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Case No. S247095

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ALAMEDA COUNTY DEPUTY SHERIFF'S 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;

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1021, et al.,
Interveners;

BUILDING TRADES COUNCIL OF ALAMEDA COUNTY et al.,
Interveners and Appellants.

After an Order by the Court of Appeal, First Appellate District,
Case No. A141913, Contra Costa County Superior Ct. Case No. MSN12-1870
(Coordinated with Alameda Superior Ct. Case No. RG12658890
and Merced Superior Ct. Case No. CV003073)

PETITIONERS, ALAMEDA COUNTY DEPUTY SHERIFFS' ASSOCIATION, ET AL.'S ANSWER BRIEF ON THE MERITS

DAVID P. MASTAGNI, ESQ., SBN 57721
DAVID E. MASTAGNI, ESQ., SBN 204244
ISAAC S. STEVENS, ESQ., SBN 251245
MASTAGNI HOLSTEDT, APC
1912 I Street, Sacramento, CA 95811
Telephone: (916) 446-4692 / Facsimile: (916) 447-4614
Attorneys for Petitioners and Appellants,
ALAMEDA COUNTY DEPUTY SHERIFF'S ASSOCIATION, JON RUDOLPH, ROCKY MEDEIROS, JAMES NELSON, and DARLENE HORNSBY

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I

INTRODUCTION

Petitioners/Respondents Alameda County Deputy Sheriff's Association ("ACDSA"), *et al.*, submit this brief in opposition to the State's Opening Brief ("SOB.") This case affords this Court an opportunity to reaffirm its deeply rooted jurisprudence underpinning the California Rule and restore predictability and continuity to the law. The State seeks to upend core tenets of Contracts Clause analysis in advocating that items of compensation included in the pension formulae are not vested. Under the State's analytical framework, the pension formulae could eliminate all special compensation when a new spending priority arises – a fact Governor Brown himself has admitted. This threat is real – ACERA attempted to eliminate over 41 items of compensation earnable. The Contracts Clause has long prohibited permanent impairments of financial terms. This Court should affirm that any detrimental change to the pension formulae must contain corresponding new advantages or be limited to prospective members of the pension system.

Petitioners earned vested rights to pension benefits based on compensation earnable that included sick leave and vacation cash outs, as well as other pay items, like "on-call" and "standby" pay. The Alameda County Employees Retirement Association ("ACERA") and the County of Alameda promised to include these pay items in pension benefits pursuant to a court-approved settlement agreement executed in 1997, in the wake of this Court's landmark

ruling in *Ventura.* In subsequent years, ACERA continually reaffirmed its promise that these pay items would be included in compensation earnable, and collected contributions from its members and Alameda County to pre-fund their inclusion. In 2012, the Public Employees Pension Reform Act ("PEPRA") amended the definition of compensation earnable in the County Employees Retirement Law ("CERL"), prompting ACERA to impair members' vested pension rights by excluding the disputed pay items.

The State's claim that PEPRA is necessary to prevent pension inflation and the corresponding burden of unanticipated liabilities has no application in Alameda County. ACERA knew terminal pay and the other disputed pay items would be included in members' pensionable income, set contribution rates sufficient to pay for benefits that included those pay items, and collected money from members and their employers to pay for their inclusion. PEPRA did not prevent ACERA from being saddled with unanticipated liabilities; rather it provided a windfall in eliminating pension obligations that Petitioners and the County already pre-funded.

The Court should decline this request to uproot the core constitutional protections of the Contract Clause and affirm its precedent that the California Rule requires any detrimental change to pension benefits be offset by a corresponding new advantage. This appeal affords the Court an important opportunity to restore continuity and predictability to the vested rights jurisprudence.

The Court should also affirm the appellate court's ruling that promissory estoppel entitled Petitioners to pension benefits that included the disputed pay items. The appellate court properly held ACERA exercised its authority to settle post-*Ventura* litigation over whether terminal pay and other disputed pay items were pensionable by agreeing to include the disputed pay items in members' pension benefits. In miscasting the settlements as fraudulent and collusive, the State neglects to mention that ACERA's class action settlement was subject to two levels of judicial scrutiny and court approval. By claiming Petitioners were not entitled to rely on a court-approved class action settlement, the State seeks to undermine the finality of the superior court's judgment and the rule of law. Accordingly, Petitioners respectfully request the Court deny the State's appeal, affirm this Court's stare decisis regarding the California Rule, and rule that PEPRA unconstitutionally impaired Petitioners' vested rights.

II

FACTS

A. PETITIONERS' PENSION BENEFITS

Petitioner ACDSA is the employee organization representing deputy sheriffs in the County of Alameda. Petitioners Rudolph, Medeiros, Nelson, and Hornsby are, or were, employees of the County of Alameda and represented by the ACDSA in employee relations. The County of Alameda maintains an employee retirement plan under the County Employees' Retirement Law ("CERL") administered by ACERA.

Petitioners' retirement benefits are a combination of a retirement annuity based on their accumulated contributions, supplemented by a pension established with county contributions sufficient to equal a specified fraction of their "final compensation." (*Ventura County Deputy Sheriffs' Assn v. Board of Retirement* (1997) 16 Cal.4th 483, 490 ("*Ventura*.") To calculate an employee's retirement amount, ACERA must determine whether items paid to the employee are "compensation" under Government Code section 31460 and "compensation earnable" pursuant to Government Code section 31461.

Government Code section 31460 defines "compensation" as "the remuneration paid in cash out of county or district funds, plus any amount deducted from a member's wages for participation in a deferred compensation plan . . . but does not include the monetary value of board, lodging, fuel, laundry, or other advantages furnished to a member." Government Code section 31461 defines "compensation earnable" and, as discussed below, was modified significantly by the Public Employees' Pension Reform Act ("PEPRA.")

B. ACERA'S POST-*VENTURA* PENSION LITIGATION

For years, ACERA has included in employees' compensation earnable standby pay, call-back pay, and cash received for cashing out sick leave and vacation hours. It did so pursuant to a settlement agreement between ACERA, employee organizations, and the County of Alameda, executed after the *Ventura* case. ACERA's *Ventura* Settlement states "compensation earnable" will include "leave paid as salary or in lieu of paid leave and pay for hours ordinarily worked

by the employee in the employee's penman work assignment, mandated by the County or applicable Memorandum of Understanding." (23 CT 6770.) With respect to final compensation, the *Ventura* Settlement provides that "vacation leave and/or sick leave paid as a lump sum shall be recognized as final compensation only to the extent that it is earned during the final compensation period and, in the case of a three-year final compensation period, shall be the annual average of the leave earned." (23 CT 6770.) It does not request members to cash out that leave in service, instead of at retirement.

C. ACERA CONTINUOUSLY PROMISED THE DISPUTED PAY ITEMS WOULD BE INCLUDED IN COMPENSATION EARNABLE

Not only were the benefits mandated via the *Ventura* Settlement, but, for over a decade, ACERA's communications to its members advised them of their entitlement to them.

ACERA's Members Handbook, which is the main way members are informed of, and understand their benefits, advised members of their right to "selloff" leave time earned during the final compensation period. For example, the Handbook stated "If you accrue vacation at a rate of five weeks per year, you can sell/cash out up to 15 weeks of vacation during the consecutive 36-month period leading to retirement (5 weeks x 3). This value can be included in your final average salary calculation..." (24 CT 7070.) Likewise, section 7 of the Handbook advised members that "your final average salary can also include eligible vacation accruals in the form of cash outs at retirement." (24 CT 7151.) It

further states that, "under the Ventura Settlement Agreement, the cash value for vacation received (as a result of vacation sell back and/or vacation 'cashed-out' due to termination or retirement) can be included in your final average salary calculation."

Other communications indicated the *Ventura* benefits, including on-call, standby, and other pay items, would be included in members' retirement benefits. For example, ACERA provided an annual "Member Benefit Statement" that informed members of their "Average Monthly Salary" on which their pension would be computed. (24 CT 7150.) With respect to such pay items, the Member Handbook also indicated "your employee contribution rates is a percentage of base pay and certain pay differentials. For a comprehensive list of pay types which are included or excluded, contact ACERA Member Services." (24 CT 7106.)

The Handbook promises these benefits, stating they are vested and guaranteed. "When a member is 'vested,' it means that he or she has earned a right to receive a monthly ACERA retirement benefit upon retirement eligibility." (24 CT 7107.)

This changed when PEPRA was enacted. ACERA announced, effective January 1, 2013, it would no longer include these pay items in compensation earnable. This change reduced employees' pension benefits. The affected employees received no new offsetting advantages in return for these reductions.

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D. ACERA'S MEMBERS AND EMPLOYERS PAID TO INCLUDE THE DISPUTED PAY ITEMS IN COMPENSATION EARNABLE

The cost of including these pay items in employees' pension benefits was included in ACERA's actuarial assumptions, and factored into the contribution rates ACERA charged employees and their employers. Indeed, the ACERA Board resolved "ACERA must collect appropriate employee contributions on all additional compensation earnable (as determined by the Board under the *Ventura* decision) payable to ACERA members from and after October 1, 1997." (23 CT 8095.) As shown in ACERA's actuarial estimates from 1999, as a result of the agreement the "employer contribution rates were adjusted to reflect estimated annual sell off of vacation." (23 CT 6799.) Employee rates were also adjusted, with the actuaries noting early on that "[a]djustments to member basic rates may result if terminal pay is reflected in the salary scales used to derive basic rates." (23 CT 6799.) As such, ACERA's members have *paid* for the benefit of having these pay items included in their pensions.

Over the next 15 years, contribution rates reflected the cost of the increased terminal pay, including leave cash outs. (23 CT 6854, 24 CT 6865, 26 CT 7700 (calculating terminal pay as a percentage of retirement costs.)) As a result, the additional cost of the including terminal pay in members' pension calculations was incorporated into the contribution rates ACERA members paid. (24 CT 6894; 25 CT 76522; 28 CT 8099 ("it is recommended that the Board determine the method and timing of any retroactive employee contributions if any

and that the collection of employee contributions on future compensation shall be implemented as soon as possible."))

E. PEPRA REDEFINED "COMPENSATION EARNABLE"

PEPRA became effective January 1, 2013, drastically changing the laws governing public employees' pension benefits. This suit challenges PEPRA's changes to Government Code section 31461, which provides the definition of "compensation earnable" used to calculate employees' pension benefits.

Before PEPRA's enactment, Government Code section 31461 defined "compensation earnable" as "the average compensation as determined by the board for the period under consideration upon the basis of the average number of days ordinarily worked by persons in the same grade or class of positions during the period, and at the same rate of pay. (Govt. Code § 31461(a).) "The computation for any absence shall be based on the compensation of the position held by the member at the beginning of the absence." (*Id.*) "Compensation, as defined in section 31460, that has been deferred shall be deemed 'compensation earnable' when earned, rather than when paid." (*Id.*)

PEPRA moved the old definition of compensation earnable to its own subsection, then added a subsection (b) to Government Code section 31461, excluding various forms of pay from "compensation earnable." Government Code section 31461(b) provides:

> (1) Any compensation determined by the board to have been paid to enhance a member's retirement

benefit under that system. That compensation may include:

(A) Compensation that had been previously provided in kind to the member by the employer or paid directly by the employer to a third party other than the retirement system for the benefit of the member, and which was converted to and received by the member in the form of a cash-payment in the final average salary period.

