No. S247095

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ALAMEDA COUNTY DEPUTY SHERIFFS' ASSOCIATION, et al.,

Plaintiffs and Appellants,

vs.

ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASSN. AND BD. OF THE ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASSN., et al.,

Defendants and Respondents,

and

THE STATE OF CALIFORNIA,

Intervener and Respondent.

First Appellate District, Division Four, Case No. A141913
Contra Costa County Superior Court, Case No. MSN12-1870
Hon. David B. Flynn (Ret.), Judge

APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF ASSOCIATION OF CALIFORNIA SCHOOL ADMINISTRATORS

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APPLICATION TO FILE AMICUS CURIAE BRIEF

Pursuant to California Rules of Court, Rule 8.520(f), the Association of California School Administrators ("ACSA"), requests leave to file the *amicus curiae* brief submitted herewith. This brief is not submitted in support of a specific party, as ACSA is partially supportive of the position advanced by Intervenor and Respondent State of California ("the State") (see *Amicus Curiae Brief*, fn. 2), and is partially supportive of the position advanced by Petitioner Alameda County Deputy Sheriff's Association ("Petitioner"). The State and Petitioner both filed Reply Briefs on the Merits on August 23, 2018.

I. Interest of Amicus Curiae

ACSA – a voluntary professional membership association of over 18,000 public school administrators – represents most of the school and district administrators who are directly responsible for providing high quality education to the more than six million children attending public schools in California. With regard to the pension systems impacting public school employees, ACSA members have multiple interests which they must balance. For example, superintendents and others in top leadership positions are tasked with operating our public schools, which necessarily includes finding ways to contain costs (including pension costs) and maximize funds available to operate programs that benefit students. On the other hand, school administrators are members of CalPERS and CalSTRS, and, as public employees who earn pension benefits, they are interested in stability and certainty with regard to those benefits.

The Court of Appeal herein correctly decided that: (1) "[T]he use of 'must' in [*Allen v. Board of Administration* (1983) 34 Cal.3d 114 ("*Allen II*")] was not 'intended to herald a fundamental doctrinal shift.'"; and (2) The Court of Appeal in *Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.* (2016) 2 Cal.App.5th 674 (hereafter

"*Marin*") "improperly relied on its general sense of what a reasonable pension might be . . .." Instead, as determined by the Court of Appeal herein, analysis of an alleged impairment of vested pension rights requires an "individualized balancing test . . . [and] a specific analysis of the changes that have been effected by the new law." (*Alameda County Deputy Sheriff's Association v. Alameda County Employees' Retirement Assn.* (2018) 19 Cal.App.5th 61, 122 (hereafter "*Alameda*").)

ACSA has an interest in this Court's review of this case, and in any alteration of the "California Rule" relative to alleged impairment of pension benefits, given the importance to every ACSA member of clearly articulated rules related to modification or elimination of pension benefits.

II. Need For Further Briefing

ACSA believes additional briefing is necessary to address matters not fully addressed by the parties.

ACSA will address the Contract Clause underpinnings of the "California Rule," and will argue that the contention that employees are entitled in the abstract to only a "substantial or reasonable pension" (*Kern v City of Long Beach* (1947) 29 Cal.2d 848, 855) — whatever that means — is unsustainable as a matter of Contract Clause analysis.

For the foregoing reasons, *amicus curiae* Association of California School Administrators respectfully request that the Court accept the attached brief for filing.

Respectfully submitted,

ATKINSON, ANDELSON, LOYA, RUUD & ROMO

Dated: September 21, 2018

By: _____

Anthony P. De Marco
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AMICUS CURIAE BRIEF

I. INTRODUCTION

The parties have comprehensively briefed the question of whether the Public Employee Pension Reform Act of 2013 (PEPRA) statutes, as applied to the County Employees Retirement Law of 1937 (CERL), merely clarified the law to prevent "pension spiking" or instead changed the law and substantially impaired pension benefits earned by county employees.[1] The issue of whether comparable advantages "must" or "should" be provided to offset pension plan changes that disadvantage employees – the debate over the scope of the "California Rule" – is also well covered in other briefs.

