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

---

OPENING BRIEF ON THE MERITS

MESSING ADAM & JASMINE LLP
Gary M. Messing, Bar No. 75363
gary@majlabor.com
*Gregg McLean Adam, Bar No. 203436
gregg@majlabor.com
Jason H Jasmine, Bar No. 215757
jason@majlabor.com
235 Montgomery St., Suite 828
San Francisco, California 94104
Telephone: 415.266.1800
Facsimile: 415.266.1128

Attorneys for Petitioners and Appellants CAL FIRE Local 2881, et al.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

FEDERAL CASES

OUT OF STATE CASES

STATUTES

TABLE OF AUTHORITIES
(Continued)

Page

CONSTITUTIONAL PROVISIONS

LEGISLATION

I.

SUMMARY OF ARGUMENT

This case involves whether the Legislature may eliminate the right of existing state and local public employees to purchase additional service credits pursuant to former Government Code section 20909 ("section 20909").[1] The Legislature enacted the benefit in 2004, in part to allow employees to take educational and child-rearing leaves of absence without foregoing their pension benefits. It abruptly modified the statute in 2012, to prevent any purchases of additional service credits after December 31, 2012, prompting this action.[2]

Petitioners contend that under this Court's extensive and longstanding vested rights doctrine—dating back to *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, and arguably to *O'Dea v. Cook* (1917) 176 Cal. 659—the repeal of a pension right without providing adversely affected employees with a comparable pension advantage violated the Contracts Clause in article 1, section 9 of the California Constitution. This follows because the right to purchase additional service credits at any point

---

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

[2] Strictly speaking, the Legislature modified section 20909 by adding subsection 20909(g) in tandem with a new enactment, section 7522.46, which ended purchases after December 31, 2012; however, as the court of appeal recognized (Slip Op. at p. 6), this "effectively repeal[ed]" the pension right—so Petitioners use the term "repeal" or "repealed" herein to describe the elimination of the right to purchase additional service credit.

prior to retirement was one of a wide array of pension rights under the Public Employees' Retirement Law ("PERL"), section 20000 *et seq*. When existing employees performed service during periods in which section 20909 was offered as part of their employment terms with the state employer, vested contractual rights were created.

In this Opening Brief, Petitioners argue that under this Court's vested rights precedents (which have been widely and, until recently, invariably followed by the courts of appeal) section 20909 created a vested right. The repeal of section 20909 in 2012 therefore violated employees' vested rights in two distinct ways. First, the Legislature failed to establish that the elimination of the right to purchase additional service credits was necessary to preserve and maintain the pension system. Second, it failed to provide employees who were disadvantaged by repeal with offsetting comparable pension advantages.

This Court has routinely struck down modifications—whether statutory (*Olson v. Cory* (1980) 27 Cal.3d 532) or constitutional (*Legislature v. Eu* (1991) 54 Cal.3d 492)—to vested pension benefits. It should do so again here because no special circumstances warrant abandoning its longstanding precedent.

II.
ISSUE PRESENTED

1. Was the option to purchase additional service credits a vested pension right or benefit?
2. Was the repeal of section 20909 necessary to preserve and maintain PERL?
3. Did the repeal of section 20909, without providing disadvantaged employees with an offsetting pension advantage, violate the Contracts Clause?

III.
STANDARD OF REVIEW

The facts in this case are undisputed; accordingly, because the issues presented involve interpretation of statutes and our state Constitution, this Court exercises its independent judgment and reviews the matter *de novo.* (*Bd. of Administration of the Public Employees' Retirement System v. Wilson* (1997) 52 Cal.App.4th 1109, 1129 ["The ultimate questions of whether vested contractual rights exist and whether impairments are unconstitutional present questions of law subject to independent review"].)

IV.
FACTS AND PROCEDURAL HISTORY

Petitioners are a labor union and its state employee members whose pension benefits are administered by the California Public Employees'

Retirement System ("CalPERS"). They sued in early 2013, after the Legislature repealed section 20909, a pension statute, which had formerly allowed employees to purchase additional service credit. (Joint Appendix ("JA") at p. 001 [Petition].) Petitioners alleged that the repeal of section 20909 violated the Contracts Clause of the California Constitution. (JA at p. 004.) The lawsuit did not contest the Legislature's right to prevent application of the statute to future employees.

