No._____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CAL FIRE LOCAL 2881
(formerly known as CDF Firefighters), *et al.*,

Petitioners and Appellants,

v.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
(CalPERS) *et al.*,

Respondent,

and

THE STATE OF CALIFORNIA,

Intervenor and Respondent.

Court of Appeal of the State of California
First Appellate District, Division 3
Case No. A142793

Appeal from Superior Court of California, County of Alameda
The Honorable Evelio Grillo, Presiding Judge
Civil Case No. RG12661622

PETITION FOR REVIEW

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I

ISSUES FOR REVIEW

Following this Court's grant of review on November 22, 2016, in *Marin Association of Public Employees, et al. v. Marin County Employees' Retirement Association, et al.* (2016) 2 Cal.App.5th 674 (California Supreme Court, Case No. S237460) ("*Marin Public Employees*"), this petition raises complimentary—and equally important—questions concerning how statutory pension benefits become vested and the extent to which they may be modified or eliminated; specifically:

1. Does the Contracts Clause of the California Constitution prevent the Legislature from eliminating a statutory pension benefit without providing employees with offsetting comparable new advantages?
2. Does a statute which provides a pension benefit enjoy contracts clause protections only if it expressly provides that the benefit cannot be modified or eliminated?
3. Is the option to purchase additional service credits a vested pension benefit?

II

REASONS FOR GRANTING THE PETITION

Review of the opinion below by the Court is necessary to secure uniformity of decision concerning California's vested pension rights

doctrine. (Cal. Rules of Court, rule 8.500(b)(1).) In a sharp break from this Court's longstanding jurisprudence protecting public employee pension rights, the opinion below affirms the Legislature's unilateral elimination of the right of *existing* state and local government employees to purchase additional service credit under Government Code section 20909 ("section 20909").[1] From 2004 until the date it was repealed on December 31, 2012, section 20909 permitted qualifying employees to increase the service component of their final pension by purchasing additional service credit. CalPERS, the nominal defendant in this case, agrees with Petitioners that section 20909 created vested contract rights for existing employees. (Slip op. at p. 10.)

Like *Marin Public Employees*, with which it unreservedly casts its lot, the lower court makes a frontal challenge to the "California Rule." Petitioners relied on this Court's longstanding vested rights jurisprudence (slip op. at pp. 5, 7 and 14, acknowledging Petitioners' reliance on *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, *Betts v. Board of Administration of Public Employees' Retirement System* (1978) 21 Cal.3d 859 and *Allen v. City of Long Beach* (1955) 45 Cal.2d 128), but the court below rejected it in favor of the revised theory put forward in *Marin Public Employees* that

[1] All statutory references are to the Government Code unless stated otherwise.

governing entities have *carte blanche* to eviscerate public employee pension benefits to a point short of destruction. (Slip op. at pp. 10-12.) For the same reasons the Court granted review in *Marin Public Employees*, it should do so here.

Attempting to buttress its holding (recognizing, presumably, this Court's grant of review in *Marin Public Employees*), the lower court held that section 20909—a statute within a broad pension law scheme (Public Employees' Retirement Law, § 20000 *et seq*.)—created neither a pension benefit nor a vested contractual right. It did so by reading new restrictions on the creation of vested pension rights from this Court's ruling in *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171. *Retired Employees Assn*. unanimously affirmed that *implied* vested retiree health benefits for public employees can be created under California law, so long as clear evidence of a legislative intent to create such rights exists. (*Id*. at pp. 1189-1190.) The Court stressed the higher burden one seeking to establish such rights *by implication* faces. (*Id*.) Yet the court below applied those same standards to the *express* benefit created by section 20909, superimposing the obligation that the statute "unambiguously state[] an intent by the Legislature to create a vested pension benefit." (Slip op. at p. 9, citing *Retired Employees Assn*., at p. 1190.) The lower court suggested that a pension statute does not create a

vested right unless it contains a "promise by the Legislature *not to modify or eliminate*" the benefit. (Slip op. at p. 9 [italics in original].)

This highly restrictive reading of how vested pension rights are created conflicts with decades of case law. For example, the statutes that were modified in *Betts v. Board of Administration of Public Employees' Retirement System*, 21 Cal.3d 859 and *Olson v. Cory* (1980) 27 Cal.3d 532—to name two of many cases—did not explicitly state that vested rights were created or that the Legislature could not modify or eliminate the benefits. Nonetheless, in each case this Court invalidated, on vested rights grounds, attempts by the Legislature to eliminate pension benefits created by statute. (*Betts*, 21 Cal.3d at pp. 867-868 [invalidating statutory amendment that withdrew pension benefits from legislators]; *Olson v. Cory*, 27 Cal.3d at p. 541 [invalidating new statute limiting cost-of-living increases for retired judges].) This Court should grant review and reaffirm that its ruling in *Retired Employees Assn*. clarified but did not break from its prior jurisprudence with respect to legislative enactments pertaining to pension benefits enjoying contractual protections. (*Olson*, 27 Cal.3d at p. 538 ["When agreements of employment between the state and public employees have been adopted by governing bodies, such agreements are binding and constitutionally protected."], quoting *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 304.)

Finally, this Court should grant review of the lower court's determination that only pension benefits that meet its narrow definition of "deferred compensation" are constitutionally protected. That flies in the face of countless cases which protect, as vested, employees' rights ranging from: required levels of employer contributions disability retirement benefits, sabbaticals, and even supplemental cost of living adjustments based on how well a retirement system's investments perform.

III

FACTUAL AND PROCEDURAL BACKGROUND

Petitioners are state employees and their labor union whose pension benefits are administered by the California Public Employees' Retirement System ("CalPERS"). They sued in early 2013, after the Legislature eliminated Government Code section 20909, a pension statute, which had formerly allowed state and local employees to purchase additional service credit. Petitioners alleged that the elimination of section 20909 violated the Contracts Clause. The lawsuit did not challenge the Legislature's right to eliminate the statute for *future* employees.

A. The Creation In 2004 Of The Right Of Qualifying Employees To Purchase Additional Service Credit

CalPERS is a public pension system, established under section 20000, *et seq.*, which defines its pension benefits exclusively by statute. (Slip. op. at p. 2.) CalPERS must administer benefits and discharge its

duties solely in the interest of plan participants and their beneficiaries. (Cal. Const. Article XVI, § 17(b).)

The right to purchase service credits was offered initially in 2004, when section 20909 was enacted, and remained available until December 31, 2012. It permitted a "member who has at least five years of credited state service" to make a one-time purchase of "not less than one year, nor more than five years, in one-year increments, of additional retirement service credit in the retirement system … at any time prior to retirement." (§ 20909(b).)

The opportunity to purchase the additional service credits provided advantages to employees:

> Being able to purchase [additional service credits] allows members of CalPERS to increase their retirement benefits at no cost to employers. Many members take breaks in employment to raise children, advance their educations, or work in the private sector for a time. For members who do not enter CalPERS covered employment until later in life or who have breaks in service, purchasing [additional service credits] may contribute to providing a livable retirement income.

