Case No. S247095 **No Fee (Gov. Code § 6103)**

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.

STATE OF CALIFORNIA
Intervenor and Respondent,

CENTRAL CONTRA COSTA SANITARY DISTRICT
Real Party in Interest and Respondent.

SUPREME COURT
FILED
JUL 20 2018
Jorge Navarrete Clerk
Deputy

AFTER A DECISION BY THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FOUR, CASE NO. A141913, CONTRA COSTA SUPERIOR CT. CASE NO. MSN12-1870 (COORDINATED WITH ALAMEDA SUPERIOR CT. CASE NO. RG12658890 AND MERCED SUPERIOR CT. CASE NO CV003073);
HON. DAVID B. FLYNN (RET.)

ANSWER BRIEF ON THE MERITS

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I. INTRODUCTION

Respondents, the Alameda County Employees' Retirement Association ("ACERA") and the Contra Costa County Employees' Retirement Association ("CCCERA") and their respective Boards of Retirement ("Boards") take no position on whether the Public Employees' Pension Reform Act of 2013 ("PEPRA") and the accompanying amendments to the County Employees' Retirement Law, Gov't Code, § 31450 *et seq.* ("CERL"), were constitutional. This brief addresses only the lower court's incorrect application of equitable estoppel to force Respondents to act contrary to the new law.

The lower court correctly held that the Boards acted within their authority over fifteen years ago when they entered into and performed court-approved settlement agreements that resolved then-disputed questions of statutory law regarding the inclusion and exclusion of pay elements in pensionable "compensation earnable." But the Legislature and the Governor changed that law in 2012. This Court's precedent required the Boards to comply with the 2012 statutory amendments to "compensation earnable" without questioning their constitutionality. *See Lockyer v. City and County of San Francisco*

(2004) 33 Cal.4th 1055, 1102. A retirement board's role is to administer the plan in accordance with statutes enacted by the Legislature, not question the constitutionality of those statutes.

Under the lower court's own analysis, the Boards acted properly at all times. Nevertheless, the lower court ordered the Boards to ignore the new statute and continue to perform under the settlement agreements, under the doctrine of "equitable estoppel." The doctrine of equitable estoppel, however, cannot apply because there has been no finding that the Boards ever misinformed their systems' members as to any material fact, or that the members ever relied on any such misinformation. Further, the lower court's opinion departs from decades of precedent holding that equitable estoppel may not be applied to require a retirement board to confer benefits on members beyond what the governing statutes allow.

The lower court's application of equitable estoppel was incorrect and, if affirmed, would set troubling precedent. Accordingly, this Court should reverse the lower court's equitable estoppel ruling, irrespective of how the Court may rule on the other issues before it.

II. LEGAL AND FACTUAL BACKGROUND

A. The Boards' Roles In Determining "Compensation Earnable"

ACERA and CCCERA were created under the CERL. They provide retirement, disability, death and other benefits for the employees of their respective counties and multiple other public districts within those counties.

The California Constitution entrusts the exclusive fiduciary responsibility for administering CERL retirement systems to local county boards of retirement. *See* Cal. Const., art. XVI, § 17. Under CERL § 31520.1, these boards are comprised of the county Treasurer, four independent trustees appointed by the county board of supervisors, three active members of the system elected by the system's active members, one retired member of the system elected by the system's retired members, along with one or more alternates. The trustees exercise their collective judgment at duly noticed, open and public meetings. *See* Gov't Code §§ 54950, *et seq.* This Court described a California public retirement board's decision-making process: "[T]hrough the representation of all stakeholders, fair and

wise decisions will [ ] emerge." *See Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1096.

At retirement, qualified members of CERL retirement plans receive a defined benefit that is based on a formula that considers the employee's age at retirement, number of years of service and the employee's highest average annual compensation earned during a one-year or three-year period in his or her career ("compensation earnable"). Both before and after the 2012 amendments to CERL § 31461, that code section always outlined the basic parameters of pensionable "compensation earnable" and stated that a members' "compensation earnable" ultimately shall be "determined by the board." Thus, the Legislature always understood that CERL boards of retirement would exercise some judgment and discretion as to which pay items are to be included in "compensation earnable," based on the unique compensation models, collective bargaining agreements and contextual history in each county. In so doing, each retirement board must "discharge their duties with respect to the system with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these

matters would use in the conduct of an enterprise of a like character and with like aims." Cal. Const., art. XVI, § 17(c).

