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

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ALAMEDA COUNTY DEPUTY SHERIFFS' ASSOCIATION, et al.,
Plaintiffs and Appellants,

v.

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

STATE OF CALIFORNIA
Intervenor and Respondent,

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

SUPREME COURT
FILED
MAY 04 2018
Jorge Navarrete Clerk
Deputy

AFTER A DECISION BY THE COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION FOUR, 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); HON. DAVID B. FLYNN (RET.), JUDGE.

OPENING BRIEF OF CENTRAL CONTRA COSTA SANITARY DISTRICT

MEYERS, NAVE, RIBACK, SILVER & WILSON
KENTON L. ALM (SBN 59017)
555 12th Street, Suite 1500
Oakland, California 94607
Telephone: (510) 808-2000
Facsimile: (510) 444-1108

RENNE PUBLIC LAW GROUP®
*LINDA M. ROSS (SBN 133874)
RANDY RIDDLE (SBN 121788)
350 Sansome Street, Suite 300
San Francisco, California 94104
Telephone: (415) 848-7200
Facsimile: (415) 848-7230

Attorneys for Real Party in Interest
CENTRAL CONTRA COSTA SANITARY DISTRICT

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

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ALAMEDA COUNTY DEPUTY SHERIFFS' ASSOCIATION, et al.,
Plaintiffs and Appellants,

v.

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

STATE OF CALIFORNIA
Intervenor and Respondent,

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

AFTER A DECISION BY THE COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION FOUR, 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); HON. DAVID B. FLYNN (RET.), JUDGE.

OPENING BRIEF OF CENTRAL CONTRA COSTA SANITARY DISTRICT

MEYERS, NAVE, RIBACK, SILVER & WILSON
KENTON L. ALM (SBN 59017)
555 12th Street, Suite 1500
Oakland, California 94607
Telephone: (510) 808-2000
Facsimile: (510) 444-1108

RENNE PUBLIC LAW GROUP®
*LINDA M. ROSS (SBN 133874)
RANDY RIDDLE (SBN 121788)
350 Sansome Street, Suite 300
San Francisco, California 94104
Telephone: (415) 848-7200
Facsimile: (415) 848-7230

Attorneys for Real Party in Interest
CENTRAL CONTRA COSTA SANITARY DISTRICT

TABLE OF CONTENTS

Page

I. INTRODUCTION AND SUMMARY OF ARGUMENT 12

II. ISSUES FOR REVIEW 15

III. BACKGROUND 16

A. In *Ventura*, This Court Determined How Retirement Boards Are To Analyze Pensionable Compensation Under CERL. 16

B. The CCCERA Board Adopts Post-*Ventura* Policies On Final Compensation That Were Contrary To Advice Of Counsel. 17

C. The Board Negotiates The *Paulson* Settlement Agreement Only With Retirees, Not Active Employees. 18

D. The Board Continues Its Policy, Despite Being Advised That It Is Unlawful. 19

1. Two California Court Of Appeal Decisions Rule That Terminal Pay Is Not Pensionable. 19

2. The Board's Fiduciary Counsel Advises The Board To Make "Appropriate Adjustments" To Its Policy To Stop "Overstatement Of Pensionable Compensation." 20

3. The Board Changes Its Policy, But Only For New Employees Hired After January 1, 2011. 22

E. The Board's Actuaries Conclude That Employers, Not Employees, Had Been Paying The Additional Costs Of Spiking. 23

F. AB 197 Amends CERL's Definition Of Compensation Earnable To Confirm That The Pension Spiking Permitted By CCCERA Was Unlawful. 23

G. The Board Changes Its Policy To Conform To What The Governing Statute Had Always Required. 25

TABLE OF CONTENTS (CONT'D)

Page

IV. STATEMENT OF THE CASE 26

A. Summary Of CCCERA Policies. 26

B. Lawsuits Challenging AB 197. 27

C. Trial Court and Court of Appeal Decisions. 27

V. STANDARD OF REVIEW 27

VI. ARGUMENT 28

A. The Unions Have The Heavy Burden To Prove That The State Legislature Endorsed The Spiking Practices They Seek To Perpetuate. 28

1. To Prevail, the Unions Must Prove That The Legislature Clearly And Unequivocally Expressed An Intention To Create A Vested Right 28

2. Retirement Boards, Through The Adoption Of Policies, Do Not Have The Authority To Create Vested Rights. 29

B. CERL Never Clearly And Unequivocally Endorsed The Spiking Practices At Issue Here, Which Was Confirmed By AB 197. 30

C. The Unions Cannot Prove That The Legislature Created A Vested Right To Inclusion Of Vacation Cash-Outs Beyond Sums Earned And Payable In The Final Compensation Period. 32

1. The Definition Of "Compensation Earnable" Focuses On Compensation Attributable To The Final Compensation Period To Avoid "Distortion" Of The Legislative Scheme. 32

2. The Court Of Appeal Improperly Focused On the Definition of "Compensation." 34

Page

3. The Final Sentence Of Section 31461, Which The Legislature Added To Prevent "Padding" Of Compensation Earnable, Confirms That Vacation Cash-outs Are Limited To The Amount Accrued In The Final Compensation Period. 36

4. AB 197 Did Not Change But Rather Clarified the Law. 37

a. Canons Of Statutory Interpretation Require Giving Effect To All Statutory Terms. 37

b. The Historical Background To AB 197 Demonstrates That The Terms "Earned" And "Payable" Have Two Distinct Meanings. 38

c. The Court Of Appeal's Statements On Financial Impact Are Entirely Speculative. 40

D. The Unions Cannot Prove That The Legislature Created A Vested Right To On Call Pay. 41

1. There Is No Clear And Unequivocal Evidence That Pre-AB 197 The Legislature Intended On Call Pay To Be Pensionable. 41

2. AB 197 Confirmed That On Call Pay Is Not Included In Compensation Earnable. 43

E. Pension Enhancements Were Never Authorized By CERL. 44

F. The Doctrine of Equitable Estoppel Does Not Require CCCERA To Continue To Include Terminal Pay In Compensation Earnable. 46

1. In The Case Of CCCERA, There Was No Settlement Agreement That Required CCCERA To Include Terminal Pay In Compensation Earnable For Active Employees. 47

TABLE OF CONTENTS (CONT'D)

Page

2. The Court Of Appeal's Application Of The Doctrine Of Equitable Estoppel Is Inconsistent With Decisions of This Court Concluding That Estoppel May Not Be Applied to Expand an Agency's Statutory Authority. 48

3. The Court of Appeal's Ruling Creates An Expansive Exception That Undermines Legislative Authority. 50

4. The Court of Appeal Erred in Concluding that the Unions Established the Evidentiary Elements Required For Equitable Estoppel To Apply Here. 51

5. The Court Of Appeal's Policy Justifications Are Unsupported. 52

G. The Court Of Appeal Incorrectly Imposed Insurmountable Burdens That Would Effectively Prevent Any Modification Short Of Pension System Bankruptcy. 53

1. Minimal Changes Do Not Violate Vested Rights...... 54

2. There Should Be No Requirement Of Pension System Insolvency To Justify Changes In Benefits. 56

a. Modifications Must Be Permitted To Address Unforeseen Advantages And Burdens. 57

b. Long Before A Pension System Is Insolvent, Public Employers and Their Retirees Will Be Harmed. 58

VII. CONCLUSION 59

PROOF OF SERVICE 62

TABLE OF AUTHORITIES

Page(s)

Cases

Alameda Deputy Sheriffs' Assn., et al. v. Alameda County Employees' Retirement Assn, et al.
(2018) 19 Cal.App.5th 61, 227 Cal.Rptr.3d 787 .... *passim*

Allen v. Bd. of Admin.
(1983) 34 Cal.3d 114 .... 55, 58

Allied Structural Steel Co. v. Spannaus
(1978) 438 U.S. 234 56

Berg v. Christie
(2016) 225 N.J. 245 38

Betts v. Bd. of Admin.
(1978) 21 Cal.3d 859 58

Boren v. State Personnel Bd.
(1951) 37 Cal.2d 634 49

Cal Fire Local 2881 v. California Public Employees' Retirement System
(2016) 7 Cal.App.5th 1115 .... 54, 56

California School Employees Assn. v. Jefferson Elementary School Dist.
(175) 45 Cal.App.3d 683 52

City of El Paso v. Simmons
(1965) 379 U.S. 497 56

City of Long Beach v. Mansell
(1970) 3 Cal.3d 462 52

City of Oakland v. Oakland Police and Fire Retirement System
(2014) 224 Cal.App.4th 210 50

City of Pleasanton v. Bd. of Admin.
(2012) 211 Cal.App.4th 522 .... 45, 50

TABLE OF AUTHORITIES (CONT'D)

Page(s)

City of San Diego v. Haas
(2012) 207 Cal.App.4th 472 30

City of San Diego v. San Diego City Employees' Retirement System
(2010) 186 Cal.App.4th 69 30

In re City of Stockton, California
(Bankr. E.D. Cal. 2015) 526 B.R. 35 *aff'd in part, dismissed in part* (B.A.P. 9th Cir. 2015) 542 B.R. 261 60

Cranston Firefighters, IAFF Local 1363, AFL-CIO v. Raimondo
(1st Cir. 2018) 880 F.3d 44 29

Curle v. Superior Court
(2001) 24 Cal.4th 1057 39

Deputy Sheriffs' Assn. of San Diego County v. County of San Diego
(2015) 233 Cal.App.4th 573 30

Fleice v. Chualar Union Elementary School Dist.
(1988) 206 Cal.App.3d 886 50

Fry v. City of Los Angeles
(2016) 245 Cal.App.4th 539 30

Hudson v. Bd. of Admin.
(1997) 59 Cal.App.4th 1310 32

Imperial Merchant Services, Inc. v. Hunt
(2009) 47 Cal.4th 381 39

League of Residential Neighborhood Advocates v. City of Los Angeles
(9th Cir. 2007) 498 F.3d 1052 52

Longshore v. County of Ventura
(1979) 25 Cal.3d 14 49

TABLE OF AUTHORITIES (CONT'D)

Page(s)

Lyon v. Fluornoy
(1969) 271 Cal.App.2d 774 58

Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.
(2016) 2 Cal.App.5th 674 .... 54, 55, 56

Martin v. Henderson
(1953) 40 Cal.2d 583 49

McGlynn v. State
(2018) 21 Cal.App.5th 548 .... 49, 50

Medina v. Bd. of Retirement
(2003) 112 Cal.App.4th 864 50

Nowicki v. CCCERA,
2017 WL 2775042, No. 17-cv-00629-SI, 6/27/17) 46

Oden v. Bd. of Admin.
(1994) 23 Cal.App.4th 194 30

Pacific Legal Foundation v. California Coastal Com.
(1982) 33 Cal.3d 158 48

Paulson v. Contra Costa County Employees' Retirement Assn.,
No. C-96-02939 .... 19, 20, 22

Pomona Police Officers' Assn. v. City of Pomona
(1997) 58 Cal.App.4th 578 32

Prentice v. Bd. of Admin.
(2007) 157 Cal.App.4th 983 32

Retired Employees Assn. of Orange County, Inc. v. County of Orange
(2011) 52 Cal.4th 1171 .... 14, 29, 30

In re Retirement Cases
(2003) 110 Cal.App.4th 426 .... *passim*

TABLE OF AUTHORITIES (CONT'D)

Page(s)

Rose v. City of Hayward
(1981) 126 Cal.App.3d 926 34

Salus v. San Diego County Employees Retirement Assn.
(2004) 117 Cal.App.4th 734 .... *passim*

San Diego County v. California Water & Tel. Co.
(1947) 30 Cal.2d 817 .... 51, 52

Santa Monica Police Officers Assn. v. Bd. of Admin.
(1977) 69 Cal.App.3d 96 .... 34, 36

Scott v. Williams
(Fla. 2013) 107 So.3d 379 56

Shelden v. Marin County Employees' Retirement Assn.
(2010) 189 Cal.App.4th 458 44

