As a public entity, Marin CERA is exempt from filing fees.
No. S237460

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MARIN ASSOCIATION OF PUBLIC EMPLOYEES, et al.,
Petitioners,

v.

MARIN COUNTY EMPLOYEES' RETIREMENT ASSOCIATION, et al.
Respondents,

and

STATE OF CALIFORNIA,
Intervenor and Respondent.

On Appeal from the First Appellate District, Division 2
Court of Appeal Case No. No. A139610
Superior Court Case No. CIV 1300318

SUPREME COURT
FILED
OCT 14 2016
Jorge Navarrete Clerk
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ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Petition for Review should be denied because it is well settled that the Legislature may clarify the term "compensation earnable" for legacy members of public employee retirement plans in a manner consistent with the preexisting statutory definition without impairing vested rights. Thus, that holding in the Court of Appeal's decision is correct and granting review would not serve this Court's interests in securing uniformity of decision or settling an important question of law. Further, there is no need to address the secondary issue, identified in the Petition as issue number 1, of whether or not an offsetting comparable new advantage "must" or "should" be granted once a material impairment of a vested right has occurred, what constitutes a "comparable new advantage," or the scope of permissible changes in vested benefits under California law, because both the Superior Court and the Court of Appeal correctly held that the Marin County Employees' Retirement Association ("Marin CERA") members in this case had no vested right to the continued inclusion in prospective retirement allowance determinations of the standby-type pay and in-kind flexible benefit conversions at issue in this case. Where no vested right has been impaired, there is no impairment to be offset.

In 2012, the California Public Employees' Pension Reform Act of 2013 ("PEPRA") was signed into law. PEPRA was a comprehensive effort to reform, and make uniform, nearly all public retirement plans in California that are governed by state statute. The few discrete and limited

provisions of PEPRA at issue in this litigation apply to "legacy" members (*i.e.,* people who were employed and in retirement system membership positions when PEPRA was enacted). In particular, PEPRA made amendments to the County Employees Retirement Law of 1937 ("CERL") to clarify the exclusion from retirement allowance calculations for legacy members of two sorts of pay: (1) services rendered outside of normal working hours (*e.g.,* "standby" and "on call" pay), and (2) payments in lieu of insurance and related premiums ("in-kind flexible benefit conversions").

In fact, these particular PEPRA amendments simply make explicit certain exclusions from the generally described CERL "compensation earnable" definition that already had been explicitly excluded for state and other county employees who are governed by the Public Employees' Retirement Law ("PERL") since the mid-1990s. Moreover, when the Legislature made these same amendments to the PERL definition of "compensation earnable" in the 1990s, it applied them to all members of the California Public Employees' Retirement System ("PERS") at that time, including legacy employees. That specific exclusionary language in PERL that the PEPRA legislation now mirrors had already been construed and upheld as constitutional in numerous published decisions since its original adoption.

The Legislature had never intended to provide more favorable pensionability rules to county employees governed by CERL than it provides for other county and state employees governed by PERL. Indeed,

our Supreme Court stated in *Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, 504 ("*Ventura*"), that provisions in CERL and PERL defining "compensation earnable" for county and state employees are to be interpreted "consistently" with one another. The modest and specific PEPRA amendments at issue here were enacted in part to clarify that the generally stated CERL definition of "compensation earnable," which even before PEPRA was passed always included a requirement that it be based upon the days "ordinarily worked," is consistent with that in PERL with respect to the specific pay item exclusions at issue already enacted there and now included here.

The Court of Appeal's decision, which held that the Legislature's amendments to CERL are constitutional on their face and that Respondents Board of Retirement of Marin CERA and Marin CERA (collectively, at times, "Marin CERA") implemented the amendments without impairing any vested rights of "legacy members," is correct. The Legislature has the authority to grant and to clarify public retirement rights and such actions are presumed to be constitutional. Further, the limited scope of the statutory amendments regarding standby-type pay and in-kind flexible benefit conversions at issue here do not violate legacy members' vested rights and are entirely consistent with existing case law, CERL, and PERL. Moreover, retirement boards, such as Marin CERA's Board, do not have the constitutional obligation (or the statutory authority) to continue including particular compensation items in determination of future

retirement allowances to be provided to their retirement system members when the Legislature has prohibited those benefits from being so included. Because there is no serious doubt as to the correctness of the lower courts' conclusion that the prospective clarifications of the law to exclude the specific pay items regarding standby-type pay and in-kind flexible benefit conversions at issue here did not violate any members' vested pension rights, the Petition for Review should be denied.

II. BACKGROUND AND PROCEDURAL HISTORY

A. PEPRA Clarifies the CERL Definition of Compensation Earnable for Legacy Members.

In 2011, the Legislature renewed its efforts to reform and, in certain instances, to clarify California public pension laws through its development of PEPRA, as encompassed in Assembly Bill 340 (2011-2012 Reg. Sess.) ("AB 340") and its trailer bill AB 197 (2011-2012 Reg. Sess.) ("AB 197") (collectively referred to as "PEPRA"). In September 2012, Governor Brown signed PEPRA into law, effective as of January 1, 2013.

With respect to CERL, PEPRA retained the existing generally-stated definition of "compensation earnable" in Government Code section 31461[1] for so-called "legacy members," but simply repeated it in a re-designated subdivision (a), and then added a new subdivision (b) that addresses some of the specific pay items that had been publicly criticized as the basis for substantial "spiking" of benefits in CERL retirement systems. Subdivision

(b) provides, in pertinent part, that compensation earnable specifically 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 member, and which was converted to and received by the member in the form of a cash payment in the final average salary period . . . .
>
> (3) Payments for additional services rendered outside of normal working hours, whether paid in a lump sum or otherwise.