(B) Any one-time or ad hoc payment made to a member, but not to all similarly situated members in the member's grade or class.

© Any payment that is made solely due to the termination of the member's employment, but is received by the member while employed, 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.

(2) Payments for unused vacation, annual leave, personal leave, sick leave, or compensatory time off, however denominated, whether paid in a lump sum or otherwise, in an amount that exceeds that which may be earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid.

(3) Payments for additional services rendered outside of normal working hours, whether paid in a lump sum or otherwise.

(4) 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.

F. PEPRA REDUCED PETITIONERS' PENSION BENEFITS

Under the auspices of implementing PEPRA, ACERA excluded certain previously included pay items from Petitioners' "compensation earnable." These exclusions applied to new and legacy members alike. Specifically, ACERA announced it would exclude on-call and call-back pay, pay for performance benefits, vacation and sick leave sold back at retirement, and various other payments. (Minutes of the January 17, 2013 Meeting of the ACERA Board of Retirement, p. 6 (42 CT 012336.)) These changes significantly reduced employees' pension benefits. (*See* Miles Declaration in Support of Appellants' Motion for Stay of Appeal filed May 29, 2014, ¶ 5 ($1,000/month reduction); Medeiros Declaration in Support of Appellants' Motion for Stay of Appeal filed May 29, 2014, ¶ 14 ($850/month reduction.))

In implementing PEPRA, ACERA declared it would no longer include a large portion of members' vacation cash outs in their pension benefits. (*See* ACERA Members: How Does the New CA Pension Law Affect You?, p.1; 24 CT 007168.) Instead, ACERA announced compensation earnable would only include vacation employees sold back while still employed. (24 CT 007168.)

ACERA also declared sick leave cash outs would no longer be included in Safety members' final compensation. (24 CT 007169.) As a result, Safety members in ACERA were no longer entitled to include 13 or 39 days of sick leave cash out in their final compensation.

Finally, ACERA announced that many other forms of pay previously included in final compensation would no longer count towards members' pension benefits. These forms of pay included: 232 (On-call Duty); 284 (Emergency Response); 316 (Water Quality Analyst Cert); 369 (Pay for Performance); 403 (Election Poll Worker); 405 (Emergency Call Coverage); 452 (Canine Care); 715 (Recruit Bonus); 716 (OneTime Payment); 829 (CWW ERU 24hr Shift OnCall Cov.); 830 (Member, Planning Commission); 912 (Members, LAFC); 913 (Member, Assessment Appeals Board); 914 (Member, Retirement Board); 915 (Member, Board of Equalization); 917 (Member, Board of Dir-Flood Control); CAO (Comp Time Payoff (Alt Wrk Sch); EOM (Employee of the Month (Zone 7); ERR (Emergency Response); 150 (Converted 5D DSA In-Lieu Payoff); ICO (In-lieu Payoff - Court (Expire)); IDO (DSA In-Lieu Payoff (Expire)); INO (In-lieu Payoff (Non Expiring)); IPO (Payoff in Lieu Balance); S00 (Share the Savings $100); S50 (Share the Savings $50); S75 (Share the Savings $75); SBY (Standby); SLC (Sick Leave - Cash Out 20%); SNP (Short Notice Cov. Pay-Zone 7); SS2 (Shift Standby - Shift 2); SS3 (Shift Standby - Shift 3); SS6 (Shift Standby - Shift 6); SS8 (Shift Standby - Shift 8); SSA (Shift Standby - Shift A); SSY (Shift Standby - Shift Y); SSZ (Shift Standby - Shift Z); TSR (Call Back); TRW (Call Back); VMC (Vacation Maximum Cashout); VPO (Vacation Payoff). (*See* County of Alameda: Pay Codes Not Compensation Earnable After January 1, 2013 (24 CT 007174; 37 CT 11017-11025.)

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G. PROCEDURAL HISTORY

Petitioners filed this action in the Superior Court for the County of Alameda in December 2012, as a petition for mandamus relief requiring ACERA to continue including the disputed pay items in legacy employees' pension calculations. The petition alleged PEPRA impaired Petitioners' vested pension benefits. It sought relief on constitutional and promissory estoppel grounds.

The matter was later consolidated with similar challenges filed in Merced and Contra Costa County, and heard by Judge Flinn in the Contra Costa Superior Court.

1. Trial Court Proceedings and Judgment

The trial court separated the litigation into phases. Phase One was limited to purely legal issues focused on whether pay items expressly excluded from compensation earnable by PEPRA were includable under prior CERL law and whether, if not, legacy members could nonetheless obtain a vested right to have such compensation included.

The trial court issued its decision on May 12, 2014. Along with its decision, the trial court issued judgments specific to each retirement system, and ordered the issuance of related writs of mandate. The court's judgments denied Petitioners' request to have PEPRA deemed an unconstitutional impairment of the vested rights of legacy members.

The trial court's decision in the case first addressed the "timing issue" – whether compensation had to be earned *and* payable in the final compensation

period before PEPRA amended Government Code section 31461. The court determined that cash outs of leave that were not earned during the final compensation period could not be included in compensation earnable, even before PEPRA was enacted. The court further determined that terminal pay could not be included in compensation earnable, because it was not payable during the final compensation period – only at retirement.

Next, the court addressed whether PEPRA's exclusion of "payments for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise" required ACERA to exclude on-call and call-back pay. On this issue, the court directed ACERA to continue including the pay in legacy members' compensation earnable, "in those limited circumstances where the pay category was previously included <u>and</u> the amount to be included was both earned and required of the employee during his or her final compensation period."

The trial court denied Petitioners' estoppel claims, ruling that promissory estoppel was unavailable on the facts presented.

Finally, the court addressed whether PEPRA changed the definition of compensation earnable by excluding "any compensation determined by the board to have been paid to enhance a member's retirement benefit." The court denied Petitioners' request for relief, ruling in essence any danger of this new exclusion affecting them was pure speculation.

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2. The *MAPE* and *CalFire* Decisions

While this case was on appeal, the First District Court of Appeal issued rulings in *MAPE*[1] and *CalFire*[2]. Like this case, *MAPE* addressed PEPRA's changes to the definition of "compensation earnable" used to calculate pension benefits. *CalFire* dealt with PEPRA's elimination of "air time."

In *MAPE*, the appellate court ruled PEPRA did not unconstitutionally impair employees' pension benefits because it left a "reasonable" benefit intact. (*MAPE*, *supra*, 2 Cal.App.5th at p. 707.) In reaching this conclusion, the court opined that a detrimental change to pension benefits need not be accompanied by a comparable new advantage to be deemed constitutional. (*Id.*, at p. 698.)

The *MAPE* court held this Court misconstrued its own precedent in *Allen v. Board of Administration* (1983) 34 Cal.3d 114 ("*Allen II*"), which stated that, to survive constitutional scrutiny, any modification "must be accompanied by comparable new advantages." The *MAPE* court held the 1983 *Allen II* decision's use of the word "must" simply misstated this Court's prior rulings. (*MAPE*, *supra*, 2 Cal.App.5th at p. 698.) The *MAPE* court conjectured that it did "not believe the word 'must' was intended to be given the literal and inflexible meaning" attributed to it.

This ruling broke from decades of precedent requiring any changes to be offset by comparable new advantages. The Court granted review in *MAPE*,

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[1] *Marin Association of Public Employees v. Marin County Employees' Retirement System* (2016) 2 Cal.App.5th 674

[2] *Cal Fire Local 2881 v. California Public Employees' Retirement System* (2016) 7 Cal.App.5th 115

deferring further action pending the decision in this case. (*Marin Assn. Of Public Employees v. Marin County Employees' Retirement Association* (2016) 210 Cal.Rptr. 3d 15.)

The appellate court then issued its decision in *CalFire*, which challenged PEPRA's elimination of the option to purchase "airtime" service credit. Despite finding no vested right to purchase airtime, the court gratuitously affirmed *MAPE* by holding the State was not required to provide a comparable new advantage to offset the loss of airtime even if it was a vested right. (*CalFire, supra*, 7 Cal.App.5th 115, 130-31.) The court reiterated *MAPE*'s assertion that this Court did not mean detrimental changes to pension rights *must* be offset by new advantages. This Court granted review in the *CalFire* case on April 12, 2017. (*CalFire Local 2881 v. California Public Employees' Retirement System* (2017) 216 Cal.Rptr.3d 119.)

3. The Appellate Court Finds Vested Pension Rights and Grounds for Applying Equitable Estoppel in This Case

The appellate court in this case affirmed in part and reversed in part the trial court's ruling, and remanded the matter for further proceedings. The appellate court found PEPRA impaired employees' vested rights by adding a new requirement that compensation earnable cannot include pay to employees for the purposes of enhancing their retirement benefit. (*Id.*, at p. 110.) This impaired employees' vested right to a pension based on the pre-PEPRA definition of compensation earnable that contained no such requirement. Additionally, the

appellate court correctly reversed the trial court's ruling denying Petitioners' estoppel claims, finding the Petitioners were entitled to pension benefits that included the pay items at issue because they relied on representations from their employer and ACERA. (*Id.*, at pp. 128-129.)

While the court sided with the Petitioners on several points, it incorrectly affirmed the trial court's ruling that terminal pay was not pensionable before PEPRA's enactment, and thus PEPRA did not change how terminal pay was treated with respect to calculating pension benefits. (*Alameda County Deputy Sheriffs' Association v. Alameda County Employees Retirement Association* (2018) 19 Cal.App.5th 61, 102-103, ("*ACDSA*").) This appeal followed.

III

STANDARD OF REVIEW

The facts in this case are largely undisputed. In deciding the legal issues, including the interpretation of the County Employees' Retirement Law ("CERL") the standard of review is de novo. (*See City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210, 226.) Because the CERL governs pension rights, its provisions must be construed in favor of pensioners. (*City of Long Beach v. Allen* (1956) 143 Cal.App.2d 35, 38 ("*Allen I*").)

The same is true for Petitioners' equitable estoppel claim, as the facts material to that cause of action are not disputed. Although estoppel is generally a question of fact, "it is a question of law when the facts are undisputed and only

one reasonable conclusion can be drawn from them. (*Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 708.)

IV

DISCUSSION

Pursuant to the pre-PEPRA definitions and ACERA's court-approved *Ventura* Settlement, Petitioners have a vested right to pension benefits based on compensation earnable that includes their leave cash outs, on-call and standby pay, and the other pay items at issue in this case. PEPRA substantially impaired that right by changing the definition of compensation earnable to exclude those pay items.

This impairment was not reasonable or necessary for an important public purpose because saving money, even if framed as taxpayer money, is not a valid justification. Moreover, the impairment was not reasonable or necessary. ACERA was, and is, well funded, and its members and their employers paid to have the disputed items included in pension benefits. The State has produced no evidence to the contrary. Accordingly, the Court should hold PEPRA invalid under the Contracts Clause of the U.S. and California Constitutions.