Summit Media LLC v. City of Los Angeles
(2012) 211 Cal.App.4th 921 52

Taylor v. City of Gadsden
(11th Cir. 2014) 767 F.3d 1124 56

Timney v. Lin
(2003) 106 Cal.App.4th 1121 52

United States v. Winstar
(1996) 518 U.S. 839 29

Vallejo Police Officers Assn. v. City of Vallejo
(2017) 15 Cal.App.5th 601 30

Ventura County Deputy Sheriffs' Assn. v. Bd. of Retirement
(1997) 16 Cal.4th 483 .... *passim*

Walden v. Contra Costa County Employees' Retirement Assn.,
No. C-97-03953 19

Woods v. Super. Ct. of Butte County
(1981) 28 Cal.3d 668 51

TABLE OF AUTHORITIES (CONT'D)

Page(s)

Statutes

California Government Code

§ 20636(c)(7)(B) 43, 44

§ 20636(g)(4)(I) 43

§ 31460 .... 17, 36, 39

§ 31461 .... *passim*

§ 31461(a) 24

§ 31461(b)(1) 17, 45, 46, 47

§ 31461(b)(2) 16, 33, 40

§ 31461(b)(3) 17, 42, 45

§ 31461(b)(4) 16, 40

§ 31461(b) 25

§ 31461(c) 26

§ 31461.6 44

§ 31462.1 17

§ 31525 51

§ 31539 46

§ 31539(a)(2) 46

§ 31641(a) 24

§ 31641(b)(1) 45

California Health and Safety Code

§§ 6400 *et seq.* 13

Other Authorities

August 27, 2009, https://calpensions.com/2009/08/page/2/ 21

Contra Costa Times, February 9, 2017, https://www.mercurynews.com/2017/02/09/borenstein-permitted-pension-spiking-will-cost-2-1-million/ 23, 27

Little Hoover Report, at p. 24, http://www.lhc.ca.gov/sites/lhc.ca.gov/files/Reports/204/Report204.pdf 59

TABLE OF AUTHORITIES (CONT'D)

Page(s)

Mistaken Policy Cannot Be Basis For Vested Right," Contra Costa Times, January 15, 2010, https://www.eastbaytimes.com/2010/01/15/daniel-borenstein-mistaken-policy-cannot-be-basis-for-vested-right/ 21, 33

Pension Calculus Draws New Scrutiny, Wall Street Journal, July 20, 2009, www.wsj.com/articles/SB124804047828063059 21

Pension Math: Public Pension Spending and Service Crowd Out in California," 2003-2030, Stanford Institute For Economic Policy Research, October 2, 2017, https://siepr.stanford.edu/sites/default/files/publications/17-023_1.pdf 59

Spiking Pensions by Cashing Out Benefits," Sonoma Press Democrat, August 19, 2012, http://www.pressdemocrat.com/news/2304510-181/ spiking-pension-by-cashing-out 20

The Central Contra Costa Sanitary District ("District") is an employer member of the Contra Costa County Employees' Retirement System ("CCCERA") and is adversely affected by the Court of Appeal decision in this case.[1]

I. INTRODUCTION AND SUMMARY OF ARGUMENT

For over a decade, CCCERA maintained policies – commonly known as "pension spiking" – that impermissibly expanded the definition of "compensation earnable" in the County Employees Retirement Law ("CERL"). CCCERA engaged in these practices in defiance of advice from its own attorneys, and the decisions of two Courts of Appeal.

Under CERL, "compensation earnable" identifies the pay items to be included in "final compensation," which in turn affects the amount of an employee's pension. CCCERA's policies permitted pensions to be inflated by including in compensation earnable three impermissible components: cash-outs of multiple years of vacation time ("Leave Cash-outs"), lump sum payments made only upon retirement ("Terminal Pay"), and pay for being on call but not working ("On-call Pay").

Inclusion of these pay items in compensation earnable unlawfully boosted employee pensions, in some cases by over 30%, and left local government employers to foot the bill. In one well-publicized case, counsel for CCCERA estimated that pension spiking would cost an additional million dollars over time *for just one retiree*.

In 2012, after CCCERA's policies had been widely criticized, the State Legislature enacted AB 197 to confirm that the CERL did not permit these forms of pension spiking. But in this case, the Court of Appeal

---

[1] The District is a special district organized under California Health and Safety Code §§ 6400 *et seq.* to collect and treat wastewater for the residents and businesses in central Contra Costa County.

invalidated AB 197.[2] If allowed to stand, the Court of Appeal's decision not only permits, but *requires*, CCCERA to continue spiking for "legacy" employees, to the detriment of public agencies that must pay for it.

The Court of Appeal decision must be reversed.

Appellants ("Unions") cannot prove a vested right to the pension spiking allowed by the CCCERA Board. This Court has held that a legislative act creates vested rights only where there is "clear" and "unequivocal" legislative intent to "create private rights of a contractual nature enforceable against" the government. (*Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1176, 1186.)

Before the enactment of AB 197, CERL defined compensation earnable 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. (Gov. Code § 31461.)

There is nothing "clear" or "unequivocal" in this definition that provides for inclusion of Leave Cash-outs, Terminal Pay, or On-call Pay to be counted towards an employee's pension. In fact, the Legislature never authorized the inclusion of these pay items in "compensation earnable." Without legislative authority, retirement systems have no authority to grant benefits. Accordingly, there was never a vested right to these benefits.

---

[2] *Alameda Deputy Sheriffs' Assn., et al. v. Alameda County Employees' Retirement Assn, et al.* (2018) 19 Cal.App.5th 61, 227 Cal.Rptr.3d 787.

Moreover, AB 197 did not change the law, but rather confirmed that these spiking practices are not permitted. AB 197 is consistent with the Legislature's historical practice, as pension abuses have arisen, to take action to clarify the law. Contrary to this legislative intent, the Court of Appeal's decision actually *requires* continuation of spiking practices that the Legislature never authorized, and indeed has repeatedly sought to end.

First, CERL has never permitted boosting "compensation earnable" with Leave Cash-outs attributed to multiple years of work, because it would distort the legislative scheme by including more pay than the employee regularly earned. Yet the Court of Appeal held that CERL – both before and after AB 197 – requires this spiking.

The Court achieved this result through an unwarranted interpretation of this Court's opinion in *Ventura County Deputy Sheriffs' Assn. v. Bd. of Retirement* (1997) 16 Cal.4th 483, even though the Court of Appeal acknowledged *Ventura* did not address the issue. The Court of Appeal compounded that error by an interpretation of AB 197 that violates canons of statutory construction. This interpretation applies to all CERL systems statewide and undermines the Legislature's intent to stop this form of spiking.

Second, as the Court of Appeal concluded, CERL has never permitted inclusion of Terminal Pay in "compensation earnable." Nevertheless, the Court of Appeal applied equitable estoppel to rule that – based on 20-year-old settlement agreements – the retirement systems must continue to count Terminal Pay toward a "legacy" employee's pension.

The Court's ruling creates an expansive exception to settled law under which equitable estoppel *cannot* bind an agency to actions for which it has no legal authority. The ruling is especially remarkable because the CCCERA settlement agreement was only with retirees, not active employees, and the agreement specifically stated that it could not be applied in other litigation.

Third, as for On-call Pay and a retirement board's authority to stop payments made to "enhance" a pension, the Court of Appeal concluded that AB 197 imposed new rules, potentially violating employees' vested rights, and sent these issues back to the trial court for determination. But as stated above, there was never a right to the inclusion of On-call Pay in pension calculation. And, retirement boards under CERL have always had the authority to ferret out abuses that artificially enhanced pensions. As a matter of law, the Unions cannot show a violation of vested rights.

Accordingly, the District asks this Court to hold that AB 197 is constitutional in all respects. Because the Unions cannot prove the existence of a right to any of these spiking practices, this Court need not reach the Court of Appeal's determinations concerning the proper standard to modify a vested right for active employees in this case. However, the Court of Appeal was incorrect when it set a virtually insurmountable bar to any modification, a standard this Court should reject.

II. ISSUES FOR REVIEW

The issues identified by the District in its Petition For Review include:

1. Leave Cash-Outs. Under Government Code section 31461(b)(2), does the term "earned and payable in each 12-month period … regardless of when reported or paid," mean only "paid," thus permitting employees to increase their pensions by cashing out, in the final compensation period, more vacation and other leave pay than accrued in that period?

2. Terminal Pay. Despite Government Code section 31461(b)(4), and the finding by the Court of Appeal, based on prior Court of Appeal decisions, that Terminal Pay has never been pensionable, does the doctrine of equitable estoppel nonetheless permit employees to increase their pensions with Terminal Pay?

3. On-Call Pay. In enacting Government Code section 31461(b)(3), which prohibits including as pensionable "payments for additional services rendered outside of normal working hours," did the Legislature have the authority to prohibit "on-call" pay from being counted towards an employee's pension?

4. Compensation Determined to Have Been Paid to Enhance a Members' Retirement Benefit. In enacting Government Code section 31461(b)(1), did the Legislature have the authority to empower retirement systems to exclude "any compensation determined by the board to have been paid to enhance a member's retirement benefit"?

III. BACKGROUND

A. In *Ventura*, This Court Determined How Retirement Boards Are To Analyze Pensionable Compensation Under CERL.

Over twenty years ago, in *Ventura County Deputy Sheriffs' Assn. v. Bd. Of Retirement* (1997) 16 Cal.4th 483 ("*Ventura*"), this Court applied a three-step winnowing exercise that retirement boards must follow when calculating pensionable compensation under CERL: (1) first, boards are to apply section 31460, which limits "compensation" to cash remuneration only; (2) then they apply section 31461, which limits "compensation earnable" to the "average compensation" based on 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" (thus excluding overtime) and includes deferred compensation "when earned rather than when paid;" and (3) finally they must apply section 31462.1, which limits "final compensation" to the "average annual compensation earnable by a member" during their final year. (*Ventura* at p. 491.)

Ventura applied these statutory standards in a different context than presented here, holding that "compensation earnable" and thus "final

compensation" included compensation such as "bonuses, incentives and other forms of compensation...even if not earned by all employees in the same grade or class." (*Ventura* at p. 487.)

B. The CCCERA Board Adopts Post-*Ventura* Policies On Final Compensation That Were Contrary To Advice Of Counsel.

After the decision in *Ventura*, retirement boards, including CCCERA, needed to bring their policies in line with the principles articulated in *Ventura*. The CCCERA Board's 1998 policy included in final compensation pay items entitled "Annual Cash-out" and "Lump sum at termination." The policy provided in relevant part:

> **Remuneration paid in cash for time earned is considered "final compensation" and is limited by the following:**
>
> a. Annual "Cash-out"
>
> The value of accrued time, such as vacation, holiday or sick leave that is sold back to the employer by the employee each year under a "cash-out" agreement, is includible in compensation earnable.
>
> b. Lump sum at termination
>
> Only the portion of accrued time (such as vacation, holiday or sick leave) that is paid in the form of a lump sum at termination, and that represents time earned during the final compensation period is includible in compensation.

(17 C.T. 4922-4923)[3]

The "Annual cash-out" was not limited to the value of one year of leave time, but could include leave that had been accrued in prior periods and then cashed out in the final year of employment. And "Lump sum at termination" included leave time, although accrued in the final compensation period, that was payable only after employment ended.

[3] Citations to the Clerk's Transcript are designated as: Volume _ CT __, and to the Supplemental Clerk's Transcript as: SCT __.

These policies were adopted against the advice from the Board's own fiduciary counsel. Before these policies were adopted, counsel had warned that final compensation should not include cash-outs of vacation or other leave that had been earned in prior years. Counsel stated that, "compensation earnable outside of the final compensation period should be excluded from the definition in order to avoid distortion of the basic legislative retirement scheme." (17 C.T. 4935-4936 [Morrison & Forrester 1997 opinion letter], at p. 12].)