This brief will focus more broadly on state and federal precedents related to vested rights protected by the contract clauses of the U.S. and California constitutions. These cases require: (1) a recognition that employees have a "vital interest" in their pension plans; (2) identification of the severity of the impairment of vested rights, and a corresponding balancing of the interests of the employees and the state with respect to pension plan changes; and, (3) that any vested rights analyses take into account the reasonable expectations of employees with respect to the specific pension benefits at issue. None of this suggests that pension benefits can never be modified without providing new advantages for employees, nor that there is an absolute bar on impairments of vested rights. However, as the Court of Appeal in this case correctly noted, courts

[1] ACSA members are subject to the California Public Employees' Retirement System or the California State Teachers Retirement System, not the CERL, and ACSA expresses no view regarding pensionable compensation under the CERL and the specific policies and practices at issue in this case.

cannot forego this careful inquiry and improperly rely on their "general sense of what a reasonable pension might be."

The "reasonable expectations" of California public-sector employees, for purposes of a Contract Clause analysis, must be considered in light of an unbroken chain of cases — stretching back more than 60 years (the entire working lifetime of virtually all current public employees) (see, e.g., *Allen v. City of Long Beach* (1955) 45 Cal.2d 128) ("*Allen I*") — which establishes, at a minimum, that any detrimental changes to an established pension formula "*should* be accompanied by comparable new advantages." (*Id.* at p. 131.)

Moreover, contrary to concerns raised by Respondents: (1) windfall pension benefits conferring "unforeseen advantages" can be addressed (and, in appropriate cases, eliminated) without a wholesale reworking of the "California Rule;" and, (2) prospective changes to long-standing pension formulas may impair vested rights, and are not immune from scrutiny simply because they are limited in application to compensation earned after the effective date of the impairment.

II. THE CONTRACT CLAUSE PROTECTS REASONABLE EXPECTATIONS — WHICH INCLUDES APPLICATION OF THE LONG-STANDING "CALIFORNIA RULE" — BUT ALLOWS FOR ELIMINATION OF WINDFALL BENEFITS OR UNANTICIPATED ADVANTAGES

A. The Contract Clause Is Not An Absolute Bar To Impairment Of Vested Pension Benefits

The Contract Clause provides that "no State shall . . . pass any . . . Law impairing the Obligation of Contracts." The U.S. Supreme Court has, nevertheless, held that this "prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula." (*Home*

Building and Loan Assn. v. Blaisdell (1934) 290 U.S. 398, 428.). Instead:

> Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State "to safeguard the vital interests of its people."

Energy Reserves Group, Inc. v. Kansas Power & Light Co. (1983) 459 U.S. 400, 410.

Even where public obligations are impaired, the U.S. Supreme Court has held that "[t]he Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose." (*U.S. Trust Co. of New York v. New Jersey* (1977) 431 U.S. 1, 25.)

B. Claimed Contract Impairments — And Particularly Impairments Impacting Pension Benefits — Are Subject To Careful Examination Tied To The Reasonable Expectations Of The Parties

It is beyond dispute that California public pensions give rise to rights which are protected under the Contract Clause. (See, e.g., *Kern, supra,* 29 Cal.2d at 853 (holding that "public employment gives rise to certain obligations which are protected by the contract clause of the Constitution, including the right to the payment of salary which has been earned. Since a pension right is 'an integral portion of contemplated compensation', it cannot be destroyed, once it has vested, without impairing a contractual obligation." (citations omitted); *Lyon v. Flournoy* (1969) 271 Cal.App.2d 774, 779 ("California is firmly committed to the proposition that [public employees' retirement rights'] are contractual . . ..")

