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

REPLY IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

In response to three separate petitions urging this Court's review of *Alameda County Deputy Sheriffs' Association v. Alameda County Employees' Retirement Assn.* (2018) 19 Cal.App.5th 61 (*Alameda County*), the Answer filed by the unions opposing review (unions) labors without success to identify a persuasive argument for why review should not be granted.

The unions claim that "the bulk, if not all, of the issues raised [by the State and Central Contra Costa Sanitary District] are either legally settled or not issues of significance that need to be addressed by this Court." (Answer at p. 13.) Yet, the Answer concedes that this case raises many of the same legal issues as *Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.* (2016) 2 Cal.App.5th 674, review granted Nov. 22, 2016 (S237460) (*Marin*), issues which this Court has *already* determined are significant and proper for its review. It was presumably in part for that reason that when this Court granted review of the *Marin* case, it stayed briefing in *Marin*, pending the Court of Appeal's decision in this matter. Moreover, *Alameda County* presents these issues, along with others never addressed in *Marin*,[1] with a far more developed factual record.

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[1] Some of the most egregious pension-spiking practices in CERL counties involved the inflation of final pensionable compensation with excessive cashouts of unused leave in Alameda, Contra Costa, and Merced counties. These practices were unlawful under CERL—both before and after AB 197—and were accordingly prohibited by most counties, including Marin County. Consequently, the provisions in AB 197—including Government Code section 31461, subdivision (b)(2) and (b)(4)—that apply to these practices are not at issue in the *Marin* case. *Marin* also does not involve the issue of whether settlement agreements promising unlawful benefits can be used as the basis to estop retirement boards from applying the governing law.

The Answer also insists that this Court has "long ago settled" the question of whether employees acquire vested rights to the inclusion of specific pay items in their future final compensation before they earn those pay items through service. (Answer at p. 19.) But the unions' explanation shows that, far from settled, this significant legal question is hotly contested and in need of this Court's clarification. The two cases cited by the Answer as "settling" the issue in fact leave the issue open or do not address it at all. And contrary to this Court's precedent, the Answer suggests that the issue should be analyzed differently under the contract clause of the California Constitution than under the federal contract clause.

Similarly, the Answer dedicates several pages to arguing that this Court's well-established rule prohibiting the application of estoppel "to contravene directly any statutory or constitutional limitations" is not in fact "a bright-line rule" that barred estoppel as a matter of law here. Yet, the contortions necessary to distinguish numerous precedent of this Court and other courts of appeal belie any claim that the law is either clear or uniform. If anything, they underscore the urgent need for this Court to clarify if estoppel can indeed be used to contravene statutory limitations and effectively nullify the Legislature's anti-spiking policy in three counties.

Ultimately, the unions' arguments are best understood in light of the single objective motivating them: shielding from review a decision that bestows upon the unions' membership an unprecedented financial windfall and hobbles pension reform efforts going forward. To resolve the multiple conflicts between the *Alameda County* decision and this Court's precedent noted in the State's petition, and to protect the elected branches' efforts to bring egregious pension-spiking practices to an end, this Court should grant review.

I. THE UNIONS FAIL TO ADDRESS THE CONFLICTS OF LAW AND IMPORTANT LEGAL QUESTIONS RELATED TO VESTED RIGHTS CREATED BY THE DECISION BELOW

In its petition for review, the State urges this Court to "grant review to clarify the scope of the Legislature's authority to clarify and update the definition of pensionable compensation applicable to current employees." (State's Petition at p. 20.) As explained in the State's petition, three issues particularly merit clarification: (1) whether, before AB 197's enactment, CERL included as pensionable compensation (a) payments for services rendered outside normal working hours and (b) payments made specifically to enhance a member's pension; (2) whether employees have vested rights to the inclusion in their future pensionable compensation of pay items that they have not yet earned; and (3) the extent of the Legislature's authority to modify vested pension rights without providing comparable new advantages.

A. The Unions' Response Fails to Show That the Court of Appeal Correctly Interpreted Government Code Section 31461

On the question of whether the Court of Appeal incorrectly determined that payments for services rendered outside normal working hours (Gov. Code, § 31461, subd. (b)(3)) were included in pensionable compensation prior to AB 197, the unions assert that "simply being incorrect is not reason enough to grant review. (Answer at p. 20.) In fact, as discussed in the State's petition, the Court of Appeal's analysis is not merely incorrect; the analysis also conflicts with the test long used by retirement boards and recognized in *Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4th 483. (State's Petition at p. 22.) That test looks not at whether the pay item is for services that are part of an individual's regular work assignment, but rather at whether a pay item is based on "the average number of days ordinarily worked by persons in the

same grade or class of positions during the period." (*Ventura*, *supra*, 16 Cal.4th at pp. 500-501, quoting Gov. Code, § 31461.) By replacing this test with a new one divorced from the statute and *Ventura*, the Court of Appeal departed from this Court's precedent and muddied this important area of law.

