*In the Supreme Court of the State of California*

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| **Cal Fire Local 2881, et al.,**<br>**Petitioners and Appellants,**<br>**v.**<br>**California Public Employees' Retirement System (CalPERS),**<br>**Defendant and Respondent,**<br>**and**<br>**The State of California,**<br>**Intervener and Respondent.** | Case No. S239958 |


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First Appellate District Division Three, Case No. A142793
Alameda County Superior Court, Case No. RG12661622
The Honorable Evelio Martin Grillo, Presiding Judge

# INTERVENER AND RESPONDENT STATE OF CALIFORNIA'S ANSWER BRIEF ON THE MERITS


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## INTRODUCTION

Twenty years ago, federal tax law began allowing state and local public pensions systems to sell additional, fictional years of retirement service credit to their members. When purchased and added to an employee's years of actual service, this "airtime" artificially increased the number of years used to calculate the employee's pension.

In 2003, the California Legislature enacted legislation granting many public employees in the state the option to purchase airtime. The legislation was premised on the assumption that it would cost public employers nothing—employees electing to participate were supposed to pay both their share *and* their employers' share of the full present cost of future pension benefit increases. Over the program's first several years, however, serious flaws emerged. Allowing employees to inflate their pensions with airtime undermined the principle that public pensions rewarded faithful public service and fueled cynicism about public employee pensions. To compound matters, many public employees used the program to retire earlier than they otherwise would have, exacerbating already severe shortages of educational staff, correctional staff, and firefighters throughout the state. And because the actuarial assumptions being used to price airtime failed to account for early retirements, as well as other factors, airtime was wildly underpriced for many years. Employees could purchase airtime often as much as 40 percent below the actual cost. That, in turn, increased unfunded liability in the pension system and imposed heavy unexpected financial obligations on public employers—exactly the opposite of what the Legislature had envisioned.

These facts came to light in the midst of the worst economic downturn in the state and nation since the Great Depression. That downturn hit California's public pension systems especially hard. For years, self-interested practices, overly generous promises whose true costs were often

shrouded by flawed actuarial analyses, and failures of public leadership had caused unsustainable public pension liabilities. When investment returns abruptly fell off a cliff, unfunded liabilities skyrocketed. Estimates placed unfunded pension liabilities in California in the hundreds of billions of dollars, far exceeding any other state in the nation.

Governor Brown and the Legislature responded to this crisis by enacting the Public Employees' Pension Reform Act of 2013 (PEPRA). PEPRA addressed the problem of unfunded liabilities primarily by reducing the benefits offered to new employees. But it also reformed some laws and practices enjoyed by current employees, including the law offering airtime for sale. Effective January 1, 2013, and after providing eligible employees one final 15-week opportunity to purchase airtime, PEPRA withdrew the airtime offer. Employees who had already purchased airtime, or did so before January 1, 2013, were not affected.

Cal Fire Local 2881 and several of its members (together, the Union) filed this lawsuit, alleging that the legislative repeal of the airtime statute violated the California Constitution's contract clause as applied to any employee hired before January 1, 2013. As both the trial court and Court of Appeal held, that claim lacks merit.

As a threshold matter, the statutory offer to sell airtime did not create a vested contract right. The Legislature is generally free to amend or repeal any law. A party alleging that the contract clause bars the Legislature from repealing a statute must provide clear and unequivocal evidence to overcome the presumption that the Legislature did not intend to create a vested contractual obligation. Here, there is no evidence that the Legislature intended to extend an *irrevocable* offer to purchase airtime and prevent future legislators from adjusting benefits for the fiscal health of the state's pension system. Unlike the narrow set of laws that have been held to impliedly create pension rights protected by the contract clause, the

statutory option to purchase airtime bears no resemblance to deferred compensation earned in exchange for work performed. The airtime purchase option was therefore not a "pension right," subject to heightened protection under the contract clause. Especially when unfunded liabilities of California's public pension systems are at record levels and rising rapidly, the Union's attempt to radically *expand* the scope of the vested rights doctrine should be rejected.

Furthermore, even if this Court were to assume that the Legislature created a vested right to purchase airtime, the Legislature was free to withdraw it. Withdrawing the offer did not substantially impair employees' right to a substantial or reasonable pension, or their reasonable expectations. And even a law substantially impairing a contract will generally stand if it was reasonable and necessary to serve an important public purpose. The law here easily meets this test. Ending the costly, imperfect practice of selling additional "service credit" untethered to service was necessary to re-align pension benefits with public service, eliminate a cause of premature retirements, and address a well-established source of unfunded liabilities never intended by the Legislature. And because the mere offer to sell airtime conferred no cash value, withdrawing the offer from employees who never purchased airtime did not materially disadvantage anyone.

This Court should affirm the Court of Appeal's judgment.

## BACKGROUND

### I. PUBLIC PENSIONS IN CALIFORNIA

Pensions represent compensation that is earned through service and deferred for payment during retirement. (*Packer v. Board of Retirement of Los Angeles County Peace Officers' Retirement System* (1950) 35 Cal.2d 212, 215.) The Public Employees' Retirement Law (PERL) provides the

legal framework for the pensions of most state employees and established the California Public Employees' Retirement System (CalPERS). (Cal. Const., art. XVI, § 17; Gov. Code, § 20120.)[1] CalPERS is the nation's largest public employee pension system, administering the pension benefits of most state government employees as well as employees of local governments that contract with CalPERS for the provision of pension benefits.

Public employee pensions are typically calculated using a formula set in statute that multiplies the number of years of service, final compensation, and an age-based multiplier, yielding a "defined benefit" for the employee. Most of the employees represented in this case by Cal Fire Local 2881 (and all the individual petitioners who have not yet retired) are expecting benefits using a "3%-at-50" formula. (§ 21363.4.)Under that formula, an employee who retires at age 50 with 30 years of service credit and $100,000 in final compensation would receive a $90,000 annual pension for the rest of his or her life (30 [years in service] x $100,000 [annual salary] x .03 [age-based multiplier] = $90,000 [annual pension]). A cost-of-living adjustment and purchasing power protection allowance further annually augment the employee's pension, ensuring that its value is not diminished by inflation. (§§ 21329, 21337.)

Pensions are funded by combining regular contributions from both the employee and his or her employer, and investing the funds over the employee's career. In theory, the contributions for that employee plus investment returns are supposed to cover the cost of the employee's pension benefits. In practice, however, it is difficult to predict how many years a given employee will work, what salary increases the employee will achieve during that span, what returns the investment of contributions will

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[1] All further undesignated references are to the Government Code.

earn annually, and how long an employee will live after retiring. As a result, the respective monthly contributions of employees and employers are calculated using a number of general assumptions. (See e.g., Joint Appendix (JA) 312.) These assumptions sometimes prove inaccurate over time (JA 316-317 [noting need to adjust actuarial assumptions after study of "recent patterns of termination, death, disability, retirement, and salary increases"]), creating shortfalls between promised pension benefits and the revenues generated by member contributions and investment earnings. In such cases, the assumptions are adjusted, but the employer is responsible for covering the prior shortfalls and is legally obligated to make further contributions. (See, e.g., JA 283 [noting one way in which shortfalls may result, forcing an increase in employer liability].)

PERL also conforms itself to the requirements of the federal tax code to ensure CalPERS's federal tax-exempt status. (§ 21750 et seq.)

## II. FEDERAL TAX LAW AUTHORIZES AIRTIME

Since 1997, federal tax law has permitted (but not required) public pension programs to offer employees who have worked for at least five years the opportunity to purchase additional years of service credit in order to artificially increase the base rate used to calculate a pension. (26 U.S.C. § 415(n)(3)(C).) This "nonqualified service credit" (*ibid.*) is commonly referred to as "airtime" "because it does not correspond to any service actually performed" (JA 264). Federal tax law further allows employees to purchase airtime using accumulated savings in tax-deferred retirement plans, such as 401(k) and 457 plans. (JA 256.)

In 1997, the Legislature enacted legislation to allow members of the California State Teachers Retirement System to purchase up to five years of airtime. (Ed. Code, § 22826 [Stats. 1997, ch. 569, § 2].)

## III. THE STATE ENACTS THE AIRTIME LAW

In 2003, the Legislature passed laws expanding airtime beyond the teaching profession. As relevant here, AB 719 allowed members of CalPERS systems to purchase up to five years of airtime. (Assem. Bill No. 719 (2003-2004 Reg. Sess.) § 1.)[2] Governor Gray Davis signed AB 719 into law on October 11, 2003.

In its bill analysis for AB 719, CalPERS contrasted the proposed airtime program with programs in which purchase of retirement service credit is associated with time in service—such as time that an employee worked for the employer before the employer joined the CalPERS system. (JA 270.) In those programs, employees pay the equivalent of their normal retirement contributions, with interest, for the covered period, and the employer pays the balance. (*Ibid.*) Under AB 719, however, the time purchased would not correspond to time in service. And because employers would not "directly benefit" from the fictional time purchased, employees were supposed to pay both the employee *and* employer shares of the full present value of the benefit increase. (JA 270-271.) Consequently, CalPERS claimed that the program should cost public employers nothing. (JA 271.) Legislative analyses concurred in CalPERS's conclusion, and pointed out that proponents of the law claimed the same. (JA 259-260 [AB 719 Senate Floor Analysis]; JA 255 [AB 719 Assembly Committee Analysis].)