Even if this Court finds the CERL did not allow ACERA to include the disputed pay items in members' pension calculations before PEPRA's enactment, estoppel lies to enforce the promises ACERA and the County of Alameda made to include them. ACERA was aware its members were relying on its representations that the disputed pay items would be included in their pension

calculations, and of the court's approval of the Ventura Settlement. Accordingly, the Court should enforce those promises and uphold the appellate court's ruling applying estoppel in this case.

A. PETITIONERS HAVE A VESTED RIGHT TO HAVE THE DISPUTED PAY ITEMS INCLUDED IN THEIR PENSIONABLE INCOME

The Petitioners have a vested right to have their leave cash outs, on-call pay, standby pay, and other disputed pay items included in the compensation earnable used to calculate their pension benefits.

1. Petitioners Have a Vested Right to the Pension Formula in Place When They Started Working, Plus Any Enhancements Made During Their Employment

Pension benefits are deferred compensation. (*Thorning v. Hollister School Dist.* (1992) 11 Cal.App.4th 1598, 1606-7.) Public employees obtain a vested contractual right to earn retirement benefits upon accepting employment. (*Betts v. Board of Administration* (1978) 21 Cal.3d 859, 864; *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 853; *Miller v. State of California* (1977) 18 Cal.3d 808, 817; *Carman v. Alvord* (1982) 31 Cal.3d 318, 325.) They are entitled to continue earning additional retirement benefits through continued service under the terms originally promised by the employer. (*See Legislature v. Eu* (1991) 54 Cal.3d 492, 530; *Pasadena Police Officers Assn. v. City of Pasadena* (1983) 147 Cal.App.3d 695.) They also have a vested right to any additional retirement benefits established during their employment. (*County of Orange v. Assn. of Orange County Deputy Sheriffs* (2011) 192 Cal.App.4th 21, 41-42.)

Pension benefits are constitutionally protected, because they are an inducement to employment and considered deferred compensation, granted in exchange for employees' continued service. (*See, e.g. In re Marriage of Brown* (1976) 15 Cal.3d 838, 845 ("Since pension benefits represent a form of deferred compensation for services rendered, the employee's right to such benefits is a contractual right, derived from the terms of the employment contract."); *Miller v. State of California* (1977) 18 Cal.3d 808, 814 ("Pension rights . . . are deferred compensation earned immediately upon the performance of services for a public employer and cannot be destroyed without impairing a contractual obligation."); *Lyon v. Flourny* (1969) 271 Cal.App.2d 774, 781 (both state and federal Contracts Clauses protect public pension benefits.))

Although pension benefits are a type of contractual obligation under the Contracts Clause, there is no need to show an explicit contractual agreement for the constitutional protection to apply. Rather, so long as the particular pension benefits have been properly instituted and formally adopted, employees gain a vested right to them. This flows from the idea that pension benefits are offered as deferred compensation, and prospective employees accept the offer by virtue of commencing, or continuing in, employment. (*See*, e.g. *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 851-52 (upon performing work "the pension provisions become a part of the contemplated compensation for those services and so in a sense a part of the contract of employment itself."); *Dryden v. Bd. of Pension*

Commissioners (1936) 6 Cal.2d 575, 579 (pension provisions were an "integral portion" of the employee's contemplated compensation.))

The extent to which an employee relies on a particular pension benefit is not relevant; a pension is "an inducement to enter and continue in public employment," therefore, the acceptance of employment, not the extent to which an employee actually relies on the pension benefit, determines the existence and extent of the vested pension right. (*Carman v. Alvord* (1982) 31 Cal.3d 318, 325.)

As discussed above, once vested, an employee's right to a particular pension benefit cannot be frustrated without violating a contractual obligation. (*Betts*, *supra* 21 Cal.3d at 863.) The Contracts Clause protects vested pension rights from impairment, with limited exceptions for reasonable modifications needed to maintain the integrity of the pension system. (*Allen II, supra,* 34 Cal.3d at p. 120.) To change an employee's vested rights, the change must be reasonable and necessary for an important public purpose. To be reasonable, changes must bear some material relation to the theory of a pension system and its successful operation, and any changes that result in a detriment to employees must be accompanied by comparable new advantages. (*Ibid.*)

2. Employees Have a Vested Right to Benefits Calculated Using the Definition of Compensation Earnable in Place Upon Acceptance of Employment

The State's extreme contention that compensation earnable excluded under PEPRA is not vested because it had not yet been earned in the final compensation period is untenable. (SOB, p. 41-46.) The definition of

compensation earnable is on equal footing with the service time and multiplier components of employees' pension formula, and is therefore vested upon acceptance of employment. The vested formula incorporates all includable compensation the employee is eligible to earn over his or her employment.

Lacking any limiting principle, this flawed argument would render all special compensation items, which comprise a significant portion of safety employees' compensation, not vested. The State argues compensation earnable must be worked in the final compensation period to vest, even if earned for years before retirement and included in member contributions. (SOB, pp. 40-41.) Thus, an integral component of the pension formula would not vest until retirement. This upending of expectations is not theoretical – ACERA excluded over 40 items that had been compensation earnable as a result of PEPRA.

The appellate court correctly recognized that Petitioners' vested pension rights included the right to the definition of compensation earnable in place when they accepted employment. Indeed, the court found that PEPRA impaired the Petitioners' vested rights by adding a new requirement to the definition of compensation earnable calling for the exclusion of compensation paid for the purposes of enhancing members' retirement benefits. (*ACDSA, supra,* 19 Cal.App.5th at p. 110.)

The State's claim that CERL is "subject to the implied qualification that the [Legislature] may make modifications and changes in the system"[3] ignores the

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[3]SOB, p. 42.

fact that these modifications must be accompanied by corresponding new advantages if they result in a detriment to the employee.[4] Indeed, *Miller*, which the State quotes in support of its position, cites *Allen I* for the rule that any such modifications should be offset by new advantages.

The fact that the Legislature has amended the statute defining "compensation earnable," as discussed in the *Ventura* decision, does not show that the Legislature reserved the right to narrow the definition of compensation earnable, as the State claims. (SOB, p. 42.) Rather, the examples the Court cited in *Ventura* expanded the definition of compensation earnable (e.g. the 1993 amendment, which expressly added special compensation to the definition) or merely clarified the status quo. These changes did not remove pay items from the definition of compensation earnable.

The cited cases do not support the position that the definition of compensation earnable does not vest upon employment. The cases do not deal with prospective changes to the pensionability of pay items.[5] *U.S. v. Larianoff* (1977) 431 U.S. 864, 879, involved a re-enlistment bonus promised at the time of re-enlistment, which was changed before the period of service began. Notably, the Court found the plaintiffs were entitled to the bonus promised them when they made the commitment to re-enlist. While acknowledging Congress could prospectively reduce employees' pay, the Court clarified that "it is quite a different matter . . . for Congress to deprive a service member of pay due for

[4] SOB, p. 42 (*citing Ventura, supra* 16 Cal.4th at pp.504-505.)
[5] SOB, p. 43.

services already performed, but still owing." (*Id.* at p. 879.) The court in *Taylor v. Gadsen* (11th Cir. 2014) 767 F.3d 1124 made the same distinction. (*Id.* at 1135 ("Earned compensation is contractually protected . . . anticipated compensation, by contrast, does not receive the same protection.")) As discussed previously, pension benefits are deferred compensation for work already performed. (*See, e.g. Miller, supra* 17 Cal.3d at p. 814.) Thus, *Larianoff* and *Taylor* contradict the State's position in this case.

Likewise, the State's claim that *Legislature v. Eu* only dealt with "prospective termination of all pension rights" lacks merit. (SOB, p.44.) Actually, *Eu* involved a proposition that eliminated the prospective accrual of service credit to be applied to the multiplier to determine employees' benefits. This Court concluded the prospective restriction on future accruals of service credits unlawfully impaired the formula determining future benefits. (*Legislature v. Eu* (1991) 54 Cal.3d 492, 530.) This impairment is analogous to PEPRA's reduction in the formula by excluding special compensation items from the formula that will be applied at retirement.

The State's tunneled focus on the lack of cases addressing exclusions of a specific pay item ignores the multitude of cases holding pension formulae cannot be changed for the worse once an employee begins working for a public agency. More likely, after *Eu,* such blanket reductions were not again contemplated. In *Betts* and *Allen I*, the Court held employees had a vested right to fluctuating pension benefits. Likewise, in *Kern,* this Court held employees cannot be divested

of their pensions. (*Kern*, *supra*, 29 Cal.2d at pp. 855-56.) Allowing pre-retirement modifications of compensation earnable would be on par with reducing the multiplier during employment of freezing service credit accumulation. PEPRA's clever attack on compensation earnable items is simply a back door impairment of the pension formula itself.

3. Petitioners Have a Vested Right to Pension Benefits Including the Disputed Pay Items

Petitioners earned a vested right to pension benefits including the disputed pay items pursuant to the court-approved *Ventura* Settlement, the explicit promises to include those pay items in compensation earnable, and Petitioners' continued employment with the County. Contrary to the State's assertion, the CERL did not prohibit ACERA from including those pay items in employees' compensation earnable.

a. Petitioners' Vested Right

The *Ventura* Settlement states that incentives for special duties will be included as compensation earnable. (28 CT 8096, 8099, 8108.) Under the terms of the *Ventura* Settlement, "leave paid as salary or lump sum(s) in lieu of paid leave" would be "compensation earnable," and such cash outs would be considered "final compensation," up to the amount of leave earnable during an employee's final compensation period, even if paid at retirement. (28 CT 8095-96, 8099-8100, 8108.) The Settlement was approved by a superior court, after a fairness hearing. (24 CT 8146-47.) The superior court did not just rubber stamp

this settlement. The court granted preliminary approval and provided an opportunity for class members to object, received four objections, reviewed those objections, then entered a judgment granting final approval and found the settlement fair, reasonable, and in the interest of the class. (24 CT 8146-47.)

Notably, the *Ventura* Settlement does not call for the inclusion of leave cash outs in excess of the amount earnable in ACERA members' final compensation periods. In fact, it expressly states such cash outs "shall be recognized as final compensation only to the extent that [they are] earned during the final compensation period." (23 CT 6770.) This distinguishes the leave cash outs in Alameda from those in Contra Costa and Merced – a fact the appellate court properly noted. (*ACDSA, supra,* 19 Cal.App.5th at p. 102, footnote 16 (noting ACERA cash outs are limited to the amount earned during the final compensation period, and opining "since such a cash-out is both earned and payable in the final compensation period, it is not terminal pay, even if a member elects to actually receive the cash after retirement.")) Thus, the first issue presented by the State, whether Government Code section 31461(b)(2) barred the inclusion of leave cash outs in excess of the amount earnable in an employee's final compensation period,[6] is inapplicable to the Alameda Petitioners.