(JA at pp. 260, 266 & 271-272.) Thus, an employee might take five years off for the purpose of improving his/her education, for child care, or for providing healthcare for a relative, or plan to do so in the future and rely upon this statute to allow the employee to retire without loss of time or pension benefits. Because pension benefits are based on length of service

and compensation, without the statute, employees who took such leave would suffer a reduced pension.

The entire cost of the benefit, if exercised, was borne by the employee, who was required to "contribute 'an amount equal to the increase in employer liability, using the pay rate and other factors affecting liability on the date of the request for costing of the service credit.'" (Slip op. at p. 2, citing § 20909, subds. (a), (b); § 21052.) The "increase in employer liability" was calculated as the "present value of the projected increase in liability to the CalPERS system." (§ 21052; AB 719, Bill Analysis, p. 2 (Aug. 18, 2003).)

Among the putative class members were one firefighter who missed eligibility to purchase the service credits by 16 days (JA at pp. 158, 164), and others who had provided five years of service and planned to purchase additional service credits but were financially unable to do so before December 31, 2012. (JA at pp. 157-158.)

B. CalPERS Recognized That The Right To Purchase Additional Service Credit Was A Vested Right

CalPERS agreed with Petitioners that section 20909 created vested rights. Its publication "Vested Rights of CalPERS Members: Protecting the Pension Promises Made to Public Employees," was published in July 2011, widely read, and remained on its website, unaltered, until at least December 21, 2016.

CalPERS recognized that the right to purchase additional service credits vests immediately when offered:

> RULE 1:
>
> Employees Are Entitled To Benefits In Place During Their Employment
>
> Public employees obtain a vested right to the provisions of the applicable retirement law that exist during the course of their public employment. Promised benefits may be increased during employment, but not decreased, absent the employees' consent. *These rules apply to all active CalPERS members, whether or not they have yet performed the requirements necessary to qualify for certain benefits that are part of the applicable retirement law. For example, even if a member has not yet satisfied the five year minimum service prerequisite to receiving most service and disability benefits, the member's right to qualify for those benefits upon completion of five years of service vests as soon as the member starts work.*

(JA at p. 229, emphasis added.) More specifically, CalPERS described the right to purchase service credit as one of eleven vested rights:

> "Purchase service credit under the terms that existed in the law when they provided service, if the member satisfies all eligibility requirements."

(JA at p. 234.) Individual petitioners' reliance on the future ability to purchase was also set forth in the record. (JA at p. 160.)

C. The Legislature Repeals Section 20909, As Part Of PEPRA, And Petitioners File Suit

On January 1, 2013, section 7522.46 became effective as part of the Public Employees' Pension Reform Act of 2013 ("PEPRA"). PEPRA made significant changes to public employee pensions, primarily for *future*

employees, including reducing pension formulas for new hires. (See Legis. Counsel's Dig., Assem. Bill No. 340 (2011-2012 Reg. Sess.).) But section 7522.46 repealed section 20909 as it applied to *existing* employees as well.

Petitioners sued in the Superior Court of Alameda County seeking to compel CalPERS to allow future purchases of service credits for qualifying employees employed as of December 31, 2012. (JA at p. 166.) CalPERS declined to defend the legislation, so Respondent State of California intervened, unopposed, to defend it.

The trial court held a hearing on the petition on February 24, 2014. Several months later, on May 12, 2014, the trial court issued a final order; then, on June 5, 2014, an amended final order, both denying the petition. The trial court entered judgment on June 19, 2014.

D. The Court Of Appeal Holds That Pension Reductions Need Not Be Offset By Comparable Benefits So Long As Employees Retain A "Reasonable" Pension

On appeal, Petitioners relied on this Court's longstanding vested rights jurisprudence. (AOB at pp. 11-12.) The State did not contest that body of law, but argued that the right to purchase service credits was a mere "option," not a pension benefit. (State's Br. at p. 13.) It reasoned that if the employee bore the cost of the benefit, it could be characterized as neither deferred compensation nor a pension benefit, and consequently the Legislature could freely repeal the statute. (*Id*. at p. 15.) Oral argument occurred on December 21, 2016.

On December 30, 2016, the court of appeal issued its opinion and rejected Petitioners' claims on several bases. First, it faulted section 20909 for failing to "unambiguously state[] an intent by the Legislature to create a vested pension right." (Slip op. at p. 9, citing *Retired Employees Assn.*, 52 Cal.4th at p. 1190.) Without such a statement, reasoned the court, the Legislature's "continuing government power" allowed it to eliminate the benefit. (Slip op. at pp. 7-9.)

Second, accepting for the sake of argument that vested pension rights were created, the lower court held that "California law is quite clear that the Legislature may indeed modify or eliminate vested pension rights in certain cases." (Slip op. at p. 10.) The lower court cited older decisions of this Court for the proposition that the "government entity providing the pension may make reasonable modifications and changes in the pension system … [t]o maintain the integrity of the system and carry out its beneficent purpose." (Slip op. at p. 10, quoting *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 854-855 and citing *Wallace v. City of Fresno* (1954) 42 Cal.2d 180 and *Packer v. Board of Retirement* (1950) 35 Cal.2d 212.) But when it confronted the critical additional component of pension law—that "*changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages*" (slip op. at p. 11, quoting *Betts*, 21 Cal.3d at 864 [italics in the original])—the lower court fell back on *Marin Public Employees* and all the controversial aspects of

that opinion, including the view that so long as pension reductions do not destroy a public employee's pension, the Legislature is not foreclosed by the Contracts Clause from making modifications. (Slip op. at p. 12, n. 5, and pp. 13-16.)

Third, it accepted the State's argument that any purchase of service credits under section 20909 was not deferred compensation and therefore was not a pension benefit. (Slip op. at p 13.) Despite the statute requiring that employees provide five years of service, the Court concluded that the benefit was "wholly unrelated" to service. (*Id*.)

IV

DISCUSSION

A. Review Should Be Granted Because The Court Of Appeal Decision Relies Extensively On The Same Flawed Rationale As *Marin Public Employees*

This Court should grant review and decide this case together with *Marin Public Employees*. Alternatively, it should grant review and hold the opinion until *Marin Public Employees* is decided.

While the court below proffered that its ruling against Petitioners is not radical (slip op. at p. 10 ["California law is quite clear that the Legislature may indeed modify or eliminate vested pension rights in certain cases"**]**), ultimately it adopted *Marin Public Employees* as follows:

- reductions in promised pension benefits can occur without the obligation to provide offsetting comparable advantages (*id*. at p. 12, n 5);
- any changes short of "'destroying' an employee's anticipated pension" are permissible (*id*.);
- where this Court and other appellate courts have used the term "must"—as in "any modification of vested pension rights … when resulting in disadvantage to employees, *must* be accompanied by comparable new advantages" (*Allen v. Board of Administration* (1983) 34 Cal.3d 114, 120)—they meant "should," a term which shoulders no legal obligation (*id*. at pp. 14-15);
- only employees who show that "their right to a reasonable pension" has been forfeited can establish a vested rights violation (*id*. at p. 16).