AB 719 was enacted as an amendment to the PERL. (§ 20909 [Stats. 2003, ch. 838, § 1]; see also § 20000.) Section 20909 extended to active employees with at least five years of service credit a one-time offer to

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[2] AB 55 similarly allowed members of systems established pursuant to the County Employees' Retirement Law of 1937 to purchase up to five years of airtime. (Assem. Bill No. 55 (2003-2004 Reg. Sess.) § 1.) Like AB 719, it was signed into law. (§ 31658 [Stats. 2003, ch. 261, § 3].)

purchase up to an additional five years of service credit, in one-year increments. (§ 20909, subds. (a), (e)(1).) To accept the offer, an employee had to pay "an amount equal to the increase in employer liability." (§ 21052; see also §§ 20909, subd. (b), 21050, subd. (a.). Notably, airtime could not be used to meet the minimum legal qualifications for retirement or any benefits, such as healthcare benefits, that are based on years of service. (§ 20909, subds. (b)-(c).)

CalPERS published an employee guide to purchasing airtime. (JA 273-281.) It informed members that they would "pay the entire cost of the estimated increase in their future retirement income." (JA 273.) It also notified them that the offer could not be accepted after separating from state service or if "repealed by future legislation." (JA 274.)

Seven years after enactment, CalPERS issued a report reviewing the airtime program. (JA 312-321.) The report noted that in the three-year period from June 30, 2004 to June 30, 2007, the vast majority of eligible employees did not elect to purchase airtime; still, over 33,000 employees did. (JA 313.) Analysis of the transactions showed that, due to inaccurate assumptions, employees were consistently and substantially underpaying for airtime. (JA 317-321 [showing airtime was underpriced, on average, by at least 11-28 percent].) It also found that employees who purchased airtime tended to retire sooner than employees who did not. Among school staff eligible for retirement, for example, those who bought airtime were *three* times more likely to have retired during the study period than those who did not. (JA 314.)

## IV. THE STATE'S FISCAL CRISIS AND INCREASING UNFUNDED LIABILITIES LEAD TO REPEAL OF THE STATUTE

Around the time CalPERS reported the unintended consequences of the airtime program, California was wrestling with multi-billion dollar budget deficits year after year, and the staggering unfunded liabilities of

public pension programs across the state became a matter of increasingly urgent and widespread public concern. (See *San Joaquin County Correctional Officers Association v. County of San Joaquin* (2016) 6 Cal.App.5th 1090, 1095 (*County of San Joaquin*).) Some estimates placed unfunded liabilities in the hundreds of billions of dollars. (*Marin Association of Public Employees v. Marin County Employees' Retirement Association* (2016) 2 Cal.App.5th 674, 680-681 (*Marin County*), review granted Nov. 22, 2016 (S237460).)[3]

A 2011 report by the Little Hoover Commission advised the Governor and the Legislature that "California's pension plans are dangerously underfunded, the result of overly generous benefit promises, wishful thinking and an unwillingness to plan prudently.'" (*County of San Joaquin*, *supra*, 6 Cal.App.5th at p. 1095, quoting Little Hoover Com., Public Pensions for Retirement Security (Feb. 2011) (*Little Hoover Com.*).) "'Unless aggressive reforms are implemented now,'" the report warned, "'the problem will get far worse, forcing counties and cities to severely reduce services and lay off employees to meet pension obligations.'" (*Ibid.*) The Commission urged the State to "exercise its authority—and establish the legal authority—to reset overly generous and unsustainable pension formulas for both current and future workers." (*Marin County*, *supra*, 2 Cal.App.5th at pp. 681-682, quoting Little Hoover Com., *supra*, at p. 53.)[4]

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[3] As many experts have noted, actual pension costs are frequently "shrouded." (See generally Glaeser & Ponzetto, *Shrouded Costs of Government: The Political Economy of State and Local Pensions* (April 2013) National Bureau of Economic Research < http://www.nber.org/papers/w18976.pdf > [as of Nov. 6, 2017).)

[4] The Commission emphasized that "[t]he problem . . . cannot be solved without addressing the pension liabilities of current employees. . . . To provide *immediate savings of the scope needed*, state and local

(continued...)

In response to these concerns, Governor Edmund G. Brown Jr. proposed a Twelve Point Pension Reform Plan. (JA 387.)[5] The plan was designed to "put California on a more sustainable path to providing fair public retirement benefits" (*Ibid.* [fn. 1]). Point 10 called for ending the sale of airtime. Pensions should correspond to work "actually" performed, the Governor explained, not time that had merely been purchased. (*Ibid.*, quoting Governor's October 27, 2011 plan.) Employers and taxpayers "should not bear the burden of guaranteeing the additional employee investment risk that comes with airtime purchases." (*Ibid.*)

Like the Governor, the Legislature "heard, and agreed" with the concerns about the enormous unfunded liabilities of the state's pension systems, and enacted PEPRA in response. (*Marin County*, *supra*, 2 Cal.App.5th at p. 682 [citing § 7522 et seq., Stats. 2012, ch. 296].) The law adopted nine of the twelve points set forth in the Governor's reform plan, including the proposal to withdraw the airtime offer. (JA 387.)

Among other reforms, PEPRA barred public retirement systems from offering employees the option to purchase airtime, effective January 1, 2013 (§ 7522.46, subd. (a)), while authorizing them to honor all applications to purchase airtime received before January 1, 2013 (*id.*, subd. (b)). Thus, active public employees who had five years of service had a 15-week window in which to purchase airtime before the offer was

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(...continued)
governments must have the flexibility to alter future, unaccrued retirement benefits for current workers," "which at current levels is unsustainable."'" (Little Hoover Com., *supra*, at pp. v, 42, italics added.) The Little Hoover Commission's report is available at: http://www.lhc.ca.gov/sites/lhc.ca.gov/files/Reports/204/ Report204.pdf.

[5] The Governor's plan is available at: https://www.gov.ca.gov/docs/Twelve_Point_Pension_Reform_10.27.11.pdf.

withdrawn on PEPRA's effective date. Airtime that had already been purchased was unaffected.

## STATEMENT OF THE CASE

The Union challenged section 7522.46, the statute withdrawing the airtime offer, by petition for writ of mandate. (JA 1-9.) It asked the trial court to direct CalPERS to accept airtime applications filed at any time by employees who were hired before PEPRA's effective date, arguing that the law impaired their vested pension rights in violation of the contract clause of the California Constitution. (JA 5-6, 8; JA 156-166.) The State of California, at the Governor's direction, intervened in the case to defend PEPRA's constitutionality. (JA 30-32.)

The trial court denied the Union's petition, holding that the option to purchase airtime was not a vested right. (JA 385-412.) The court found no evidence that the Legislature intended to create a contract right or for the airtime offer to serve as a form of deferred compensation. (JA 397, 400.) In the alternative, the court held that, even if section 20909 conferred a vested right, eliminating that right was a permissible modification to a pension plan. (JA 390-394.) Ending the sale of airtime aligned the pension system with its purpose of compensating employees for work performed. (JA 391-392.) And no longer selling airtime did not result in a disadvantage to employees to be offset. (See JA 392-394.)

The Court of Appeal affirmed. It viewed the airtime offer as "wholly distinct" from the pension paradigm of compensation in exchange for work performed, and agreed with the trial court that nothing in the text or legislative history of section 20909 demonstrated legislative intent to confer on public employees a contract right in the form of an irrevocable offer to purchase airtime. (*Cal Fire Local 2881 v. California Public Employees' Retirement System* (2016) 7 Cal.App.5th 115, 126-127 (*Cal Fire*).)

Like the trial court, the Court of Appeal also held that even if the Legislature had intended to confer a vested contract right, prohibiting new sales of airtime would not have unconstitutionally impaired a contract. (See *Cal Fire*, *supra*, at pp. 129-132.) Withdrawal of the airtime offer was "wholly reasonable" based on the record, and clearly "carried some material relation to the theory of a pension system and its successful operation." (*Id.* at p. 132, internal quotations omitted.) The court also rejected the argument that the State needed to provide a comparable benefit to offset the elimination of the airtime offer, concluding that the contract clause is not so "inflexible" that it categorically *requires* every impairment to be offset by comparable benefits. (*Id.* at p. 131.) In this case, the court pointed out, the responsibility was on employees to exercise the option "in order to avoid losing it"; any loss was therefore "a product of their own doing." (*Ibid.*) Moreover, airtime was not a benefit earned as compensation for work performed; it was a benefit employees purchased. (*Id.* at pp. 131-132.) As a result, eliminating the option to purchase that benefit did not implicate the same concerns as reducing a pension benefit. (*Id.* at p. 132; see also *id.* at p. 121.) Finally, the court noted that no employee's right to a "reasonable pension" had been lost because airtime was no longer being sold. (*Id.* at p. 132.)

This Court granted the Union's petition for review on April 12, 2017.

## STANDARD OF REVIEW

This case presents questions of law, which this Court reviews de novo. (*Leider v. Lewis* (2017) 2 Cal.5th 1121, 1127.) "Generally, the trial court's [factual] findings will not be disturbed if substantial evidence supports the judgment." (*Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1127.) All conflicts in the evidence should be resolved "in favor of the judgment." (*Ibid.*) In assessing the constitutionality of section 7522.46, "all intendments favor the exercise of the Legislature's

plenary authority: If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action." (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 253, quotation marks omitted.)

## ARGUMENT

Ending the sale of airtime fell within the Legislature's plenary authority to enact, repeal, and modify the laws. Public employees who never purchased airtime did not have a vested contract right under section 20909, and the Legislature could modify that right without violating the contract clause.