A. In 2004, The Legislature Created The Right Of Qualifying Employees To Purchase Additional Service Credit

CalPERS is a public pension system, established under PERL, which defines its pension rights exclusively by statute. (Slip Op. at p. 2.) CalPERS administers benefits and discharges its duties solely in the interest of plan participants and their beneficiaries. (Cal. Const. art. XVI, § 17(b).) CalPERS' plans provide defined benefits to members based on age at retirement, service credit and final compensation. (See, e.g., § 21363.4 [state firefighters' safety formula].) The more service credit the employee has, the higher will be his or her monthly pension.

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

retirement system … at any time prior to retirement." (§ 20909(a) and (b).) This right to secure additional service credit is not unusual—PERL also allows employees to supplement their service credit with, for example: prior military service (§§ 21032, 21033; see §§ 21020, 21024); certain leaves converted into additional retirement service credit (§ 20898 [credit for holidays, sick leave, vacation, or leave of absence]); and, two years of additional service credit for certain retiring judicial branch state employees (§ 20902.5). In fact, from section 20890 to section 21054, PERL provides dozens of statutes governing the use, crediting and computation of service credit relating to service other than that provided directly to the state.

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

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

(JA at pp. 260, 266, 271-272.) Thus, an employee might take three years off to improve her education, to care for a new child or a relative, or might plan to do so, and rely upon section 20909 to allow her to purchase additional service credit so as to allow her to retire without loss of time or

future income level. Because pension benefits are predominately based on length of service and compensation, without the statute employees who take leave either postpone retirement or suffer a reduced pension.

The entire cost of the benefit, if exercised, was designed to be borne by the employee, who was required to "contribute 'an amount equal to the increase in employer liability, using the pay rate and other factors affecting liability on the date of the request for costing of the service credit.'" (Slip Op. at p. 2, citing § 20909, subds. (a), (b); § 21052; see also *Marzec v. California Public Employees Retirement System* (2015) 236 Cal.App.4th 889, 905 ["… section 21052 provides that if an employee elects to purchase [additional service credit] it is the employee, not the employer, who is required to contribute 'an amount equal to the increase in employer liability'"].) The "increase in employer liability" was calculated as the "present value of the projected increase in liability to the CalPERS system." (§ 21052; Assem. Bill No. 719, 2nd reading Aug. 18, 2003, Bill Analysis, p. 2.) This right nonetheless benefitted employees because it gave them the option of turning savings into defined pension benefits.

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

CalPERS' role administering pensions gives it special expertise in interpreting pension laws. (*People ex. rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 309 ["contemporaneous administrative construction

of [an] enactment by those charged with its enforcement ... is entitled to great weight"], quoting *Coca–Cola Co. v. State Bd. of Equalization* (1945) 25 Cal.2d 918, 921.) CalPERS agreed with Petitioners that section 20909 created vested rights. Its 2011 publication "Vested Rights of CalPERS Members: Protecting the Pension Promises Made to Public Employees" was widely-read and remained on its website, unaltered, until at least December 21, 2016.[3] CalPERS recognized that the right to purchase additional service credits vests immediately when offered:

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

[3] The publication remained on CalPERS website until at least December 21, 2016 (the day before the court of appeal heard oral argument) at www.Calpers.ca.gov/docs/forms-publications/vested-rights-members-pdf. It was subsequently removed.

> *completion of five years of service vests as soon as the member starts work.*

(JA at p. 229, emphasis added.) More specifically, CalPERS described the right to "Purchase service credit under the terms that existed in the law when they provided service, if the member satisfies all eligibility requirements" as one of eleven defined vested rights. (JA at p. 234.) Individual petitioners' reliance on the future ability to purchase is set forth in the record. (JA at p. 160.)

C. The Legislature Repealed Section 20909 And Petitioners Filed Suit

On January 1, 2013, section 7522.46 became effective as part of the Public Employees' Pension Reform Act of 2013 ("PEPRA"). PEPRA significantly changed public employee pensions for *future* employees, including reducing pension formulas. (See Legis. Counsel's Dig., Assem. Bill No. 340 (2011-2012 Reg. Sess.).) But section 7522.46 added subsection 20909(g), which eliminated the right of *current and future* employees to purchase service credit.

It is uncontested that the Legislature offered no comparable pension advantages to existing employees who were disadvantaged by repeal. Moreover, in passing PEPRA the Legislature failed to make any specific finding that repeal of section 20909—or any other part of PEPRA—was necessary to preserve and maintain the integrity of the system.