Counsel also warned against the inclusion in final compensation of Terminal Pay that was not otherwise payable in the final compensation period. The Board's counsel wrote that "there is room for argument," but that "such pay, to the extent that it includes a cash-out of vacation time earned during the final compensation period, is includible *up to the amount* that could be legitimately cashed out by the employee during the final compensation period." (17 C.T. 4937)

C. The Board Negotiates The *Paulson* Settlement Agreement Only With Retirees, Not Active Employees.

In the aftermath of the *Ventura* decision, CCCERA retirees filed two class action lawsuits to obtain retroactive application of the *Ventura* case to the pensions being received by the retirees.[4]

In 1999, the CCCERA Board reached a settlement agreement with the retirees to include a number of pay items in computing their pensions. (16 C.T. 4739-4781) These pay items included vacation cash outs and terminal pay that the Board's fiduciary counsel had advised were unauthorized by law.

---

[4] *Paulson v. Contra Costa County Employees' Retirement Assn.,* No. C-96-02939, and *Walden v. Contra Costa County Employees' Retirement Assn.*, No. C-97-03953. The two cases were consolidated and collectively referred to as "*Paulson.*"

(17 C.T. 4784-4839; see 4793 [specifically referring to the 1998 policies on vacation cash out and terminal pay].)

The *Paulson* settlement, however, did not apply to active employees because they were not members of the class. (17 C.T. 4743) Moreover, not only did the agreement contain an integration clause, stating that it contained the entire agreement of the parties, the agreement specifically provided that it was not to be used as evidence in any other proceeding. (16 C.T. 4750, 4753)

D. The Board Continues Its Policy, Despite Being Advised That It Is Unlawful.

1. Two California Court Of Appeal Decisions Rule That Terminal Pay Is Not Pensionable.

In 2003 and 2004, two Court of Appeal decisions confirmed the Board counsel's 1997 opinion that CERL did not permit final compensation to include leave that was convertible to cash only upon termination of employment (i.e., Terminal Pay). *In re Retirement Cases* (2003) 110 Cal.App.4th 426, 475, ruled: "This language is not ambiguous; it plainly excludes [compensation paid only at] retirement and we will not rewrite the statute."

Soon after, *Salus v. San Diego County Employees Retirement Assn.* (2004) 117 Cal.App.4th 734, 741 read the statute the same way, holding that a policy of including terminal payments in the final compensation calculus would "creat[e] the risk of substantial distortion in the retirement benefits otherwise payable to employees." The *Salus* Court wrote that such a policy would fly in the face of legislative intent: "There is nothing in CERL which suggests the Legislature intended pensions should vary so widely on the basis of accrued and unused leave, rather than on the basis of age, years of service and salary." (*Id.* at p. 740.)

Unlike other retirement boards, CCCERA ignored these appellate decisions, and did not modify its policy on Terminal Pay.

2. The Board's Fiduciary Counsel Advises The Board To Make "Appropriate Adjustments" To Its Policy To Stop "Overstatement Of Pensionable Compensation."

In the years after the decisions in *In re Retirement* and *Salus*, a series of newspaper articles revealed the widespread pension spiking practices permitted by CCCERA and other retirement systems.[5]

In October 2009, the Board's fiduciary counsel advised the Board that its Leave Cash-out and Terminal Pay policies were unlawful. (17 C.T. 4951-

---

[5] For example:

The Wall Street Journal reported "A California dustup over large pension payments is shining a spotlight on the practice of spiking -- increasing a salary just before retirement and boosting the lifelong payout." ("Pension Calculus Draws New Scrutiny, Wall Street Journal, July 20, 2009, www.wsj.com/articles/SB124804047828063059.)

CalPension.com provided a summary of local reporting on the issue, which had revealed that a fire chief "had a final salary of about $221,000 before retiring last December at age 51 with an annual pension of $284,000," among other reports. (August 27, 2009, https://calpensions.com/2009/08/page/2/.)

The Contra Costa Times reported: "To boost the final year's salary, employees in the Contra Costa system have been allowed for more than a decade to count the payments they receive upon termination for unused holidays or, much more significantly, vacation time. ("Mistaken Policy Cannot Be Basis For Vested Right," Contra Costa Times, January 15, 2010, https://www.eastbaytimes.com/2010/01/15/daniel-borenstein-mistaken-policy-cannot-be-basis-for-vested-right/.)

The Sonoma Press Democrat reported: "Contra Costa County assumes cashouts and other 'terminal pay' additions add an average of 12 percent to 16 percent for most of its employee groups, with the top average at 24 percent...." ("Spiking Pensions by Cashing Out Benefits," Sonoma Press Democrat, August 19, 2012, http://www.pressdemocrat.com/news/2304510-181/spiking-pension-by-cashing-out.)

4959) After reviewing CERL, *Ventura*, *Salus* and *In Re Retirement Cases*, the Board's attorney concluded:

> It would be prudent now to consider appropriate adjustments to CCCERA's policies and practices in order to avoid potentially substantial future unfunded costs to the system, its participating employers, and ultimately, the county's taxpayers.

(17 C.T. 4958 [Reed Smith 2009 memorandum], at p. 8.)

The memorandum concluded that "compensation earnable" did not include Leave Cash-outs in amounts *earned outside* of the final compensation period, and did not permit cash-out of Terminal Pay if not both *earned and payable* during the final compensation period.

On Leave Cash-outs, the memorandum concluded: "Under applicable law members should not be allowed to include more than one year's worth of accrued vacation cash out in their final compensation (or nor more than three years' worth of accrued vacation cash out if the member has a three year final compensation period.)" (17 C.T. 4956)

On Terminal Pay, the memorandum concluded that, based on *In Re Retirement Cases* and *Salus*, "for members retiring after September 30, 1997 [and thus not subject to the *Paulson* Settlement], case law indicates that cash outs payable only at termination ought not be included in final compensation." (17 C.T. 4957)

The memorandum also advised the Board that "the *Paulson* settlement is not binding as to any member who retired after September 30, 1997, and the Board is not bound by the *Paulson* settlement as to any such members or their beneficiaries." (17 C.T. 4955)

The legal memorandum containing these conclusions illustrated the dramatic effect of the Board's unlawful policies by using an example of "a member with a base salary of $222,507, and whose $293,958 annual

retirement allowance was recently highlighted in the Contra Costa Times." (17 C.T. 4957) According to the memorandum, as a result of illegal spiking:

> [T]he member's final compensation appears to have been overstated by at least $37,526, resulting in his pension being overstated by approximately $34,000 per year, plus compounding COLA increases on that amount, for the rest of his life (presumably another 20 to 30 years). Thus we can see how just one example of what the press calls 'pension spiking' (albeit an extreme case) could result in a benefit cost approaching a million dollars over time.

(17 C.T. 4958) Counsel reiterated this advice at public Board meetings. (E.g. 17 C.T. 4961-4972, 5075, 30 C.T. 8770)

3. The Board Changes Its Policy, But Only For New Employees Hired After January 1, 2011.

Despite counsel's advice, the CCCERA Board chose to continue its policies as to existing employees, though changing them as to new employees – those who became retirement system members after January 1, 2011. (17 CT 5067-5068 [addendum policy effective March 10, 2010]) The addendum to the existing policy stated in relevant part:

> **Additional examples of amounts that are <u>not</u> included in "compensation earnable"**
>
> a. For each year of the final compensation period, leave amounts sold back during any twelve-month period that were accrued over two or more fiscal or calendar years, and *that exceed the amount that was both earned and cashable during service in that twelve-month period.*
>
> b. Incentives, bonuses and other payments *to the extent they may not be received in cash during service, but only upon termination or retirement.*
>
> c. Conversion of in-kind benefits and other advantages to cash during the final compensation period.

(17 C.T. 5067, emphasis added)

The Board voted to retain its existing policy for all active members and retirees. (17 C.T. 5074 [March 10, 2010 meeting minutes], at p. 5].)

E. The Board's Actuaries Conclude That Employers, Not Employees, Had Been Paying The Additional Costs Of Spiking.

In 2011, the Board's actuary published an analysis of who had been paying the extra costs of what the actuary called "terminal pay," which included both Leave Cash-outs and Terminal Pay. According to the actuary, *employers* paid almost the entire cost:

> The member Basic contribution rate is not affected by the terminal pay assumption (i.e. it is an employer only cost) and there is only a relatively small Cost-of-Living (COL) component for members. As a result, the great majority of the contribution rate impact of the terminal pay assumption is borne by the employer.

(18 C.T. 5086 [Segal report to Board dated April 7, 2011], at p. 3].)

F. AB 197 Amends CERL's Definition Of Compensation Earnable To Confirm That The Pension Spiking Permitted By CCCERA Was Unlawful.

In 2012, the Legislature enacted AB 197 to amend CERL. In enacting Government Code section 31641(a), the Legislature retained the original definition of "compensation earnable":

> [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.

(Gov. Code § 31461, subd. (a).)

The Legislature added subdivision 31461(b) to confirm that CERL did not permit certain pension spiking practices, including the practices identified in press reports and the CCCERA counsel's memo. The AB 197

amendments confirmed that "compensation earnable" for CERL legacy employees does not include:

> (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).)

Subsection (c) of section 31461 expressly states that subsection (b) aims to codify the statutory construction of section 31461 that had been provided a decade earlier by two Courts of Appeal:

> 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.

(Gov. Code § 31461, subd. (c).)

AB 197's legislative history explained that AB 197 was intended to prohibit pension spiking:

> 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.
>
> This bill clarifies the intent of the conference report with regard to these current employees by specifying that payments for termination pay and leave, as specified, may not exceed what is earned in a year and payable, consistent with the applicable court cases in regard to this issue.

(SCT 115, see also 119)

G. The Board Changes Its Policy To Conform To What The Governing Statute Had Always Required.

At the CCCERA Board's October 30, 2012 meeting, the Board voted to comply with AB 197, directing its staff to implement the changes to compensation earnable. (30 C.T. 8778 [October 30, 2012 meeting minutes], at p. 3].) The Board also voted to release the memorandum prepared by its fiduciary counsel on October 29, 2012, which advised the Board that it must change its policy to comply with AB 197. (18 C.T. 5195-5197) The memorandum informed the Board that AB 197 was consistent with the policies the Board had already adopted for new employees. (18 C.T. 5195)

IV. STATEMENT OF THE CASE

A. Summary Of CCCERA Policies.

Below is a summary of the CCCERA policies, adopted in 1998, and at issue here.

Leave Cash-outs. A "Leave Cash-out" is compensation paid in lieu of taking vacation or other leave. CCCERA permitted leave cash outs to be pensionable, even beyond amounts accrued in a single twelve-month period. (17 C.T. 4956) This term includes compensation from a practice called "straddling" in which an employee chose a final compensation period that straddled two calendar years in order to cash out twice, thus spiking the employee's final compensation, and accordingly, the employee's pension. (17 C.T. 4956, 4957, 4958)

Terminal Pay. "Terminal Pay" is compensation paid for unused vacation, sick or other leave at termination of employment including at retirement. CCCERA permitted Terminal Pay to be pensionable, up to what was accrued during the final compensation period even if it was not payable during that period, thus spiking final compensation. (17 C.T. 4957)

On Call Pay. "On-call Pay" is compensation paid for employees to be "on call" or on "stand by" but not working. CCCERA permitted On Call Pay to be pensionable if it was a regular part of the job. In some instances, this pay was included even if the employee had volunteered for on call time in the final compensation period in order to spike the employee's pension.[6]

---

[6] A Contra Costa Times article described the impact as follows: "The scheme, first reported in this column in July 2013, resulted in some workers in the months before their retirements being on-call almost all the hours they weren't at work." ("Permitted Pension Spiking Will Cost $2.1 million," Contra Costa Times, February 9, 2017, https://www.mercurynews.com/2017/02/09/borenstein-permitted-pension-spiking-will-cost-2-1-million/.)