Like its counterpart in the U.S. Constitution, the California Constitution's contract clause prohibits the Legislature from enacting any "law impairing the obligation of contracts." (Cal. Const. art. I, § 9; compare *ibid.*, with U.S. Const. art. I, § 10, cl. 1 ["No State shall . . . pass any . . . Law impairing the Obligation of Contracts"].)[6] Analysis of a contract clause claim proceeds in two steps. (*Valdes v. Cory* (1983) 139 Cal.App.3d 773, 785.) First, the court must determine whether the party

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[6] This Court has called the two contract clauses "parallel." (*Allen v. Board of Administration of the Public Employees' Retirement System* (1983) 34 Cal.3d 114, 119 (*Allen II*).) It has 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.) And it has cited state and federal authorities interchangeably and without comment when considering cases alleging that laws impaired public employment contracts. (See, e.g., *Terry v. City of Berkeley* (1953) 41 Cal.2d 698, 703; *Legislature v. Eu* (1991) 54 Cal.3d 492, 525 (*Eu*) [relying on California cases to interpret and apply the federal contract clause].) The Ninth Circuit has observed that courts "apply the same analysis to claims brought under the Contract Clause of the United States Constitution and the California Constitution." (*Retired Employees Association of Orange County, Inc. v. County of Orange* (9th Cir. 2010) 610 F.3d 1099, 1102.)

asserting the claim has properly identified a contract. (*Ibid.*) If so, the court considers the Legislature's authority to modify the contract. (*Ibid.*; see also *Allen II*, *supra*, 34 Cal.3d at p. 119.) "The party asserting a contract clause claim has the burden of making out a clear case, free from all reasonable ambiguity, [that] a constitutional violation occurred." (*Deputy Sheriffs' Association of San Diego County v. County of San Diego* (2015) 233 Cal.App.4th 573, 578.) The court below correctly concluded that the Union's claim failed at each stage of this analysis.

## I. THE OPTION TO PURCHASE AIRTIME WAS NOT A VESTED CONTRACT RIGHT

The Court of Appeal correctly observed that the "overarching issue" in this case is whether the Legislature "bestow[ed] upon plaintiffs and other CalPERS members a vested contract right to purchase airtime service credit." (*Cal Fire*, *supra*, 7 Cal.App.5th at p. 123.) The Union argues that such a right was clearly bestowed by the Legislature. According to the Union, the option to purchase airtime was a "pension right," and pension rights automatically vest upon the start of employment. (AOB 8-9.)

However, this argument is flawed in its premise. While the option to purchase airtime may have been related to pensions, it was not a "pension right," as this Court has long defined that term. The Union's argument that a pension right is any benefit or option offered in the governing public employee pension law at the time of an employee's service (AOB 9) ignores well-established law defining a pension right as a right to *deferred compensation*. Because the option to purchase airtime was not deferred compensation—a point conceded by the Union—it was not a pension right, and there is no basis for treating it as such. More fundamentally, the Union misapprehends the proper framework for analyzing vested rights, where vested rights are implied from statutes only if there is an unequivocal exchange of consideration. The Union's approach ignores that requirement,

and, if adopted, would radically expand the scope of the vested rights doctrine, divesting lawmakers of the power to maintain the pension system for the benefit of future generations of public employees and address serious funding problems *before* they explode into full-blown fiscal emergencies.

### A. A Law Creates a Vested Contract Right Only Where the Legislature Clearly and Unequivocally Intends to Contract

The Union's argument that the option to purchase airtime was a vested right misapprehends the framework established by this Court to analyze vesting. According to the Union, any option or benefit that potentially affects a pension and is offered through the employee pension law at the time of an employee's service is a vested pension right. Thus, the Union claims, the option to purchase airtime was a vested right because it could affect employee pensions and was offered through PERL while petitioners were in service.

This Court has never embraced such a broad vesting rule untethered to contract clause principles. As this Court has recognized, treating laws as contracts creates knotty constitutional problems. The Legislature's role "is not to make contracts, but to make laws that establish the policy of the governmental body." (*Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1186-1187 (*Retired Employees*).) Such policies are "inherently subject to revision and repeal" (*id.* at p. 1186) and one Legislature "may not bind future Legislatures" (*Rossi v. Brown* (1995) 9 Cal.4th 688, 715). Yet finding that a law creates a contractual commitment does just that, threatening "the sovereign responsibilities of state government." (*United States v. Winstar Corp.* (1996) 518 U.S. 839, 874 [plur. opn.].)

For these reasons, "it is presumed that a statutory scheme is not intended to create private contractual or vested rights." (*Retired Employees*, *supra*, 52 Cal.4th at p. 1186, quotations omitted.) This "heavy" presumption against treating a law like a contract protects "the essential powers of a legislative body," and prevents the government and the public from getting "blindsided by unexpected obligations." (*Id.* at p. 1189.) It also "avoid[s] difficult constitutional questions about the extent of state authority to limit the subsequent exercise of legislative power." (*Winstar*, *supra*, 518 U.S. at p. 875 [plur. opn.].)

To overcome the presumption and establish that a statute created a contract, the party asserting the creation of a contract must show that the "legislative intent to create private rights of a contractual nature against the governmental body" is "*clearly and unequivocally* expressed." (*Retired Employees*, *supra*, 52 Cal.4th at pp. 1186-1187, italics added, quotations omitted.) This "unmistakability" doctrine ensures that any relinquishment of the state's sovereign power is expressed in "terms too plain to be mistaken." (*Winstar*, *supra*, 518 U.S. at pp. 874-875, quotation marks and alterations omitted.) Absent a "clear showing" that lawmakers intended to contract, California's laws should not be read as contracts. (*Retired Employees*, *supra*, 52 Cal.4th at p. 1186.)

Of course, this does not mean that statutes give rise to vested rights only where legislative intent to contract is "express." (*Retired Employees*, *supra*, 52 Cal.4th at p. 1186 ["despite the presumption, a clear manifestation of intent to contract does not require explicit statutory acknowledgement," quotations omitted].) "In California law, a legislative intent to grant contractual rights can be implied from a statute if it contains an unambiguous element of exchange of consideration by a private party for consideration offered by the state." (*Ibid.*, quoting *California Teachers Assn. v. Cory* (1984) 155 Cal.App.3d 494, 505.) Such an "unambiguous

element of exchange of consideration" within a statute demonstrates clear intent on the part of the Legislature to contract and create vested rights. Where a statute contains neither express intent nor an unequivocal exchange of consideration, however, the requisite clarity of legislative intent does not exist, and no vested right can be implied. (*Ibid.* [no "implication of suspension of legislative control" unless "unmistakable," quoting *Claypool v. Wilson* (1992) 4 Cal.App.4th 646, 670].)

**B. No Vested Contract Right to Purchase Airtime Can Be Implied From Section 20909**

In arguing that the mere *option* to purchase airtime was a vested right, the Union ignores these well-established principles. The Union all but concedes that neither the statute itself nor the legislative history provides evidence of an express legislative intent to contract. And while it argues that section 20909 implied a vested right to purchase airtime, the Union fails to demonstrate that the option to purchase airtime was itself part of an unambiguous exchange of consideration, as required.

A plain reading of the statute makes clear that the unambiguous exchange of consideration contemplated by the Legislature was *airtime in exchange for payment*—not an option to purchase airtime in exchange for continued state service. If an employee paid the required amount ("equal to the increase in employer liability"), he or she obtained from the State a contract right to the purchased airtime. (§§ 20909, subd. (a)-(b); see also § 21050.) If nothing was paid, there was no exchange of consideration and no contract with the State was formed. (See § 21050, subd. (a) [service credit "effective *only if* accompanied by" payment, emphasis added].)

Consistent with the "general contract law principle that offers are revocable until accepted" (*T.M. Cobb Co. v. Superior Court of Marin County* (1984) 36 Cal.3d 273, 281), numerous decisions confirm that laws offering an option to enhance public employee pensions do not create

vested contract rights unless the option is exercised and consideration provided. In *Creighton v. Regents of University of California* (1997) 58 Cal.App.4th 237, the University of California responded to budget shortfalls by allowing eligible employees to retire early in exchange for "credit for three additional years of age and five additional years of service, as well as a lump-sum 'transition assistance payment' equal to three months' covered compensation." (*Id.* at p. 241.) A few weeks after its initial offer, the University modified it, reducing the years of service credit provided. (*Ibid.*) Employees who had not accepted the initial offer sued under the contract clause, claiming a right to retire early under the more favorable original terms. (*Id.* at p. 242.) The Court of Appeal denied the claim, holding that the University was free to change the terms of its offer. The terms of early retirement offered to employees did not define "a pension benefit which immediately vest[ed] by implication as in the *Kern-Betts* line of cases. Rather, it [was] a limited offer of enhanced benefits which, upon an eligible employee's timely acceptance (election to participate . . .), and with consideration . . . create[d] a separate binding contract." (*Id.* at p. 245.) And because there had been "no acceptance or consideration in response to the [University's] offer" by appellants, "no binding contract was established." (*Ibid.*)

Similar reasoning was used in *Piombo v. Board of Retirement of San Mateo County* (1989) 214 Cal.App.3d 329. There, deputy district attorney Piombo withdrew his contributions from the county retirement system when he became the City Attorney of Millbrae. (*Id.* at p. 337.) He then left that position to become a judge, again withdrawing his retirement contributions. (*Ibid.*) A law enacted while he was city attorney offered to reinstate his retirement benefits if he redeposited the funds, with interest. (*Id.* at pp. 335-336.) But the law changed before he acted, excluding employees, like him, who had left eligible public service positions. (*Id.* at

p. 333.) The Court of Appeal held Judge Piombo had no contract right to an option that was withdrawn before he accepted it. (*Id.* at pp. 339 ["The fact that the Legislature . . . limited [the] option before [respondent] elected to exercise it, did not deprive respondent of any 'vested rights'"].)