The petition for review, the twenty amicus letters in support of review,[2] and the five in support of depublication in *Marin Public Employees* argued that these holdings warranted review for reasons ranging

[2] The California Attorney General's Office was also an intervenor in *Marin Public Employees* and supported review of that appellate decision to the extent it challenged the Court's prior rulings on vested rights.

from the evisceration of the longstanding consensus on California vested pension rights law, to the standard-less rule that only the right to a "reasonable" pension is required, to the split created with other district courts of appeal or even within the same district. (See, e.g., *Protect Our Benefits v. City and County of San Francisco* (2015) 235 Cal.App.4th 619, 628-629 ["[w]ith respect to active employees, ... any modification of vested pension rights … *when resulting in a disadvantage to employees, must be accompanied by comparable new advantages*"] (italics in original).)

Having granted review in *Marin Public Employees*, the Court should also do so here.

B. The Court Of Appeal Decision Reads *Retired Employees' Assn*. As A Break With This Court's Prior Decisions On How Statutory Vested Rights Are Created

Furthermore, the appellate court's belief that *Retired Employees Assn.* requires that an express statutory pension benefit "unambiguously state[] an intent by the Legislature to create a vested pension right" should be reviewed. (Slip op. at p. 9, citing *Retired Employees Assn.*, 52 Cal.4th at p. 1190.) The lower court took *Retired Employees Assn.* to extreme lengths, suggesting that a statute must "promise … *not to modify or eliminate*" a pension benefit in order to create a vested right. (Slip op. at p. 9.)

Petitioner believes that the language in *Retired Employees Assn.* resulted from the question before the Court in that case: whether *implied* contracts in the public employment context can create vested rights? (52 Cal.4th at p. 1179.) In contrast, two of this Court's most prominent vested rights decisions, *Betts v. Board of Administration* (1978) 21 Cal.3d 859 and *Olson v. Cory* (1980) 27 Cal.3d 532, involved statutes which this Court found conveyed vested contractual rights to employees. Those statutes did not state that a vested right was being created nor had language prohibiting modification or elimination of the benefit; yet this Court unhesitatingly found that modifications to the statutes violated vested pension rights. (See also *Valdes v. Cory* (1983) 139 Cal.App.3d 773, 787 ["explicit language in the retirement law constitutes a contractual obligation on the part of the state as employer"].)

Betts concerned the Legislators' Retirement Law, section 9359.1, subdivision (b), which provided, in pertinent part, when the plaintiff was a legislator that:

> The retirement allowance for [a nonlegislative (sic) member] . . . is an annual amount equal to five percent (5%) of the compensation payable at the time payments of the allowance fall due, *to the officer holding the office which the retired member last held* prior to his retirement, *or* five percent (5%) of the highest compensation *fixed for such office* during the member's last term or any subsequent term prior to his retirement, whichever is greater, multiplied by [years of service credit] . . . .

(21 Cal.3d at p. 862 [italics in original].) This Court noted the "strict limitation" on "modify[ing] the pension system in effect during employment," applying the rule from *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131 that "changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages," and concluded that a statutory amendment that replaced a "fluctuating" system of benefit computation with a "fixed" one could not constitutionally be applied to the plaintiff. (*Betts, supra,* at pp. 864-868.) The fact that the statute did not itself prohibit its future amendment did not prevent the petitioner from acquiring "a vested contractual right while employed." (*Id.* at p. 867.) To the contrary, the Court concluded that, having performed services for four years under a statutory scheme that included the pre-amendment version of section 9359.1, that statute, not its amended version, "form[ed] the basis by which petitioner's reasonable pension expectations must be measured." (*Id.* at pp. 867-868.)

Olson v. Cory involved a 1976 statutory amendment to section 68203 which limited annual cost of living increases in judges' salaries. (26 Cal.3d at pp. 534-535.) This Court concluded that the amendment violated two different vested rights: judges already serving a term of office prior to the amendment "had a vested right … to an annual increase in salary equal to the full increase in the [consumer price index]," which section 68203 had provided before it was amended (*id.* at p. 536), and—most pertinent to this

case—the amendment impaired the vested rights of retired judges by withdrawing rights under the prior version of section 68203 that had been earned while employed. (*Id*. at pp. 537-538.) "Such modification of pension benefits works to the disadvantage of judicial pensioners *by reducing potential pension increases*, and provides no comparable new benefit." (*Id*. at p. 538 [emphasis added].) The protection of potential pension increases in *Olson v. Cory* resonates with this case because of the emphasis the lower court erroneously placed on the right to purchase additional service credit as an unexercised option. (Slip op. at p. 13.)

This Court should use this case to clarify that *Retired Employees Assn*. did not change the longstanding rule that where a statute expressly creates a pension benefit, once "adopted by governing bodies, such agreements are binding and constitutionally protected." (*Olson*, 26 Cal.3d at p. 536.) California courts routinely struck down pension legislation that impaired vested rights established under state and local statutes without requiring promises "not to modify or eliminate" (slip op. at p. 9). (See, e.g., *Board of Administration of the Public Employees' Retirement System v. Wilson* (1997) 52 Cal.App.4th 1109, 1137 [invalidating legislation substituting in-arrears financing of pension system in place of actuarial-based funding]; *DeCelle v. City of Alameda* (1963) 221 Cal.App.2d 528 [modification of pension system precluding pension upon such discharge was detrimental to employee]; *United Firefighters of Los Angeles City v.*

City of Los Angeles (1989) 210 Cal.App.3d 1095 [3% cap on pension cost of living adjustments was unconstitutional as applied to employees hired prior to enactment of charter amendment]; *Pasadena Police Officers' Association v. City of Pasadena* (1983) 147 Cal.App.3d 695 [amendments substantially reducing cost of living benefits of pension plan were invalid]; *Teachers Retirement Bd. v. Genest* (2007) 154 Cal.App.4th 1012 [legislation reducing state's obligation to fund retirees' supplemental benefit maintenance account was invalidated]; *Chapin v. City Commission of Fresno* (1957) 149 Cal.App.2d 40 [ordinance changing method of computing retirement benefits invalid]; *Protect Our Benefits v. City and County of San Francisco, supra,* 235 Cal.App.4th, at pp. 619, 628-629, [invalidating charter amendment which added additional condition precedent to receipt of supplemental cost of living allowances].)

C. The Court Should Grant Review To Reaffirm That Contracts Clause Protections Extend To The Range Of Benefits Offered By The Retirement Law In Effect During Employment

The lower court defined pension benefits too narrowly, as only "deferred compensation that has been earned through the performance of work." (Slip op. at p. 13.) It considered the option to purchase service credit to be "wholly unrelated to actual services provided or work performed" and for that reason not a benefit that "provide[d] state employees with a monetary advantage." (*Id*. at pp. 13-14.)

