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

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Hon. David B. Flynn (Ret.), Judge

INTERVENOR AND RESPONDENT STATE OF CALIFORNIA'S OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

A public employee's pension is typically calculated using a formula set in statute. The formula uses the number of years of the employee's service, the pension-eligible (pensionable) compensation earned by the employee in their final compensation period, and an age-based multiplier. The Legislature sets the parameters for what pay items, on top of an employee's final salary, can be included in pensionable compensation. The issues presented in this case are:

1. Under Government Code section 31461, subdivision (b)(2), is a cashout of unused leave excluded from pensionable compensation to the extent that the amount of leave cashed out exceeds the amount of leave that may be earned during each 12-month period of the final compensation period?

2. Can the Legislature, consistent with the contract clauses of the federal and state Constitutions, exclude from an employee's future pensionable compensation a specific pay item that has yet to be earned during that employee's final compensation period?

3. Where the Legislature has always excluded a pay item from pensionable compensation, can a court rely on principles of equitable estoppel to compel a government agency to include the pay item in the future pensionable compensation of thousands of public employees?

INTRODUCTION

"The practice known as 'pension spiking,' by which public employees use various stratagems and ploys to inflate their income and retirement benefits, has long drawn public ire and legislative chagrin." (*Marin Association of Public Employees v. Marin County Employees' Retirement Association* (2016) 2 Cal.App.5th 674, 679, review granted Nov. 22, 2016 (S237460) (*Marin*).) For decades, the Legislature has tried to close loopholes and clarify the law to end the most abusive practices. But pension spiking, especially under the County Employees' Retirement Law of 1937 (CERL; Gov. Code, § 31450 et seq.[1]), has proven resilient, evolving quickly in response to new legal developments and cloaking itself within the complex nuances of 20 separately-administered county systems.

The practices at issue in this case are particularly egregious because they were *never* lawful. For years, the retirement systems in Contra Costa, Alameda, and Merced counties flouted CERL's clear limitations, ignoring explicit warnings from their legal counsel. In the flush times of the dot-com bubble, this rule-bending was largely ignored. Then, amidst the worst economic downturn since the Great Depression, investment returns abruptly dropped and unfunded liabilities skyrocketed. Between 2008 and 2012, the percentage of funded pension liabilities in Merced County's retirement system plunged from 70.5 percent to just 54.2 percent.[2] Unfunded liabilities for Contra Costa County's retirement system reached

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

[2] Compare Buck Consultants, *Report on the Actuarial Valuation as of June 30, 2008* (2009) p. 3 <https://www.co.merced.ca.us/ArchiveCenter/ViewFile/Item/605>, with EFI Actuaries, *Actuarial Review and Analysis as of June 30, 2012* (2013) p. 1 <https://www.co.merced.ca.us/ArchiveCenter/ViewFile/Item/609> [as of May 4, 2018].

$2.3 billion.[3] Some estimates placed unfunded liabilities across the 20 CERL systems in the hundreds of billions of dollars. (*Marin, supra*, 2 Cal.App.5th at p. 680.)

As the systems attracted greater scrutiny, once-obscure practices were exposed. In this case, employees in Contra Costa, Alameda, and Merced counties could spike their final pensionable compensation by tens of thousands of dollars by volunteering for thousands of hours of "standby" shifts in their final year of employment.[4] Managers were sometimes given unexplained payments on the eve of their retirement specifically to enhance their pensions.[5] And employees were allowed to include in their final compensation cashouts of hundreds of unused leave hours from multiple years. Such practices could result in the inflation of an employee's lifetime pension benefits by easily over $1 million *per employee*. (17 CT 4958.)[6]

In 2012, the Governor and Legislature responded to growing public outrage by enacting AB 340 and AB 197 (together, "AB 197") to clarify the unlawfulness of a number of spiking schemes under CERL, including those outlined above. Employee unions sued, claiming that AB 197's limitations on pension spiking violated the "vested rights" of "legacy employees."

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[3] Segal Company, *Actuarial Valuation and Review as of December 31, 2012* (2013) p. iii <https://www.cccera.org/sites/main/files/file-attachments/actuarial_val_report_2012.pdf> [as of May 4, 2018].

[4] Borenstein, *On-Call Pension Spike Provides Huge Boost to Retirement Pay* (June 25, 2013) East Bay Times <https://www.eastbaytimes.com/2013/07/25/daniel-borenstein-on-call-pension-spike-provides-huge-boost-to-retirement-pay/> [as of May 4, 2018].

[5] Borenstein, *Fire Board Aided Chief's Pension Spike* (Aug. 6, 2009) East Bay Times <https://www.eastbaytimes.com/2009/08/06/daniel-borenstein-fire-board-aided-chiefs-pension-spike-2/> [as of May 4, 2018].

[6] References to the Clerk's Transcript (CT) are described by volume number and page number. For instance, volume 30, page 9015 is identified as "30 CT 9015."

Largely dismissing these claims, the trial court affirmed the application of AB 197's limitations to legacy employees, with two very narrow exceptions. However, the Court of Appeal partially reversed. The Court of Appeal did not dispute that AB 197 did not affect anyone who had already retired and applies only to pay items earned after its effective date. The court also agreed with the trial court that many of the practices prohibited under AB 197 were *already* clearly prohibited under the law. Finally, the court below did not dispute that the statutory definition of pensionable compensation has always been regulated by the Legislature and subject to legislative clarification in the past. Nonetheless, it blocked the application of most of AB 197's provisions to legacy employees in the three counties, embracing the theory that employees hired before AB 197's effective date have a right to spike their pensions in perpetuity, free from AB 197's limitations.

This decision should be reversed. It rests on a faulty construction of CERL as it existed before AB 197, as well as misinterpretations of key provisions of AB 197 itself. More fundamentally, the decision errs by adopting an expansive theory of vested rights that is internally incoherent, in conflict with basic contract clause principles, and inconsistent with a proper understanding of the Legislature's police power and exclusive authority to define the parameters of pensionable compensation. At a time when taxpayers are already struggling to pay for *legitimate* pension liabilities, they should not be forced to absorb unlawfully calculated pension liabilities as well. State and local governments also must have flexibility to adjust the pensionability of specific pay items that have not yet been earned.

The State respectfully requests that this Court vacate the lower court's decision and confirm that AB 197's application to legacy employees is consistent with contract clause principles, without exception.

BACKGROUND

I. Pensionable Compensation Under CERL

The Legislature enacted CERL to provide the legal and policy framework for counties to establish their own independent retirement systems. Twenty counties—including the three involved in this litigation—have elected to provide retirement benefits to their employees under CERL's provisions.

Each county's system is administered by its own retirement board. (§ 31520.) A core responsibility of the retirement board is calculating the pension of an employee who has retired. To do so, a board must first calculate the pensionable compensation that the employee earned during the employee's final compensation period. That requires the board to take an employee's "compensation"—that is, "remuneration paid in cash" (§ 31460)—and determine "compensation earnable" by filtering out compensation for overtime work and other periods not based on "the average number of days ordinarily worked" by similarly situated employees. (§ 31461.) The board must then identify the "compensation earnable" received during the single, contiguous 365-day period chosen by the employee as their "final compensation" period (usually the last year of employment when salary and benefits are at their highest). (§ 31462.1.)[7] Compensation that is payable only outside the final compensation period (for example, a payment made only upon retirement) is excluded from pensionable compensation. (See *Salus v. San Diego County Employees Retirement Ass'n* (2004) 117 Cal.App.4th 734, 739-740.)

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[7] Some employees may be subject to a three-year final compensation period under section 31462, in which case their "final compensation" is the average of each of those final three years.

This Court confirmed many of these principles in *Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, when it was asked to consider whether various pay items qualified as pensionable compensation under CERL. This Court determined that a number of items paid in cash, including annual cashouts of unused leave hours, were properly treated as pensionable, even when not paid uniformly to all employees in the same job classification. (See *id.* at pp. 495-506.) At the same time, nothing in the *Ventura* decision suggested any alteration to CERL's longstanding rules limiting pensionable compensation to the compensation that is both earned and payable during the final compensation period.

II. Pension Spiking in Contra Costa County

In December 1997, the Contra Costa County Employees' Retirement Association (CCCERA) adopted a new pensionable compensation policy. Part of the policy was intended to recognize certain pay items addressed in *Ventura* as pensionable. Another part, however, introduced a pay item never addressed in *Ventura*. CCCERA would begin allowing employees to include in their final compensation not only the normal annual cashout of unused leave hours, but also a separate cashout payable only at retirement for additional unused leave hours, equivalent to the number of hours that could be accrued during the final compensation period. (17 CT 4923.) This latter cashout was commonly referred to as "terminal pay" or "termination pay."