And on facts that nearly mirror those here, the Ohio Supreme Court held that an employee's "right to purchase his past service credit was a mere expectancy interest and not subject to the constitutional protections afforded to vested rights." (*State, ex rel. Hughes v. Public Employees Retirement System* (Ohio 1988) 520 N.E.2d 577, 579-580. As with the individual petitioners here, the employee's "right to have his past service as a volunteer fire fighter credited to his [pension] was contingent upon his exercising this option." (*Id.* at p. 579.) Because he "failed to exercise this option prior to the imposition of additional requirements," he "failed to satisfy all the conditions necessary to vest his right to purchase the past service credit." (*Ibid.*)

The Union's suggestion that five years of prior service and active employment functioned as the requisite consideration provided by employees in exchange for the airtime option (AOB 43 [noting "state service" was "consideration"]) confuses eligibility requirements for consideration. The eligibility requirements of five years of prior service and active employment simply limited the class of people section 20909 "applie[d] to." (§ 20909, subd. (e).) Satisfying such conditions is not the legal equivalent of exchanging consideration. (See, e.g., *Creighton, supra,* 58 Cal.App.4th 237 at p. 245 [concluding that notwithstanding their eligibility, employees' failure to accept offer to enhance pension benefits before it was modified meant "no binding contract was established"].) The trial court further noted that nothing in section 20909's legislative history "suggest[s] that the [L]egislature created the opportunity to purchase Airtime as an inducement for employees to work for the state for at least

[five] years." (JA 400-401.) Rather, "the legislative history indicates that the Internal Revenue Code required employees to have [five] years of service credit before they could purchase nonqualified time and the [L]egislature simply wrote [section] 20909 to be consistent with the tax code." (JA 401.) The rationale behind the requirement of active employment was the same.[7]

Multiple cases also reject the Union's overbroad argument that section 20909, as "a component part of PERL," necessarily became a part of an employee's "contemplated compensation" in exchange for service (AOB 24). (See *Miller v. State of California* (1977) 18 Cal.3d 808 [although set forth in PERL, right to work until age 70 was not a vested right]; *Piombo, supra*, 214 Cal.App.3d 329 [although in PERL, right to reinstatement of pension benefits upon redeposit of funds with interest was not a vested right]; *Vielehr v. State* (1980) 104 Cal.App.3d 392 [although in PERL, right to interest up to the day of withdrawing employee pension contributions was not a vested right].)

More recently, the Second District Court of Appeal rejected outright the argument that all the terms in a pension law become contractual obligations upon enactment. (*Fry v. City of Los Angeles* (2016) 245 Cal.App.4th 539, 550 ["obtaining a vested contractual right to earn a pension upon acceptance of public employment does not mean that all terms governing the pension system then in effect become vested contractual rights of the employee"].) As this Court reasoned in *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 855, just because "an employee may acquire a vested contractual right to a pension," does not mean that

[7] That the statute in no way limited an employee from leaving state service immediately after purchasing airtime further belies the Union's suggestion that active employment constituted the requisite exchange of consideration to create a vested right.

that right is "rigidly fixed by the specific terms of the legislation in effect during any particular period in which he serves."[8]

In sum, the Union has not met its burden of demonstrating that the option to purchase airtime was itself part of "an unambiguous" exchange of consideration between employees and the State. As the courts below both correctly concluded, no vested right to purchase airtime can be implied from section 20909.[9]

### C. Because the Option to Purchase Airtime Was Not Deferred Compensation, There Is No Basis for Treating It as a Vested Pension Right

Ignoring the need for an unambiguous exchange of consideration to imply a vested right from a statute, the Union instead simply asserts that the option was a "pension right" because it was placed in PERL and could help increase a pension. As such, the Union claims, it vested like other pension rights as soon as petitioners started employment.

But this Court has long defined vested pension rights otherwise. "Pension rights," as defined by this Court, represent compensation that has been earned by an employee for service, but not yet paid. (*Miller*, *supra*, 18 Cal.3d at p. 815 [although an employee "has actually earned some pension rights as soon as he has performed substantial services for his

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[8] According to the Union, the Legislature was powerless to withdraw the airtime purchase offer even from employees who were hired shortly before PEPRA came into effect but were still years away from meeting the five-year eligibility criterion. (JA 164; AOB 30-31.)

[9] Taking a statement in the Court of Appeal's opinion out of context, the Union claims that the court required section 20909 to "'unambiguously state[e] an intent by the Legislature to create a vested pension right.'" (AOB 31-32, quoting *Cal Fire*, *supra*, 7 Cal.App.5th at p. 126.) In fact, in determining whether there was a contract, the court looked correctly to both the "language of the statute" *and* "the circumstances accompanying its passage" for a "demonstration of intent." (*Cal Fire*, *supra*, 7 Cal.App.5th at p. 126.)

employer . . . he is not fully compensated upon receiving his salary payments because, in addition, he has then earned certain pension benefits, the payment of which is to be made at a future date," quoting *Kern*, *supra*, 29 Cal.2d at p. 855].) In other words, they represent rights to deferred compensation. (*Eu*, *supra*, 54 Cal.3d at p. 533 ["Pension rights . . . are deferred compensation earned immediately upon the performance of services for a public employer"]; *Miller*, *supra*, 18 Cal.3d at p. 815 [same]; *Wallace v. City of Fresno* (1954) 42 Cal.2d 180, 184 ["pension payments are deferred compensation to which a pensioner becomes entitled upon performing all services required under the contract"].) By definition, such rights reflect an unequivocal exchange of consideration between two parties—the employee's service for a certain period in return for the employer's promise of future payment based on a specific formula—that has in turn created a binding contract between them. Because these circumstances leave no doubt about the legislative intent to contract, no additional expression or evidence of legislative intent is necessary. The intent to contract can be safely implied. And once a right to deferred compensation has vested upon the performance of service, it "cannot be destroyed . . . without impairing a contractual obligation." (*Kern*, *supra*, 29 Cal.2d at p. 853.)

The Union concedes that the option to purchase airtime was not deferred compensation. (JA 328 ["Petitioners *never* have argued that the offer itself was 'deferred compensation'—only that the right to enhance, like other enhancement rights, is a vested one"].) But it insists this is immaterial. (AOB 23.) It claims that the option here falls within the same category of rights as those to deferred compensation. The offer was contingent on state service and part of state retirement law when the individual petitioners here began employment, and it could, if accepted, help increase pension benefits. (AOB 24-29.) That, according to the

Union, is sufficient for the offer to be treated like deferred compensation and fall within the *Kern* line of cases protecting vested pension rights.

This Court's precedent rejects this expansive view. As discussed above, *Miller, supra,* 18 Cal.3d 808, rejected the same argument. Like the offer to purchase airtime, the chance to continue working until age 70 was directly tied to state service and would—if accepted—have helped enlarge Miller's pension. Under the Union's theory, the potential "effect" of that right on Miller's pension should have been dispositive. (See AOB 28-29.)

Nonetheless, this Court declined to find that the chance to work until age 70 was a contract right. Unlike the laws in the *Kern* line of cases, the provision setting a mandatory retirement age did not confer deferred compensation, but was instead a general term or condition of civil service employment, and as such, subject to legislative modification. (*Miller, supra,* 18 Cal.3d at p. 814.) The Court recognized that Miller's right to pension benefits was vested, but that did not mean every statutory provision that might help him maximize his pension benefits established additional vested pension rights. (*Id.* at p. 817.) Under the terms of the pension statute itself, receiving maximum benefits was "subject to conditions and contingencies"—including continuing in employment until age 70—that Miller had not satisfied at the time the Legislature changed the law. (*Ibid.*) And because the option to work until age 70 was a term of employment and not a contract right, the Legislature was free to modify it, even if it "defeated [Miller's] expectation of additional salary and a larger retirement allowance." (*Ibid.*) The "effect of the modification" (AOB 29) on Miller's pension was irrelevant. (See *id.* at pp. 817-818.)

Versions of the Union's theory have surfaced in other cases. Each time the plaintiffs claimed, as here (AOB 28-29), that their vested pension rights had been impaired because they had lost an opportunity to increase their pension. Each time the argument has been rejected. (See, e.g.,

*Creighton*, *supra*, 58 Cal.App.4th at pp. 243-244 [concluding ability to receive service credit in exchange for early retirement was "different *in kind*" from the pension rights "governed by the *Kern-Betts* line of cases"]; *Piombo*, *supra*, 214 Cal.App.3d at pp. 337-338 [concluding ability to redeposit pension contributions into retirement system was not a vested pension right]; *Vielehr*, *supra*, 104 Cal.App.3d at pp. 395-396 [concluding interest paid on pension contributions pursuant to statute was not a vested pension right]; *San Diego Police Officers' Ass'n v. San Diego City Employees' Retirement System* (9th Cir. 2009) 568 F.3d 725, 737-738 [concluding salaries of Deferred Retirement Option Program were not a vested pension right, notwithstanding relationship to amounts deposited into retirement account].) Summarizing this case law, the Ninth Circuit concluded that such theories—which argue that entitlements turn into vested pension rights just because they might enhance pension benefits—are "at odds with the established principle that indirect effects on pension entitlements do not convert an otherwise unvested benefit into one that is constitutionally protected." (*San Diego Police Officers' Ass'n*, *supra*, 568 F.3d at p. 738.)

