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

In The Supreme Court Of The State Of California

ALAMEDA COUNTY DEPUTY SHERIFFS' ASSOCIATION, ET AL.,

Petitioners and Appellants,

vs.

ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASSN., ET AL,

Defendants and Respondents,

STATE OF CALIFORNIA,

Intervener,

CENTRAL CONTRA COSTA SANITARY DISTRICT,

Real Party in Interest.

.

AFTER A DECISION BY THE COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION FOUR, CASE NO. A141913, CONTRA COSTA COUNTY SUPERIOR COURT CASE NO. MSN12-1870 (CONSOLIDATED)

REPLY IN SUPPORT OF PETITION FOR REVIEW BY CENTRAL CONTRA COSTA SANITARY DISTRICT

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Petitioner Central Contra Costa Sanitary District ("Sanitary District"), real party in interest in the above captioned case, reported as *Alameda County Deputy Sheriff's Association et al. v. Alameda County Employees' Retirement Association, et al.* (2018) 19 Cal.App.5th 61 (*Alameda*), files this Reply in response to the Answer filed by various parties in this case.

I. INTRODUCTION

The parties to the Answer would have this Court deny review because the legality of AB 197 is either "legally settled" or does not involve "issues of significance." Given their extensive briefing on the merits, these assertions obviously are not correct.

Although one party on their side filed a Petition For Review in this case on the issue of whether a "comparable new advantage" must be offered for every pension modification, Answering parties make a series of convoluted arguments to avoid review of the many other important issues raised by the *Alameda* decision. They argue that, without review, this Court should simply send *Marin Association of Public Employees' Retirement Association* (2016) 2 Cal.App.5th 674 (*Marin*) back to the Court of Appeal to be decided consistent with *Alameda,* or decide the "comparable advantage" issue in the case of *Cal Fire Local 2881 v. California Public Employees' Retirement System* (2016) 7 Cal.App.5th 115 (*Cal Fire*), now pending before this Court, or in the *Marin* case.

Putting aside that Answering parties are asking this Court to prematurely determine the merits in *Cal Fire* and *Marin*, both before this Court, this case involves important issues beyond whether a comparable new advantage is required.

First, this *Alameda* case involves important issues of statutory interpretation of AB 197's anti-spiking provisions, which affect all 20 CERL counties, and not addressed in the *Cal Fire* or *Marin* cases. Were this Court to decide that the *Alameda* Court is wrong on these statutory issues, and instead find that AB 197 simply confirmed that various forms of spiking were illegal, this case could be decided without reaching the constitutional vested rights issues. Second, even if the constitutional issues are reached, *Alameda* involves the separate and important issue (beyond the comparable advantage issue) of what financial or other justification must be shown for pension modifications for active employees. Third, the case involves whether equitable estoppel can apply when an agency lacks legislative authority, an important issue that negatively affects all public agencies.

It is obvious why Answering parties are concerned that this Court not reach the important issues raised in this *Alameda* case. They would walk away with dramatic changes in the law: a mandate for pension spiking for the lifetimes of their members, an impossible standard that would prevent pension modification for active employees, and a broad rule of equitable

estoppel that could be used in numerous other cases to frustrate legislative intent. All without review by this Court.

Because the *Alameda* decision would have far reaching effects, in this and other cases, this Court should grant review. In order to address the pending cases most efficiently, the Court should order simultaneous briefing in the *Marin* and *Alameda* cases.

II. ARGUMENT

A. The Contention That This Court Should Send The *Marin* Case Back To Be Decided In Accord With The *Alameda* Case, Or Hold This Case Until *Cal Fire* Or *Marin* Is Decided, Will Not Resolve The Important Issues Of Law Presented By The *Alameda* Case.

The Answering parties contend that this Court should adopt the *Alameda* decision because it is "comprehensive and largely correct" by transferring the *Marin* decision back to the Court of Appeal and directing the *Marin* panel to decide the case consistent with the *Alameda* decision. In the alternative they contend that this Court could grant and hold the *Alameda* decision until it decides the pension modification issues in the *Cal Fire* or *Marin* cases. The Court must reject these suggestions because they will not resolve the important issues presented in this *Alameda* case.

Answering parties make two arguments in support of their plan.

First, they spend numerous pages arguing that the Courts in *Cal Fire* and *Marin* are "outliers" on the issue of pension modification, and that the decisions in those cases simply should be disregarded as contrary to the law.

(Answer Brief 13-19.) This Court, however, already granted review in those cases indicating that there are important issues of law at stake and in fact there are. The extensive briefing on *Cal Fire* and *Marin* presented by the Answering parties is more properly addressed to the merits, as opposed to an Answer to a Petition For Review, and only confirms the importance of the issues involved.