AB 197 did not change these provisions of AB 340, and they now are part of section 31461. AB 197 refined the leave cash out language in subdivisions (b)(1)(C) and (b)(2), which are not at issue in this case, and added a new subdivision (c) to section 31461, which codifies one of the Legislature's purposes in enacting PEPRA—to clarify, not alter, CERL's "compensation earnable" definition. Section 31461, subdivision (c) provides:

> 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 Association* (2004) 117 Cal.App.4th 734 and *In re Retirement Cases* (2003) 110 Cal.App.4th 441.

The Legislature did not identify *Ventura* in this provision.

B. The Marin CERA Board Implemented PEPRA by Policy.

In December 2012, Respondent Marin CERA Board of Retirement

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[1] All statutory references herein are to the Government Code.

adopted the "Marin County Employees' Retirement Association (MCERA) Policy Regarding Compensation Earnable and Pensionable Compensation Determinations" (the "Policy") effective January 1, 2013, and announced its Policy setting forth its interpretation of the compensation earnable and pensionable compensation definitions in light of PEPRA and the case law that preceded PEPRA. (Slip Op. at pp. 9-10.) In so doing, Marin CERA sought to implement the law as mandated by the Legislature, to protect the integrity of the defined benefit retirement system that it is charged by law to administer, and to act in the overall best interest of *all* Marin CERA members, now and into the future by dampening pension spiking.

Marin CERA also applied the amendments in a manner that did not change benefits already provided and to be provided in the future to their retired members and that permitted employed members with compensation earnable periods prior to January 1, 2013 to continue to benefit from its policies in effect at that time if they so choose by selecting a final compensation period at retirement that includes time during the pre-2013 period during which those compensation earnable policies had been in effect.

C. The Superior Court Correctly Granted Marin CERA's Demurrer, Holding That the PEPRA Amendments at Issue are Constitutional on Their Face and as Applied.

Petitioners are public employees and their union representatives who filed a verified writ petition on January 18, 2013 challenging two aspects of the Policy relating to section 31461 — prospectively excluding pay for

services rendered outside of normal working hours (standby-type pay) and in-kind flexible benefit conversions — and seeking a declaration that those provisions in section 31461 and Marin CERA's implementation of them resulted in an unconstitutional impairment of their vested rights. (Slip Op. at 11.) Specifically, Petitioners argued that because Marin CERA previously had included such pay items in its compensation earnable determinations based on Marin CERA's understanding of *Ventura* at that time, they had acquired a vested right to have them continue to be included in their pension calculations in perpetuity so long as their employer continued to pay those items to them. Petitioners thus argued that the statutory amendments and the Marin CERA Board's change in its prior policy to implement them violated the "vested rights" of legacy members to permanent inclusion of those two types of pay.

The Superior Court sustained Respondents' demurrer without leave to amend, stating:

> The court finds the Respondents' actions implementing Govt. Code §31461, as amended effective January 1, 2013, are proper and that the Public Employees' Pension Reform Act of 2013 is constitutional. The Respondent Board of Retirement has the exclusive authority and responsibility to determine its members' "compensation earnable," which is used to calculate members' retirement allowance, pursuant to Govt. Code §31461. (*See Howard Jarvis Taxpayers' Ass'n v. Bd. of Supervisors of Los Angeles County* (1996) 41 Cal.App.4th 1363, 1373, and *In re Retirement Cases* (2003) 110 Cal.App.4th 426, 453.) A statute, once duly enacted, is presumed to be constitutional.
>
> SO ORDERED.

(Slip Op. at 15.) Judgment was entered [*Ibid*.], and Petitioners appealed.

D. The Court of Appeal Correctly Upheld the Superior Court's Dismissal of Petitioners' Challenge to Certain Aspects of PEPRA and the Retirement Board's Policy.

On August 17, 2016, Division Two of the First District Court of Appeal issued a unanimous published decision in *Marin Assn. Public Employees, et al. v. Marin County Employees' Retirement Assn., et al.* (2016) 2 Cal.App.5th 674 ("*MAPE v. MCERA*")[2], which correctly upheld the constitutionality of the provisions of PEPRA that are at issue in this case. Specifically, the Court of Appeal held that prospective exclusions of standby-type payments and in-kind flexible benefit conversions from retirement allowance calculations were constitutional both on their face and as interpreted and applied by the Marin CERA. (Slip Op. at pp. 1-2.) That result is entirely consistent with both the statutory "plan in effect" prior to PEPRA and the most recent case law prior to those amendments, and hence their prospective exclusion did not violate any vested right previously held by the active members who worked during that period. (*See*, *infra*, Section IV.A-IV.B.)

III. THE REQUIREMENTS FOR SUPREME COURT REVIEW

The Supreme Court should deny Petitioners' Petition because none of the grounds for review provided in California Rule of Court

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2 All citations to the *MAPE v. MCERA* decision herein are to the Slip Opinion attached to MAPE's Petition for Review.