The fact that ACERA assessed the cost of these items of compensation into the contribution rates is dispositive – these "*Ventura* benefits" were a contemplated component of the "pension contract" for which consideration was

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[6]SOB, p. 10.

exchanged. (*Pasadena Police Officers Assn. v. City of Pasadena* (1983) 147 Cal.App.3d 695, 707 ("By so agreeing, the retirees gave consideration for the city's promise to pay a fully adjustable pension (Civ. Code § 1605) and a contract was formed, a contract entitled to constitutional protection against impairment."); Civil Code § 1605 ("Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is good consideration for a promise."))

Moreover, ACERA advised members – including the Petitioners – that the disputed pay items would be included in their compensation earnable in its Members Handbook and other publications. (See, e.g., 24 CT 7106-7.) Communications directed at those who will rely on them are evidence of an implied contractual right. (*Kashmiri v. Regents of the University of California* (2007) 156 Cal.App.4th 809, 828 (University's promise on its website and in catalogues not to raise certain fees held to be an implied contact.)) Further, the conduct of providing a benefit – coupled with assurances that those benefits may be relied upon also gives rise to an enforceable implied or quasi contract. (*See Requa v. Regents of the University of California* (2012) 213 Cal.App.4th 213, 226-28 (Implied contract for retiree medical benefits may arise from history of provision of the benefits and publications assuring employees of such benefits.))

For these reasons, the Petitioners had a vested right to have the disputed pay items included in their pensionable income.

b. CERL Did Not Forbid ACERA From Including The Disputed Pay Items Before PEPRA's Enactment

The fact that terminal pay and the other disputed pay items were not expressly listed in the definition of compensation earnable before PEPRA's enactment does not defeat Petitioners' vested rights claim. Over the years, courts have consistently interpreted CERL as affording retirement boards discretion over what elements of pay to treat as compensation earnable in their pension formulae, so long as they included the pay items described in Government Code section 31461. Section 31461 specifically states "'compensation earnable' by a members means the average compensation as determined by the board." Most importantly, courts have correctly construed section 31461 as a floor, i.e. a list of items that *must* be included in compensation earnable, not a restriction on which items of compensation retirement boards can exercise their discretion to include.

In *Guelfi v. Marin County Employees' Retirement Assn.* (1983) 145 Cal.App.3d 297, members of the Marin retirement association tried to compel it to include overtime, education incentives, and uniform allowances in their pensionable compensation. They claimed the retirement board had a ministerial duty to include the items for compensation earnable, and the retirement association claimed CERL left it to the board to determine whether the pay items would be included. (*Id.* at p. 300.)

The court ultimately ruled in favor of the retirement association, stating the retirement board did not abuse its discretion by excluding the pay items. (*Id.* at p. 307.) Significantly, the court said its decision did not divest the retirement association of the authority to include pay items such as the education incentive in the definition of compensation earnable if it wished to:

> *Nothing in this opinion should be taken as barring either the inclusion* of the uniform allowance, educational incentive pay and overtime in the calculation of benefits should the Board decide to do so, or the right of a retired member to continue to receive benefits according to such calculations once established. Our conclusion is only that CERL does not *require* the inclusion of those items of remuneration for retirees. (*Guelfi, supra*, 145 Cal.App.3d at p. 307, footnote 6 (emphasis added.))

The *Guelfi* court ruled the CERL did not *prohibit* retirement associations from including the disputed pay items – it just did not *require* inclusion. *Guelfi* recognized the CERL set a floor for what types of pay must be included in compensation earnable – not a limit on retirement board's authority to include additional pay items if it so chooses.

Likewise, in *Howard Jarvis Taxpayers' Assn. v. Board of Supervisors of Los Angeles County* (1996) 41 Cal.App.4th 1363, the court recognized "the Board of Retirement is vested with the authority to determine which elements of compensation constitute 'compensation earnable' for purposes of inclusion or exclusion from the calculation of 'final compensation'" and retirement boards could include additional pay items beyond what the CERL required "should the

board decide to do so." (*Id.* at pp. 1373-34; *see also County of Marin Association of Firefighters v. Marin County Employees Retirement Association* (1994) 30 Cal.App.4th 1638, 1646, citing *Guelfi, supra* 145 Cal.App.3d at p. 305.) Tellingly, the SOB is bereft of any authority supporting its novel position that the CERL curtails the retirement board's discretion to define compensation earnable.

These rulings comport perfectly with the county retirement boards' vested authority to manage their retirement systems. Before PEPRA's enactment, the CERL did not restrict boards' discretion with respect to including additional pay items in compensation earnable. (Cal. Const. Art XVI, § 17(a) ("The retirement board shall also have sole and exclusive responsibility to administer the system"); Govt. Code § 31520 ("Management of the retirement system is vested in the board of retirement"); Govt. Code § 31461(a) (retirement boards shall determine "compensation earnable.")) Thus, the California Constitution, the CERL, and the cases interpreting them, recognize retirement boards' authority to administer their systems and determine what elements of pay will be treated as compensation earnable beyond the minimum items set forth in section 31461.

In *Ventura*, this Court acknowledged *Guelfi's* discussion of retirement boards' discretion to include items in compensation earnable beyond those enumerated in the CERL. Yet, the Court limited its disapproval of *Guelfi* to only the determination of what CERL *required* the retirement board to treat as compensation (*Ventura, supra* 16 Cal.4th at pp. 492, 505.) Thus, *Ventura*

confirmed the CERL restricts the retirement boards' authority to *exclude* certain items of compensation, not their authority to include additional items.

The CERL did not prohibit ACERA from including pay items in employees' compensation earnable beyond those expressly listed in Government Code section 31461. As such, the Court should reject the State's misconception that the pre-PEPRA definition of compensation earnable prohibited ACERA from including the disputed pay items in Petitioners' pension calculations. Petitioners have a vested right to have these pay items included in the compensation earnable.

c. The State Improperly Conflates On-Call and Standby Pay with Overtime Pay

Contrary to the State's argument, the appellate court correctly held on-call and standby pay were compensation earnable before PEPRA's enactment.[7] This Court should disregard the State's attempt to conflate them with overtime which has long been excluded. On-call and standby pay do not represent pay for hours worked, but rather additional compensation for working assignments which require on-call or standby availability. They do not even resemble overtime; when actually called to work outside their normal schedule, Petitioners earn overtime at the regular rate of pay, in addition to on-call pay. In fact, on-call pay must be included in the regular rate of pay. (29 C.F.R. 223.) Accordingly, the Court should reject the State's attempt to characterize these pay items as

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[7]*ACDSA*, *supra,* 19 Cal.App.4th at pp. 107-08.

overtime, and affirm the propriety of their pre-PEPRA inclusion in Petitioners' compensation earnable.

This distinction between overtime compensation and on-call or standby pay has been recognized nationally by the Department of Labor and federal courts under the Fair Labor Standards Act. Pursuant to 29 C.F.R. section 778.223, money paid to employees to remain on call, while not related to any specific hours of work, are nonetheless awarded as compensation for performing a duty involved in the employee's job – namely, the employee's willingness and commitment to work unscheduled hours if requested. The plain language of the regulation makes clear that all monies paid as compensation for either a general or specific work-related duty should be included in the regular rate. (*See also Acton v. City of Columbia, MO* (8th Cir. 2006) 436 F.3d 969, 977 (pay an employee receives for being on call is not allocable to any specific hours of work.)) Distinct from standby pay, time an employee is called back to work must be paid at the overtime rate.

Indeed, public agencies across the state have argued successfully that on-call duty is not "work." For example, in *Berry v. County of Sonoma* (1994) 30 F.3d 1174, the County of Sonoma successfully defended deputies' claims for overtime compensation based on their hours on call, claiming the time spent on call was not "hours worked," under the FLSA. The court in *Berry* held the on-call time was not compensable as overtime, because being on call was not "work."

Because on-call and standby pay are not compensation for hours worked, they are not comparable to "overtime," and may be included in employees' compensation earnable under the CERL.

B. PEPRA SUBSTANTIALLY IMPAIRED PETITIONERS' VESTED RIGHTS

PEPRA substantially impaired Petitioners' vested rights. An impairment of the financial terms of a contract is per se substantial. By changing the definition of compensation earnable, PEPRA reduced ACERA members' pension benefits by up to 15% from the exclusion of leave cash outs alone. The State cannot credibly deny this.

It is well established that an impairment of the financial terms of a contract is "substantial," for the purposes of Contracts Clause analysis. (*Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 308-09 ("*Sonoma*.")) The State claims the impairments are "modest" and that should end the inquiry. To the contrary, even so-called modest impairments of financial terms have consistently been deemed substantial.

In *Sonoma*, the Court found that a law prohibiting the distribution of certain funds to counties granting employees a cost of living adjustment above that granted to state employees was a substantial impairment. The respondents argued the impairment was not substantial, because in only affected a single pay item in employees' labor contracts. The Court rejected this argument, finding that an increase in wages is frequently the heart of employment contracts, and the

impairment was a "severe, permanent, and immediate change" in the employees' rights. (*Id.* at pp. 308-09.) Similarly, the Ninth Circuit held that even the relatively "modest" impairment from a lag in the timing of payroll checks was a substantial impairment. (*University of Hawai'i Professional Assembly v. Cayetano* (9th Cir. 1999) 183 F.3d 1096, 1104.)

The State's focus on whether a substantial benefit remains lacks merit. The main case on which the State relies, *Packer v. Board of Retirement* (1950) 35 Cal.2d 212, does not support the State's position.(SOB pp. 47-48.) In *Packer*, the challenged law allowed employees to opt for a lower pension benefit in exchange for a pension to be paid to the employee's surviving spouse or dependents, in an amount equal to half the employee's terminal wage. It eliminated a $50 flat benefit for survivors. The Court found the impairment was offset by other improvements to the pension benefits.

The State claims – without evidence – that PEPRA's exclusions from the definition of compensation earnable are relatively modest.[8] Common sense shows otherwise. Before PEPRA's enactment, the Alameda Petitioners were allowed to include leave cash outs in their pensionable income, in an amount equal to what they earned during their final compensation periods. For ACDSA members, this meant an amount equal to five weeks of vacation pay per year of their final compensation period was included in their pensionable income. PEPRA reduced the amount of vacation cash out includable in ACDSA members' pension to two

[8](SOB, p. 50.)

weeks per year, the amount they were able to cash out each year. Thus, PEPRA reduced ACDSA members' pensionable vacation cash out by over half.

C. PEPRA'S CHANGES TO EMPLOYEES' PENSION CALCULATIONS ARE NOT REASONABLE

To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in a disadvantage to employees must be accompanied by comparable new advantages. (*Allen II, supra,* 34 Cal.2d at p. 131; *Betts, supra,* 21 Cal.3d at p. 864; *Maffei v. Sacramento County Employees' Retirement System* (2002) 103 Cal.App.4th 993, 999-1000.) Notwithstanding the various nuances of the First Appellate District's efforts to erode the California Rule, this Court and other lower courts have consistently affirmed the California Rule since the Court's decision in *Allen I.* (*See Legislature v. Eu* (1991) 54 Cal.3d 492; *Protect Our Benefits v. City and County of San Francisco* (2015) 235 Cal.App.4th 619.)

