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 a Decision 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)

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INTRODUCTION

This Court long ago established that pension benefits are an "integral part" of the contract between public employees and their employers, and are protected against impairment by the Contract Clause. (*Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852-853; Cal. Const., art. I, § 9.) "[T]he right to a pension is . . . clearly 'favored' by the law," and pension legislation "must be liberally construed and applied to the end that the beneficent results of such legislation may be achieved." (*Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374, 390, quotation marks and citations omitted.) Reductions in pension benefits for existing employees are unconstitutional unless the changes "bear some material relation to the theory of a pension system and its successful operation" and disadvantages to employees are "accompanied by comparable new advantages." (*Allen v. City of Long Beach.* (1955) 45 Cal.2d 128, 131 (*Allen I*).)

This case applies these principles to the County Employees Retirement Law of 1937 (CERL), Government Code section 31450 *et seq.*, and to court-approved settlements entered into after *Ventura County Deputy Sheriffs' Association v. Board of Retirement* (1997) 16 Cal.4th 483 (*Ventura*). *Ventura* greatly expanded the kind of remuneration CERL retirement systems were required to include as pensionable, and pursuant to

Ventura, the CERL systems in Alameda, Contra Costa, and Merced Counties agreed to settlements that identified specific types of payments that would be considered "compensation earnable" in pension benefit calculations. (See Gov. Code, § 31461.) For more than a decade, they provided pensions according to those settlements and related policies, and communicated the terms of those benefits to thousands of employees and retirees.

These payments were included in pension formulas consistent with CERL, and they are an integral part of employees' vested pension benefits. But the Public Employee Pension Reform Act of 2013 (PEPRA) and the related Assembly Bill 197 (AB 197), Statutes 2012, chapter 296, and chapter 297, narrowed the definition of "compensation earnable," thereby imposing new restrictions on what pay could be considered pensionable.[1] Because this reduced pension benefits for legacy employees in the three counties—those employed before AB 197 went into effect—and since no offsetting advantage was provided, nor any showing made of a material relationship or the necessity of these changes for successful operation of the

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[1] AB 197 was a follow-up bill to PEPRA, amending slightly changes already included in PEPRA. For convenience, "AB 197" is used throughout to refer to the cumulative changes made by PEPRA and AB 197 to CERL.

pension systems, the changes made by AB 197 impaired vested pension rights.

As the Court of Appeal found, AB 197 changed CERL significantly. For the first time, Government Code section 31461 excluded from "compensation earnable" compensation deemed to be a retirement "enhancement," certain payments for unused vacation or other leave, payments for services rendered "outside of normal working hours," and most payments made at termination of employment. (Compare former Gov. Code, § 31461 with current Gov. Code, § 31461, as amended by Stats. 2012, ch. 297, § 2.) Although other pension statutes such as the Public Employees' Retirement Law (PERL), Government Code section 20000 *et seq.*, had been amended repeatedly over the years to add these types of restrictions, until AB 197, the Legislature had never imported similar exclusions into CERL, making them entirely new to that statute.

The Court of Appeal largely reached the correct result. While it misunderstood the scope of the "comparable advantage" test set forth in *Allen I* and other cases, it was fundamentally correct that AB 197 reduced pension benefits by excluding on-call payments and supposed pension "enhancements." (*Alameda County Deputy Sheriff's Assn. v. Alameda County Employees' Retirement Assn.* (2018) 19 Cal.App.5th 61, 110, 113 (*Alameda*).) In fact, because this Court's precedent clearly requires that a

comparable advantage be provided before pension benefits may be reduced, there was no need for the Court of Appeal to remand for further proceedings, since employees received no comparable advantage here.

The court was also right to find that, properly understood, AB 197 did not restrict the amount of leave that could be paid out in service and be considered pensionable—but even if that is incorrect, a new restriction on such leave cash-outs would be an impairment of vested pension rights because it would limit benefits without an offsetting advantage.

Although the Court of Appeal incorrectly held that employees did not have a vested right to inclusion of vacation and other leave paid out at retirement—so-called "terminal pay"—it properly applied the doctrine of equitable estoppel to ensure that employees and retirees received the benefit promised to them. Ultimately, under either theory—vested rights or estoppel—existing employees have a right to continued inclusion of these payments in pension benefits.

In short, the decision should be affirmed, with the additional application of the proper test for impairment. The lower court's decision preserves pension benefits for thousands of retirees and employees, rather than recalculating and clawing back benefits as the State of California and Central Contra Costa Sanitary District's (Sanitary District) positions would require. The public servants represented by the union petitioners here

(Unions) long ago earned a vested right to their pensions by accepting and continuing in public employment, and the Unions therefore ask that the Court uphold the benefits promised to them.

STATEMENT OF FACTS

The Court of Appeal sets out in considerable detail the facts of this dispute and the history of CERL. (*Alameda*, *supra*, 19 Cal.App.5th at pp. 76-89.) In brief, AB 197 amended Government Code section 31461 by excluding certain pay from the definition of "compensation earnable." This significantly reduced the value of pension benefits in the three counties, contrary to settlements and policies put in place after *Ventura*.

I. THE CALCULATION OF COMPENSATION EARNABLE UNDER CERL

CERL governs county retirement plans in the three counties involved in this litigation, among 20 counties in this state. (*Alameda*, *supra*, 19 Cal.App.5th at p. 76.) Each plan is administered by a retirement board that separately manages the retirement system. (*Ibid.*, citing Gov. Code, § 31520.)

Pension benefits for members of CERL retirement systems are based on (1) the statutory formula, (2) the member's age at retirement, (3) the member's years of credited service, and (4) the member's "final compensation." (Gov. Code, §§ 31664, 31664.1, 31664.2, 31676.01-31676.19.)

Calculating "final compensation" is a three-step process that requires (1) determining "compensation" under Government Code section 31460; (2) determining what "compensation" is "compensation earnable" under Government Code section 31461; and (3) application of the definition of "final compensation," based on Government Code sections 31462 or 31462.1. (*Ventura, supra*, 16 Cal.4th at pp. 493-494.)

CERL 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 [it] does not include the monetary value of board, lodging, fuel, laundry, or other advantages furnished to a member." (Gov. Code, § 31460.) This generally means that any cash payments to a member are "compensation." (See *Ventura, supra*, 16 Cal.4th at pp. 497-499.)

Prior to the passage of AB 197, "compensation earnable" was defined as:

> [T]he 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. The computation for any absence shall be based on the compensation of the position held by the member at the beginning of the absence. Compensation, as defined in Section 31460, that has been deferred shall be deemed "compensation earnable" when earned, rather than when paid.

(Former Gov. Code, § 31461, as enacted by Stats. 1947, ch. 424, § 1 p. 1264, and as amended by Stats. 1993, ch. 396, § 3, p. 2238, and Stats. 1995, ch. 558, § 1, p. 4358; see also *Ventura*, *supra*, 16 Cal.4th at p. 491.)

"Final compensation" is "the average annual compensation earnable by a member during any year elected by a member at or before the time he files an application for retirement, or, if he fails to elect, during the year immediately preceding his retirement," or, if applicable, the average annual compensation during the three-year period elected by the member or immediately preceding retirement. (Gov. Code, §§ 31462.1, subd. (a), 31462, subd. (a); see also *Ventura*, *supra*, 16 Cal.4th at p. 491.) Thus, to determine "final compensation," the retirement system must look at "compensation earnable" and calculate what the "final compensation" is under Government Code sections 31462 or 31462.1, based on the applicable time period used to calculate pension benefits. (*Ventura*, *supra*, 16 Cal.4th at pp. 490-491; see also *Guelfi v. Marin County Employees' Retirement Association* (1983) 145 Cal.App.3d 297, 303.)

II. THE *VENTURA* DECISION

This Court's decision in *Ventura* clarified how pension benefits should be calculated under CERL. In *Ventura* the Court found that, except for overtime, all cash payments that are considered "compensation" under Government Code section 31460, must be included as "compensation

earnable," even if those payments are "not earned by all employees in the same grade or class." (*Ventura, supra*, 16 Cal.4th at p. 487.) As such, pay items like bilingual pay, uniform allowances, educational incentive pay, on-call pay for meal periods, pay in lieu of taking accrued leave, holiday pay, motorcycle bonuses, field training officer bonuses, and longevity bonuses, were required components of an employee's pension benefits. (*Ventura, supra*, 16 Cal.4th at pp. 487-489, fns. 2-13.)

In so finding, *Ventura* disapproved of the conclusion in *Guelfi v. Marin County Employees' Retirement Association* (1983) 145 Cal.App.3d 297, that payments must be received by all employees "in the same grade or class of position" in order to be "compensation earnable." (*Alameda, supra*, 19 Cal.App.5th at p. 78, citing *Guelfi, supra*, 145 Cal.App.3d at pp. 306-307.) Because retirement systems had previously followed *Guelfi*'s much more narrow analysis of "compensation earnable," *Ventura* dramatically altered the landscape regarding what payments were pensionable under CERL. Many categories of pay, previously excluded from pension calculations under *Guelfi*, were now required to be considered "compensation earnable." As a result, numerous lawsuits concerning *Ventura* were filed and eventually coordinated in *In re Retirement Cases* (2003) 110 Cal.App.4th 426. In some counties—including the three counties here—the retirement systems reached individual, court-approved

settlement agreements with employees and retirees prior to the decision in *In re Retirement Cases*. (*Alameda, supra*, 19 Cal.App.5th at pp. 81.)