Second, the Answering parties argue that it would be unnecessarily duplicative to grant review in this case when the *Cal Fire* and *Marin* cases are pending before this Court. This contention is incorrect. This case presents numerous important issues that will not be decided in the *Cal Fire* or *Marin* cases.

Cal Fire. *Cal Fire* does not involve AB 197, but a different pension reform provision that ended the ability of CalPERS members to purchase "air time" in order to increase their pensions. The Court of Appeal held that the purchase of airtime was not a vested right, and even if it was a vested right, the legislature had the authority to modify it. Accordingly, *Cal Fire* does not involve the separate, and important, statutory issues present in the *Alameda* case.

These issues include: (1) whether CERL always prohibited the "cash out" of vacation and other leave in pensionable compensation beyond that which was accrued and paid out in the final compensation period, and whether AB 197's use of the term "earned and payable" changed the law, (2)

whether CERL previously permitted the inclusion of on call pay in pensionable compensation and whether AB 197 changed those rules, (3) whether CERL previously permitted retirement boards to disallow manipulation of final compensation to boost pensions and whether AB 197 changed those rules, (4) even though "terminal pay" is not permitted by CERL, whether the settlement agreements entered into by the three CERL systems provide a basis for equitable estoppel. Accordingly, the decision in *Cal Fire* will not resolve these important issues, raised in *Alameda*, but not *Cal Fire*.

***Marin*.** At the time AB 197 was enacted, the Marin retirement system was not engaged in many of the questioned practices present in the Alameda, Contra Costa and Merced systems, in particular the inclusion of certain leave cash outs and terminal pay in final compensation. Accordingly, although the *Marin* case involved AB 197, it did not involve all of the statutory issues presented in the *Alameda* case, most importantly: (1) whether leave cashouts were ever pensionable under CERL and whether AB 197 made a change, and (2) whether equitable estoppel permitted terminal pay to be pensionable based on settlement agreements.

On other issues, *Marin* assumed that AB 197 changed the rules on call pay and pension enhancements, but did not specifically analyze the pre-197 statutory issues. The Marin retirement board made compelling arguments

that AB 197 did not in fact change the law, as has the State in this case, and those arguments need to be considered by this Court.

In summary, neither the *Cal Fire* nor the *Marin* cases will resolve the separate and important statutory legal issues presented by the *Alameda* case. Accordingly, this Court should grant review to decide those issues. Were this Court to determine that AB 197 did not change the law, it would avoid an unnecessary examination of the constitutional vested rights issues.

Moreover, if this Court did reach the pension modification issues, the *Alameda* decision presents a conflict with *Marin* and *Cal Fire* that should be addressed by this Court. The *Alameda* decision articulated an onerous burden, effectively requiring financial insolvency, in order to justify a modification for active employees in connection with future work. This conflicts with the standards articulated in *Marin* and *Cal Fire.*

Accordingly, there is no basis for denying review or holding this *Alameda* case in light of *Cal Fire* or *Marin*. If the Court wishes to avoid redundancy, and ensure that that all issues are addressed, it should order simultaneous briefing in the *Marin* and *Alameda* cases.

B. Whether This Court's Decision In *Ventura*, Decided Over 20 Years Ago, Authorizes The Pension Spiking At Issue Here Presents Important And Undecided Questions Of Law.

Answering parties want it both ways. First, they tell the Court that this Court's decision in *Ventura* left many pensionability issues undecided,

requiring the retirement systems to enter into the 1999 Settlement Agreements. (Answer Brief at 10-11.) They then argue that *Ventura* actually requires the continuation of these practices. *Ventura* in fact does not answer the issues posed by this case, but the *Alameda* Court's insistence that it does creates an important issue of law for review by this Court.

1. The Definition Of "Compensation Earnable" Never Provided Clear And Unequivocal Evidence That The Legislature Intended To Permit The Spiking Practices Addressed By AB 197.

This Court has held that the "legislative intent to create private rights of a contractual nature against the governmental body must be 'clearly and unequivocally expressed.'" (*Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1186-1197 ("*REAOC*") [quoting *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.* (1985) 470 U.S. 451, 466].) This is the "unmistakability" doctrine. (*United States v. Winstar* (1996) 518 U.S. 839, 860.) "[N]either the right of taxation, nor any other power of sovereignty, will be held . . . to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken." (*Ibid.*)

Before AB 197, the definition of "compensation earnable" stated only that:

> [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 for 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.
>
> (Gov. Code 31461(a).)