1. To Be Sustained as Reasonable, Detrimental Changes Must Be Offset by New Advantages

While courts have oscillated between saying a detrimental change "must" or "should" be offset by new advantages, the cases applying the California Rule (with the exception of the First Appellate District's opinions, in *MAPE, CalFire* and this appeal) have used the terms interchangeably to indicate a legal obligation to offset pension reductions with new advantages. For example, in *Abbot v. City of Los Angeles* (1958) 50 Cal.2d 438, 452-53, this Court said any disadvantage

"should" be offset by comparable new advantages, then opined "the validity of attempted changes" to employees' pension rights depended on the advantage or disadvantage imposed on the employees. (*Id.*)

Likewise, in *Betts, supra,* this Court invalidated a statutory amendment that withdrew pension benefits promised during employment because no new comparable advantages offset the detriment the petitioner suffered. (*Id.,* at pp. 867-68.) This Court again invalidated a detrimental change to pension rights in *Olson v. Cory* (1980) 27 Cal.3d 532, "since no new comparable or offsetting benefit appeared in the modified plan." (*Id.*, at p. 541.) Indeed, in *Allen II* this Court emphasized that "disadvantage to employees, *must* be accompanied by comparable new advantages." (*Id.*, at p.120.)

Likewise, in *Legislature v. Eu, supra,* at p. 533, this Court affirmed that vested benefits cannot be detrimentally changed without a new advantage. At issue in that case was the State's attempt to change legislators' accumulation of pension benefits. According to the Court in *Eu,* once the State created a retirement plan for its legislators, it could not thereafter abandon the plan for incumbent/re-elected legislators "without providing them comparable new benefits." (*Ibid.*)

Over the last sixty years, the lower courts have followed the California Rule as well by requiring pension impairments to be offset by new advantages. (*See Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1137 (disadvantage to employees "must" be accompanied by comparable new

advantages); *Frank v. Board of Administration* (1976) 56 Cal.App.3d 236; *Lyon v. Flourny* (1969) 261 Cal.App.2d 774.) Indeed, before *MAPE* the First District appellate court itself acknowledged in *Protect Our Benefits, supra*, at pp. 628-29, that any modification resulting in a disadvantage to employees "must be accompanied by comparable new advantages."

a. Impairing Pension Benefits to Save Money is Per Se Unreasonable

The *ACDSA* decision is the latest in a string of cases from the First District seeking to turn public employees' deferred compensation into a new source of revenue for other spending priorities. While *ACDSA* recommended a less extreme break from the California Rule than *MAPE* and *CalFire*, it leads to the same result – public employers impairing contractual obligations to redirect revenues to performed spending priorities. The government's spending preferences cannot override the California Rule.

This Court and the U.S. Supreme Court have repeatedly said saving money is not an important public purpose justifying the impairment of vested rights. Saving money is not a valid purpose justifying contract impairment. (*U.S. Trust Co. v. New Jersey* (1977) 431 U.S. 1.) "A governmental entity can always find a use for extra money, especially when taxes do not have to be raised." (*Valdes v. Corey* (1983) 139 Cal.App.3d 773, 789-90.) The California Rule prevents the use of pension cuts as a tool for debt relief, because any savings must be allocated to the benefit of the pensioners in the form of a new advantage.

The State attempts to conceal its financial interest in upholding PEPRA to avoid strict scrutiny; in fact, it asks this Court to "defer" to its judgment. (SOB, pp. 50-57.) The Court should continue to apply strict scrutiny where, as is the case here, the State impairs its own financial obligations. (*See City of Torrance v. Workers Compensation Appeals Board* (1982) 32 Cal.3d 371, 386 ("We should observe stricter scrutiny because the contractual impairment is severe and the state is attempting to modify its own obligations"); *Interstate Marina Development Co. v. County of Los Angeles* (1984) 155 Cal.App.3d 435, 446 ("Where the government is part to the contract, the level of scrutiny is necessarily greater, because its self-interest is involved."); *Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1156 (rejecting claim that courts defer to legislative judgments, holding strict scrutiny applies to impairments of public contracts.))

The State has a clear financial interest in upholding PEPRA, as PEPRA substantially reduces its pension obligations to state employees, even if its application to ACERA members is ancillary. Moreover, the State has consistently cited the statewide pension system as a justification for the impairment. (Notably, the California Public Employees' Retirement System provides pension benefits to State and local public employees.) Finally, employing euphemisms to recast interests in financial savings as closing loopholes and protecting taxpayers cannot

avoid strict scrutiny. Meanwhile, Governor Brown's 2018-19 Budget projects a $9 billion surplus.[9]

The appellate court in the instant appeal, *MAPE*, and *CalFire* ignore the offsetting new advantage requirement entirely, asserting a net pension cut can be reasonable.

MAPE upheld a pension detriment with no offsetting advantage. While the appellate court in this case criticized *MAPE*'s reasonableness scrutiny, it bolstered *MAPE*'s evisceration of the California Rule. After defending a net diminution as "non-controversial," the appellate court attempted to excuse *MAPE*'s lack of scrutiny due to the "procedural nature" of the case. *(ACDSA, supra,* 19 Cal.App.5th at p. 831.)

In upholding PEPRA's changes to pension benefits, the *MAPE* court effectively reversed *Allen I* and its progeny. The appellate court tried parsing the language of *Allen I* to nullify its holding that changes to pensions resulting in a disadvantage must be offset by comparable new advantages. The appellate court hinged its argument on the fact that the *Allen I* Court said "changes in a pension plan which result in disadvantage to employees *should* be accompanied by comparable new advantages." (*MAPE, supra*, 2 Cal.App.5th at p. 697, *citing Allen I, supra,* 45 Cal.2d at p. 131.) According to the appellate court, the *Allen I*

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[9]Jerry Brown Approves $201 Billion California Budget, Says it Fulfills His Fiscal Pledge, Sacramento Bee, Adam Ashton, June 27, 2018, https://sacbee.com/news/politics-government/capitol-alert/article213922434.html)

Court's use of the word "should" meant the Court did not intend to require detrimental changes to be offset by comparable advantages.

The *MAPE* court's interpretation of *Allen I* conflicts with this Court's subsequent interpretation of the same case. In 1983, this Court cited *Allen I* as requiring detrimental changes to be offset by corresponding advantages to be sustained as reasonable. (*Allen II, supra*, 34 Cal.3d at p. 120.) In that case, this Court cited *Allen I* in support of its assertion that a modification resulting in a disadvantage to employees "*must* be accompanied by comparable new advantages." (*Id.*) The appellate court erred by presuming this Court didn't mean what it said in *Allen II.* Likewise, the appellate court disregarded this Court's ruling in *Legislature v. Eu, supra*, which held the State could not change legislators' pension plan without providing comparable new benefits. (*Legislature v. Eu* (1991) 54 Cal.3d 492, 533.)

The appellate court in this case largely adopted the *MAPE* court's position about the need for offsetting new advantages, going a step further to say it was "not controversial." (*ACDSA, supra*, 19 Cal.App.5th at p. 121.) To be sure, the appellate court disagreed with *MAPE's* focus on whether a reduction leaves a "reasonable" pension benefit intact, acknowledging that the "reasonable pension" is one subject only to reasonable modifications. (*Id.*, at p. 122.) Nevertheless, it affirmed that an offsetting new advantage was not absolutely required for a detrimental change to public employees' pension benefits to survive

constitutional scrutiny. (*Id.*, at p. 121.) In so doing, the court further eroded this Court's precedent, i.e. the California Rule.

b. The Impairment's Reasonableness Does Not Turn on Potential Savings

The State's reference to the financial burdens PEPRA sought to alleviate[10] do not support a finding that PEPRA's impairment of Petitioners' vested pension rights was reasonable. The State cannot just issue findings of a "compelling state interest in resurrecting the actuarial viability of public retirement systems and avoiding the draconian consequences that will occur if public pension liabilities remain underfunded" to justify impairing employees' vested rights, as the First District recently suggested in *McGlynn v. State* (2018) 21 Cal.App.5th 548, 565. While properly recognizing the analysis must consider each pension system individually, the *ACDSA* court's holding that "difficulty meeting its pension obligations" could be a legitimate public purpose for allowing a public entity to impair financial terms is error.

In this case, as in *MAPE*, the appellate court misguidedly focused its scrutiny on the "financial stability of the specific CERL system" and its difficulty meeting pension obligations, rather than the financial condition of the employer responsible for funding those obligations. (*ACDSA, supra*, 19 Cal.App.5th at p. 123.) Specifically, the court stated the proper analysis compares the impact on "specific" pension plan members with whether, without the changes, the pension plan would have difficulty meeting its obligations. However, the employer owes

[10] *See* SOB, p.12

the obligation to provide a County-funded pension benefit, not the individual CERL systems, which merely administer and service the pensions. (*In re City of Stockton, California* (Bankr. E.D. Cal. 2015) 526 B.R. 35, 60, aff'd in part, dismissed in part (B.A.P. 9th Cir. 2015) 542 B.R. 261.) "In the absence of a clear and unequivocal declaration in the pension provisions that benefits are payable only to the extent of available funds from specified contributions, the liability to pay promised pension benefits is a general obligation of the city." (*Bellus v. City of Eureka* (1968) 69 Cal.2d 336, 348-352; *see also Carman v. Alvord* (1982) 31 Cal.3d at pp. 318, 332-333.)

Thus, the appellate court should have based its reasonableness analysis on the justification – if any – for impairing financial terms of the County of Alameda's contractual obligations, not just reducing pension costs generally. As a threshold matter, a state-wide proscription reducing all 1937 Act counties' financial obligations is ill-suited to survive strict scrutiny, given the varied financial conditions of the public employers who must contribute to the CERL systems.

The appellate court merely redirected *MAPE's* misguided Contracts Clause analysis from focusing on the reasonableness of the post-impairment pension benefit to the reasonableness and necessity of the savings resulting from the impairment. This analysis suffers the same defect; financial savings are never legitimate or reasonable grounds for impairment of contract. "A State cannot refuse to meet its legitimate financial obligations simply because it would prefer

to spend the money to promote the public good rather than the private welfare of its creditors." (*U.S. Trust Co. v. New Jersey* (1977) 431 U.S. 1, 27.) "If a state could reduce its financial obligations whenever it wanted to spend money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *(University of Hawai'i Professional Assembly, supra*, 183 F.3d at p. 1107.) Moreover, "in the last thirty-five years, no Ninth Circuit or Supreme Court case has found a statute or ordinance necessary when the law in question altered a financial term of an agreement to which a state entity was a party." (*Southern California Gas v. City of Santa Ana* (C.D. Cal. 2002) 202 F.Supp.2d 1129, 1139.)

