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)

Defendant and Respondent,

and

THE STATE OF CALIFORNIA,

Intervener and Respondent.

On Review From The Court Of Appeal For the First Appellate District, Division Three, Civil No. A142793

After An Appeal From the Superior Court For The State of California, County of Alameda, Case Number RG12661622, Hon. Evelio Grillo, Presiding Judge

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REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(Continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

FEDERAL CASES

TABLE OF AUTHORITIES
(Continued)

Page

OUT OF STATE CASES

STATUTES

TABLE OF AUTHORITIES
(Continued)

Page

OTHER AUTHORITIES

TREATISES

I.
INTRODUCTION

Respondent State of California tries to justify the elimination of a vested pension benefit, swimming against a 65-year tide of cases which protect vested pension rights from impairment unless employees receive offsetting comparable advantages. Respondent cannot prevail under that longstanding rule, so instead it argues unconvincingly that a statute in a pension law which provides employees with up to one-sixth of the value of their retirement allowance is not a pension benefit at all.

Respondent also claims, on one hand, that the statute at issue, Government Code section 20909 ("section 20909"), should not be read to create contract rights, but, on the other, concedes it does just that. Respondent also argues—in the face of contrary contract law principles and pension cases—that optional pension benefits may be withdrawn unilaterally even where the offer has induced service by employees.

Respondent ultimately, and without acknowledging it, seeks reinterpretation by this Court of its comparable advantages rule. Yet if fails to justify why this Court should revise a body of law that has induced extensive reliance by employers, employees and retirement systems.

Finally, Respondent asks this Court to apply the necessity doctrine for the first time to justify the impairment of a vested pension benefit. But none of the conditions this Court has enunciated for application of that

doctrine—an "emergency" and a "temporary" impairment of vested rights—exist here.

II.

SECTION 20909 CREATED A VESTED CONTRACT RIGHT FOR EMPLOYEES WHO PERFORMED SERVICES FOR THE STATE PRIOR TO ITS REPEAL

Respondent claims section 20909 did not create contract rights for current employees to purchase Additional Retirement Service Credit ("ARSC"). Respondent spends much time arguing that statutory schemes generally should not be read to create contract rights. But that principle does not apply because Respondent concedes that section 20909 creates contract rights.

A. As Respondent Concedes, The Language Of Section 20909 Clearly And Unequivocally Sets Forth An Intent To Contract

Notwithstanding Respondent's assertion (Ans. Br. at pp. 11, 22, 24, 25, 29, and 30)[1], Petitioners do not claim that section 20909 created *implied* contract rights. As the court of appeal recognized, Petitioners contend the statute created *express* contract rights. (*Cal Fire Local 2881 v. California Public Employees' Retirement System* (2016) 7 Cal.App.5th 115, 126

[1] Respondent claims Petitioners "all but concede[] that neither the statute itself nor the legislative history provides evidence of an express legislative intent to contract" (Ans. Br. at p. 25) without identifying where this phantom concession occurred.

["plaintiffs theorize that the prior version of section 20909 created … an 'express vested right'"].)

1. Section 20909 Expressly Lays Out Contract Terms

"The terms of an express contract are stated in words" whereas "[t]he existence and terms of an implied contract are manifested by conduct." (*Retired Employees Ass'n of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1178, citing Civ. Code §§ 1620, 1621.) The main difference between express and implied contracts "is the evidentiary method by which proof of their existence and terms is established." (*Youngman v. Nevada Irr. Dist.* (1969) 70 Cal.2d 240, 246.)

Petitioners highlighted a broad array of statutes and ordinances which California courts found created vested pension rights. (Appellants' Opening Brief ("AOB") at pp. 31–36.) Likewise, the "statutory language" of sections 20909(a) and (b) "clearly evince a legislative intent to create private rights of a contractual nature" (*Retired Employees*, 52 Cal.4th at p. 1187)[2]:

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[2] Respondent reads *Retired Employees* as a break from this Court's vested rights precedent. But the test articulated in *Retired Employees*—that "legislation in California may be said to create contractual rights when the statutory language or circumstances accompanying its passage 'clearly …evince a legislative intent to create private rights of a contractual nature enforceable against the [government body]'"—is consistent with, and drew heavily from, prior vested rights cases. (52 Cal.4th at p. 1187, (internal quotes omitted) citing, *inter alia, Valdes v. Cory* (1983) 139 Cal.App.3d 773, 786; *Bd. of Admin. v. Wilson* (1997) 52 Cal.App.4th 1109, 1135; and *California Teachers Assn. v. Cory* (1984) 155 Cal.App.3d 494, 506.)

> (a) *A member who has at least five years of credited state service, may 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 *additional retirement service credit* in the retirement system.
>
> (b) *A member may elect to receive this additional retirement service credit at any time prior to retirement by making the contributions as specified in Sections 21050 and 21052*. A member may not elect additional retirement service credit under this section more than once.

(§ 20909(a), (b) [emphasis added].)

The offer presented in the statute allows employees to purchase up to five years of service credit "at any time prior to retirement." (§§ 20909(a) and (b); *Valdes v. Cory*, 139 Cal.App.3d at p. 787 ["explicit language in the retirement law constitutes a contractual obligation on the part of the state as employer"].) Acceptance and consideration is provided through "at least five years of credited state service," (§ 20909(a)), and "contributions as specified in Sections 21050 and 21052," (§ 20909(b)). Section 20909 sets forth a "palpable element of exchange" which results in a contractual 'promise,' an intent to confer private rights." (*California Teachers Assn.,* 155 Cal.App.3d 494, 506, citing Rest. (2nd) Contracts, § 2.) Nothing need be "implied" from section to find offer, acceptance, and bargained for consideration. (*Lundgren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [no

need for resort to legislative intent if statutory language clear and unambiguous].)

Further, the Legislature is clear when it does not intend to create vested rights in pension statutes. (§ 31581.2(b) ["enactment of a resolution pursuant to this section shall not create vested rights in any member"].) Section 20909 did not contain any such limitation.