The following example of an actual employee was described by CCCERA's counsel to help elucidate how terminal pay was incorporated into final compensation:

An employee's MOU allowed the employee to accrue 240 hours of vacation per year, and to "sell back" or "cash out" up to 80 hours of unused vacation annually. (17 CT 4958.) While the employee therefore *earned*

240 hours of vacation per year, only the cashout of 80 hours was *payable* during the employee's final compensation period. (*Ibid.*) And because CERL restricted the inclusion of cashouts of leave to only what the employee could both earn and cash out during the final compensation period (17 CT 4953), CERL permitted including a cashout of only up to 80 leave hours in the employee's final compensation.[8]

After *Ventura*, however, CCCERA began allowing an employee to include in their final compensation *both* the annual cashout of up to 80 hours of unused leave *and* the separate terminal pay cashout that the employee would receive only at retirement. (17 CT 4958.) With respect to that latter cashout, the employee could cash out as many leave hours as the employee could accrue under their MOU during the final compensation period—in this case, up to 240 hours. (*Ibid.*) They were allowed to do this even if they had *already* cashed out 80 hours of unused leave accrued from the year. And because CCCERA included *both* cashouts in final compensation, an employee's final compensation could include the cashout of 80 hours *plus* the terminal pay cashout of 240 hours (*ibid.*)—together, 320 total hours of unused leave. That was not only significantly more than the 240 hours that an employee could *accrue* during the final compensation period. It was *four times greater* than the 80 hours which CERL actually allowed to be cashed out and included in pensionable compensation (because only 80 hours could be both accrued and cashed out under the employee's MOU during the final compensation period).

In addition, the employee could further spike their final compensation by "straddling" their final compensation period over two fiscal years. (17 CT 4956, 4967.) Because the employee could cash out 80

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[8] Any part of the cashout excluded from pensionable compensation was still kept by the employee.

hours of unused leave in *each* of the two fiscal years, straddling permitted an *additional* 80-hour cashout of unused leave from the *second* fiscal year to be included in final compensation. (17 CT 4958.) With both straddling and terminal pay, the employee could easily inflate their final compensation with cashouts of 400 total hours of unused leave—*five times greater* than the 80 hours which CERL actually allowed.

To support these inflated benefits, the mandatory contributions of public *employers* were markedly increased. In contrast, *employees* were not required to make any additional contributions. (19 CT 5482 ["[T]here will be *no change in member basic benefit contribution rates* as a result of the new terminal pay assumptions," italics added]; 19 CT 5491 [terminal pay assumptions "Applied to *Employer rate only*," italics added].)

CCCERA's practices were directly contrary not only to CERL, but also to explicit legal direction provided by its own lawyers immediately following *Ventura*. Those lawyers specifically advised CCCERA that a leave cashout at termination (i.e., terminal pay) was only pensionable "up to the amount that could be legitimately cashed out by the employee *during* the final compensation period." (17 CT 4937, italics added; see also *ibid.* [advising that a leave cashout is *not* includible in pensionable compensation if it represents "vacation time earned outside of the final compensation period"].) In other words, where only 80 hours of leave could be cashed out during the final compensation period, no more than 80 hours' worth of terminal pay was pensionable (assuming no other leave cashout had been already included). But, as discussed above, CCCERA ignored these restrictions and permitted retiring employees to inflate their pensions with hundreds of unused leave hours in excess of the leave amount accruable during their final compensation period.

Over a year after CCCERA began these practices, it reached a settlement to resolve claims brought by a group of members who had

already retired. The 1999 *Paulson* settlement applied only to employees who had already retired as of September 30, 1997 and provided that *those* retirees should have their pensions re-calculated, in line with the practices adopted by CCCERA in 1998. (16 CT 4743-4744.)

Not long afterward, courts began showing that CCCERA was misguided. The San Francisco County Superior Court concluded that CERL did *not* in fact require terminal or termination pay to be included as pensionable compensation, because such pay was not receivable during the final compensation period, but only upon retirement. (*In re Retirement Cases* (2003) 110 Cal.App.4th 426, 474 [summarizing trial court's analysis].) In 2003, the First District Court of Appeal affirmed, concluding that CERL's "language is not ambiguous." (*Id.* at p. 475.) In 2004, another court of appeal ruled that "postretirement payments for unused leave . . . are not part of an employee's final compensation within the meaning of CERL." (*Salus, supra*, 117 Cal.App.4th at p. 740.) That court worried that such payments would create "the risk of substantial distortion" in what pension benefits are paid to employees across CERL counties. (*Id.* at p. 741.) Other CERL counties ensured that their policies were consistent with these rulings. CCCERA, in contrast, declined to revise its practices.

In 2009, CCCERA's counsel *again* advised CCCERA that its practices were contrary to CERL, not compelled by *Ventura*, and should be changed. (17 CT 4952-4957.) CCCERA finally amended its policy in 2010 to limit the inclusion of leave cashouts to amounts that were both earned and payable during the final compensation period. (17 CT 5067.)

However, employee groups opposed the changes and threatened litigation. In the end, the new policy was applied only to employees hired on or after January 1, 2011. (17 CT 5068.) While (as CCCERA's counsel noted) the *Paulson* settlement did not pose any legal obstacle to ending CCCERA's prior practices (17 CT 4955, 4957), employees hired *before*

2011 continued to benefit from the pre-2011 practices, which substantially inflated their pensions in ways not possible for employees in the vast majority of other CERL counties whose retirement boards adhered to the law.

III. Pension Spiking in Alameda County

In April 1998, the Alameda County Employees' Retirement Association (ACERA) adopted a policy to implement *Ventura*. While the policy expressly promised fidelity to CERL (23 CT 6774), it also allowed employees to inflate their pensions beyond CERL's strict parameters. Like CCCERA's 1998 policy, ACERA's policy allowed employees to include in their pensionable compensation not only annual cashouts of unused leave, but also an additional cashout payable only at retirement for other unused leave hours. (23 CT 6770, 6774.) Both cashouts were included in pensionable compensation so long as the number of hours cashed out did not exceed the number of hours that could be accrued during the final compensation period. (23 CT 6770.) Thus, if an employee accrued 240 hours during the final compensation period and could cash out 80 hours annually, the employee could include the 80-hour cashout *as well as* a cashout at retirement for up to 160 more leave hours (equaling a total of 240 hours, since that was the number of accruable hours annually). In this way, ACERA's policy enabled employees to inflate their final compensation with cashouts of leave often three times greater than what CERL actually permitted. "Straddling" practices allowed employees to spike their pensions even further.

Like in Contra Costa County, ACERA's policy was adopted independent of pending litigation. Indeed, ACERA's 1998 policy was in effect for over a year before ACERA entered into an agreement settling litigation that *ACERA* had initiated. (23 CT 6771.) While resolving issues related to employees who had already retired, the 1999 settlement

agreement merely reaffirmed the 1998 policy as to the pensionable compensation of members retiring after *Ventura*. (23 CT 6774.) Like in Contra Costa County, the burden of funding the new policy was to be borne entirely by *employers*. (23 CT 6798.)

While the settlement agreement's express terms required consistency with CERL (23 CT 6774), ACERA did not revisit its policy after the decisions in *In re Retirement Cases* and *Salus*.

IV. Pension Spiking in Merced County

The Merced County Employees' Retirement Association (Merced CERA) settled post-*Ventura* litigation in 2000. (5 CT 1324-1336.) For employees retiring after *Ventura*, the agreement generally limited the inclusion of leave cashouts in pensionable compensation up to the amount that was actually cashed out by an employee during the final compensation period—not to exceed one year's annual leave accrual. (5 CT 1330.) The agreement further provided that under no circumstances could an employee include more than 160 hours of cashed-out leave in their pensionable compensation. The parties also agreed that "under no circumstances" would current 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," subject to future reconsideration. (5 CT 1331.)

In implementing the agreement, Merced CERA staff failed to follow these rules. They allowed employees to include however much leave they sold back annually (which was typically limited to between 20 and 80 hours) *plus* a cash-out of up to 160 hours, accrued at any point in time. (10 CT 2702-2703.) Including these dual payouts in pensionable compensation flouted CERL's parameters, as well as the absolute 160-hour cap in the settlement agreement itself.

In 2006, Merced CERA's failure to follow the settlement agreement's plain language came to light. (10 CT 2703.) Merced CERA sought a judicial declaration regarding the meaning of the terms of the settlement agreement. (*Ibid.*) Notwithstanding the agreement's plain language, the Merced County Superior Court affirmed the prior staff practices as consistent with the 2000 settlement agreement. (10 CT 2703-2706.) The court's 2007 decision misunderstood key provisions of the agreement (10 CT 2704-2705), misconstrued *Salus* and the scope of *Ventura* (10 CT 2705), and simply ignored *In re Retirement Cases*. Despite the clear contradiction between the court's decision and established appellate authority, Merced CERA declined to appeal.

V. AB 340 AND AB 197

In 2011, the Little Hoover Commission advised the Governor and Legislature that pension-spiking practices had become "widespread throughout local government," generating "public outrage that cannot continue to be ignored." (*Marin*, *supra*, 2 Cal.App.5th at p. 682, quoting Little Hoover Com., Public Pensions for Retirement Security (Feb. 2011), at pp. 36, vi.) "The spiking games must end." (*Ibid.*, quoting Little Hoover Com., *supra*, at p. 46.) The Commission further 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." (*Id.* at pp. 681-682, quoting Little Hoover Com, *supra*, at p. 53.)

In the face of this concern over both the integrity and solvency of CERL systems, the Governor and Legislature enacted AB 340 and AB 197. According to AB 340's author, California's public pension systems had been "tainted" by employees who had "taken advantage of the system," in part due to CERL's "very broad and general definition of 'compensation earnable.'" (*Marin*, *supra*, 2 Cal.App.5th at p. 682, fn. 2, quoting AB 340 legislative history.) AB 340 was intended to "address these abusive

practices" by "eliminat[ing]" the "ability for employees to manipulate their final compensation calculations." (*Ibid.*) AB 197, in turn, was passed soon after AB 340's enactment in order to clarify some of AB 340's provisions[9] and further "rein in pension spiking by current members of the system to the extent allowable by court cases that have governed compensation earnable in that system since 2003." (Supplemental Clerk's Transcript 114-116.)