In *Sonoma County Organization of Public Employees v. County of Sonoma*, 23 Cal.3d 296, 302, 152 Cal.Rptr. 903 (1979), this Court invalidated legislation that "impair[ed] the obligation of contracts in violation of article 1, section 10, of the United States Constitution and article 1, section 9, of the California Constitution." *Sonoma* held a statute prohibiting payment of contractual cost of living increases due under local public employees' labor contracts unconstitutionally impaired their contractual rights, even though the statute was enacted in response to the fiscal crisis following the enactment of Proposition 13. (*Id.,* at pp. 313-317.)

Further, the constricted consideration of only the CERL system's funding does not account for the fact that the system's funding level is in significant part a product of the employer's contributions and discretionary actuarial assumptions

(e.g. the discount rate employed, the length of the amortization period, mortality rates.) The post-recession growth of the unfunded liability was caused in significant part by rapid and unexpected changes in actuarial assumptions. For example, CalPERS estimates its three year reduction of the discount rate alone will increase the normal cost as a percentage of payroll by 1 to 5 percent and a 30 to 40 percent increase in their current unfunded accrued liability payments.[11]

The court's reasonableness analysis fails to account for the employing agency's burden to *demonstrate* its impairments were a reasonable and necessary response in light of less drastic measures because "impairing the obligations of its own contracts" is not "on par with other policy alternatives." (*See Sonoma, supra*, 23 Cal.3d at p. 308; *U.S. Trust Co., supra*, 431 U.S. at pp. 30-31; see also *Opinion of the Justices (Furlough)* (1992) 135 N.H. 625, 635-636 ("The contract clause, if it is to mean anything, must prohibit the State from dishonoring its existing contractual obligations when other policy alternatives are available."))

Moreover, this tunneled analysis ignores the myriad of non-impairing alternative measures available to realize equivalent savings. The government can always cut discretionary expenditures or raise revenues, and it can reduce pension payments directly without impairing vested rights. Future pension obligations can be reduced by paying off or down unfunded actuarial liabilities with reserves or one-time revenue, such as the $9 billion California budget surplus. Reciprocity

[11] *See* CalPERS to Lower Discount Rate to Seven Percent Over the Next Three Years, https://www.calpers.ca.gov/page/newsroom/calpers-news/2016/calpers-lower-discount-rate

rules could be modified to prevent unexpected unfunded actuarial liabilities associated with job changes. Employers can reduce staffing levels or negotiate concessionary terms in labor contracts that have significant ancillary reductions in pension liabilities. (*In re City of Stockton, California* (B.A.P. 9th Cir. 2015) 542 B.R. 261, 279 (*holding* the plan of adjustment had a substantial indirect impact on pensions because "employee compensation on which pension benefits were calculated had been reduced", "reductions in numbers of City employees", "the contributions to retirement plans . . . was shifted back to the employees," and "pension benefits for new City employees had been reduced" in the labor contracts.))

In addition to violating the Contracts Clause, PEPRA's impairment of pension benefits improperly seeks to supplant Chapter 9 of the Bankruptcy Code as the appropriate mechanism by which a local government may impair financial terms of its contracts, under the supervision of a federal bankruptcy judge. "While the Contracts Clause is a key navigational star in the firmament of our Constitution and economic universe, it is subject to being eclipsed by the Bankruptcy Clause." (*In re City of Stockton*, Cal. (Bankr. E.D. Cal. 2012) 478 B.R. 8, 15.) "For a plan of adjustment to be confirmed as to a class of claims that has not accepted the plan, it must be "fair and equitable" and "not discriminate unfairly." (11 U.S.C. § 1129(b)(1.)) Bankruptcy laws exist to allow municipalities to do that which they cannot do outside of bankruptcy: impair contracts to save money. "While a state cannot make a law impairing the obligation of contract,

Congress can do so. The goal of the Bankruptcy Code is adjusting the debtor-creditor relationship." (*In re City of Stockton, Cal.*, *supra*, 478 B.R. at p. 16.) If resurrecting the "financial stability of the specific CERL system" or the overall financial condition of a County justified unilateral impairment of financial terms of their contracts, governments would have no reason to petition for bankruptcy – they could simply afford themselves contract modifications without judicial oversight or the inconvenience of treating creditors equally. Moreover, there is no meaningful limiting principal to the *MAPE* or *ACDSA* standard. Under these standards the government could unilaterally impair a municipal bond funding a stadium if the stadium failed to produce sufficient revenue to service the bond. The Court should affirm the longstanding principle that a government's desire to save money does not justify impairing its financial obligations.

D. EVEN IF SAVING MONEY COULD JUSTIFY AN IMPAIRMENT, THIS IMPAIRMENT WAS NOT REASONABLE OR NECESSARY

The State cannot credibly claim its statewide changes to the definition of compensation earnable were reasonable and necessary for an important public purpose – even if reducing Alameda County's pension obligations was a valid public purpose. PEPRA changed the definition of compensation earnable for *all* 1937 Act retirement associations – regardless of whether they were facing financial difficulties. Indeed, the State cites no evidence that it considered ACERA's financial condition, much less tailored PEPRA to address that condition. Moreover, PEPRA *permanently* impaired employees' vested rights,

thus rendering it *per se* unreasonable. Even if the State could impair pensions as a cost-saving measure, it cannot show its impairment of the Petitioners' pensions was reasonable and necessary.

1. Changing the Definition of Compensation Earnable Was Not Necessary

The State has not even argued that changing the definition of compensation earnable in Alameda County was necessary – instead, it cited supposed "statewide" funding issues. According to the court, the Governor was "faced with a statewide crisis involving the significant underfunding of public pension systems" when he signed PEPRA into law. (*ACDSA*, *supra* 19 Cal.App.5th at p. 61.) This assertion ignores the fact that 1937 Act retirement systems, like ACERA, are not statewide organizations, or controlled by the State.

1937 Act retirement systems, including ACERA, are independent of each other, administering pension benefits solely for employees of the County or other local entity they serve. (*See* Govt. Code § 31520.) Their funding levels and general financial conditions vary as well.

PEPRA is not tailored to address any financial concerns ACERA may have. There is no evidence the Legislature considered whether ACERA had any financial concerns. Indeed, while the State discussed supposed "spiking" in Alameda County in its petition for review, it cited no evidence showing ACERA is underfunded as a result of "spiking," or that changing the definition of compensation earnable was necessary to address any financial issue. In fact, ACERA's funding level was above 70% when PEPRA was enacted. Moreover,

ACERA has factored the cost of including the disputed pay items in members pension benefits ever since it executed the *Ventura* Settlement. (*See, e.g.,* 23 CT 6854 (Actuarial Experience Study.)) Thus, the State cannot claim its decision to redefine compensation earnable was "reasonable and necessary" to save money – even if saving money was a valid justification for impairing ACERA members' pensions.

2. Permanently Impairing Petitioners' Pension Rights Was Not Reasonable

PEPRA permanently altered employees' pension benefits. As such, it does not meet this Court's requirement that any impairments be temporary, with interest running during the period of deferment. (*See Olson v. Cory* (1980) 26 Cal.3d 532, 539 (to survive scrutiny, the enactment must (among other things) be designed to be a temporary measure, during which time the vested contract rights are not lost but merely deferred for a brief period, interest running during the temporary deferment); *see also Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 306.)

E. THE COURT CORRECTLY FOUND THAT PROMISSORY ESTOPPEL ENTITLES PETITIONERS TO THEIR PRE-PEPRA PENSION FORMULA

The appellate court correctly found that the Petitioners were entitled to have the disputed pay items included in their pension calculations based on the principles of estoppel. (*ACDSA, supra,* 19 Cal.App.5th 61, at p. 129.) Even if the Court were to determine that terminal pay cash outs were not pensionable before

PEPRA's enactment, estoppel entitles the Petitioners to have these cash outs treated as pensionable income.

1. Equitable Estoppel Is Warranted Here

As the State acknowledges, for estoppel to apply, four elements must be present: (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 on the conduct to his injury." (*City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210, 239.)[12] When a party asserts the doctrine of estoppel against a governmental entity, an additional element applies: "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." (*Id* at 240.) Finally, "estoppel cannot lie to contravene any statutory limitation on an agency's authority." (*Id.* at 243-44.)

In the context of public employee pensions, public policy favors protecting employee and pensioner rights and, therefore, the doctrine of equitable estoppel has been consistently applied in that context.

> The cases which have applied estoppel to the narrow area of public employee pensions, have

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[12]SOB, pp. 51-52.

> emphasized the unique importance of pension rights to an employee's well-being, and have frequently arisen after employees were included to accept and maintain employment on the basis of expectations fostered by widespread, long-continuing misrepresentations by their employers. In each of these instances the potential injustice to employees or their dependents clearly outweighed any adverse effects on established public policy." (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 28.)

As stated in *Crumpler*: "In a matter as important to the welfare of a public employee as his pension rights, the employing agency bears a more stringent duty to desist from giving misleading advice." (*Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567, 583; *see also Baillargeon v. Dept. of Water and Power* (1977) 69 Cal.App.3d 670, 680.))

There are many ways a public employer can create entitlement to pension benefits. One way is through collective bargaining. (*Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1182.) Retirement system boards can also enter into binding contracts, and an intent to make a contract is established where a governing board ratifies, adopts, or approves a contract. (*Chisom v. Bd. or Retirement of County of Fresno Employees' Retirement Assn.* (2013) 218 Cal.App.4th 400, 414.) Alameda County and ACERA did this when they executed the *Ventura* Settlement.

Promises to provide pension benefits can also be inferred from personnel policies (*Hunter v. Sparling* (1948) 87 Cal.App.2d 711, 721-22), and communications directed to those who will rely on them, are another way to

established implied vested rights. (*Kashmiri v. Regents of the University of California* (2007) 156 Cal.App.4th 809, 828-33.) Importantly here, the conduct of providing a benefit coupled with assurances that those benefits may be relied upon gives rise to an enforceable implied or quasi-contract. (*Requa v. Regents of the University of California* (2012) 213 Cal.App.4th 213, 226-28.)

ACERA and the County used each of these methods, and in keeping with the principles and the public policy recognizing the "unique importance of pension rights," the Supreme Court has recognized and affirmed the application of equitable estoppel when needed to preserve the pension bargain struck by public employers, and especially in cases where "employees were induced to accept and maintain employment on the basis of expectations fostered by widespread, long continuing misrepresentations." (*Longshore*, *supra* 25 Cal.3d at p. 28.)

The Petitioners offered substantial evidence of the formal adoption of an express contract between ACERA and the County – the *Ventura* Settlement – which obligated ACERA to include the disputed pay items in its members compensation earnable. Further, the record includes communications between ACERA and members describing – and specifically guaranteeing – these pay items will be include in ACERA members' pensionable income. Thus, even if the Court determines there is a technical legal deficiency that prevents establishing a vested contractual right, these facts are enough to warrant the application of equitable estoppel to preserve the pension bargain.

The *Ventura* Settlement, to which both the County and ACERA are parties, states "compensation earnable" will include "leave paid as salary or in lieu of paid leave and pay for hours ordinarily worked by the employee in the employee's permanent work assignment, mandated by the County of applicable [MOU.]" (23 CT 6770.) The Settlement provides 'vacation leave and/or sick leave paid as a lump sum shall be recognized as final compensation only to the extent that it is earned during the final compensation period and, in the case of a three-year final compensation period, shall be the annual average of the leave earned." (23 CT 6770.) It does not require members to cash that leave in service, instead of at retirement.