2. Respondent Admits that the Statute Created at Least One Contract, But Misreads its Express Terms

Respondent admits that a "plain reading of the [section 20909] makes clear that the unambiguous exchange of consideration contemplated by the Legislature was *airtime in exchange for payment*." (Ans. Br. at p 25 [emphasis in original].) This concedes that section 20909 creates *some* contract rights. But it overlooks the fact that employees first needed "five years of credited state service" to purchase ARSC. (§ 20909(a).) The consideration which formed the contract was payment *plus* service in exchange for service credit.

B. The Contract Clause Protects Pension And Other Employee Benefits Beyond Just Deferred Compensation

Respondent argues that the Contract Clause protects *only* "deferred compensation." (Ans. Br. at pp. 29–30.) This reads phrases about "pensions" being "deferred compensation" too broadly, in isolation from larger principles espoused in the case law. All pension benefits are

ultimately some form of "deferred compensation," but arguments about whether section 20909 provides a "pension benefit" or a "pension right" are academic because both enjoy Contract Clause protections.

California courts have repeatedly rejected derivatives of Respondent's argument and applied Contract Clause protections to not only the basic pension benefit but, *inter alia*, to disability benefits, sabbaticals, longevity pay, and supplemental pension benefits like retiree healthcare benefits. (AOB at pp. 25–26.) What controls is whether the benefit is "part of the contemplated compensation for those services and so in a sense a part of the contract of employment itself." (*Int'l Ass'n of Firefighters v. City of San Diego* (1983) 34 Cal.3d 292, 302 [public pension plan part of employment "contract"].) The right to purchase ARSC after the provision of sufficient state service was part of Petitioners' employment contract.

In circumstances similar to here, in *Santin v. Cranston* (1967) 250 Cal.App.2d 438, 442, the court of appeals concluded that two California National Guard officers had a vested right under *Allen v. City of Long Beach* (1955) 45 Cal.2d 128 to receive additional retirement service credit for past inactive United States Military service. The Legislature amended the applicable Military and Veterans Code provisions to exclude inactive service before the plaintiffs retired. The court held that the plaintiffs were entitled to the pre-amendment benefit, specifically rejecting the argument that the benefit was not vested: "The 'California rule' is based upon the

theory of the existence of a contract. Some contracts contain terms more advantageous than others. Some contracts of employment contain both better compensation and so-called 'fringe' benefits than others. They are contracts nonetheless." (*Santin,* 250 Cal.App.2d at pp. 443-444.)

Bd. of Admin. v. Wilson (1997) 52 Cal.App.4th 1109 rejected a governor's claim that only pension "benefits" were protected by the Contract Clause. "Although certain cases happened to involve modification of benefits, the controlling principle applies to modification of any 'vested contractual pension right.' … *Valdes* itself did not involve a modification of benefits but rather a modification in the payment of employer contributions to the fund." (52 Cal.App.4th at p. 1145, quoting and discussing *Valdes,* 139 Cal. App. 3d at 784.) *Wilson*, like *Valdes*, involved not the pension benefit itself but ancillary rights to an actuarially sound retirement system. (*Wilson*, 52 Cal.App.4th at pp. 1153–1154.)

Two other types of pension cases further undermine Respondent's argument. Cost of living adjustments are another ancillary pension right which courts have nonetheless afforded identical Contract Clause protection. (*Olson v. Cory* (1980) 27 Cal.3d 532, 534–535; *Pasadena Police Officers Ass'n v. City of Pasadena* (1983) 147 Cal.App.3d 695, 706–707.) Consider *Protect Our Benefits v. City and County of San Francisco* (2015) 235 Cal.App.4th 619, 622, which ruled that employees enjoyed

vested contractual rights to a cost of living enhancement tied not to service but to investment returns.

Similarly, disability retirement rights exist apart from service retirement rights. In *Frank v. Board of Administration* (1976) 56 Cal.App.3d 236, the plaintiff was statutorily-entitled to law enforcement industrial disability rights when he began work. Subsequently, however, the Legislature removed his classification from the list of those entitled to law enforcement industrial disability rights. Subsequently, when the plaintiff suffered a job-related injury and qualified for disability retirement he received lesser benefits than initially promised. Applying *Allen v. City of Long Beach*, the court of appeal held that plaintiff's vested pension rights were violated by his exclusion from the law enforcement benefit. (56 Cal.App.3d at pp. 245–246.) Like section 20909, disability retirement benefits are an *optional* benefit with a precondition (*i.e.*, job-related disability). It did not matter in *Frank* that *at the time the statute was amended* the employee had yet to qualify for, or exercise his right to apply for, disability retirement. Nor should it matter here that current employees had not yet qualified to purchase, or elected to exercise their right to purchase, ARSC when section 20909 was amended.

Section 20909 is closer to a core pension benefit than actuarial soundness, cost of living adjustments or disability retirement because purchasing service credit directly affects employees' *initial* retirement

allowances. Those disadvantaged by the amendment now have to work five years longer or retire with a lesser benefit.

C. Even Optional Pension Benefits Cannot Be Revoked After Employees Begin Employment

1. Employees Reasonably Expected to be Able to Purchase ARSC "At Any Time Prior to Retirement"

Respondent's arguments completely ignore employees' reasonable expectations. (AOB at p. 33; *Bellus v. City of Eureka* (1968) 69 Cal.2d 336, 341, 350 [protecting employees' reasonable expectation that city would fund retirement system].) In *Betts v. Board of Administration* (1978) 21 Cal.3d 859, this Court concluded that, having performed services for four years under a particular statute, the original version, not an amended version, "form[ed] the basis by which petitioner's reasonable pension expectations must be measured." (*Id*. at pp. 867–868; *Frank,* 56 Cal.App.3d at p. 245 [employees' "reasonable expectations" to disability retirement rights "thwarted" by amendment].)

Section 20909 was in effect for ten years. Employees reasonably expected to be able to purchase ARSC up to their retirement *because the statute said so*. (§ 20909(b); *California Teachers Assn.,* 155 Cal.App.3d at p. 507, citing Rest. (2nd) Contracts, § 50 ["a bargain may be sealed by performance with knowledge of the offer."].)

