No. S237460

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MARIN ASSOCIATION OF PUBLIC EMPLOYEES, CATHERINE HALL, SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1021, MARIN COUNTY FIRE DEPARTMENT FIREFIGHTERS' ASSOCIATION, MARIN COUNTY MANAGEMENT EMPLOYEES ASSOCIATION, JOEL CHANDLER, AND ANGELO SACHELI,
Petitioners and Appellants,

v.

MARIN COUNTY EMPLOYEES' RETIREMENT ASSOCIATION; BOARD OF RETIREMENT OF THE MARIN COUNTY EMPLOYEES' RETIREMENT ASSOCIATION,
Respondents,

and

STATE OF CALIFORNIA,
Intervener and Respondent

Court of Appeal of the State of California
First Appellate District, Division 2
Case No. A139610

Appeal from Superior Court of California, County of Marin
Honorable Roy O. Chernus
Civil Case No. CIV 1300318

REPLY IN SUPPORT OF PETITION FOR REVIEW

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THE ANSWERS BY MCERA AND THE STATE SUPPORT GRANTING THE PETITION FOR REVIEW

The Answer of Intervenor the State of California ("the State") expressly supports granting the Petition for Review. The Answer of Marin County Employees' Retirement Association ("MCERA") opposes review, but does so on grounds that both Petitioners and the State believe justify review—to address important questions of law and establish uniformity of decision. As the disputes and confusion amongst the parties, as well as the interest from *amici*, demonstrates, the opinion below had statewide reverberations that this Court must address by granting review.

A. The State Supports Review

"[T]he State supports this Court's review" (State Answer at p. 9) for two reasons. First, it believes that whether the Public Employees' Pension Reform Act ("PEPRA") may exclude certain elements of compensation from "compensation earnable" calculations for existing employees under Government Code section 31461—which was the second issue Petitioners presented for review—is an "important question of statewide concern" justifying review. (State Answer at p. 1.)

Second, the State believes that if this Court "disagrees with the State and [MCERA]" and determines that items formerly included as compensation earnable for existing employees cannot be excluded, review

of the first question proposed by Petitioners would be warranted—i.e., whether a modification to pension benefits that results in a disadvantage to the employee must be accompanied by comparable advantage. (State Answer at p. 1.)

The State's formulation of its second point is problematic because the State and MCERA disagree over whether MCERA had power to include the payments at issue as compensation earnable in the first place. (See, e.g., Pet. for Rev. at p. 18 [summarizing contrary arguments of MCERA and the State in their appellate briefs].) And even though the result of the opinion below favored the State and MCERA, the Court of Appeal decided the case on dramatically different grounds than either sought.

Notwithstanding these complications, however, the primary takeaway is that the State of California, advocating on behalf of the people of the state and our legislature, agrees that one or both of the issues presented by Petitioners deserves to be reviewed by this Court.

B. MCERA Fails to Address the Uncertainty, Conflict of Law and Important Question of State Law Created by the Decision Below

Most of MCERA's Answer belabors its merits arguments in the court below. By myopically focusing on why it believes it should win, MCERA fails to address Petitioners' grounds for review.

MCERA does not dispute that the published opinion below seeks to reshape seventy years of this Court's vested rights pension decisions or that it conflicts with every other published appellate decision about modifying pension benefits since 1955. Nor does it address the confusion created by the decision and the likelihood that it will encourage unnecessary litigation. Those concerns, as well as the erroneous result, have prompted numerous *amici* to urge that review be granted.

1. The Opinion Below Does Not "Clarify" Pension Law—It Seeks to Change It Radically

MCERA contends that "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." (MCERA Answer at p. 1.) But that ignores what the Court of Appeal actually held, which was that "the Legislature may, prior to the employee's retirement, alter the formula, thereby reducing the anticipated pension. So long as the Legislature's modifications do not deprive the employee of a 'reasonable' pension, there is no constitutional violation." (Slip Op. at p. 2.)

The opinion below not only embraces radical change, it advocates for it. The panel grounds its opinion in public policy arguments it believes justify reducing pensions without offering comparable

advantages. Throughout, the lower court uses the word "change" and exalts PEPRA as responding to the need for it. For example, the opinion assails petitioners because they "do not mention the economic storm clouds that attended the enactment of the Pension Reform Act, or how their presence was perceived by the Legislature as a spur to *fundamental change*." (Slip Op. at p. 36 [emphasis added].) It was with this self-proclaimed mission to enable fundamental change that the panel below set about deconstructing California vested rights law.