B. The Boards Settled Disputed Claims Regarding The Breadth Of "Compensation Earnable"

In 1997, this Court ruled that "compensation earnable" should include not only an employee's base salary, but also other items of remuneration paid to the individual employee in cash, including "premium pay" items, bonuses, incentives and cash-outs of accrued vacation leave at the end of one's career. *Ventura County Deputy Sheriffs' Ass'n v. Board of Retirement* (1997) 16 Cal.4th 483, 497-99 ("*Ventura*"). This Court's ruling in *Ventura* mandated that all CERL systems change how they calculated "compensation earnable," but *Ventura* also left many questions unanswered, and it spawned new statewide litigation.

The ACERA and CCCERA Boards each determined that the most prudent course of action for their respective systems was to settle the disputed questions of law arising from *Ventura*. *See Alameda County Deputy Sheriff's Assn. v. Alameda County Employees' Retirement Assn.* (2018) 19 Cal.App.5th 61, 82-83. The Boards, the systems' members and those members' employers

negotiated settlement agreements that delineated which elements of pay would and would not be included in "compensation earnable."[1] *Id.* Both settlement agreements were approved by the courts after due notice. *Id.* These court-approved settlement agreements remained binding on the parties even after *In re Retirement Cases* (2003) 110 Cal.App.4th 426 and *Salus v. San Diego County Employees Retirement Association* (2004) 117 Cal.App.4th 734 held that "compensation earnable" was narrower than had been established under the settlement agreements, and the settlement agreements governed the systems' payments of benefits and collections of contributions on an actuarially sound basis for over a dozen years. *Id.*

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1 The lower court's opinion asserts that CCCERA "voluntarily extended [the settlement agreement's] terms to active members by resolution." *Alameda County Deputy Sheriff's Assn.*, 19 Cal.App.5th at 126 fn.26. Such extension, however, was mandated by the earlier California Court of Appeal's decision in *Irby v. Board of Retirement of the Contra Costa Employees' Retirement Association*, which (although unpublished) was binding on the CCCERA Board. *Irby* held that once the CCCERA board found that a pay item (in that case "holiday pay") should be included as "compensation earnable" for a certain groups of members, it must include "holiday pay" in "compensation earnable" for all members. 29 C.T 008447-57.

C. In 2012 The Legislature Amended The Definition Of "Compensation Earnable" And The Boards Had To Comply With The Amended Law

In 2012, the California Legislature passed and the Governor signed into law two companion pension reform measures, Assembly Bill 340 (Chapter 296, 2011-2012 Reg. Sess.) ("AB 340") and Assembly Bill 197 (Chapter 297, 2011-2012 Reg. Sess.) ("AB 197"). Among other provisions, AB 340 included PEPRA, which changed the defined benefit plans for "new members" of those plans on and after January 1, 2013. Portions of AB 340 and all of AB 197, however, changed the defined benefit plans of so-called "legacy" employees, *i.e.,* those who were first employed before January 1, 2013. Effective January 1, 2013, AB 197 amended the definition of "compensation earnable."

Through the addition of new subsections (b) and (c) to CERL section 31461, AB 197 imposed limitations on the elements of pay that could be included in calculating retirement allowances. It did so to make the statutory law "consistent with and not in conflict with the holdings in" *In re Retirement Cases* and *Salus*. CERL § 31461, subd. (c). Among other limitations, AB 197 excluded accrued leave cash-outs from "compensation earnable" if the amounts were not both

earned and payable within the member's final compensation period. *Id.* at § 31461, subds. (b)(2) & (4). AB 197 also excluded pay received for additional work rendered outside normal working hours, sometimes referred to as "stand-by," "on-call" and "call-back" pay. *Id.* at subd. (b)(3). AB 197 continued verbatim the pre-existing text of CERL section 31461, relabeling it as subsection (a). As before, under all circumstances, "compensation earnable" remained "as determined by the board, for the period under consideration." *Id.* at subd. (a).