(“Rule”) 8.500, subdivision (b) exist. Rule 8.500, subdivision (b), limits review by this Court to those few cases where (1) review is necessary “to secure uniformity of decision or the settlement of important questions of law”; (2) the Court of Appeal lacked jurisdiction over the case; (3) the Court of Appeal’s decision lacked the concurrence of a “required majority of qualified judges”; or (4) for transferring the matter to the Court of Appeal.

As the Supreme Court explained in 1905, the role of the Supreme Court is not to act as a forum for hearing all appeals; rather, the Supreme Court exists:

> [T]o supervise and control the opinions of the several district courts of appeal, each of which is acting concurrently and independently of the others, and by such supervision to endeavor to secure harmony and uniformity in the decisions, their conformity to the settled rules and principles of law . . . .

(*People v. Davis* (1905) 147 Cal. 346, 348.) It is well settled that where a decision by the appellate court was correct based upon one valid reason, that another reason given in support of the decision was inapplicable does not support the grant of review. (*See Morgan v. Mutual Ben. Life Ins. Co.* (1911) 16 Cal.App. 85, 95 [denying transfer of a case where it was “clear that as to the merits of the controversy the final decision . . . was correct”]; *Southern Pac. Co. v. Superior Court* (1915) 27 Cal.App. 240, 256 [denying a petition for review where the Court of Appeal correctly decided a case although it stated its views on a point more broadly than necessary]; *Carpenter v. Pacific States S. & L. Co.* (1937) 19 Cal.App.2d 263, 269

[denying a petition for hearing where the Court of Appeal's "opinion to the law of the case as stated therein was not necessary for the decision" even though it was erroneously applied to facts in the action, and withholding "approval of that portion of said opinion in which the law of the case is discussed and applied to facts in the present action"].)

Here, the Supreme Court should deny review because the result of the Court of Appeal's decision upholding the prospective exclusion of standby-type pay and in-kind flexible benefit conversions is correct and conforms to well-settled law.

IV. ARGUMENT

A. The Court of Appeal Decision is Correct That the PEPRA Amendments Are Facially Constitutional: the Law is Well Settled That CERL and PERL Definitions of "Compensation Earnable" Are, and Always Have Been, Consistent with One Another and Amendments to Clarify Them to Maintain That Consistency Are, and Always Have Been, Applicable to "Legacy" Members.

1. The Supreme Court Has Construed the Government Code's "Compensation Earnable" Definitions Applicable to County and State Employees to Be Consistent with One Another.

"The term 'compensation earnable' is used in some 80 pension-related code sections, primarily in the Government Code and Education Code." (*Ventura*, *supra*, 16 Cal.4th at p. 503, fn. 24.) Analyzing the Government Code provisions, the Supreme Court found the provisions applicable to state and county employee pensions to be comparable to one

another. Specifically, the Court noted that section 20023 of PERL, as enacted in 1945, defined "compensation earnable" as:

> [T]he average monthly compensation as determined by the board upon the basis of the average time put in by members in the same group or class of employment and at the same rate of pay. The computation for any absence of a member shall be based on the compensation of the position held by him at the beginning of the absence and that for time prior to entering State service shall be based on the compensation of the position first held by him in such service.

(*Ventura*, *supra*, 16 Cal.4th at p. 504, *quoting* Stats. 1945, ch. 123, § 1, p. 575.)

The Court compared PERL section 20023 to CERL section 31461 — applicable to Marin CERA and 19 other county retirement systems — which, as enacted in 1947, 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 him at the beginning of the absence.

(*Id.* at p. 502, fn. 21, *quoting* Stats. 1947, ch. 424, § 1, p. 1264.)

Comparing these PERL and CERL definitions of "compensation earnable," the Court concluded:

> The Legislature is presumed to be aware of other statutes on the same or analogous subject matter in which the same language is used. 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*.

(*Id.* at p. 504 (emphasis added).) Thus, this Court concluded that CERL and PERL definitions of “compensation earnable” are to be construed consistently.[3]

2. Courts Have Upheld Amendments Explicitly Restricting PERL’s Definition of “Compensation Earnable” That Apply to “Legacy” Members.

Four court of appeal decisions upheld the Legislature’s amendments to the “compensation earnable” definition in PERL section 20023 and subsequent amendments to the definition, determining that they were simply clarifications of existing law and did not impair vested rights of legacy PERS members to plan benefits in effect before the legislative

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[3] And, by way of example, Section 20636, subdivision (g), which is applicable only to state members, defines “compensation earnable” as it had been defined in section 20023 previously, and then defines “pay rate,” and “special compensation,” and lists a variety of items that are “neither ‘pay rate’ nor ‘special compensation,’” including two specific exclusions concerning the very pay items that are the *subjects* of this case as to CERL:

> (I) 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.
>
> ...
>
> (K) Payments made by the employer to or on behalf of its employees who have elected to be covered by a flexible benefits program, where those payments reflect amounts that exceed the employee’s salary.

(Section 20636, subd. (g)(4).)

amendments. (*See, e.g.*, *Pomona Police Officers' Assn. v. City of Pomona* (1997) 58 Cal.App.4th 578; *Hudson v. Board of Administration* (1997) 59 Cal.App.4th 1310; *Prentice v. Board of Administration* (2007) 157 Cal.App.4th 983; and *Molina v. Board of Administration* (2011) 200 Cal.App.4th 53.)