The two bills (together, "AB 197") preserved the prior language in the definition of "compensation earnable" as subdivision (a) of section 31461, but added new subdivisions (b) and (c). Subdivision (b) clarifies that "compensation earnable" "does not include, in any case, the following:"

- Payments determined by a retirement board "to have been paid to enhance a member's retirement benefit." (§ 31461, subd. (b)(1).)
- Payments for unused leave amounts exceeding the amount "which may be earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid." (§ 31461, subd. (b)(2).)
- "Payments for additional services rendered outside of normal working hours." (§ 31461, subd. (b)(3).)
- "Payments made at the termination of employment, except those payments that do not exceed what is earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid." (§ 31461, subd. (b)(4).)

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[9] Borenstein, *Pension Reform Bill Loophole Would Expand Spiking Opportunities* (Aug. 30, 2012) Mercury News <https://www.mercurynews.com/2012/08/30/daniel-borenstein-pension-reform-bill-loophole-would-expand-spiking-opportunities/> [as of May 4, 2018].

Subdivision (c), in turn, clarifies that subdivision (b) is intended to codify the statutory construction of the prior version of section 31461 by the courts in *Salus* and *In re Retirement Cases*. (§ 31461, subd. (c).)

VI. THE RETIREMENT BOARDS' IMPLEMENTATION OF AB 197

Following passage of AB 197, CCCERA, ACERA, and Merced CERA began adopting AB 197's requirements. (16 CT 4730-4731; 1 CT 188; 41 CT 12132-12135.) Their new policies, effective January 1, 2013, continued to permit retiring employees to receive annual leave cashouts and terminal pay, and to incorporate those payments into their final compensation. However, the amount of such payments to be included in final compensation was capped by what was both earned and payable during the final compensation period. In practice, this meant that employees typically could include in their final compensation a leave cashout up to the amount of leave that under their MOU they were able to both accrue and cash out annually. In Contra Costa County, implementing AB 197 largely meant applying CCCERA's existing policy for employees hired after January 1, 2011 to employees hired before that date. (18 CT 5199.)

In light of AB 197's exclusion of pay for services rendered outside normal working hours, the new policies in Alameda and Merced counties also prospectively precluded employees from including pay for standby or on-call shifts in their final compensation. (42 CT 12336; 41 CT 12132-12135.) ACERA additionally excluded a number of pay categories from pensionable compensation under section 31461, subdivision (b)(1). (24 CT 7174; 37 CT 11017–38 CT 11054.)

In 2014, CCCERA ended straddling, pursuant to AB 197.[10] ACERA has refused to change its straddling policy.

VII. The Trial Court's Decision

Claiming that "vested rights" under prior retirement board policies and practices had been violated, various public employees and public employee unions in Contra Costa, Alameda, and Merced counties (collectively, "unions") filed writs of mandate challenging the retirement boards' actions under the contract clauses of the state and federal Constitutions.

The unions argued that the boards' implementation of AB 197 impaired legacy employees' vested rights to include four pay items in their pensionable compensation: (1) payments made specifically to enhance a member's pension; (2) cashouts of unused leave in excess of the amount of leave that may be accrued during the final compensation period; (3) payments for services rendered outside normal working hours; and (4) payments made at the termination of employment, to the extent that they exceed what is both earned and payable during the final compensation period. The unions obtained stays enjoining the implementation of AB 197 as applied to legacy employees.

After the retirement boards declined to defend the constitutionality of AB 197, the State intervened. The actions in the three counties were consolidated in the Contra Costa County Superior Court. Multiple rounds of briefing and hearings extended over a year. In May 2014, the trial court issued a final statement of decision, largely denying the petitions, but with two narrow exceptions.

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[10] Unions challenged CCCERA's prohibition on straddling. In 2016, the Contra Costa County Superior Court determined that AB 197 barred straddling. However, final resolution of that litigation remains, pending the resolution of this matter.

With respect to leave cashouts and terminal pay, the court found that AB 197 simply clarified exclusions that already existed in the law and thus did not violate any vested rights. Nonetheless, the court determined that the retirement boards should be estopped from applying AB 197 to a small number of employees in Contra Costa and Merced counties.

The court found the analysis of AB 197's other two exclusions to be less straightforward. While determining that payments for on-call shifts assumed *voluntarily* by an employee had never been pensionable, the court concluded that payments for *required* shifts might have been pensionable under certain circumstances. In the case of the latter, AB 197 appeared to infringe legacy employees' vested rights. Finally, with respect to AB 197's exclusion of pension-spiking enhancements, the court denied the petitions without prejudice, reasoning it was too early to tell if anyone's vested rights had been violated.[11]

VIII. THE COURT OF APPEAL'S DECISION

The Court of Appeal affirmed the trial court's decision in part, reversed in part, and remanded for further proceedings. The Court of Appeal agreed with the trial court that CERL had never authorized the inclusion of leave cashouts or terminal pay in pensionable compensation beyond what AB 197 allowed. Accordingly, no vested rights as to those items were violated. (See *Alameda County Deputy Sheriffs' Association v. Alameda County Employees' Retirement Assn.* (2018) 19 Cal.App.5th 61, 100-104.) Nonetheless, citing the settlement agreements into which the retirement boards had entered, the court estopped the retirement boards

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[11] On July 12, 2014, the trial court's stay of AB 197 dissolved. (44 CT 12889.) Because of the trial court's stay, AB 197's provisions were never applied to employees who retired between January 1, 2013 and July 12, 2014.

from applying AB 197's limitations on terminal pay to legacy employees. (See *id.* at pp. 126-129.)

With respect to the inclusion of payments for services rendered outside of normal working hours and payments made to enhance a member's retirement benefit, the Court of Appeal determined that legacy members had vested rights that AB 197 appeared to modify. (See *supra*, 19 Cal.App.5th at pp. 110-113.) The court then set forth legal standards to evaluate the reasonableness of detrimental changes to vested pension rights, and remanded for further determinations in accordance with those standards. (*Id.* at pp. 123.)

On March 28, 2018, this Court granted the petitions for review filed by the State, the Central Contra Costa Sanitary District, and the Alameda County Deputy Sheriffs' Association.

STANDARD OF REVIEW

"The ultimate questions of whether vested contractual rights exist and whether impairments are unconstitutional present questions of law subject to independent review. The question whether there is an impairment is a mixed question of fact and law." (*Bd. of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1129.) Other questions of constitutional and statutory construction presented in this appeal are also subject to de novo review. (*Ibid.*) The substantial evidence standard of review applies to a trial court's factual findings in granting or denying a writ of mandate. (*City of San Diego v. San Diego City Employees' Ret. System* (2010) 186 Cal.App.4th 69, 78.)

"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 party must also overcome the presumption in favor of a law's constitutionality, which

resolves "any doubt as to the Legislature's power to act . . . in favor of the Legislature's action." (*Cal. Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 253.)

ARGUMENT

The U.S. Constitution prohibits any state from passing a law "impairing the Obligation of Contracts." (U.S. Const. art. I, § 10, cl. 1.) A parallel provision is contained in article I, section 9 of the California Constitution. This Court adjudicates claims under the federal and state contract clauses using the same standard. (See, e.g., *Allen v. Board of Administration* (1983) 34 Cal.3d 114, 119-125 (*Allen II*); *Campanelli v. Allstate Life Ins.* (9th Cir. 2003) 322 F.3d 1086, 1097 ["The California Supreme Court uses the federal Contract Clause analysis for determining whether a statute violates the parallel provision of the California Constitution"].)

Analysis of a contract clause claim involves a two-part inquiry. The first part explores "the nature and extent of any contractual obligation." (*Deputy Sheriffs' Assn.*, *supra*, 233 Cal.App.4th at p. 578, quotation marks omitted.) Here, the threshold question is whether, before AB 197 excluded from pensionable compensation irregular ad hoc payments, excess leave cashouts, and payments for services rendered outside normal working hours, legacy employees ever acquired vested rights to the future inclusion of those pay items. If legacy employees never acquired vested rights to the future inclusion of these items, then even the unions do not dispute that their contract clause claims fail. If, however, legacy employees acquired vested rights to items excluded from pensionable compensation by AB 197, then this Court must undertake a second inquiry into "the scope of the Legislature's power to modify" the vested rights at issue. (*Teachers' Retirement Bd. v. Genest* (2007) 154 Cal.App.4th 1012, 1027; see also *Allen II*, *supra*, 34 Cal.3d at p. 119.)]

The unions' claims fail at both stages of this analysis. Legacy employees never acquired vested rights to enhance their pensions contrary to AB 197's prohibitions because the pension-spiking practices at issue were never consistent with prior law. To the extent that the prior law was unclear, the Legislature never relinquished its power to clarify the law as to the pensionability of pay items that had not yet been earned. Thus, even in the case that legacy employees were not previously barred from certain spiking practices, the lower court erred by assuming that employees had "vested rights" to spiking going forward. Neither the federal nor the state contract clause precludes altering the pensionability of pay that is yet to be earned. Those clauses also do not forbid the type of minimal alterations to vested rights that AB 197, at most, effected.

Finally, unlawful pension spiking is not subject to protection under principles of equitable estoppel. This Court should reverse the lower court's misapplication of estoppel and confirm AB 197's application to legacy employees without exception.