To assist county retirement boards in making their determinations as to what should and should not be included in "compensation earnable," the Legislature added a new section 31542 to the CERL in the companion AB 340, which expanded the Board's authority. Section 31542 reads in material part:

> (a) The board shall establish a procedure for assessing and determining whether an element of compensation was paid to enhance a member's retirement benefit. If the board determines that compensation was paid to enhance a member's benefit, the member or the employer may present evidence that the compensation was not paid for that purpose. Upon receipt of sufficient evidence to the contrary, a board may reverse its determination that compensation was paid to enhance a member's retirement benefits.
>
> (b) Upon a final determination by the board that compensation was paid to enhance a member's retirement benefit, the board shall provide notice of that

> determination to the member and employer. The member or employer may obtain judicial review of the board's action by filing a petition for writ of mandate within 30 days of the mailing of that notice.

In response to the mandate of AB 197, ACERA directed its staff to perform an analysis on how the new law's requirements might affect any pay items covered within its system. 42 C.T. 012335. At ACERA's January 17, 2013 board meeting, its staff presented a written analysis and recommended that "on-call and call-back pay elements should no longer be included as compensation earnable in conformity with AB 197." *Id.* During the meeting, the Board opened discussion to the public for comment. *Id.* Thereafter, the ACERA Board passed resolutions by 8-0 votes to ratify and adopt its staff's recommendations to end the inclusion of on-call pay in light of the changes presented in AB 197. 42 C.T. 012336. The Board premised its action on the determination that "payments for services rendered outside of normal working hours, such as stand-by pay, on-call pay and call-back pay," do not fall within the meaning of section 31461(b)(3)'s amended definition of "compensation earnable" because it was pay for additional "services rendered outside of normal working hours." *Id.*

CCCERA also conducted studies on AB 197's effect on retirement allowances covered within its system. 30 C.T. 008777. At its October 30, 2012 board meeting, CCCERA's General Counsel made an educational presentation to the Board on changes to CERL section 31461's definition of "compensation earnable" as a result of AB 197. 30 C.T. 008777-78. As explained, AB 197 prohibited payments for unused leave time as pensionable if the pay exceeds the amount of paid leave that could be both earned and payable in a twelve month final compensation period. 30 C.T. 008777. Following the conclusion of the presentation, the Board heard public comment from sixteen individuals, and discussed at length the effects of AB 197 on current active employees' future benefits. 30 C.T. 008778. Prior to voting on a resolution to implement AB 197, the "[CCCERA] Board noted [that] the changes in AB 197 are not changes the Board initiated but rather changes that have been mandated by current legislation." *Id.* Bound by the new law, the Board passed a resolution by a 7-2 vote to "implement the changes to compensation earnable [determinations] as outlined by AB 197." *Id.* As a result, CCCERA eliminated on-call and stand-by pay under CERL section 31461, subdivision (b)(3), and leave cash-outs that exceed the amount that is

"earned and payable" under CERL section 31461, subdivisions (b)(2) and (4).

At all stages of this case, both Boards have defended their actions to implement AB 197 (in compliance with this Court's precedent), but have taken no position on whether the new law unconstitutionally impaired legacy members' rights. 2 C.T. 000423-35; 7 C.T. 001948-56.

There is no allegation in this case that the Boards ever misled retirement system members as to any material fact. Rather, it is undisputed that, when the parties entered into the settlement agreements, they were each exercising their own best judgment based on the same set of information—including the legal uncertainties regarding the breadth of "compensation earnable" at that time. Indeed, the Boards had agreed to a partial expansion of "compensation earnable" only to settle the members' own claims to such expansion. The record establishes that the Boards never misrepresented any material fact to any member, and no member ever relied on any such misrepresentation.

III. ARGUMENT

A. The Standard Of Review Is *De Novo*

For review of the lower court's estoppel ruling, the standard of review is *de novo*, because the essential facts are not in dispute. *See Alameda County Deputy Sheriff's Assn.,* 19 Cal.App.5th at 89-90; *see also Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799 (when "decisive facts" are not disputed, an appellate court is confronted with a question of law).

B. The Boards Acted Properly At All Times

1. The Boards Properly Entered Into And Complied With The Settlement Agreements

When the Boards entered into the settlement agreements, CERL § 31461 stated that "compensation earnable" was to be "determined by the board" and precedent suggested that the Boards had discretion to include items in "compensation earnable," even if the inclusion of those items was not legally required. *See Guelfi v. Marin County Employees' Retirement Association* (1983) 145 Cal.App.3d 297, 307. The Boards were faced with costly and burdensome litigation, their benefits administration was in limbo and they had a fiduciary duty to respond to actual and threatened litigation "with the care, skill,

prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of a like character and with like aims." Cal. Const., art. XVI, § 17(c).