D. The Trial Court Determined Section 20909 Created No Vested Rights

Petitioners sued in the Superior Court of Alameda County seeking to compel CalPERS to allow future purchases of service credits for qualifying employees employed as of December 31, 2012. (JA at p. 166.) Among the Petitioners is one firefighter who missed eligibility to purchase additional service credits by 16 days (JA at pp. 158, 164), and others who provided five years of service, and planned to purchase additional service credits, but were financially unable to do so before December 31, 2012. (JA at pp. 157-158.) CalPERS declined to defend the legislation, so Respondent State of California intervened, without opposition, to defend it.

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

In its order the trial court made a number of erroneous determinations. It concluded that: even if section 20909 created a vested pension right, "the Legislature lawfully eliminated the benefit as a permissible modification to a pension plan" (JA at p. 390); the adoption of sections 7522.46 and 20909(g) "were materially related to the theory and successful operation of a pension system because they restricted the pension system to providing retirement benefits based on work performed" (JA at p. 391); the Legislature did not intend to create a vested right

because the phrase "at any time" in subsection 20909(b) meant only at any time the statute was in effect (JA at pp. 397-400); and no service was provided in exchange for the right to purchase additional service credit or for the additional service credit itself. (JA at p. 400.)

The trial court entered judgment against Petitioners on June 19, 2014. (JA at pp. 428-429.)

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

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

On December 30, 2016, the court of appeal issued its opinion rejecting Petitioners' claims. First, it faulted section 20909 for failing to "unambiguously state[] an intent by the Legislature to create a vested pension right." (Slip Op. at p. 9, citing *Retired Employees Ass'n of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1190.) Without such a statement, reasoned the lower court, the Legislature's "continuing

government power" allowed it to eliminate the benefit. (Slip Op. at pp. 7-9.)

Second, accepting for the sake of argument that vested pension rights were created, the lower court held that "California law is quite clear that the Legislature may indeed modify or eliminate vested pension rights in certain cases." (Slip Op. at p. 10.) The lower court cited older decisions of this Court for the proposition that the "government entity providing the pension may make reasonable modifications and changes in the pension system … [t]o maintain the integrity of the system and carry out its beneficent purpose." (Slip Op. at p. 10, quoting *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 854-855 and citing *Wallace v. City of Fresno* (1954) 42 Cal.2d 180 and *Packer v. Board of Retirement* (1950) 35 Cal.2d 212.) But when it confronted the critical additional component of pension law—that "changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages" (Slip Op. at p. 11, quoting *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 864 [italics in the original])—the lower court fell back on *Marin Association of Public Employees, et al. v. Marin County Employees' Retirement Association, et al.* (2016) 2 Cal.App.5th 674, 704-705 (review granted, California Supreme Court, Case No. S237460) and its view that so long as pension reductions do not destroy a public employee's pension, the Legislature is not

foreclosed by the Contracts Clause from making modifications. (Slip Op. at p. 12, n. 5, and pp. 13-16.)

Third, it accepted the State's argument that any purchase of service credits under section 20909 was not deferred compensation and therefore was not a pension benefit. (Slip Op. at p 13; but see *Marzec*, *supra*, 236 Cal.App.4th at p. 905 [right to purchase service credit pursuant to section 20909 "is a benefit that was offered to some individuals who were already members of CalPERS"].) Despite the statute requiring that employees provide five years of service before being eligible to exercise their right to purchase service credit, the Court concluded that the benefit was "wholly unrelated" to service. (*Id.*)

V.

LONGSTANDING PRINCIPLES GOVERN PUBLIC EMPLOYEE PENSION RIGHTS

A. A Vested Contractual Right To Pension Benefits Accrues Upon A Public Employee's Acceptance Of Employment

Unlike other terms of public employment, which are wholly a matter of statute, pension rights are obligations protected by the Contracts Clause of the federal and state Constitutions. (U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9 ["a law impairing the obligation of contracts may not be passed"]; *United Firefighters of Los Angeles City v. City of Los Angeles* (1989) 210 Cal.App.3d 1095, 1102.) "A public employee's pension constitutes an element of compensation, and a vested contractual right to

pension benefits accrues upon acceptance of employment. Such a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity." (*Betts, supra*, 21 Cal.3d at p. 863; *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131; *Kern, supra*, 29 Cal.2d at p. 855 ["employing governmental body may not deny or impair the contingent liability [of pensions] any more than it can refuse to make the salary payments which are immediately due"].) These rights vest in the sense that they cannot be destroyed by statutory repeal—even before the benefit has been accessed or the time for retirement has arrived. (*Kern, supra*, 29 Cal.2d at pp. 855-856; *Wallace, supra,* 42 Cal.2d at p. 183.)