III. POST-*VENTURA* SETTLEMENT AGREEMENTS

The three retirement systems involved in this litigation enacted settlement agreements with employees and retirees to establish definitions or categories of pay that would be included as "compensation earnable." (*Alameda, supra*, 19 Cal.App.5th at pp. 82-83.)

A. Alameda County

In June 1999, Alameda County, the Alameda County Employees' Retirement Association (ACERA), and several employee organizations entered into a court-approved settlement agreement "to comply with the Ventura decision" that applied to all retired and active members on or after October 1, 1997. (23 CT 6773; *Alameda, supra*, 19 Cal.App.5th at p. 82.) The ACERA *Ventura* Settlement adopted its own definition of compensation earnable to be used when calculating final compensation. This included "all items of remuneration paid to County and district employees in cash for services rendered or special skills" such as "pay premiums that recognize special duties, qualifications, or skills" and "other leave paid as salary or lump sum(s) in lieu of paid leave." (23 CT 6770; 28 CT 8095-8096, 8099-8100, 8103-8104; *Alameda, supra*, 19 Cal.App.5th at pp. 82-83.)

The settlement agreement included cashed-out vacation and other leave as pensionable, with the limitation that it would be "final compensation" "only to the extent that [leave] 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; 28 CT 8095-8096, 8099-8100, 8103-8104; *Alameda*, *supra*, 19 Cal.App.5th at p. 83.)

The ACERA *Ventura* Settlement did not require members to cash out vacation and sick leave prior to separating from employment for the payments to be pensionable. Rather, the members in Alameda County were permitted to receive the pay when they retired and have the pay included in their final compensation. (See 1 CT 158; 24 CT 7138.)

B. Contra Costa County

In 1999, Contra Costa County, the Contra Costa County Employees' Retirement Association (CCCERA), other participating employers, and a class of members who had retired on or before September 30, 1997 entered into a court-approved settlement agreement. (*Alameda*, *supra*, 19 Cal.App.5th at p. 82; 16 CT 4728.) The settlement agreement, also known as the *Paulson* Settlement, provided that "compensation earnable" would include, among other things, unused vacation earned during the final compensation period and paid upon termination—otherwise known as

"terminal pay"—and any leave the employer permitted to be cashed out in service. (16 CT 4728; 17 CT 4784-4788.) Furthermore, other "compensation earnable" included on-call payments and payments received in lieu of in-kind benefits, if substituted for salary payments. (17 CT 4910, 4922-4923.)

By board policy in 1998, CCCERA had extended to active employees the terms of the *Paulson* settlement, to avoid litigating the same issues for existing retirement system members and to ensure that a consistent post-*Ventura* understanding of CERL governed both retirees and active employees. (16 CT 4739; 17 CT 4955, 4784 [*Paulson* settlement terms intended to "implement[] the '*Ventura* decision'" for specified pay items].)

Additionally, for new hires starting on or after January 1, 2011, CCCERA limited pensionable in-service leave cash-outs and terminal pay to the amount of leave earned and cashable in the final compensation period, and excluded from pensionable compensation in-kind benefits converted into cash during the final compensation period. (*Alameda*, *supra*, 19 Cal.App.5th at p. 82; 17 CT 5067-5068.)

C. Merced County

In 2000, Merced County, the Merced County Employees' Retirement Association (MCERA), and several employees and employee

organizations entered into a court-approved settlement agreement to establish pensionable compensation after *Ventura*. (5 CT 1324-1336; *Alameda, supra*, 19 Cal.App.5th at p. 83.) The settlement agreement allowed members to include a maximum of 160 hours of terminal pay as "compensation earnable." (5 CT 1330; *Alameda, supra*, 19 Cal.App.5th at p. 83.)

In December 2006, MCERA filed a lawsuit seeking declaratory relief regarding implementation of the *Ventura* settlement agreement. (10 CT 2701-2701.) The Merced County Superior Court in *Board of Retirement v. Baker et al.* (Super. Ct. Merced County, 2007, No. 149970) held that the Merced County *Ventura* settlement agreement allowed for the inclusion of up to 160 hours of terminal pay as part of pensionable compensation, in addition to any in-service leave cash-outs permitted by the employer. (10 CT 2705-2706.) Furthermore, the Merced County Superior Court determined that its holding regarding the settlement agreement was consistent with the holding in *Ventura*.

IV. PEPRA AND AB 197

AB 197, which was enacted following PEPRA in 2012 and was effective January 1, 2013, changed Government Code section 31461 by making the former definition of "compensation earnable" subdivision (a)

and adding a new subdivision (b), which specified that "'compensation earnable' does not include, in any case, the following:"

(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 previously been 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.

(C) 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.

(Gov. Code, § 31461, subd. (b).)

In response, the three retirement boards excluded several categories of pay from pension benefit calculations for all employees retiring after AB 197's effective date, notwithstanding their inclusion as "compensation earnable" under the court-approved settlement agreements. (*Alameda*, *supra*, 19 Cal.5th at p. 85.) Among categories of pay excluded, and in dispute here, were (1) payments that supposedly "enhanced" retirement benefits, (2) on-call, standby, and similar payments, (3) in-service leave cash-outs, and (4) "terminal pay," or leave cashed out only at termination of employment. (*Alameda*, *supra*, 19 Cal.5th at pp. 85-86 [retirement boards excluded on-call payments, one-time payments, payments in lieu of certain benefits, certain leave cash-outs, and terminal pay]; see also 16 CT 4731; 23 CT 6714-6720, 6759-6760; 24 CT 7174; 37 CT 11017-38 CT 11035; 5 CT 1369-1374.)

The Unions sued and argued that the exclusion of those pay items by AB 197 from pensionable compensation impaired the vested pension rights of legacy employees who were members of the retirement system prior to the passage of AB 197. (*Alameda*, *supra*, 19 Cal.App.5th at pp. 85-86.)

The Court of Appeal determined that the exclusions of "enhancement" payments and on-call pay were new exclusions that potentially impaired vested rights. (Gov. Code, § 31461, subd. (b)(1),

(b)(3).) As such, the Court of Appeal remanded the matter for the trial court to conduct a more detailed vested rights analysis. (*Alameda*, *supra*, 19 Cal.App.5th at pp. 109-110, 111-112, 122-123.)

The Court of Appeal further held that CERL, as amended, did not impose limits on the amount of leave cash-outs (Gov. Code, § 31461, subd. (b)(2)) that can be cashed out in service and be considered compensation earnable. Moreover, it ruled that leave cash-outs are not limited to leave accrued during the final compensation period. (*Alameda*, *supra*, 19 Cal.App.5th at pp. 98-100.)

With respect to terminal pay (Gov. Code, § 31461, subd. (b)(4)), the court found that it was not "compensation earnable," but that legacy employees were still entitled to the continued pension benefit through the doctrine of estoppel. This conclusion was driven by the fact that terminal pay benefits were conferred pursuant to the retirement boards' authority to settle litigation. (*Alameda*, *supra*, 19 Cal.App.5th at pp. 124-130.)

ARGUMENT

Before AB 197, CERL required that all items of "compensation" paid in cash, even if not earned by all employees in the same grade or class, must be included in the "compensation earnable" and "final compensation" on which an employee's pension is based, with the exception of overtime. (*Ventura*, *supra*, 16 Cal.4th at p. 487.) Until their elimination, the payments

in dispute here were all included in pension calculations in accordance with CERL, *Ventura*, and the post-*Ventura* settlements and policies.

As the Court of Appeal found, AB 197 changed CERL by narrowing the definition of "compensation earnable" in Government Code section 31461; this ultimately impaired vested rights.

First, subdivisions (b)(1) and (b)(3), which eliminate alleged pension "enhancements" and pay for work outside of normal working hours, are both entirely new to CERL and therefore impair existing pension rights.

Second, subdivision (b)(2), which excludes cashed-out leave beyond the payments that could be "earned and payable" in each 12-month period, did not limit when the leave needs to have been accrued or restrict the total cash-out amount that could be considered "compensation earnable." But even if it does, this would impose a new limitation on pensionable compensation, impairing vested rights.

Third, while there is good reason to find that the inclusion of "terminal pay" was a vested right that subdivision (b)(4) eliminated, the legacy employees represented by the Unions are entitled to the continued inclusion of these payments under either a vested rights or an estoppel theory, and the Court of Appeal was correct to find that estoppel applied given the extraordinary circumstances of the post-*Ventura* landscape.

Finally, although the Unions agree that the Court of Appeal was mostly correct, they also agree with the Alameda County Deputy Sheriffs' Association that the court erred in its understanding of the pension case law. This Court has clearly established that a comparable advantage is required before pension benefits can be reduced, contrary to the recent decision in *Marin Association of Public Employees v. Marin County Employees' Retirement Association* (2016) 2 Cal.App.5th 674 (*MAPE*). AB 197 impaired vested benefits because it provided no comparable advantage to offset the benefit reductions, and because no material relationship to the theory or successful operation of the pension systems was established.

V. THIS COURT'S CONTRACT CLAUSE PRECEDENT PROTECTS PUBLIC EMPLOYEE PENSION RIGHTS FROM IMPAIRMENT AND REQUIRES LIBERAL CONSTRUCTION OF BENEFITS

As an initial matter, the State and Sanitary District misunderstand or fail to acknowledge certain fundamental principles about public employee pensions, including the means by which pension rights vest and the test for impairment. The State and Sanitary District wrongly insist that the Unions must prove that CERL expresses a "clear" and "unequivocal" legislative intent to create a vested pension rights or that they must make out a "clear" case "free from all reasonable ambiguity" that the Contract Clause was violated. (Opening Brief of Sanitary District ["Sanitary District's Brief"],

pp. 13, 28-29; State's Opening Brief on the Merits ["State's Brief"], pp. 26-27.) However, these arguments do not reflect California law.

