

In the Supreme Court of the State of California

Cal Fire Local 2881, et al.,

Petitioners and Appellants,

v.

**California Public Employees' Retirement
System (CalPERS),**

Respondent,

and

The State of California,

Intervener and Respondent.

Case No. S239958

SUPREME COURT
FILED

FEB 28 2017

Jorge Navarrete Clerk

Deputy

First Appellate District Division Three, Case No. A142793
Alameda County Superior Court, Case No. RG12661622
The Honorable Evelio Grillo, Presiding Judge

ANSWER TO PETITION FOR REVIEW

XAVIER BECERRA
Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
TAMAR PACTER
Supervising Deputy Attorney General
*NELSON R. RICHARDS
Deputy Attorney General
State Bar No. 246996
2550 Mariposa Mall, Room 5090
Fresno, CA 93721
(559) 477-1688
Nelson.Richards@doj.ca.gov
*Attorneys for Intervener and
Respondent State of California*

TABLE OF CONTENTS

| | Page |
|------------------------------------|-------------|
| Introduction | 4 |
| Statement of the Case..... | 5 |
| I. Legal background..... | 5 |
| II. Procedural history | 7 |
| Reasons to deny the petition | 8 |
| Conclusion..... | 10 |

TABLE OF AUTHORITIES

| | Page |
|--|------------|
| CASES | |
| <i>Cal Fire Local 1555 v. California Public Employees' Retirement System</i> (2016) 7 Cal.App.5th 115 | 7 |
| <i>Lexin v. Superior Court</i> (2010) 47 Cal.4th 1050 | 5 |
| <i>Marin Association of Public Employees v. Marin County Employees' Retirement Association</i> (2016) 2 Cal.App.5th 674 | 4, 7, 8 |
| <i>Miller v. State of California</i> (1977) 18 Cal.3d 808 | 9 |
| <i>Retired Employees Assn. of Orange County, Inc. v. County of Orange</i> (2011) 52 Cal.4th 1171 | 8, 9 |
| <i>San Joaquin Correctional Officers Association v. County of San Joaquin</i> (2016) 6 Cal.App.5th 1090, 1095 | 6 |
| STATUTES | |
| Government Code | |
| § 7522.20 | 6 |
| § 7522.46 | 7, 8 |
| § 20909 | 5, 7, 8, 9 |
| § 20909, subd. (a) | 6 |
| § 20909, subd. (b) | 6 |
| § 20909, subd. (c) | 6 |
| § 20909, subd. (g) | 7 |
| § 21050, subd. (a) | 6 |
| § 21052 | 6 |
| Public Employees' Pension Reform Act of 2013 | 4, 6, 7 |

INTRODUCTION

In 2003, the Legislature gave public employees an option to purchase retirement service credit—known as “airtime” because it did not correspond to actual service—as a way to increase their pension benefits. Public employees electing to purchase the option, and not public employers, were to bear the full cost of these increased benefits. Several years later, the Legislature ended the airtime purchase option when it adopted the Public Employees’ Pension Reform Act of 2013 (PEPRA). The Court of Appeal held that, because the option to purchase airtime was not a vested right, ending it did not violate the contracts clause of the California Constitution. This decision, with which no court has disagreed, turns on the interpretation of a distinct and unique pension statute and does not merit this Court’s review.

Petitioners Cal Fire Local 2881 and several of its members (together, the Union) urge review based largely on an alternative holding. Specifically, the Court of Appeal noted that, even if the option to purchase airtime were a vested right, the Legislature could have modified it, relying on *Marin Association of Public Employees v. Marin County Employees’ Retirement Association* (2016) 2 Cal.App.5th 674 (*Marin County*), review granted Nov. 22, 2016 (Case No. S237460). The Union argues that because this Court will review *Marin County*, it should likewise grant review in this case. But no decision this Court might reach in *Marin County* would undermine the primary holding below that the option to purchase airtime is not a vested right. Even if the Court were to decide that the analysis in *Marin County* was incorrect, citations to that decision in the Courts of Appeal necessarily would cease to have precedential value. Under the circumstances of this case, review is not warranted.

STATEMENT OF THE CASE

I. LEGAL BACKGROUND

Defined benefit pensions offered to public employees are typically calculated using a formula that multiplies the number of years of service, final compensation, and an age-based multiplier. (See, e.g., *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1065, fn. 7.) Some state employees, for example, calculate their benefits using a 2%-at-62 formula. (See Gov. Code, § 7522.20.) Under that formula, an employee who retires at age 62 after working for 30 years with \$50,000 in final compensation would receive a \$30,000 annual pension (30 [years in service] x \$50,000 [annual salary] x .02 [age-based multiplier] = \$30,000 [annual pension]).