Yet based on this general definition, which says nothing in particular about leave cash outs, on call pay, or pension enhancements, Answering parties contend that, pre-AB 197, the legislature intended to permit the very specific spiking practices at issue here. Under the "clear and unequivocal" standard articulated by this Court, they are wrong. And because they have no textual support, they rely on *Ventura*, but as shown below, it does not provide the answer.

2. *Ventura* Never Addressed Whether Inclusion Of Cash Outs Of Leave Accrued In Prior Periods Was Authorized By CERL.

The Answering parties contend that, "[l]ong before AB 197, *Ventura* found that leave cashouts are 'compensation earnable' that must be included in pension calculations, and it did not find any limitation in CERL on how much leave could be cashed out." (Answer Brief at 22.) The *Alameda* Court agreed, finding that, under *Ventura*, compensation is pensionable when an employee elects to receive cash in lieu of accrued vacation, in other words when paid. (*Alameda*, 19 Cal.App.4 at 99-100.)

But *Ventura* never answered the question posed here. As previously pointed out by the District, in making this ruling, the *Alameda* Court was

forced to acknowledge that *Ventura* "did not squarely address the timing issue presented in this case." (*Alameda* at 99.) Indeed, the Court of Appeal admitted that: "Indeed, given the limited facts disclosed, it is not impossible that a *Ventura* employee could have accrued the maximum number of annual leave hours permitted to be converted into cash in the same final compensation period as the actual cash-out." (*Alameda* at 99.)

And there is no support for the Court of Appeal's determination that, based on *Ventura*, AB 197 intended to perpetuate this spiking practice. AB 197 was enacted to prevent spiking practices that had arisen under CERL. [1] It was a response to numerous press reports that specifically criticized spiking with unused leave. [2] And AB 197 specifically states that it was enacted to be consistent with two leading Court of Appeal decisions that

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[1] "There is no dispute that the purpose of this change was to curtail pension spiking." (*Marin*, 2 Cal.App.5th at 684.) The *Marin* Court cited to AB 197's legislative history:

> The intent of this section is to reign [sic: rein] in pension spiking by current members of the system to the extent allowable by court cases that have governed compensation earnable in that system since 2003. These cases allow certain cash payments to be included in compensation for the purpose of determining a benefit, but only to the extent that the cash payments were limited to what the employee earned in a year.

(*Marin* at 684, fn. 6; see also SCT 000115, 000119)

[2] See Sanitary District Petition For Review at n. 3.

criticized spiking with leave cash outs payable upon termination of employment. [3]

The Court of Appeal completely ignored this legislative history. It also ignored the plain text of AB 197 (subsection § 31461(b)(2)), which added the requirement that compensation must be both "earned and payable." Rather than engaging in statutory construction, the Court simply conflated the two terms. The Court held that compensation is "earned" not when accrued (as held by the trial court) but rather when paid. Thus, according to the Court of Appeal, the terms "earned" and "payable" essentially mean the same thing –when paid. [4]

Whether this Court's opinion in *Ventura* justifies spiking practices is an important issue of law that needs to be addressed by this Court. The Court of Appeal decision opens the door to the very practices addressed by the legislature in enacting AB 197 – spiking pensions by moving leave accrued in prior time periods into the final compensation period. There are 20 county retirement systems governed by CERL. In the courts below, the State

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[3] AB 197 subsection (c) states: "The terms of subdivision (b) are intended to be consistent with and not in conflict with the holdings in *Salus v. San Diego County Employees Retirement Assn.* (2004) 117 Cal.App.4th 734 and *In re Retirement Cases* (2003) 110 Cal.App.4th 426."

These cases disapproved spiking pensions with terminal pay.

[4] The Court of Appeal stated: "Although admittedly, the word 'payable' was not expressly included in CERL prior to the AB 197 amendments, we believe that in in this context, it is essentially a synonym for 'earned." (*Alameda* at n. 17.)

demonstrated that most CERL retirement systems did not count cash outs as pensionable beyond that accrued and paid in the final compensation system. (SCT 000045-000046, 000050, 000055, 000061.) The three systems involved in this case were the exception. As a result, if the Decision remains published, all CERL systems may be required to reconsider their policies and potentially permit this spiking.

3. *Ventura* Never Addressed Whether Inclusion Of On Call Pay Was Authorized By CERL.