B. Lawsuits Challenging AB 197.

After CCCERA and other retirement boards changed their policies to comply with the new law, the Unions filed Petitions for Writ of Mandate and other relief alleging that AB 197 violated the vested rights of their members under the California Constitution's contracts clause. (6 C.T. 1559-1572) They sued the retirement boards for the counties of Marin, Contra Costa, Alameda and Merced. The trial court permitted the State to intervene. (8 C.T. 2347)

Subsequently, the trial court consolidated the action brought against the CCCERA and its Board with similar actions filed against the Alameda and Merced retirement associations and their Boards under the case name *Alameda County Deputy Sheriffs' Assn., et al v. Alameda County Employees' Retirement Assn., et al.* Case No. A1419143.

C. Trial Court and Court of Appeal Decisions.

On May 12, 2014, the trial court issued a "Final Statement of Decision Upon All Issues Following Hearings of October 31, 2013, December 10, 2013, February 11, 2014, March 7, 2014 and April 25, 2014." (44 C.T. 12852-12889). On January 8, 2018, as modified on February 5, 2018, the Court of Appeal issued its decision. The District adopts the State's description of the trial court and Court of Appeal rulings.

V. STANDARD OF REVIEW

The District adopts the standard of review articulated in the State's brief.

VI. ARGUMENT

A. The Unions Have The Heavy Burden To Prove That The State Legislature Endorsed The Spiking Practices They Seek To Perpetuate.

1. To Prevail, the Unions Must Prove That The Legislature Clearly And Unequivocally Expressed An Intention To Create A Vested Right.

Retirement benefits involve potential long-term financial commitments for the life of an employee and the employees' survivors, thus spanning multiple decades. Accordingly, 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 requirement is known as 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.*) Any vested rights claim "confronts a tropical-force headwind in the form of the 'unmistakability doctrine.'" (*Cranston Firefighters, IAFF Local 1363, AFL-CIO v. Raimondo* (1st Cir. 2018) 880 F.3d 44, 48.)

As explained by this Court in *REAOC*, whether a legislative enactment "was intended to create private contractual or vested rights or merely to declare a policy to be pursued until the legislative body shall ordain otherwise requires sensitivity to 'the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the [governmental body].'" (*REAOC*, 52 Cal.4th at 1185 [quoting *National R.R.*, 470 U.S. at 466].) "Thus, it is presumed that a statutory scheme is not intended to create private contractual or vested

rights and a person who asserts the creation of a contract with the state has the burden of overcoming that presumption." (*Id.* at 1186 [quoting *Walsh v. Bd. of Admin.* (1992) 4 Cal.App.4th 682, 697].)

California appellate courts have rigorously applied the "clear" and "unequivocal" standard. (See *Vallejo Police Officers Assn. v. City of Vallejo* (2017) 15 Cal.App.5th 601, 620 [VPOA "did not meet its burden to show 'a clear basis' in the 2009 Agreement or 'convincing extrinsic evidence'. . . of a vested right to retiree medical benefits in the full amount of the Kaiser rate"] [citation omitted]; *Fry v. City of Los Angeles* (2016) 245 Cal.App.4th 539, 552 [Charter amendments and later ordinances "do not evince a 'legislative intent' to create a vested right to a Board-determined subsidy amount"]; *Deputy Sheriffs' Assn. of San Diego County v. County of San Diego* (2015) 233 Cal.App.4th 573, 578 ["The party asserting a contract clause claim has the burden of 'mak[ing] out a clear case, free from all reasonable ambiguity', [that] a constitutional violation occurred."].)

2. Retirement Boards, Through The Adoption Of Policies, Do Not Have The Authority To Create Vested Rights.

As stated above, there must be clear *legislative* intent by a legislative body before a Court will find a vested right. In contrast, retirement boards, through adoption of administrative policies, have no independent power to create vested rights. (See *City of San Diego v. Haas* (2012) 207 Cal.App.4th 472, 495 [applying *REAOC*, "only the City Council has the power to grant employee benefits, and [the retirement board] exceeds its authority when it attempts to 'expand pension benefits' beyond those the City Council has granted"]); *City of San Diego v. San Diego City Employees' Retirement System* (2010) 186 Cal.App.4th 69, 79-80 ("The scope of the board's power as to benefits is limited to administering the benefits set by the City"); *Oden v. Bd. of Admin.* (1994) 23 Cal.App.4th 194, 201 [Under PERL, "public

agencies are not free to define their employee contributions as compensation or not compensation … the Legislature makes those determinations"].)

Here, the State Legislature, which enacted CERL, never authorized the spiking practices at issue. Accordingly, as a matter of law, there can be no vested right to have those practices continue.

B. CERL Never Clearly And Unequivocally Endorsed The Spiking Practices At Issue Here, Which Was Confirmed By AB 197.

Before AB 197, the definition of "compensation earnable" was as follows:

> "Compensation earnable" by a member means the average compensation as determined by the board, for the period under consideration upon the basis of the average number of days ordinarily worked by persons in the same grade or class of positions during the period, and at the same rate of pay. 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.

(Gov. Code § 31461.)

Based on this definition of "compensation earnable"– which makes no mention of Leave Cash-Outs, On-call Pay, or pension enhancements – the Court of Appeal held that, pre-AB 197, the state Legislature intended to permit these specific spiking practices. But given the generality of this text, the Unions cannot meet their "heavy" burden to show by "clear" and "unequivocal" proof that the Legislature intended to create vested rights. Moreover, AB 197, rather than changing the law, confirmed that the specific abuses that had arisen in determining "compensation earnable" are not permitted.

The Legislature regularly takes action to clarify pension law when abuses emerge, in particular the manipulation of pay into the final

compensation period in an effort to boost pensions. (See e.g.. *Prentice v. Bd. of Admin.* (2007) 157 Cal.App.4th 983, 990, n. 4 [new requirement that pensionable pay items be set forth in "publicly available pay schedules" "was a matter of clarification"]; *Hudson v. Bd. of Admin.* (1997) 59 Cal.App.4th 1310, 1322, [recognizing that agencies and employees might act to "avoid the exclusion of final settlement pay" the "Legislature moved to make it clear it did not intend such a result"]; *Pomona Police Officers' Assn. v. City of Pomona* (1997) 58 Cal.App.4th 578, 587-588 & n. 5 [1994 amendments prohibited conversion of in kind benefits to cash unless certain requirements met because "the retirement conversion option is simply an attempt to convert excluded compensation into included compensation for retirement purposes at no substantial cost"].

A legislative clarification to prohibit unanticipated abuses that have arisen is not a change in the law. (See *Ventura, supra*, 16 Cal.4th at 504 ["bill recasts and redefines 'compensation' and 'compensation earnable,' but does not indicate that the inclusion of 'special compensation' in the definition adds anything that was not included under the prior legislation or results in higher 'final compensation' or increased pensions"]; *Hudson v. Bd. of Admin.*, 59 Cal.App.4th at 1322 ["Our consideration of the surrounding circumstances can indicate that the Legislature made material changes in statutory language in an effort only to clarify a statute's true meaning" (citations omitted)].)

In summary, the Unions cannot prove that the Legislature granted a vested right to spiking pensions with the disputed pay items. Moreover, in enacting AB 197, the Legislature did not change the law but rather confirmed its disapproval of the practices that had arisen.

C. The Unions Cannot Prove That The Legislature Created A Vested Right To Inclusion Of Vacation Cash-Outs Beyond Sums Earned And Payable In The Final Compensation Period.

The trial court upheld the constitutionality of section Government Code section 31461(b)(2). The trial court found that it had always been illegal under CERL to inflate one's pension with the cash out of leave pay in the final compensation period, beyond amounts accrued and payable in that period, and that AB 197, section 31461(b)(2), made no change in that regard. (44 C.T. 12854-12865)

The Court of Appeal disagreed, holding that under *Ventura*, the cash out of leave pay during the final compensation period is pensionable even if the leave was more than accrued in that period and that section 31461(b)(2) made no change in the law.

The Court of Appeal's decision is a misreading of CERL that would permit the very type of manipulation in pensions the Legislature repeatedly has sought to prevent. The employee who "worked the system" by banking vacation or sick leave, and cashing it out during the final compensation period, would receive a significantly higher pension over the employee's remaining lifetime, and at a higher cost to the employer. As explained in one newspaper report: "In essence, by adding in the additional payments, longtime employees can collect most of that vacation money over and over each year in their pensions until they die." ("Mistaken Policy Cannot Be Basis For Vested Right," Contra Costa Times, January 15, 2010.)

1. The Definition Of "Compensation Earnable" Focuses On Compensation Attributable To The Final Compensation Period To Avoid "Distortion" Of The Legislative Scheme.

The pre-AB 197 definition of "compensation earnable" only permitted inclusion of compensation "for the period under consideration"

based on the "average number of days ordinarily worked" during "the period" and specified that it was to be counted "when earned rather than when paid." (Gov. Code § 31461.) This definition focuses on the time *ordinarily worked* during the *period* and excludes amounts *earned* in prior years but accumulated and then *paid* in the final compensation period. (*Ibid.*)

Accordingly, as explained by the trial court, this definition does not permit inflating "compensation earnable" with Leave Cash-outs, earned in other periods of work, but cashed out in the final compensation period. (44 C.T. 12856-12858 [rejecting "the possibility of a pension greater than what the employee was regularly earning"].

Under both PERL and CERL, courts have recognized that inclusion of compensation accrued in prior years, but ultimately paid in the final compensation period, would distort the legislative scheme.

Under PERL, it has long been determined that leave earned in prior years, and not the final compensation period, is excluded from "compensation earnable." (See *Santa Monica Police Officers Assn. v. Bd. of Admin.* (1977) 69 Cal.App.3d 96; accord *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 941-942.) *Santa Monica* explained that: "[S]ection 20024.1 limits the relevant period to 'compensation earnable' during the three years preceding retirement. Lump-sum payments may—or may not—cover only a three-year period." (*Id.* at 100-101 [citation to footnote omitted].)

Although *Santa Monica* addressed Terminal Pay – compensation payable only upon termination – its reasoning supports the exclusion of Leave Cash-outs not accrued during the final compensation period. The Court concluded that the "relevant period" was only three years, and that counting "amounts accrued over a lengthy period of time" would "distort the legislative scheme." (*Ibid.*)

In 2004, in addressing CERL, the Court of Appeal echoed the *Santa Monica* Court in citing "distortion" of the legislative scheme as the reason

that vacation and leave cash outs earned in prior periods could not be part of "compensation earnable." *Salus v. San Diego County Employees' Retirement Assn.* (2004) 117 Cal.App.4th 734, explained that: "There is nothing in CERL which suggests the Legislature intended pensions should vary to widely on the basis of accrued and unused leave, rather than on the basis of age, years of service and salary." (*Id.* at 740.) Again, *Salus* was addressing Terminal Pay, but its analysis applies with equal force to Leave Cash-outs accrued in prior periods.

Accordingly, only the amount of vacation or other leave that is accrued in the final compensation period constitutes "compensation earnable" – not leave accrued in other periods. Otherwise, a retiree would obtain credit for leave cash outs earned in more than "the average days ordinarily worked" during "the period." Indeed, the retiree would receive credit for days worked in years before the final compensation period.

2. The Court Of Appeal Improperly Focused On the Definition of "Compensation."

The Court of Appeal based its decision on an unsupportable interpretation of *Ventura*.

The Court of Appeal acknowledged that *Ventura* "did not squarely address the timing issue presented in this case." (*Alameda* at 99.) And the Court recognized 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.)[7]

[7] In *Ventura*, the leave program permitted an employee to "elect to receive pay in lieu of up to 40 hours of annual leave accrual and on accruing 400 hours [to] elect to be paid for another 40 hours [of annual leave accrual.]" (*Ventura*, 16 Cal.4th at 488, n. 6.) *Ventura* did not address, and given the limited facts presented, could not have addressed, whether the leave being cashed out was beyond that accrued in the final compensation period.