The Union's argument is also flawed by false equivalence. It relies almost exclusively on cases addressing deferred compensation, while admitting that the airtime offer was not a form of deferred compensation. (JA 328.) One group of such cases held that governments cannot avoid pension obligations either by not adequately funding them or by forcing employees to fund them. (See *Bellus v. City of Eureka* (1968) 69 Cal.2d 336; *Wilson*, *supra*, 52 Cal.App.4th 1109; *Valdes*, *supra*, 139 Cal.App.3d 773.) Other cases that the Union cites likewise addressed deferred compensation, and are therefore inapposite here. (See *Frank v. Board of Administration* (1976) 56 Cal.App.3d 236 [re-designation of plaintiff's job a few weeks before he became disabled and requested his retirement on

disability pension was to cut monthly pension payments]; *Association of Blue Collar Workers v. Wills* (1986) 187 Cal.App.3d 780 [forcing workers to pay for unfunded pension—despite the city's "express intent" to cover that liability itself—would have diminished value of employees' pensions]; *Protect Our Benefits v. City and County of San Francisco* (2015) 235 Cal.App.4th 619 [city initiative limited supplemental cost-of-living allowances paid to retirees].[10]

These cases, and the others cited by the Union, all involve the State or local governments paying employees less than they had been promised for work performed. Here, in contrast, legislative repeal of the airtime offer statute left pensions alone. It did not decrease earned pension benefits or jeopardize employees' ability to earn a reasonable pension. No case that the Union cites found a vested right where employees had an unexercised choice to pay for the full cost of a benefit out of their own pockets.

**D. The Union's Other Arguments Are Unavailing**

The Union offers two other arguments that section 20909 created a contract right. Neither is convincing.

First, it contends that because subdivision (b) of section 20909 provided that employees could elect to purchase airtime "at any time prior to retirement," the Legislature intended to create a contract right. (AOB 30-31.) Both the trial court and Court of Appeal correctly found this argument unpersuasive. (JA 398-400; *Cal Fire*, *supra*, 7 Cal.App.5th at p. 127.) As the Court of Appeal observed, the phrase *at any time* in

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[10] The Union also relies on *American River Fire Protection Dist. v. Brennan* (1997) 58 Cal.App.4th 20 (AOB 27), but that case dealt only with the question of whether unused sick leave—which had already been converted into service credit—could further be paid out at retirement, consistent with the extra compensation clause. It did not involve the contract clause or an analysis of vested rights.

subdivision (b) "means just what it says and no more": employees could purchase service credits at any time before they retired. (*Ibid.*) It did not contain a promise not to modify or eliminate the offer. (*Ibid.*) Nor would it make sense to read the law as guaranteeing a right to purchase airtime at any time in the future, given that section 20909 was written "to be consistent with the [federal] tax code" (JA 401), and could have automatically become inoperative had the federal tax code changed (see § 21762). Moreover, even if the meaning of the phrase were ambiguous, the Union's interpretation could not satisfy the clear showing required by *Retired Employees*.

Second, the Union argues that the State should be bound by a 2011 CalPERS pamphlet that described the airtime program as a vested right. (AOB 13-14, 28, 30 fn. 4; see also JA 226, 234.) This argument asks this Court to defer to CalPERS's interpretation of section 20909. But, as the Court of Appeal correctly noted, courts have the "ultimate responsibility" to interpret the law. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12.) The "difficult constitutional questions about the extent of state authority to limit the subsequent exercise of legislative power" make that responsibility all the more important here. (*Winstar, supra*, 518 U.S. at p. 875 [plur. opn.].)

In any event, CalPERS's pamphlet interpretation is not entitled to any weight. Most significantly, the agency has chosen not to defend the statement in its pamphlet in this case. (See, e.g., JA 52; see also *Estate of Coward v. Nicklos Drilling Co.* (1992) 505 U.S. 469, 480 ["it would be quite inappropriate to defer to an interpretation which has been abandoned by the policymaking agency itself"].) The pamphlet is also contradicted by the agency's statement in the weeks after the airtime law went into effect that the offer would be available on an "ongoing basis []unless repealed by future legislation." (JA 274.) Traditionally, an agency's contemporaneous

construction of a law receives greater weight than later constructions. (*Yamaha*, *supra*, 19 Cal.4th at p. 13; *Watt v. Alaska* (1981) 451 U.S. 259, 272-273 [explaining that an agency's "current interpretation, being in conflict with its initial position, is entitled to considerably less deference"].) Nor does the 2011 pamphlet appear to have been the result of a formal agency process, like rulemaking or adjudication, that entailed input or advocacy from interested parties. (See JA 224.) Taken together, these considerations undermine the significance the Union accords the pamphlet. (See *Yamaha*, *supra*, 19 Cal.4th at pp. 7, 12-13.)

## II. Even Assuming The Option to Purchase Airtime Were a Vested Contract Right, Withdrawing the Option Was Permissible Under the Contract Clause

Even if the option to purchase airtime offered in section 20909 somehow became a vested contract right, the Legislature did not violate the contract clause by withdrawing the option from current employees.[11] This Court has repeatedly noted that "[n]ot every change in a retirement law constitutes an impairment of the obligation of contracts . . . . Nor does every impairment run afoul of the contract clause." (E.g., *Allen II*, *supra*, 34 Cal.3d at p. 119.) The constitutional prohibition against impairing contracts "is not an absolute one and is not to be read with literal exactness like a mathematical formula." (*Ibid.*, quoting *U.S. Trust Co. of New York v. New Jersey* (1977) 431 U.S. 1, 21.) Rather, it should always be "construed in harmony" with "the principle of continuing governmental power" (*id.* at

[11] The Union asserts that the State "thus far" has not argued that, even if the right to purchase airtime were "a pension benefit subject to vested rights protections . . . the Legislature maintained the power to eliminate the right." (AOB 47.) In fact, the State argued at length beginning on page 18 of its Opposition Brief (filed on April 17, 2015 in the Court of Appeal) that "[e]ven if the option to purchase airtime were a vested right . . . legislative withdrawal of that option would have been a permissible modification."

p. 120), including "the essential attributes of sovereign power necessarily reserved by the States to safeguard the welfare of their citizens." (*U.S. Trust Co*, *supra*, 431 U.S. at p. 21.)

The Union claims that if this Court were to determine the airtime purchase option was a vested right, it should conclude that there was an unconstitutional impairment of that right because the State failed to provide comparable advantages to offset the loss of that option. According to the Union, "[o]ver a series of cases" beginning with *Allen v. City of Long Beach* (1955) 45 Cal.2d 128 (*Allen I*), this Court developed a rule categorically *requiring* any impairment of a vested pension right to be offset by comparable new advantages. (AOB 21.) Arguing that the option to purchase airtime was a vested pension right, the Union insists that the elimination of that right is subject to the "comparative advantages" test, fails that test, and on that basis violates the contract clause. (AOB 44-47.)

As the Court of Appeal recognized, however, this argument misapprehends this Court's precedent. That precedent does not hold that *every* modification of a vested pension right must pass a test for comparable new advantages to be constitutional. To be sure, whether comparative new advantages offset disadvantages resulting from the impairment of vested pension rights can be a significant part of a court's analysis. But the absence of comparative new advantages is not dispositive in every case involving the vested rights of current employees.

Consistent with general contract clause principles, this Court's precedent requires looking more broadly at the reasonableness and necessity of the impairment, not just at whether there are comparative new advantages. "[A]n impairment may be constitutional if it is reasonable and necessary to serve an important public purpose." (*U.S. Trust Co*, *supra*, 431 U.S. at p. 25.) Here, the withdrawal of the airtime offer did not significantly impair active employees' reasonable pension expectations, and

was reasonable and necessary to serve at least three important public purposes. This Court should affirm the conclusion of the courts below that, even if withdrawing the airtime offer impaired a vested right, doing so was permissible.

**A. The Union Misconstrues This Court's Precedent.**

As a threshold matter, none of the case authority allegedly establishing the "comparable advantages" test governs here. All of this Court's precedent cited by the Union (AOB 21-22, 44-45) involved vested rights to deferred compensation that were at risk of drastic reduction or elimination. (See *Eu*, *supra*, 54 Cal.3d at pp. 530-531 [termination of deferred compensation system, risking in some cases "absolute divest[ment]" of deferred compensation already earned]; *Allen II*, *supra*, 34 Cal.3d at pp. 117-119 [alteration of deferred benefit formula so pension no longer based on incumbent legislators' salaries]; *Olson*, *supra*, 27 Cal.3d at p. 541 [reduction in retirees' pensions proportionate to new limitations on salary cost-of-living increases]; *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 862-863 [alteration of deferred benefit formula so pension no longer based on incumbent's salary]; *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 445-447 [same, resulting in fixed pension substantially losing value over time]; *Allen I*, *supra*, 45 Cal.2d at pp. 130-132 [same].) Here, by contrast, no rights to deferred compensation are at issue (as discussed in Part I, *supra*), and so any special rules to protect such compensation do not control.