This follows because, from the moment an employee begins service, the pension is part of the contemplated compensation and part of the contract of employment itself. (*Kern, supra*, 29 Cal.2d at pp. 855-856; *Wallace, supra*, 42 Cal.2d at p. 183; *O'Dea, supra*, 176 Cal. at pp. 661-662.) Moreover, public employees have the "right to earn future pension benefits through continued service, on terms substantially equivalent to those" existing at the time they began working, or added at any point during their service. (*Legislature v. Eu, supra,* 54 Cal.3d at p. 528; *Sweesy v. Los Angeles County Peace Officers' Retirement Board* (1941) 17 Cal.2d 356, 361 [public employees entitled to subsequent benefit increases]; *Carman v. Alvord* (1982) 31 Cal.3d 318, 325 ["[b]y entering public service an

employee earns a vested contractual right to earn a pension on terms substantially equivalent to those then offered by the employer"].)

B. Modifications To Vested Pension Benefits Are Controlled By A Strict And Longstanding Rule

While the constitutional proscription against the destruction of vested contractual pension rights "does not absolutely prohibit their modification" (*Allen v. Board of Administration* (1983) 34 Cal.3d 114, 120), lawmakers' power to modify pension rights, once vested, is "quite limited." (*In re Retirement Cases* (2003) 110 Cal.App.4th 426, 447.) Over a series of cases from *Allen v. City of Long Beach*, *supra*, 45 Cal.2d 128 to *Legislature v. Eu, supra,* 54 Cal.3d 492, this Court developed what has become known as "the California Rule":

> 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. [Citations.] As to retired employees, the scope of continuing governmental power may be more restricted, the retiree being entitled to the fulfillment without detrimental modification of the contract which he already has performed.

(*Allen v. Board of Administration*, *supra*, 34 Cal.3d at p. 120 [disadvantageous amendments to pension plan ruled unconstitutional]; see also *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438 [amendment

substituting fixed pension for payments on a fluctuating basis invalid; increase in benefits for a narrow class of pensioners was not commensurate with detriment imposed], *Betts, supra*, 21 Cal.3d 859 [no comparable benefits were provided to offset the detriment to former State Treasurer of less generous, later-enacted method of calculating pension]; *Olson v. Cory* (1980) 27 Cal.3d 532, 541 [statute limiting cost-of-living increases for retired judges failed to provide any offsetting comparable advantages].) Importantly, "it is the advantage or disadvantage to the particular employees … by which modifications to pension plans must be measured." (*Abbott, supra*, 50 Cal.2d at p. 449.)

Thus, a modification of a vested pension benefit must pass two tests: (1) it "must bear a material relation to the theory and successful operation of a pension system;" and (2) "a disadvantage to employees, must be accompanied by comparable new advantages." (*Allen v. Board of Administration, supra,* 34 Cal.3d at p. 120.)

As discussed below, petitioner contends that the repeal of section 20909 satisfied neither test.

VI.

THE REPEAL OF SECTION 20909 VIOLATED THE VESTED RIGHTS OF EXISTING EMPLOYEES

A. The Right To Purchase Additional Service Credits Under Section 20909 Was A Pension Right

Whether section 20909 is classed as a pension right or benefit, the Contracts Clause protected existing employees' rights under it. (*Board of Retirement v. Wilson, supra* 52 Cal.App.4th at p. 1145, quoting *Valdes v. Cory* (1983) 139 Cal. App. 3d 773, 784 ["controlling principle applies to modification of any 'vested contractual pension rights.'"].) The court of appeal committed reversible error when it held that section 20909 did not create vested contractual pension rights. It reasoned that because the employee "pays the present value cost of the additional service credit" (§ 21052), "this simply is not a case where the state provided a retirement benefit to its employees in exchange for their work performance." (Slip Op. at p. 16.) As explained below, this unnecessarily narrow view that "pension benefits are 'deferred compensation that has been earned through the performance of work' not … an option to purchase nonqualifying service credit wholly unrelated to actual services provided or work performed" (Slip Op. at p. 13), caused the lower court to fail to apply California law.