I. THE PENSION-SPIKING PRACTICES PROHIBITED BY AB 197 WERE NEVER PERMITTED UNDER CERL

A. Government Code Section 31461, Subdivision (b)(1)

1. Subdivision (b)(1) must be interpreted according to the Legislature's narrow intent

The court below misconstrued two of AB 197's provisions: subdivision (b)(1) and subdivision (b)(2). In the case of subdivision (b)(1), the court misunderstood the provision's breadth, mistaking a narrow provision for an extremely broad one. This mistake in statutory construction, in turn, led the court to find a likely impairment of vested rights where none exists.

Subdivision (b)(1) was enacted to eliminate the practice of inflating pensions with irregular, ad hoc payments bestowed upon employees specifically to enhance their pensions. The provision excludes from pensionable compensation "[a]ny compensation determined by the board to have been paid to enhance a member's retirement benefit." As enumerated in the provision itself, payments that *might* fall within its scope include: (A) payments made in the final compensation period in lieu of in-kind benefits provided before; (B) one-time or ad hoc payments not received by similarly situated members; and (C) payments made solely due to the termination of employment. (§ 31461, subd. (b)(1)(A)-(C).)

In contrast to AB 197's other provisions, subdivision (b)(1) requires a specific factual determination by the retirement board regarding a payment's purpose. As a result, subdivision (b)(1) does not permit the categorical exclusion from pensionable compensation of payments in categories (A), (B), and (C), but rather provides only that such payments *may* be excluded, depending on the board's determination of the payment's purpose. Section 31542, subdivision (a), which was enacted contemporaneously with AB 197, further requires that a retirement board "establish a procedure for assessing and determining whether an element of compensation was paid to enhance a member's retirement benefit." This procedure must include the opportunity for the member and employer to present evidence that compensation was *not* paid to enhance a member's retirement benefit. (§ 31542, subd. (a).)

In construing subdivision (b)(1), the Court of Appeal ignored this Court's instruction to interpret statutes in a manner "that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statutes' general purposes." (*Commission on Peace Officers Standards and Training v. Superior Court* (2007) 42 Cal.4th 278, 290.) Believing that "an argument can be made" that any item of

compensation received during a member's final compensation period was "paid, at least to some extent, to enhance that member's pension," the court concluded that subdivision (b)(1) could be applied potentially to "*every item of compensation received by a CERL employee*." (*Supra*, 19 Cal.App.5th at p. 113, italics added.) The only question, from the court's perspective, was what the "employer's subjective intent" was when it made the payment. (*Id.* at p. 111.)

That construction is plainly inconsistent with the Legislature's narrow purpose in enacting subdivision (b)(1), which was to target irregular ad hoc payments whose real basis was enhancing a member's pension. Reflecting its confusion, the court insisted that "any number of premium payments" might fall within the scope of subdivision (b)(1). (*Supra*, 19 Cal.App.5th at p. 112.) This is incorrect. Premium payments are paid to compensate an employee for special skills or qualifications of value, not "to enhance a member's retirement benefit." As such, they fall outside subdivision (b)(1)'s scope.

The court's construction is also impossible to reconcile with section 31529, subdivision (c). That provision designates payments that a member "was entitled to receive pursuant to a collective bargaining agreement" as *not* "hav[ing] been paid to enhance a member's retirement benefit," and thus as outside the scope of subdivision (b)(1). Since the vast majority of payments received by CERL members are paid pursuant to a collective bargaining agreement (this is true particularly in the case of rank-and-file employees), section 31529 further confirms that subdivision (b)(1) is principally aimed at manipulative practices benefitting management-level employees, and not "every item of compensation" payable to a CERL employee.

2. Irregular ad hoc payments whose real purpose is to enhance a member's pension were never pensionable under CERL

The lower court's misconstruction of subdivision (b)(1) led it to erroneously conclude that subdivision (b)(1) threatened legacy employees' vested rights. On the ground that subdivision (b)(1) potentially subjected "every item of compensation received by a CERL employee" "to an after-the-fact re-characterization as an impermissible enhancement," the court worried that subdivision (b)(1) threatened to "significantly impair the stability and predictability of a member's anticipated pension benefit." (*Supra*, 19 Cal.App.5th at p. 113.)

In fact, as described above, subdivision (b)(1) excludes from pensionable compensation only irregular, ad hoc payments whose real purpose is enhancing a member's pension. Such payments were never pensionable under CERL. Indeed, the idea of basing a public employee's pension on payments intended to spike the member's retirement benefit, and not exclusively on compensation for faithful service, contradicts the fundamental theory of a pension system. (Cf. *MacIntyre v. Retirement Board of City and County of San Francisco* (1941) 42 Cal.App.2d 734, 736.)

That, in turn, is fatal to the unions' vesting argument. In a system established and operated under CERL, the right to the inclusion of a particular pay item in pensionable compensation is defined exclusively by CERL. (See *In re Retirement Cases*, *supra*, 110 Cal.App.4th at pp. 453-454.)[12] Because CERL never required that the payments excluded by subdivision (b)(1) be pensionable, employees never could have acquired a

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[12] The unions declined to appeal the lower court's decision that boards have no discretion to make items pensionable beyond CERL's parameters. (*Supra*, 19 Cal.App.5th at pp. 96, 105.)

vested right to the pensionability of those payments. By excluding those payments, subdivision (b)(1) could not have impaired any vested rights.

The unions' argument to the contrary is entirely premised on the claim that *Ventura* interpreted CERL to require *any* cash payment, except overtime, to be treated as pensionable. This is the same claim advanced by the unions for why all forms of pension spiking were permissible before AB 197. It should be rejected.

Contrary to the unions' contention, *Ventura* interpreted CERL in light of the specific kinds of payments at issue in that case. Those payments were remuneration for past services, special skills, qualifications, and longevity. (See *supra*, 16 Cal.4th at pp. 497-501.) Because none of those payments were primarily designed to enhance a member's pension benefit, *Ventura*'s holding does not encompass the payments excluded under subdivision (b)(1). (See *Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1134 [cases not authority for propositions not considered or decided].)

To be sure, *Ventura* addressed in dicta "cash payments made in lieu of providing" in-kind advantages, and suggested that such payments are pensionable. (*Supra*, 16 Cal.4th at p. 497.) These payments are similar to ones that subdivision (b)(1)(A) identifies as susceptible to abuse and worth special scrutiny by retirement boards. Nothing the *Ventura* court said in that brief discussion, however, indicates that those payments are pensionable had they been converted to cash in an employee's final year specifically to enhance that employee's pension. That issue is simply not addressed by *Ventura*.

In sum, because subdivision (b)(1) merely clarified the law, it could not have impaired any vested rights. It did not make non-pensionable what had previously been pensionable.

B. Government Code Section 31461, Subdivision (b)(2)

1. Subdivision (b)(2) must be interpreted according to the Legislature's anti-spiking purpose

The Court of Appeal agreed with the trial court that neither subdivision (b)(2) nor subdivision (b)(4) impair vested rights, because they merely clarify existing exclusions in CERL. With respect to subdivision (b)(4), which excludes from pensionable compensation termination pay, the court correctly concluded that this provision does not impair any vested pension rights, because "even prior to [AB 197], the plain language of CERL excluded terminal pay from compensation earnable for pension purposes." (*Supra*, 19 Cal.App.5th at p. 103.)[13]

While the Court of Appeal also reached the right conclusion regarding subdivision (b)(2)'s consistency with prior law, it did so based on an erroneous construction of the statute. According to the court, subdivision (b)(2) simply requires leave cashouts to be payable during the final compensation period in order to be pensionable. (*Supra*, 19 Cal.App.5th at p. 100.) And because that is no different than what CERL requires of any other compensation, subdivision (b)(2) simply restates existing law and therefore could not have impaired any vested rights. (*Ibid.*)

In fact, subdivision (b)(2) clarifies existing law, but with respect to a different point than what the Court of Appeal understood. Subdivision (b)(2) clarifies that leave cashouts are only pensionable to the extent that the leave amount cashed out does not exceed the leave amount accrued during the final compensation period. This provision was enacted to address, among other issues, the problem of "straddling."

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[13] The unions declined to appeal this aspect of the decision.

Some employees "straddle" their final compensation period over two calendar years—for example, from July 1 of one year to June 30 of the next. In *each* of the two calendar years, the employees cash out the maximum amount of leave they can annually sell back—for example, 80 hours per year. Because the employees technically receive both 80-hour cashouts between July 1 of one year and June 30 of the next, the retirement boards allow them to inflate their pensionable compensation with *both* cashouts, reflecting 160 hours of leave cashed out from two years. Subdivision (b)(2) was enacted to clarify that employees may only include in their pensionable compensation cashouts equivalent to the amount of leave *both* accrued *and* cashed out during the final compensation period (in this case, 80 hours).