The record is replete with employees who intended to exercise their contractual rights under the statute but, for varying reasons, did not. (JA at pp. 157–166.) In a fact reminiscent of *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 850 [pension benefit eliminated when employee was 32 days shy of service requirement to vest], one petitioner who intended to purchase ARSC was only 16 days short of service eligibility when the benefit was eliminated. (JA at pp. 158, 164.)

2. The Right to Purchase ARSC "At Any Time Prior to Retirement" Could Not Be Eliminated For Those Employed Before the Public Employees' Pension Reform Act of 2013 ("PEPRA")

Respondent argues that the right to purchase ARSC could be revoked for anyone who had not already purchased it by January 1, 2013. (Ans. Br. at p. 25.) However, an employee's right to promised pension benefits vests with the commencement of service. (*Betts*, 21 Cal.3d at p. 863.) The right to purchase ARSC in the future, or to accrue additional service credit to become eligible to purchase, therefore vested in the sense that it could not be destroyed by statutory amendment. (*Kern*, 29 Cal.2d at pp. 855–856; *Legislature v. Eu* (1991) 54 Cal.3d 492, 531–532.)

Respondent ignores these deep-rooted principles by characterizing the five-year service requirement in section 20909 as an "eligibility" requirement. (Ans. Br. at pp. 27–28.) But sufficient service is both

consideration and an eligibility requirement. All pension systems have durational eligibility requirements[3]—yet the employer cannot revoke a promised benefit before the employer reaches eligibility. (*Kern,* 29 Cal.2d at p. 856.)

3. Optional Benefits are Protected by the Contract Clause

Respondent characterizes section 20909 as an "option" freely revocable before employees exercised it. (Ans. Br. at pp. 25–26.) But options, like defined benefits, attract and retain employees because employees value them. Respondent cites no case providing lesser protection to optional benefits. (*Frank,* 56 Cal.App.3d at pp. 242–244 [optional disability benefits protected by Contract Clause].) Moreover, the offer in the statute contained an explicit timeframe—"at any time prior to retirement" (§ 20909(b))—which precluded the offer being withdrawn prematurely.

Even if the statute provided no time limit, it would be treated as an offer of a unilateral contract term for which performance is tendered by beginning and continuing employment. (Rest. (2nd) of Contracts § 45; *see also State v. Agostini* (1956) 139 Cal.App.2d 909, 914 ["[I]f an offer for a unilateral contract is made, and *part of* the consideration requested in the

[3] *See*, *e.g.*, Gov. Code § 21060 (a) [PERL five-year vesting rule]; Gov. Code § 31672 [County Employee Retirement Law ("CERL") ten-year vesting rule].

offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being offered or tendered."])

In *Newberger v. Rifkind* (1972) 28 Cal.App.3d 1070, 1076–1077, the court held that employees could enforce an options contract, and purchase stock in the company at the promised price and quantity by tendering the money *at the appropriate time*. Despite employees exchanging neither money nor property for the option, the court found that by beginning and continuing performance and remaining employed, they provided ongoing consideration for the option and accepted the terms of the offered option. (*Id*. at p. 1076.) The same contract rules apply here. (*Retired Employees*, 52 Cal.4th at p. 1179 ["All contracts, whether public or private, are to be interpreted by the same rules …"].)

D. None Of The Cases Respondent Cites Involve Modification Of Vested Pension Benefits

Respondent argues that amendment of section 20909 had only an "indirect effect[] on pension entitlement." (Ans. Br. at p. 32.) But, as discussed below, the cases Respondent cites do not support that proposition.

Creighton v. Regents of the University of California (1997) 58 Cal.App.4th 237, involved a one-time, elective, early retirement incentive which was specifically designated "not vested." (*Id*. at p. 244.) The court

of appeal " h[e]ld only that a one-time limited offer of special incentives for early retirement, accompanied by such an express disclaimer" was not a vested right. (*Id*. at p. 245.)

The facts in *Miller v. State of California* (1977) 18 Cal.3d 808 are fundamentally different from this case because they addressed a civil service statute imposing a mandatory retirement age, not the modification of a pension benefit. Consequently, this Court did not determine whether the modification was permissible under *Allen* and its progeny. (*Id.* at p. 817.)

Piombo v. Board of Retirement (1989) 214 Cal.App.3d 329 involved a plaintiff who elected to withdraw his pension contributions from a county retirement plan upon separation. *After* his separation, a 1965 law permitted employees to redeposit pension contributions into the plan if they started employment with a public agency in a reciprocal plan. But in 1971, *before* the plaintiff rejoined a public agency with a reciprocal plan, the Legislature amended the 1965 law to preclude employees in the plaintiff's situation from redepositing contributions. The court of appeal rejected plaintiff's claim to a vested right in the 1965 law because his employment contract with the county ended before it was enacted. (*Id*. at pp. 338–339.) This case is inapposite because section 20909 existed during Petitioners' employment.

Vielehr v. State of California (1980) 104 Cal.App.3d 392 is a state employee discipline case. Like, *Miller* it recognized that indirect effects on pension entitlements, such as salary, do not convert non-vested benefits into constitutionally-protected ones. Likewise, *San Diego Police Officers' Ass'n v. San Diego City Employees' Retirement System* (9th Cir. 2009) 568 F.3d 725, 738–739, involved a negotiated salary provision where the employer agreed to temporarily pay employees' retirement contributions. It did not involve a statutory retirement benefit.

Respondent also argues that since section 20909 was based on the federal tax code the Legislature could not have promised a future right to purchase since the tax code *might* change. But that is like arguing that employees could not be promised a right to future service because their jobs *might* be eliminated. (*Eu,* 54 Cal.3d at p. 52 ["right to earn future pension benefits through continued service, on terms substantially equivalent to those" existing at the time they began working, or added during service]; see also AOB at pp. 20–21.)[4]

[4] Nor does *State, ex rel. Hughes v. Public Employees Retirement System* (Ohio 1988) 520 N.E.2d 577, 579–580 support Respondent. The Ohio Constitution permits retroactive pension right modifications that are "done reasonably and not arbitrarily." (*State, ex rel. Horvath v. State Teachers Retirement Board* (1998) 83 Ohio St. 3d 67, 76–77.) So if, as occurred in *Hughes*, the employer impairs its contractual obligations, it has no obligation under Ohio law to provide a comparable advantage.