To the extent that the precedent of this Court cited by the Union is nonetheless relevant here, none of it holds that the constitutionality of modifying a vested pension right turns only on whether offsetting new advantages are provided. Such a rule would "introduce an inflexible hardening of the traditional formula for public employee pension modifications," rendering pension systems incapable of adapting to

changed fiscal or factual circumstances. (*Cal Fire*, *supra*, 7 Cal.App.5th at p. 131, quoting *Marin County*, *supra*, 2 Cal.App.5th at p. 699.)[12] Instead, as this Court has always emphasized, public pension systems require "flexib[ility]" to adjust to "changing conditions" and "maintain the integrity of the system." (*International Assn. of Firefighters v. City of San Diego* (1983) 34 Cal.3d 292, 300; *Allen I*, *supra*, 45 Cal.2d at p. 131.) Modifications to public pension systems that are reasonable and necessary in light of the circumstances may be permissible. (See *U.S. Trust Co*, *supra*, 431 U.S. at p. 25.)

Under this Court's precedent, the absence of comparable new advantages has been one of *multiple* factors to be considered in determining whether modifications are reasonable and justified. What *is* indispensable is that modifications of pension rights "bear some material relation to the theory of a pension system and its successful operation." (*International Assn.*, *supra*, 34 Cal.3d at p. 301; *Allen I*, *supra*, 45 Cal.2d at p. 131.) If no such relationship exists, the impairment is unlikely to survive constitutional scrutiny.

The absence of comparable new advantages, by contrast, is important, but not in itself fatal, as the Court of Appeal correctly noted. (See *Cal Fire*, *supra*, 7 Cal.App.5th at p. 483 [agreeing that most case precedent uses formulation "'[s]hould' provide some new compensating benefit, not 'must' . . . and 'should' does not convey imperative obligation," but rather "is 'a recommendation,'" quoting *Marin County*, *supra*, 2 Cal.App.5th at

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[12] Many legal experts have criticized the rigid inflexibility of the Union's position, pointing out that it is contrary to contract clause principles, inconsistent with general contract and economic theory, and effectively depresses the salaries and benefits of newer generations of public employees. (See, e.g., Monahan, *Statutes as Contracts? The "California Rule" and Its Impact on Public Pension Reform* (2012) 97 Iowa L. Rev. 1029.)

p. 699].) The contract clause is not a straitjacket; "the reservation of the essential attributes of continuing governmental power" must be "read into contracts as a postulate of the legal order. (See *Allen II*, *supra*, 39 Cal.3d at p. 120, quotations omitted; see also *id.* at p. 119 ["The Constitution is intended to preserve practical and substantial rights, not to maintain theories"].) The absence of comparable advantages must therefore be balanced with other factors. If the impairment is limited and does not meaningfully alter an employee's right to a "substantial or reasonable pension" (*Miller*, *supra*, 18 Cal.3d at p. 816), or if it is reasonable and necessary to serve an important public purpose, it may be permissible under the contract clause.

To be sure, when no independent rationale for the impairment has been offered, the absence of comparable new advantages has proven dispositive in the impairment analysis. This is what happened in both *Betts* and *Olson*, two cases on which the Union heavily relies (see, e.g., AOB 22, 45).

In *Betts*, *supra*, 21 Cal.3d at p. 862, the Legislature amended the law governing the Legislators' Retirement System in 1974 to substitute a "fixed" pension in place of a "fluctuating" one. The new defined benefit formula also reduced the disability pension Betts was to receive by nearly 39 percent—an extraordinarily severe reduction, and particularly problematic because it came toward the end of Betts's career. (See *id.* at pp. 862-863 [salary on which pension to be based lowered from $35,000 to $21,499].) *Allen I* and *Abbott* had both already held that substituting a fixed pension for a fluctuating one was unreasonable when not materially related to the integrity and successful operation of a pension system. (*Abbott*, *supra*, 50 Cal.2d at pp. 454-455.) But the only justification offered by the respondent retirement board was that 11 years earlier the Legislature had added a cost-of-living adjustment. (*Betts*, *supra*, 21 Cal.3d at p. 865.)

This, the board claimed, offset the later dramatic alteration of Betts's pension formula and subsequent reduction in his benefit. (*Ibid.*) Predictably, this Court rejected such reasoning: a cost-of-living adjustment in 1963 could not serve as a comparative *new* advantage offsetting changes 11 years later. And *in the absence of any other reasons* to justify the impairment of Betts's vested pension rights, the Court concluded that the impairment was unreasonable. (See *id.* at pp. 866-868.)

*Olson* posed a similar scenario. In that case, the Legislature enacted a law limiting annual cost-of-living increases in judicial salaries. (26 Cal.3d at p. 537.) Because pensions for retired judges were tied to salaries of incumbent judges, the new limits also effectively limited cost-of-living adjustments for retired judges' pensions. (*Id.* at pp. 540-541.) Again, the respondents in the case "offer[ed] no reason or justification for the state action"; they argued only that no vested rights had been impaired. (*Id.* at pp. 539, 541.) After disagreeing that no vested rights had been impaired, this Court concluded that, *in the absence of any justification for the impairment* or comparable new advantages, the law was unconstitutional. (*Id.* at p. 541.)

In sum, neither *Betts* nor *Olson* supports the Union's contention that an impairment of a vested pension right can only be constitutional if offset by comparable new advantages. In both cases, the Court was open to considering justifications for the impairments at issue, but those tasked with defending the impairments failed even to *attempt* to justify the necessity of the impairments.[13]

[13] *Olson* is further distinguishable because the vested pension rights impaired by the new law were those of retired judges. (26 Cal.3d at p. 540 & fn. 5.) "[T]he scope of continuing governmental power may be more restricted" as to a retiree than an active employee. (*Allen II*, *supra*, 34 Cal.3d at p. 120.)

*Allen I* and *Abbott* also fail to support the Union's position, because in neither case did this Court have occasion to consider whether a modification might be reasonable if, like here, it was supported by compelling reasons materially related to the successful operation of the pension system. In both cases, a city altered the defined benefit formula so that employees would receive a pension that was fixed upon retirement, not one that fluctuated upwards as city salaries increased. The consequences of this change were serious in light of the inflationary trends of the post-World War II era, which easily could erase half the value of a pension within a decade. (*Abbott, supra*, 50 Cal.2d at p. 484; *Allen I, supra*, 45 Cal.2d at p. 132.) Yet, there was "no showing [in either case] that the . . . amendments [bore] any material relation to the integrity or successful operation or to the preservation or protection of the pension program applicable to [the] plaintiffs." (*Abbott, supra*, 50 Cal.2d at p. 455.) It was in light of that failure that this Court held in both cases that "the substitution of a fixed for a fluctuating pension is not permissible unless accompanied by commensurate benefits." (*Id.* at p. 454.)

The Union also relies upon *Allen II*, but that case does more to undermine the Union's position here than support it. In the case, a new law withheld from retired former legislators an unexpected windfall. (34 Cal.3d at p. 125.) By withholding the windfall, the law modified what had been the vested pension rights of the retirees. Contrary to the Union's theory, however, this Court did not require comparative new advantages to offset the disadvantages resulting from the modifications—even though the Union claims that *Allen II expressly* adopted the "comparative advantages" test. Instead, this Court considered whether retiree expectations of the windfall benefits were reasonable. Finding them not to be so, the Court upheld the law. (See *id.* at pp. 123-125.)

Finally, the Union's reliance on *Eu* is misplaced. As this Court emphasized in *Eu*, *supra*, 54 Cal.3d at p. 530, the limitations on legislators' pension rights at issue in the case did not seek to "modify" the Legislators' Retirement System, but rather to "*terminate* that system entirely as to additional benefits accruing for future services," which in turn threatened to entirely *divest* legislators of the benefits they had already accrued, though were not yet eligible to receive. (*Id.* at p. 531.) But when the State has established a pension plan for employees, "it cannot simply "*abandon* that plan . . . without providing them comparable new benefits." (*Ibid.*, italics added.)

In contrast to the limitations at issue in *Eu*, ending the sale of airtime did not jeopardize the entire CalPERS system going forward. Nor did it threaten to divest employees of benefits they had already accrued. *Eu* therefore does not control this case. Moreover, to the extent it suggests circumstances where comparable new advantages are needed, they are where reductions in pension benefits are "substantial" and absolute divestment of pension rights is a possibility. (*Id.* at p. 521.)

As the Court of Appeal recognized, the Union's interpretation of this Court's precedent lacks merit. That precedent does not adopt the "comparable advantages" test urged by the Union, but favors instead examining whether an impairment of vested rights is justified under the specific circumstances of a case. Under these principles, withdrawing the airtime offer was permissible, even if doing so impaired a vested right.

### B. Withdrawing the Airtime Offer Did Not Rise to the Level of Substantial Impairment.

As a threshold matter, an impairment of a vested contract right violates the contract clause only if the impairment was "substantial." (*Energy Reserves Group, Inc. v. Kansas Power & Light Co.* (1983) 459 U.S. 400, 411; *University of Hawai'i Professional Assembly v. Cayetano*

(9th Cir. 1999) 183 F.3d 1096, 1104.) "Alteration of contractual obligations" that is "minimal," in contrast, does not meet this standard, "end[ing] the inquiry at its first stage." (*Allen II*, *supra*, 34 Cal.3d 114, 119, quoting *Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 245.)