Section 20909 was a component part of PERL, adopted on employees' behalf by the Legislature. And PERL's provisions "become a part of the contemplated compensation for those services and so in a sense a part of the contract of employment itself." (*O'Dea, supra,* 176 Cal. at pp. 661-662; *Int'l Ass'n of Firefighters v. City of San Diego* (1983) 34 Cal.3d 292, 302 [public pension plan part of employment "contract"].) If an employee exercised the right to purchase additional service credit, it increased the pension benefit—which the Legislature fully intended as a means to encourage employees to take leaves of absence from state service. (JA at pp. 260, 266, 271-272.) Importantly, the benefit was *directly* tied to state service: only a "member who has at least five years of credited state service" (§ 20909(b)) could exercise the option to buy additional service credit.

Courts sometimes frame pension benefits as deferred compensation. (*Kern, supra,* 29 Cal.2d at p. 853 ["a pension right is an 'integral portion of contemplated compensation'"], quoting *Dryden v. Bd. of Pension Commissioners* (1936) 6 Cal.2d 575, 579.) But the court of appeal read this too rigidly, embracing the trial court's reasoning that the law distinguished between service credit that was earned through labor and that which was purchased. (Slip Op. at p. 13.)

The court of appeal in *Bd. of Administration v. Wilson, supra*) 52 Cal.App.4th 1109 rejected a similar effort to distinguish between pension benefits and pension rights.

> Appellant does not assert any comparable new advantage exists but instead argues a comparable new advantage is required only in cases of modification of a pension benefit, because cases cited by PERS in the trial court involved modifications of pension benefits. We disagree. *Although certain cases happened to involve modification of benefits, the controlling principle applies to modification of any "vested contractual pension right*." (See *Valdes v. Cory* [(1983) 139 Cal.App.3d 773] at p. 784 ...) *Valdes* itself did not involve a modification of benefits but rather a modification in the payment of employer contributions to the fund.

(*Wilson*, 52 Cal.App.4th at p. 1145 [emphasis added].) In *Wilson*, the court held that a new statute which enacted "in arrears" funding of CalPERS' pension fund violated plan members' vested right to an actuarially sound retirement system. (*Id.* at pp. 1153-1154.)

In accord with *Wilson*, California courts have routinely protected a broad panoply of pension rights beyond service credits earned as a result of labor, such as: promised disability retirement provisions (*Frank v. Board of Administration* (1976) 56 Cal.App.3d 236, 242-244); preventing employees with being burdened with unfunded liability contributions (*Ass'n of Blue Collar Workers v. Wills* (1986) 187 Cal.App.3d 780, 792); requiring employers to adequately fund benefits (*Bellus v. City of Eureka* (1968) 69

Cal.2d 336, 350; *Teachers Retirement Bd. v. Genest* (2007) 154 Cal.App.4th 1012, 1029-1032; *Valdes v. Cory, supra,* 139 Cal.App.3d at pp. 783-789*; California Teachers Assn. v. Cory* (1984) 155 Cal.App.3d 494, 506); providing retiree healthcare benefits (*Thorning v. Hollister School District* (1992) 11 Cal.App.4th 1598, 1608-1609); and providing supplemental cost of living enhancements to original pension benefit (*Protect Our Benefits v. City and County of San Francisco* (2015) 235 Cal.App.4th 619, 622; *United Firefighters of Los Angeles City, supra,* 210 Cal.App.3d at pp. 1101-1102, 1108; *Pasadena Police Officers Ass'n v. City of Pasadena* (1983) 147 Cal.App.3d 695, 706-707). *Protect Our Benefits* which ruled that employees enjoyed vested contractual rights to a cost of living enhancement tied not to service but to investment returns epitomizes the scope of benefits protected by the vested rights doctrine. (235 Cal.App.4th at p. 622.)

California courts have even extended the rationale to prohibit the elimination of benefits in cases not involving a pension right or benefit, including: annual step increases for employees hired on a month-to-month basis (*Youngman v. Nevada Irrigation District* (1969) 70 Cal.2d 240); annual salary increases (*Olson v. Cory* 27 Cal.3d at pp. 536); longevity pay and sabbaticals (*California League of City Employees Association v. Palos Verdes Library District* (1978) 87 Cal.App.3d 135); and a five-step plan (*Ivens v. Simon* (1963) 212 Cal.App.2d 177). None of these benefits were

deferred compensation; yet because the benefits were promised when employees provided service, courts protected them against impairment.