A. Public Employee Pension Benefits Vest Immediately Upon Accepting Employment, Without the Need to Show a "Clear" and "Unequivocal" Intent to Create a Vested Benefit

First, the Unions do not need to show a "clear" and "unequivocal" intent expressed in CERL to create a vested right, contrary to the Sanitary District's argument. (Sanitary District's Brief, p. 28, quoting *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1186-1187 (*REAOC*).)

Public employee pension benefits are "a form of deferred compensation for services rendered." (*In re Marriage of Brown* (1976) 15 Cal.3d 838, 845.) They induce employees to enter and continue in public service, while also providing subsistence for those who have fulfilled their obligations. (*Carman v. Alvord* (1982) 31 Cal.3d 318, 325, fn. 4; *Bellus v. City of Eureka* (1968) 69 Cal.2d 336, 351.) Since pensions are a form of promised compensation, "the employee's right to such benefits is a contractual right, derived from the terms of the employment contract." (*In re Marriage of Brown*, *supra*, 15 Cal.3d at p. 845; *Kern*, *supra*, 29 Cal.2d at p. 852 [pension benefits are "an integral part of the contemplated compensation set forth in the contract of employment" and "an

indispensable part of that contract," quoting *Dryden v. Bd. of Pension Commrs.* (1936) 6 Cal.2d 575, 579].)

"[A] vested contractual right to pension benefits accrues upon acceptance of employment," and public employees likewise have vested rights to additional benefits conferred during the course of their employment.[2] (*Betts v. Bd. of Admin.* (1978) 21 Cal.3d 859, 863, 866; *Protect Our Benefits v. City and County of San Francisco* (2015) 235 Cal.App.4th 619, 628.)

In other words, the intent to create a vested right is inherent in the offering of the pension benefit, because it is understood that the benefit is deferred compensation and "an indispensable part" of the employment contract. (*Kern, supra*, 29 Cal.2d at p. 852; *California Teachers Assn. v. Cory* (1984) 155 Cal.App.3d 494, 506 ["A statute offering pension rights in return for employee services expresses an element of exchange and thereby implies these rights will be private rights in the nature of contract"].) And because the contractual right is created through the acceptance of employment, the Court has never required that petitioners demonstrate that

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[2] In this context, vesting means that an employee acquires an irrevocable interest in the benefit; it is distinct from the maturing of those benefits—i.e., meeting all of the conditions precedent for payments to be made. (*REAOC, supra*, 52 Cal.4th at p. 1189, fn. 3; *Kern, supra*, 29 Cal.2d at p. 855.)

the employer or pension statute "clearly and unequivocally" express an intent to create vested pension rights.

This is why numerous pension cases find impairment without requiring a predicate showing of a clear and unequivocal intent to create a vested benefit. (See, e.g., *Betts, supra*, 21 Cal.3d at pp. 862-863 [finding vested right although pension statute at issue did not state so explicitly]; *Wallace v. City of Fresno* (1954) 42 Cal.2d 180, 183 [employment service under pension provisions was sufficient to create vested right, and court did not note any explicit vesting intent in the city charter or pension ordinance]; *Pasadena Police Officers Assn. v. City of Pasadena* (1983) 147 Cal.App.3d 695, 701-702 [finding that city charter limits on cost of living increases impaired vested rights without finding an explicit or clear intent to provide vested benefits].) Likewise, pension statutes and employers' offers of pension benefits rarely, if ever, state that a vested contractual right is being created, particularly when, for decades, this has been the background principle against which the pensions already operate.[3]

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[3] CERL declares that its purpose includes "making provision for retirement compensation and death benefit as additional elements of compensation for future services," which parallels the case law's recognition that pensions are deferred compensation promised in return for employees' service. (Gov. Code, § 31451.)

REAOC, which the Sanitary District cites, does not erode this longstanding rule because it is not a pension case. That case answered the specific question certified to the Court, whether "a California county and its employees can form an implied contract that confers vested rights to health benefits on retired county employees." (*REAOC*, *supra*, 52 Cal.4th at p. 1176.) Pension benefits were not at issue in *REAOC*, only the employer's practice of pooling retirees with active employees for the purpose of setting health insurance premiums, which it did through annual motions and resolutions. (*Id.* at pp. 1177-1178.) It was under those circumstances, and in the absence of any explicit ordinance or statutory provision establishing the benefit, that the Court explained that an implied vested right could be created "when the statutory language or circumstances accompanying [the passage of legislation] clearly evince a legislative intent to create private rights of a contractual nature enforceable against the governmental body." (*Id.* at p. 1187, alterations and citation omitted.)

REAOC therefore does not address, let alone upset, the principle that pension benefits vest upon acceptance of employment, regardless of whether the employer or authorizing legislation evinces a clear and unequivocal intent to create a vested benefit. In this case, the pension benefits, including the scope of "compensation earnable," were established pursuant to CERL and *Ventura*, as well as the three retirement systems'

authority to administer their respective retirement systems. (See Gov. Code, § 31520; Cal. Const., art. XVI, § 17.) Accordingly, there is no mistaking that they were duly enacted and sufficient to create vested rights, which AB 197 later impaired.[4]

B. Existing Employees' Pension Benefits May Be Modified Only If Disadvantages Are Accompanied by Comparable New Advantages

As the Court's precedent has long made clear, pension benefits for existing employees may be modified only in limited circumstances. "[A]ny modification of vested pension rights must be reasonable, must bear a material relation to the theory and successful operation of a pension system, and, when resulting in disadvantage to employees, must be accompanied by comparable new advantages." (*Allen v. Bd. of Admin.* (1983) 34 Cal.3d 114, 120 (*Allen II*).)

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[4] The Sanitary District's argument that retirement board policies cannot create vested rights relies on cases where retirement boards or public agencies exceeded their statutory authority; they do not demonstrate that lawfully enacted policies cannot create vested rights. (Sanitary District's Brief, p. 29; see, e.g., *City of San Diego v. San Diego City Employees' Retirement System* (2010) 186 Cal.App.4th 69, 79-80 [retirement board could not exceed scope of its authority].) Indeed, as the pension case law makes clear, policies offering pension benefits to employees create vested rights once the employee accepts employment, and, in fact, other cases have held that public agency policies create vested rights. (E.g., *Thorning v. Hollister School Dist.* (1992) 11 Cal.App.4th 1598 [school board policy created vested right to retiree health benefits].)

The requirement that a comparable pension advantage must be provided to existing employees has been affirmed by numerous decisions of this Court and lower courts. (See, e.g., *Allen I*, *supra*, 45 Cal.2d at p. 131; *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 447-448; *Betts*, *supra*, 21 Cal.3d at pp. 864-865; *Olson v. Cory* (1980) 27 Cal.3d 532, 541; *Legislature v. Eu* (1991) 54 Cal.3d 492, 529-530; *Lyon v. Flournoy* (1969) 271 Cal.App.2d 774, 780; *United Firefighters of Los Angeles City v. City of Los Angeles* (1989) 210 Cal.App.3d 1095, 1103-1104; *Teachers Retirement Bd. v. Genest* (2007) 154 Cal.App.4th 1012, 1037; *Protect Our Benefits*, *supra*, 235 Cal.App.4th at pp. 628-629.)

As discussed further below, the State and Sanitary District largely ignore this precedent, and their failure to address these cases directly is telling, because it underscores that their only theory below was that the benefits were never legal under CERL, which the Court of Appeal rejected.

Because the comparable advantage requirement is clear, the Court of Appeal erred when it failed to apply the Court's "comparable advantage" test as articulated. Instead, the court rejected "the absolute need for comparable new advantages when pension rights are eliminated or reduced," and re-crafted the requirement as a kind of balancing test between the detrimental changes on the one hand and, on the other, whether there is "compelling evidence establishing that the required changes bear a

material relation to the theory of a pension system[] and its successful operation." (*Alameda*, *supra*, 19 Cal.App.5th at pp. 121, 123, italics omitted.) That is not how *Allen I*, *Allen II*, or any other case has formulated the test for modifications, nor is that how the test has been applied.

For example, the Court found in *Eu* that the redirection of pension funds to Social Security did not provide a comparable new advantage that would make up for termination of the right to accrue pension benefits based on future service. (*Eu*, *supra*, 54 Cal.3d at pp. 529-530 [reasonable modifications permitted "*so long as* employees receive 'comparable new advantages' in return for any substantial reduction in benefits," emphasis added].) Likewise, in *Olson*, the Court found that the elimination of future cost-of-living adjustments reduced pension benefits without providing a comparable new benefit, impairing vested rights. (*Olson*, *supra*, 27 Cal.3d at p. 541 ["Again, we conclude that defendants have failed to demonstrate justification for impairing these rights or that comparable new advantages were included"]; see also, e.g., *Betts*, *supra*, 21 Cal.3d at pp. 867-868 [finding unconstitutional impairment because no comparable advantage provided]; *Protect Our Benefits*, *supra*, 235 Cal.App.4th at pp. 628-630 [elimination of pension cost-of-living adjustments without comparable new advantage impaired vested rights].)

Thus, to the extent the Court of Appeal remanded for further proceedings—instead of simply finding an impairment based on the lack of comparable advantage—it should have required that both prongs of the *Allen I* test be met: that (1) changes must bear a material relation to the theory and successful operation of the pension system, and (2) pension disadvantages must be accompanied by comparable new advantages. (*Allen II*, *supra*, 34 Cal.3d at p. 120.)