Withdrawing the airtime offer would be a minimal alteration under this analysis. As this Court has repeatedly noted, until a pension becomes payable, an "employee does not have a right to any fixed or definite benefits but only to a substantial or reasonable pension." (*Betts*, *supra*, 21 Cal.3d at p. 863; *Miller*, *supra*, 18 Cal.3d at p. 816; *Wallace*, *supra*, 42 Cal.2d at p. 183; *Kern*, *supra*, 29 Cal.2d at p. 855.) Thus, so long as an employee retains his or her right to a substantial or reasonable pension, changes to a pension plan before the employee retires do not amount to an unconstitutional impairment. (See *Kern*, *supra*, 29 Cal.2d at p. 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 benefits may be altered"].)

Applying this principle in *Packer*, *supra*, 35 Cal.2d at pp. 218-219, this Court upheld the constitutionality of amendments to a state law that modified active peace officers' vested pension rights. Among other changes, the amendments substantially narrowed the circumstances under which a peace officer's widow or children could receive a pension (*id.* at p. 213), and lowered the defined pension benefit payable in cases where a peace officer's retirement "resulted from a nonservice disability" (*id.*at pp. 218-219). Nonetheless, the Court concluded that these changes did not amount to an unconstitutional impairment because "the basic conditions under which a county peace officer could obtain a pension were substantially unchanged." (*Id.* at p. 218.) Taking into account "the total value of all pension rights," the Court determined that it was "reasonably

clear" that peace officers "retained rights to substantial pension benefits." (*Id.* at p. 219.)

This analysis is instructive here. That petitioners no longer have a statutory option to purchase unearned retirement service credit did not meaningfully alter "the basic conditions" under which they could earn a pension. Withdrawing the airtime offer did not change what public employees could reasonably expect to receive in exchange for their labor; even service credits are accounted for in employees' pension calculation just as they were before the airtime offer existed. Indeed, those who never purchased airtime saw *no changes whatsoever* to their expected pension once the offer was withdrawn. Thus, petitioners "retained rights to substantial pension benefits" even more so than the officers in *Packer*. (35 Cal.2d at p. 219.) "Laws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of a contract." (*Allen II*, *supra*, 34 Cal.3d at p. 124, quoting *City of El Paso v. Simmons* (1965) 379 U.S. 497, 515.) That should end the inquiry.

### C. Withdrawing the Option to Purchase Airtime Was Reasonable and Necessary to Serve Important Public Purposes.

Even if withdrawing the option to purchase airtime amounted to a substantial impairment of a vested right, that impairment would still not violate the contract clause so long as it was "reasonable and necessary to serve an important public purpose." (*U.S. Trust Co*, *supra*, 431 U.S. at p. 25.) Whether an impairment meets this standard turns on several factors. To assess reasonableness, courts consider the public purposes served by the impairment, as well as the extent to which the reasonable expectations of the parties are impaired. (See *S. California Gas Co. v. City of Santa Ana* (9th Cir. 2003) 336 F.3d 885, 894-895.) In the pension context, "alterations

of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation." (*International Assn.*, *supra*, 34 Cal.3d at p. 301.) To evaluate necessity, courts look to whether a "more moderate course" would have served the State's "purposes equally well," and whether the State considered the impairment "on a par with other policy alternatives." (*U.S. Trust Co.*, *supra*, 431 U.S. at pp. 30-31.) In addition, while "*complete* deference to legislative assessments of the reasonableness and necessity for modifying public contracts is not appropriate . . . at least some deference to legislative policy decisions to modify these contracts in the public interest must be accorded." (*Baltimore Teachers Union, Am. Fed'n of Teachers Local 340, AL-CIO v. Mayor & City of Council of Baltimore* (4th Cir. 1993) 6 F.3d 1012, 1019.) Here, the withdrawal of the statutory airtime offer by the Governor and Legislature satisfied the test for "reasonableness and necessity" in three ways.

### 1. Restoring the severed link between pension benefits and public service.

At the most basic level, ending the sale of airtime was critical to restoring the severed link between pension benefits and public service resulting from section 20909. Public pension systems are designed to provide retirement benefits earned through years of faithful public service. (See *Carman v. Alvord* (1982) 31 Cal.3d 318, 325 & fn. 4 ["Pensions . . . help induce faithful public service and provide agreed subsistence to retired public servants who have fulfilled their employment contracts"]; JA 391 [trial court finding that "providing retirement benefits based on work performed . . . is the primary purpose of a pension system"]; see also JA 387 ["Pensions are intended to provide retirement stability for time *actually worked*," quoting Governor's October 27, 2011 plan, italics added].) Selling airtime directly undercut this design. By enabling employees to purchase airtime, the Legislature permitted employees to

artificially inflate the years used to calculate their pension so that service credit no longer reflected actual public service. As the trial court correctly determined, the sale of airtime "broke the link between work performed and benefits earned," transforming a pension (which employees earn) into an "annuity[y]" (which employees buy). (JA 392.)

The Union claims that allowing employees to purchase up to five years of service credit was "not unusual." (AOB 12.) CalPERS took a different view, noting that "[w]hen the option to buy [airtime] became available to members, the [CalPERS] Actuarial Office had no specific experience [from any other program] on which to derive assumptions." (JA 313.) Furthermore, the Union's claim ignores the distinguishing characteristic of *airtime*, which *by definition* was distinct from "any other time recognized for service credit by the retirement system." (§ 20909, subd. (c) [defining "additional retirement service credit"].) Other laws permit employees to elect to convert prior *public service* into credit. (See, e.g., §§ 21020 [defining "public service"], 21032 [allowing eligible employees to purchase credit for prior "public service"], 20898 [permitting service credit for benefits earned through service, including "holidays, sick leave, vacation, or leave of absence, with compensation"].) In contrast, section 20909 allowed employees the option to purchase unearned time in no way connected to public service or a public employer, and have it credited in their pension calculation.[14]

The severed link between a pension and service, in turn, not only contradicted "the theory of a pension system" (JA 392 [trial court's

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[14] Section 20902.5 is not to the contrary. That statute permits the Chief Justice to accelerate the retirement of judicial branch employees when she determines it would serve "the best interests of the state." (§ 20902.5, subd. (a).) It does not allow employees to purchase airtime or establish a vested right to such an option.

finding]), but also undermined public trust in the system. Like many other forms of "pension spiking," buying airtime to enhance one's pension may have fallen "within the rules of the pension system" (Beermann, *The Public Pension Crisis* (2013) 70 Wash. & Lee L. Rev. 3, 21), but it "seem[ed] illegitimate" to the general public "for the simple reason that pensions manipulated in this manner are not related to the employee's needs and legitimate expectations after retirement." (*Ibid.*) Thus, it fueled the increasingly widespread view that public employee pensions were "excessive" and that the system was being abused. (*Ibid.*)

At a time when California was struggling through one of its worst budget crises and the state's pension systems were estimated to have hundreds of billions of dollars of unfunded liabilities, reining in such abusive practices and restoring the link between pension benefits and public service was not only "material[ly] relat[ed] to the theory of a pension system and its successful operation" (*International Assn.*, *supra*, 34 Cal.3d at p. 301), but also imperative. And there was no other way to restore that link than to prohibit further purchases of airtime, which were responsible for severing the link in the first place. At stake was public trust in the government's prudent use of limited taxpayer funds and the success of the effort through Proposition 30 to raise additional revenue.[15] Moreover, any alteration of employees' reasonable pension expectations resulting from ending the sale of airtime was slight for the reasons set forth above.

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[15] At the time PEPRA was signed into law, Proposition 30 was on the ballot for voter approval in the November 2012 election. It was ultimately passed by voters, but had it not passed, the state budget crisis would have required eliminating at least $6 billion of education funding in the 2012-13 fiscal year alone.

### 2. Eliminating a known cause of premature retirements.

Withdrawing the airtime offer was further reasonable and necessary to address a second serious problem arising from the airtime program. The program was enacted into law to allow employees with gaps in service to purchase a "livable retirement income." (JA 256, 259, 269].) But an internal 2010 analysis of the airtime program by CalPERS showed that airtime purchasers retired *earlier* than their peers who did not purchase benefits. (JA 314; see also JA 393 [trial court noting "evidence that state employees who purchased Airtime retired at more rapid rates and at earlier ages than state employees who did not purchase Airtime"].) This, in turn, strongly suggested that employees were using airtime less to fill in gaps in service, and more to speed up the time when their pension formula was effectively maximized and there was no further financial benefit to working.

Nothing in the legislative history suggests that the Legislature intended airtime to accelerate the retirement of veteran public employees in this way. (JA 393-394.) To the contrary, section 20909 expressly prohibited employees from using airtime to accelerate the date on which they became legally eligible for retirement. (§ 20909, subd. (d).) Yet, by the time of the Governor's Twelve Point Pension Reform Plan, it was clear that the airtime program was sharply accelerating retirements of firefighters, school staff, and correctional staff, often with serious consequences for the state and its citizens.

Nowhere was the impact more serious than in the state's prison system. According to the 2010 CalPERS study, the airtime program began in 2004 to accelerate the retirement of public employees staffing

California's prison system. (See JA 314.)[16] Yet, during the same period, the prison population was steadily growing, *increasing* demand for correctional officers and experienced medical and mental health care staff. (See *Brown v. Plata* (2011) 563 U.S. 493, 502-503.)