The Court of Appeal nevertheless chose to apply *Ventura*. But in doing so, the Court mistakenly focused on section 31460, which defines "compensation," rather than on section 31461, at issue here, which defines "compensation earnable."

The Court of Appeal relied on the fact that the Legislature did not create "an exclusion under section 31460 [from "compensation"] for 'cash payments made in lieu of providing the same advantages in kind.'" (*Id.* at 99, quoting *Ventura*, 16 Cal.4th at 497.) Based this difference, the Court of Appeal concluded that: "Thus, '[w]hen paid in cash, the payment is remuneration and, as it is not excluded, it is 'compensation' under section 31460.'" (*Ibid.*, quoting *Ventura* at 497.)

But *Ventura*'s treatment of some leave cash-outs as "compensation" under *section 31460* does not address the very different practice presented by this case – the spiking of "compensation earnable" under *section 31461* – by including the cash out of vacation time that had been accrued in prior periods. The Court of Appeal's mistake in conflating "compensation" with "compensation earnable" was recognized years ago in *Santa Monica, supra*, in which the Court stated in connection with PERL: "We disagree with petitioner's theory, which, by focusing exclusively on the definition of 'compensation' . . . fails to consider the provisions of the State Retirement System as a coherent whole." (69 Cal.App.3d at 99.)

Finally, the Court of Appeal erred in stating that the disparities in pensions created by inclusion of Leave Cash-outs accrued over multiple years were consistent with *Ventura*, because *Ventura* permitted disparities based on "the inclusion of earned premiums and incentives in an individual member's compensation earnable." (*Alameda* at 101.) This analogy fails because the Leave Cash-outs are not necessarily accrued during the final compensation period, whereas premiums and incentives are.

3. **The Final Sentence Of Section 31461, Which The Legislature Added To Prevent "Padding" Of Compensation Earnable, Confirms That Vacation Cash-outs Are Limited To The Amount Accrued In The Final Compensation Period.**

Any question about the pensionability of Leave Cash-outs is settled by the final sentence of section 31461, enacted in 1995. It states: "Compensation, as defined in section 31460, that has been deferred shall be deemed 'compensation earnable' when earned, rather than when paid." (SCT 122 [1995 amendment to Gov. Code § 31461])

The trial court noted, correctly, that this added sentence "tells us that [compensation] is 'earnable' at the time when the employee incurs the right, not at the time of the cash-out." (44 C.T. 12856, 12864.). This conclusion is supported by the amendment's legislative history, which explained that it was added to prevent moving compensation into the "final year of employment" in an effort to "increase" final compensation. The Enrolled Bill Report provided to the Governor in 1995 states that:

> SB 226 would make the provision which specifies that deferred compensation would be 'compensation earnable' when earned and not when paid applicable for all '37 Act counties. This provision was enacted in Los Angeles County to prevent employers from purposely delaying payment of certain benefits until the final year of employment in an effort to increase the dollar amount of employees final compensation. The sponsor argues that padding final compensation is inappropriate in any situation.
>
> (SCT 127)

In dismissing the last sentence of section 31461, the Court of Appeal reasoned that *Ventura* "viewed this reference to deferred compensation in section 31461 as referring to funds deferred in connection with participation in a deferred compensation plan." (*Alameda* at 100, n. 14.) *Ventura*, however, was addressing a different, narrow issue – whether "matching

funds" provided by an employer to a deferred compensation plan were pensionable –and found that they were not. (*Ventura* at 489-490, 495.) This Court had no reason to review the legislative history of the last sentence of section 31461 in the context of the questions here.

In summary, the Unions have the burden of proving by "clear" and "unequivocal" evidence that the Legislature intended to create a vested right to inclusion of multiple years of Leave Cash-outs in compensation earnable. As demonstrated above, the evidence is to the contrary.

But even if section 31461 were ambiguous, there is no basis to find a vested right. As the New Jersey Supreme Court observed in similar circumstances: "Although both plaintiff retirees and the State advance plausible arguments on that question, the lack of such unmistakable legislative intent dooms plaintiffs' position." (*Berg v. Christie* (2016) 225 N.J. 245, 253.)

4. AB 197 Did Not Change But Rather Clarified the Law.

The Court of Appeal further held that AB 197 did nothing to change the law. (*Alameda* at 100.) The Court of Appeal was correct, but only because the law *had never permitted* spiking with leave cash-outs beyond those accrued in the final compensation period. AB 197 simply confirmed that longstanding rule.

a. Canons Of Statutory Interpretation Require Giving Effect To All Statutory Terms.

Despite its conclusion that AB 197 did not change the law, the Court of Appeal spilled no ink on interpreting AB 197's amendments to the definition of "compensation earnable." Rather, the Court simply stated: "Thus, in the end, we endorse the trial court's conclusion that new subdivision (b)(2) of section 31461 does not change existing law with respect

to in-service leave cash-outs, while at the same time rejecting its conclusions regarding when such cash-outs are earned for purposes of CERL." (*Alameda* at 100.)

The only statement by the Court concerning the "earned and payable" requirement appears in a footnote in which the Court 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 103, n. 17.) This conclusion, made without any analysis, violates basic canons of statutory interpretation.

"Statutes must be interpreted, if possible, to give each word some operative effect." (*Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381 [quotations omitted]; *Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063 [Courts must give "significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose"].) Here, the Court of Appeal not only construed "earned" and "payable" to mean paid – thereby reading "earned" out of the statute – it completely ignored the phrase "regardless of when reported and paid." The Court of Appeal erred.

b. The Historical Background To AB 197 Demonstrates That The Terms "Earned" And "Payable" Have Two Distinct Meanings.

In fact, the terms "earned" and "payable" do not both mean "paid" but rather have two distinct meanings. The term "earned" means when the leave accrued. The term "payable" means when the employee had the right to be paid.

The Legislature has long distinguished between the terms "earned" and "paid." As explained above, in 1995, the Legislature added to section 31461 the statement that: "Compensation, as defined in Section 31460, that has been deferred shall be deemed 'compensation earnable' when *earned*,

rather than when *paid*." (Emphasis added.) The Legislature made this change to prohibit employees from "padding" their pensions. (SCT 000126-131)

The events that led to the passage of AB 197 also demonstrate that the Legislature intended the terms "earned" and "payable" to have separate meanings. Those terms became synonymous with efforts to prevent pension spiking in the CCCERA system.

In 2009, CCCERA's fiduciary counsel advised CCCERA to change its ways and specifically concluded: "To be included in final compensation, an amount must be <u>both</u> (a) *earned* by the member and (b) paid (or *payable*) to the member during the member's final compensation year, and it must not represent overtime pay." (17 C.T. 4953 [emphasis added].)

Based on this advice, in 2010, the CCCERA Board revised its policies for new employees to exclude from "compensation earnable" annual leave "cash-outs" "that exceed the amount that was both *earned and cashable* during service in that twelve month period." (17 C.T. 5067-5068 [emphasis added].)

In 2012, when the Legislature enacted AB 197, it included similar language to exclude from "compensation earnable" payments for unused leave "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.*" (Gov. Code § 31461(b)(2), emphasis added [Leave Cash-outs]; see also § 31461(b)(4) [Terminal Pay].) In fact, after the enactment of AB 340, AB 197 expressly added the term "payable" to ensure that spiking practices did not continue. (SCT 110 [AB 340], 119 [addition of "payable"].)

This legislative intent is further confirmed by AB 197's legislative history, which states that it was intended to implement case law that allows "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." (SCT 115, 119, emphasis added.)

This sequence of historical events demonstrates that the Legislature recognized the abuses that had arisen under CERL in connection with Leave Cash-outs and intended to rectify them. The Legislature did so by clarifying that to be "compensation earnable" compensation must be both "earned" and "payable" during the final compensation period.

c. The Court Of Appeal's Statements On Financial Impact Are Entirely Speculative.

In an effort to minimize the consequences of its holding, the Court of Appeal stated that it would have little practical impact. (*Alameda* at 100-101, n. 15) In fact, the record shows the Court of Appeal's decision has a substantial economic impact on CCCERA employers.

As established by the CCCERA actuary, it was the employers, not the employees who paid for the cash outs. (18 C.T. 5086) And the actuarial report shows that employee final compensation was being boosted, by over 24% in one case, by the combination of leave cash-outs and terminal pay. (18 C.T. 5091) Moreover, as explained in the 2009 legal memorandum to the CCCERA Board, individual employees ended up with significant pension increases at the expense of the employers. (17 C.T. 4957-4958.)

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 years into the final compensation period. Indeed, because the Court of Appeal interprets CERL to *require* this

inclusion of Leave Cash-outs, all CERL systems would need to comply, despite the fact that they previously barred this practice. [8]

D. The Unions Cannot Prove That The Legislature Created A Vested Right To On Call Pay.

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 108.) 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. (*Alameda* at 109.) The Court remanded this issue to the trial court to determine if this change was a reasonable modification of CERL under the law of vested rights. (*Ibid.*)

The Court of Appeal erred. The Unions cannot prove the Legislature ever created a vested right to On-call Pay. Accordingly, AB 197 did not change the law and there is no reason to remand to the trial court.

1. There Is No Clear And Unequivocal Evidence That Pre-AB 197 The Legislature Intended On Call Pay To Be Pensionable.

The Unions cannot meet their burden to prove, by clear and unequivocal evidence, that before the enactment of AB 197, CERL included On-call Pay in compensation earnable. Pre-AB 197, section 31461 defined "compensation earnable" as computed "upon the basis of the average number of days ordinarily worked by persons in the same grade or class of positions

---

[8] See e.g. SCT 000055 (Orange County Employees' Retirement System policy that included in compensation earnable only: "Payoffs of Vacation/Leave hours to the extent each such hour was earned during the measuring period and permitted to be cashed out during the measuring period under the member's applicable MOU regardless of when actually cashed out. The maximum that may be included is the maximum earned and cashable during a single fiscal year, for each year of the measuring period.")

during the period, ..." (Gov. Code § 31461.) Accordingly, pay for time worked in excess of the *average number of days ordinarily worked* – such as On-call Pay – did not meet this definition.

The Unions contend that *Ventura* found On-call Pay to be pensionable because the case permitted the inclusion of a small amount of pay attached to being on call during a meal period. But the Court of Appeal correctly found *Ventura* never engaged in any searching statutory analysis of on call pay in general. (*Alameda* at 108.) The Court concluded: "[T]here is no specific analysis in the opinion regarding On-call Pay as a component of compensation earnable" and therefore "the bases and parameters for this conclusion are not readily apparent." (*Ibid.*)

In fact, although *Ventura* did not directly address whether On-call Pay is "compensation earnable," language in that case supports its exclusion from CERL. The *Ventura* Court found that the statutory construction of "compensation earnable" under CERL and of the Public Employees Retirement Law (PERL) should be similar, despite PERL's more specific list of items included in compensation earnable.[9] (*Ventura* at 504-505.) Under PERL, the definition of "compensation earnable" excludes: "Payments made for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise" (Gov. Code § 20636(c)(7)(B)), and "Compensation for additional services outside regular duties, such as standby pay, callback pay, court duty, allowance for automobiles, and bonuses for duties performed after the member's regular work shift." (Gov. Code § 20636(g)(4)(I) [applicable to state members].) Moreover, On-call Pay is

---

[9] "Since we have no reason to think that the Legislature intended that the same specifically defined term take on a different meaning in computing the pension of a county employee, the construction of 'compensation earnable' should be consistent under CERL, the 1931 State Employee Retirement Act, and PERL, which is the successor to the 1931 Act." (*Ventura* at p. 504.)

akin to overtime, which *Ventura* made clear was not included in "compensation earnable." (*Ventura* at 500-501 [noting that plaintiffs in that case accepted that overtime pay was not included].)