American River Fire Protection District v. Brennan (1997) 58 Cal.App.4th 20 affirms this reasoning. There, the employer sued to take back additional service credits received at retirement by firefighters in exchange for unused sick leave balances, claiming that the exchange constituted "extra compensation" barred by the state constitution. (*Id*. at p. 28.) The court rejected the employers' claims and recognized that "the buy-out program provided an alternative that would result in increased benefits upon retirement for some firefighters. This increased benefit is payable due to their status at retirement, not as extra compensation for work already performed." (*Id*.) While *American River Fire Protection District* presented a different question, the ultimate analysis of the court confirms that additional service credits are a pension right protected by the vested rights doctrine. (*Id*. at p. 28, citing *United Firefighters of Los Angeles City supra,* 210 Cal.App.3d at p. 1105 and *Miller v. California* (1977) 18 Cal.3d 808, 815.)

The trial court further erred by concluding that the right to purchase additional service credit was merely an optional benefit which functions like an annuity. (JA at p. 392 [Order 8:6-8]—but see *American River Fire Protection District, supra,* 58 Cal.App.4th at pp. 28-29 [optional conversion of unused sick leave credits to retirement service credit].) This

attempts to separate rights under section 20909 and other service credit statutes (see, e.g., §§ 20898. 20902.5, 21032, 20133) from other parts of the pension plan. Yet CalPERS confirmed that the option and/or right to purchase is an inherent and vested part of the pension benefit. (See Section V, *supra*; (JA 229 ["Vested Rights of CalPERS Members"].) Other provisions in PERL are optional (see § 21150 *et seq*. [disability retirement], § 21070 ["buy up" to Second Tier level of benefits], § 21451 [survivor benefits]), but no less part of the pension contract. (*Int'l Ass'n of Firefighters, supra,* 34 Cal.3d at p. 302 [whether a proposed change impairs a vested right under a public pension plan depends upon how the member's rights are defined under the terms of the governing "contract"]; *Frank, supra,* 56 Cal.App.3d at pp. 242-244 [protecting promised disability retirement benefits].)

The court of appeal appeared to accept the trial court position that section 20909 provided something other than a pension right or benefit because it was purportedly "wholly unrelated to actual services provided or work performed." (Slip Op. at p. 13.) But this argument is one of form over substance. The purchase of service credits is, on a practical level, indistinguishable from deferred compensation because it actually results in a change to employees' pension formulas. If instead of repealing section 20909, the Legislature had passed a statute making all state service provided between January 1, 2013 and December 31, 2017 not count

towards retirement service credits, that argument would be defeated. Yet the effect of the repeal of section 20909 on an employee who planned to purchase five years of additional service credits is the same. In other words, the court of appeal repeated the error of the trial court by deciding the case not on the ultimate effect of the modification—the loss of up to five years of service credit—but on the means by which the right was acquired. This was a distinction without a difference since the end result was the elimination of a pension right which employees had been promised and towards which they had performed service.

B. The Passage Of Section 20909 Created A Vested Right For Employees Who Performed Services During Its Existence

1. Statutory Enactments are Valid and Enforceable Sources of Vested Property Rights

In contrast to other statutes governing public employment, "pension laws … establish contractual rights." (*Kern, supra,* 29 Cal.2d at p. 853.) Where a statute expressly creates a pension benefit, once "adopted by governing bodies, such agreements are binding and constitutionally protected." (*Olson, supra,* 27 Cal.3d at p. 536; *Valdes v. Cory, supra,* 139 Cal.App.3d at p. 787 ["The explicit language in [PERL] constitutes a contractual obligation on the part of the state as an employer …."]; *Claypool v. Wilson* (1992) 4 Cal.App.4th 646, 662 ["The contractual basis of a pension right … is the exchange of an employee's services for the pension right offered in the statute]."). Moreover, "under California law

there is a strong preference for construing government pension laws as creating contractual rights for the payment of benefits and when feasible to do so such laws should be construed as guaranteeing full payment to those entitled to its benefits …." (*Wilson, supra,* 52 Cal.App.4th at p. 1131, citing *Walsh v. Board of Administration* (1992) 4 Cal.App.4th 682, 698.)