It is no surprise therefore that the opinion below disregards MCERA's argument that the PEPRA amendments were merely clarifications. On the contrary, by resolving the case solely on Contracts Clause jurisprudence—or at least its understanding of it—the court implicitly rejected both MCERA's and the State's position that no vested rights were ever created. In other words, the panel accepted Petitioners' position that vested rights were created, but it reinterpreted this Court's precedent to deny any of the protections afforded by those rights.

The opinion below radically re-interprets this Court's decisions regarding modifications of public pension benefits for legacy members. It contends that reductions are permissible as long as the employee is left with a "reasonable" pension. (Slip. Op. at p. 2.) And further, that changes resulting in disadvantages to the employee need no longer be accompanied by comparable new advantages.

Thus, MCERA's arguments against review ring hollow. Its primary contention is that the outcome below was correct, even if the decision's reasoning was "broader than necessary." (MCERA Answer at p. 31.) But this wrongly assumes that the court provided alternative grounds for affirming outside of its evisceration of vested rights principles. It did not: the court of appeal's decision rests solely on the grounds that current employees' pension benefits may be reduced prior to retirement, so long as employees retain a "reasonable" pension. The court declined to adopt MCERA's argument—or the State's—that no vested right exists. (Slip Op. at p. 2.) MCERA fails to acknowledge what the opinion below actually holds and all of the implications it presents for California pension laws.

2. The Authority of California Pension Boards to Create Vested Retirement Benefits is Itself an Issue That Should be Reviewed

The Court should also grant review of the underlying dispute over whether County Employees Retirement Law of 1937 ("CERL"), Government Code section 31450 *et seq.* permits retirement boards to create vested rights and whether MCERA's reading of PEPRA impaired the vested pension rights of existing employees. (Pet. for Rev. at p. 6 [issue presented] and pp. 29-31 [argument].) That was the real underlying issue here before the court of appeal spun the case in a dramatically new direction.

Intrinsic to the underlying dispute are the intertwined questions of whether CERL required that the payments here be included as "compensation earnable," as Petitioners contend; allowed MCERA the discretion to include and then exclude them, as MCERA argues; or prohibited them from inclusion, as the State argues. These raise some points that were within the scope of this Court's decision in *Ventura County Deputy Sheriffs' Association v. Board of Retirement* (1997) 16 Cal.4th 483, but others which this Court has not addressed.

For example, MCERA's position that CERL provides it with authority to exclude certain types of compensation from pension benefit calculations that it formerly included presents one important issue not yet addressed by this Court. As the Petition for Review explained in more detail, *Guelfi v. Marin County Employees' Retirement Association* (1983) 145 Cal.App.3d 297, concluded that CERL retirement boards do have the power to include additional items not required by the statute as "compensation earnable" and that doing so would give rise to a vested pension benefit. (*Id.* at p. 307, fn. 6.) *Ventura* overruled *Guelfi* "to the extent that *Guelfi* is inconsistent" with *Ventura*'s findings of what must be included as "compensation earnable." (*Ventura*, *supra*, 16 Cal.4th at p. 505.) But neither *Ventura* nor any decision since has disturbed *Guelfi's* position about the authority of a CERL retirement board to create vested pension rights.

In re Retirement Cases (2003) 110 Cal.App.4th 426, a case addressing the retroactive applicability of *Ventura* and decided by the same division of the First Appellate District, also ruled that certain payments were "not *required* under CERL to be included in the calculation of pension benefits." (*Id*. at pp. 476, 481 [emphasis added].) *In re Retirement Cases* expressly declined to address a retirement board's discretionary authority: "Because we are considering what must be included under the statute and we conclude that the items requested by plan members do not have to be included under CERL, we need not consider L.A. County's argument that these items cannot be included…." (*Id*. at p. 472, n. 20.) MCERA discusses *Guelfi* (Answer of MCERA at pp, 16-17, 21) but does not acknowledge the central question it poses on the authority under CERL of retirement boards to create vested rights.