In 2011, the U.S. Supreme Court concluded that the subsequent staffing shortages posed grave threats to inmates. "Prisons were unable to *retain* sufficient numbers of competent medical staff, and would hire any doctor who had a license, a pulse, and a pair of shoes." (*Plata, supra*, 563 U.S. at p. 508, italics added, citations and quotations omitted.) In 2008, "vacancy rates for medical and mental health staff ranged as high as 20% for surgeons, 25% for physicians, 39% for nurse practitioners, and 54.1% for psychiatrists." (*Id.* at pp. 517-518.) "[C]hronically understaffed," the prison system simply could not adequately "fill positions necessary for the adequate provision of medical and mental health care" under the Eighth Amendment. (*Id.* at p. 528.) While the airtime program was not the proximate cause of the "serious constitutional violations" that resulted (*id.* at p. 499), the program clearly exacerbated severe shortages of critical staff. Preventing public employees from using airtime to retire early was

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[16] The CalPERS study found that among "State Safety" members eligible to retire during the study period, only 6.6 percent of those who did not purchase airtime elected to retire. By comparison, 12.5 percent of those who purchased airtime elected to retire—an increase of nearly 90 percent. Most dentists, nurse practitioners, physicians, psychiatrists, and psychologists who work at correctional facilities are "State Safety" members. (§ 20405.)

Similarly, among "State POFF" members—which encompasses correctional officers (§§ 20392, 20395)—eligible to retire, 11.5 percent of those who did not purchase airtime retired, in contrast to a retirement rate nearly 63 percent higher for those who purchased airtime (18.7 percent). (JA 314.)

therefore urgent. And there was no other way to achieve this end than to limit them from buying airtime to begin with.

To the extent that employees were hoping to be able to purchase airtime at some point in the future so that they could retire early, their expectation was never consistent with what the Legislature had intended, and should not factor into the analysis. (See *Allen II*, *supra*, 34 Cal.3d at p. 119 [the contract clause "does not prevent laws which restrict a party to the gains reasonably to be expected from the contract"].)[17]

**3. Eliminating an inherently unworkable and fiscally unsustainable scheme.**

Finally, ending the sale of airtime addressed an unworkable defect in the airtime law that gave airtime purchasers large unexpected windfalls while saddling public employers with tens of millions of dollars of unforeseen liabilities. Though the law mandated that eligible employees purchase airtime for the "amount equal to the increase in employer liability" (§ 21052; see also §§ 20909, subd. (b), 21050, subd. (a)), it became clear that this was not happening, and that employer liability was in fact increasing, contrary to the law.

CalPERS staff flagged the problem almost as soon as the sale of airtime began. In March 2004, staff noted that to calculate the increase in employer liability that an airtime purchaser was legally obligated to pay, it was necessary to incorporate assumptions about what "special compensation" an employee would ultimately earn before retiring. (See JA 283 ["not taking special compensation into account in the present value calculation" would mean that an airtime buyer would pay "less than the increase in the employer's liability . . . resulting in the employer liability

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[17] Furthermore, none of the individual petitioners here allege that they took a break from state service in reliance on the airtime offer.

section 21052 prohibits"].) But it was not clear whether an employee's future "special compensation" at retirement could be reliably projected. There were "more than 130 types of special compensation," and the amount of such compensation received by employees ranged widely "from 0% to more than 50% of base pay." (JA 283.) Staff warned that the "significant[] increase" of "complexity" was a difference in kind, possibly requiring "substantial computer system changes." (JA 283-284.) The risk of mispricing airtime and shifting much of its actual costs onto employers—contrary to the Legislature's clear intent—was great.

Concerns about mispricing airtime were ultimately validated by a 2010 review by CalPERS "to identify whether the assumptions used to calculate the cost of [airtime] purchases should be changed." (JA 313.) The review found that airtime had been systematically underpriced. Instead of paying "the full present value cost" of airtime, most employees paid far less, in the worst cases 40 percent below what should have been paid. (See JA 317-321; JA 393.) The cause of the mispricing was inaccurate actuarial assumptions, the most significant of which was the failure to anticipate that airtime purchasers would decide to retire early. (JA 316-317.) To correct the mispricing, CalPERS staff recommended substantially raising the price at which airtime was sold. For example, the price school staff paid needed to be increased by 38 percent on average. (JA 317.)

In the meantime, employers were forced to make up the shortfalls that had been created. In its 2010 review, CalPERS did not estimate precisely how much employer liability had increased as a result of years of underpricing airtime. But aggregating the tens of thousands of employees (33,000 in just the first three years) who purchased airtime at significant discount, it was clear that employers were picking up tens of millions of dollars of additional liability—liability that under the original airtime law they were never supposed to have to absorb (JA 259).

Moreover, given not only this experience but also the inherent and intractable complexity of accurately projecting age at retirement, life expectancy, future salary increases, and investment returns, it was all but certain that airtime sold going forward would only continue adding to the state's substantial unfunded pension liabilities. According to the Governor's Twelve Point Pension Reform Plan, this was yet another reason why the airtime program proved unfair to employers and taxpayers and needed to end. "Employers, and ultimately taxpayers, should not bear the burden of guaranteeing the additional employee investment risk that comes with airtime purchases." (JA 387, quoting Governor's October 27, 2011 plan]; see also *Allen II*, *supra*, 34 Cal.3d at p. 125 ["equity and financial responsibility strongly counsel[] against" allowing employees to receive pensions "far outstripping any reasonable expectations" and "dwarfing" what they have contributed, because it "require[s] correspondingly excessive appropriations of general tax funds to maintain the retirement system's fiscal integrity"].)

Under well-established principles, the Legislature's effort to address these serious concerns was reasonable. (See *Allen II*, *supra*, 34 Cal.3d at p. 120 ["Constitutional decisions have never given a law which imposes unforeseen advantages or burdens on a contracting party constitutional immunity against change," quoting *El Paso*, *supra*, 379 U.S. at p. 515].) Moreover, to ensure public employers faced no further increase in liability on account of airtime—liability that not only eroded the financial solvency of the pension system but was also prohibited by law—the State had no choice but to stop selling airtime. (See *El Paso*, *supra*, 379 U.S. at 515-516 [imposing new limit on purchasers' redemption rights was "quite clearly necessary" to cure problem of clouded title and enable state to operate its school lands program]; *Baltimore Teachers Union*, *supra*, 6 F.3d at pp.

1018-1022 [reducing teacher salaries was reasonable and necessary to ensure city's financial integrity].)

At the same time, the State "clearly sought to tailor the plan as narrowly as possible" to address the problem. (*Baltimore Teachers Union*, *supra*, 6 F.3d at p. 1021.) The Legislature's action was far less drastic than other alternatives—such as cancelling completed airtime transactions and refunding employee payments with interest. And notwithstanding its withdrawal of the airtime offer, the Legislature ensured that the offer remained open for eligible employees who exercised the option before January 1, 2013. In these respects, "the statute represent[ed] a considered legislative judgment as to the appropriate reach of the [contract clause]," which "enjoys significant weight and deference by the courts." (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180 ["the presumption of constitutionality accorded to legislative acts is particularly appropriate when the Legislature has enacted a statute with the relevant constitutional prescriptions clearly in mind"].)

### D. Withdrawing the Option to Purchase Airtime Resulted in No Material Disadvantages To Be Offset.

As explained in Part II.C, *supra*, eliminating the option to purchase airtime was reasonable and necessary to serve important public purposes, and thus did not violate the contract clause. Significantly, the elimination of the option satisfied this Court's mandate that any alterations of pension rights "bear some material relation to the theory of a pension system and its successful operation." (*Betts*, *supra*, 21 Cal.3d 859, at p. 864.) Withdrawing the airtime offer helped restore the severed link between public service and pension benefits that is at the heart of any public pension system, and eliminated a well-established source of unfunded liability never intended by the Legislature.

However, were this Court to further consider whether withdrawing the airtime offer demanded comparative new advantages, it should conclude that no such advantages were merited because there was no material disadvantage to be offset. The Union's argument that disadvantages to employees resulted from section 7522.46 repeatedly conflates the airtime offer (which was of no benefit until accepted) with the airtime actually purchased by employees (which did benefit employees in a number of ways, but which the Legislature never took away). (See, e.g., AOB 12, 29.) Unlike purchased airtime, which had a clear price and value, the mere unexercised option was never priced, had no clear material value, and conferred no monetary benefit. While purchasing airtime may have been like buying a higher pension for some employees, it was not so for the majority of employees, who chose not to purchase it while it was for sale. For example, employees who wished to work until a normal retirement age rarely, if ever, could enjoy any financial benefit from buying airtime. And without actually spending the money necessary to purchase airtime, employees were materially in the same position as similarly situated employees who never purchased airtime.

Given that the Union accepts that the option to purchase airtime was not a form of deferred compensation (JA 328), its failure to describe the disadvantage to employees or suggest what an offsetting benefit might look like betrays the weakness of its argument. This simply was not a case like *Allen I*, *supra*, 45 Cal.2d 128, or *Betts*, *supra*, 21 Cal.3d 859, where the changed laws disadvantaged employees by materially decreasing the pensions they were expecting.

In sum, the unaccepted offer of airtime was alone insufficient to confer financial value. Withdrawing it therefore resulted in no material disadvantage to be offset. For this reason, even were the Court to apply the

Union's "comparable advantages" test here, it would not change the outcome.

## CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeal.

Dated: November 6, 2017

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the attached Intervener and Respondent State of California's Answer Brief on the Merits uses a 13 point Times New Roman font and contains 13,869 words.

Dated: November 6, 2017

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