In considering an alleged pension impairment, the starting point for

analysis must, therefore, must be the foundational cases establishing the contours of Contract Clause analysis. The court in *Rue-Ell Enterprises, Inc. v. City of Berkeley* (1983) 147 Cal.App.3d 81 summarized the three-step analytical process developed in *Energy Reserves* as follows:

> The Supreme Court in *Energy Reserves* described a three-step process for analyzing impairment claims. The first step is to determine whether the state law has "operated as a substantial impairment of a contractual relationship." . . . [T]he next [second] step is to determine whether the state, in justification, has "a significant and legitimate public purpose behind the regulation . . ., such as the remedying of a broad and general social or economic problem." . . . [T]he third inquiry is whether the adjustment of the rights and duties of the contracting parties is based upon "reasonable conditions" and is "of a character appropriate to the public purpose justifying [the legislation's] adoption.

(*Id.* at pp. 87-88) (emphasis added) (citations omitted); (Accord, *Barrett v. Dawson* (1998) 61 Cal.App.4th 1048, 1054-1055.)

Under this test, "[t]he threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.'" (*Energy Reserves, supra*, 459 U.S. at 411 [citing to *Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 244].)

In conducting this threshold inquiry, a sliding scale applies: "The severity of the impairment measures the height of the hurdle the state legislation must clear." (*Allied Structural Steel Co., supra*, 438 U.S. at 245; Accord, *Energy Reserves, supra*, 459 U.S. at 411.) A "minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation." (*Ibid.*) "[T]he severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected." (*Energy Reserves, supra,* 459 U.S. at 411 [citing to *Allied Structural Steel Co., supra*, 438 U.S. at 245].)

The fact that a particular impairment may impact only a small percentage of a larger whole is not necessarily the end of the inquiry. For example, in *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 308-309, this Court held that impairment of a "single contract provision for salary increases in the 1978-1979 fiscal year [which] by its express terms does not invalidate contract provisions dealing with fringe benefits and other matters," was nonetheless a "severe, permanent, and immediate change."

When considering the public purpose behind an alleged impairment, courts "[e]valuat[e] with particular scrutiny a modification of a contract to which the State itself [i]s a party." (*Allied Structural Steel Co., supra,* 438 U.S. at 244.) This analysis is "more stringent" than applies to claimed impairments of contracts between private parties. (*Id.* at p. 244, fn. 15.)

Ultimately, before authorizing an impairment of contract, "what is required is a "careful examination of the nature and purpose of the state legislation." (*Allied Structural Steel Co., supra*, 438 U.S. at 245; Accord *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2011) 86 Cal.App.4th 534 (citing to *Sonoma County Organization of Public Employees, supra*, 23 Cal.3rd at 309.)

As part of this analysis, the reasonable expectations of the parties to the contract (including the affected employees) must be considered. Restricting "a party to gains it reasonably expected from the contract does not necessary constitute a substantial impairment." (*Energy Reserves, supra*, 459 U.S. at 411 (emphasis added) (citing to *Allied Structural Steel Co., supra*, 438 U.S. at 242; see, also, *City of El Paso v. Simmons* (1965) 379 U.S. 497, 515 (holding "This Court's decisions have never given a law which imposes unforeseen advantages or burdens on a contracting party

constitutional immunity against change.").)

In the pension context, the U.S. Supreme Court has also observed that both parties have a "vital" reliance interest in anticipated pension benefits. In *Allied Structural Steel Co.*, the U.S. Supreme Court held that "the funding of a pension plan" is "an area where the element of reliance [is] vital." (*Allied Structural Steel Co., supra*, 438 U.S. at 246.) Although the "vital" interest in that case was the interest of an employer in avoiding unanticipated state-mandated pension obligations, the Court expressly observed that, although no issue of employee reliance was raised in that case, "**the element of reliance may cut both ways**." (*Id.* at 246, fn. 18.)

Accordingly, the contention that employees are entitled in the abstract to only a "substantial or reasonable pension" (*see Kern, supra*, 29 Cal.2d at 855) — whatever that means — is unsustainable as a matter of Contract Clause analysis, as it ignores: (1) the employees' "vital interest" in their pension; (2) the "careful examination," tied to the severity of the impairment, which is required under the Contract Clause; and (3) the "reasonable expectations" of each party (i.e. including each impacted public employee).