First, in *Pomona Police Officers'*, the court detailed various amendments to PERL, including the 1994 amendments that, according to Governor Pete Wilson's message upon signing the bill, sought to "eliminate pension abuse in the nearly 1,700 cities, counties and special districts [who participate in PERS]." (*Id.*, *supra*, 58 Cal.App.4th at p. 587, fn. 5.) Upholding PERS's prohibition of in-kind conversions by legacy members in the *Pomona Police Officers'* case, the court noted that:

> The retirement conversion option is simply an attempt to convert excluded compensation into included compensation for retirement purposes at no substantial cost. The attempt fails. Any other resolution of this issue would permit local government employers and their employees to engage in blatant pension abuse at the expense of PERS and its other participants.

(*Id*. at p. 587.)

Next, in *Hudson*, the court analyzed both the PERL definition of compensation earnable in effect when appellants retired, and the definition later adopted in 1993, and concluded that the subject in-kind flexible benefit conversions should be excluded for legacy members under both definitions:

> The exclusion of final settlement pay from compensation was intended to eliminate distortions caused by extraordinary increases just prior to retirement. The conversions involved here reflected just such an arrangement. It would frustrate the intent of the statute to exclude such an arrangement from the definition of final settlement pay merely because it is not specifically mentioned in the definition.

(*Id*., *supra*, 59 Cal.App.4th at p. 1321.) The court also noted that:

> [A]ppellants suggested the fact that certain proponents of the 1993 legislation characterized the existing law as "flawed" demonstrates that the existing law did not, in fact, preclude arrangements of the type at issue here, and that the 1993 legislation was necessary to correct that flaw.

(*Id*. at p. 1324, fn. 8.) The court rejected that argument:

> However, we view the proponents' statements as a recognition that the existing law, as written, failed to make it clear that converted benefits were intended to be excluded from compensation. The fact the law was "flawed" in that sense is in no way inconsistent with our conclusion that the amendment of the law in 1993, to address that point explicitly, *accomplished a clarification rather than a substantive change*.

(*Ibid*. (emphasis added).)

Thereafter, in *Prentice*, the court noted that even the new requirement that pay items included in a "pay rate" be set forth in "publicly available pay schedules," as provided in section 20636, subdivision (b)(1)[4],

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[4] The definition of "compensation earnable" in section 20636 also identified various exclusions from compensation earnable that had not been specified under section 20023. Specifically, section 20636, subdivision (c)(7), explicitly excluded, and excludes now, three items from "special compensation," including the italicized language that is one of the two subjects of this case as it applies under CERL: (A) "Final settlement pay"; *(B)* "*Payments made for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise;"* and *(C) "Any other payments the board [of PERS] has not affirmatively determined to be*

which was added by the Legislature in 2006, was a matter of "clarification," and hence governed on appeal even though the member retired in 2003. (*Id*., *supra*, 157 Cal.App.4th at p. 990, fn. 4.)

Finally, in *Molina*, the court concluded that *Ventura*, which interpreted the CERL definition of compensation earnable, "makes plainly clear that an individual's pay will not count towards 'compensation earnable' unless it qualifies as either 'payrate' or 'special compensation'." (*Molina*, *supra*, 200 Cal.App.4th at p. 68.) The court observed:

> *Ventura* describes certain specific types of cash payments… that count towards "compensation earnable" precisely because they do meet PERL's definition of "special compensation." But *Ventura* says nothing that would require broadening PERL's definition of "compensation earnable" to include cash payments that are *not* special compensation.

(*Ibid*.) Thus, the court in *Molina* rejected the argument that *Ventura* requires pay items that are not special compensation under PERL to be included in pension calculations.[5]

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special compensation." (Emphasis added.) As this Court in *Ventura* explained, the PERL definition of "compensation earnable," quoted above, "was repealed in 1993 and replaced with a new section 20023 that expressly included 'special compensation' in 'compensation earnable,' and made it clear that *the individual employee's pay is the basis for computing the employee's 'compensation earnable.'*" (*Ventura, supra*, 16 Cal.4th at p. 504, citing § 20023 as enacted by Stats. 1993, ch. 1297, § 6 (emphasis added).)

[5] Importantly, in *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, 537, the Court of Appeal, Division One, concluded that "special compensation must be 'for services rendered during normal working hours,'" and that, by definition, standby pay does not meet that requirement. (*Id*. at p. 539.) This decision was significant because the language in PERL that the court construed in *City of Pleasanton* is precisely the same language that the Legislature chose to include in its

None of the Legislature's amendments to the PERL definition of "compensation earnable" during the 1990s were restricted to future members of PERS and they were not held to violate then-employed PERS members' vested rights. Rather, the Legislature's "recast" definition of "compensation earnable" adopted in the mid-1990s in PERL applied prospectively and equally to so-called "legacy" members and to future members, and — despite the numerous cases that interpreted the amendments — PERL's revised definition of compensation earnable was *never* deemed to have impaired vested rights of legacy PERS members.

3. Courts Have Interpreted *Ventura* to Permit Exclusions from CERL's "Compensation Earnable" Definition.

Ventura was the Supreme Court's first case interpreting either the CERL or PERL definition of "compensation earnable." In that 1997 case, the Court overturned the longstanding rule established in *Guelfi v. Marin County Employees' Retirement Assn.* (1983) 145 Cal.App.3d 297, that under CERL "an item of compensation must be received by all employees in the applicable grade or class of position if it is to be part of a retiring employee's 'compensation earnable.'" (*Ventura, supra*, 16 Cal.4th at p. 500.)