The lower court misses the forest for the trees. An optional statutory provision which, if exercised, increases an employee's future retirement benefits is unmistakably both a monetary benefit and a pension benefit. The appellate court repeats the mistakes the trial court made in focusing on the short-term cost, instead of the long-term benefit, of exercised rights. And it ignored the statutory requirement that employees had to have at least five years of state service in order to be eligible to purchased additional service credit. (§ 20909.)

The court's fixation with whether or not the benefit was deferred compensation caused it to completely disregard a myriad of California precedents which afford constitutional protection to pension rights that are not in and of themselves deferred compensation. For example, in *Board of Administration v. Wilson,* 52 Cal.App.4th at p. 1137, the court invalidated the governor's attempt to substitute in-arrears financing of a pension system in place of actuarial-based funding. Similarly, in *Teachers Retirement Bd. v. Genest*, 154 Cal.App.4th at pp. 1029-1032, the court of appeal invalidated legislation which reduced the state's obligation to fund retirees' supplemental benefit maintenance account on vested contractual rights grounds. (See also *California Teachers Assn. v. Cory* (1984) 155 Cal.App.3d 494, 506 [holding the state's failure to fund the Teachers' Retirement Fund in accordance with statutory terms constituted an impairment of contract].) In *Frank v. Board of Administration* (1976) 56

Cal. App. 3d 236, 242-244, the court of appeal held that legislation which reduced the range of benefits available to employees who qualified for a disability retirement could not be applied to an existing employee. And in *Protect Our Benefits,* another Division of the First Appellate District held that employees and retirees had a constitutionally-protected vested right to a supplemental cost of living allowance which retirees received when the retirement system's investment returns exceeded projected earnings. (235 Cal.App.4th at p. 622.)[3]

California courts have recognized other non-pension vested benefits, including annual step increases for employees hired on a month-to-month basis (*Youngman v. Nevada Irrigation District* (1969) 70 Cal.2d 240); longevity pay and sabbaticals (*California League of City Employees Association v. Palos Verdes Library District* (1978) 87 Cal.App.3d 135); a five-step plan (*Ivens v. Simon* (1963) 212 Cal.App.2d 177); post-retirement continuation of health benefits (*Thorning v. Hollister School District* (1992) 11 Cal.App.4th 1598).

None of these benefits were deferred compensation. Yet because they were benefits which were in effect when employees provided service, none of those appellate courts had any difficulty finding that they

[3] Despite *Protect Our Benefits* being the subject of a letter brief and Petitioners' primary focus at oral argument, the court below ignored the decision in its opinion.

were subject to the same protections as the underlying pension benefit itself. The purchase of service credits is, on a practical level, indistinguishable from deferred compensation because it actually results in a change to employees' pension formulas.

This Court should reaffirm that the vested rights doctrine protects an employees' reasonable expectation of the beneficial provisions of the applicable retirement law that exist during the course of his or her public employment. (*Bellus v. City of Eureka* (1968) 69 Cal.2d 336, 350.)

V

CONCLUSION

California vested rights law has been settled for more than sixty years. The decision of the panel below seeks to steer California's vested rights doctrine in a dramatically different direction. This Court should grant the Petition for Review.

Dated: February 8, 2017

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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 4,356 words, as determined by the computer program used to prepare the brief.

Dated: February 8, 2017

Gregg McLean Adam

DECISION

Filed 12/30/16

CERTIFIED FOR PUBLICATION

THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CAL FIRE LOCAL 2881 et al.,

Petitioners and Appellants,

v.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM et al.,

Defendants and Respondents,

THE STATE OF CALIFORNIA,

Intervenor and Respondent.

A142793

(Alameda County
Super. Ct. No. RG12661622)

This is an appeal from the trial court's denial of a petition for writ of mandate and injunctive relief filed by plaintiff Cal Fire Local 2881 on behalf of itself and its members. Plaintiffs, professional firefighters employed by the State of California and the union representing them, sought this relief against defendant California Public Employees' Retirement System (CalPERS) to compel it to continue to enforce Government Code section 20909, a state law enacted by the Legislature in December of 2003 to provide eligible public employees the option to purchase at cost up to five years of nonqualifying service credit (sometimes referred to as "airtime").[1]

This airtime service credit, when purchased, provided an increase in the pension benefits paid to state employees during their retirement, as it enabled the purchasers to increase the amount of service credit factored into their pensions. However, in 2012, the Legislature eliminated this option as of January 1, 2013 upon enacting the Public

[1] Unless otherwise stated herein, all statutory citations are to the Government Code.

Employees' Pension Reform Act of 2013 (PEPRA), a comprehensive reform measure designed to, among other things, strengthen the state's public pension system and ensure its ongoing solvency. (See § 7522.46, § 20909, subd. (g).)

According to plaintiffs, the Legislature's elimination of the option provided under section 20909 to purchase airtime service credit is a violation of the contracts clause of the California Constitution (Cal. Const., art. I, § 9) and, as such, CalPERS lacks authority to refuse to consider applications for this service credit. For reasons set forth below, we reject plaintiffs' position and affirm the trial court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The facts as found by the trial court are not in dispute. CalPERS is the sole administrative agency responsible for administering the California Public Employees' Retirement System for the State of California. (Cal. Const., art. XVI, § 17, subds. (b), (h); see also §§ 20001, 20002, 20004.) Plaintiffs, as state employees, are enrolled in CalPERS and eligible for certain retirement benefits, including pension benefits. (§ 20400; *Miller v. State of California* (1977) 18 Cal.3d 808, 814 ["Pension rights . . . are deferred compensation earned immediately upon the performance of services for a public employer"] [*Miller*].) These retirement benefits are defined exclusively by statute and are not subject to expansion or abridgement by CalPERS. (*Miller, supra*, 18 Cal.3d at p. 814; see also *City of San Diego v. Hass* (2012) 207 Cal.App.4th 472, 495 ["only the [legislative body] has the power to grant employee benefits, and [the local agency charged with administering the City's retirement system] exceeds its authority when it attempts to "expand pension benefits beyond those the [legislative body] has *granted"*].)

Of significance here, one such benefit, available to active CalPERS members as of January 1, 2003, was the option afforded under section 20909 to purchase up to five years of nonqualifying service credit (aka, airtime). To qualify for this option, the employee was required to have attained at least five years of state service, to be presently employed by the state, and to contribute "an amount equal to the increase in employer liability, using the payrate and other factors affecting liability on the date of the request for costing of the service credit." (§ 20909, subds. (a), (b); § 21052.) Thus, this airtime service

credit was unique in that it did not reflect the member's actual service in qualifying employment. Rather, the credit could be added to the member's total amount of service credit when calculating the member's retirement allowance, but did not affect the vesting of medical coverage or membership. Further, the cost of the airtime, which was to be borne entirely by the purchasing member and not by the state, was calculated as a present value of the projected increase in liability to the CalPERS system. (See § 21052; AB 719 Assembly Bill-Bill Analysis, p. 2 (Aug. 18, 2003) ["this benefit is intended to be cost neutral to employers. The member pays the full present value cost of the additional service credit . . . [which] is calculated to be equivalent to the cost of the increased benefit due to the additional service credit"]; AB 719, Assembly Bill-Bill Analysis, Senate Rules Committee, p. 2 ["the cost of the 'air time' service credit will be fully paid by the member, with no employer contribution permitted"].)