Not finding the answer in *Ventura*, the Court of Appeal turned to other case law, but came to the wrong conclusions. *Shelden v. Marin County Employees' Retirement Assn.* (2010) 189 Cal.App.4th 458, 462 held that a deputy sheriff's voluntary work on the weekend, serving arrest warrants, was not pensionable because it did not qualify as "normally scheduled or regular working hours" under section 31461.6. The Court of Appeal admitted that *Shelden* was "not directly relevant" since it did not involve On-call Pay, but nonetheless relied on *Shelden* to conclude that any *required* (as opposed to voluntary) on call work *was* compensation earnable. (*Alameda* at 107.) And, engaging in pure speculation, the Court of Appeal stated that "although this matter was not directly addressed in *Ventura*, it seems highly likely that the employees at issue in that case were receiving On-call Pay because they were required to remain subject to call during lunch as part of their regularly scheduled work assignment." (*Alameda* at 108.)

The Court of Appeal's search of the tea leaves demonstrates better than any brief that pre-AB 197, there was not "clear" and "unequivocal" law making On-call Pay pensionable. Indeed, the better analysis is that CERL always excluded On-call Pay from compensation earnable, because it is for time worked in excess of the "average number of days ordinarily worked."

2. AB 197 Confirmed That On Call Pay Is Not Included In Compensation Earnable.

As part of the effort to curtail pension spiking, AB 197 addressed pay, such as On-call Pay, for services outside normal working hours. As the Court of Appeal correctly noted, PERL expressly excluded from compensation earnable "[p]ayments made for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise." (Gov. Code

§ 20636(c)(7)(B).) AB 197 adopted this language to expressly exclude "[p]ayment for additional services rendered outside of normal working hours." (Gov. Code § 31461(b)(3).) Around the same time, *City of Pleasanton v. Bd. of Admin.* (2012) 211 Cal.App.4th 522 held that, under PERL, "stand by" pay was not pay "for services rendered during normal working hours." (*Id.* at 537-540.)

Given the generality of the definition of "compensation earnable" in CERL, and the outstanding questions left by the case law, there was no "clear" and "unequivocal" evidence that Legislature intended, before enacting AB-197, to permit on call pay to be pensionable. Accordingly, there is no vested right to the inclusion of On-call Pay in compensation earnable.

E. Pension Enhancements Were Never Authorized By CERL.

AB 197 added Government Code section 31641(b)(1), which permits a retirement board to find that payments made to "enhance" a pension are not includable in "compensation earnable." This section lists, as examples, payments previously made in-kind but converted to cash in the final compensation period, one-time payments made to a member but not to all similarly situated employees, or any payment made solely due to termination of a member's employment. (Gov. Code § 31461(b)(1).)

Rather than speculating about vested rights issues that might arise based on this amendment, the trial court adopted a "wait-and-see attitude." (*Alameda* at 111.) The Court of Appeal, however, found that this new subdivision "represents a change to prior 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.)

In fact, the prohibition on payments made to "enhance" a pension is nothing new.

Government Code section 31539, which predated AB-197, permits a CERL 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(a)(2).)

Under this section, the board has the authority to adjust the benefits prospectively and collect any overpayment. (*Id.*) Indeed, in 2015, CCCERA relied upon this section to reduce the pension of and obtain back payments from a retired fire chief. (See *Nowicki v. CCCERA,* 2017 WL 2775042, No. 17-cv-00629-SI, 6/27/17) [Order Granting Defendants' Motions To Dismiss Complaint and Granting Leave To Amend].)

Additionally, as demonstrated above, in 1995, SB 226, which also predated AB-197, added the last sentence to Government Code section 31641's definition of "compensation earnable" to address the practice of permitting employees to convert non-cash benefits, such as car allowances and medical insurance, to cash in the final compensation period. (SCT 126)

The decisions in *In re Retirement* and *Salus*, *supra*, which pre-dated AB-197, held that payments made only upon retirement, and not otherwise earned and payable during the final compensation period, are not pensionable under CERL.

In summary, in enacting section 31461(b)(1), the Legislature was confirming the types of spiking practices not authorized by CERL and giving Retirement Boards the authority to ferret them out.

Not only did the Court of Appeal incorrectly conclude that section 31461(b)(1) was new law, the Court theorized about its potential application without any support in the law or record. In doing so, the Court of Appeal misstated the law, for example stating that under *Ventura*, any "in kind benefit" received in cash during the final compensation period "must have been included in final compensation earnable, regardless of the intent by any

party and contrary to subdivision (b)(1)." (*Alameda* at 111-112.)[10] And the Court of Appeal improperly speculated about hypothetical situations not before the Court, opining: "Indeed, an argument *can be made* that every item of compensation received by a CERL employee is paid, at least to some extent, to enhance that member's pension." (*Id.* at 113.)

In summary, section 31461(b)(1) is not new law, rather it is a clarification of existing law. The record does not support the Court of Appeal's sweeping conclusion that any implementation would constitute a change in the law and thus raise a vested rights issue.

F. The Doctrine of Equitable Estoppel Does Not Require CCCERA To Continue To Include Terminal Pay In Compensation Earnable.

The Court of Appeal held, correctly, that CERL had never permitted the inclusion of Terminal Pay in pensionable compensation. (*Alameda* at 103, 125) And the Court of Appeal concluded, again correctly, that retirement board policies do not, if contrary to statute, create vested rights. (*Alameda* at 125.)

But the Court nonetheless concluded that Terminal Pay must be included in calculating pensions for members of the three retirement systems. 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 complying with the law as to all "legacy" employees. (*Alameda* at 125-126.)

This rationale does not apply to CCCERA, which never entered into a settlement agreement with its active employees. And it pits the Court of Appeal's decision against decades of jurisprudence developed by this

[10] In fact, the last sentence of section 31641 was added in 1995 specifically to prevent the conversion of in kind benefits to cash during the final compensation period. (SCT 127.)

Court – and faithfully followed by numerous courts of appeal – to ensure that public agencies, like retirement boards, act within the statutory limits of the authority imposed by the Legislature. Indeed, although the Court of Appeal applied equitable estoppel only to Terminal Pay, under its reasoning, the retirement boards would be estopped from eliminating any of the pay items listed in their settlement agreements, however unlawful.

1. In The Case Of CCCERA, There Was No Settlement Agreement That Required CCCERA To Include Terminal Pay In Compensation Earnable For Active Employees.

The Court of Appeal's error on this issue is particularly egregious, and unlawful, as applied to CCCERA.

CCCERA's settlement agreement was solely with its retirees. Active employees were not parties and therefore were not part of the settlement agreement. (17 C.T. 4743 ["The class shall consist of all retired members of CCCERA whose effective retirement date was on or before September 30, 1997 and their beneficiaries."].) Moreover, the agreement specifically stated that it "shall not be construed as, or offered as, evidence of any kind in the actions or in any other action or proceeding (except for a proceeding to enforce this Settlement Agreement)." (17.C.T. 4753)

Nonetheless, the Court of Appeal speculated that active employees might have chosen to litigate the issue at some unknown date in the future, and that this mere possibility was "sufficient to bring active members within the purview of CCCERA's settlement purview." (*Alameda* at 126, n. 26.) In engaging in this speculation, the Court of Appeal acted beyond its authority. (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170 [judicial rulings cannot be based on hypothetical situations].) Accordingly, the Court of Appeal's decision must be reversed on this issue. There is simply no settlement agreement by CCCERA to support the Court of Appeal's imposition of equitable estoppel.

2. The Court Of Appeal's Application Of The Doctrine Of Equitable Estoppel Is Inconsistent With Decisions of This Court Concluding That Estoppel May Not Be Applied to Expand an Agency's Statutory Authority.

Even if the Court of Appeal had not engaged in unlawful speculation as to CCCERA, under decades of precedent from this Court, equitable estoppel cannot be applied against a public agency where it would contravene constitutional or statutory provisions, or expand the statutory authority the Legislature has chosen to grant to local agencies.

In *Boren v. State Personnel Bd.* (1951) 37 Cal.2d 634, this Court rejected the argument of a dismissed employee that the state was estopped from enforcing the governing civil service laws. This Court explained:

> To invoke estoppel in cases like the present would have the effect of granting to the state's agents the power to bind the state merely by representing that they have the power to do so. It is accordingly held that the authority of a public officer cannot be expanded by estoppel.

(*Id.* at 643.)

Two years later, this Court concluded that the governing statutes precluded overtime pay to two state employees despite the fact that the additional compensation had been promised to them by agency administrative bulletins. (*Martin v. Henderson* (1953) 40 Cal.2d 583, 589-590.) In *Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 28, this Court noted that estoppel had been applied in some pension cases, but emphasized that "no court has expressly invoked principles of estoppel to contravene directly any statutory or constitutional limitations."

Appellate decisions faithfully followed this principle, most recently *McGlynn v. State* (2018) 21 Cal.App.5th 548. In that case, judges elected to the superior court before the effective date of PEPRA but who took office after its effective date sought relief requiring the state to include them within

the pre-PEPRA retirement system. The Court rejected the judges' equitable estoppel argument, which was based on the fact that "state personnel told them several times PEPRA did not apply to them and for more than a year the state treated them as members of pre-PEPRA JRS II." (*Id.* at 561.) Consistent with the principle articulated by this Court, the *McGlynn* Court explained: "[E]ven if the retirement system administrator mistakenly made assurances to appellants that PEPRA would not apply to them and they reasonably relied on those assurances, appellants cannot invoke estoppel to prevent the state from correcting that mistake and properly applying the JRS II/PEPRA statutory scheme." (*Id.* at 561-562.)

McGlynn is consistent with an unbroken line of decisions by the courts of appeal. (See *City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210, 233-234 ["[P]rospective application of estoppel would require the Board to calculate retirement allowances using an item of compensation that has been judicially determined not to be 'compensation attached to rank,' in contravention of the express dictates of the Charter.'"]; *City of Pleasanton v. Bd. of Admin.* (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. Bd. 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].)

In summary, the Court of Appeal decision contradicts the decisions of this Court and the courts of appeal that hold estoppel cannot be employed where a public entity lacks legislative authority.

3. The Court of Appeal's Ruling Creates An Expansive Exception That Undermines Legislative Authority.

The Court of Appeal stated that CERL boards have "plenary authority" to administer their respective systems, including the implicit authority to settle litigation. Given this general administrative authority, the Court of Appeal concluded that "estoppel is not barred in this case based on a lack of statutory authority for CERL boards to do what they did." (*Alameda* at 127.)

The Court of Appeal cites no authority for this novel and troubling conclusion, which would undercut any limits on estoppel. Indeed, the law is to the contrary. Under CERL, retirement boards only have the authority to "make regulations not inconsistent with this chapter." (Gov. Code § 31525.) "[T]here is no [agency] discretion to promulgate a [policy] which is inconsistent with the governing statute." (*Woods v. Super. Ct. of Butte County* (1981) 28 Cal.3d 668, 679.)

Under this Court's decisions, the exercise of administrative authority, when in violation of statutory authority, does not support equitable estoppel. In *San Diego County v. California Water & Tel. Co.* (1947) 30 Cal.2d 817, plaintiff argued that "since the county has a general power to abandon and relocate roads, it may be estopped by its promise to relocate [a road] even though it could not make a valid contract to do so and even though there was 'irregularity' in the procedure by which the general power was exercised." (*Id.* at 825.) In reasoning that applies with equal force here, this Court rejected that argument:

> It is true that in some "exceptional cases," or situations where "justice and right require it," a governmental body may be bound by estoppel. However, as a corollary of the general rule that contracts wholly beyond the powers of a municipality are void, the California decisions have held that estoppel to deny their invalidity may not be invoked against a governmental body . . .

(*Id.* [citations omitted])

This result is not altered by the contract here being a settlement agreement. "The case law uniformly treats a settlement agreement as a contract subject to all the normal legal and statutory contractual requirements." (*Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1127.) Accordingly, courts have properly rejected the proposition that settlement agreements that violate local or state statutes are enforceable. (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].) By failing to follow this sound policy, the Court of Appeal erred.