In response to *Ventura*, retirement boards throughout California, including Marin CERA's Board, analyzed its scope and attempted to apply

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enumerated exclusions from the compensation earnable and pensionable compensation definitions in PEPRA.

it, resulting in multiple legal challenges. Those challenges were coordinated and resulted in the *In re Retirement Cases* decision.

As the court of appeal observed in *In re Retirement Cases*, *Ventura's* "analysis of 'compensation' did not differ significantly from the one employed by the Court of Appeal in *Guelfi*." (*Id*., *supra*, 110 Cal.App.4th at p. 440.) Rather, the Supreme Court's new interpretation of CERL applied to the definition of "compensation earnable":

> The [*Ventura*] court concluded that, in the context of CERL and PERL, "'compensation earnable' is the average pay of the individual retiring employee computed on the basis of the number of hours worked by other employees in the same class and pay rate—that is the average monthly pay, excluding overtime, received by the retiring employee for the average number of days worked in a month by the other employees in the same job classification at the same base pay level."

(*Id*. at p. 441, citing *Ventura, supra*, 16 Cal.4th at p. 504.)[6]

Thus, both the Supreme Court and the court of appeal concluded that the compensation earnable definitions in PERL, even after its revisions in the 1990s, and the compensation earnable definition in CERL, should be interpreted in the same way. Both Courts also determined that an individual's pay items were to be considered pensionable if those payments were "'received by the retiring employee for the average number of days

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6 Importantly, the Court in *Ventura* also concluded that the legislative history "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." (*Id*. at pp. 504-505.)

worked in a month by the other employees in the same job classification at the same base pay level.'" (*Ibid*.)

The court of appeal then addressed four topics that had not been resolved by the *Ventura* decision: (1) whether retired members were entitled to the benefits of the decision (the so-called "retroactivity" issue); (2) whether cash-outs of unused leave upon separation from service (so-called "terminal pay") must or may be included in retirement allowance calculations; (3) whether an employer's payments for insurance premiums (so-called "flexible benefits") must or may be included in retirement allowance calculations; and (4) whether employer payment of employee contributions to the retirement system must or may be included in retirement allowance calculations. (*In re Retirement Cases*, *supra*, 110 Cal.App.4th at p. 434.)

With respect to "terminal pay," this Court held:

> When PERL's "compensation" and "compensation earnable" statutes were essentially the same as those in CERL, termination pay was excluded from calculating retirement benefits. [Citations omitted.] .... Termination payments have never been included in the definition of "compensation earnable" under PERL, and plan members have presented no compelling reason as to why this construction under PERL should not apply to "compensation earnable" under CERL.

(*Id.* at p. 476.)

With respect to in-kind flexible benefits, this Court held:

> [C]ontrary to plan members' assertions, the Legislature expressed its intent that it *never* considered inclusion of flexible benefits to be mandatory under CERL.

(*Id*. at p. 480.) This Court also observed:

> Thus, "[w]e assume the Legislature amends a statute for a purpose, but that purpose need not necessarily be to change the law. [Citation.] 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."

(*Id*. at pp. 480-481, citing *Hudson*, *supra*, 59 Cal.App.4th at p. 1322.)

In re Retirement Cases thus became the first published case after *Ventura* to clarify certain exclusions from the compensation earnable definition in CERL that were consistent with PERL exclusions from compensation earnable.

The following year, *Salus v. San Diego County Employees Retirement Assn.* (2004) 117 Cal.App.4th 734, addressed further issues left unresolved by *Ventura*, relying heavily on the court's analysis in *In re Retirement Cases*. Considering the in-kind benefit conversions at issue there, the court held:

> As the facts in this case demonstrate, any departure from *In re Retirement Cases* would, among other problems, create substantial differentials in the retirement benefits payable to employees who in all other respects would be entitled to similar benefits. Under the rule advanced by appellants, the employee who only received $2,874.50 in sick leave pay would have a substantially smaller pension than the employee who received $41,580.55 in sick leave pay, even if both were the same age, had the same years of service and earned the same annual salary. 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. [Citing

> *Hudson*, for the proposition that "payments made solely on condition that an employee retire are not part of final compensation, otherwise 'spiking' of pension benefits would occur."]

(*Salus*, *supra*, 117 Cal.App.4th at p. 740.) *Salus* thus confirmed the exclusion of certain in-kind flexible benefit conversions from the CERL pre-PEPRA compensation earnable definition.

Subsequently, the Marin CERA Board determined that payments that are not "ordinarily worked," such as off-duty arrest warrant work, were not pensionable even before AB 340 and AB 197. (See, e.g., *Shelden v. Marin County Employees' Retirement Assn.* (2010) 189 Cal.App.4th 458 ("*Shelden*") (upheld Marin CERA retirement board's determination that deputy sheriff's time spent working on arrest warrant shift on his day off was not compensation earnable); see also *City of Pleasanton v. Board of Administration*, *supra*, 211 Cal.App.4th at p. 539 (payments made "for being available to work on a standby basis outside of [the plaintiff's] normal working hours" were properly excluded from compensation earnable by CalPERS).) Indeed, as Division 5 of the Court of Appeal recognized in *Shelden*, but did not address, Marin CERA there argued that it properly excluded payments for services such as these under section 31461, because they were not "ordinarily worked by persons in the same grade or class of positions during the period, and at the same rate of pay." (*Shelden*, *supra*, 189 Cal.App.4th at p. 465 ("Having concluded that the trial court ruled correctly, we need not address the other issue the parties

address extensively in their briefs: whether *Shelden*'s work on the arrest warrant service team must be excluded from his retirement calculation under Government Code section 31461, as interpreted in [*Ventura*, *supra*, 16 Cal.4th 483 and *Guelfi v. Marin County Employees' Retirement Assn.* (1983) 145 Cal.App.3d 297]."").) With its amendments to section 31461 in AB 340 and AB 197, the Legislature confirmed exclusions, to be applied to final compensation periods occurring after January 1, 2013, that could have been determined by CERL retirement boards to have been excludable all along.