The Answer similarly fails to grapple with the State's arguments that payments made specifically to enhance a member's pension (Gov. Code, § 31461, subd. (b)(1)) were never allowed in pensionable compensation under prior law. The Answer does not attempt to defend the Court of Appeal's analysis regarding why such payments were always pensionable. Instead, after summarizing the Court of Appeal's holding, the Answer merely asserts in conclusory fashion that "the State and [Central Contra Costa Sanitary] District neither demonstrate that the court's conclusion was incorrect nor that this is an important issue warranting review." (Answer at p. 21.)

B. The Unions' Response Underscores That the Question of Whether Employees Have Vested Rights to the Inclusion in Their Future Final Compensation of Pay Items That They Have Not Yet Earned Is Far from Settled

To the extent that the Court of Appeal is correct that these payments *were* pensionable prior to AB 197, and that AB 197 therefore changed the law in this regard, the *Alameda County* decision raises an issue of extraordinary importance, as highlighted in the State's petition. (See State's Petition at pp. 23-25.) That issue is whether employees have vested rights to the inclusion in their future final compensation of pay items that they have not yet earned during the final compensation period, a question left unresolved by *Legislature v. Eu* (1991) 54 Cal.3d 492. (State's Petition at p. 25.) The time to resolve this issue has never been more pressing. An increasing number of state and local pension systems are beginning to feel

the tremendous weight of their unfunded pension liabilities. As the Little Hoover Commission emphasized to the Legislature and Governor years ago, the problem of unfunded pension liabilities "cannot be solved without addressing the pension liabilities of current employees . . . . To provide immediate savings of the scope needed, state and local governments must have the flexibility to alter future, unaccrued retirement benefits for current workers." (Little Hoover Com., Public Pensions for Retirement Security (Feb. 2011) at p. 42.)

Again, the Answer provides little meaningful response. As a threshold matter, it fails to correctly apprehend the issue raised by the State. The Answer misstates the issue as "whether future pay can be excluded from pension benefits simply because the employee has not yet been paid that money." (Answer at p. 19.) In fact, as stated in the petition, the question to be decided is whether employees have vested rights to the inclusion in future pensionable compensation of pay items that they have not yet *earned* through service. (State's Petition at pp. 7, 23-25.) The unions' misconstruction of the issue *assumes* that the employee has already earned the payment but has just not yet been paid. But the question for this Court to resolve is whether an employee has a vested right to the inclusion of a payment in pensionable compensation, before ever acquiring a vested right to the payment itself (since the employee has never earned it through service).

After misstating the issue, the Answer next insists that the issue has "long been settled," citing *Miller v. State of California* (1977) 18 Cal.3d 808, and *Carman v. Alvord* (1982) 31 Cal.3d 318. (Answer at p. 19.) Yet, neither of these cases addresses the issue. *Miller* addresses the question of whether changing the mandatory retirement age affects vested pension rights; this Court concluded that it does not. (*Supra*, 18 Cal.3d at pp. 817-818.) The issue in *Carman* was whether a voter-approved tax to fund a

city's pension obligations was exempt from a tax limitation imposed by Proposition 13; this Court concluded it was. (*Supra*, 31 Cal.3d at p. 333.) Neither case is authority for the proposition that an employee has a vested right to the pensionability of a specific pay item before ever earning that pay item through service. (See *Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1134 [cases are not authority for propositions not considered or decided].) In sum, the unions cite no authority to support their assertion that this pivotal issue has been settled.

Finally, the Answer urges this Court to reject consideration of this issue because the State is "seeking to have the Court adopt a rule from other jurisdictions." (Answer at p. 19.) Again, that is incorrect. The federal contract clause and the U.S. Supreme Court's interpretation of it both govern in California. Moreover, even if this case only involved the contract clause of the California Constitution (in fact, it involves both), the contact clauses of the California Constitution and U.S. Constitution are "parallel." (*Allen v. Board of Admin.* (1983) 34 Cal.3d 114, 119.) Indeed, this Court has frequently blended the analysis of the two together and not distinguished between the policies animating them or treated one as more expansive than the other. (See, e.g., *id.* at pp. 119-125; *Olson v. Cory* (1980) 27 Cal.3d 532, 537-540.) The unions' suggestion that the contract clause of the California Constitution is analyzed differently from the federal contract clause in the pension context conflicts with this Court's precedent and underscores the need to grant review to restore consistency in how the two clauses are treated.