The Court of Appeal held that before AB 197, "on call, standby and similar payments" were pensionable "to the extent they constituted remuneration for on-call services provided by an employee as part of his or her regular work assignment." (*Alameda* at 107-108.) But the Court also concluded that AB 197, section 31461(b)(3), which prohibits including as pensionable "payments for additional services rendered outside of normal working hours," changed the law to exclude all on-call pay. The Court remanded this issue to the trial court to determine if this was a reasonable modification of CERL under the law of vested rights.

Answering parties argue that *Ventura* held on call pay to be pensionable, because *Ventura* permitted the inclusion of a small amount of pay attached to being on call during a meal period. (Answer Brief at 21.) But *Ventura* never engaged in any searching statutory analysis of on call pay in general, which was acknowledged by the *Alameda* Court. (*Alameda* at p.

106-107 ["However, there is no specific analysis in the opinion regarding on-call pay as a component of compensation earnable."])

Both the State in this case, and the Marin retirement board, in the *Marin* case, have shown that even before the enactment of AB 197, CERL did not authorize the inclusion of on call pay in compensation earnable. They contend that Section 31461 had always defined "compensation earnable" as "the average number of days ordinarily worked by persons in the same grade or class of positions during the period." Accordingly, pay for time worked in excess of the "average number of days ordinarily worked" – such as on-call pay – does not meet this definition. (30 CT 8864 [Phase One Amicus Curiae Brief of Marin CERRA and Marin Board at p.11].) This contention conflicts with the Court of Appeal's opposite conclusion – that CERL in fact had permitted the inclusion of on-call pay in pensionable compensation.

This is an important issue of law because it impacts all 20 CERL systems. It is also important, because if the *Alameda* Court is wrong, and on call pay was never pensionable, the courts do not need to reach the constitutional issue of whether AB 197 changed the rule in violation of vested rights.

4. CERL Never Authorized Manipulation Of Final Compensation To Enhance Pensions

AB 197 includes Section 31641(b)(1) which permits a retirement board to find that payments made to "enhance" a pension are not includable

in "compensation earnable." The Court of Appeal found that this new subdivision "clearly effected a change in CERL law" and "must be subjected to a vested rights analysis to determine whether legacy members have the right to have their pensions calculated without reference to its new prescriptions." (*Alameda* at 113.)

Answering parties contend that this Court should not accept review because the *Alameda* Court "thoroughly addressed this issue." (Answer Brief at 21.) But in fact, the Court of Appeal's decision was premature and conclusory.

The record below did not include an adequate analysis into the law before and after AB 197. The Court concluded that this aspect of AB 197 was new but did not consider Government Code Section 31539, which already permitted a retirement board to rectify a situation where "the member caused his or her final compensation to be improperly increased or otherwise overstated at the time of retirement." (Gov. Code § 31539.)

Also, as pointed out by the State in its Request For Depublication, the Court of Appeal adopted an overbroad interpretation of Section 31461(b)(1) and improperly assumed that this section could be applied to general policies on which pay items are pensionable, as opposed to being applied to individualized abuses. (*Alameda* at 113 [section could potentially encompass "every item of compensation received by a CERL employee"].) This sweeping interpretation is inconsistent with AB 197's purpose of

preventing pension spiking abuses, and cannot be read to apply to practices separately addressed in other sections of AB 197.

These are important issues of law because, again, AB 197 applies to all 20 CERL systems, and because a determination that this section did not substantially change the law would avoid the constitutional issue of whether it violates vested rights.

C. The Alameda Court's Decision On Equitable Estoppel Is Contrary To Decades Of Jurisprudence And Presents An Important Legal Issue.

The Court of Appeal agreed with the trial court that CERL had never permitted the inclusion of terminal pay in pensionable compensation. (*Alameda* at 102-103, quoting *Salus*, 117 Cal.App.4th at 741.) And the Court of Appeal found that retirement board policies do not, if contrary to statute, create vested rights. (*Alameda* at 104-105.)

But the Court created an exception. Relying on settlement agreements signed 20 years ago, the Court held that the retirement boards, based on their authority to administer the retirement systems, and thus settle lawsuits, can be estopped from following the law as to all "legacy" employees – which include even those who were not yet employed at the time of the agreements. (*Alameda* at 125-129.)

Answering parties attempt to minimize the *Alameda* Court's departure from existing law by extensively reciting the public policies that support equitable estoppel (in appropriate cases) and arguing that it is a fact- based

inquiry, unlikely to be replicated. But they cannot escape that the *Alameda* Court's ruling is contrary to decades of jurisprudence developed by the Courts to keep public agencies, like retirement boards, in compliance with the law. This is an important issue of law that must be addressed by this Court.