III.

RESPONDENT MISSTATES AND MISCOMPREHENDS THIS COURT'S PRECEDENTS GOVERNING MODIFICATIONS TO VESTED PENSION RIGHTS

Respondent incorrectly claims the comparable advantages rule applies only to the "risk of drastic reduction or elimination" of vested pension rights. (Ans. Br. at p. 37.) Equally improperly, it argues the rule is just "one of multiple factors to be considered in determining whether modifications are reasonable and justified." (*Id*. at pp. 37–38, citing *Cal Fire Local 2881,* 7 Cal.App.5th at p. 131; *Marin Association of Public Employees, et al. v. Marin County Employees' Retirement Association, et al.* (2016) 2 Cal.App.5th 674,700–703.) Respondent reduces the rule to a mere recommendation, co-opting the novel "must" versus "should" rationale of *Marin Association of Public Employees*. (Ans. Br. at pp. 38–39, citing *Marin Association of Public Employees* 2 Cal.App.5th at pp. 698–699; see also *Cal Fire Local 2881,* 7 Cal.App.5th at pp. 130–131.) And parroting those cases, Respondent argues that so long as the employee maintains a "substantial or reasonable pension" few limitations restrict government's authority to eliminate benefits. (Ans. Br. at p. 39.)

But this Court has never authorized so rudderless a standard. Where this Court references "substantial" and "reasonable" since *Allen v. City of*

Long Beach, it did so as part of a broader analysis into whether an impairment occurred and whether the impairment was permissible.

Respondent also invokes the "necessity defense," arguing that the elimination of section 20909 was "reasonable and necessary" to serve an important public purpose. (Ans. Br. at p. 39.) While the "necessity defense" *may* justify *temporary* impairment of vested contract rights in emergency situations, it has been *repeatedly* rejected when advanced by past governors and legislatures to justify impairments of vested contract rights. Its prerequisites do not exist here.

A. The Comparable Advantages Rule Is A Mandatory, Singular Rule, Not Part Of A Balancing Test

Respondent never sets forth the comparable advantages rule, presumably because its argument that the "absence of comparable advantages must be balanced with other factors" (Ans. Br. at p. 39) so directly conflicts with it:

> With respect to active employees ... *any* modification of vested pension rights *must* be reasonable, *must* bear a material relation to the theory and successful operation of a pension system, and, when resulting in a disadvantage to employees, *must* be accompanied by comparable new advantages.

(*Allen v. Bd. of Admin.* (1983) 34 Cal.3d 114, 120 [emphasis added].)

Nowhere amongst the "any" and the "musts" of *Allen* and its lineage does this Court indicate that a balancing test with other factors is

appropriate. Before *Marin Association of Public Employees*, no court ever applied such a test (AOB at pp. 21–23, 44–47), even cases finding no impairment. (*Int'l Ass'n of Firefighters,* 34 Cal.3d at p. 301 [increased contributions permitted by language of pension plan]; *Amundsen v. Public Employees' Retirement System* (1973) 30 Cal.App.3d 856 [disadvantage accompanied by comparable advantages].) On the flimsiest language, Respondent speculates that the Court in *Betts* and *Olson* was "open to considering justifications for the impairments at issue." (Ans. Br. at p. 40.) But Respondent cites no California case where an impairment of vested pension rights that failed to provide offsetting advantage was permitted, upon balance, by other justifications.

Respondent appropriates *Marin Association of Public Employees,* where the court radically reinterpreted *Allen v. City of Long Beach* and held that pension impairments need not be offset by comparable advantages. (*Marin Association of Public Employees,* 2 Cal.App.5th at p. 702.) That panel concluded that when this Court used "should" as opposed to "must" in comparable advantages cases, it conveyed not a legal obligation but a lesser moral obligation, like "ought to." (*Id*. at pp. 697–699.) According to the panel, this Court's use of "must" in *Allen v. Bd. of Admin.*, 34 Cal.3d at p. 120, was sloppy and not intended to convey a mandatory obligation. (*Marin Association of Public Employees,* 2 Cal.App.5th at pp. 698–699.)

This crabbed reading conflicts with every published vested rights pension case decided in the past sixty years. Whether this Court used "should" or "must," it articulated a mandatory rule. Courts create precedential rules, not moral recommendations.

In *Allen v. City of Long Beach*, *supra*, the Court found that the city acted unconstitutionally because the law "substantially decrease[d] plaintiffs' pension rights without offering any commensurate advantages," and the city provided no "evidence or claim that the changes enacted bear any material relation to the integrity or successful operation of the pension system." (*Id*. at p. 131.) The failure to provide commensurate advantages was a contract violation not a moral failure. This contrasts with the "material relation" prong, where the Court faulted the city for failing to meet its burden of justifying that its proposed fix was well-tailored. (*Id*. at p. 133.)

Three years later, in *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, the Court again used "should" to convey legal imperative. It cited *Chapin v. City of Commission* (1957) 149 Cal.App.2d 40, which concluded that, because a comparable new advantage was not provided, the change was an "unreasonable, ineffective, and illegal modification of [the plaintiff's] vested contractual rights." (149 Cal.App.2d at p. 145.) Turning to the case before it, the *Abbott* Court was clear: "substitut[ing] a fixed for a fluctuating pension [wa]s not permissible *unless* accompanied by

commensurate benefits[.]" (50 Cal.2d. at p. 454.) The same holds true for *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 867–868 [change could not be applied because "[n]o 'comparable new advantages' to petitioner appear in the plan which can offset the detriment he has suffered…."].

One month after *Allen v. Bd. of Admin.* used "must," the Court decided *Int'l Ass'n of Firefighters v. City of San Diego* (1983) 34 Cal.3d 292, 307. Both decisions were written by Justice Richardson who uses the terms interchangeably. *Int'l Ass'n of Firefighters* used the "should" language from *Allen v. City of Long Beach* and *Betts*, both of which applied it as a binding legal requirement.