C. The State, Employers, and Some Unions All Agree That Review Is Necessary to Secure Uniformity on the Vested Rights Doctrine

As to whether review is necessary to clarify the scope of the Legislature's authority to modify vested pension rights, the Answer does

not dispute that there is a conflict among the courts of appeal. Nonetheless, the Answer urges this Court to reject the State's petition for review because, it claims, the *Alameda County* decision is "largely correct," while the other two cases before the Court—*Marin* and *Cal Fire Local 2881 v. California Public Employees' Retirement System* (2016) 7 Cal.App.5th 115, review granted April 12, 2017 (S239958)—are incorrect. (Answer at pp. 6-7.)

While dedicating several pages to why the other two cases already before this Court are incorrect (Answer at pp. 13-16), the Answer fails to address the State's argument that *Alameda County*'s analysis of pension modifications conflicts *with this Court's precedent*, in addition to *Marin* and *Cal Fire Local 2881*. (See State's Petition at pp. 26-28.) Significantly, the Answer does not respond to the State's contention that the Court of Appeal's reasoning conflicts with precedent holding that minimal alterations of contractual obligations do not implicate the contract clause. (*Id.* at p. 27, citing *Allen*, *supra*, 34 Cal.3d at p. 119; *Packer v. Bd. of Retirement* (1950) 35 Cal.2d 212, 218-219.) Nor does the Answer address the State's argument that the Court of Appeal's instructions to lower courts "threaten[] to create a patchwork of CERL systems, in which the same statutory provisions will be constitutional in some counties, but not in others, depending on the fiscal circumstances in each county." (State's Petition at p. 27 fn.10.) For all these reasons, deciding *Marin* and *Cal Fire Local 2881* without also reviewing *Alameda County* would not secure uniformity of the law.

On at least five issues relevant to the interpretation and implementation of AB 197, the *Alameda County* decision conflicts with the *Marin* decision. These issues include: (1) whether Government Code section 31461, subdivision (b)(3), "impairs" legacy employees' vested pension rights; (2) whether section 31461, subdivision (b)(1), "impairs"

legacy employees' vested pension rights; (3) the standard for analyzing modifications of vested pension rights; (4) the scope of section 31461, subdivision (b)(1); and (5) whether estoppel is available to prospectively treat pay items as pensionable, contrary to law. To ensure uniformity in the law, *Alameda County* and *Marin* should be decided together. In addition, *Alameda County* is a better vehicle for many of these issues, as the factual record is more fully developed. *Alameda County* also involves issues not addressed in *Marin* (e.g., the meaning of Government Code section 31461, subdivision (b)(2)). In sum, the State, employers like Real Party in Interest the Central Contra Costa Sanitary District, and unions like the Alameda County Sheriffs' Association all agree that "review is needed to secure uniformity of decision about California's vested pension rights doctrine." (Alameda County Sheriffs' Association Petition at p. 11.)

II. THE UNIONS' DEFENSE OF THE COURT OF APPEAL'S ESTOPPEL DECISION UNDERSCORES THE NEED FOR THIS COURT'S REVIEW

The unions do not dispute that the Court of Appeal's estoppel decision enables *thousands* of legacy employees in Alameda, Contra Costa, and Merced counties to artificially inflate their final pensionable compensation with payments for unused leave that are easily three or more times greater than what is permitted by law (see State's Petition at pp. 11-15).[2] Many of the legacy employees ordered to receive this windfall are

[2] The Court of Appeal appeared to minimize these costs to counties. (See *Alameda County*, *supra*, 19 Cal.App.5th at p. 127.) However, projected over decades, the reversal of the trial court's decision unquestionably imposes hundreds of millions of dollars of additional pension liabilities on taxpayers. (See 17 CT 4958 [memo by CCCERA's legal counsel explaining that spiking practices can result in the inflation of an employee's lifetime pension benefits by easily over $1 million *per*

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years, if not decades, from their final compensation period. Once these employees retire, they will then be able to receive inflated pension benefits for as many years or decades that they continue to live. In other words, even many decades from now, many employees in Alameda, Contra Costa, and Merced counties will be receiving a pension that was spiked using practices that were never lawful before, during, or after their service. Moreover, in most cases, employees contributed little or nothing toward these spiked benefits. (See 23 CT 6798 [showing the burden of funding ACERA's 1998 policy was to be borne entirely by employers]; 19 CT 5482 ["[T]here will be no change in member basic benefit contribution rates as a result of the new terminal pay assumptions" in Contra Costa County]; 5 CT 1331 [agreement of parties that "under no circumstances" would Merced County employees "be required to make additional contributions to the system, to offset any projected funding liabilities as a result of the increased benefits paid under this agreement"].)

