

XAVIER BECERRA
Attorney General

State of California
DEPARTMENT OF JUSTICE



2550 MARIPOSA MALL, ROOM 5090
FRESNO, CA 93721

Public: (559) 477-1691
Telephone: (559) 477-1688
Facsimile: (559) 445-5106
E-Mail: Nelson.Richards@doj.ca.gov

March 10, 2017

VIA HAND DELIVERY

Chief Justice Tani Cantil-Sakauye and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

RE: Cal Fire Local 2881 v. California Public Employees' Retirement System
California Supreme Court, Case No. S239958
Opposition to Requests for Depublication

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The State of California opposes the requests to depublish the Court of Appeal's decision in this case. (Cal. Rules of Court, rule 8.1125.) The State intervened as a respondent in the trial court to defend the constitutionality of Government Code section 7522.46, which eliminated public employees' option to purchase airtime (see Gov. Code, § 20909). The case should remain published because it provides useful guidance on how to analyze contracts clause claims.

As discussed in the State's answer to the petition for review, airtime does not correspond to work actually performed; purchasing it was optional; and the Legislature intended that public employers not pay anything for the increase in benefits—employees were to pay the full cost (but they underpaid in practice). (See Answer to Petn. for Rev. 5-7.) Consistent with established rules of analyzing contract clause claims, the Court of Appeal considered the statutory language and its legislative history and correctly concluded that the Legislature did not intend to create a vested right for public employees to have an option to purchase airtime. (See Slip Op. 7-9.) In the alternative, the Court of Appeal held that even if the option to purchase airtime were a vested right, the Legislature would have acted within its authority in modifying that right. (See Slip Op. 12-16.)

Cal Fire Local 2881 et al. (the Union) and International Federation of Professional and Technical Employees Local 21 et al. (Amici) request depublication because the Court of Appeal's alternative holding relied in part on a case in which this Court has granted review, *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). (See Union Letter 5-7; Amici Letter 6-7.) Even accepting as true the Union and Amici's

assumption that the petitioners in *Marin County* will prevail, depublication would be unnecessary. If this Court were to overrule *Marin County*, the portions of the Court of Appeal’s alternative holding that rely on that decision would automatically lose any precedential or persuasive effect. The primary holding—that section 20909 never conferred a vested right on public employees to purchase airtime—would remain unaffected.

The Union and Amici also argue that the Court of Appeal’s decision should be depublished because the court erred by requiring an unambiguous showing of legislative intent to create a vested right. (Union Letter 7; Amici Letter 4.) But requiring a party to establish an unambiguous intent to bind the State, as the Court of Appeal did (see Slip Op. 6-9), is exactly what precedent requires parties asserting a contracts clause claim to do (see *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1185 [“to construe laws as contracts when the obligation is not *clearly and unequivocally expressed* would be to limit drastically the essential power of a legislative body,” emphasis added, quotation marks omitted]; see also *Deputy Sheriffs’ Assn. of San Diego County v. County of San Diego* (2015) 233 Cal.App.4th 573, 578 [“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,” emphasis added, quotation marks omitted]).

Finally, the Union argues for depublication on the ground that the Court of Appeal held that contracts clause protections extend only to pension benefits that are deferred compensation. (Union Letter 9-10.) But the Court of Appeal relied on the Legislature’s intent in enacting section 20909, rather than any categorical rule about what can or cannot be a vested pension benefit. (See Slip Op. 8-9.) And to the extent it understood that pension benefits must be deferred compensation to receive contracts clause protection, that understanding would be correct. (See, 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”].)

* * *

The Court of Appeal applied established legal principles, and its decision provides useful precedent. The decision should not be depublished.

Sincerely,



NELSON R. RICHARDS
Deputy Attorney General

for

For XAVIER BECERRA
Attorney General

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *Cal Fire Local 2881 v. California Public Employees' Retirement System*

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 March 10, 2017, I served the attached **OPPOSITION TO REQUESTS FOR DEPUBLICATION** 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
Deputy General Counsel
CalPERS Legal Office
P.O. Box 942707
Sacramento, CA 94229-2707

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

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

Peter Saltzman
Kate Hallward
Attorney at Law
Leonard Carder, LLP
1330 Broadway, Suite 1450
Oakland, CA 94612

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

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 March 10, 2017, at San Francisco, California.

A. Bermudez
Declarant

A. Bermudez
Signature