Eight years later, the Court reaffirmed the mandatory nature of the word "should" when, in *Legislature v. Eu*, 54 Cal.3d at pp. 529–530, it permitted reasonable modifications "so long as" comparable benefits are provided. To the *Eu* Court, "should" meant "so long as" because it supported its description of the settled law with a quote from *Olson v. Cory,* 27 Cal.3d at 541, which also used the word "should."

B. The Elimination Of Section 20909 Rights Bears No Material Relation To The Theory And Successful Operation Of A Pension System

Respondent claims the amendment of section 20909 "was supported by compelling reasons materially related to the successful operation of the

pension system." (Ans. Br. at p. 41.) But Respondent's justifications are neither compelling nor materially related to the successful operation of the pension system.

Respondent speculates that the state's pension systems have "hundreds of billions of dollars of unfunded liabilities" (*id*. at p. 47; *see also* pp. 16–17)[5], yet it fails to explain how section 20909 contributes to this problem. (*United Firefighters of Los Angeles City v. City of Los Angeles* (1989) 210 Cal.App.3rd 1095, 1112 [desire to reduce costs or limit public spending does not justify impairment of a public entity's contractual obligations notwithstanding the legitimacy of such a purpose].) As the court in *Alameda County Deputy Sheriffs' Association v. Alameda County Employees' Retirement Association* (Jan. 8, 2018) A141913 recently concluded, breaking with *Marin Association of Public Employees*:

> [T]here is no indication in the *Marin* [*Public Employees*] decision that, in considering the fiscal justification for application of the pension modifications at issue to [current employees], the court specifically weighed the financial implications for Marin [County Employees Retirement Association] if [current employees] were exempted from those modifications, rather

[5] Respondent assails the cost to taxpayers of funding public employee pensions; however, the State funds only 25% of the cost of CalPERS benefits—with the remainder covered by employee contributions and investment returns. (*See* CalPERS, *Perspective Winter 2017*, available at https://www.calpers.ca.gov/docs/forms-publications/perspective-winter-2017.pdf at p. 15.)

> than impermissibly focusing on the unfunded pension liability crisis in general.

(Slip Op. A141913 at p. 60, citing *Abbott*, 50 Cal.2d at pp. 445, 455.) The *Alameda County* court rightly read this Court's precedents to require "specific analysis of the changes that have been effected by the new law," "consideration of the impact of those changes" on impacted employees, and "an evaluation of the legislative rationale for the change in the context of the facts of each" affected retirement system. (*Alameda County*, Slip Op. A141913 at p. 61.)

Respondent, like the court below, ignores the effect of the amendment on harmed employees. Nor did the Legislature evaluate *each* affected retirement system[6]—specifically to weigh the impact on each system of maintaining current employees' right to purchase ARSC. Respondent discusses claimed *past* problems but fails to address future impacts. (Ans. Br. at pp. 50-53.)

Moreover, the Legislature made no specific findings about section 20909 nor premised repeal on unfunded liability grounds. And contrary to Respondent's arguments, CalPERS found no unfunded liability issues with ARSC, concluding that repeal "create[s] neither a cost nor savings to the employer" only a "lowering of risk to employers." (CalPERS, Actuarial

[6] PEPRA also eliminated the right to purchase additional service credits under Education Code 22826 (CalSTRS) and Government Code sections 31658 and 31490.6 (both in the CERL).

Cost Analysis: California Public Employees' Pension Reform Act of 2012 (August 31, 2012) at p. 9, available at https://www.calpers.ca.gov/docs/forms-publications/pepra-cost-analysis.pdf.) Respondent offers no evidence that allowing those employed as of December 31, 2012 to continue to purchase ARSC would have created any additional unfunded liability.

Short of "extreme hardship" or imminent "collapse" of the system—neither of which exist here—poor funding status does not satisfy the material relation test. (*Ass'n of Blue Collar Workers v. Wills* (1986) 187 Cal.App.3d 780, 793; *Abbott v. City of San Diego* (1958) 165 Cal.App.2d 511, 519–520 [pension fund insolvency did not meet material relation test].) In *Abbott v. City of Los Angeles*, this Court rejected as a "plea, based on speculation," the City's argument that absent change from a fixed system to a fluctuating one, "the cost to the City and its taxpayers would have reached such staggering proportions that, in all probability, the system would have ceased to exist." (50 Cal.2d at p. 455.)

> Rising costs alone will not excuse the city from meeting its contractual obligations, the consideration for which has already been received by it. Moreover, it is not to be assumed that the city would have attempted to abolish its pension system by reason thereof, especially since such systems are almost universally essential in order to attract qualified employees….

(Id.; see also *Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, 507 [burden on county fisc does not outweigh correct application of CERL].)

Underfunding is a perennial concern, but pension systems are designed to address it through increased employer contributions. Underfunding does not foreshadow extreme hardship or imminent collapse of the system.

Respondent also claims ARSC "undermined public trust," "fueled the … view that public employee pensions were 'excessive,'" and was a necessary sacrificial lamb to secure passage of Proposition 30 in 2012. (Ans. Br. at p. 47.) But political motives do not do not bear a material relation to the theory of a pension system. *Wallace v. City of Fresno* (1954) 42 Cal.2d 180, 185–186 held that an amendment which forfeited pension benefits of those convicted of a felony was invalid because it was designed not to benefit the system but—like here—to "meet the objections of taxpayers."

Nor do unsubstantiated claims of spiking or "abusive practices" (Ans. Br at p. 47) help Respondent. ARSC was hardly abusive; it was, by design, fully paid for, including requiring *the employee* to pay the employer's contributions.

Respondent claims that repeal "eliminat[es] a known cause of early retirements." However, ARSC *could not* prompt "early" retirements

because it did not lower the minimal age for service retirement. (§ 20909(d).) Notably, PERL, like other public pension systems, encourages employees who become "superannuated" to retire so they may be "replaced by more capable"—and less costly—"employees." (§ 20001.)

Finally, Respondent claims that repeal "eliminate[d] an inherently unworkable and fiscally unsustainable scheme." (Ans. Br. at p. 50.) Yet CalPERS lends no support to this claim either in its briefings or in its report to the legislature on ARSC. (*See* CalPERS, Actuarial Cost Analysis https://www.calpers.ca.gov/docs/forms-publications/pepra-cost-analysis.pdf, further discussed below.) In terms of "workability," ARSC is no different than giving service credit for other forms of unworked time, which continue in effect. (§ 20898 [permitting service credit for holidays, sick leave, vacation or leaves of absence]; §§ 21020, 21024, 21032, 21033 [service credit for Military Leave]; and § 20902.5 [golden parachutes].)