The principle that estoppel cannot contravene statutory restrictions was recently confirmed by *City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210 (*City of Oakland*), which relied on the following line of authority: *Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 28 (*Longshore)*, ("no court has expressly invoked principles of estoppel to contravene directly any statutory or constitutional limitations"); *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, 542-543 (estoppel barred as matter of law where PERS statute precludes treatment of standby pay as pensionable compensation); *Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864, 869-871 (estoppel not available because retirement board lacked authority to classify as safety members employees who do not meet the statutory definition); *Fleice v. Chualar Union Elementary School Dist*. (1988) 206 Cal.App.3d 886, 893 (estoppel cannot expand a public agency's powers); Compare *Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567, 584 (not a case where invoking estoppel would enlarge the statutory power of the board)

Answering parties rely on text from *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, that explains the rationale for equitable estoppel against a governmental entity. (Answering Brief at 25-26.) But *Mansell* itself involved a situation in which the public entity *did* have the authority to provide the relief requested, making it "unnecessary" for the Court to decide the issue. (*Mansell* at p. 499 ["it would be unrealistic to assert that the State wholly lacks the power ….].) And Answering parties rely on text from *Longshore v. County of Ventura*, 25 Cal.3d 14, but *Longshore* in fact rejected "a contention that the county is estopped by its representations to deny compensation rights for pre-1961 overtime," explaining that "no court" had granted a claim for equitable estoppel when the public entity had no authority to grant the relief. (*Id*. at 20, 28.)

Not only is the Court of Appeal's ruling contrary to established law, it creates a broad exception applicable to all public agencies with "administrative" authority. Under the Court's ruling, what an agency cannot do legally, it could accomplish by entering into a settlement agreement. Courts have recognized the negative public policy implications of tying the hands of a legislative body in this manner as to future actions. (See *Summit Media LLC v. City of Los Angeles* (2012) 211 Cal.App.4th 921, 934-937 [invalidating judicially approved settlement agreements in conflict with a municipal ordinance]; *League of Residential Neighborhood Advocates v. City of Los Angeles* (9th Cir. 2007) 498 F.3d 1052, 1055-1057 [holding

judicially approved settlement agreement invalid because it conflicted with state law].) Moreover, the Court of Appeal's broad invocation of "administrative" authority suggests that a public agency may not even need a settlement agreement to be bound under equitable estoppel so long as it acts under its "administrative" powers.

This case is particularly egregious because the *Alameda* Court's order does not just benefit the retirees or employees who brought the original lawsuits that were settled in 1999. Rather, the Court's order benefits all "legacy" employees, even those not employed as of 1999, and requires payment of illegally spiked pensions for their lifetimes. Even more egregious, in the case of the CCCERA settlement, employees were not even parties to the agreement, which involved only retirees. The *Alameda* Court was forced to explain away this inconsistency by speculating that the CCCERA Board would have settled with the employees if they had in fact sued. (*Alameda* n. 26.) Based on this speculation, CCCERA employers must pay for a lifetime of spiking with terminal pay.

Answering parties attempt to confine the *Alameda* decision to the facts of this case, but the *Alameda* Court made broad statements concerning application of equitable estoppel that will negatively impact future cases, in which parties will argue that an agency's "administrative" authority authorizes departure from the law.

III. CONCLUSION

This Court must grant review to address the important legal issues and conflicts with other cases raised by the *Alameda* decision. The Court should reject the contention that it send the *Marin* case back to the Court of Appeal to be decided in accord with the *Alameda* case. And the Court should reject the contention that it hold the *Alameda* case while it considers the *Cal Fire* or *Marin* cases. The *Alameda* case presents important statutory and legal issues that affect all 20 CERL systems, and thousands of employees, and will not be resolved in those cases. The Court should grant review and order simultaneous briefing in the *Marin* and *Alameda* cases in order to efficiently address any overlapping issues.

Respectfully submitted,

Dated: March 19, 2018

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CERTIFICATION OF WORD COUNT
(California Rules of Court, Rule 8.204(c)(1))

The foregoing brief contains 3,935 words (including footnotes, but excluding the table of contents, table of authorities, certificate of service, and this certificate of word count), as counted by the Microsoft Word word processing program used to generate the brief.

Dated: March 19, 2018

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On March 19, 2018, I served the following document(s): **REPLY IN SUPPORT OF PETITION FOR REVIEW FOR CENTRAL CONTRA COSTA SANIARY DISTRICT**

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And

✓	One Unbound copy hand delivered to the California Court of Appeal, First Appellate District, 350 McAllister Street, San Francisco, CA 94102

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I declare, under penalty of perjury that the foregoing is true and correct. Executed on March 19, 2018, in San Francisco, California.

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