Consistent with their fiduciary duties, the Boards reached compromises with their respective members and those members' employers. The courts formally approved the parties' compromises and those agreements were binding notwithstanding later judicial pronouncements. Precedent is clear that these kinds of settlements are not only binding, they are encouraged.

In *Fireman's Fund Insurance Company v. Workers' Compensation Appeals Board* (2010) 181 Cal.App.4th 752, an employee was awarded workers' compensation and two insurers were liable for her medical treatment. *Id.* at 758. One insurance company became insolvent, and the California Insurance Guarantee Association ("CIGA") assumed liability for its "covered claims." *Id.* at 758-59. CIGA petitioned the Workers' Compensation Appeals Board ("WCAB") to be relieved of liability, but the law at that time was unsettled about the extent of CIGA's liability. *Id.* CIGA then

stipulated to be liable for a portion of a worker's award and the stipulation was entered as an order of the WCAB. *Id.* at 757-58.

Years later, several published opinions indicated that CIGA should not be responsible for *any* of the award, so CIGA petitioned to have the stipulated order set aside. *Id.* at 759-60. The WCAB granted the petition, but the appellate court reversed, finding that the settlement survived later judicial pronouncements. *Id.* at 758, 760.

The court recognized that, even though workers' compensation awards could be reopened for good cause, including later clarifications of the law (*id.* at 768), it is not good cause to reopen an award "when the parties knowingly take the risk of unsettled law and their settlement agreement reflects such basis for their settlement." *Id.* at 769. The court explained: "[W]here the law is unsettled regarding CIGA's liability, a party negotiating with CIGA should ordinarily be entitled to rely on CIGA's reasoned evaluation of its own authority. If this were not the rule, then settlements involving CIGA would risk being meaningless and a prudent party knowing such risk would likely take all disputes to trial." *Id.* at 770-71.

The rationale in *Fireman's Fund* applies equally to public retirement boards. If their settlements of disputed questions of law

could be invalidated by later judicial pronouncements, settling disputed questions of law would not be a viable option and money that should be devoted to paying benefits and for the administration of the systems would have to be spent on litigation, even if prudent trustees might believe settlement was a superior option. *See Chisom v. Board of Retirement of Fresno County Employees' Association* (2013) 218 Cal.App.4th 400, 416 (enforcing a CERL retirement board's settlement agreement related to the breadth of "compensation earnable" in the wake of *Ventura*.)

Thus, the lower court correctly explained in the present case: "Surely, [the Boards'] broad administrative mandate must include the power to settle litigation in order to defray legal expenses and ensure the prompt and certain delivery of benefits to their members." *Alameda County Deputy Sheriff's Assn.,* 19 Cal.App.5th at 125-26.

If the Boards had failed to comply with the settlement agreements before the 2012 amendments to CERL § 31461, the members would have had a strong case for breach of contract—*not* equitable estoppel. And, when the Legislature commanded the Boards to change their practices in 2013, the proper question was whether that command impaired the members' rights under the

settlement agreements—*not* whether the Boards could be "equitably estopped" from following the new law.

2. The Boards Properly Complied With The 2012 Amendments To CERL § 31461

This Court has explained: "[A] public official's authority to act in a particular area derives wholly from statute, the scope of that authority is measured by the terms of the governing statute." *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1086. In *Lockyer*, the San Francisco Mayor ordered San Francisco Clerk to issue marriage licenses to same-sex couples, based on his belief that California law restricting marriage to opposite-sex couples was unconstitutional. This Court ruled that the Mayor was required to execute the law, as written, unless and until the courts determined the law to be unconstitutional. This Court was *not* ruling on the merits of the Mayor's constitutional objection to the law limiting marriage to opposite-sex couples.[2] *Lockyer*, *supra*, 33 Cal.4th at 1112. Rather, it was ruling only on whether the Mayor had authority to refuse to execute a law based on his own belief the law was unconstitutional.

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2 Indeed, a few years later, in *In re Marriage Cases* (2008) 43 Cal.4th 757, this Court *agreed* with the Mayor's constitutional objection to the prohibition against same sex marriage.