C. The Amendment To Section 20909 Substantially Impaired Employee Vested Rights

Citing two unrelated federal authorities—a Kansas case about natural gas purchases (*Energy Reserves Group, Inc. v. Kansas Power & Light Co*. (1983) 459 U.S. 400) and a Hawaii case about delayed pay checks (*University of Hawai'i Professional Assembly v. Cayetano* (9th Cir. 1999) 183 F.3d 1096, 1104), Respondents argue that the destruction of section 20909 rights was a "minimal alteration" insufficient to constitute

contract impairment. It is akin to arguing that Goldilocks would have avoided the three bears' wrath had she eaten their porridge a little at a time, and not all at once. "The concept of 'minimal impairments' has no proper application as a vague license for the state to impair its obligation so long as it is only 'a little bit.'" (*California Teachers Assn. v. Cory* (1984) 155 Cal.App.3d 494, 511.)

Respondent never claimed the impairment was insubstantial in the court below. Consequently, the argument is forfeited. (*People v. Clark* (2016) 63 Cal.4th 522, 552 ["new argument is forfeited . . . because he failed to object below."]; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 400.) This omission cannot be forgiven because the issue of whether an impairment was insubstantial presents factual issues, not a purely legal question.

The elimination of employees' right to purchase ARSC was hardly a "minimal alteration." (Ans. Br. at p. 43.) Substantial means "large in size, value, or importance." (https://dictionary.cambridge.org/dictionary/english/substantial.) The repeal of section 20909 constituted a potential loss in retirement allowance of up to 16.67%.[7] That is substantial in size, value *and* importance under any measure. (*Abbott,* 50 Cal.2d at p. 449 ["it is the advantage or

[7] Employees could purchase up to five years of service under a 3% formula that was capped at 90%.

disadvantage to the particular employees … by which modifications to pension plans must be measured."].)

Respondent relies heavily on *Packer v. Board of Retirement* (1950) 35 Cal.2d 212. *Packer* preceded this Court's articulation of the reasonable modification rule but still concluded that the new law gave "greater benefits than [the employees] had before" (*id*. at p. 218), whereas section 20909 rights were eliminated without an offset. Perhaps most importantly, Respondent's "substantial alterations only" theory conflicts with the basic rule that "any" modification of vested pension rights must satisfy the comparable new advantages rule. (*Allen v. Bd. of Admin.*, 34 Cal.3d at p. 120.)

D. Respondent Cannot Meet The Necessity Defense Because The Elimination Of Section 20909 Rights Was Neither Temporary, Responsive To An Emergency, Nor The Least Drastic Impairment

Completely undermining its argument that amendment of section 20909 was a "minimal alteration," Respondent next claims it was "reasonable and necessary to serve an important public purpose." (Ans. Br. at p. 44, quoting *U.S. Trust Co. of New York v. New York* (1977) 431 U.S. 1, 25.) Again, however, Respondent waived this argument by not raising it in the court below. "Reasonableness" and "necessity" by definition present factual issues which cannot be resolved abstractly when raised for the first

time on appeal. (*Sea & Sage Audubon Soc'y, Inc. v. Planning Com*. (1983) 34 Cal. 3d 412, 421–422.)

Even if waiver is excused, application of the "necessity" defense here is not justified. California courts apply strict scrutiny when the necessity defense is used to justify impairment of the state's own contract. Furthermore, the necessity defense has been rejected by every California court presented with it as justification for the impairment of vested contract rights.

1. The Necessity Defense is Subject to Strict Scrutiny, Applies Only in Emergency Situations, and Permits Only Temporary Impairment of Contract Rights

Respondent explains the necessity defense incompletely. (Ans Br. at pp. 44–45.) It derives from federal law. In *Home Building & Loan Assn. v. Blaisdell* (1934) 290 U.S. 398, the United States Supreme Court upheld the constitutionality of a Minnesota mortgage moratorium law designed to provide *temporary* relief to landowners whose property was threatened with foreclosure. Then in *U.S. Trust Co. of New York v. New York* (1977) 431 U.S. 1, the Court invalidated a New Jersey statute which retroactively repealed a covenant between the state and certain bondholders that had limited the use of certain revenues. (*Id.* at pp. 3, 9–10.) The Court recognized that the federal Contract Clause was not an absolute bar to subsequent modification of the state's own financial obligations; however,

the repeal in question was ruled unconstitutional because it substantially impaired the contract rights of private parties and was neither reasonable nor necessary to serve an important state interest. (*Id.* at pp. 17–18, 29.)

In *Sonoma County Org. of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 304–305, in the aftermath of Proposition 13, this Court invalidated a statute which declared nullified any local agency agreement to pay employees cost-of-living adjustments greater than those received by state employees. Drawing from both *Blaisdell* and *U.S. Trust Co*., it crafted a four-part test which provides that a legislative enactment that impairs a private contract right is permissible only if it: (1) protects basic interests of society; (2) is justified by an emergency; (3) is appropriate for the emergency; and (4) is temporary and defers, but does not destroy, the vested contract rights. (*Sonoma County,* 23 Cal.3d at pp. 306–309.)

This Court quoted Justice Blackmun's admonition that complete deference to legislative assessments of reasonableness and necessity "is not required because the government's self-interest is at stake":

> A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all. . . . A State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors….

> A State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives. Similarly, a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well.

(23 Cal.3d at p. 308, quoting *U.S. Trust Co.* 431 U.S. at pp. 26, 29, 30–31.)

Applying these standards, the *Sonoma County* Court found the law before it caused substantial impairment because a contractual salary increase would be "irretrievably lost." (*Id*. at pp. 308–309.) Despite legislative analysis of a projected $7 billion[8] loss in local property tax revenues, the Court rejected the government's claims of a fiscal emergency and that the legislation was necessary to "maintain essential services." (*Id*. at pp. 309–310.) Impairment of contract is permitted due to fiscal exigencies only when "legislation was temporary and limited to the exigency which provoked the legislative response." (*Id*. at pp. 305–306, 313–314.)