For these reasons, ACSA concurs with the Court of Appeal in *Alameda, supra*, that in the present context, analysis of an alleged impairment of vested pension rights requires an "individualized balancing test . . . [and] a specific analysis of the changes that have been effected by the new law." (*Alameda, supra*, at 19 Cal.App.5th at 122.) For the same reasons, ACSA likewise concurs with the *Alameda* court's assessment that "the *Marin* court improperly relied on its general sense of what a reasonable pension might be . . .." (*Ibid.*)

C. Prospective Changes To A Pension Formula Impacting Current Employees Are Outside The "Reasonable Expectations" Of California Public Employees

The State seems to contend that prospective changes to a retirement formula are always permissible where applied to compensation earned after the effective date, even where the change alters current employees' anticipated pension formula. [Intervenor and Respondent State of California's Reply Brief On The Merits, Section II].

It is beyond dispute that a change in pension formula coming at the end of a long-term employee's years of service may substantially reduce the employee's expected pension, and may substantially alter long-standing plans for retirement, depriving the employee of any benefit from years of employee (and employer) contributions keyed to the prior (more generous) formula.

More than 60 years after *Allen I*, it strains credulity to suggest that prospective changes of this nature are within the "reasonable expectations" of the parties. Here, the "reasonable expectations" of California public-sector employees must be considered in light of an unbroken chain of cases — stretching back more than 60 years (the entire working lifetime of virtually all current public employees) (see, *Allen I, supra*) — which establishes, at a minimum, that any changes to an established pension formula "*should* be accompanied by comparable new advantages." (*Id.* at p. 131 (emphasis added).)[2]

[2] We agree with the *Alameda* court's determination that *Allen II* (ostensibly replacing "should" with "must") was "not intended to herald a fundamental doctrinal shift," (citing to *Marin, supra*, 2 Cal.App.5th at pp. 697-699). But even under the "should" formulation of the "California Rule," "when no comparative new advantages are given, the corresponding burden to justify any changes with respect to legacy members will be substantive."

In cases, like this, which involve long-standing rules implicating vested rights, this Court has also been loath to disturb settled expectations. Accordingly, while decisions of this Court are generally given full retroactivity, this Court has "recognized exceptions to that rule when considerations of fairness and public policy preclude full retroactivity . . . [such as where] contracts have been made or [vested] property rights acquired in accordance with the prior decision." (*Peterson v. Superior Court* (1982) 31 Cal.3d 147). Likewise:

> The significance of stare decisis is highlighted when legislative reliance is potentially implicated. Certainly, "[s]tare decisis has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response."

Sierra Club v. San Joaquin Local Agency Formation Com. (1999) 21 Cal.4th 489, 504.

For the same reasons, this Court should reject the State's blanket assertion that prospective changes in the pension formula do not impair vested rights when limited in application to compensation earned after the effective date.

(*Alameda, supra*, 19 Cal.App.5th at 122 (citing to *Allen II, supra*, 34 Cal.3d at 119).)

D. The State's Interest In Eliminating "Pension Spiking" Does Not Require A Wholesale Reworking Of The "California Rule," But Can Be Analyzed Under Existing Law, Which Allows For The Elimination Of Windfalls Benefits And Unforeseen Advantages

Here, the State does not argue the impairments at issue are justified by fiscal distress, but instead contends that these impairments (which the State describes as a form of "pension spiking") are justified by the State's vital interest in ensuring fairness and avoiding unforeseen advantage. [Intervenor and Respondent State of California's Opening Brief, Section III.B.]

Efforts to combat "pension spiking," however, do not require a wholesale reworking of the "California Rule." Rather, under existing precedent, courts may eliminate windfall pension benefits conferring "unforeseen advantages." In *Lyon v. Fluornoy*, for example, the Third District Court of Appeal upheld a change in the applicable pension formula (barring legislators from receiving a windfall pension increase due to a sudden increase in salary from $6000 to $16,000), reasoning as follows:

> To pay them allowances based upon the new $16,000 salary **would hand them a bonanza far outstripping their expectations** for cost-of-living increases, dwarfing their relatively modest contributions and demanding enlarged appropriations of general tax funds to maintain the retirement system's solvency.
>
> . . .
>
> The 1966 restriction preserved the basic character of the earned benefit but withheld a windfall unrelated to its real character. . . . **The lawmaking power chose to confine beneficiaries to the gains 'reasonably to be expected from the contract' and to withhold 'unforeseen advantages' which had no relation to the real theory and objective of the fluctuation provision**. Such a choice is not the repudiation of a debt, not an impairment of the contract.