4. The Court of Appeal Erred in Concluding that the Unions Established the Evidentiary Elements Required For Equitable Estoppel To Apply Here.

Finally, even if equitable estoppel could have legally applied here, the Court of Appeal erred in concluding that the Unions made the required evidentiary showing on behalf of their members.

The elements of equitable estoppel are: "(1) the party to be estopped must be apprised of the facts: (2) he must intend that his conduct shall be acted upon, or so that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489; *California School Employees Assn. v. Jefferson Elementary School Dist.* (175) 45 Cal.App.3d 683, 692-693 ["Where one of these elements is missing there can be no estoppel."].)

Here, the trial court found only that "it appears to be rather without doubt that there are existing one or more legacy employees who can establish

each of the four elements." (44 C.T. 12869 [Dec. at p. 38].) The Court of Appeal was as perfunctory, stating that "[i]t was beyond doubt that this is a case 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* at 127.)

But the Unions cannot prove that their members were "ignorant of the true state of the facts." The record shows that CCCERA members, well represented by unions and by counsel from the time of the *Ventura* decision, were on notice that Terminal Pay was not pensionable. They were on notice after the decisions in *In re Retirement* and *Salus*, after the 2010 public hearings held by the CCCERA Board on its policies, and certainly after the CCCERA Board eliminated Terminal Pay from pensionable compensation for new employees. (17 C.T. 5067-5068.) Review of the extensive public legal advice to CCCERA on the issue, made in legal memoranda and in power point slides at public hearings, defeats any claim that employees were not on notice that Terminal Pay was not pensionable. (E.g., 17 C.T. 4951-4972.)

5. The Court Of Appeal's Policy Justifications Are Unsupported.

Like its legal conclusions, the policy justifications cited by the Court of Appeal are unsupported.

The Court contended that the retirement boards were simply being "equitably estopped from denying the impacted employees the benefit of their bargain." (*Alameda* at 126.) But the record shows that the employers, not the employees, historically paid for the benefit. According to CCCERA's actuaries, the benefit created unfunded liabilities, paid for by the employers as part of their annual employer contribution. (19 C.T. 5491, 18 C.T. 5086 ["Terminal Pay Assumptions – Applied to Employer rate only"].)

The Court of Appeal also contended that the benefits "have reportedly been recognized and actuarially accounted for by all three CERL systems." (*Alameda* at 127.) This statement reflects a misunderstanding of retirement system accounting. Employers generally do not pre-pay unfunded liabilities in a lump sum; rather they pay for them over a number of years, like a mortgage. (19 C.T. 5492 [unfunded liabilities paid at an "annual contribution rate which, if paid annually over the UAAL amortization period, would accumulate to the amount necessary to fully fund the UAAL"])

For these reasons, this Court should reverse the Court of Appeal's ruling on estoppel and find that there can be no estoppel here.

G. The Court Of Appeal Incorrectly Imposed Insurmountable Burdens That Would Effectively Prevent Any Modification Short Of Pension System Bankruptcy.

The standard for determining the existence a "reasonable modification" of a vested pension right is pending before this Court in two other cases involving pension reform measures included in PEPRA: *Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.* (2016) 2 Cal.App.5th 674 (S237460), and *Cal Fire Local 2881 v. California Public Employees' Retirement System* (2016) 7 Cal.App.5th 1115 (S239958). This Court issued a "grant and hold" order in the *Marin* case. At the time this brief is being filed, the Court has not yet scheduled argument in the *Cal Fire* case.

Although the *Alameda* Court agreed with the *Marin* Court that no comparable new advantage is required for every disadvantage, the Court mistakenly departed from the *Marin* Court in articulating stringent requirements that would effectively prevent pension modifications short of

retirement system bankruptcy.[11] The *Alameda* Court directed the trial court to apply the following onerous conditions on remand:

- "[T]his analysis must focus on the impacts of the identified disadvantages on the specific legacy members at issue."
- "And if the justification for the changes is the financial stability of the specific CERL system, the analysis must consider whether the exemption of legacy members from the identified changes would cause that particular CERL system to have 'difficulty meeting its pension obligations' with respect to those members.'"
- And "contrary to the holding in *Marin*, the fact that the modifications here at issue may be relatively modest looking at a system's pension costs as a whole may actually argue in favor of finding an impairment, as the continuation of such benefits solely for legacy members may not have a significant impact on the system …."

(*Alameda* at 122-123, citations and quotations omitted.)

These requirements are contrary to contract law jurisprudence.

1. Minimal Changes Do Not Violate Vested Rights.

At the outset, the *Alameda* Court clearly erred in stating that "relatively modest" changes may constitute an impairment. This Court and the federal courts have long held that an "alteration of contractual obligations" that is "minimal" does not constitute an unconstitutional impairment of contract, "end[ing] the inquiry at its first stage." (*Allen v. Bd. of Admin.* (1983) 34 Cal.3d 114, 119, quoting *Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 245.)

---

[11] Only the Deputy Sheriffs' Association filed for review of the *Alameda* Court's decision concerning the "comparable new advantage" requirement.

In assessing the severity of the modification, courts look to whether the benefit was central to a party's agreement to enter into a contract. (See *City of El Paso v. Simmons* (1965) 379 U.S. 497, 514 ["We do not believe that it can seriously be contended that the buyer was substantially induced to enter into these contracts on the basis of a defeasible right to reinstatement...."]; *Allied Structural Steel v. Spannaus* at 243 n. 14 [noting that *El Paso* Court concluded that the "'measure taken ... was a mild one indeed'" because it did not affect the contractual term that induced the agreement].)

Moreover, the changes at issue here were prospective only, which significantly reduces their materiality. The decisions in both *Marin* and *Cal Fire* rested, in part, on the prospective nature of the changes at issue in those cases.[12] As stated by the *Marin* court: "'Earned' in this context obviously means in exchange for services already performed." (2 Cal.App.5th at 694 [quoting *White v. Davis* (2003) 30 Cal.4th 528, 566].) Accordingly, courts place great weight on whether a modification is prospective, and require a lesser burden to support modification. (See e.g., *Taylor v. City of Gadsden* (11th Cir. 2014) 767 F.3d 1124, 1135; *Scott v. Williams* (Fla. 2013) 107 So.3d 379, 388-389 [approving prospective amendment "so long as any benefits tied to service performed prior to the amendment date are not lost or impaired"].)

---

[12] *Marin*, 2 Cal.App.5th at 708 ("The Legislature's change to the definition of compensation earnable was expressly made purely prospective by the Pension Reform Act. MCERA's responsive implementation was also explicitly made prospective only."); *Cal Fire,* 7 Cal.App.5th at 131 ("Nothing in the revised statutory scheme immediately destroyed plaintiffs' right to purchase the airtime service credit; rather the revised scheme set forth a deadline by which plaintiffs had to exercise this right in order to avoid losing it.").

Here, the pension modifications were "minimal," not "central" to an employee's decision to work for a public employer. The *Alameda* Court found that pre-AB 197, employees had the right to have compensation earnable determined based on On-Call Pay and without reference to pay being excluded as a pension "enhancement." It hardly can be argued that an employee agreed to work for a CERL system employer because, at the end of a twenty to thirty-year career, the employee would be able to use On-Call Pay to increase the employee's pension. And it is even more speculative to argue that an employee chose to work for an agency based on the expectation that the employee would be able to manipulate and thus "enhance" final compensation, again to boost a pension.

2. There Should Be No Requirement Of Pension System Insolvency To Justify Changes In Benefits.

The *Alameda* Court erred in stating that the modification analysis must focus on the financial stability of "the specific CERL system" and whether it would have "difficulty meeting its pension obligations" with respect to its members. (*Alameda* at 123.) The Court suggested that only "total pension system collapse may be a sufficiently weighty concern" to justify any changes in benefits for legacy members of the CERL system. (*Alameda* at 122.)

There are two problems with this statement. First, the Legislature must have the authority to address unforeseen abuses that have arisen under the system. Second, reform cannot wait for insolvency; long before a pension system becomes insolvent, public employers and retirees may be irrevocably harmed.

a. Modifications Must Be Permitted To Address Unforeseen Advantages And Burdens.

This Court has stated: "An employee's vested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system." (*Betts v. Bd. of Admin.* (1978) 21 Cal.3d 859, 863.) As stated in *Allen*, "Constitutional decisions 'have never given a law which imposes unforeseen advantages or burdens on a contracting party constitutional immunity against change.'" (34 Cal.3d at 120 [citations omitted].)

Based on this doctrine, *Lyon v. Fluornoy* (1969) 271 Cal.App.2d 774, found no constitutional impairment in a law that severed the tie between retired legislator's pensions and current legislators' salaries (which had increased three-fold), and instead gave retirees an annual cost of living increase. The court explained that: "To pay them allowances based upon the new . . . 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." (*Id.* at 786.)

Here, the record shows that abuses arose under CERL that resulted in unforeseen advantages and burdens. CCCERA and other retirement systems adopted policies that erroneously permitted employees to move compensation into the final compensation period in order to increase their pensions. As a result, pensions no longer reflected the employee's actual earnings, differed widely based on the amount of vacation, sick and other leave banked by the employee, and were costly to employers. CCCERA's actuaries reported that it was the employers, not the employees, who were paying for these additional benefits.

b. Long Before A Pension System Is Insolvent, Public Employers and Their Retirees Will Be Harmed.

The Alameda Court focused on the financial status of the individual CERL systems. But the public employer members (and thus the taxpayers or ratepayers), are the guarantors of those systems, and it is *their* financial stability, and the pensions of their retirees, that is in jeopardy. As explained by the Little Hoover Commission in its seminal report: "The problem is not that the pension funds necessarily will go broke – they just will cost far more money to run, at the expense of other government priorities." (Little Hoover Commission, Public Pensions For Retirement Security, February 2011 ["Little Hoover Report"], at p. 24.)

Unfunded liabilities are created when the retirement fund falls in value, due to increased benefit costs, unanticipated expenses, or low investment returns. Accordingly, when such a shortfall occurs, it is the employer who is obligated to pay a higher annual employer contribution to make up for these losses. [13] Accordingly, given the pension crisis over the last 15 years, employer costs have risen dramatically in all state public retirement systems.[14]

---

[13] "The state Constitution permits retirement systems to charge school districts, cities, counties and the state however much money retirement boards determine is needed to pay for the pension promises that government agencies have previously made to workers." (Little Hoover Report, at p. 24, http://www.lhc.ca.gov/sites/lhc.ca.gov/files/Reports/204/Report204.pdf.)

[14] Employer pension contributions have increased on average 400% between 2002-03 and 2017-18; contributions are predicted to rise an additional 76% by 2029-30; the average employer contribution, as a percentage of payroll has increased from 17.7% in 2008-09 to 30. 8% in 2017-18, and is predicted to reach 35.2% in 2029-30. ("Pension Math: Public Pension Spending and Service Crowd Out in California," 2003-2030, Stanford Institute For Economic Policy Research, October 2, 2017, pg. x, https://siepr.stanford.edu/sites/default/files/publications/17-023_1.pdf.)

Due to these increased employer costs, "[p]ensions are at the center of what will be an intensifying fight for diminishing resources from which government can pay for schools, police officers, libraries and health services." (Little Hoover Report, at iii.)

Moreover, as revealed in recent bankruptcy cases, when an employer can no longer pay its annual employer contribution to a retirement system, the retirees bear the risk of reduced pensions. *In re City of Stockton, California* (Bankr. E.D. Cal. 2015) 526 B.R. 35, 39 *aff'd in part, dismissed in part* (B.A.P. 9th Cir. 2015) 542 B.R. 261 (rejecting CalPERS' argument "that California law insulates its contract from rejection and that the pensions themselves may not be adjusted").