The lesson from *Lockyer* is that local public officials may not unilaterally refuse to execute the laws as written. *See also* Cal. Const., art. III, § 3.5 (state officials may not unilaterally refuse to execute laws as written). That basic separation of powers principle left no room for the Boards to disregard the Legislature's amendments to CERL § 31461, effective January 1, 2013.

Further, the commands of the Legislature were crystal clear. With respect to leave cash outs, AB 197 expressly incorporated the rules from *In re Retirement Cases* and *Salus*. With respect to "[p]ayments for additional services rendered outside of normal working hours" both lower courts[3] correctly held that AB 197's addition of subdivision (b)(3) to CERL § 31461 required ACERA, CCCERA and their Boards to abandon the "required overtime" analysis for such pay items[4] in favor of a blanket exclusion. In particular, the *verbatim* addition of the "outside of normal working

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3 The lower appellate court noted that the trial court "implicitly concluded" that AB 197 eliminated previously available forms of compensation earnable "as there would otherwise have been no reason to recognize a vested right in this area for legacy members." *Alameda County Deputy Sheriff's Assn.*, 19 Cal.App.5th at 109.

4 *See Shelden v. Marin County Employees Retirement Association* (2010) 189 Cal.App.4th 458, 464 ("Shelden was not ordered or required to perform the work in question. He volunteered to do it, and he could stop at any time.")

hours" restriction from PERL indicated the Legislature's clear intent to adopt for CERL systems the same result that the court reached in *City of Pleasanton* (2012) 211 Cal.App.4th 522, which was decided under the PERL exclusion. *See Alameda County Deputy Sheriff's Assn.*, 19 Cal.App.5th at 109-10. The lower court explained that "it is difficult to argue" otherwise (*id.* at 109), and all parties seem to agree since none has sought review of that issue.

In sum, the Boards were required to implement AB 197 until the lower courts ordered otherwise based on equitable estoppel. Both lower courts' equitable estoppel rulings were flawed. This case should turn on this Court's vested rights analysis, not estoppel.

C. The Basic Elements Of Equitable Estoppel Are Not Met

The lower court correctly identified the four basic elements of 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." *Alameda County Deputy Sheriff's Assn.,* 19 Cal.App.5th at 124. The lower court, however, did not engage in a step-by-step analysis to

demonstrate how each of those four elements is met here.

The third and fourth elements of equitable estoppel cannot be met here because ACERA and CCCERA members were not ignorant of any material fact and therefore also could not rely to their detriment on any conduct by the Boards.

All parties to the settlement agreements understood that the agreements resolved disputed questions of law regarding the breadth of "compensation earnable." *See Alameda County Deputy Sheriff's Assn.,* 19 Cal.App.5th at 82-83. Thus, all parties fully understood the same "true state of facts" and none can now claim to have been "ignorant" of those facts. Indeed, it was the *members* themselves who were seeking the expansion of "compensation earnable" that the settlement agreements implemented.[5] *Id.* Further, the court-approved settlement agreements were negotiated by class counsel

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5 The lower court stated: "It is beyond doubt that this is a case in which there have been widespread and long-continuing misrepresentations by both employers and the Boards regarding the ability of legacy members to include terminal pay in pensionable compensation." *Alameda County Deputy Sheriff's Assn.*, 19 Cal.App.5th at 127. It did not, however, cite any facts to support that "misrepresentation" conclusion. *Id.* The lower court's conclusion is wrong. The settlement agreements resolved the *members'* claims for the expansion of "compensation earnable" to include terminal pay. The Boards agreed to the inclusion of some but not all of such pay. That agreement does not constitute a "misrepresentation" for which equity must trump law.

and the Boards (*id.*), and "[w]here one has been represented by an attorney in connection with a claim the necessary elements for estoppel are not established as a matter of law." *Romero v. County of Santa Clara* (1970) 3 Cal.App.3d 700, 705; *see also Cal. Cigarette Concessions v. City of L. A.* (1960) 53 Cal.2d 865, 871. Indeed, the members' counsel monitored the boards' communications with employees, and threatened to sue if the boards deviated from the terms of the settlement agreements. *See, e.g.,* 17 CT 5042-43.