This option to purchase airtime service credit was available to CalPERS members from January 1, 2003 through the end of 2012. However, as mentioned above, in September of 2012, the Legislature enacted PEPRA, a reform measure intended to strengthen the state's public pension system and ensure its ongoing solvency. (Stats 2012 ch 296 § 15 (AB 340), effective January 1, 2013.) One PEPRA provision, section 7522.46, subdivision (b), mandated expiration of the option on January 1, 2013, thereby providing eligible members one last 15-week window of opportunity (from October 4, 2012 until December 31, 2012) to purchase airtime service credit. Afterward, however, on January 1, 2013, the option would cease to exist. (§ 7522.46 ["(a) A public retirement system shall not allow the purchase of nonqualified service credit . . . . [¶]
(b) Subdivision (a) shall not apply to an official application to purchase nonqualified service credit that is received by the public retirement system prior to January 1, 2013, that is subsequently approved by the system."]; see also § 20909, subd. (g) ["This section shall apply only to an application to purchase additional retirement credit that was received by the system prior to January 1, 2013, that is subsequently approved by the system"].)

Plaintiffs, representing a putative class of CalPERS members who were eligible to, but did not, purchase airtime service credit during this statutory time period that expired on January 1, 2013, initially filed this lawsuit on December 28, 2012.[2] The operative pleading, to wit, the third amended verified petition for writ of mandate, was then filed on July 12, 2013. In this petition, plaintiffs assert that the option to purchase airtime service credit was a vested contractual right and, thus, that the Legislature's withdrawal of this right when amending section 20909 and enacting section 7522.46 was a violation of the contracts clause of the California Constitution (Cal. Const., art. I, § 9). Accordingly, plaintiffs, reasoning that CalPERS lacks authority to enforce unconstitutional laws, sought a writ of mandate to compel CalPERS and those acting on its behalf to continue to allow purchase of the airtime service credit.

The State of California subsequently intervened in this lawsuit for the purpose of defending the amended statutory scheme. A writ hearing was held on February 24, 2014, followed by the trial court's filing of the Amended Final Order on June 5, 2014. In this order, the trial court concluded that the elimination of the option of a state employee to purchase up to five years of retirement service credit did not impair or violate any pension right of plaintiffs because, even if this option could be deemed a vested benefit, "the Legislature lawfully eliminated that benefit as a permissible modification to the pension plan." Accordingly, the trial court entered judgment denying plaintiffs' petition for writ of mandate and injunctive relief, and directing that CalPERS and the intervening State of California recover costs as permitted by law. This appeal followed.

DISCUSSION

The overarching issue in this appeal relates to the proper construction of section 20909 and, more specifically, whether the Legislature intended upon its enactment in 2003 to bestow upon plaintiffs and other CalPERS members a vested contractual right to purchase airtime service credit. We begin with the relevant legal framework.

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[2] Plaintiff Shaun Olden is the sole member of the plaintiff class not eligible to make this purchase because, while employed by the state during this time period, he had not yet served the mandatory five years for eligibility under section 20909.

"A writ of mandate lies 'to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; . . .' [Citation.] ' "Two basic requirements are essential to the issuance of the writ: (1) A clear, present and usually ministerial duty upon the part of the respondent [citations]; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty [citation]." [Citation.]' [Citation.] [¶] As to the petitioner's interest, the writ may not be issued where the injury is purely theoretical and the petitioner fails to show any benefit would accrue to him if the writ were issued, or that he will suffer any detriment if it is denied. [Citations.]" (*Steelgard, Inc. v. Jannsen* (1985) 171 Cal.App.3d 79, 83.) Further, " 'mandamus will not lie to compel the performance of any act which would be void, illegal or contrary to public policy.' [Citation.]" (*Torres v. City of Montebello* (2015) 234 Cal.App.4th 382, 403; see also *Moran v. California Dep't of Motor Vehicles* (2006) 139 Cal.App.4th 688, 691.)

On appeal, we apply the substantial evidence standard of review to a trial court's factual findings in granting or denying a writ of mandate, while independently reviewing its conclusions on legal issues, including legislative intent. (*City of San Diego v. San Diego City Employees' Ret. System* (2010) 186 Cal.App.4th 69, 78; see also *CalPERS Bd. of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1129 ["The ultimate questions of whether vested contractual rights exist and whether impairments are unconstitutional present questions of law subject to independent review"].)

Here, as stated above, plaintiffs assert a vested contractual right to purchase up to five years of airtime service credit that is not subject to elimination or destruction by legislative amendment or repeal "even *before the benefit has been accessed or the time for retirement has arrived*." (See *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 855 ["While payment of these [pension] benefits is deferred, and is subject to the condition that the employee continue to serve for the period required by the statute, the mere fact that performance is in whole or in part dependent upon certain contingencies does not prevent a contract from arising, and the employing governmental body may not deny or impair the contingent liability any more than it can refuse to make the salary payments

which are immediately due."] [*Kern*].) Plaintiffs reason that, when their civil service began, the right to purchase airtime service credit was one of the terms and conditions of their employment and, as such, the Legislature had no authority to effectively repeal this right by amending section 20909 and adding section 7522.46 in 2013, during the course of their employment.[3] Accordingly, plaintiffs contend that a violation of the contracts clause of the California Constitution has occurred, and ask this court to issue a peremptory writ ordering CalPERS to immediately resume administration of the service credit purchases by making them available to state employees employed prior to January 1, 2013, who otherwise meet the service credit eligibility requirements.

As respondents point out, however, in challenging the amended statutory scheme as contrary to our Constitution, plaintiffs face certain legal hurdles. "The party asserting a contract clause claim has the burden of making out a clear case, free from all reasonable ambiguity, a constitutional violation occurred." (*Deputy Sheriffs' Assn. of San Diego County v. County of San Diego* (2015) 233 Cal.App.4th 573, 578.) " 'When the Constitution has a doubtful or obscure meaning or is capable of various interpretations, the construction placed thereon by the Legislature is of very persuasive significance.' " (*Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 693.)