Whether the doctrine of equitable estoppel permits a court to bend the law for thousands of individuals on such a far-reaching, prospective basis is an important question of law for this Court's review. Prior to the *Alameda County* decision, using estoppel to require retirement boards to treat certain items as pensionable contrary to the Legislature's explicit prohibitions was "barred as a matter of law." (*City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, 543; *Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864, 869-871.) *Alameda County* broke with this precedent.

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employee].) None of the three counties are anywhere near able to fund the pension liabilities they already have.

The unions respond by insisting that there is no "bright-line rule." (Answer at pp. 28-29.) But the rule was set forth in *Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 28 ["no court has expressly invoked principles of estoppel to contravene directly any statutory or constitutional authority"]), and has been followed numerous times since (see, e.g., *City of Pleasanton*, *supra*, 211 Cal.App.4th at p. 542). And while the Answer denies the existence of a bright-line rule, it fails to identify a single case in which estoppel was used, like here, to require a retirement agency to treat items as pensionable on a prospective basis, contrary to the Legislature's explicit prohibitions. An irreconcilable conflict thus exists between *Alameda County* and other precedent regarding the availability of estoppel as a matter of law.

As this Court has recognized, "each case" of governmental estoppel "must be examined carefully and rigidly to be sure that a precedent is not established through which, by favoritism or otherwise, the public interest may be mulcted or public policy defeated." (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 495, fn. 30, quotation marks omitted.) The contorted logic used to justify estoppel here amply demonstrates the necessity of this Court's review to avoid perverse precedent. For example, according to the Court of Appeal, retirement boards have a "broad administrative mandate" to promise pension benefits beyond what the Legislature permits in order to ward off litigation,[3] and the retirement boards in the three counties at issue

[3] As discussed in the State's petition, this "exception" effectively usurps the Legislature's exclusive authority to define pension benefits under CERL. (State's Petition at pp. 29-30.) The rules regarding virtually any pension rule can be litigated. If a retirement board can use its "settlement authority" to bend the law for tens of thousands of employees at the mere threat of litigation (*Alameda County*, *supra*, 19 Cal.App.5th at p. 126 fn. 26 [extending estoppel to CCCERA active members—even though they were not part of any post-*Ventura* settlement agreement—because

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here exercised such authority to reach settlements in the aftermath of the *Ventura* decision. (*Alameda County*, *supra*, 19 Cal.App.5th at pp. 126-127.) At the same time, such settlement agreements necessarily involved a "knowing" misrepresentation of the law (if the retirement boards did not knowingly misrepresent the law when entering into the settlement agreements, all of the requisite elements of estoppel could not have been satisfied). (See *id.* at pp. 127-128.) Under the logic of the Court of Appeal's estoppel analysis then, retirement boards had administrative authority to knowingly "misrepresent" the law to employees in order to resolve litigation brought by those same employees. (See Answer at p. 27.) That cannot be right.

Furthermore, the premise that employees were "ignorant of the true state of facts" and simply misled by the retirement boards does not survive scrutiny. Employee unions—represented by extremely sophisticated counsel—knew everything that the retirement boards knew, including the state of the law, and closely monitored all of the retirement boards' communications with employees. Indeed, the unions concede that the alleged "misrepresentations" involving erroneous interpretations of CERL were made *at the unions' urging*. (See Answer at p. 26 ["The misrepresentations . . . were founded upon court-approved settlement agreements executed in response to [employee] litigation" urging the adoption of the misrepresentations].) Under such circumstances, the requirements that employees were "ignorant of the true state of facts" and misled by the retirement boards (see *Driscoll v. City of Los Angeles* (1967)

(…continued)
such members presented "the threat of litigation"]), its power to grant pension benefits is effectively no longer constrained by statute.