The fact that the Legislature later amended CERL § 31461 does not retroactively render the Boards' agreement to some of the members' demands misleading, nor does it cause the members' "reliance" on those agreements to be based on "ignorance." As one court explained: "To permit one who has knowledge of the law to attempt to negotiate a settlement and subsequently plead estoppel ... would seriously impair the climate and effectiveness of the present method of encouraging settlement without litigation." *Kunstman v. Mirizzi* (1965) 234 Cal.App.2d 753, 758. Thus, the third and fourth elements of equitable estoppel are not met here.

D. Equitable Estoppel Is Legally Unavailable In This Case

Decades of precedent has established that equitable estoppel can be applied against public agencies only in very narrow circumstances and it is *unavailable* to expand statutory rights to retirement benefits.

The seminal case regarding the application of equitable estoppel against a public agency is *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462. In *Mansell*, the City sought a "writ of mandate commanding its city manager and city clerk to execute and put into effect certain agreements designed to resolve title and boundary problems in the Alamitos Bay area." *Id.* at 467. The dispute arose after a combination of factors cast a cloud on the title to the dry land bordering the bay. *Id.* To resolve the dispute, the Legislature enacted a law "disclaiming state and other public interest in certain described lands . . . and authoriz[ed] the settlement of certain boundary questions." *Id.* After years of negotiation, two agreements were completed to carry out the purposes of the legislation. *Id.* The City Manager and City Clerk, however, refused to execute the agreements because they believed that they were contrary to constitutional

prohibitions against the alienation of state-owned tidelands and submerged lands. *Id.*

For 47 years, the City had granted building permits, approved subdivision maps, constructed and maintained streets and other services and collected taxes. *Id.* at 499. Thousands of citizens had settled on the land. *Id.* This Court explained that "manifest injustice would result if the very governmental entities whose conduct [over a span of forty-seven years had] induced" those citizens to settle on the land were permitted to "assert a successful claim of paramount title." *Id.* at 499. Thus, the case was one of "those exceptional cases where justice and right require that the government be bound by an equitable estoppel." *Id.* at 501 (internal marks omitted).

This Court, however, anticipated the potential danger of applying *Mansell* broadly, explaining that the application of estoppel in *Mansell* was based on "the rare combination of government conduct and extensive reliance" in that case. *Id.* at 500. The Court was therefore "creat[ing] an extremely narrow precedent for application in future cases." *Id.* Further, many published opinions have explained that the application of estoppel against a public agency

is "rare" and only available in "special," "unusual," "exceptional," unique" or "extraordinary" cases.[6]

In the realm of public employee salary and benefits, some cases "have emphasized the unique importance of pension rights to an employee's well-being" (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 28) and have applied estoppel to prevent a retirement system member from missing out on rights that would have been available to the member but for the receipt of incorrect information.

For example, in *Farrell v. County of Placer* (1944) 23 Cal.2d 624, 630-31, this Court explained: "[T]he filing of the claim within ninety days, while mandatory upon the claimant and a condition precedent to his cause of action, is nothing more than a procedural requirement as to the agency, which, as to the claimant, may be excused by estoppel." In *Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, this Court applied estoppel to allow benefits to be paid to widows who filed benefit applications late due to their receipt of

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6 *See, e.g., West Washington Properties, LLC v. Department of Transportation* (2012) 210 Cal.App.4th 1136, 1146; *Golden Gate Water Ski Club v. County of Contra Costa* (2008) 165 Cal.App.4th 249, 259; *Poway Royal Mobilehome Owners Assn. v. City of Poway* (2007) 149 Cal.App.4th 1460, 1471; *Seymour v. Cal.* (1984) 156 Cal.App.3d 200, 203; *Chaplis v. County of Monterey* (1979) 97 Cal.App.3d 249, 259.

inaccurate information from the retirement system.[7] *See also Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567, 584 ("not a case where the governmental agency 'utterly lacks the power to effect that which an estoppel against it would accomplish.'"); *Baillargeon v. Department of Water & Power* (1977) 69 Cal.App.3d 670, 677 (estoppel applied "to equalize the difference between the workmen's compensation payments she was receiving and the amount she would have been entitled to had her condition been non-job-related in accordance with the representations made by Defendants.")

In 1979, however, this Court explained that "no court has expressly invoked principles of estoppel to contravene directly any statutory or constitutional limitations." *Longshore* 25 Cal.3d at 28 After the publication of numerous cases, that statement is as true in 2018 as it was in 1979.