For similar reasons, the recent decisions in *Marin Association of Public Employees v. Marin County Employees' Retirement Assn.* (2016) 2 Cal.App.5th 674 (*MAPE*) and *Cal Fire Local 2881 v. California Public Employees' Retirement Sys.* (2016) 7 Cal.App.5th 115—both of which are also under review by this Court—are wrong in their understanding of this precedent. *MAPE* in particular goes to painful lengths to twist the case law by asserting that the Court has only "recommended" that a comparable advantage be provided, before claiming that the Contract Clause would permit numerous changes short of complete pension reduction, including significant reductions in benefits. (*MAPE*, *supra*, 2 Cal.App.5th at pp. 699, 702; see also *Cal Fire Local 2881*, *supra*, 7 Cal.App.5th at pp. 130-131.) This reading of the case law substantially departs from decades of precedent and should be overturned.

C. Pension Benefits Must Be Liberally Construed in Favor of Employees and Retirees

The State and Sanitary District also ignore that pension rights must be liberally construed in favor of retirees and employees, which has also been California law for decades. (E.g., *Ventura*, *supra*, 16 Cal.4th at p. 490 ["Any ambiguity or uncertainty in the meaning of pension legislation must be resolved in favor of the pensioner, but such construction must be consistent with the clear language and purpose of the statute"]; *Terry v. City of Berkeley* (1953) 41 Cal.3d 698, 702.)

This approach is motivated by an appreciation for, rather than an antipathy to, public employee pensions, and the Court has explicitly recognized that pensions are "among those rights clearly 'favored' by law" because of the sound public policy—protecting retirees against economic insecurity—underlying the benefit. (*Hittle v. Santa Barbara County Employees Retirement* (1985) 39 Cal.3d 374, 390, quotation marks and citations omitted.)

Yet the State and some recent Court of Appeal decisions—including this one—mistakenly insist that petitioners alleging pension impairment have the burden of "making out a clear case, free from all reasonable ambiguity, that a constitutional violation occurred." (State's Brief, p. 26, quoting *Deputy Sheriffs' Assn. of San Diego County v. County of San Diego* (2015) 233 Cal.App.4th 573, 578 (*San Diego*); *Alameda*, *supra*, 19

Cal.App.5th at p. 90; see also *Cal Fire Local 2881*, *supra*, 7 Cal.App.5th at p. 124 [describing standard as a "legal hurdle" and "elevated burden" on petitioners]; *MAPE*, *supra*, 2 Cal.App.5th at pp. 707-708.)

The Court has never adopted this standard in pension impairment cases, and it directly contravenes the liberal construction called for by *Hittle*, *Ventura*, and other decisions. This supposed elevated burden is based on *Floyd v. Blanding* (1879) 54 Cal. 41, which *San Diego* reintroduced in 2015, but *Floyd* is not a pension case at all—instead, it addressed whether erection of a seawall impaired contractual rights—and the Court has never cited *Floyd* since it was decided more than 130 years ago, let alone in a pension impairment case. (*Floyd*, *supra*, 54 Cal. at pp. 43-44; *San Diego*, *supra*, 233 Cal.App.4th at p. 578.) Indeed, *Floyd* long predates public sector pensions in California—which first arose in 1913 (see Stats. 1913, ch. 694, § 1, p. 1423 [establishing public school teachers' retirement salary fund])—and landmark decisions such as *Kern*.

There is accordingly no reason to rely on *Floyd* or *San Diego*'s mistaken resurrection of *Floyd*. The Court's other precedents have long since overtaken it, offering greater specificity and rules of construction tailored specifically to the public policy concerns underlying the courts' protection of pension benefits.

VI. AB 197 CHANGED THE DEFINITION OF "COMPENSATION EARNABLE," IMPAIRING VESTED PENSION RIGHTS

Throughout this litigation, the main contention advanced by the State and the Sanitary District has been that AB 197 did not change the law, and that instead, CERL has always prohibited including the disputed payments in "compensation earnable." As the Court of Appeal found, this story is a fiction, as is the "anti-spiking" intent supposedly inherent in CERL. AB 197 added entirely new language to CERL, and there is no basis for finding the new language to be anything but a change in the law that impaired vested rights, particularly in light of *Ventura*.

A. *Ventura* Required Inclusion of the Disputed Pay Items as "Compensation Earnable"

As noted by the Court of Appeal, *Ventura* significantly changed how CERL systems understood the remuneration that had to be included in pension benefits. (*Alameda*, *supra*, 19 Cal.App.5th at p. 79.) Its pronouncement that, even if not earned by everyone in the same grade or class, all cash payments except overtime were "compensation" and "compensation earnable" that must be included as "final compensation" in pension benefit calculations is expansive. (*Ventura*, *supra*, 16 Cal.4th at p. 478; *Alameda*, *supra*, 19 Cal.App.5th at pp. 78-80.) Given this broad understanding of "compensation earnable," the Court of Appeal correctly found that on-call payments, payments now excluded as retirement

"enhancements," and in-service leave cash-outs were all required by CERL to be included in pension benefit calculations.

1. On-Call, Standby, and Similar Payments Were "Compensation Earnable" Before AB 197

Ventura found that payments for being on call during meal periods were "compensation earnable," even though not everyone in the same grade or class earned the payments. (*Ventura*, *supra*, 16 Cal.4th at pp. 488, fn. 5, 505 [on-call pay was furnished uniformly to pilots but not to deputies, senior deputies, or sergeants because not all were in patrol divisions].) These payments were "compensation," because they were remuneration paid in cash, and the Court agreed with the plaintiffs that section 31461's requirement that "compensation earnable" be determined based on the "average number of days ordinarily worked by persons in the same grade or class" only had the effect of (1) excluding overtime and (2) ensuring that someone who was absent without pay would have his or her pension calculated assuming the individual worked the same amount of time as everyone else in the same job and pay rate. (*Id.* at pp. 497, 501, 505.)

Ventura's reasoning refutes the argument that calculating "compensation earnable" by reference to the average number of days "ordinarily worked by persons in the same grade or class of positions during the period" somehow excludes on-call pay. (State's Brief, p. 38.) Since this language only serves the limited purpose of excluding overtime

and ensuring that absent workers do not see smaller pensions, it does not exclude on-call and similar pay.

On-call pay is not overtime since it is not paid at an overtime rate—e.g., time and a half—and because it is not simply extra hours of work that would cause the time basis for the "compensation earnable" calculation to exceed what is ordinarily worked by others in the same job classification. (See *Ventura*, *supra*, 16 Cal.4th at p. 501.) Instead, being on call is compensation for a distinct service provided to the employer—being available to return to work when necessary—and would therefore be "compensation earnable" under CERL before AB 197.[5] And at worst, pre-AB 197 CERL was ambiguous as to this inclusion and therefore should be construed in employees' favor.

Any restriction of on-call or similar pay to "normal working hours" stems only from the AB 197 revisions and was not part of section 31461 before it was amended. In fact, it is clear from the new subdivision (b)(3) that the intent is to import this exclusion wholesale from PERL, where it had been added years ago. (*Alameda*, *supra*, 19 Cal.App.5th at p. 109; see

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[5] That section 31461 references an average number of "days" worked does not mean hourly rates of pay or compensation paid on something other than a daily rate get excluded from pension benefit calculations—for example, *Ventura* held that hourly bilingual premiums and annual uniform allowances were all "compensation earnable." (*Ventura*, *supra*, 16 Cal.4th at p. 488, fn. 2-3.)

Gov. Code, § 20636, subd. (c)(3), (c)(7)(B) [limiting "special compensation," which is part of "compensation earnable" under PERL, to services rendered during normal working hours]; see also Stats. 1993, ch. 1297, § 6, pp. 7691-7696 [splitting definition of "compensation earnable" into multiple subdivisions and prohibiting inclusion of "final settlement pay" and payments for services rendered outside normal working hours].) In *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, 539-540, for example, on-call pay was excluded because of the specific restrictions in PERL. But the exclusions added by the Legislature to PERL were never part of CERL, so there is no reason to find that the two statutes excluded the same pay from "compensation earnable" before AB 197.[6]

Accordingly, the court was correct to find, as *Ventura* did, that on-call, standby, and similar payments were "compensation earnable" before

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[6] Any reliance on *Ventura*'s statement that PERL and CERL should be read similarly with regard to what pay to include as "compensation earnable"—e.g., Sanitary District's Brief, page 42—ignores that the Court was not addressing exclusions from "compensation earnable," which are different between the statutes, and that the Court distinguished PERL when the language differed. (See *Ventura*, *supra*, 16 Cal.4th at pp. 497, 504.) Additionally, the Legislature has known how to constrain CERL when it wants to, and it even has given its approval to specific lists of inclusions—including with on-call payments and leave cash-outs. (See Gov. Code, § 31461.45.)

AB 197, and their elimination as pay for services "outside normal working hours" impairs vested pension rights.

2. The Payments Now Excluded as Pension "Enhancements" Were "Compensation Earnable" Before AB 197

With regard to supposed pension "enhancements," there is also no basis in CERL or the case law for finding these excluded from pension benefits before AB 197. Certainly no provision existed in the statute to inquire behind the intent of a payment and exclude it on the basis of whether it was intended to "enhance" retirement benefits.