The reason for the elevated burden on plaintiffs raising a constitutional challenge under the contracts clause is this. " 'The state occupies a unique position in the field of contract law because it is a sovereign power. This gives rise to general principles which may limit whether an impairment has [occurred] as a matter of constitutional law. First, "[a]n attempt must be made 'to reconcile the strictures of the Contract Clause with the

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[3] When enacted in 2003, section 20909 allowed a "member who has at least five years of credited state service" to purchase "not less than one year, nor more than five years, in one-year increments, of additional retirement service credit in the retirement system." This purchase could only occur one time, at any time prior to retirement. (§ 20909, subds. (a), (b).) In 2013, the Legislature added subdivision (g) to section 20909, providing, in accord with section 7522.46, that "[t]his section shall apply only to an application to purchase additional retirement credit that was received by the system prior to January 1, 2013, that is subsequently approved by the system." (Stats 2013 ch 526 § 13 (SB 220), effective January 1, 2014.)

"essential attributes of sovereign power," . . .' " [Citation.] "Not every change in a retirement law constitutes an impairment of the obligations of contracts, however. [Citation.] Nor does every impairment run afoul of the contract clause." [Citation.] " 'The constitutional prohibition against contract impairment does not exact a rigidly literal fulfillment; rather, it demands that contracts be enforced according to their "just and reasonable purport;" not only is the existing law read into contracts in order to fix their obligations, but the reservation of the essential attributes of continuing governmental power is also read into contracts as a postulate of the legal order. [Citations.] The contract clause and the principle of continuing governmental power are construed in harmony; although not permitting a construction which permits contract repudiation or destruction, the impairment provision does not prevent laws which restrict a party to the gains 'reasonably to be expected from the contract." [Citation.]' " ' [Citation.] . . . [¶] 'Our analysis requires a two-step inquiry into: (1) the nature and extent of any contractual obligation . . . and (2) the scope of the Legislature's power to modify any such obligation.' [Citation.]" (*CalPERS Bd. of Administration v. Wilson, supra,* 52 Cal.App.4th at pp. 1130-1131.)

Thus, the initial question here is whether plaintiffs lawfully claim a vested contractual right to airtime service credit as part of their pension benefits. As explained in plaintiffs' authority, "A public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment. Such a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity. [Citation.] [However, the] employee does not obtain, prior to retirement, any absolute right to fixed or specific benefits, but only to a 'substantial or reasonable pension.' [Citation.] Moreover, the employee's eligibility for benefits can, of course, be defeated 'upon the occurrence of a condition subsequent.' [Citation.]" (*Betts v. Board of Administration of Public Employees' Retirement System* (1978) 21 Cal.3d 859, 863, 864 (*Betts*).)

"[I]t is well settled in California that public employment is not held by contract but by statute and that, insofar as the duration of such employment is concerned, no

employee has a vested contractual right to continue in employment beyond the time or contrary to the terms and conditions fixed by law. [Citations.] Nor is any vested contractual right conferred on the public employee because he occupies a civil service position since it is equally well settled that '[the] terms and conditions of civil service employment are fixed by statute and not by contract.' [Citations.] Indeed, '[the] statutory provisions controlling the terms and conditions of civil service employment cannot be circumvented by purported contracts in conflict therewith.' [Citation.]" (*Miller, supra,* 18 Cal.3d at pp. 813-814.)

Thus, when applying these principles, we must keep in mind the presumption 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." (*Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1186, 1189 [*Retired Employees Assn.*].) As such, plaintiffs carry the heavy burden of proving the retirement service credit is a vested pension right. Specifically, plaintiffs must meet the "heavy burden" of demonstrating that " 'the statutory language and circumstances accompanying its passage clearly ". . . evince a legislative intent to create private rights of a contractual nature enforceable against the State . . . ." ' " (*Retired Employees Assn., supra,* 52 Cal.4th at p. 1189.) A contractual right may also be implied from legislation "in appropriate circumstances." (*Id*. at p. 1190.) However, " 'as with any contractual obligation that would bind one party for a period extending far beyond the term of the contract of employment, implied rights to vested benefits should not be inferred without a clear basis in the contract or convincing extrinsic evidence.' " (*Requa v. Regents of University of California* (2012) 213 Cal.App.4th 213, 226.)

Within this legal framework, plaintiffs theorize the prior version of section 20909 created, not an implied vested right, but an "express vested right" to purchase the airtime service credit. They reason that section 20909, enacted as part of the Public Employees' Retirement Law, section 20000 et seq., was a component of the retirement plan adopted on their behalf by the Legislature. As such, plaintiffs reason, CalPERS members relied

upon the option to purchase the service credit as part of their "contemplated compensation" in exchange for performing labor for the state.[4]

However, as the trial court found, there is nothing in either the text of the statute (§ 20909), or its legislative history, that unambiguously states an intent by the Legislature to create a vested pension benefit. This demonstration of intent, as we explained above, is required by California law. (*Retired Employees Assn., supra,* 52 Cal.4th at p. 1190.) Section 20909, however, does no more than permit an eligible member to "elect, by written notice filed with the board, to make contributions pursuant to this section and receive not less than one year, nor more than five years, in one-year increments, of [airtime service credit.]" In other words, eligible members may choose to pay the designated amount in exchange for up to five years of this service credit, wholly distinct and apart from their provision of labor for the state in exchange for compensation. (§ 20909, subd. (a); see also § 20909, subd. (b) ["A member may elect to receive this additional retirement service credit . . . by making the contributions as specified in Sections 21050 and 21052"].) While plaintiffs point to the statutory language, "at any time," in subdivision (b) of the statute to argue the Legislature intended to create a vested right, we agree with the trial court this phrase means just what it says and no more – to wit, eligible employees could opt to purchase the service credit at any time, at least so long as the statute remained in effect. We decline to add to this straightforward reading of this statutory phrase any promise by the Legislature *not to modify or eliminate* the option to purchase service credit, particularly in light of the legal presumption *against* the creation of a vested contractual right. To the contrary, we agree with the trial court that the Legislature could have – and would have – used much clearer language if it had in fact harbored such intent. (*Retired Employees Assn., supra,* at p. 1186 [courts must apply a presumption against reading a statute as creating a private contractual or vested right].) In the absence of any such clear statutory language, we reject plaintiffs' contention that there is an "express vested right" to purchase the airtime service credit.

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[4] This argument is joined by amicus curiae in support of plaintiffs, which includes several local chapters of unions representing correctional officers and firefighters.

In so concluding, we acknowledge plaintiffs' reliance on statements made in CalPERS's "widely-read" publication, *Vested Rights of CalPERS Members: Protecting the Pension Promises Made to Public Employees*, to try to show the existence of a vested contract right to purchase airtime service credit. In particular, plaintiffs point to the following exert from the CalPERS material:

"Public employees obtain a vested right to the provisions of the applicable retirement law that exist during the course of their public employment. Promised benefits may be increased during employment, but not decreased, absent the employees' consent. [¶] These rules apply to all active CalPERS members whether or not they have yet performed the requirements necessary to qualify for certain benefits that are part of the applicable retirement law. For example, even if a member has not yet satisfied the five-year minimum service prerequisite to receiving most service and disability benefits, *the member's right to qualify for those benefits upon completion of five years of service vests as soon as the member starts work*." (Italics added.)