In 2003, the Legislature offered employees the option to increase the years-in-service variable in their pension formulas by purchasing, at cost, nonqualifying service credits. (See Gov. Code, § 20909, added by Stats. 2003, ch. 838, § 1.)¹ These credits were often called “airtime” because they did not correspond to time actually worked. (See, e.g., Joint Appendix (JA) 255.) Prior to enactment, the California Public Employees’ Retirement System (CalPERS) prepared a report explaining that airtime was “intended to be cost neutral to employers,” and that public employees electing the option would pay “the full present value of the additional service credit.” (JA 265.) Assembly and Senate bill analyses relied on this assessment that the cost of airtime would be borne by the public employees who elected to exercise the option, and not by public employers. (See JA 255-256 [Assembly floor analysis]; JA 259-260 [Senate Rules Committee analysis].)

The Legislature also imposed several restrictions on the purchase of airtime. Only employees in public service for at least five years were

¹ All further undesignated references are to the Government Code.

eligible. (§ 20909, subd. (a).) The employee had to pay the full cost of the increased benefit, either in a lump-sum payment or in approved installment payments. (§§ 20909, subd. (b), 21050, subd. (a), 21052.) Airtime could be purchased in a one-time-only transaction, in one-year increments up to a maximum of five years. (§ 20909, subds. (a)-(b).) The purchased airtime credits could not be used to meet minimum qualifications for any benefits based on years of service, such as healthcare benefits. (*Id.*, subd. (c).)

In practice, airtime became a potential source of unfunded liability in pension systems. A 2010 review of the program by CalPERS found that—contrary to the intent of the program—employees were consistently and substantially underpaying for airtime.² (JA 317-321.) The agency also found that employees who bought airtime retired at a much faster rate than employees who did not buy airtime, in some cases over twice the rate. (JA 314.) As part of a 2011 pension reform plan, the Governor singled out airtime as a source of fiscal instability, explaining that pensions “are intended to provide retirement stability for time actually worked” and that “[e]mployers, and ultimately taxpayers, should not bear the burden of guaranteeing the additional employee investment risk that comes with airtime purchases.” (JA 387 [quoting from Governor’s plan].) The Governor’s plan, and the concerns about pension-fund solvency it addressed, prompted the Legislature to enact PEPRA. (See JA 387 [citing Senate Floor Analysis of PEPRA bill]; *San Joaquin Correctional Officers Association v. County of San Joaquin* (2016) 6 Cal.App.5th 1090, 1095 [“PEPRA was designed to *limit* public employee retirement compensation—within constitutional bounds—in the face of concern over unfunded liabilities”].)

² According to the trial court’s calculations, “CalPERS was selling \$1.00 worth of benefits for between \$0.72 and \$0.89.” (JA 393.)

PEPRA prohibited public retirement systems from allowing employees to purchase airtime, while honoring all airtime purchases made or requested before January 1, 2013. (§ 7522.46, added by Stats. 2012, ch. 269, § 15; see also § 20909, subd. (g), added by Stats. 2013, ch. 526, § 13.) Although it eliminated the airtime purchase option going forward, PEPRA afforded employees a 15-week grace period in which they could exercise the option to purchase airtime before the change went into effect. (See JA 389.)

II. PROCEDURAL HISTORY

The Union filed a petition for writ of mandate asking the court to order CalPERS to allow public employees hired before January 1, 2013, to purchase airtime. (See generally JA 156-167.) The petition alleged that the option to purchase airtime in section 20909 was a vested right and that section 7522.46, ending the option to purchase airtime for employees hired before PEPRA's effective date, impaired that right in violation of the contracts clause of the California Constitution. (JA 161-162.) CalPERS took no position on the merits, and instead opposed the writ on procedural grounds. (JA 52; JA 242-247.) The State, at the Governor's direction, intervened to defend the constitutionality of section 7522.46. (See JA 27; JA 22-25.)

The superior court denied the petition, and the Union appealed. Division 3 of the First District Court of Appeal affirmed in a published decision. (*Cal Fire Local 1555 v. California Public Employees' Retirement System* (2016) 7 Cal.App.5th 115.) As the primary basis for its decision, the court held that the option to purchase airtime in section 20909 did not confer a vested right on public employees. (Slip Op. 5-12.) In the alternative, it held that even if section 20909 had conferred a vested right, the Legislature would have acted within its authority in modifying that right. (Slip Op. 13-16.) The court relied, in part, on *Marin County* for the

proposition that lawmakers need not offset a modification in pension rights with a corresponding benefit so long as the modification is related to a pension system and its operation, and leaves employees with a “reasonable pension.” (Slip Op. 14.)

REASONS TO DENY THE PETITION

The Union urges review because the Court of Appeal “unreservedly cast[] its lot” with the court in *Marin County*. (Petn. for Rev. (PFR) 7.) The argument is misleading. Although the court relied in part on the reasoning of *Marin County*, it did so only in an alternative holding. (See Slip Op. 12 [“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”].) *Marin County* is under review by this Court, and if this Court were to disapprove of the appellate court’s reasoning in that case, any precedential effect of the Court of Appeal’s discussion of *Marin County* would fall away. Such a result would not affect the Court of Appeal’s judgment. The primary holding—that section 20909 did not confer a vested right on public employees to purchase airtime—would remain unchanged. (See Slip Op. 5-12.)