4. PEPRA Simply Clarifies the CERL Definition of "Compensation Earnable" for Legacy Members.

PEPRA retained the existing definition of "compensation earnable" in section 31461 for so-called "legacy" members, but placed it in a subdivision (a). PEPRA then added a new section 31461, subdivision (b), which specifically addresses some of the pay items that had been publicly criticized as the basis for substantial "spiking" of benefits in CERL retirement systems, such as the inclusion of standby pay and in-kind flexible benefit conversions in retirement allowance calculations that are not regular and recurring and are susceptible to manipulation by particular employees and their employers so as to artificially inflate the employees' lifetime retirement benefits. PEPRA also expressly states that it is intended to clarify, but not alter, CERL's "compensation earnable" definition, providing in pertinent part that subdivision (b) is "intended to be consistent

with and not in conflict with the holdings in *Salus v. San Diego County Employees Retirement Association* (2004) 117 Cal.App.4th 734 and *In re Retirement Cases* (2003) 110 Cal.App.4th 441."

5. PEPRA's Amendments to CERL Are Consistent with CERL's and PERL's Preexisting Statutory Provisions and, Accordingly, Are Facially Constitutional.

The Court of Appeal correctly held that the revisions to section 31461 through PEPRA were constitutional. (Slip Op. at pp. 1-2.) Indeed, as discussed above, the PERL definition of "compensation earnable" has been refined numerous times over the years. Those refinements have never been deemed to be unconstitutional as applied to legacy members. And, the refinement to the CERL definition of "compensation earnable" in section 31461 simply confirms exclusions to the previously general definition in the CERL that are consistent with the specific PERL exclusions. As the Court of Appeal explained, the scope of the statutory amendments that were the subject of its opinion were "quite modest." (*See* Slip Op. at p. 33.)

Further, a careful review of section 31461 as it existed before *Ventura* shows that it always required compensation earnable determinations to be made by retirement boards:

> *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.*

(*Id.*, *supra*, 16 Cal.4th at p. 491 (emphasis added)(citation omitted).) Common sense usage of the term "days ordinarily worked" is perfectly

consistent with the term “normal working hours” used in both the PERL and the clarifying language added to the CERL. (Black’s Law Dict. (9th ed. 2009) p. 1209, col. 1 [first definition of “ordinary”: “Occurring in the regular course of events; normal; usual. Cf. extraordinary.”].) Thus time “ordinarily worked” is fully consistent with “normal working” time, and neither term includes “extraordinary,” or non-normally worked time.

Moreover, as already outlined above, numerous cases under PERL had affirmed, and continued to affirm, the Legislature’s and PERS’s exclusion from compensation earnable of in-kind flexible benefit conversions, payments for services rendered outside of normal working hours, and other payments deemed to result in artificial “spiking” of retirement allowances as to legacy employees. Indeed, the court of appeal recently observed that “in order to be the basis for calculation of retirement benefits under CERL, compensation not only must be paid to the employee, it must be typical for the grade or position held by the employee, and it must constitute the average of such pay over the course of a year.” (*Stillman v. Bd. of Retirement of Fresno Cty. Employees’ Retirement Assn.* (2011) 198 Cal.App.4th 1355, 1362.)

After *Shelden*, however, it became apparent that the CERL definition of “compensation earnable” warranted clarification to affirm legislatively the judicial interpretations provided in *In re Retirement Cases*, *Salus*, and *Stillman*. PEPRA did just that, it clarified the general language in the definition of “compensation earnable” to address those ambiguities such

that the definition as applied to legacy members was consistent with prior statutory language and case law. The Legislature may regularly take action to clarify the law when either judicial developments or other public attention identifies a need to do so. (See *Hudson*, *supra*, 59 Cal.App.4th at p. 1322 ["An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act . . . ."].) Thus, the Court of Appeal's conclusion that "the Legislature did not act impermissibly by amending section 31461 to exclude specified items and categories of compensation from the calculation of pensions for current employees" is unquestionably correct as to the two types of pay at issue in this case. (Slip Op. at pp. 1-2.) Accordingly, the limited grounds for Supreme Court review set forth in Rule 8.500(b) are not available here.

B. The Court of Appeal's Decision that Marin CERA's Implementation of PEPRA Does Not Impair Petitioners' Vested Rights is Consistent with Well-Settled Legal Precedent That Restricts System Members to Those Gains Reasonably to be Expected Under the Governing Statutes.