These are important questions of law given that twenty counties provide pension benefits through CERL systems—including some of the state's most populous counties, such as Los Angeles, Orange, San Diego, San Bernardino, and Alameda Counties. Additionally, the changes at issue are the result of pension legislation that profoundly revamped benefits for new public employees (see Stats. 2012, ch. 296; Stats. 2012, ch. 297), raising questions of whether the Legislature crossed the line in reducing benefits for existing employees. (See, e.g., *Betts v. Board of Administration of the Public Employees' Retirement System* (1978) 21

Cal.3d 859, 867-868 [statutory amendment withdrawing pension benefits unconstitutional]; *Olson v. Cory* (1980) 27 Cal.3d 532, 538 [statute limiting cost-of-living increases for retired judges unconstitutional].)

MCERA's argument that its policies cannot create vested pension benefits also has significant implications for other retirement systems. Legislative bodies often craft pension plans with generalized and vague language, leaving the administering entity with discretion to fill in any substantive gaps, as MCERA has done. Thus, the position staked out by MCERA is far from settled, and this Court should grant review to address the important questions of law it raises.

C. The Differences the Parties Express About the Opinion Below Epitomize the Strong Likelihood That It Will Cause Confusion and Extensive Litigation

The lower court holding departs radically from existing California law—everyone except MCERA (including numerous *amici* who have already filed letters supporting review) agrees on this point. Yet, MCERA's arguments ignore the immense confusion and inevitable litigation that will ensue because of the lower court's decision. The State recognizes this and supports review. If the parties cannot agree on the implications of the court of appeal decision for public employee pensions, what hope do others have?

Employers, employees, and policy makers will not know the extent to which disadvantageous modifications can be made to the pension

benefits promised to current employees. This will invite litigation. It will also unsettle labor relations. Several amicus letters have already noted that public employee collective bargaining agreements throughout the state are premised on the idea that pension benefits for existing employees are largely fixed. Significant concessions have been made by labor agreements in order to secure what was understood to be firm guarantees. But this decision throws that framework into the wind, creating further confusion and labor conflict.

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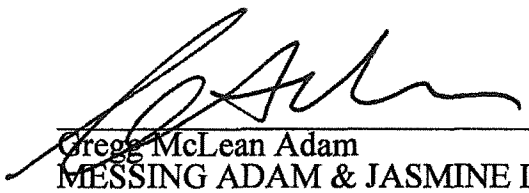
Thus, this Court should grant review now to ensure uniformity in pension rules throughout the state and to preempt the inevitable litigation that will follow this decision.

Respectfully Submitted,

Dated: October 24, 2016



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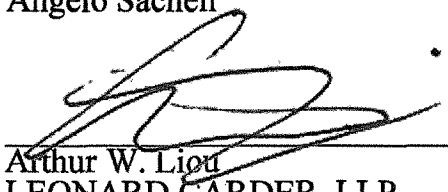

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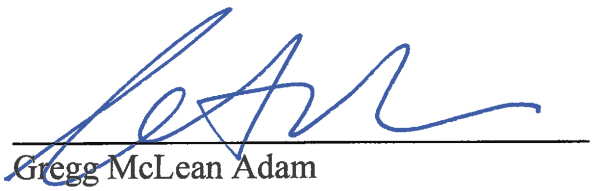
Certificate of Word Count

Pursuant to Rule 8.504(d) of the California Rules of Court, I certify that this brief contains 1,882 words, as determined by the computer program used to prepare the brief.

Dated: October 24, 2016



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Marin Association of Public Employees, et al. v. Marin County Employees' Retirement Association, et al.., California Supreme Court, No. S237460

PROOF OF SERVICE BY MAIL

I declare that I am employed in the County of San Francisco, California. I am over the age of eighteen years and not a party to the within cause; my business address is 235 Montgomery Street, Suite 828, San Francisco, CA 94104. On October 24, 2016, I served the enclosed:

REPLY IN SUPPORT OF PETITION FOR REVIEW

on the parties in said cause (listed below) by enclosing a true copy thereof in a sealed envelope or package addressed to the person(s) at the address(es) listed above and placed the envelope(s) for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Messing Adam & Jasmine LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at San Francisco, California.

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on October 24, 2016, at San Francisco, California.

Janine Oliker