67 Cal.2d 297, 305) could not have been satisfied, and equitable estoppel was unavailable as a matter of law.

In sum, the Court of Appeal's estoppel decision undermines the Legislature's exclusive authority to define public employee pension benefits under CERL, conflicts with well-established precedents, and effectively "exempts" the vast majority of county employees from the Legislature's anti-spiking policy. Review is urgently necessary to clarify when and how a government agency may be estopped from applying governing state law, and to save millions of taxpayers (and their children and grandchildren) from hundreds of millions of dollars of additional pension liability never contemplated by the law.

III. THE UNIONS' RESPONSE EVIDENCES THE SIGNIFICANT CONFUSION CREATED BY THE COURT OF APPEAL'S ANALYSIS OF THE "EARNED AND PAYABLE" REQUIREMENT IN GOVERNMENT CODE SECTION 31461, SUBDIVISION (B)(2)

For decades, all three branches of California have sought to curb efforts by retirement boards to enable employees to inflate their final pensionable compensation with cashouts of unused leave accrued over multiple years. (See, e.g., *Salus v. San Diego County Employees Retirement Ass'n* (2004) 117 Cal.App.4th 734, 739-740 ["There is nothing in CERL which suggests the Legislature intended pensions should vary so widely on the basis of accrued and unused leave, rather than on the basis of age, years of service and salary"].) By enacting AB 197, and thereby clarifying that payments for unused leave hours in excess of what "may be earned and payable" in the final compensation period are not pensionable, the Legislature and Governor finally sought to put an end to various forms of unlawful pension spiking involving unused leave.

The Court of Appeal's interpretation of Government Code section 31461, subdivision (b)(2), subverts this purpose, allowing cashouts of

unused leave to be included in pensionable compensation, even if the leave amounts clearly exceed what may be accrued by the employee in the final compensation period. (State's Petition at pp. 33-35.) Yet, rather than address this clear conflict between the statutory interpretation and the Legislature's purpose, the Answer simply repeats the same erroneous reasoning of the Court of Appeal that overlooked that conflict in the first place. (Answer at p. 23.)

In addition, the unions argue that in the case that the Court of Appeal interpreted the statute incorrectly—and that subdivision (b)(2) in fact excludes from pensionable compensation leave cashouts beyond the amount of leave that could be earned in a year—then the change in law would violate employees' vested rights. (Answer at p. 23.) But the premise for that argument—that *Ventura* permitted the inclusion of cashouts beyond the amount of leave that could be earned in a year (Answer at p. 22)—is wrong. In light of the terms of the leave program at issue, the *Ventura* decision permitted an employee to include in pensionable compensation an annual cashout for 40 hours of leave accrued during the year of the cashout, plus an additional annual cashout for 40 more hours of leave *accrued during that year*. (*Ventura, supra*, 16 Cal.4th at p. 488, fn. 6.) The cashout to be included in the employee's pension calculation was thus restricted to 80 hours of annual leave *accrued during the year of the cashout*. (See *Mason v. Retirement Bd. of City and County of San Francisco* (2003) 111 Cal.App.4th 1221, 121 [clarifying that *Ventura*'s holding with respect to the inclusion of leave cashouts was limited to payments "made *annually* while employees were still working"].) Contrary to the unions' argument, even before the enactment of subdivision (b)(2), final pensionable compensation never included leave payments exceeding the amount of leave that could be accrued in a year. But as the

Answer shows, confusion continues about the meaning of CERL's provisions both before and after AB 197.

The scope and meaning of subdivision (b)(2) is an important question of law for the 20 counties that provide pension benefits through CERL systems, including some of the state's most populous counties. The vast majority understand the "earned" requirement to apply to leave hours. *Alameda County*'s confusion of this issue may now force some counties to alter their policies. The Court's review is needed to resolve this important legal question and ensure that the Legislature's anti-spiking policy is not defeated.

CONCLUSION

The petition for review should be granted.

Dated: March 19, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY IN SUPPORT OF PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 4,052 words.

Dated: March 19, 2018

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PROOF OF SERVICE

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

Supreme Court 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 March 19, 2018, I served the State of California's **REPLY IN SUPPORT OF PETITION FOR REVIEW** 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 March 19, 2018, at Sacramento, California.

/s/ Claire Sullivan-Halpern

CLAIRE SULLIVAN-HALPERN

SERVICE LIST

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Supreme Court Case No. S247095

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STATE OF CALIFORNIA
Supreme Court of California

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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.

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

--

Date

/s/Rei Onishi

Signature

Onishi, Rei (283946)

Last Name, First Name (PNum)

Office of Governor Edmund G. Brown Jr.

Law Firm