Both before and after PEPRA, the Marin CERA Board has had the exclusive authority and responsibility to determine its members' compensation earnable pursuant to Govt. Code §31461 in the absence of specific legislative mandate. (See *Howard Jarvis Taxpayers' Assn.*, *supra*,

41 Cal.App.4th at p. 1373,[7] and *In re Retirement Cases*, *supra*, 110 Cal.App.4th at p. 453.)

After *Ventura*, *In re Retirement Cases*, *Salus*, and *Shelden*, until PEPRA was enacted, the Marin CERA Board continued to face the question of whether payments for services rendered outside of the normal or ordinary working hours of others in a member's class or grade, even if not paid at overtime rates, and in-kind flexible benefits even if convertible to cash at the option of an employee, must or may be included in "compensation earnable." In the absence of a more specific legislative direction it had to make a decision one way or the other on the specific pay codes at issue in order to administer the benefit. Immediately after *Ventura*, the Marin CERA Board resolved that ambiguity in favor of including these items in compensation earnable. (See Slip Op. at p. 9, fn.9.)

However, when PEPRA clarified the law, the Board had the discretion, authority, and responsibility to exclude the disputed items prospectively. (See generally *Howard Jarvis Taxpayers' Assn.*, *supra*, 41 Cal.App.4th at 1373.) The Board made its change to "compensation earnable" prospectively because it was changing its discretionary policy as to future final compensation periods based on clarification afforded by

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7 *Howard Jarvis Taxpayers' Assn*. noted, "[t]he board of retirement is vested with powers under the CERL ... including the responsibility of determining ... which elements of compensation constitute 'compensation earnable'...." (*Id*. at p. 1373.)

PEPRA, effective as of January 1, 2013. (See *Crumpler v. Board of Administration* [CalPERS] (1973) 32 Cal.App.3d 567 (where statutory discretion existed the CalPERS Board could change its policy re safety classification of animal control officers prospectively as to their future service, but was estopped from changing the members' classification retroactively to cover the service rendered while the Board's prior policy had been in effect).)

Marin CERA's adoption of the Policy was proper because basic rules regarding what is, and is not, pensionable for both state and county employees ultimately are set by the Legislature, not local agencies. (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 201 ["public agencies are not free to define their employee contributions as compensation or not compensation ... the Legislature makes those determinations"].) Here the Legislature's general pre-PEPRA definition of compensation earnable never relinquished its authority to clarify the parameters for specific pensionable pay items that could be included or excluded that were reasonably consistent with the prior general statutory definition. There was no prior express statutory inclusion of either standby-type pay or in-kind flexible benefit conversions from which members could imply a legislative promise to continue their inclusionary treatment. Indeed, if anything, the case law that developed after *Ventura* with regard to those specific pay items was more consistent with exclusion than mandatory continued inclusion.

Thus, no reasonable expectations of currently working Marin CERA members have been impaired as a result of the Marin CERA Board's implementation of PEPRA because the pay items at issue were never pay for "ordinary" work hours by "others" in the same class or grade, they were not clearly required to be included by *Ventura*, and constitutionally could have been prospectively excluded by the Marin CERA Board after *In re Retirement Cases*, *Salus*, and other cases discussed above, even without the specific statutory clarification provided by PEPRA. (*Internat'l Assn. of Firefighters v. City of San Diego* (1983) 34 Cal.3d 292, 303 [Court concluded that existing provisions of the Charter permitting the "setting and *revising* of employee contributions rates upon the basis of the actuarial information and revisions thereto" provided retirement boards with sufficient flexibility to include new actuarial assumptions in the calculation of such rates prospectively]; see also *Allen v. Board of Administration of the Public Employees' Retirement system* (1983) 34 Cal.3d 114, 118 ["Not every change in a retirement law constitutes an impairment of the obligations of contracts . . . . For example, '[minimal] alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.' (Citations omitted.)"].)

Nevertheless, Petitioners challenged the Policy arguing that once Marin CERA's Board exercised its statutory discretion in 1998 under

section 31461 to "determine" certain elements of compensation were to be included in compensation earnable it could never revisit that exercise of discretion and make a different determination as to "legacy" members, and that the Legislature could never clarify an exclusion from compensation earnable as to such legacy members. Under Petitioners' theory, once the retirement board had made an inclusionary decision, neither that board nor the Legislature could make any change or clarification that resulted in prospectively excluding certain future payments from retirement allowance calculations as to legacy members.

That position as to retirement boards is incorrect. Discretion assumes the existence of an ability to choose among alternatives. That rigid position amounts to an ill-favored demand for a vested right to control the administration of the plan. (*Claypool v. Wilson* (1992) 4 Cal.App.4th 646, 670.) The Court of Appeal's decision correctly permits the Marin CERA Board to exercise its discretion to include certain pay items in compensation earnable calculations as well as to exclude them where the choice is not compelled or forbidden by an explicit prior statutory mandate. (See Slip Op. at p. 33, fn. 22.)

Moreover, recent case law continues to confirm that policies adopted by boards of retirement, as a matter of law, do not create vested rights immune from later revision by that same board. (*Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1185 ["Policies, unlike contracts, are inherently subject to revision and repeal,

and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body."].) The fact that Marin CERA previously interpreted section 31461 differently by policy, as a matter of law, did not grant a vested right in members to have their retirement allowances calculated in accordance with that interpretation in perpetuity. (*San Diego City Firefighters v. Bd. of Admin. of San Diego City Employees' Retirement System* (2012) 206 Cal.App.4th 594, 621 ["The [retirement] [b]oard does not pass laws; it administers the retirement plan created by [the legislative body]"]; see also *City of San Diego v. San Diego City Employees' Retirement System* (2010) 186 Cal.App.4th 69, 79-80 ["The granting of retirement benefits is a legislative action within the exclusive jurisdiction of the [legislative body]. [Citation.]… The scope of the [retirement] board's power as to benefits is limited to administering the benefits set by the [legislative body]."].) As the Fourth District Court of Appeal plainly observed in the recent case of *Dailey v. City of San Diego* (2013) 223 Cal.App.4th 237, 253, a public retirement board administers a retirement plan, "it cannot create a benefit." (Emphasis in the original.) Accordingly a retirement board's discretionary inclusionary action could not permanently immunize its active members from prospective application of a later exclusionary change to that policy, or from implementation of a permissible legislative modification that did not contravene a prior specific statutory promise.