We accept plaintiffs' point that CalPERS's statements on this issue are entitled to significant weight given the agency's designated role as administrator of the state's retirement system. (*Bernard v. City of Oakland* (2012) 202 Cal.App.4th 1553, 1565.) Nonetheless, the fact remains that, notwithstanding any statements or suggestions by CalPERS to the contrary (published or otherwise), California law is quite clear that the Legislature may indeed modify or eliminate vested pension rights in certain cases. As the California Supreme Court has explained: "Although vested prior to the time when the obligation to pay matures, pension rights are not immutable. For example, the government entity providing the pension may make reasonable modifications and changes in the pension system. This flexibility is necessary 'to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system and carry out its beneficent policy.' (*Kern, supra*, 29 Cal.2d 848, 854-855; see also *Wallace* v. *City of Fresno* (1954) 42 Cal.2d 180, 183 . . . ; *Packer* v. *Board of Retirement* (1950) 35 Cal.2d 212, 214 . . . .) In *Wallace*, referring to *Kern*, we again emphasized 'that a public pension system is subject to the implied qualification that the governing

body may make reasonable modifications and changes before the pension becomes payable and that until that time the employee does not have a right to any fixed or definite benefits but only to a substantial or reasonable pension.' (42 Cal.2d at p. 183.)" (*Miller, supra,* 18 Cal.3d at p. 816.)

"We have described the applicable principles as follows: '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. [Citations.] Such modifications must be reasonable, and it is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, *and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.* [Citations.] . . .' [Citation.]" (*Betts, supra,* 21 Cal.3d at p. 864. Accord *Miller, supra,* 18 Cal.3d at p. 816 [" '[It] is advantage or disadvantage to the particular employees whose own contractual pension rights, already earned, are involved which are the criteria by which modifications to pension plans must be measured.' [Citation.]"].)

It is to this California Supreme Court authority, rather than to CalPERS statements, that we must defer. (See *Bernard v. City of Oakland, supra,* 202 Cal.App.4th at p. 1565 [while "the contemporaneous administrative construction of [an] enactment by those charged with its enforcement . . . is entitled to great weight," it is not controlling, particularly where "clearly erroneous or unauthorized"].) Were we to do otherwise, we would upset the proper functioning of a system designed to facilitate timely adaptation of the law in light of new or changing circumstances: "The rule permitting modification of pensions is a necessary one since pension systems must be kept flexible to permit adjustments in accord with changing conditions and at the same time maintain the

integrity of the system and carry out its beneficent policy."[5] (*Kern, supra,* 29 Cal. 2d at pp. 854-855.) Indeed, CalPERS itself acknowledged the possibility of legislative elimination of the airtime service credit in its member literature, warning in a document entitled, "What is Additional Service Credit (Frequently referred to as 'Air Time')," that the credit "will be available on an ongoing basis (*unless repealed by future legislation*)." (Italics added.)

And applying this legal standard to the case at hand, it is clear that, even if we had accepted plaintiffs' argument that the option to purchase airtime service credit under section 20909 was an express vested right (we did not), the Legislature nonetheless had ample authority to eliminate it through statutory amendment in light of the given circumstances. Specifically, as the trial court found in denying writ relief to plaintiffs, the undisputed legislative history demonstrates the "adoption of [section] 7522.46 and the addition of [section] 20909(g) were materially related to the theory and successful

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[5] As recently noted by our First District appellate colleagues: "[T]here are acceptable changes aplenty that fall short of 'destroying' an employee's anticipated pension. 'Reasonable' modifications can encompass reductions in promised benefits. (E.g., *Miller, supra*, 18 Cal.3d 808 [change of retirement age with reduction of maximum possible pension]; . . . [repeal of cost of living adjustments]; *Brooks v. Pension Board* (1938) 30 Cal.App.2d 118 . . . [pension reduced prior to retirement from two-thirds to one-half of employee's salary].) Or changes in the number of years service required. (*Miller, supra,* at p. 818 ['Upon being required by law to retire at age 67 rather than age 70, plaintiff suffered no impairment of vested pension rights since he had no constitutionally protected right to remain in employment until he had earned a larger pension at age 70']; *Amundsen v. Public Employees' Retirement System* (1973) 30 Cal.App.3d 856 . . . [change in minimum service requirement].) Or a reasonable increase in the employee's contributions. (§ 31454; [citations]; cf. *Allen v. City of Long Beach, supra*, 45 Cal.2d 128, 131 [invalidating 'provision raising the rate of an employee's contribution . . . from 2 per cent of his salary to 10 per cent'].) [¶] Thus, short of actual abolition, a radical reduction of benefits, or a fiscally unjustifiable increase in employee contributions, the guiding principle is still the one identified by *Miller* in 1977: ' "the governing body may make *reasonable* modifications and changes before the pension becomes payable and that until that time the employee does not have a right to any fixed or definite benefits but only to a substantial or *reasonable* pension." ' " (*Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn*. (2016) 2 Cal.App.5th 674, 702, review granted November 22, 2016, see Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(e).)

operation of a pension system because they restricted the pension system to providing retirement benefits based on work performed, which is the primary purpose of a pension system." In particular, the court referred to the Governor's "12 Point Plan," which indicated that pensions were intended to provide retirement stability for time "actually worked" rather than for mere "airtime." The court also referred to the legislative history of the PEPRA, which is consistent in noting the "traditional linkage between time worked and benefits received." In other words, pension benefits are "deferred compensation that has been earned through the performance of work," not, as here, an option to purchase nonqualifying service credit wholly unrelated to actual services provided or work performed. As such, the court went on to explain, when enacting section 20909 in 2003, the Legislature actually departed from the central theory of a pension system, and, conversely, when effectively repealing this legislation in 2013, the Legislature "eliminated something that was not related to the theory of a pension system and . . . was in fact detrimental to the successful operation of the pension system."

Plaintiffs do not challenge the trial court's findings or reasoning in concluding that a material relationship exists between the challenged legislative modifications that accompanied California's recent pension reform and the basic theory of the pension system and its successful operation. (Accord *Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn*. (2016) 2 Cal.App.5th 674, 704-705 ["the catalyst for the Pension Reform Act was dire financial predictions necessitating urgent and fundamental changes to improve the solvency of various pension systems"] [*Marin Assn. of Public Employees*].)[6] Instead, plaintiffs challenge the trial court's additional finding that, in this instance, the amended statutory scheme eliminating the option to purchase airtime service credit resulted in no disadvantage to state employees. In this regard, the court pointed to statements in section 20909's legislative history that airtime service credit was never intended by the Legislature to provide state employees a monetary

[6] The California Supreme Court granted review in this matter on November 22, 2016. (See Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(e)).)

advantage because it did not correspond to any service actually performed. Rather, the credit was designed to be cost-neutral. (See, *e.g.*, AB 719, Assembly Bill-Bill Analysis, p. 3 ["In this case, the member pays for the full cost of the increase in benefit that results from the service credit purchase. This cost method . . . applies when an employer does not directly benefit from the member's service"].)