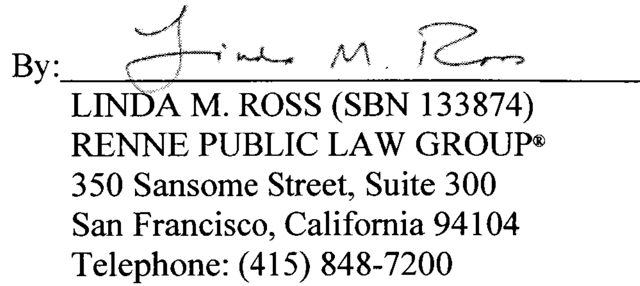
In summary, imminent insolvency of the pension system, or even its members, cannot be the standard under which courts determine whether pension benefits may be modified. Long before any pension system or member is insolvent, its member agencies will need to raise taxes or fees, or cut services, and retirees may be penalized in the form of reduced benefits. The Legislature must be permitted to identify and resolve problems before this occurs.

VII. CONCLUSION

The Legislature never made a "clear" or "unequivocal" statement that permitted Leave Cash-outs, Terminal Pay, or On-call Pay to be counted towards an employee's pension. Accordingly, there was never a vested right to these benefits. Moreover, AB 197 did not change the law, but rather confirmed that these spiking practices are not permitted. AB 197 is consistent with the Legislature's historical practice, as pension abuses have arisen, to clarify the law. In violation of this legislative intent, the Court of Appeal's decision *requires* continuation of the very practices that the Legislature never authorized and has sought to end.

Respectfully submitted,

Dated: May 4, 2018 RENNE PUBLIC LAW GROUP

By: 

LINDA M. ROSS (SBN 133874)
RENNE PUBLIC LAW GROUP®
350 Sansome Street, Suite 300
San Francisco, California 94104
Telephone: (415) 848-7200

Attorneys for Real Party in Interest
CENTRAL CONTRA COSTA SANITARY DISTRICT

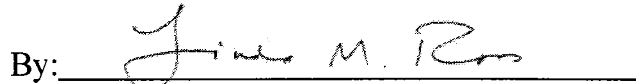
CERTIFICATION OF WORD COUNT
(California Rules of Court, Rule 8.204(c)(1))

The foregoing brief contains 13,967 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 processing program used to generate the brief.

Respectfully submitted,

Dated: May 4, 2018

RENNE PUBLIC LAW GROUP

By: 

LINDA M. ROSS (SBN 133874)
RENNE PUBLIC LAW GROUP®
350 Sansome Street, Suite 300
San Francisco, California 94104
Telephone: (415) 848-7200

Attorneys for Real Party in Interest
CENTRAL CONTRA COSTA SANITARY DISTRICT

PROOF OF SERVICE

Case Name: *Alameda Co. DSA, et al. v. ACERA, et al.*
Court of Appeal Case No.: A141913
Lower Court Case No. MSN12-1870

I am not a party to the within action, am over 18 years of age. My business address is 350 Sansome Street, Suite 300, San Francisco, California 94104.

On May 4, 2018, I served the following document(s): **OPENING BRIEF OF CENTRAL CONTRA COSTA SANITARY DISTRICT**

✓	By electronic service via TRUEFILING to all registered participants on the attached service list

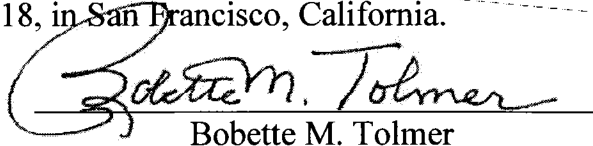
And

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

✓	By United States Mail, enclosed in a postpaid properly addressed wrapper in a Post Office Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of California to the below courts:

Clerk of the Superior Court Contra Costa County Superior Court 725 Court Street, Room 103 Martinez, CA 94553	Clerk of the Superior Court Merced County Superior Court 2260 N Street Merced, CA 95340-3744
Clerk of the Superior Court Alameda County Superior Court Rene C. Davidson Courthouse 1225 Fallon Street Oakland, CA 94612	

I declare, under penalty of perjury that the foregoing is true and correct. Executed on May 4, 2018, in San Francisco, California.



Bobette M. Tolmer

SERVICE LIST	
Party	**Attorney**
Alameda County Deputy Sheriff's Association, Jon Rudolph, James D. Nelson, Darlene Hornsby, Robert Brock, Rocky Medeiros: Plaintiffs and Appellants	David E. Mastagni Isaac Sean Stevens Mastagni Holstedt, APC 1912 I Street Sacramento, CA 95811 davidm@mastagni.com istevens@mastagni.com
Alameda County Employees' Retirement Assn. and Bd. of the Alameda County Employees Retirement Assn.: Defendant and Respondent	Harvey Lewis Leiderman Reed Smith 101 Second Street - Suite 1800 San Francisco, CA 94105-3659 hleiderman@reedsmith.com Robert Lee Gaumer Alameda City Employees' Retirement Association 475 14th Street, Suite 1000 Oakland, CA 94612-1916 rgaumer@acera.org
Service Employees International Union, Local 1021, Amy Dooha, Building Trades Council of Alameda County, Mike Harteau: Interveners and Appellants	Anne I. Yen Weinberg, Roger & Rosenfeld 1001 Marina Village Parkway - Suite 200 Alameda, CA 94501-1091 ayen@unioncounsel.net
Alameda County Management Employees' Association, Kurt Von Savoye, International Federation of Professional and Technical Engineers, Local 21: Interveners and Appellants	Peter Warren Saltzman Leonard Carder LLP 1330 Broadway - Suite 1450 Oakland, CA 94612 psaltzman@leonardcarder.com
Teamsters Local 856, Hasani Tabari, Daniel Lister: Interveners and Appellants	Katwyn T. DeLaRosa Bennett & Sharpe, Inc. 2444 Main Street, Suite 110 Fresno, CA 93721 ktdelarosa@bennettsharpe.com Robert Bonsall Beeson Tayer Silbert & Bodine 250 Capitol Mall, Suite 300 Sacramento, CA 95814 rbonsall@beesontayer.com

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

SERVICE LIST	
Party	**Attorney**
Service Employees International Union, Local 1021, Peter Barta: Interveners and Appellants	Vincent A. Harrington, Jr. Weinberg Roger & Rosenfeld 1001 Marina Village Parkway - Suite 200 Alameda, CA 94501-1091 vharrington@unioncounsel.net
Public Employees Union, Local No. 1, International Federation of Professional and Technical Engineers, Local 21, David M. Rolley, Peter J. Ellis, Susan Guest: Interveners and Appellants	Arthur Wei-Wei Liou Leonard Carder 1330 Broadway - Suite 1450 Oakland, CA 94612 aliou@leonardcarder.com
Locals 512 and 2700 of the American Federation of State, County and Municipal Employees AFL-CIO : Intervener and Appellant	Andrew Harold Baker Beeson Tayer & Bodine 483 Ninth Street, 2nd Floor Oakland, CA 94607 abaker@beesontayer.com Robert Bonsall Beeson Tayer Silbert & Bodine 250 Capitol Mall, Suite 300 Sacramento, CA 95814 rbonsall@beesontayer.com
United Chief Officers Association: Intervener and Appellant	Robert James Bezemek 1611 Telegraph Avenue - Suite 936 Oakland, CA 94612 rjbezemek@bezemeklaw.com
Alameda County Medical Center: Interested Entity/Party	Wright Lassiter, III, CEO Alameda County Medical Center, 1411 East 31st St. Oakland, CA 94602 wlassiter@acmedctr.com In Pro Per
First 5, Alameda County Children & Families Commission: Intervener and Appellant	Mark Friedman, CEO First 5 1115 Atlantic Avenue Alameda, CA 94501 mark.friedman@first5ecc.org In Pro Per

SERVICE LIST	
Party	**Attorney**
Housing Authority of County of Alameda: Intervener and Appellant	Brian Edward Washington Office of County Counsel 1221 Oak Street - Suite 450 Oakland, CA 94612-4296 brian.washington@acgov.org
Livermore Area Recreation and Park District: Intervener and Appellant	Rod A. Attebery Neumiller & Beardslee 509 West Weber Avenue, 5th Floor P. O. Box 20 Stockton, CA 95201-3020 rattebery@neumiller.com
Alameda County Office of Education: Intervener and Appellant	Sheila Jordan, Superintendent of Schools 313 W. Winton Avenue Hayward, CA 94544 sjordan@acoe.org In Pro Per
Superior Court of California: Intervener and Appellant	Patricia Sweeten, Court Executive Officer 1225 Fallon Street, Room 209 Oakland, CA 94612 psweeten@alameda.courts.ca.gov In Pro Per
County of Alameda: Intervener and Appellant	Andrea Lynne Weddle Office of the County Counsel Alameda County 1221 Oak Street, Suite 450 Oakland, CA 94612 andrea.weddle@acgov.org

SERVICE LIST	
Party	**Attorney**
State of California, Dominic Ciotola: Interveners, Appellants and Respondents	Anthony Paul O'Brien Office of the Attorney General 1300 "I" Street - Suite 125 Sacramento, CA 95814 anthony.obrien@doj.ca.gov Rei R. Onishi Office of Governor Edmund G. Brown Jr. State Capitol, Suite 1173 Sacramento, CA 95814 rei.onishi@doj.ca.gov
Rodeo-Hercules Fire Protection District: Intervener and Appellant	Richard Delmendo PioRoda Meyers, Nave, Riback, Silver & Wilson 555 12th Street, Suite 1500 Oakland, CA 94607 rpioroda@meyersnave.com
Bethel Island Municipal Improvement District: Intervener and Appellant	David Jeffry Larsen Law Office of David J. Larsen 5179 Lone Tree Way Antioch, CA 94531 dlarsen@dlarsenlaw.com
Contra Costa County, Contra Costa County Fire Protection District, Housing Authority of the County of Contra Costa, In-Home Supportive Services Public Authority, Contra Costa Local Agency Formation Commission, Children and Families First Commission: Intervener and Appellant	Thomas Lawrence Geiger Contra Costa County Counsel 651 Pine Street, 9th Floor Martinez, CA 94553-1229 thomas.geiger@cc.cccounty.us
Central Contra Costa Sanitary District: Real Party in Interest and Respondent	Kenton Alm Meyers, Nave, Riback, Silver & Wilson 555 12th Street, Suite 1500 Oakland, CA 94607 kalm@meyersnave.com Linda M. Ross Renne Sloan Holtzman Sakai LLP 350 Sansome Street, Suite 300 San Francisco, CA 94104 lross@publiclawgroup.com

SERVICE LIST	
Party	**Attorney**
Superior Court of California County of Contra Costa: Intervener and Appellant	Lyle R. Nishimi Judicial Council of California 455 Golden Gate Avenue San Francisco, CA 94102 lyle.nishimi@jud.ca.gov
East Contra Costa County Fire Protection District: Intervener and Appellant	Diane Marie Hanson Hanson Bridgett LLP 425 Market Street, 26th Floor San Francisco, CA 94105 domalley@hansonbridgett.com
Byron, Brentwood, Knightsen Union Cemetery District: Intervener and Appellant	Barbara Fee P.O. Box 551 Brentwood, CA 94513 ucemetery@yahoo.com In Pro Per
Rodeo Sanitary District: Intervener and Appellant	Carl P. Nelson Bold, Polisner, Maddow, Nelson & Judson, PC 500 Ygnacio Valley Road, Suite 325 Walnut Creek, CA 94596-3840 cpanelson@bpmnj.com
San Ramon Valley Fire Protection District: Intervener and Appellant	Robert Leete 1500 Bollinger Canyon Road San Ramon, CA 94583 William Dale Ross 400 Lambert Ave. Palo Alto, CA 94306-2219 wross@lawross.com
Contra Costa Mosquito & Vector Control District: Intervener and Appellant	Craig Downs 155 Mason Circle Concord, CA 94520 Martin Thomas Snyder Snyder, Cornelius & Hunter 399 Taylor Blvd., Suite 102 Pleasant Hill, CA 94523 mtsnyder@schlawfirm.net

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