In *Barrett v. Stanislaus County Employees Retirement Assn.* (1987) 189 Cal.App.3d 1593, the court explained:

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[7] Although not an "estoppel" case, this Court's ruling in *Hittle v. Santa Barbara County Employees' Retirement Association* (1985) 39 Cal.3d 374, was consistent with *Driscoll*. In *Hittle*, a member failed to timely apply for service-connected disability benefits, because the system failed to properly advise him of its right to apply. Although this Court did not analyze the case through an estoppel lens, it required the system to process the otherwise tardy service-connected disability application.

> A fundamental maxim of jurisprudence is that equity must follow the law. Equity is bound by rules of law; it is not above the law and cannot controvert the law. Equity penetrates beyond the form to the substance of a controversy, but is nonetheless bound by the prescriptions and requirements of the law. While equitable relief is flexible and expanding, its power cannot be intruded in matters that are plain and fully covered by positive statute. A court of equity will not lend its aid to accomplish by indirect action what the law or its clearly defined policy forbids to be done directly. *Id.* at 1608 (internal citations omitted)

In *Medina v. Board of Retirement* (2003) 112 Cal. App. 4th 864, employees were incorrectly classified as "safety" members for years and the court ruled that they were entitled only to "general" member status. The court explained: "principles of estoppel may not be invoked to directly contravene statutory limitations." *Id.* at 869.

In *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, the trial court awarded benefits to a CalPERS member based its reading of retirement law and, alternatively, based on equitable estoppel. The appellate court found that the trial court had misapplied retirement law and then explained: "Because we disagree with the trial court's conclusion, and find § 20636 did at all times preclude PERS from treating Linhart's standby pay as pensionable compensation, we hold any award of benefits to Linhart based on estoppel is barred as a matter of law." *Id.* at 543.

In *Chaidez v. Board of Administration etc.* (2014) 223 Cal.App.4th 1425, the court explained that "no court has expressly invoked principles of estoppel to contravene directly any statutory or constitutional limitations. ... Chaidez and the City describe this as an issue of first impression, but it is in reality a contention that has been rejected." *Id.* at 1432; *see also San Diego City Firefighters, Local 145 v. Bd. of Admin. of San Diego City Emples. Ret. Sys.* (2012) 206 Cal.App.4th 594, 611.

In *McGlynn v. State of California* (2018) 21 Cal.App.5th 548,[8] the court explained that "even when equitable estoppel against a public entity might otherwise be warranted, it is improper when application of the doctrine would contravene a 'statutory limitation.'" *Id.* at 561. That court reiterated that, in 2018, there was no "case of which we are aware [that] employed principles of estoppel to afford a public employee a benefit that otherwise would directly contravene a statutory or constitutional limitation." *Id.* at 564. Indeed, *McGlynn* is in direct conflict with the lower court's application of estoppel in the present case. In *McGlynn*, the court explained:

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8 On June 27, 2018, this Court granted review of *McGlynn*, which is therefore cited for persuasive value only. *See* Rule 8.1115(e)(1).

> Appellants further contend that whatever PEPRA may say, that statutory scheme is ultimately of no consequence because the initial assurances they were given about retirement benefits under pre-PEPRA JRS II, were made before PEPRA went into effect. This does not change the fact that requiring respondents to treat appellants as coming within pre-PEPRA JRS II would require respondents to act beyond the legal authority they ***now*** have. *Id.* at 562 (emphasis added).

Thus, decades of precedent establishes:

(1) If the receipt of incorrect information from a retirement system causes a member to miss out on benefits that otherwise could have been available to the member, estoppel *can* apply.

(2) If the receipt of incorrect information from a retirement system causes a member to believe he or she is entitled to benefits beyond those provided by law, estoppel *cannot* apply.

These rules are sound, because individuals should neither lose nor gain rights due to a retirement system's error. Applying estoppel to reinstate a right that was lost due to a system error merely corrects the error. Allowing estoppel to *expand* retirement rights, however, would cause those rights not to be governed by law, but rather by the extent to which imperfect humans and computer systems err in the administration of benefits.

Here, the lower court held that the Boards do not have the power to include terminal pay in "compensation earnable" as a matter of discretion and also held that AB 197 required a blanket exclusion of after-hours pay. *Alameda County Deputy Sheriff's Assn.*, 19 Cal.App.5th at 109-10, 125. Thus, while the Boards' lawful and proper settlement agreements may pose an interesting "vested rights" question in light of the Legislature's 2012 amendments to CERL § 31461 (a point on which the Boards take no position), it is clear the lower court improperly applied estoppel to force these Boards to confer retirement benefits beyond what the law provides.