Payments that the retirement systems excluded as "enhancements"—which was done on a categorical basis by ACERA, at least—included one-time bonuses, payments in lieu of health insurance benefits, and others. (See, e.g., 37 CT 11017-11025.) *Ventura* establishes that these payments were required to be included as "compensation earnable" since they were cash remuneration that was not overtime. Certainly, *Ventura* acknowledge that payments in lieu of in-kind benefits—for example, uniform allowances—were "compensation earnable," so even if employees had the option of taking the in-kind benefit or alternatively receiving cash, the fact that they had a choice would not have changed the pensionability under *Ventura*. (*Ventura*, *supra*, 16 Cal.4th at p. 489, fn. 3; cf. Gov. Code, § 31461, subd. (b)(1)(A).) Likewise, one-time bonuses, even if not received

by all employees in the same grade or class, would have been "compensation earnable" under *Ventura* since they are cash payments remunerating employees for their service. (Cf. Gov. Code, § 31461, subd. (b)(1)(B).) In short, there is no question AB 197 eliminated previously included payments from legacy members' benefits.

The Sanitary District argues that Government Code section 31539 and subdivision (b)(1)'s enhancement exclusion are the same, but this is not the case. Section 31539 addresses increases or overstatements of "final compensation" based on a member's fraudulent or improper action. But subdivision (b)(1) allows retirement boards to exclude payments from pension calculations even if the individual employee did nothing wrong, which is significantly different from what CERL allows under section 31539. This shows that AB 197 changed the law rather than just clarifying it.

Finally, Government Code section 31542, which was added to CERL to implement the pension "enhancement" exclusion also demonstrates that the exclusion is entirely new. There would be no need to add a procedure for challenging "enhancement" exclusions if the exclusion were already part of the law. (See Gov. Code, § 31542, added by Stats. 2012, ch. 296, § 29.) Thus, the court was also correct to find that subdivision (b)(1) was a new restriction on pensionable compensation.

3. *Ventura* Also Held that Leave Cash-Outs Were Compensation Earnable, Without Regard for When Leave Was Accrued

The trial court in this case held that under pre-AB 197 CERL, leave cash-outs could never include leave accrued outside of the final compensation period—e.g., if an employee had vacation saved from prior years—so pensionable leave cash-outs could never exceed the amount of leave accruable in the final compensation period. (44 CT 12854-12860, 12866-12868.) The Court of Appeal found that section 31461, both before and after its amendment, did not restrict the total amount of leave that could be cashed out in service and considered pensionable. This view is supported by CERL and *Ventura*, particularly since the amount of leave an employee can cash out—and therefore receive as compensation—is simply a question of how the employer has agreed to compensate its employees and is not restricted by CERL.

In *Ventura*, the Court specifically addressed leave cash-outs and found that payments in lieu of vacation and other leave were remuneration paid in cash that must be included as "compensation earnable." (*Ventura*, *supra*, 16 Cal.4th at pp. 488-489, fn. 6, 11, 12 [employees offered pay in lieu of annual leave of up to 80 hours depending on accruals, lump sum annual leave credits of up to 104 hours per year that could be paid out, and other leave redemption rights for management and unrepresented

employees],) Importantly, the leave time became "compensation"—and therefore "compensation earnable"— only when it was paid as cash, since usage of leave as time off of work is instead the in-kind benefit of free time, with any "compensation" coming in the form of the employee's regular pay. (*Id.* at p. 497; see also *In re Retirement Cases*, *supra*, 110 Cal.App.4th at pp. 474-475.) In other words, "compensation" is not "earned" until there is a cash payment, meaning that the new "earned and payable" in subdivision (b)(2) must necessarily be referring only to actual cash-outs, not to amounts of leave or the timing of accruals.

Whether employers permit workers to cash out leave in service is a question of how they choose to compensate their employees. Some, like the Sanitary District, have agreed to permit cash-outs, while others do not. But nothing about the definition of "compensation earnable" or other parts of pre-AB 197 CERL put a limit on how employers could compensate their employees, nor did the law limit the amount of cashed-out leave that could be considered "compensation earnable."

Thus, even if an employer permitted significant leave cash-outs in service—for example, letting an employee cash out all accrued leave at any point during the employee's career—that would not have changed the nature of the payment, nor would the timing of the accrual matter, e.g., in what year the specific vacation hour was accrued. The cash-out would still

have been paid as cash and therefore "compensation," and since it is not overtime, it follows under *Ventura* that the payment is "compensation earnable." To the extent this resulted in different pension benefits because of different cash-out amounts, that is a choice made by the employer or in collective bargaining, and it is entirely permissible under *Ventura* and CERL for compensation to vary—even be "distorted"—between individuals, even when they were performing the same job. (*Alameda, supra*, 19 Cal.App.5th at p. 101.) If, for instance, an employer rewarded high performing employees with bonuses or with greater leave cash-outs, that would not make the compensation excludable from pension calculations.

The other basis cited by the State and Sanitary District for finding that leave cash-outs were always limited to the leave that could be accrued in any 12-month period is the last sentence of what is now section 31461, subdivision (a), which states that "[c]ompensation, as defined in Section 31460, that has been deferred shall be deemed 'compensation earnable' when earned, rather than when paid." But *Ventura* and *In re Retirement Cases* both understood this sentence to be referring to deductions from an employee's "compensation" that were directed to the deferred compensation plans described in Government Code section 31460. (*Ventura, supra*, 16 Cal.4th at pp. 494-495 ["The references to deferred

compensation in sections 31460 and 31461 make it clear that the deferred funds, which clearly would have been 'compensation' if paid in the normal course, do not lose that status for pension purposes even though they had not been received by the employee at the time the pension was calculated"]; *In re Retirement*, *supra*, 110 Cal.App.4th at p. 475.) So this argument has been clearly rejected by the Court and the Court of Appeal.[7]

The amended section 31461 does not change this, given its specific use of "earned and payable"—it does not say, for instance, that "compensation earnable" is limited to the "leave that could be accrued and payable," which is what one would expect if the amendment was intended to specifically address how much leave could be accrued.

Ultimately, however, even if the Court of Appeal is incorrect in its understanding of the amended section 31461, a new limit imposed by AB 197 would still be an unconstitutional impairment of pension rights. Since

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[7] The argument that the Governor's Bill Report shows that this language is intended to prevent final compensation increases is contradicted by the more definitive legislative history in the Legislative Counsel's Digest and Assembly committee reports, which show that the intent was to ensure full funding even if employee pay was being diverted to the referenced deferred compensation plans. (Legis. Counsel's Dig., Sen. Bill No. 226 (1995-1996 Reg. Sess.); Assem. Com. On Appropriations, analysis of Senate Bill 226 (1995-1996) Reg. Sess.), as amended April 4, 1995; Assem. Com. on Public Employees, Retirement & Soc. Security, analysis of Senate Bill 226 (1995-1996 Reg. Sess.) as amended April 4, 1995.) Nor, ultimately, is accrued leave "deferred compensation" under CERL, since under section 31460 it does not become "compensation" until it is paid as cash.

CERL did not previously impose a limit on when leave needed to have been accrued or how much cashed-out leave could be considered "compensation earnable," it would reduce benefits to now limit these payments in the pension formula. So even if the State or Sanitary District are correct that AB 197 now limits leave cash-outs to only the amount of leave that could be accrued within the relevant 12-month period, this is a new unconstitutional restriction on leave cash-outs.

B. AB 197 Impaired Vested Pension Benefits

As shown above, the exclusions added by AB 197 were not previously part of section 31461, and even the State and Sanitary District cannot dispute that AB 197 added entirely new language to CERL. AB 197 reduced pension benefits when it excluded from "compensation earnable" on-call and standby payments, supposed retirement "enhancements," and, as discussed below, terminal pay. This impaired vested pension rights because no offsetting advantage was provided and because it has never been established that these changes were necessary to maintain the integrity or successful operation of the retirement systems in the three counties.

First, it is un disputed that neither PEPRA nor AB 197 authorized any offsetting benefits for members of CERL systems. (*Alameda*, *supra*, 19 Cal.App.5th at p. 123.) The laws only imposed additional restrictions on "compensation earnable," narrowing the definition without doing anything

more. (See Gov. Code, § 31461, subd. (b).) The end result is clearly a disadvantage, no different than if the percentage multiplier in the pension formula were reduced—in both instances, the pension calculation is changed to limit the amount of compensation that will count toward pension benefits.

Second, there has been no showing that the exclusions are necessary to maintain the integrity of the retirement systems or for their successful operation. (*Assn. of Blue Collar Workers v. Wills* (1986) 187 Cal.App.3d 780, 790-791 [entity seeking to change pension benefits bears the burden of showing changes are necessary to preserve the integrity of the system].) The blanket elimination of the disputed pay items from all CERL retirement systems is not tailored to the operations of the three retirement systems here, which provide different benefits, involve different employers and employees, and are funded at different levels. And to the extent the new exclusions save the retirement systems or employers money, that, without more, is insufficient to make the impairment reasonable—or establish an "important public purpose" (State's Brief, p. 49)—since governmental agencies can always find a use for additional money and have an inherent self interest in being able to impair contracts on this basis. (See *Abbott*, *supra*, 50 Cal.2d at p. 455 ["Rising costs alone will not excuse the city from meeting its contractual obligations, the consideration for which has already

been received by it"].) In this regard, it is also notable that political objections by taxpayers is not a reason sufficiently related to the theory of the pension system—the provision of pension benefits—or its successful operation to justify reducing established benefits. (See *Wallace v. City of Fresno* (1954) 42 Cal.2d 180, 185.)