Thus, the Court of Appeal also properly concluded that Marin CERA's implementation of PEPRA as to the two types of pay at issue in this case was not an impairment of the Petitioners' vested rights. (Slip Op. at pp. 1-2.) Review on this issue, which was decided in accordance with well-settled law, is also not available under Rule 8.500(b).

C. The Petition for Review and Amici in Support Thereof Challenge Legal Analysis in the Court of Appeal Decision That Was Broader Than Necessary to Decide the Case and Review is Not Warranted to Address That Analysis

Petitioners, and the various groups that have filed amicus letters in support of Petitioners, argue that review is warranted because the Court of Appeal invoked reasoning that is unique or broader than the law stated in other decisions by the appellate courts creating a need for uniformity of decision. While the Court of Appeal addressed legal concepts beyond Respondents' briefing in the case, the Court's decision on the merits of this particular case is correct. For one, the Court of Appeal explained that the scope of the statutory amendments that are the subject of its opinion were "quite modest" and it specifically "emphasize[d] the limited nature of [its] holding." (Slip Op. at pp. 33, 37.) And, even if the Court of Appeal's decision is based on reasoning that can be distinguished from other decisions by the appellate courts, Petitioner is not entitled to Supreme Court review because those portions of the Court of Appeal's decision do not affect the result. (*See White v. White* (1936) 11 Cal.App.2d 570, 575 [so holding in the context of an error of fact].)

It is well settled that where a decision by an appellate court was correct based upon one valid reason, that another reason given in support of the decision was broader than necessary does not support the grant of review. (See *Morgan v. Mutual Ben. Life Ins. Co., supra*, 16 Cal.App. at p. 95 [denying transfer of case where it was "clear that as to the merits of the controversy the final decision . . . was correct"]; *Southern Pac. Co. v. Superior Court, supra*, 27 Cal.App. at 256 [denying a petition for review where the Court of Appeal correctly decided a case although it stated its views on a point more broadly than necessary]; *Carpenter v. Pacific States S. & L. Co., supra*, 19 Cal.App.2d at 269 [denying a petition for hearing where the Court of Appeal's "opinion to the law of the case as stated therein was not necessary for the decision" even though it was erroneously applied to facts in the action, and withholding "approval of that portion of said opinion in which the law of the case is discussed and applied to facts in the present action"].)

Here, the Supreme Court should deny review because, as discussed at length supra, the result of the Court of Appeal's decision (*i.e.,* that petitioners did not have a vested right to have future retirement allowance calculations include standby-type pay and in-kind flexible benefit conversions that they received during post-January 1, 2013 periods once the Legislature clarified that those payments did not conform to the existing statutory plan in effect during their employment) is correct and conforms to well-settled law.

V. CONCLUSION

This Court should deny the Petition because there is no serious doubt that the result of the Court of Appeal's decision to affirm the Superior Court's conclusion that the challenged amendments to section 31461 prospectively excluding standby-type pay and in-kind flexible benefit conversions are constitutional on their face and as applied by Marin CERA is correct. Accordingly, Petitioners' "Issue for Review No. 2" must be resolved in the negative. Petitioners had no vested right to the permanent inclusion of those pay items. At that point Petitioners' "Issue for Review No. 1" is beyond the scope of the questions necessary to resolve the underlying case and further review by this Court is not necessary.

Respectfully submitted,

NOSSAMAN LLP

Dated: October 14, 2016

By:

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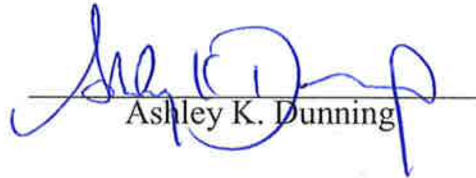
CERTIFICATE OF COMPLIANCE
California Rules of Court, Rule 14(c)(1)

Pursuant to California Rules of Court, Rule 14(c)(1), the foregoing ANSWER TO PETITION FOR REVIEW is double-spaced and was printed in proportionately spaced 13-pt. Times New Roman type. It is 32 pages long. According to Microsoft Word, it contains 7,877 words (inclusive of textboxes, footnotes and endnotes, but exclusive of the cover page, tables, signature block, the Certificate of Compliance, and the Certificate of Service).

Executed this 14th day of October, 2016, at San Francisco, CA



Ashley K. Dunning

CERTIFICATE OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is Nossaman LLP, 50 California Street, San Francisco, CA 94111.

On October 14, 2016, I served the following document described as **ANSWER TO PETITION FOR REVIEW** on all interested parties in this action by placing a true copy of the original thereof enclosed in sealed envelopes addressed as follows:

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I caused said document to be deposited in a box or other facility regularly maintained by FedEx providing overnight delivery pursuant to C.C.P. §1013(c) on that same date at San Francisco, CA in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 14, 2016 at San Francisco, California.

/s/ Marion M.N. Tom
Marion M.N. Tom