E. Expanding Statutory Rights To Retirement Benefits By Equitable Estoppel Is Particularly Troubling Public Policy

As the lower court explained:

> Where, as here, a party seeks to invoke the doctrine of equitable estoppel against a governmental entity, an additional element applies. That is, the government may not be bound by an equitable estoppel in the same manner as a private party unless, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel. *Alameda County Deputy Sheriff's Assn,* 19 Cal.App.5th at 125.

This "fifth element" of equitable estoppel is not met here, because the nature of public retirement systems renders the application of equitable estoppel to expand statutory retirement rights particularly problematic.

First, the modern administration of retirement benefits is highly complex, so administrative errors are bound to occur from time to time. *See City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210, 244 (explaining how retirement systems must make "many complex adjustments required for system administration" and "must prioritize the rights of retirees while making complex decisions impacting multiple variables.") Thus, allowing estoppel to expand statutory rights to retirement benefits poses a high risk of eroding the intent of the Legislature over time.

Second, because each member of a retirement system has a different experience interacting with his or her employer and the retirement system, allowing members to expand their rights based on the claimed receipt of inaccurate information would result in similarly situated members having different retirement rights, based solely on which members were misinformed by the system (and

failed to obtain the correct information on their own). This would raise serious fairness questions and also would result in an unwarranted administrative burden, as the retirement systems would have to manage a patchwork of rights among otherwise similarly situated members.

Third, retirement systems *administer* benefits, but the employers have sole authority to *grant* benefits and are ultimately responsible for the full *funding* of the benefits they grant. Thus, it is crucial to sound budgeting and fair collective bargaining that employers know exactly what retirement benefits they are granting. Indeed, the law provides that when an employer seeks to increase retirement benefits, it must commission and make public an actuarial study disclosing the likely annual cost of the increase at least two weeks before adopting the change. *See* Government Code § 7507. If bargained-for benefits can be expanded by subsequent retirement association administration, employers will be burdened with unanticipated costs and the public will not receive the notice to which it is entitled.

Fourth, when setting employer and employee contributions to fund promised benefits on an actuarially sound basis, a board of

retirement must make assumptions and projections based on governing law; not an unknowable set of rights that may emerge over time due to administrative applications beyond what the law provides. These assumptions and projections attempt to predict the financial needs of the pension fund to pay out the promised benefits as the system's members retire. Without certainty as to the members' rights, a board of retirement cannot determine what benefit levels they are obligated to fund. Thus, applying estoppel to expand statutory retirement rights hampers the sound actuarial funding of public retirement benefits.

Fifth, allowing equitable estoppel to expand retirement rights is an invitation for abuse and wasteful litigation. For example, a member may have a suspicion that he or she has received incorrect information, but might be rewarded for choosing not to investigate further. Determining the merits of an estoppel claim will always turn on factual questions, such as what a member understood and whether it was reasonable for the member to have that understanding. This will lead to costly and burdensome litigation over matters that should be resolved by the CERL alone.

IV. CONCLUSION

The lower court's ruling on equitable estoppel was unfounded and ill-advised. This Court should reverse that ruling and also reverse the trial court's writ that is based on estoppel, irrespective of how it may rule on the other issues before it.

DATED: July 19, 2018

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule of Court 8.204(c), and in reliance on the word count of Microsoft Office Word 2010 used to prepare this brief, I certify that this brief contains 6,740 words, not including the words in the Table of Contents and Table of Authorities or in this Certificate of Compliance.

DATED: July 19, 2018

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PROOF OF SERVICE

Alameda County DSA, et al. v. ACERA, et al.
CA Supreme Court Case No. S247095
Court of Appeal Case No. A141913
Superior Court of Contra Costa Case No. MSN12-1870

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 101 Second Street, Suite 1800, San Francisco, California 94105-3659. On July 19, 2018 I served the following document(s) by the method indicated below:

ANSWER BRIEF ON THE MERITS

☑ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed to recipients set forth below. I am readily familiar with the firm'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.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on July 19, 2018 at San Francisco, California.

Julie Horning

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