C. The State and Sanitary District Have Not Presented a Reason for Deviating from this Court's Pension Precedent

The State and Sanitary District do not address directly the Court's precedent requiring that a comparable advantage be provided to offset pension reductions. Instead, they attempt to paint California pension precedent as something other than what it is, relying on inapplicable decisions from other jurisdictions, the erroneous *MAPE* decision, or incomplete snippets from the case law. (State's Brief, pp. 41-51; Sanitary District's Brief, pp. 53-57.)

The State in particular cites extensively from non-California decisions, but fails to address whether a comparable advantage has been provided, let alone acknowledge the requirement. (See State's Brief, pp. 41-51.) While California law recognizes that employers or legislative bodies have the power to modify pension benefits, that power is subject to the comparable advantage and material relationship requirements where existing employees are concerned. Even the State's secondary sources—hostile as they are to the Court's precedent—acknowledge that this is

California law. (See Monahan, *Statutes as Contracts? The "California Rule" and Its Impact on Public Pension Reform* (2012) 97 Iowa L. Rev. 1029, 1036 [noting that California has been the most influential state in developing contractual protections for pensions and that twelve other states follow the California Rule].)

In this regard, the State and Sanitary Districts are making an implicit—if not explicit—request for the Court to overturn its own precedent, but neither presents a legitimate justification for such a dramatic shift. The Court has always required a "special justification" for departing from precedent, and particularly when the Court's precedent has engendered reliance and become part of a complex and comprehensive statutory scheme, the burden on the party advocating abandonment is heavy. (See *Golden Gateway Ctr. v. Golden Gateway Tenants Assn.* (2001) 26 Cal.4th 1013, 1022; *People v. Mendoza* (2000) 23 Cal.4th 896, 924.) With regard to pensions, the Court's precedent has been ingrained in the compensation of millions of public employees for decades, and it is the backdrop against which the Legislature, hundreds of pension systems, related laws, employers, and employees all operate. (See, e.g., Educ. Code, § 2202.5, subd. (b).) Accordingly, there is no basis for deviating now, notwithstanding recent decisions which seem politically motivated to "establish the legal authority[] to reset overly generous and unsustainable

pension formulas for both current and future workers." (*MAPE*, *supra*, 2 Cal.App.5th at pp. 681-682, quoting Little Hoover Com., Public Pensions for Retirement Security (Feb. 2011), 53.)

In conjunction with these arguments, the State and Sanitary District insist that there is no impairment, because AB 197 is prospective only, citing *MAPE*'s erroneous assertion of the same. (State's Brief, p. 40; Sanitary District's Brief, p. 55.) There are multiple problems with this argument.

First, by its own terms, AB 197 applies to all retirements occurring after its effective date, and the three retirement boards acted to implement the restrictions for all retirements after the effective date. Everything else being equal, employees who received any of the disputed pay items but who happened to retire after AB 197's effective date saw a reduction in benefits. So to the extent the statute is "prospective," it is only trivially so, because pension benefits are clearly reduced, and in other cases, courts have found unconstitutional impairments based on similarly "prospective" reductions.[8] (See, e.g., *Kern*, *supra*, 29 Cal.2d at pp. 855-856 [finding

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[8] Likewise, there is no factual basis for the claim that the impairment is not substantial—for many employees, the reductions mean a loss of thousands of dollars per year.

unconstitutional impairment because pension benefits eliminated before individual retired]; *Eu*, *supra*, 54 Cal.3d at pp. 528, 530.)

Second, and relatedly, a public employee's vested right to pension benefits includes the "right to earn, through continued service, additional pension benefits in an amount reasonably comparable to those available when he or she first took office." (*Eu*, *supra*, 54 Cal.3d at p. 530; *Carman*, *supra*, 31 Cal.3d at p. 325 ["By entering public service an employee obtains a vested contractual right to earn a pension on terms substantially equivalent to those then offered by the employer"]; see also *Olson*, *supra*, 27 Cal.3d at pp. 540-541 [finding reduction in future potential pension increases unconstitutional].) *Eu*, in fact, explicitly rejected an argument that incumbent legislators did not have a vested right to accrue pension greater benefits through continued service, contrary to the State's argument. (State's Brief, pp. 43-44.) In this case, AB 197 will prevent employees from retiring in the future with pensions calculated based on the full complement of pay that was previously included as "compensation earnable," which is an impairment under *Eu* and other California precedent.[9]

While some other states take an approach that vested pension rights accrue only on a prorated basis with each additional year of service—which

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[9] The answer to the State's second issue—whether the Legislature could exclude a pay item from future pensionable compensation—is therefore no.

essentially appears to be what the State is seeking to establish—that is not California law. (*United Firefighters*, *supra*, 210 Cal.App.3d at p. 1115 [rejecting Maryland prorated vesting approach].)

Finally, if the State and Sanitary District are correct that AB 197 is only a clarification, rather than a change, and the disputed payments were never permissible, then the retirement systems have been illegally providing a benefit in violation of CERL. Such a finding would have a retroactive impact on those who have already retired, since it puts their pension benefits at risk. If the benefits were granted illegally for all these years, the retirement systems, pursuant to their fiduciary responsibility, would likely need to recalculate benefits and recoup past overpayments. This would lead to significant pension reductions for thousands of retirees, who have little or no means of earning additional income or pension benefits, and is another reason these arguments should be rejected.

VII. RETIREMENT BOARDS HAD THE DISCRETION TO INCLUDE TERMINAL PAY AS "COMPENSATION EARNABLE" WHEN THEY ENTERED INTO THE POST-*VENTURA* SETTLEMENT AGREEMENTS

The Court of Appeal found that the retirement boards did not have the discretion to include terminal pay as "compensation earnable" under the language of CERL, and therefore no vested right could arise as to inclusion of those payments. But until now, no court had expressly found that CERL retirement boards were prohibited from including additional pay items

beyond the statutory minimums "should the board decide to do so." (*Guelfi*, *supra*, 145 Cal.App.3d at p. 307, fn. 6; *Alameda*, *supra*, 19 Cal.App.5th at p. 92.) In this case, the retirement boards acted pursuant to that existing law when they promised the inclusion of terminal pay based on the settlement agreements and policy amendments, giving rise to vested pension rights.

As the Court of Appeal, admitted "no case or legislative action since *Guelfi* ha[d] expressly debunked this notion," and the Legislature in fact "encouraged it." (*Alameda, supra,* 19 Cal.App.5th at pp. 92, 126 [settlement agreements and policies were generated during an "unprecedented situation" which included "the lingering (albeit incorrect) notion that CERL boards possessed discretion under *Guelfi* to include additional pay items, over and above those mandated by *Ventura*, in compensation earnable"].) *Guelfi*'s finding of this authority goes hand in hand with the statutory authority CERL retirement boards have to determine "compensation earnable" under the guidance of CERL and the authority vested in the boards under the state constitution. (Gov. Code, § 31461, subd. (a) ["compensation earnable" means the employee's average compensation "as determined by the board"]; Cal. Const., art. XVI, § 17, subd. (a) ["The retirement board shall also have sole and exclusive responsibility to administer the system"].)

Most significantly, in 1992, the Legislature explicitly adopted *Guelfi's* discussion of retirement boards' discretionary authority when it repealed former Government Code section 31460.1. The Legislature cited *Guelfi*'s footnote six, which stated that nothing prohibited the inclusion of pay items not required by CERL "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 calculation once established." (*Guelfi, supra,* 145 Cal.App.3d at p. 307, fn. 6, emphasis added ["Our conclusion is only that CERL does not require inclusion of those items of remuneration for retirees"]; (Stats. 1992, ch. 45, § 3, pp. 158-159.)

Additionally, the Legislature declared that since its inception CERL had "conferred upon the county retirement boards the duty and power to determine which . . . items of compensation . . . constitute 'compensation earnable,'" and that the Legislature had a "long-standing practice . . . of not intruding into the county decisionmaking process regarding compensation determinations with respect to those county retirement systems." (Stats. 1992, ch. 45, § 3, pp. 158-159.)

This longstanding practice is necessary and appropriate in light of counties' express constitutional authority to provide for their employees' compensation. (Cal. Const., art. XI, § 1 [counties "shall provide for the number, compensation, tenure, and appointment of employees"]; *County of*

Riverside v. Superior Court (2003) 30 Cal.4th 278, 285–286 ["The constitutional language is quite clear and quite specific: the *county*, not the state, not someone else, shall provide for the compensation of its employees," emphasis original]; see *Sonoma County Org. of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 317; *Dimon v. County of Los Angeles* (2008) 166 Cal.App.4th 1276, 1281-1282.) Because county employee compensation includes their pension benefits, CERL must accommodate local control over employee compensation, including pension benefits. (*Kern, supra,* 29 Cal.2d at p. 853.)

At the same time, appellate courts, including this one, acknowledged or even endorsed *Guelfi*'s statement regarding retirement board discretion. (See, e.g., *Howard Jarvis Taxpayers' Assn. v. Bd. of Supervisors of Los Angeles County* (1996) 41 Cal.App.4th 1363, 1373-1374.) In *Ventura*, the Court expressly acknowledged *Guelfi*'s discussion that retirement boards had the authority to include pay items as "compensation earnable" above the statutory minimum, but limited its disapproval only to *Guelfi*'s conclusion that section 31461 did not require the various pay items under discussion to be considered "compensation earnable." (*Ventura, supra*, 16 Cal.4th at pp. 492, 505.)

