

No. S239958

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,

Intervener 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

REPLY IN SUPPORT OF PETITION FOR REVIEW

Gary M. Messing, No. 075363
*Gregg McLean Adam, No. 203436
Jason H. Jasmine, No. 215757
MESSING ADAM & JASMINE LLP
235 Montgomery Street, Suite 828
San Francisco, CA 94104
Telephone: 415.266.1800
Facsimile: 415.266.1128
Email: gary@majlabor.com
gregg@majlabor.com
jason@majlabor.com
Attorneys for CAL FIRE LOCAL 2881, et al.

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Jorge Navarrete Clerk

Deputy



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I

REVIEW IS NECESSARY TO RESOLVE THE DISPUTE THIS COURT OF APPEAL DECISION CREATES ABOUT WHAT PUBLIC EMPLOYEE BENEFITS ARE VESTED

The State urges this Court to accept the erroneous conclusion of the lower court that no pension right was created by Government Code section 20909. (Slip Op. at p. 16 [“this simply is not a case where the state provided a retirement benefit to its employees in exchange for their work performance”] and Answer at p. 6.) Yet the Answer itself repeatedly concedes that a retirement benefit of value to the employee was offered: “[t]he legislature gave public employees an option to purchase retirement service credit ... as a way to increase their pension benefits” (at p. 4); “employees who bought airtime retired at a much faster rate than employees who did not buy airtime” (at p. 6); and “employers, and ultimately taxpayers, should not bear the burden of guaranteeing the additional employee investment risk that comes with airtime purchases” (*id.*).

With both sides acknowledging that the statute offered a benefit, the important question for this Court to decide is whether that benefit was vested and therefore protected against elimination absent a comparable advantage, as the cases cited on pages 7 to 9, 18 and 23 to 25 of the Petition for Review uniformly held, or could be freely eliminated by the Legislature, as the court below and *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) have opined. It is an issue that parallels *Marin Association of Public Employees*, yet presents its own key issues for review.

For example, the State is wrong in arguing that this Court's vested rights jurisprudence affords Contracts Clause protections only to deferred compensation. (Answer at p. 9.) The Answer ignores the array of cases cited in the Petition that establish that this Court, and the many appellate courts which have followed it, has protected not only a broad range of pension-related benefits but also numerous non-pension benefits as vested benefits. (Petition at pp. 23-24.) The State cites only *Miller v. State of California* (1977) 18 Cal.3d 808 to support its unduly narrow reading of vested rights law. But *Miller* was not a pension case—despite the best efforts of the unsuccessful plaintiff in that case to make it one. It offers a useful summary of the Court's public employee vested rights cases up to 1977, but the decision (which turned on a mandatory retirement clause) has no bearing on this case.

Equally unpersuasive is the Answer's echoing of the lower court's view that the purchase of additional service credit under Section 20909 "did not correspond to actual service" (p. 4) and had a "disconnect from work actually performed." (Answer at p. 9.) This falsely suggests anyone could purchase the service credit. But the statute required

employees to have at least five years of state service—as both the Answer (at pp. 5-6 [“[o]nly employees in public service for at least five years were eligible”]) and the lower court (Slip Op. at pp. 11-12) acknowledge. That an employee’s public service did not directly tie to a retirement benefit did not prevent multiple courts from finding that Contracts Clause protections applied to broader concepts of retirement benefits. (See, e.g., *California Teachers Assn. v. Cory* (1984) 155 Cal.App.3d 494, 506 [state’s failure to fund the Teachers’ Retirement Fund in accordance with statutory terms constituted an impairment of contract]; *Protect Our Benefits v. City and County of San Francisco* (2015) 235 Cal.App.4th 619, 628-629 [constitutionally-protected vested right to a supplemental cost of living allowance which retirees received when the retirement system’s investment returns exceeded projected earnings].) As CalPERS publicly declared, employees had a vested right to “[p]urchase 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.)¹

The Court should grant review and reaffirm that vested rights protections extend to a broader panoply of pension rights than some mere narrow construct of deferred compensation.

¹ While it is true, as the Answer states at footnote 3, that CalPERS took no position in this litigation, it is equally true that CalPERS publicly supported Petitioner’s position for at least five years. (Petition at pp. 12-13.)

