA*, *supra*, 19 Cal.App.5th at p. 126; see *City of Long Beach*, *supra*, 3 Cal.3d at 498, 500 [Noting that the "nature" of the government entity's course of conduct is "of extreme relevance in assessing the effect upon public policy," because "the precedent set by allowing estoppel" is narrowed where there exists "a considerable combination of governmental actions not likely to recur."].) There is thus no need for the Court to clarify this aspect of the lower court's opinion.

2. The Court Has Not Established a Bright-Line Rule that Would Prohibit Estoppel in these Circumstances

The State and the Sanitary District do not contend that the court improperly analyzed the traditional elements of estoppel. (See *Alameda County DSA*, *supra*, 19 Cal.App.5th at pp. 126-127.) Instead, both incorrectly assert that estoppel is barred as a matter of law because estoppel cannot be invoked to enforce a right in contravention of statutory prohibitions. (State's Petition, pp. 28-30; Sanitary District's Petition, pp. 21-23.)

Contrary to this assertion the Court has not stated a bright-line rule prohibiting the application of estoppel where a distinct legal right is not

[10] The claim that public agencies will use sham settlements to circumvent the law is likewise absurd, since courts are capable of evaluating whether settlements have been entered into in good faith and whether the equities weigh in favor of estoppel.

established. Rather, as articulated and applied by this Court in *City of Long Beach*, the court is tasked with weighing any frustration of public policy with the injustice averted, and determining whether it is justified in the context of the circumstances of the case. (*City of Long Beach*, *supra*, 3 Cal.3d at p. 498.) In other words, an "effect upon public interest or policy" is assumed by and imbedded in the balancing test itself. If this was not so, equitable estoppel could never exist against any government entity because the claim arises only where a party suffers injury to their legal rights or status. The asserted bright-line rule would threaten to swallow the doctrine of equitable estoppel entirely.

This Court in *City of Long Beach* upheld estoppel even while assuming it "would be contrary to the public policy reflected in" a particular provision of the state constitution. (*City of Long Beach*, *supra*, 3 Cal.3d at p. 500.) The assumed effect on public policy was not dispositive, because "more significant" was "the rare combination of government conduct and extensive reliance" which created "an extremely narrow precedent for application in future cases." (*Ibid.*) Thus, even when confronted with an acknowledged frustration of constitutional policy, the balancing of equities favored the application of estoppel. Indeed, as correctly recognized by the Court of Appeal in this case, this Court has specifically declined to hold that estoppel can never apply "in a case where the governmental entity in question utterly lacks the power to effect that which an estoppel against it would accomplish." (*Alameda County DSA*, *supra*, 19 Cal.App.5th at p. 125; *City of Long Beach*, *supra*, 3 Cal.3d at p. 499.)

This Court's decision in *Longshore*, *supra*, 25 Cal.3d 14, which the State and Sanitation District rely on, is factually distinguishable, and more importantly, does not change the fundamental nature of the estoppel analysis set forth in *City of Long Beach*.

First, *Longshore* concerned "alleged assurances" by an individual employee's supervisors that certain overtime credits would be compensated as cash. (*Longshore*, *supra*, 25 Cal.3d at p. 27-28.) *Longshore* did not involve the application of estoppel in "the narrow area of public employee pensions," which is of "unique importance" "to an employee's well-being." (*Id.* at pp. 28-29 ["Here . . . compensation rather than pension rights are involved."].)

Second, *Longshore* affirms both the application of estoppel in circumstances where "employees were induced to accept and maintain employment on the basis of expectations fostered by widespread, long-continuing misrepresentations," and that the proper analysis is a balancing test which assumes there will be an adverse effect on public policy. (*Longshore*, *supra*, 25 Cal.3d at p. 28, emphasis added ["In each of these instances the potential injustice to employees or their dependents clearly outweighed any adverse effects on established public policy."].) Estoppel was not appropriate in *Longshore* because the plaintiff there "assert[ed] no widespread misleading practices," nor was he "induced by [] misrepresentations to perform the work in question . . . ." (*Id.* at p. 29.) While *Longshore* does note in reflective dicta that "no court has expressly invoked principles of estoppel to contravene directly any statutory or constitutional limitations," it does not say that such an application of estoppel would be barred in circumstances where "justice and right require it." (*Id.* at p. 28; *City of Long Beach*, *supra*, 3 Cal.3d at p. 493.)

In short, *Longshore* recognizes the unique importance of public employee pension rights, reaffirms the balancing test as outlined in *City of Long Beach*, and acknowledges that estoppel is appropriate where public employees are induced to accept and maintain their employment by a public entity's "widespread" and "long-continuing" misrepresentations.