Again, the State misconstrues the nature and effect of ACERA's *Ventura* Settlement as tantamount to a strawman lawsuit scheme to circumvent the CERL.[13] To the contrary, ACERA's post-*Ventura* suit was a class action over a bona fide dispute, and the resulting settlement agreement was subject to court approval. The State's insinuation of fraud impugns the court's judgment of the ACERA *Ventura* Settlement.[14]

Similarly, the State's efforts to distinguish *Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, are unavailing. The State unpersuasively contends "misadvis[ing]" widows about their eligibility to receive a pension is materially different than misadvising pensioners about which items of special compensation

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[13]SOB, p. 55
[14]*See* SOB, p. 55

are includable in their pensions[15]. As the State cannot escape the holding of *Driscoll*, the Court should affirm the lower court's estoppel ruling.

The *Ventura* Settlement says it has a "binding effect" and applies to any "past, present and future" affiliates, boards, divisions, officers, representatives . .. assigns and partners" of the parties. (23 CT 6780.) The parties agreed the settlement was "fair and reasonable,"provided "predictability to both [ACERA's] members and the County," and thus could be relied on by Petitioners. Indeed, a superior court approved the *Ventura* Settlement as fair and reasonable.

The elements of an estoppel claim are satisfied in this case. The evidence showed ACERA members relied on and expected their pension benefits would include the disputed pay items, as a result of the *Ventura* Settlement, ACERA Board resolutions and policies, and ACERA's communications regarding the inclusion of those pay items in pension benefits.

2. Estoppel Does Not Contravene Statutory Limitations Here

The Court should reject the State's claim that estoppel would contravene statutory limitations in this case. Even if the Court finds the disputed pay items were not required to be included in pensionable income before PEPRA's enactment, ACERA had the authority to include them. Moreover, even if the Court finds the CERL did not grant the discretion to decide whether the disputed pay items were pensionable income, it should uphold the appellate court's ruling that ACERA was empowered to include the disputed pay items in pension

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[15]SOB, p. 53.

benefits pursuant to their plenary authority to administer their retirement system.

The State's estoppel argument is infused with the same fundamental error as its vesting analysis; it misconstrues the CERL's mandates for includability as eliminating ACERA's constitutional authority to provide additional compensation earnable.[16] As discussed in the appellate court's opinion, ACERA's Board has plenary authority over the administration of the retirement system. (*ACDSA, supra* 19 Cal.App.5th at p. 125 (*citing* Govt. Code 31520 (giving the retirement system board authority to manage the retirement system); Cal Const. Art. XVI, § 17 (retirement board has "plenary authority and fiduciary responsibility for investment of moneys and administration of the system); *id.,* § 17(a) (retirement board has "sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries); *id.*, § 17(b) (members of the retirement board shall discharge their duties to defray "reasonable expenses of administering the system.")

The State's objections to the appellate court's uncontroversial interpretation of the relevant authority lack merit[17].

Allowing ACERA to settle disputes over whether forms of pay are pensionable will not sanction fraud. The State claims that, if ACERA had the authority to "misrepresent the law" to resolve litigation, it could make "widespread and long-continuing" misrepresentations to members, and violate the

[16]SOB, pp. 54-55.
[17]*See,* SOB, p. 57.

trust placed in the board.[18]" However, it offers no facts supporting this assertion. Moreover, it ignores the fact that ACERA subjected this *Ventura* Settlement Agreement to court approval.

Likewise, allowing ACERA to settle disputes over whether pay items are pensionable would not "usurp the Legislature's exclusive authority to define public employee pension benefits under CERL.[19]" As discussed previously, ACERA had the authority to include items in members' pension benefits regardless of whether they were *required* to include them under the CERL.

Moreover, the cases the State relies on did not deal with the issue of whether estoppel lies to enforce a settlement agreement between a retirement system and its member's employers. *City of San Diego v. Hass* (2012) 207 Cal.App.4th 472, deals with whether memoranda of understanding between the City and its employee organizations effectively terminated certain pension benefits for new hires. The retirement system claimed the benefits were not effectively terminated, and the City sued. The court ruled in the City's favor, finding the memoranda of understanding terminated the benefits before the affected employees were hired, thus precluding any claim they could make for them. The court did not discuss whether the employees could nevertheless receive the benefits under a theory of promissory estoppel.

In *Longshore*, *supra*, the issue was whether estoppel was available to require an employer to pay the plaintiff for unused compensatory time off that

[18]SOB, p. 55.
[19]SOB, p. 55.

had expired pursuant to the employer's ordinances about time off. In ruling that the elements for estoppel were not satisfied, the court actually distinguished the case from cases involving estoppel in pension cases. The court ruled that the cases applying estoppel in public employee pensions had emphasized "the unique importance of pension rights to an employee's well-being, and have frequently arisen after employees were induced to accept and maintain employment on the basis of expectations fostered by widespread, long-continuing misrepresentations by their employers . . . Here, in contrast, compensation rather than pension rights is involved." The court went on to explain that applying estoppel in the case would violate a constitutional prohibition on retroactively expanding compensation. (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 29.)

Oden v. Bd. of Administration (1994) 23 Cal.App.4th 194, which the State also cites, dealt with neither a settlement agreement nor claims of estoppel. (SOB, p. 55.) In *Oden*, the issue was whether employer paid member contributions were pensionable compensation. The court held they were not, regardless of how the payments were described in collective bargaining agreements between local agencies and their members. The case did not involve a settlement agreement or address whether PERS had authority to enter into a settlement agreement with the affected agencies, allowing for the inclusion of the disputed payments in members' pension benefits.

Finally, *Summit Media LLC v. City of Los Angeles* (2012) 211 Cal.App.4th 921, which the State cites as authority for the position that "any portion of a

settlement agreement that violates state law has hitherto been held valid" has nothing to do with public employee pensions or estoppel. (SOB, p. 56.) At issue in that case was a settlement agreement between the City of Los Angeles and two billboard companies, which exempted the companies from a local law banning updates to existing billboards, which another company sued to invalidate. The court unsurprisingly held the City could not enter into a settlement agreement to exempt two companies from the ban, while enforcing it against all other companies. The facts in that case are very different than those here, where the Petitioners are asserting the doctrine of equitable estoppel to require ACERA to enforce a settlement agreement that resolved a dispute over the pensionability of certain pay items for all affected members.

The State's position would prevent retirement systems from ever resolving disputes over whether pay items are pensionable with anything short of a court judgment. Thus, retirement boards would be forced to fully litigate every dispute over such issues – regardless of the amount in controversy or the relative merits of the any particular dispute. Such an obligation, if it existed, would likely saddle retirement system boards with millions of dollars in additional legal expenses, as boards would be forced to litigate cases even if the inclusion of a pay item cost less than the cost of litigating whether it was includable – no member would be able to rely on a settlement with the board, as it would always be subject to being overturned later.

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3. Enforcing ACERA's Promise Will Not Saddle Taxpayers with Unanticipated Costs

The State's claim that "the estoppel order imposes hundreds of millions of dollars of additional pension liability on county governments" lacks merit. (*See* SOB, p. 57.) As discussed previously, ACERA members and their employers have already paid for these benefits, the costs of which were included in ACERA's actuarial assumptions for over a decade, and factored into the contribution rates ACERA charged. Allowing ACERA to provide members the pension benefits it promised them, which the members and their employers already paid for, would not saddle Alameda County with any additional pension liability. It would merely ensure ACERA's members receive what they were promised.

The interests of justice favor the employees in this case, not the State. If the Court refuses to enforce the promises ACERA and the County made to include the disputed pay items in pension benefits, thousands of employees will be denied pension benefits they paid for. This will grant ACERA an unexpected windfall in reduced pension obligations despite the fact it received years worth of contributions from its members and their employers to pre-fund the inclusion of the pay items. The Court should affirm the appellate court's estoppel ruling to ensure the Petitioners receive the benefits they paid for.

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V

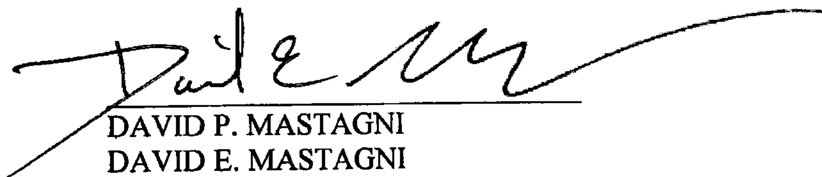
CONCLUSION

For the forgoing reasons, Petitioners respectfully ask the Court to reverse the appellate court's decision.

Respectfully Submitted:

Dated: July 19, 2018

MASTAGNI HOLSTEDT, APC



DAVID P. MASTAGNI
DAVID E. MASTAGNI
ISAAC S. STEVENS
Attorneys for Petitioners and Appellants,
ALAMEDA COUNTY DEPUTY SHERIFFS' ASSN., JON RUDOLPH, ROCKY MEDEIROS, JAMES D. NELSON, and DARLENE HORNSBY

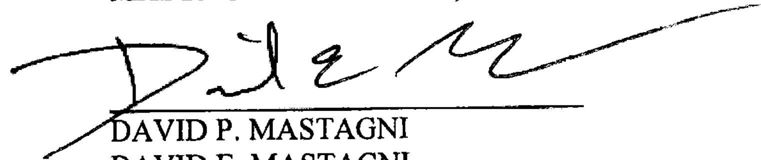
CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I certify that this brief consists of 13,595 words, as counted by the computer program used to generate the document.

Respectfully Submitted:

Dated: July 19, 2018

MASTAGNI HOLSTEDT, APC



DAVID P. MASTAGNI
DAVID E. MASTAGNI
ISAAC S. STEVENS
Attorneys for Petitioners and Appellants, ALAMEDA COUNTY DEPUTY SHERIFFS' ASSN., JON RUDOLPH, ROCKY MEDEIROS, JAMES D. NELSON, and DARLENE HORNSBY

PROOF OF SERVICE

SHORT TITLE OF CASE: *ACDSA, et al. v. ACERA, et al.*
SUPREME COURT CASE NO.: S247095
COURT OF APPEAL CASE NO.: A141913

I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the above-entitled action. My business address is 1912 I Street, Sacramento, California 95811-3151. On the date below, I served the following document(s):

- **PETITIONERS' OPENING BRIEF ON THE MERITS**

Addressed as follows:

SEE ATTACHED SERVICE LIST

X BY ELECTRONIC SERVICE: I certify that all participants in the case are registered TRUEFILING users and that service will be provided this date by TRUEFILING to parties' attorneys of record, pursuant to Local Rule 9(a);

And,

Clerk of the Court of Appeal First District Court of Appeal 350 McAllister Street San Francisco, CA 94102	Clerk of the Superior Court Contra Costa County Superior Court 725 Court Street, Room 103 Martinez, CA 94553
Clerk of the Superior Court Merced County Superior Court 2260 N Street Merced, CA 95340-3744	Clerk of the Superior Court Alameda County Superior Court René C. Davidson Courthouse 1225 Fallon Street Oakland, California 94612

X BY U.S. MAIL. By placing a true copy thereof enclosed in a sealed envelope(s) addressed as above, and placing each for collection and mailing today, following ordinary business practices. 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 United States Mail, with postage thereon fully prepaid at Sacramento, California in the ordinary course of business.