II

REVIEW IS NECESSARY TO RESOLVE DISPUTES ABOUT HOW SUCH VESTED RIGHTS ARE CREATED

The State further contends that the opinion below correctly applied *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171 and is consistent with this Court's vested rights authorities. Neither is true. The Answer fails to address the clear break the court of appeal makes with prior decisions of this Court and other appellate courts.

Retired Employees Assn. did not involve a statute providing a pension benefit – it involved a practice by a county of pooling medical premium payments. So the Court was correct to hold the plaintiffs' efforts to find vested rights by implications to higher thresholds of proof.

In contrast, in this case, the pension benefit at issue was expressly provided for within a statute. Further, section 20909 appeared as part of a larger statutory scheme designed to provide pension benefits.

As the Petition explained at pages 18-22, in numerous cases since 1957, California courts have held that statutes conveyed vested pension benefits to employees despite not saying so explicitly nor containing language prohibiting modification or elimination of the benefit. The opinion below broke with these cases because it asserted that a party trying to establish an express statutory vested pension benefit must meet the

same higher burdens placed on one trying to establish a vested pension benefit by implication. (Slip Op. at p. 9, citing *Retired Employees Assn.*, 52 Cal.4th at p. 1190.) The opinion below is the first published opinion counsel is aware of that refused to find that a pension statute, Government Code section 20909, established a vested right because, in addition to stating the pension benefit, it failed to also “promise ... *not to modify or eliminate*” the benefit. (Slip Op. at p. 9.) No case has previously required such a promise; yet the lower court read *Retired Employees Assn.* to require one. (*Id.*)

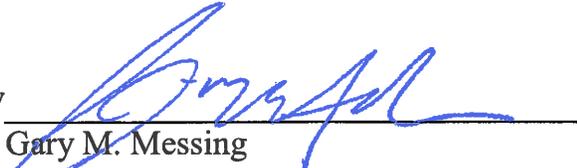
As amicus curiae point out, California cases never previously required that a pension statute include language that creates a vesting right surviving the statute’s repeal. Yet that is the new standard the opinion below creates through its erroneous reading of *Retired Employees Assn.*

The Court should grant review to resolve the dispute the lower court opinion creates about how statutory vested pension rights are formed.

Dated: March 16, 2017

MESSING ADAM & JASMINE LLP

By



Gary M. Messing

Gregg McLean Adam

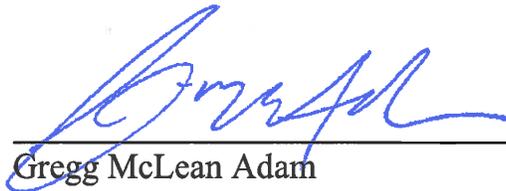
Jason H Jasmine

*Attorneys for CAL FIRE LOCAL 2881,
et al.*

Certificate of Word Count

Pursuant to Rule 8.504(d) of the California Rules of Court, I certify that this brief contains 1,098 words, as determined by the computer program used to prepare the brief.

Dated: March 16, 2017



Gregg McLean Adam

CAL FIRE Local 2881, et al. v. California Public Employees' Retirement System (CalPERS), California Supreme Court, No. S239958

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 March 16, 2017, I served the enclosed:

REPLY IN SUPPORT OF PETITION FOR REVIEW

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Preet Kaur
CalPERS
Lincoln Plaza North
400 Q Street
Sacramento, CA 95814
Ph: (916) 795-1054
Email: preet.kaur@calpers.ca.gov

*Counsel for California Public
Employees' Retirement System
(CALPERS), Defendant and
Respondent*

Rei R. Onishi
Department of Justice
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Ph: (415) 703-1613
Email: rei.onishi@doj.ca.gov

*Counsel for The State of
California, Intervener and
Respondent*

Nelson Ryan Richards
California Attorney General's Office
2550 Mariposa Mall Rm 5090
Fresno, CA 93721
Ph: (559) 477-1688
Email: Nelson.Richards@doj.ca.gov

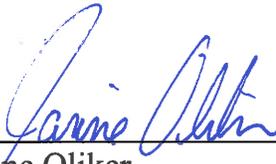
*Counsel for The State of
California, Intervener and
Respondent*

Office of the Court Clerk
Alameda County Superior Court
1225 Fallon Street
Oakland, CA 94612

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

BY HAND DELIVERY

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on March 16, 2017, at San Francisco, California.



Janine Olikier