In re Retirement Cases and *Salus v. San Diego County Retirement Association* (2004) 117 Cal.App.4th 734 do not erode *Guelfi*'s finding of

retirement board discretion, and neither had been decided at the time the retirement boards entered into the post-*Ventura* settlement agreements. *In re Retirement Cases* concerned whether CERL *required* particular pay items be included as "compensation earnable." (*In re Retirement Cases*, *supra*, 110 Cal.App.4th at p. 434.) While the court ultimately held that terminal pay was "not required under CERL to be included,"[10] the court never held that retirement boards were prohibited from including terminal pay as "compensation earnable" if they decided to do so:

> Because we are considering what must be included under the statute and we conclude that the items requested by plan members do not have to be included under CERL, we need not consider L.A. County's argument that these items cannot be included . . . .

(*Id.* at pp. 472, fn. 20, 476.)

Likewise, the issue in *Salus* was whether retirement boards were required to include the value of accrued leave that could not be converted to cash before retirement in the calculation of employee pension benefits. Again, and like *In Re Retirement Cases*, the court in *Salus* phrased its holding explicitly in these terms: "[b]ecause the sick leave payments were

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[10] Although *In re Retirement Cases* describes the definition of "final compensation" as unambiguously referring to the year or years "immediately preceding" retirement, that is not clear from the statutory language given that members can elect what year or years to use as the final compensation period. (*In re Retirement Cases*, *supra*, 110 Cal.App.4th at p. 475; see Gov. Code, §§ 31462, 31462.1.)

not final compensation, defendant and respondent . . . *was not required* to include the sick leave payments in calculating appellants' retirement benefits." (*Salus*, *supra*, 117 Cal.App.4th at p. 87, emphasis added.)

In sum, for over three decades retirement boards were consistently told they had the discretion to include additional pay items within the calculation of a member's pension benefit over and above the statutory minimums set forth in CERL. They acted pursuant to that guidance when they executed the settlement agreements and issued policies that included terminal pay in the calculation of their members' pension benefits. Because employees' pension rights are governed "not only from the language of the pension provisions but also from the judicial construction of [those provisions] at the time the contractual relationship was established," employees have a vested right to continue earning pension benefits on the terms conferred, and unwinding those benefits now is both unlawful and manifestly unjust. (*Kern, supra,* 29 Cal.2d at p. 850; *Eu*, *supra*, 54 Cal.3d at p. 530.)

VIII. THE COURT OF APPEAL CORRECTLY APPLIED ESTOPPEL TO PREVENT INJUSTICE UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE

Even if the inclusion of terminal pay is not protected as a vested right, the Court of Appeal correctly found that estoppel applies.

The State and Sanitary District argue that estoppel is not appropriate, primarily by erroneously asserting that it cannot be invoked to enforce pension rights contravening CERL and by assuming bad faith by the boards, employers, unions, and employees who agreed to the post-*Ventura* settlements. Estoppel, however, is not foreclosed here given the boards' authority to settle litigation in the interest of the retirement systems and their members, and, as the court correctly determined, "the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify" the incidental impact on current-day interpretations of CERL. (*Alameda*, *supra*, 19 Cal.App.5th at p. 126, quoting *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 496-497.)

A. Estoppel Is Appropriate to Avoid Injustice Caused by Widespread and Long-Continuing Misrepresentations

This Court has long recognized "the unique importance of pension rights" to public employees, and that estoppel is appropriate where such employees were "induced to accept and maintain employment on the basis of expectations fostered by widespread, long-continuing misrepresentations" concerning their future pension rights. (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 28.)

The doctrine of equitable estoppel "rests firmly upon a foundation of conscience and fair dealing," and may be appropriately applied against the government "where justice and right require it." (*City of Long Beach*,

supra, 3 Cal.3d at pp. 488, 493.) It is a tool of equity allowing a court to avoid injustice—injury resulting from justifiable reliance induced by another party's conduct. (*Id.* at p. 489.) In the context of public employee pensions, this occurs where "employees were induced to accept and maintain employment on the basis of expectations fostered by widespread, long-continuing misrepresentations," and the circumstances indicate "an extremely narrow precedent for application in future cases." (*Longshore, supra,* 25 Cal.3d at p. 28; *City of Long Beach, supra,* 3 Cal.3d at p. 500.)

Specifically, "[t]he government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, 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 . . . ." (*City of Long Beach, supra,* 3 Cal.3d at pp. 496-497.) Accordingly, cases in which estoppel has been applied against the government involve not only a determination as to whether the traditional elements of estoppel are present but an additional balancing of two competing principles—the principle of equity favoring the avoidance of manifest injustice and the principle seeking to preserve the public interest. (*Id.* at pp. 495-496.) "The tension between these twin principles

makes up the doctrinal context in which concrete cases are decided." (*Id.* at p. 493.)

This is necessarily a fact-intensive inquiry, each case turning on the specific circumstances and relevant equitable considerations. The Court of Appeal here carefully considered the circumstances and weighed the injustice that would result. It found estoppel appropriate based on extraordinary circumstances that included the sea change *Ventura* caused for CERL systems regarding pensionable compensation; the post-*Ventura* lawsuits filed across the state; the prospect of significant and costly on-going litigation; the continuing authority of *Guelfi*; and the mandate that retirement systems efficiently provide benefits to their members. (*Alameda, supra*, 19 Cal.App.5th at p. 126.) As a result, the court properly applied estoppel, particularly because the circumstances involved an "impressive combination of governmental acts encouraging reliance" by thousands of public employees that is "not likely to recur." (*City of Long Beach, supra,* 3 Cal.3d at p. 498.)

Indeed, there is no doubt that the government's extraordinary conduct here encouraged reliance by thousands of public employees over many years, and that, as a result, employees in the three counties believed their pension benefits included terminal pay. The representations to employees came from both the employers and retirement boards, were open

and affirmative, and lasted for years. All were the consequence of judicially-approved settlement agreements executed in response to litigation arising from this Court's decision in *Ventura*, which the boards had the authority to settle in light of their power to administer the retirement systems. (*Alameda*, *supra*, 19 Cal.App.5th at pp. 125-126, 77-81.) In Merced, the misrepresentations continued following a Superior Court judgment affirming members' continued receipt of the benefits promised to them in the settlement agreement. (10 CT 2705-2706.)

The Sanitary District asserts that because CCCERA never entered into a formal settlement agreement with active employees after *Ventura*, applying estoppel to them was improper because there was no threatened litigation. (Sanitary District's Brief, p. 47.) This is incorrect: CCCERA admits that it extended the terms of the *Paulson* Settlement to active employees because those employees were threatening litigation—no illusory threat given the post-*Ventura* litigation across the state. (17 CT 4955.) Moreover, CCCERA agreed to the same terms for active employees because it was obligated to "implement[] the '*Ventura* decision'" for the pay items specified. (17 CT 4784.) It would have made no sense for CCCERA to implement its understanding of the law differently for different members, so the fact that active members were not party to the settlement agreement is immaterial. Instead, CCCERA acted appropriately

to amend its policies rather than expend more resources on re-litigating the same issues with active employees as well.

Nor is it relevant that the employees were represented by counsel. (State's Brief, p. 52.) The State's own cited authority makes clear that this principle is only relevant, and never dispositive, where "one acts with full knowledge of *plain provisions of law*." (*California Cigarette Concessions, Inc. v. City of Los Angeles* (1960) 53 Cal.2d 865, 871, emphasis added; *Jordan v. City of Sacramento* (2007) 148 Cal.App.4th 1487, 1497.) Moreover, the representations at issue here are factual, not legal in nature—legacy employees in the three counties were told that what their retirement benefits would be, and that they would include terminal pay and the other disputed payments. Only now, as a result of AB 197, and even though the benefits were in place for more than a decade, is it being asserted by the State and Sanitary District that the benefits were unlawful.

In light of those circumstances, it is speculation to assert that the public employees in this case "were on notice" that terminal pay was not pensionable. (Sanitary District's Brief, p. 52; State's Brief, pp. 52-53.) To the contrary, legacy employees reasonably relied on representations and encouragement from entities that owed them a duty of care not to deceive and mislead them. (Cal. Const., art. XVI, § 17, subd. (b) ["A retirement board's duty to its participants and their beneficiaries shall take precedence

over any other duty"]; *Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 308 ["[I]t is significant if there is a confidential relationship between the public entity and the claimant, as in the case of an applicant for a pension and a board of . . . pension commissioners . . . . Of particular significance is the nature of the right asserted . . . . the greater the right of the claimant, the heavier the obligation upon the agency not to mislead him"]; *Crumpler v. Bd. of Admin.* (1973) 32 Cal.App.3d 567, 582 ["In a matter as important to the welfare of a public employee as his pension rights, the employing public agency 'bears a more stringent duty' to desist from giving misleading advice"].)

The "stringent duty" not to mislead employees is particularly relevant, given that the Sanitary District now asks the Court to relieve it of contractual obligations promised to its employees and adhered to by the Sanitary District for years. The Sanitary District not only agreed to the *Paulson* Settlement, without ever protesting or asserting that it was illegal, but openly informed CCCERA's Board that it offered terminal pay to its employees "*in order to stay competitive in their industry and keep their employees' retirement comparable to the . . . formula offered by other sanitary districts.*" (18 CT 5096, emphasis added; 16 CT 4771.) In other words, the Sanitary District admits that it offered this benefit to induce employees to accept and maintain their employment with the district

As the lower court put it, "[i]t is beyond doubt that this is a case in which there have been widespread and long-continuing misrepresentations by both employers and the Boards regarding the ability of legacy members to include terminal pay in pensionable compensation." (*Alameda*, *supra*, 19 Cal.App.5th at p. 127.) The "unprecedented" circumstances induced reasonable reliance by the employees on the retirement boards' and employers' representations, and limits any adverse effect on public policy because such circumstances are "not likely to recur." (*Alameda*, *supra*, 19 Cal.App.5th at p. 126; *City of Long Beach*, *supra*, 3 Cal.3d at 498, 500 [nature of government entity's conduct is "of extreme relevance in assessing the effect upon public policy"].) The requisite elements of estoppel are plainly met in this case.