I declare under penalty of perjury, under the laws of the state of California, that the foregoing is true and correct and executed on **July 19, 2018**, at Sacramento, California.

PATRICK R. BARBIERI

SERVICE LIST	
Party	**Attorney**
Alameda County Deputy Sheriff's Association, Jon Rudolph, James D. Nelson, Darlene Hornsby, Robert Brock, Rocky Medeiros : Plaintiffs and Appellants	David E. Mastagni Isaac Sean Stevens Mastagni Holstedt, APC 1912 I Street Sacramento, CA 95811 davidm@mastagni.com istevens@mastagni.com
Alameda County Employees' Retirement Assn. and Bd. of the Alameda County Employees Retirement Assn. : Defendant and Respondent	Harvey Lewis Leiderman Reed Smith 101 Second Street - Suite 1800 San Francisco, CA 94105-3659 hleiderman@reedsmith.com Robert Lee Gaumer Alameda City Employees' Retirement Association 475 14th Street, Suite 1000 Oakland, CA 94612-1916 rgaumer@acera.org
Service Employees International Union, Local 1021, Amy Dooha, Building Trades Council of Alameda County, Mike Harteau : Interveners and Appellants	Anne I. Yen Weinberg, Roger & Rosenfeld 1001 Marina Village Parkway - Suite 200 Alameda, CA 94501-1091 ayen@unioncounsel.net
Alameda County Management Employees' Association, Kurt Von Savoye, International Federation of Professional and Technical Engineers, Local 21 : Interveners and Appellants	Arthur Wei-Wei Liou Leonard Carder 1330 Broadway - Suite 1450 Oakland, CA 94612 aliou@leonardcarder.com
Teamsters Local 856, Hasani Tabari, Daniel Lister : Interveners and Appellants	Katwyn T. DeLaRosa Bennett & Sharpe, Inc. 2444 Main Street, Suite 110 Fresno, CA 93721 ktdelarosa@bennettsharpe.com Robert Bonsall Beeson Tayer & Bodine 483 Ninth Street, Suite 200 Oakland, CA 94607 rbonsall@beesontayer.com

Contra Costa County Deputy Sheriff's Association, Ken Westermann, Sean Fawell : Plaintiff and Appellant	Rockne Anthony Lucia Timothy Keith Talbot Rains Lucia Stern St. Phalle & Silver PC 2300 Contra Costa Blvd., Suite 500 Pleasant Hill, CA 94523 rlucia@rlslawyers.com ttalbot@rlslawyers.com
United Professional Fire Fighters of Contra Costa County, Local 1230 : Plaintiff and Appellant	W. David Holsberry McCracken, Stemerman & Holsberry, LLP 595 Market Street, Suite 800 San Francisco, CA 94105 wdh@dcbsf.com
Physicians' and Dentists' Organization of Contra Costa : Intervener and Appellant	William Ira Corman Bogatin Corman & Gold 1330 Broadway, Suite 1203 Oakland, CA 94612 wcorman@bcgattorneys.com
Contra Costa County Employees' Retirement Association, Board of Retirement of the Contra Costa County Employees' Retirement Association : Defendants and Respondents	Harvey Lewis Leiderman Reed Smith 101 Second Street - Suite 1800 San Francisco, CA 94105-3659 hleiderman@reedsmith.com
International Association of Fire Fighters Local 3546, Michael Mohun, David Atkins, Contra Costa County Deputy District Attorneys Association, Paul Graves, Gary Koppel : Interveners and Appellants	Christopher E. Platten Wylie, McBride, Platten & Renner 2125 Canoas Garden Avenue - Suite 120 San Jose, CA 95125 cplatten@wmprlaw.com
Probation Peace Officers Association of Contra Costa County : Intervener and Appellant	Paul Quentin Goyette Goyette & Associates 2366 Gold Meadow Way - Suite 200 Gold River, CA 95670 goyettep@goyette-assoc.com Rockne Anthony Lucia Rains, Lucia & Wilinson 2300 Contra Costa Blvd., Suite 230 Pleasant Hill, CA 94523 rlucia@rlslawyers.com
Service Employees International Union, Local 1021, Peter Barta : Interveners and Appellants	Vincent A. Harrington, Jr. Weinberg Roger & Rosenfeld 1001 Marina Village Parkway - Suite 200 Alameda, CA 94501-1091

	vharrington@unioncounsel.net
Public Employees Union, Local No. 1, International Federation of Professional and Technical Engineers, Local 21, David M. Rolley, Peter J. Ellis, Susan Guest : Interveners and Appellants	Arthur Wei-Wei Liou Leonard Carder 1330 Broadway - Suite 1450 Oakland, CA 94612 aliou@leonardcarder.com
Locals 512 and 2700 of the American Federation of State, County and Municipal Employees AFL-CIO : Intervener and Appellant	Robert Bonsall Beeson Tayer & Bodine 483 Ninth Street, Suite 200 Oakland, CA 94607 rbonsall@beesontayer.com
United Chief Officers Association : Intervener and Appellant	Robert James Bezemek 1611 Telegraph Avenue - Suite 936 Oakland, CA 94612 rjbezemek@bezemeklaw.com
Alameda County Medical Center : Interested Entity/Party Wright Lassiter, III, CEO Alameda County Medical Center, 1411 East 31st St. Oakland, CA 94602 wlassiter@acmedctr.com	Pro Per
First 5, Alameda County Children & Families Commission : Intervener and Appellant Mark Friedman, CEO First 5 1115 Atlantic Avenue Alameda, CA 94501 mark.friedman@first5ecc.org	Pro Per
Housing Authority of County of Alameda : Intervener and Appellant	Brian Edward Washington Office of County Counsel 1221 Oak Street - Suite 450 Oakland, CA 94612-4296 brian.washington@acgov.org
Livermore Area Recreation and Park District : Intervener and Appellant	Rod A. Attebery Neumiller & Beardslee 509 West Weber Avenue, 5th Floor P. O. Box 20 Stockton, CA 95201-3020 rattebery@neumiller.com
Alameda County Office of Education : Intervener and Appellant	Pro Per

Sheila Jordan, Superintendent of Schools 313 W. Winton Avenue Hayward, CA 94544 sjordan@acoe.org	
Superior Court of California : Intervener and Appellant Patricia Sweeten, Court Executive Officer 1225 Fallon Stret, Room 209 Oakland, CA 94612 psweeten@alameda.courts.ca.gov	Pro Per
County of Alameda : Intervener and Appellant	Andrea Lynne Weddle Office of the County Counsel Alameda County 1221 Oak Street, Suite 450 Oakland, CA 94612 andrea.weddle@acgov.org
State of California, Dominic Ciotola : Interveners, Appellants and Respondents	Anthony Paul O'Brien Office of the Attorney General 1300 "I" Street - Suite 125 Sacramento, CA 95814 anthony.obrien@doj.ca.gov Rei R. Onishi Office of Governor Edmund G. Brown Jr. State Capitol, Suite 1173 Sacramento, CA 95814 rei.onishi@gov.ca.gov
Rodeo-Hercules Fire Protection District : Intervener and Appellant	Richard Delmendo PioRoda Meyers, Nave, Riback, Silver & Wilson 555 12th Street, Suite 1500 Oakland, CA 94607 rpioroda@meyersnave.com
Bethel Island Municipal Improvement District : Intervener and Appellant	David Jeffry Larsen Law Office of David J. Larsen 5179 Lone Tree Way Antioch, CA 94531 dlarsen@dlarsenlaw.com
Contra Costa County, Contra Costa County Fire Protection District, Housing Authority of the County of Contra Costa, In-Home Supportive Services Public Authority, Contra Costa Local Agency Formation Commission, Children and Families First Commission :	Thomas Lawrence Geiger Contra Costa County Counsel 651 Pine Street, 9th Floor Martinez, CA 94553-1229 thomas.geiger@cc.cccounty.us

Intervener and Appellant	
Central Contra Costa Sanitary District : Real Party in Interest and Respondent	Linda M. Ross Renne Public Law Group 350 Sansome Street, Suite 300 San Francisco, CA 94104 lross@publiclawgroup.com Kenton Alm Meyers, Nave, Riback, Silver & Wilson 555 12th Street, Suite 1500 Oakland, CA 94607 kalm@meyersnave.com
Superior Court of California County of Contra Costa : Intervener and Appellant	Lyle R. Nishimi Judicial Council of California 455 Golden Gate Avenue San Francisco, CA 94102 lyle.nishimi@jud.ca.gov
Attorneys for East Contra Costa County Fire Protection District : Intervener and Appellant	Diane Marie Hanson Hanson Bridgett LLP 425 Market Street, 26th Floor San Francisco, CA 94105 domalley@hansonbridgett.com
Byron, Brentwood, Knightsen Union Cemetery District : Intervener and Appellant Barbara Fee P.O. Box 551 Brentwood, CA 94513 ucemetery@yahoo.com	Pro Per
Rodeo Sanitary District : Intervener and Appellant	Carl P. Nelson Bold, Polisner, Maddow, Nelson & Judson, PC 500 Ygnacio Valley Road, Suite 325 Walnut Creek, CA 94596-3840 cpanelson@bpmnj.com
San Ramon Valley Fire Protection District : Intervener and Appellant Robert Leete 1500 Bollinger Canyon Road San Ramon, CA 94583	William Dale Ross 400 Lambert Ave. Palo Alto, CA 94306-2219 wross@lawross.com
Contra Costa Mosquito & Vector Control District : Intervener and Appellant Craig Downs	Martin Thomas Snyder Snyder, Cornelius & Hunter 399 Taylor Blvd., Suite 102 Pleasant Hill, CA 94523

155 Mason Circle Concord, CA 94520	mtsnyder@schlawfirm.net
Moraga/Orinda Fire Protection District : Intervener and Appellant Sue Casey 33 Orinda Way Orinda, CA 94563 scasey@mofd.org	Pro Per
American Federation of State, County and Municipal Employees Local 2703, AFL-CIO, Jeffrey Miller, Sandra Gonzalez-Diaz, Merced County Sheriff's Assoc., an Affiliate of International Brotherhood of Teamsters, Local 856: Plaintiffs , Appellants and Respondents	Barry Jay Bennett Katwyn T. DeLaRosa Bennett, Sharpe, Delarosa, Bennett & Licalsi 2444 Main Street, Suite 150 Fresno, CA 93721 ktdelarosa@bennettsharpe.com
Merced County Employees' Retirement Association, Board of Retirement of the Merced County Employees' Retirement Association : Defendant and Respondent	Ashley K. Dunning Nossaman LLP 50 California Street 34th Floor San Francisco, CA 94111 adunning@nossaman.com