Misunderstanding subdivision (b)(2)'s purpose, the lower court incorrectly assumed that the operative qualifier in subdivision (b)(2)—"in an amount that exceeds that which may be earned and payable in each 12-month period during the final average salary period"—refers to leave cashouts. This assumption led the court, in turn, to believe that the main task in interpreting subdivision (b)(2) was determining what it means for *leave cashouts* to be "earned and payable" during the final compensation period. (*Supra*, 19 Cal.App.5th at p. 98.) Ultimately, the court concluded, leave cashouts are "earned" when members convert their leave into cash and are "paid." As a result, so long as a "member exercises his or her employer-granted option to convert the leave into cash during the final compensation period," "leave cash-outs must be included in a member's pensionable compensation—regardless of when the leave time was accrued." (*Id.* at p. 100.) And as for why the Legislature specifically added the word "payable" to subdivision (b)(2) if the terms "earned" and "payable" are essentially synonymous, the court explained that "payable" was "simply a clarification that, once the right to compensation is *earned* in

the final compensation period it is includable in compensation earnable, even if it happens to be actually *paid* at a later time." (*Id.* at pp. 103, fn. 17.)

Like the lower court's construction of subdivision (b)(1), this construction fails "to determine the Legislature's intent so as to effectuate the law's purpose." (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) As construed by the court, subdivision (b)(2) does not end the practice of straddling but *legalizes* it for new generations of employees. In addition, under the court's interpretation, the sole effect of subdivision (b)(2) is to exclude leave cashouts from pensionable compensation if they are not payable during the final compensation period. But such an interpretation effectively renders the enactment of subdivision (b)(2) an "idle act[]" (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22), since it has long been clear that all pay items are subject to that condition. Moreover, by reading the word "earned" to be merely synonymous with "payable," the court's interpretation contradicts the statutory canon presuming that "the Legislature intended every word, phrase and provision . . . in a statute . . . to have meaning and to perform a useful function." (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476.)[14]

Subdivision (b)(2) must be read instead in the context of AB 197's anti-spiking purpose. Properly understood within that context, the phrase "an amount that exceeds that which may be earned and payable in each 12-month period" refers to *leave amounts* exceeding what may be accrued and cashed out during the final compensation period. That reading is not only consistent with "the plain and commonsense meaning" of subdivision

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[14] The Court of Appeal's theory is also not consistent with the legislative history. Before the term "payable" was added to subdivision (b)(2) through AB 197's enactment, AB 340 *already* included the language "regardless of when reported or paid" in subdivision (b)(2).

(b)(2) (*People v. Skiles* (2011) 51 Cal.4th 1178, 1185), but also best serves the statute's purpose of ensuring that employees cannot inflate their pensions with cashouts of leave exceeding the amount of leave accruable during the final compensation period.

Further support for this interpretation comes from the 2010 CCCERA rules on which the Legislature patterned subdivision (b)(2). (17 CT 5067.) CCCERA's rules were adopted specifically to end straddling as to employees hired on or after January 1, 2011, and employ variations of the phrase "earned and payable" in connection with *amounts of leave*, not leave cashouts. For example, under the CCCERA rules, "leave amounts sold back" are excluded from pensionable compensation to the extent that *the leave amounts* "exceed the amount [of leave] that was both earned and cashable during service." (17 CT 5067.)

For all these reasons, this Court should reject the lower court's interpretation of subdivision (b)(2). That provision must be construed instead to advance the Legislature's clear anti-spiking purpose and therefore to exclude from pensionable compensation cashouts for leave in excess of the leave amount accruable during the final compensation period.

2. CERL never allowed the inclusion of cashouts for unused leave in an amount in excess of how much leave was accrued during the final compensation period

The unions argue that if the Court of Appeal interpreted subdivision (b)(2) incorrectly, then subdivision (b)(2) would impose new limitations on leave cashouts, in violation of legacy employees' vested rights. These rights, the union insists, were established in *Ventura*.

Once again, the unions' reliance on *Ventura* is misplaced. *Ventura* dealt with a leave program that allowed an employee to sell back up to 40 hours of leave annually, plus an additional 40 hours once the employee had accrued 400 leave hours. (*Supra*, 16 Cal.4th at p. 488, fn. 6.) This Court

held that both cashouts were pensionable. Together, these annual cashouts amounted at most to 80 hours of annual leave—*less* than the amount of leave that could be accrued during the year. Thus, nothing in *Ventura* suggested that cashouts of leave *in excess* of what is accrued during the final compensation period were ever pensionable under CERL. Moreover, the unions' understanding of *Ventura* is inconsistent with the retirement boards' post-*Ventura* settlement agreements and pre-AB 197 stated policies. (See 5 CT 1330 [Merced CERA restricting the amount of "accrued vacation and holiday leave" that is pensionable to no more than "one year's annual leave accrual"]; 17 CT 5067 [CCCERA excluding from pensionable compensation "leave amounts sold back during any twelve-month period that were accrued over two or more fiscal or calendar years, and that exceed the amount that was both earned and cashable during service in that twelve-month period"] 23 CT 6770 [ACERA recognizing leave cashout as pensionable "only to the extent that it is earned during the final compensation period"].)

To limit the variability of pensions "on the basis of accrued and unused leave, rather than on the basis of age, years of service and salary," the Legislature has always limited the pensionability of leave cashouts to no more than the amount of leave that can be accrued during the final compensation period. (*Salus*, *supra*, 117 Cal.App.4th at p. 740.) And because subdivision (b)(2) only "clarif[ies] [the] statute's true meaning" (*Hudson v. Board of Amin.* (1997) 59 Cal.App.4th 1310, 1322, quotations omitted), its exclusions could not have violated any vested rights.

C. Government Code Section 31461, Subdivision (b)(3)

The lower court also concluded that subdivision (b)(3)—which excludes payments for services outside normal working hours from pensionable compensation—potentially impairs legacy employees' vested

rights. According to the court, before AB 197, CERL allowed employees to include in pensionable compensation pay for "on-call duty [that] was part of their regular work assignment." (*Supra*, 19 Cal.App.5th at pp. 107-108.) Because AB 197 excludes such pay, the court determined that employees' vested rights may have been impaired.

This analysis misapprehends the pre-AB 197 law. The operative test set forth in the pre-AB 197 law has always been whether a given 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." (§ 31461.) The term "'[o]rdinarily' in its customary usage means normally." (*O'Bryan v. Superior Court of Los Angeles County* (1941) 18 Cal.2d 490, 500-501; see *Ventura, supra,* 16 Cal.4th at p. 500 ["In common usage, 'ordinarily' means 'in the ordinary course of events' or 'usually'"].) Thus, CERL has always looked at whether a pay item is based on the time "normally" worked by similarly-situated employees, and if it is not, excluded it from pensionable compensation. Overtime pay is understood to be generally excluded from pensionable compensation under this test. (See *Ventura, supra,* 16 Cal.4th at pp. 500, 504.)

Like overtime pay, an employee's standby pay is not based on the "days" "normally" worked by similarly-situated employees. The lower court should have therefore concluded that it was never pensionable under CERL. (See *Ventura, supra,* 16 Cal.4th at pp. 500 ["the Board must make its determination upon the basis of the number of 'days' ordinarily worked. The choice of the word 'days' rather than 'hours' or some other temporal measure suggests reference to a standard work week (or month) and not to any extra hours put in as overtime," quotations omitted].) Yet, while acknowledging that CERL has never included pay for standby shifts voluntarily assumed by an employee, the court reached a different conclusion regarding pay for other types of standby shifts that are "part of

[the employee's] regular work assignment." (*Supra*, 19 Cal.App.5th at p. 108.) Such pay, the court concluded, had been pensionable up until AB 197. (*Ibid.*)

But the pre-AB 197 law contained no such distinction. The lower court never explained why CERL allegedly treated pay for simply "standing by" outside normal working hours (i.e., *not* working) *more* advantageously than pay for *working* overtime. And neither of the cases cited by the court supports its reasoning. In *Shelden v. Marin Cty. Employees Ret. Assn.* (2010) 189 Cal.App.4th 458, 463-464, the court held that the overtime pay at issue was *not* pensionable under CERL precisely because the overtime was outside of the employee's "normally scheduled or regular working hours." Significantly, the *Shelden* court noted that the employee's supervisor had approved the assignment of the overtime work at issue (*id.* at p. 460), and that the employee had "regularly" performed the work once a week for four years (*id.* at p. 464). Nonetheless, applying the same test set forth in subdivision (b)(3)—whether the overtime work was within the employee's normal working hours—the court decided the regularly scheduled overtime was not pensionable.

The Court of Appeal also places more weight on *Ventura* that it can bear. Even as it acknowledged that "there is no specific analysis in [*Ventura*] regarding on-call pay as a component of compensation earnable" (*supra*, 19 Cal.App.5th at p. 106), the court attempted to discern larger principles from *Ventura*'s treatment of meal period payments. Based on the pensionability of $60 biweekly payments for meal periods during which sheriffs remained on call, the Court of Appeal inferred a broader rule regarding the pensionability of payments for standby shifts that are part of an employee's regular work assignment. But the facts of *Ventura* do not justify this broad inference.

While the short meal periods in *Ventura* were part of the employees' regular work assignment, they were also always attached to the employees' mandatory, normally scheduled working hours. (See *Alameda County*, *supra*, 19 Cal.App.5th at p. 108 ["it seems highly likely that the employees at issue in [*Ventura*] were receiving on-call pay because they were required to remain subject to call during lunch as part of their regularly scheduled work assignment"].) Consequently, far from suggesting that all pay for regularly-assigned standby shifts was pensionable before AB 197, *Ventura* merely confirms that there are cases in which short on-call periods fall within normally scheduled working hours. In such cases, the pay may be pensionable. Pensionability in such isolated instances, however, does not justify treating standby pay more generally as pensionable. Indeed, a similar exception has long applied to overtime pay. (See § 31461.6 [excluding "overtime premium pay" from "compensation earnable" except when overtime hours are "worked within the normally scheduled or regular working hours" of the employee].) Despite this exception, overtime pay is still generally treated as *excluded* from pensionable compensation.