B. There Is No Bright-Line Rule Prohibiting Estoppel Under the Circumstances of this Case

The State and the Sanitary District assert that estoppel is barred as a matter of law because estoppel cannot be invoked to contravene statutory prohibitions. (State's Brief, pp. 54-56; Sanitary District's Brief, pp. 48-51.) However, this Court has never set forth a bright-line rule prohibiting estoppel when a distinct legal right was not established. Rather, as articulated in *City of Long Beach*, the Court is tasked with weighing any frustration of public policy against the injustice averted and determining whether estoppel is justified under the circumstances. (*City of Long Beach*,

supra, 3 Cal.3d at p. 498.) In other words, an "effect upon public interest or policy" is assumed by and imbedded in the balancing test itself. This is so because estoppel is fundamentally a tool of equity—employed to remedy an injustice resulting from a party's injury to their legal rights or status. If it were summarily prohibited by existing statutory authority, it could never exist against any government entity. A bright-line rule would threaten to swallow the doctrine of equitable estoppel entirely.

City of Long Beach upheld estoppel even while assuming it "would be contrary to the public policy reflected in" the state constitution. (*City of Long Beach*, *supra*, 3 Cal.3d at p. 500.) The assumed effect on public policy was not dispositive, because "more significant" was "the rare combination of government conduct and extensive reliance" which created "an extremely narrow precedent for application in future cases." (*Ibid.*) Thus, this Court did not apply a bright-line prohibition on the application of estoppel even when confronted with an acknowledged frustration of constitutional policy.

This Court's decision in *Longshore, supra*, 25 Cal.3d 14, does not change the fundamental nature of the estoppel analysis set forth in *City of Long Beach*. First, *Longshore* concerned "alleged assurances" by an individual employee's supervisors that certain overtime credits would be compensated as cash. (*Id.* at pp. 27-28.) *Longshore* did not involve the

application of estoppel in "the narrow area of public employee pensions," which is of "unique importance" "to an employee's well-being." (*Id.* at pp. 28-29 ["Here . . . compensation rather than pension rights are involved."].)

Second, *Longshore* affirms both the application of estoppel in circumstances where "employees were induced to accept and maintain employment on the basis of expectations fostered by widespread, long-continuing misrepresentations," and that the proper analysis is a balancing test which assumes there will be an adverse effect on public policy. (*Longshore*, *supra*, 25 Cal.3d at p. 28 ["In each of these instances the potential injustice to employees or their dependents clearly outweighed any adverse effects on established public policy"].) Estoppel was not appropriate in *Longshore* because the plaintiff there "assert[ed] no widespread misleading practices," nor was he "induced by [] misrepresentations to perform the work in question . . . ." (*Id.* at p. 29.) While *Longshore* does note in reflective dicta that "no court has expressly invoked principles of estoppel to contravene directly any statutory or constitutional limitations," it does not say that such an application of estoppel would be barred in circumstances where "justice and right require it." (*Id.* at p. 28; *City of Long Beach, supra,* 3 Cal.3d at p. 493.)

In short, *Longshore* recognizes the unique importance of public employee pension rights, reaffirms the balancing test as outlined in *City of*

Long Beach, and acknowledges that estoppel is appropriate where public employees are induced to accept and maintain their employment by a public entity's "widespread" and "long-continuing" misrepresentations about their future pension rights.

But the cases the State and the Sanitary District rely on for their asserted bright-line rule do not even meet the threshold test for the application of estoppel in the first instance. Neither *Boren v. State Personnel Bd.* (1951) 37 Cal.2d 634 nor *Martin v. Henderson* (1953) 40 Cal.2d 583 are pension cases, and both pre-date *City of Long Beach*. These cases concerned the "terms and conditions of civil service employment" which are "fixed by statute and not by contract." (*Boren, supra,* 37 Cal.2d at 641; *Martin, supra,* 40 Cal.2d at 590.) The "contract" alleged in *Boren* was a "postal card questionnaire filled out by plaintiff when he applied for state employment." (*Boren, supra,* 37 Cal.2d at p. 641.) In *Martin*, the chief of the department did not have the authority to alter statutory compensation for state employees. The majority opinion in *Martin* does not even mention estoppel.

There were no widespread or long-continuing misrepresentations inducing continued employment in *McGlynn v. State* (2018) 21 Cal.App.5th 548. Rather, the plaintiffs there were given false information by unspecified "state personnel" and thereafter misclassified by the retirement system for a

single year. (*Id.* at p. 542.) Moreover, the misrepresentations were made to the plaintiffs, elected judges, after they were elected to their positions. (*Ibid.*) Therefore, they did not accept or maintain continued employment for years based on those misrepresentations, as the legacy members have here.

The plaintiffs in *Medina v. Bd. of Retirement* (2003) 112 Cal.App.4th 864 likewise were not induced to take action as a result of widespread or long-continuing misrepresentations. Instead, they sought to gain from the retirement system's isolated mistake in not reclassifying them after they moved from safety to miscellaneous positions. (*Id.* at pp. 866-868.) Similarly, the plaintiff in *City of Pleasanton, supra*, 211 Cal.App.4th 522, sought to gain from an isolated administrative mistake—the employer's improper reporting of compensation to the retirement system. (*Id.* at pp. 527-528.) No representations by the retirement system were at issue in the case. In *Fleice v. Chualar Union Elementary School Dist.* (1988) 206 Cal.App.3d 886, pension rights were not at issue. Instead the case concerned an employer that mistakenly granted tenure to an employee. (*Id.* at pp. 888-889.)

Unlike this case, the courts in *Medina*, *City of Pleasanton*, and *Fleice* had no occasion to balance any injustice with a frustration of statutory policy because none of those cases identified any injustice in the

first place. There were no "widespread" or "long-continuing" affirmative representations upon which large groups of people were induced to accept and maintain long-term employment. All concerned isolated administrative mistakes for which individual plaintiffs were seeking to unjustifiably capitalize.

Finally, *City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210, considered a purely retrospective application of estoppel, not prospective, and therefore is not authority on the question before this Court. (*Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195 [noting that an opinion is not authority for a proposition not considered].) The decision plainly states it did not consider or decide the issue. (*City of Oakland, supra,* 224 Cal.App.4th at p. 243.) On its merits, *City of Oakland* supports applying estoppel here, because it recognizes that the duty of retirement boards to participants and beneficiaries "take[s] precedence over all other provisions of law." (*City of Oakland, supra,* 224 Cal.App.4th at p. 246; Cal. Const., art. XVI, § 17.) It also affirms that pension rights are of "unique importance" to the persons holding those rights and that retirement boards have broad administrative discretion to effectuate their constitutional duties to their participants. (*City of Oakland, supra,* 224 Cal.App.4th at pp. 242, 245.) Similarly here, the retirement boards exercised their plenary authority

to administer the retirement systems, including the power to settle litigation in the interest of the systems and consistent with their fiduciary responsibilities. (*Id.* at pp. 243-245; Cal. Const., art. XVI, § 17; *Alameda*, *supra*, 19 Cal.App.5th at pp. 125-126.)

In sum, estoppel is appropriate against the government where all the requisite elements are present, and "justice and right require it" to prevent a manifest injustice, and it is certainly appropriate here. (*City of Long Beach, supra,* 3 Cal.3d at p. 493.)

For many years, the retirement boards, on behalf of and working with employers, induced thousands of legacy members to continue employment on the explicit promise that terminal pay would be included in their pension calculation. Many employers, including the Sanitary District, benefited from this promise. The Court of Appeal appropriately recognized these extraordinary circumstances, and correctly determined that estoppel applies.

CONCLUSION

This Court long ago established that pensions play a vital role in protecting retired and disabled public employees against economic insecurity; these public policy reasons are precisely why pensions are a right "favored" by law. (*Hittle*, *supra*, 39 Cal.3d at p. 390.) For its part, CERL declares that its purpose is to "recognize a public obligation to

county and district employees who become incapacitated by age or long service in public employment and its accompanying physical disabilities by making provisions for retirement compensation and death benefits as additional elements of compensation for future services." (Gov. Code, § 31451.)

Notwithstanding political winds blowing against public employees and their retirement benefits, the Court should honor that commitment to retirement security and uphold its own Contract Clause precedent. The retirees and employees here dedicated years, if not decades, to public service, and anecdotes about highly compensated executives do not reflect the thousands of rank-and-file who will never receive headline-grabbing pension benefits, even under the terms in place before AB 197. Because these legacy members have a vested right to their pensions and are owed the benefit of what was promised to them, the Unions respectfully ask that the Court find in their favor.

Date: July 19, 2018

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CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.204(c)(1), I certify that the text of this brief contains 13,954 words, as counted by the Microsoft Word program used to generate the brief.

Dated: July 19, 2018

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PROOF OF SERVICE

Alameda County Deputy Sheriff's Association, et al. v Alameda County Employees' Retirement Association, et al.,
California Supreme Court Case No. S247095

I am employed in Alameda County. I am over the age of eighteen (18) years and not a party to the within action. My business address is LEONARD CARDER, LLP, 1330 Broadway, Suite 1450, Oakland, California 94612. On July 19, 2018, I served the following document(s):

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

/s/

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