All other cases upon which the State and the Sanitary District rely for their asserted bright-line rule do not even meet the threshold test for the

application of estoppel in the first instance.[11] (See, e.g., *Medina v. Bd. of Retirement* (2003) 112 Cal.App.4th 864, 866-868 [no indication that the plaintiffs were induced to take any action as a result of widespread or long-continuing affirmative representations, and instead they sought to gain from the retirement system's isolated administrative mistake]; *City of Pleasanton v. Bd. of Administration* (2012) 211 Cal.App.4th 522, 527-528 [no representation by retirement system at all, only improper reporting of compensation by the employer]; *Fleice v. Chualar Union Elementary School Dist*. (1988) 206 Cal.App.3d 886, 888-889 [error led to employee mistakenly being granted tenure prematurely; no pension rights involved at all].)

Finally, the State and the Sanitary District completely ignore the effect their position will have on the strong public policy of encouraging the settlement of litigation. (See *Fisher v. Superior Court* (1980) 103 Cal.App.3d 434, 440 ["The encouragement of settlements has always been part of the strong public policy of our state."]; *Potter v. Pacific Coast Lumber Co. of Cal.* (1951) 37 Cal.2d 592, 602 ["The law wisely favors settlements . . . ."].) Indeed, should the State's and the Sanitary District's position prevail, it is not clear how a retirement board (or an employer, such as Sanitary District) could ever execute a settlement in good faith, and thereafter adhere to it in good faith for more than a decade as happened in this case, if such an agreement could always be unwound by subsequent legislative action. Such

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[11] Nor does *City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210, support the State's and the Sanitary District's assertion of a bright-line rule. In *City of Oakland*, the retirement board had discretion with regard to how overpayments should be handled, and similarly here, the retirement boards exercised their plenary authority to administer the retirement systems, including the power to settle litigation in the interest of the system and consistent with their fiduciary responsibilities. (*Id.* at pp. 243-245; Cal. Const. Art. XVI, § 17; *Alameda County DSA, supra*, 19 Cal.App.5th at pp. 125-126.)

an outcome would impermissibly handicap the retirement boards' broad mandate to administer their systems.

IV.
CONCLUSION

Review of this case is unnecessary and would be a poor use of the Court's and litigants' resources, when the Court has other options for addressing any important issues raised by this case. The Unions therefore ask that review be denied.

Date: March 8, 2018

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

The foregoing Answer to Petitions for Review contains 8,372 words, including footnotes, based on the Microsoft word count feature, excluding the Table of Contents, Table of Authorities, Certification of Word Count and the signature block.

Date: March 8, 2018 /s/ *Timothy K. Talbot*
Timothy K. Talbot

PROOF OF SERVICE

I am employed in the City of Sacramento, State of California. I am over 18 years of age and not a party to this action. My business address is Rains Lucia Stern St. Phalle & Silver, PC, One Capitol Mall, Suite 345, Sacramento, CA 95814.

On the date below I served a true copy of the following document(s):

PETITION FOR REVIEW

on the interested parties to said action by the following means:

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SERVICE LIST	
Party	**Address**
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First 5, Alameda County Children & Families Commission	Mark Friedman Chief Executive Officer First 5 1115 Atlantic Avenue Alameda, CA 94501 Email: mark.friedman@first5ecc.org
Housing Authority of County of Alameda; County of Alameda	Brian E. Washington Andrea Weddle Office of the County Counsel County of Alameda 1221 Oak Street, Suite 450 Oakland, CA 94612-4226 Email: brian.washington@acgov.org andrea.weddle@acgov .org
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Alameda County Office of Education	Sheila Jordan Superintendent of Schools Alameda County Office of Education 313 W. Winton Avenue Hayward, CA 94544 Email: sjordan@acoe.org
Superior Court of California	Patricia Sweeten Executive Officer Alameda County Superior Court 1225 Fa1lon Street, Room 209 Oakland, CA 94612 psweeten@alameda.courts.ca.gov

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

DATED: March 8, 2018 /S/ Lesley Welch

Lesley Welch

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 3/9/2018 by Ines Calanoc, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **ALAMEDA COUNTY DEPUTY SHERIFF'S ASSOCIATION v. ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASSN. AND BD. OF THE ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASSN.**

Case Number: **S247095**

Lower Court Case Number: **A141913**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **ttalbot@rlslawyers.com**

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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

--

Date

/s/Timothy Talbot

Signature

Talbot, Timothy (173456)

Last Name, First Name (PNum)

Rains Lucia Stern, PC

Law Firm