II. EMPLOYEES NEVER ACQUIRED A VESTED RIGHT TO THE PENSIONABILITY OF FUTURE PAY ITEMS NOT YET EARNED

None of the spiking practices now prohibited under AB 197 were ever allowed under CERL. But even if CERL did not previously bar all of the practices prohibited under subdivisions (b)(1), (b)(2), and (b)(3), those provisions still could not have impaired any vested rights, because they only operate prospectively. (See *Marin*, *supra*, 2 Cal.App.5th at p. 708 ["The Legislature's change to the definition of compensation earnable was expressly made purely prospective by [AB 197]"].) Significantly, AB 197 does not affect the pension of anyone who retired before its effective date. Nor does it *retroactively* re-characterize the pensionability of any item that

was earned and already included in an employee's final pensionable compensation before AB 197's effective date.

The Court of Appeal erred by disregarding AB 197's prospective character and simply *assuming* that AB 197 impaired vested rights. Believing enhancement payments and certain standby payments were pensionable before AB 197, the court assumed that legacy employees automatically acquired vested rights to the inclusion of those payments in their *future* pensionable compensation, *even if the payments have not yet been earned.* (See *supra,* 19 Cal.App.5th at pp. 113, 122-123.) But no analysis of "the nature and extent of any contractual obligation" was done. (*Deputy Sheriffs' Assn., supra,* 233 Cal.App.4th at p. 578.) Nor did the court provide any explanation for where such rights came from or how they were established.

In fact, the unions have consistently failed to show that legacy employees actually had vested rights to include future pension-spiking enhancements, excess leave cashouts, and standby pay in their future pensionable compensation. To support their assertion of these vested rights, the unions rely upon retirement board policies regarding pensionable compensation that they claim were consistent with CERL and *Ventura* before the enactment of AB 197. But, to the extremely limited extent that these policies even addressed pension-spiking enhancements, leave cashouts, and standby pay,[15] none of the policies purported to guarantee employees the pensionability of those pay items in perpetuity, regardless of legislative changes. Rather, the policies promised—and employees agreed—"to have their 'compensation earnable' and 'final compensation'

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[15] Neither of the post-*Ventura* settlements applicable to legacy employees even *addressed* the pensionability of the items excluded by subdivisions (b)(1) and (b)(3).

calculated pursuant to CERL." (*In re Retirement Cases*, *supra*, 110 Cal.App.4th at pp. 453-454, italics added; see also 5 CT 1330 [requiring "payment of increased retirement benefits" by Merced CERA to be "consistent with CERL"]; 23 CT 6769-6770, 6774 [requiring "definitions of 'compensation earnable' and 'final compensation'" adopted in ACERA's policies and *Ventura* settlement "to be interpreted consistently with CERL"].) Repeatedly and consistently, the retirement boards reinforced this understanding by advising employees that CERL's provisions would ultimately govern the calculation of their pension. (See, e.g., 24 CT 7094 ["No statement in this handbook is a legally binding interpretation, enlargement, or amendment of the provisions in the CERL or ACERA's policies. If conflict arises between this handbook and the CERL, the decision will be based on the CERL . . . and not on information contained in this handbook"].)

CERL, in turn, "is subject to the implied qualification that the [Legislature] may make modifications and changes in the system." (*Miller v. State of California* (1977) 18 Cal.3d 808, 816; *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 855.) The Legislature has never relinquished its "essential powers" to regulate county retirement systems (*Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1189), and in fact has exercised this power repeatedly to modify the parameters of the definition of pensionable compensation applying to active employees. (See, e.g., *Ventura*, *supra*, 16 Cal.4th at pp. 504-505 [discussing amendments in 1951, 1972, and 1993]; see also § 31461.5 [enacted in 1998 to clarify that "salary bonuses and any other compensation incentive payment" were not pensionable]; § 31461.6 [enacted in 2000 to clarify when overtime pay is pensionable].) Any policies regarding pensionable compensation were therefore "structured against the background of" this very extensive legislative regulation.

(*Energy Reserves Group, Inc. v. Kansas Power and Light Co.* (1983) 459 U.S. 400, 416.) No policy was exempt from compliance with CERL *and its amendments*, and legacy employees understood that when they reached their final compensation period, the definition of pensionable compensation in effect would govern the calculation of their pension. (See *U.S. Trust Co. of New York v. New Jersey* (1977) 431 U.S. 1, 22 ["One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them," quotations omitted].)

That legacy employees lacked vested rights to the pensionability of future compensation is also consistent with well-established contract clause principles. The contract clauses generally do not protect public employees' rights to future items of compensation, which have not yet been earned through service. (See *United States v. Larionoff* (1977) 431 U.S. 864, 879 [prospective reductions of pay do not violate the Contract Clause, "even if that reduction deprived members of benefits they had expected to be able to earn"]); *Taylor v. City of Gadsden* (11th Cir. 2014) 767 F.3d 1124, 1135 ["before a public employee renders services, the amount of promised compensation can be freely amended"]; see also *Maryland State Teachers Ass'n, Inc. v. Hughes* (D. Md. 1984) 594 F.Supp. 1353, 1360 ["A very important prerequisite to the applicability of the Contract Clause at all to an asserted impairment of a contract by state legislative action is that the challenged law operate with retrospective, not prospective effect"].)

The unions' theory gets the logic behind vested pension rights backward. Under the theory of vested pension rights, it is the performance of a service that "earns" compensation, and gives rise to a vested right to payment of deferred compensation for that service. (See *Miller*, *supra*, 18 Cal.3d at p. 815.) So where an employee has not yet provided a service during their final compensation period, the employee could not possibly have earned any compensation (deferred or otherwise) for that service. The

unions, in contrast, insist that the right to deferred compensation for a service may *precede* the actual performance of that service, and thereby block the Legislature from modifying the terms of compensation earned in the future for that service.

That "would be a significant, unprecedented change that goes beyond any known theory of deferred compensation." (Monahan, *Statutes as Contracts? The "California Rule" and Its Impact on Public Pension Reform* (2012) 97 Iowa L. Rev. 1029, 1061.) The unions' theory is also inconsistent with the well-established "unmistakability" doctrine. Here, the Legislature has never so much as *suggested* relinquishing its sovereign power to modify the terms of future compensation, let alone expressed such an intent "clearly and unequivocally." (*Retired Employees*, *supra*, 52 Cal.4th at p. 1185.)

Finally, the unions' theory is not supported by this Court's jurisprudence. This Court has repeatedly held that employees cannot be shifted from fluctuating pension systems to far less generous fixed pension systems. (See, e.g., *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 867-868; *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131-133 (*Allen I*).) It has also held that employees on the brink of retirement cannot be suddenly divested of their pensions. (See *Kern*, *supra*, 29 Cal.2d at pp. 855-856.) None of these cases addresses the issue of whether the Legislature can adjust the pensionability of a specific pay item before it is earned during the final compensation period.

Legislature v. Eu (1991) 54 Cal.3d 492, is the lone case dealing with a purely prospective change to legacy employees' vested rights, but it also does not support the unions' position. That case addressed the prospective *termination* of all pension rights, and held that, to protect an employee's vested right from complete divestment in such cases, an employee may in some circumstances have a vested right to earn additional pension benefits

through continued service. (See *id.* at pp. 530-532.) However, nothing in *Eu* holds that that an employee has a vested right to earn such additional benefits based on the continuation of every single term fixed in a statute. Instead, the consistent principle emphasized by this Court is that "the amount, terms and conditions of [active employees' pension] benefits may be altered" (*Kern*, *supra*, 29 Cal.2d at p. 855) in order 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.)

Flexibility with respect to the pensionability of future remuneration for future service is consistent with the approach of not only this Court and the federal courts, but also other state courts that have approached this issue. (See, e.g., *Moro v. State* (Or. 2015) 351 P.3d 1, 37 [rejecting claim that pension benefits cannot be "changed prospectively . . . for work that is yet to be performed"]; *AFT Michigan v. Michigan* (Mich. 2014) 846 N.W.2d 583, 594 ["the Legislature cannot diminish or impair accrued financial benefits, but we think it may properly attach new conditions for earning financial benefits which have not yet accrued"]; *Scott v. Williams* (Fla. 2013) 107 So.3d 379, 388-389 [legislature has authority "to amend a retirement plan prospectively, so long as any benefits tied to service performed prior to the amendment date are not lost or impaired"].) Such flexibility is also consistent with basic notions of fairness. No unfairness or detrimental reliance arises when employees understand the non-pensionability of a payment before performing the service earning that payment.

By simply *assuming* that legacy employees had acquired vested rights to the future pensionability of spiking enhancements and standby pay not yet earned, the lower court embraced a dangerously expansive theory of vested rights that threatens to divest legislative bodies of the power to

address the deepening crisis of unfunded pension liabilities. Absent explicit legislative promises, neither the federal nor state contract clause protects a right to the pensionability of un-accrued compensation. To avoid further "limit[ing] drastically the essential powers" of the elected branches (*Retired Employees*, *supra*, 52 Cal.4th at p. 1185), this Court should reverse the lower court.