One year later, *Olson v. Cory* applied the same four-part test, without reference to *U.S. Trust Co*., to invalidate a statute which eliminated cost of living increases for active and retired judges. Rejecting the necessity defense as applied to the active judges, it found "no reason or justification for the state action," and reiterated that the state has the burden

[8] This equates to $26 billion in 2017 dollars, according to http://www.usinflationcalculator.com/.

of establishing that a particular impairment "is warranted by an 'emergency' serving to protect a 'basic interest of society.'" (27 Cal.3d at pp. 536, 537–538 [also maintaining prior holdings that no comparable advantage afforded to the retired judges].)

2. No California Court Has Permitted Impairment of Vested Pension Rights as a Necessity

Since *Sonoma County* and *Olson*, California courts of appeal have repeatedly rejected governmental invocation of the necessity defense to justify impairment of vested rights.

In 1982, in *Valdes v. Cory*, the court considered "emergency" legislation to end certain state contributions to CalPERS. (139 Cal.App.3d at pp. 777–779.) Concluding that the enactment substantially impaired vested pension rights (*id*. at p. 790), the court analyzed whether impairment was constitutional under *Sonoma County*, *Olson*, *Blaisdell* and *U.S. Trust Co*.. The court recognized the legislation "further[ed] an important public interest," but found "no evidence that the Legislature gave considered thought to the effect the emergency provisions might have on [Cal]PERS or the possibility of alternative, less drastic, means of accomplishing its goal." (*Id*. at p. 791.) Noting that the enactment "irretrievably lost," rather than deferred, the funding to CalPERS, the court concluded: "the state has failed to meet its burden of demonstrating that the impairment of petitioners'

rights is warranted by an 'emergency' serving to protect a 'basic interest of society.'" (*Valdes*, 139 Cal.App.3d at p. 791.)

Two years later, in *California Teachers Assn. v. Cory*, the same court issued a peremptory writ of mandate to require the state controller to transfer certain funds from the General Fund to the Teachers' Retirement Fund. Holding that the state's failure to fund the Retirement Fund in accordance with Education Code section 23401 *et seq*. was a substantial impairment of contract (155 Cal.App.3d at pp. 511–512), the court again rejected the necessity defense:

> *United States Trust* places the justification for an impairment of a contractual funding obligation under the light of strict scrutiny. It requires the state assert a compelling interest for the impairment. *United States Trust* rules out, as a permissible justification, a legislative purpose simply to expend the obligated money for a purpose deemed a better expenditure. That is the case here. Respondent offers no justification for the breach of the contract save that implicit in the message accompanying his action reducing the budget appropriation to $1; that the 'amount [reduced] can have an immediate and significant impact in other areas of education [exhibiting] more pressing needs ….' This is not a purpose which justifies an impairment.

(*Id.* at pp. 511-12 (citations omitted); *see also United Firefighters of Los Angeles City v. City of Los Angeles* (1989) 210 Cal.App.3d 1095 [rejecting city's argument that unforeseen loss of revenue upon the enactment of Proposition 13 justified pension impairment].)

Thirteen years later, in *Wilson*, 52 Cal.App.3d at pp. 1154–1157, 1159–1161, the Third District, applying *Valdes*, *California Teachers* and *U.S. Trust Co*., held that *temporary* "in arrears" funding of the state's CalPERS obligations violated plan members' vested right to an actuarially sound retirement system. (*Id.* at pp. 1153–1154.)[9] *Wilson* "assume[d] for the sake of argument … the existence of a fiscal emergency," but still concluded that the enactments were not "appropriate for the emergency" because Governor Wilson:

> [C]ites no evidence of any effort to deal narrowly with the exigencies of the emergency or of consideration of other less drastic alternatives within the PERS system. Indeed, there was not even any actuarial input from the PERS Board. Where the state has not shown that it gave "considered thought to the effect the emergency provisions might have on PERS or the possibility of alternative, less drastic, means of accomplishing its goal," then the necessity defense fails. (*Valdes v. Cory*, *supra*, 139 Cal.App.3d at p. 791.) Since actuarial input from the PERS Board was not obtained, that showing cannot be made.

(*Id*. at pp. 1160–1161.)

[9] *Wilson* questioned whether the emergency and temporary duration requirements remained (*id*. at 1160, citing *U.S. Trust Co.*, 431 U.S. at p. 23, fn. 19) but ruled without resolving the applicability of those two elements.

3. Repeal of Section 20909 Did Not Respond to an Emergency or Protect a Basic Interest of Society

Without acknowledging the significant limitations placed on application of the necessity doctrine by California courts, Respondent cobbles a "fiscal crisis" together from commission reports and research papers.[10] (Ans. Br. at pp. 16-17; but see *In re Retirement Cases* (2003) 110 Cal.App.4th 426, 458 ["underfunding, in itself, does not establish hardship"].) Yet the Legislature never declared an emergency. Reasonable minds may differ about public employee pensions but this Court's jurisprudence rest on facts not policy debates. (*Holtz v. Superior Court* (1970) 3 Cal.3d 296, 305 [courts narrowly circumscribe the types of emergency that exempt public entities from liability for constitutional violation].)

In *San Christina Investment Co. v. San Francisco* (1914) 167 Cal. 762, 773, this Court defined an emergency as: "An unforeseen occurrence or combination of circumstances which calls for immediate action or remedy: (a) pressing necessity, [an] exigency." (See also 65 Cal. Ops.

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[10] On page 17, Respondent cites Glaeser & Ponzetto, *Shrouded Costs of Government: The Political Economy of State and Local Pensions* (April 2013) National Bureau of Economic Research http://www.nber.org/papers/w18976.pdf . Yet the version cited was not peer reviewed and was subsequently submitted for publication in substantially reduced form. It presents a political economy model with manifold simplifying assumptions improper for a court to rely on as fact.

Atty. Gen., 151, 157 (1982).) Not even legislative claims of a "fiscal crisis of severe magnitude" will clear this high bar. (*Sonoma County*, 23 Cal.3d at pp. 309–310.)