Despite this legislative history, plaintiffs (as well as the amicus curiae supporting them) insist the right to purchase the airtime service credit was indeed financially beneficial, and that "no comparable advantage has been offered to offset the loss of [the elimination of this right]. This is barred under the Contracts Clause." We disagree.

First, plaintiffs suggest that the state was required to provide a comparable advantage to offset the loss arising from elimination of the option to purchase airtime service credit, citing *Allen v. City of Long Beach* (1955) 45 Cal. 2d 128. However, as our colleagues in this District recently explained after an exhaustive review of the case law: " 'Should' [provide some new compensating benefit], not 'must,' remains the court's preferred expression. And 'should' does not convey imperative obligation, no more compulsion than 'ought.' (*Lashley v. Koerber* (1945) 26 Cal.2d 83, 90 . . . ; see *People v. Webb* (1986) 186 Cal.App.3d 401, 409, fn. 2 . . . ['the word "should" is advisory only and not mandatory'].) In plain effect, 'should' is 'a recommendation, not . . . a mandate.' [Citation.]" (*Marin Assn. of Public Employees, supra,* 2 Cal.App.5th at p. 699, review granted November 22, 2016, see Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(e).) We agree with this conclusion reached by our colleagues and, as such, reject plaintiffs' claim that, absent proof that CalPERS members were granted a comparable advantage, the Legislature's elimination of the airtime service credit must be deemed constitutionally barred. (*Marin Assn. of Public Employees, supra,* 2 Cal.App.5th at p. 699 [concluding that California Supreme Court authority such as *Allen v. Board of Administration* (1983) 34 Cal.3d 114, 120, which used the term "must" rather than "should," was not meant to "introduce an inflexible hardening of the traditional formula for public employee pension

modification. Consequently, we do not deem ourselves bound by expressions in Court of Appeals opinions . . . reiterating the ["must"] language"].)[7]

Further, plaintiffs also disregard the fact that, when amending the statutory scheme governing pension rights, the Legislature in fact provided eligible CalPERS members (like plaintiffs) a several-month window in which to purchase the airtime service credit before the option terminated. Specifically, as set forth above, while PEPRA was enacted in September of 2012 (Stats 2012 ch 296 § 15 (AB 340)), the option to purchase airtime service credit did not expire until January 1, 2013, giving eligible members several weeks to apply to purchase this credit before its expiration. (§ 7522.46, subd. (b); see also § 20909, subd. (g) ["This section shall apply only to an application to purchase additional retirement credit that was received by the system prior to January 1, 2013, that is subsequently approved by the system"].) Thus, 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. To the extent plaintiffs lost out on the opportunity to purchase the airtime service credit, such loss was, accordingly, a product of their own doing.

And, finally, we agree with the trial court that, while the airtime service credit clearly provided something valuable for those state employees choosing to purchase it, the fact remains that the employees, not the state, paid for this benefit. (See § 21052; AB 719 Assembly Bill-Bill Analysis, p. 2 (Aug. 18, 2003) ["this benefit is intended to be cost neutral to employers. The member pays the full present value cost of the additional service credit . . . [which] is calculated to be equivalent to the cost of the increased benefit due to the additional service credit"]; AB 719, Assembly Bill-Bill Analysis,

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[7] As explained in *Allen v. Board of Administration, supra*, 34 Cal.3d at pp. 119-120, " '[T]he contract clause and the principle of continuing governmental power [must be] construed in harmony; although not permitting a construction which permits contract repudiation or destruction, the impairment provision does not prevent laws which restrict a party to the gains "reasonably to be expected from the contract." ' [Citation.] Constitutional decisions "have never given a law which imposes unforeseen advantages or burdens on a contracting party constitutional immunity against change." ' [Citation.]"

Senate Rules Committee, p. 2 ["the cost of the 'air time' service credit will be fully paid by the member, with no employer contribution permitted"].) As such, contrary to the arguments of plaintiffs and their amicus curiae, this simply is not a case where the state provided a retirement benefit to its employees in exchange for their work performance, and then took the benefit away, despite the employees' continued service, without offering a comparable benefit.

Thus, for all the reasons stated, we conclude plaintiffs' constitutional challenge to the identified PEPRA provisions must fail given their failure to make out a clear case, free from all reasonable ambiguity and reasonable doubt, that any contract clause violation occurred. To the contrary, the record supports the trial court's conclusion that the Legislature's modification of the statutory law governing the airtime service credit was wholly reasonable and carried "some material relation to the theory of a pension system and its successful operation." (*Miller, supra,* 18 Cal.3d at p. 816.) While plaintiffs may believe they have been disadvantaged by these amendments, the law is quite clear that they are entitled only to a "reasonable" pension, not one providing fixed or definite benefits immune from modification or elimination by the governing body. (*Kern, supra,* 29 Cal.2d at pp. 854-855.) Plaintiffs have made no showing that, following the elimination of their right to purchase airtime service credit, their right to a reasonable pension has been lost. (See *Marin Assn. of Public Employees, supra,* 2 Cal.App.5th at p. 707 ["Repeated invocation of the inviolability of their 'vested rights' cannot substitute for analysis of just how the change to [the statutory law] demonstrates that employees will not retire with a 'substantial' or 'reasonable' pension"], review granted November 22, 2016, see Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(e).)

Accordingly, plaintiffs' petition for writ of mandate and injunctive relief was properly rejected. The judgment thus stands.[8]

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[8] Given this holding, we need not address the separate argument raised by CalPERS in its Respondent's Brief that, even if this court were to find a contract clause violation in this case, plaintiffs cannot meet the standard for issuance of a traditional writ of mandate because CalPERS has no ministerial duty to act contrary to the provisions of section

DISPOSITION

The judgment is affirmed.

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Jenkins, J.

We concur:

_____
Pollak, Acting P. J.

_____
Siggins, J.

Cal Fire Local 2881 et al. v. *California Public Employees' Retirement System et al.,* A142793

7522.46 or section 20909, subdivision (g). (See *Torres v. City of Montebello, supra,* 234 Cal.App.4th at p. 403 [mandamus will not lie to compel the performance of an act that is illegal or contrary to public policy].)

Trial Court:	Alameda County Superior Court
Trial Judge:	Hon. Evelio M. Grillo
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Amicus Curiae in Support of Petitioners/Appellants Cal Fire Local 2881, et. al.

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CAL FIRE Local 2881, et al. v. California Public Employees' Retirement System (CalPERS), California Supreme Court, No. S_____

PROOF OF SERVICE BY FEDERAL EXPRESS

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 February 8, 2017, I served the enclosed:

PETITION FOR REVIEW

on the parties in said cause (listed below) by enclosing a true copy thereof in a prepaid sealed package, addressed with appropriate Federal Express shipment label, and depositing them with a facility regularly maintained by Federal Express.

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BY HAND DELIVERY

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on February 8, 2017, at San Francisco, California.

Janine Oliker