III. EVEN IF AB 197'S EXCLUSIONS IMPACTED LEGACY EMPLOYEES' VESTED RIGHTS, THE EXCLUSIONS WERE PERMISSIBLE UNDER THE CONTRACT CLAUSES

Even assuming arguendo that AB 197 impacted legacy employees' vested rights to the pensionability of certain ad hoc and standby payments, it would not follow that the statute violated the contract clause of the state or federal Constitution.

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.*, quotations omitted.) Rather, it should always be "construed in harmony" with "the principle of continuing governmental power" (*id.* at p. 120), including "the essential attributes of sovereign power necessarily reserved by the States to safeguard the welfare of their citizens." (*U.S. Trust*, *supra*, 431 U.S. at p. 21.)

Disregarding these principles, the Court of Appeal remanded to the trial court to conduct a "systematic vested rights analysis" that would evaluate the impact of AB 197's exclusions on legacy employees "in the context of each county's particular CERL system." (*Supra*, 19 Cal.App.5th at p. 123.) In so doing, the court entirely ignored a threshold issue that,

properly analyzed, would have obviated remand. That issue is the severity of the alleged impairment, which is fundamental because it "measures the height of the hurdle the state legislation must clear." (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 830, quotations omitted.) Severe impairment "will push the inquiry to a careful examination of the nature and purpose of the state legislation." (*Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 245.) "Minimal alteration of contractual obligations may end the inquiry at its first stage." (*Allen II, supra*, 34 Cal.3d 114, 119, quotations omitted.)

The Court of Appeal erred by failing to consider this threshold issue. Compounding its error, the court advised the trial court on remand to subject any impairment to heightened scrutiny, without regard to the impairment's severity, and to look upon "relatively modest" modifications as strongly suggestive of unconstitutional impairment. (*Supra*, 19 Cal.App.5th at p. 123.) This Court should reverse. To the extent that AB 197's exclusions affected vested rights, they were no more than a minimal alteration.

A. AB 197's Exclusions Did Not Rise to the Level of Substantial Impairment

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.) That right to a substantial or reasonable pension is not "rigidly fixed by the specific terms of the legislation in effect during any particular period in which [they] serve." (*Kern*, supra, 29 Cal.2d at p. 855.)

Applying these principles in *Packer v. Board of Retirement* (1950) 35 Cal.2d 212, 218-219, this Court upheld the constitutionality of statutory modifications of 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 legacy employees can no longer increase their pensions with spiking enhancements or pay for standby shifts related to their regular work assignments did not meaningfully alter "the basic conditions" under which they could earn a pension. Under AB 197, pensionable compensation still includes base salary, limited cashouts of unused leave, and premium payments. Compensation both earned and payable during the final compensation period continues to be pensionable. And both the definition of the final compensation period and the defined benefit formula applicable to legacy employees remain the same. In sum, the alleged modifications at issue here are different in kind from those in *Allen I*, or *Betts*, or *Eu*, all of which involved radical changes to active employees' defined benefit formulas. Here, legacy employees "retained rights to substantial pension benefits," even more so than the officers in *Packer*. And to the extent that there were changes, they were "mild," and "hardly burdensome" for legacy employees. (*City of El Paso v. Simmons* (1965) 379 U.S. 497, 516.)

The Legislature's amendments to CERL were also consistent with legacy employees' reasonable expectations. As discussed above, legacy

employees "agreed to have their 'compensation earnable' and 'final compensation' calculated pursuant to CERL." (*In re Retirement Cases*, *supra*, 110 Cal.App.4th at pp. 453-454.) Because CERL "is subject to the implied qualification that the [Legislature] may make modifications and changes in the system" (*Kern*, *supra*, 29 Cal.2d at p. 855), and has in fact been amended repeatedly over the years, any assumption that the definition of pensionable compensation was immutable was not reasonable. (*Miller*, *supra*, 18 Cal.3d at p. 816 ["pension rights are not immutable"]; *Kern*, *supra*, 29 Cal.2d at p. 855 ["the amount, terms, and conditions of benefits may be altered"]; cf. *Calfarm*, *supra*, 48 Cal.3d at p. 830 ["Insurance . . . is a highly regulated industry, and one in which further regulation can be anticipated. . . . Neither the company nor a policyholder has the inviolate rights that characterize private contracts"].) Particularly where alterations to that definition were modest, that should end the inquiry. (See *Allen II*, *supra*, 34 Cal.3d at p. 124 ["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," quotations omitted.]). The lower court erred in instructing the trial court otherwise.

B. AB 197's Exclusions Were Reasonable and Necessary to Serve Important Public Purposes

Were this Court to determine that AB 197's exclusions amounted to a substantial impairment of legacy employees' vested rights, it should still conclude that there was no contract clause violation. Even a substantial impairment may not run afoul of the contract clause if it was "reasonable and necessary to serve an important public purpose." (*U.S. Trust*, *supra*, 431 U.S. at p. 25; see also *Terry v. City of Berkeley* (1953) 41 Cal.2d 698, 702 ["reasonable changes detrimental to the pensioner may be made in pension provisions for public employees or their beneficiaries before the

happening of the contingency"].) The important public purpose "need not be addressed to an emergency or temporary situation." (*Energy Reserves*, *supra*, 459 U.S. at p. 412.) 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.)

AB 197's exclusions easily satisfy the test for "reasonableness and necessity." To the extent that employees could spike their pensions with irregular ad hoc payments and thousands of hours of standby pay in their final year, unforeseen loopholes within the law were to blame. These loopholes allowed employees to game the system and inflate their pensions in ways never completed by the Legislature, with heavy multi-decade financial repercussions for county taxpayers. Closing these loopholes was necessary to reducing manipulation of CERL systems, ensuring that like payments (standby pay and overtime pay) were treated consistently, and ultimately protecting county taxpayers from abusive practices. (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," quotations omitted]; see also *Energy Reserves*, *supra*, 459 U.S. at 412 ["elimination of unforeseen windfall profits" is "legitimate state interest"].)

Moreover, there are compelling reasons to defer to the Legislature's judgment as to reasonableness and necessity here. The relative modesty of AB 197's exclusions suggests that "the height of the hurdle the state legislation must clear" is relatively low. (*Calfarm*, *supra*, 48 Cal.3d at p. 830.) And because the State has not acted "to repudiate debts it has incurred under a contract" or otherwise impair its own financial obligations, there is no reason why this Court should second-guess the Legislature's use of its police power "to achieve the legitimate purpose of promoting the

welfare of its people." (*Interstate Marina Dev. Co. v. Cty. of Los Angeles* (1984) 155 Cal.App.3d 435, 448; see also *U.S. Trust*, *supra*, 431 U.S. at p. 25; *City of El Paso*, *supra*, 379 U.S. at pp. 508-509 [legislature has "wide discretion . . . in determining what is and what is not necessary," quotations omitted].) Particularly in light of these factors, this Court should reverse the lower court and conclude that any impairment of vested rights did not violate the contract clause of the state or federal Constitution.

IV. THE COURT OF APPEAL MISAPPLIED EQUITABLE ESTOPPEL

On the ground that "even prior to [AB 197], the plain language of CERL excluded terminal pay from compensation earnable for pension purposes," the Court of Appeal agreed that employees had no vested right to the inclusion of terminal pay. AB 197's exclusion of terminal pay from pensionable compensation thus could not have violated any vested rights.

Nonetheless, the Court of Appeal blocked the application of AB 197's restrictions on terminal pay to legacy employees in Contra Costa, Alameda, and Merced counties under the doctrine of equitable estoppel. This unprecedented application of estoppel compels retirement boards to *violate* AB 197 as to thousands of employees, even employees who are still decades from retiring. As a matter of law, such estoppel is unavailable here. Even if that were not the case, this Court should still reverse the lower court to protect the basic separation of powers underlying our system of government.

A. The Requisite Elements for Equitable Estoppel Were Not Satisfied

The doctrine of equitable estoppel "provides that a person may not deny the existence of a state of facts if that person has intentionally led others to believe a particular circumstance to be true and to rely upon such belief to their detriment." (*McGlynn v. State of California* (2018) 21 Cal.App.5th 548, 561.) Four elements must be present in order to apply

equitable estoppel: "(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. (*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305.) "When the evidence is not in conflict and is susceptible of only one reasonable inference, the existence of an estoppel is a question of law." (*Ibid.*)

Here, the lower court erred as a matter of law in concluding that these elements had all been satisfied. In fact, none were satisfied. While the court pointed to "widespread and long-continuing misrepresentations by both employers and the Boards regarding the ability of legacy members to include terminal pay in pensionable compensation" (*supra*, 19 Cal.App.5th at p. 127), such "misrepresentations" were inaccurate legal interpretations, not misrepresented or concealed *facts*. That distinction is critical. It is "black-letter" law that "where the material facts are known to both parties and the pertinent provisions of law are equally accessible to them, a party's inaccurate statement of the law . . . cannot give rise to an estoppel." (*Jordan v. City of Sacramento* (2007) 148 Cal.App.4th 1487, 1496.)