Nor does the primary holding merit review.³ (See PFR 8-10.) The Union makes two related arguments on that score. First, it maintains that the Court of Appeal misapplied *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171 (*Retired*

³ The Union incorrectly contends that CalPERS “agrees with Petitioners that section 20909 created a vested contractual rights for existing employees.” (PFR 7.) CalPERS has taken no position on sections 20909 and 7522.46 in this litigation. (See, e.g., JA 52; JA 171.)

Employees). (PFR 18-22.) But the Union misreads *Retired Employees* as having drawn an analytical distinction between express statutory pension benefits and implied vested rights. This Court drew no such distinction. Instead, it described the general framework for analyzing vested right claims, which focuses on legislative intent, and held that framework applied to claims of implied contractual rights. (See *Retired Employees, supra*, 52 Cal.4th at 1187-1189.) The Court of Appeal properly applied that general framework here, and in the process rejected the Union’s argument that section 20909 created an “express vested right.” (See Slip Op. 8-9.)

Second, the Union contends that the Court of Appeal “defined pension benefits too narrowly, as only deferred compensation that has been earned through the performance of work.” (PFR 22, quotation marks omitted.) The court’s definition of vested pension benefits was correct, however.⁴ (Slip Op. 13; see also, e.g., *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”].) More importantly, the Court of Appeal’s primary holding focused on the Legislature’s intent in enacting section 20909. The court looked at the express language of the statute, considered its legislative history, and determined that the Legislature did not intend to create a vested right when it offered the airtime purchase option. (Slip Op. 8-9.) This was a routine exercise in statutory interpretation that does not merit review.

In the end, the unique nature of airtime—its disconnect from work actually performed, the fact that purchasing it was optional, the Legislature’s intent that employees electing the option pay the full cost

⁴ Even the amici supporting the Union’s petition for review disagree with the Union. (See Feb. 21, 2017 Letter of Amici Curiae 5 [“vested pension benefits are earned as deferred compensation for services performed”].)

while imposing no costs on public employers—makes this case a poor candidate for review because it would not settle an important question of law or otherwise provide useful guidance to the lower courts.

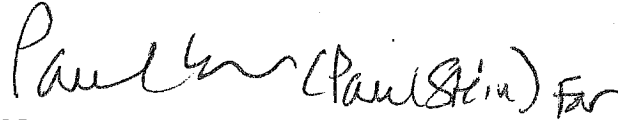
CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court deny the petition for review.

Dated: February 28, 2017

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
TAMAR PACHTER
Supervising Deputy Attorney General

A handwritten signature in cursive script that reads "Paul Stein" followed by a small flourish.

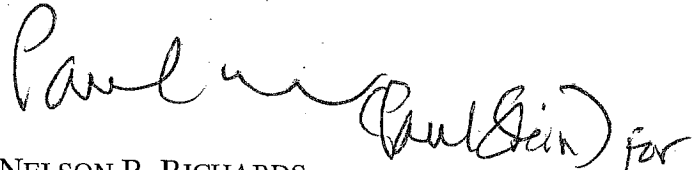
NELSON R. RICHARDS
Deputy Attorney General
*Attorneys for Intervener and
Respondent State of California*

CERTIFICATE OF COMPLIANCE

I certify that the attached Answer to Petition for Review uses a 13 point Times New Roman font and contains 1,838 words.

Dated: February 28, 2017

XAVIER BECERRA
Attorney General of California

A handwritten signature in cursive script that reads "Paul R. Richards" with a circled "Paul (Rich)" and the word "for" written below it.

NELSON R. RICHARDS
Deputy Attorney General
*Attorneys for Intervener and
Respondent State of California*

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *Cal Fire Local 2881 v. California Public Employees' Retirement System (CALPERS), et al. (APPEAL)*

No.: **S239958**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On February 28, 2017, I served the attached **ANSWER TO PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Gina M. Ratto
Preet Kaur
CalPERS Legal Office
P.O. Box 942707
Sacramento, CA 94229-2707

Gary M. Messing
Gregg McLean Adam
Messing Adam & Jasmine LLP
235 Montgomery Street, Suite 828
San Francisco, CA 94104

Amber Lynn Griffiths
Carroll, Burdick & McDonough, LLP - SF
44 Montgomery Street, Suite 400
San Francisco, CA 94104-4606

County of Alameda
Administration Building
Superior Court of California
County Administration Building
1221 Oak Street
Oakland, CA 94612

Clerk
California Court of Appeal
First Appellate District, Division 3
350 McAllister Street
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 28, 2017, at San Francisco, California.

A. Bermudez
Declarant

A. Bermudez
Signature