Nor did the Legislature make findings that amendment was necessary to protect basic societal interests. Furthermore, the amendment completely destroyed—as opposed to temporary deferred—vested pension rights. Likewise, there is no evidence that the Legislature considered more moderate action. (*Wilson*, 52 Cal.App.4th at p. 1157 [no consideration of "mitigating measures, or … less drastic means of" impairing pension rights].) Ending the benefit for new employees only or repricing it were more moderate alternatives.

Respondent claims repeal restored the "severed link" between pension benefits and "work performed." (Ans. Br. at pp. 45–47.) But nothing in the legislative history supports this rhetoric. Nor does the Legislature's retention of provisions which permit employees to purchase retirement service credit for holiday, sick and vacation leave credits and paid leaves of absence (§ 20898) and golden parachutes (§ 20902.5).[11] Besides, section 20909 was explicitly linked to state service. (§ 20909(a) [requiring "five years of credited state service"].)

[11] There is no meaningful distinction between ARSC and vacation. A thirty-year employee who averages four weeks of vacation annually receives approximately two-and-one-half years of *unworked* service credit towards future retirement benefits.

Respondent claims ARSC contributed to unconstitutional treatment of inmates in California's state prison system, (Ans. Br. at pp. 48–50 [ARSC "clearly exacerbated" staff shortages]), and says "there was no other way" to fix prison staffing problems than to end section 20909 rights (*id*. at p. 50). Codswallop. *Brown v. Plata* (2011) 563 U.S. 493 attributes not one word to ARSC as a basis for the unconstitutional prison conditions. Nor did the federal receiver believe that amending section 20909 was the *only* means to remedy staffing shortages. (*See* San Diego Tribune, *Prison health worker salary increases OK'd* (Nov. 17, 2007), available at http://legacy.sandiegouniontribune.com/uniontrib/20071117/news_1n17prison.html [federal receiver raised doctors' salaries by 8–20% for December 2007 on top of earlier raises that year].)

Finally, sewing from whole cloth, Respondent claims section 20909 was "unworkable and fiscally unsustainable." (Ans. Br. at pp. 50–53.) But not all the affected pension plans were consulted. Only CalPERS was consulted—belatedly—about PEPRA. CalPERS was asked to create a fiscal analysis after PEPRA came out of the Conference Committee. (*See* California State Assembly Floor Analysis on Conference Report for AB 340, August 28, 2012.) Three days later, on August 31, 2012—the same day the final vote on PEPRA was taken—CalPERS published a 10-page Actuarial Cost Analysis report that was "not intended to be relied upon as a complete analysis of the actuarial impact of the PEPRA." (CalPERS,

Actuarial Cost Analysis: California Public Employees' Pension Reform Act of 2012 (August 31, 2012) at p. 1, available at https://www.calpers.ca.gov/docs/forms-publications/pepra-cost-analysis.pdf.) Only the last paragraph mentions ARSC:

> PEPRA prohibits the purchase of non-qualified time ("airtime") on and after January 1, 2013. Such purchases are currently intended to be cost neutral to employers. The member pays the full present value cost of the additional service credit. That cost is an estimate that includes assumptions with respect to the age at retirement, salary at retirement, age at death, and the retirement system's investment return. While service purchases on a present value method are not expected to increase employer contributions, they do increase the risk to the employer in the form of higher volatility in employer rates if events do not occur as expected. *As such, PEPRA would appear to create neither a cost nor savings to the employer. It would however result in a lowering of risk to employers.*

(*Id*. at p. 9 [emphasis added].) No reference to the Actuarial Cost Analysis appears in the subsequent legislative history and there is no record of it being considered by the Legislature. (*Wilson*, 52 Cal.App.3d at pp. 1160–1161 no "actuarial input from the PERS Board"].)

The sum of CalPERS' analysis was not that allowing the purchase of ARSC was an "unworkable defect" or "fiscally unsustainable," only that eliminating it lowered the employer's risk—not the stuff of necessity.

IV.

THE CONSTITUTIONALITY OF SECTION 20909 IS DIRECTLY AT ISSUE IN THIS ACTION

It is not clear what CalPERS' point is in asserting that "Petitioners have not directly challenged the constitutionality of Section 7522.46." (CalPERS' Br. at p. 3.) The State, for its part, correctly recognizes Appellants' constitutional challenge throughout its brief.

The Third Amended Verified Petition for Writ of Mandate is clear in alleging both a violation of the law in the passage of the new provision, as well as in the implementation by CalPERS. (JA 161–163 [¶¶ 13, 16, 19].)

Thus, the petition directly attacks the constitutionality of the new provision, and also attacks the implementation of that provision by CalPERS.

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V.

CONCLUSION

PEPRA was a vast enactment. Most of its restrictions were within legislature's power because they did not impair contractual rights. This action challenges only the modification of rights under one small part of it. The elimination of section 20909 rights for current employees impaired their vested rights and should be found unconstitutional.

DATED: January 22, 2018

MESSING ADAM & JASMINE LLP

By: _____

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Jason H Jasmine
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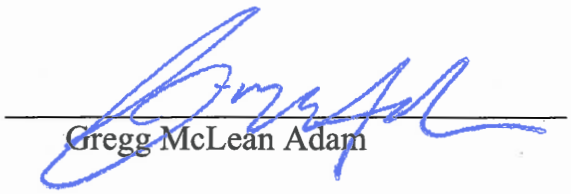
CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.504(d)(1)

Pursuant to California Rules of Court Rule 8.504(d)(1), I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 13 points and contains 8,222 words.

DATED: January 22, 2018



Gregg McLean Adam

PROOF OF SERVICE

CAL FIRE Local 2881, et al. v. CalPERS (State of California)
California Supreme Court, Case No. S239958

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 235 Montgomery St., Suite 828, San Francisco, CA 94104.

On January 22, 2018, I served true copies of the following document(s) described as **REPLY BRIEF ON THE MERITS** on the interested parties in this action as follows:

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BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Messing Adam & Jasmine LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 22, 2018, at San Francisco, California.

Janine Oliker