Furthermore, "[t]he invocation of estoppel is particularly inappropriate where the party seeking it was represented by counsel at the time of the misrepresentation of law." (*Jordan*, *supra*, 148 Cal.App.4th at p. 1497.) Here, employee unions knew everything that the retirement boards knew—including the state of the law—and entered into settlement agreements under the guidance of their counsel. Indeed, the unions concede that the alleged "misrepresentations" involving erroneous legal interpretations were made *at the unions' urging*. (See Answer to Petitions for Review at p. 26 ["The misrepresentations . . . were founded upon court-approved settlement agreements executed in response to [employee]

litigation" urging the adoption of the misrepresentations].) Moreover, for years after entering into the settlement agreements, union counsel closely monitored all of the boards' communications with employees, and threatened to sue if the boards deviated from the unions' positions—the very positions that the unions are now calling "misrepresentations." (See, e.g., 17 CT 5042-5043 [attorney representing employees in fire protection district threatening CCCERA that "any attempt to reduce the current benefit level for retired or *active members* of CCCERA will be attacked on a variety of legal grounds," italics added].) Under these circumstances, claims that employees were "ignorant of the true state of facts" and long misled by the retirement boards simply do not withstand scrutiny. (See *California Cigarette Concessions, Inc. v. City of Los Angeles* (1960) 53 Cal.2d 865, 871 ["[W]here one acts with full knowledge of plain provisions of law, and their probable effect upon facts within his knowledge, especially when represented by counsel, he can neither claim (1) ignorance of the true facts or (2) reliance to his detriment upon conduct of the person claimed to be estopped, two of the essential elements of equitable estoppel"].)

Driscoll is not to the contrary. In *Driscoll*, this Court estopped a city from applying a statute of limitations to claims filed by widows of former city employees. The city had misadvised the widows that they were ineligible to receive a pension, causing the widows to miss the filing deadline. (See *supra*, 67 Cal.2d at pp. 301-305.) Unlike the legacy employees here, however, the widows were *not* represented by counsel at the time of the city's misrepresentations, and were given specific advice within a confidential relationship "as to the legal effect of the statutory provisions *as applied to [them]*" in particular. (*Id.* at p. 310, italics added.) That is very different from being "merely" informed "as to the content of

the pertinent provisions" of CERL in public, like the legacy employees were here. (*Ibid.*)[16] For these reasons, *Driscoll* does not help the unions.

B. Because Estoppel Directly Contravenes Statutory Limitations, It Is Not Available

Even if the unions could demonstrate that all four elements for estoppel have been satisfied, estoppel is barred by law here, because estoppel may not be used to "contravene directly any statutory or constitutional limitations." (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 28.)

To be sure, courts have estopped "the government from asserting *a procedural barrier*" against a claimant in the public pension context, where the government "caused the claimant's failure to comply with the procedural requirement." (*Feduniak v. California Coastal Com'n* (2007) 148 Cal.App.4th 1346, 1372.) However, where retirement boards lack the statutory authority to treat pay items as pensionable, requiring the boards to do so "based on estoppel is barred as a matter of law." (*City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, 543; see also *McGlynn, supra,* 21 Cal.App.5th at p. 562; *Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864, 869-871.) And because the lower court acknowledged that boards never had "the power to include terminal pay in compensation earnable as a matter of discretion" (*supra,* 19 Cal.App.5th at p. 125), that lack of authority alone should have as a matter of law precluded using estoppel to require the boards to make terminal pay pensionable. That bar is especially clear where estoppel is to be applied *prospectively*. (See *City of Oakland v. Oakland Police and Fire Retirement*

[16] All of the member handbooks on which employees allegedly relied also expressly advised that "[t]he information presented in this handbook should not be construed as legal advice or as a legal opinion on specific facts." (E.g., 24 CT 7094.)

System (2014) 224 Cal.App.4th 210, 243-245; *Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567, 584.)

To circumvent this clear bar, the Court of Appeal invented an exception to it. According to the court, a board's "broad administrative mandate" to settle litigation enables it to promise pension benefits beyond what the Legislature permits, and all three retirement boards exercised such authority to reach settlements after *Ventura*. (*Supra*, 19 Cal.App.5th at pp. 126-127.) This novel exception has two serious flaws.

First, it licenses fraud. If the boards had "administrative" authority to misrepresent the law to resolve litigation (and to continue the misrepresentation years after it became undeniable), then they effectively had authority to make "widespread and long-continuing misrepresentations" to members, and violate the trust placed in a retirement board. (*Supra*, 19 Cal.App.5th at pp. 127-128.)

Second, the Court of Appeal's exception effectively usurps the Legislature's exclusive authority to define public employee pension benefits under CERL. Under longstanding law, "only the [legislative body] has the power to grant employee benefits, and [the board] exceeds its authority when it attempts to 'expand pension benefits' beyond those the [legislative body] has *granted*." (*City of San Diego v. Haas* (2012) 207 Cal.App.4th 472, 495.) An agency's settlement with employees has never altered this rule. (See *Longshore*, *supra*, 25 Cal.3d at p. 23 ["The statutory compensation rights of public employees are strictly limited and cannot be altered or enlarged by conflicting agreements between the public agency and its employees"]; *Oden v. Bd. of Administration* (1994) 23 Cal.App.4th 194, 201 ["Statutory definitions delineating the scope of PERS compensation cannot be qualified by bargaining agreements"].) Nor has it mattered if the agreement resolves litigation; any portion of a settlement

agreement that violates state law has hitherto been invalid. (*Summit Media LLC v. City of Los Angeles* (2012) 211 Cal.App.4th 921, 934-937.)

The lower court's decision distorts these basic principles. The rules regarding virtually any pension rule can be litigated. If a retirement board can use its "administrative mandate" to bend the law for thousands of employees at the mere *threat* of litigation (*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 such members presented "the threat of litigation"]), its power to grant pension benefits is no longer constrained by statute. This Court should not permit employee groups to be able to effectively amend CERL's provisions county by county by filing litigation and then entering into settlement agreements with retirement boards. The actions of retirement boards "must conform to the legislative will if we are to preserve an orderly system of government." (*Morris v. Williams* (1967) 67 Cal.2d 733, 737.)

C. The Estoppel Decision Effectively Nullifies Duly-Enacted Law in Contra Costa, Alameda, and Merced Counties

Finally, the Court of Appeal's estoppel decision ignores this Court's rule against using estoppel "to defeat the effective operation of a policy adopted to protect the public." (*Longshore*, *supra*, 25 Cal.3d at p. 28, quotations omitted; *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493.) 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." (*Mansell*, *supra*, 3 Cal.3d at p. 495, fn. 30, quotation marks omitted.) Here, AB 197 was enacted to clarify the law and put an end to egregious pension-spiking practices that were eroding the public's trust in the integrity of public pension systems, were

never lawful, and were saddling public employers (and ultimately taxpayers) with hundreds of millions of dollars in liabilities never intended by the Legislature. By estopping the three counties' retirement boards from applying AB 197's provisions to the vast majority of county employees who have yet to retire and *compelling* the boards to spike pensions unlawfully, the decision effectively nullifies the Legislature's policy in three counties, violating this Court's instruction.

The profoundly far-reaching nature of this judicial nullification also threatens the constitutional separation of powers. (See *Bd. of Supervisors v. California Highway Comm'n* (1976) 57 Cal.App.3d 952, 961-962 ["Generally, a court is without power to interfere with purely legislative action, whether the act . . . be at the state level or the local level"]; Cal Const., art. III, § 3.) The lower court's estoppel decision enables *thousands* of legacy employees in three counties to artificially inflate their final pensionable compensation with payments for unused leave that are easily three or more times greater than what was ever permitted by law. Many of the legacy employees ordered to receive this windfall are 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 decades from now, many employees in Contra Costa, Alameda, and Merced counties will be receiving a pension that was spiked using practices that were never lawful before, during, or after their service. Furthermore, the estoppel order imposes hundreds of millions of dollars of additional pension liability on county governments—costs that were never contemplated by the governing statute and will ultimately be borne by taxpayers.

The effective nullification of the Legislature's policy in three counties further undermines the uniform application of CERL statewide.

While employees in the other 17 CERL counties whose retirement boards faithfully obeyed the law will be subject to governing state law and not reap the benefits of unlawful pension spiking, most employees in the three counties at issue here will be exempt from many of AB 197's anti-spiking provisions and continue to benefit from unlawful practices. "Such inconsistency in the application of a single state statute is inappropriate, if not impermissible." (*Irvin v. Contra Costa County Employees' Retirement Association* (2017) 13 Cal.App.5th 162, 172.)

Finally, the judicial nullification of duly-enacted law cannot be justified by the alleged "injustice which would result from a failure to uphold an estoppel" here. (*Mansell, supra*, 3 Cal.3d at pp. 496-497.) No "injustice" arises by limiting the unlawful use of unused leave to spike an employee's pension. Rather, the interests of justice strongly favor applying the same rules to all CERL members and protecting millions of taxpayers—along with their children and grandchildren—from having to finance abusive, unlawful practices.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeal as to any limitation on AB 197's application to legacy employees.

Dated: May 4, 2018

Respectfully submitted,

PETER A. KRAUSE
Legal Affairs Secretary

/s/ Rei Onishi

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CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 13,979 words.

Dated: May 4, 2018

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Legal Affairs Secretary

/s/ Rei Onishi

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PROOF OF SERVICE

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

Case No. S247095

I am employed in the Office of Governor Edmund G. Brown Jr. I am over the age of 18 years and not a party to this matter. My business address is State Capitol, Suite 1173, Sacramento, CA 95814. On May 4, 2018, I served the State of California's OPENING BRIEF ON THE MERITS 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 May 4, 2018, at Sacramento, California.

/s/ Claire Sullivan-Halpern

CLAIRE SULLIVAN-HALPERN

SERVICE LIST

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

Case No. S247095

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