(*Lyon v. Fluornoy*, *supra*, 271 Cal.App.2d at 786-787 (emphasis added).) The holding in *Lyon*, moreover, is consistent with long-standing Contract Clause analysis. (*see Energy Reserves, supra*, 459 U.S. at 411; *Allied Structural Steel Co., supra*, 438 U.S. at 242; *City of El Paso, supra*, 379 U.S. at 515.)

In short, windfall pension benefits conferring "unforeseen advantages" can be addressed (i.e. in appropriate cases eliminated) without a wholesale reworking of the "California Rule."

III. CONCLUSION

For the reasons set forth above, *amicus* Association of California School Administrators requests that the Court uphold the Court of Appeal's determination remanding the matter for further consideration by the trial court, and further requests that the Court:

1. Reject the notion that employees have only an abstract entitlement to a "substantial or reasonable" pension, and adopt the *Alameda* court's determination that an alleged impairment of vested pension rights requires an "individualized balancing test . . . [and] a specific analysis of the changes that have been effected by the new law." (*Alameda*, *supra*, at 19 Cal.App.5th at 122.)

2. Hold that legislative enactments conferring "unforeseen advantage," or which includes "windfall [benefits] unrelated to its real character" — what the State describes herein as "pension spiking" — can be addressed without a wholesale reworking of the "California Rule."

3. Reject the notion that prospective changes to long-standing pension formulas do not impair vested rights, merely because they are limited in application to compensation earned after the effective date.

Respectfully submitted,

ATKINSON, ANDELSON, LOYA, RUUD & ROMO

Dated: September 21, 2018

By: _____

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Joshua E. Morrison
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CERTIFICATE OF COMPLIANCE

(PURSUANT TO CRC 8.504(D)(1))

Pursuant to California Rules of Court Rule 8.504(d)(1), I certify that according to Microsoft® Word 2010 word-processing program, the brief is proportionally spaced, has a typeface of 13 points and contains 5,260 words used to generate the brief.

Joshua E. Morrison

PROOF OF SERVICE

[C.R.C. 8.212(c)]

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and am not a party to the within action; my business address is 12800 Center Court Drive South, Suite 300, Cerritos, California 90703.

On September 21, 2018, I served the following document(s) described as **APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF ASSOCIATION OF CALIFORNIA SCHOOL ADMINISTRATORS** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

☒ **BY MAIL:** I placed a true and correct copy of the document(s) in a sealed envelope for collection and mailing following the firm's ordinary business practices. I am readily familiar with the firm's practice for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

☒ **BY OVERNIGHT COURIER:** I enclosed the document(s) in an envelope or package provided by an overnight delivery carrier and addressed it to the parties shown herein. I placed the envelope or package at my place of employment in accordance with regular business practices for collection and overnight delivery.

☒ **BY ELECTRONIC SUBMISSION:** A true and correct copy of the document(s) was scanned and electronically submitted to the Supreme Court of the State of California, via the California Courts website at www.courts.ca.gov, in a text-searchable PDF format pursuant to California Rules of Court, Rule 8.212(c)(2)(A).

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on September 21, 2018, at Cerritos, California.

Jeannie Curtiss

SERVICE LIST

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

Case No. S247095

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Clerk of the Court of Appeal First District County of Appeal 350 McAllister Street San Francisco, CA 94102	**By Overnight Mail**
Clerk of the Superior Court Contra Costa County Superior Court 725 Court Street Martinez, CA 94553	**By Overnight Mail**
Clerk of the Superior Court Alameda County Superior Court René C. Davidson Courthouse 1225 Fallon Street Oakland, CA 94612	**By Overnight Mail**
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