Section 20909 established a vested contractual right for existing employees to purchase additional service credits. The benefit may have had a qualifying period of five years before it could be *exercised* (§ 20909(b)); however, *the right to access it* vested immediately upon performance of service. (*Kern, supra,* 29 Cal.2d at pp. 855-856 [vesting of pension plan occurred when it was offered]; *Betts, supra,* 21 Cal.3d at p. 863 ["vested contractual right to pension benefits accrues upon acceptance of employment"]; *O'Dea v. Cook, supra,* 176 Cal. at pp. 661-662 ["pension provisions [setting forth the benefit are] part of the contract of employment itself"].)[4]

Section 20909 was an element of the employment contract for employees who performed service before it was repealed in 2012, and because subsection 20909(b) allowed purchases "at any time prior to

[4] CalPERS recognized this and said so unambiguously: "Public employees obtain a vested right to the provisions of the applicable retirement law that exist during the course of their public employment … whether or not they have yet performed the requirements necessary to qualify for certain benefits that are part of the applicable retirement law." (JA 229 ["Vested Rights of CalPERS Members"].)

retirement," employees could reasonably rely on that expectation. (*Bellus v. City of Eureka* (1968) 69 Cal.2d 336, 352 [city "cannot escape liability for those pension payments which it has led its employees reasonably to expect"]; *Ass'n of Blue Collar Workers, supra,* 187 Cal.App.3d at p. 792 [right vested in employees is their "reasonable expectation" that the city would meet its statutory obligation to fund past liabilities].) Had the statute instead stated that the option could be revoked at any time, the Legislature could have freely exercised that reserved right. (See, e.g., *Int'l Ass'n of Firefighters, supra,* 34 Cal.3d at pp. 302-303 [right to increase contributions based on actuarial calculations provided in language of pension plan].) But whereas the Legislature retained the right to repeal the right for new employees, it could not do so for existing employees.

2. A statute Which Clearly Provides a Pension Benefit Need Not Explicitly State its Intent to Create a Vested Right

Statutory language must clearly describe the benefit. (*Valdes v. Cory, supra,* 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"].) But if the language is clear and unambiguous, there is no need for construction or resort to other evidence of legislative intent. (*Lundgren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) The court of appeal mistakenly believed that a statute containing a pension benefit must "unambiguously state[] an intent by the Legislature to create a vested

pension right." (Slip Op. at p. 9, citing *Retired Employees*, 52 Cal.4th at p. 1190.) This it mistakenly took to mean that a statute must "promise … not to modify or eliminate" the benefit. (Slip Op. at p. 9.)

Pension statutes have rarely, if ever, explicitly stated that a vested right is being created or promised not to modify or eliminate whatever is offered. Yet California courts have long held that pension benefits offered in statutes create vested rights without requiring explicit statements of intent to create a vested right. (*Betts, supra*, 21 Cal.3d at p. 863; *Eu, supra*, 54 Cal.3d at pp. 529-530; *United Firefighters of Los Angeles City, supra*, 210 Cal. App. 3d at p. 1105; *Protect Our Benefits, supra*, 235 Cal.App.4th at p. 628.) Two of this Court's most prominent vested rights decisions, *Betts, supra,* 21 Cal.3d 859 and *Olson v. Cory*, s*upra*, 27 Cal.3d 532, involved statutes which did not state that a vested right was being created nor had language prohibiting modification or elimination of the benefit. Yet this Court unhesitatingly invalidated modifications to the benefits on vested rights grounds.

Betts concerned a "fluctuating" method of pension computation in the Legislators' Retirement Law, specifically section 9359.1, subdivision (b):

> The retirement allowance for [a nonlegislative (sic) member] … is an annual amount equal to five percent (5%) of the compensation payable at the time payments of the allowance fall due, to the officer holding the office which the

> retired member last held prior to his retirement, or five percent (5%) of the highest compensation fixed for such office during the member's last term or any subsequent term prior to his retirement, whichever is greater, multiplied by [years of service credit] ....

(21 Cal.3d at p. 862.) Notwithstanding the absence of any explicit vesting language or any other promise not to modify the benefit, this Court concluded that a statutory amendment that created a "fixed" computation method could not constitutionally be applied to the plaintiff. (*Betts, supra,* 21 Cal.3d at pp. 864-868.) The fact that the statute did not itself prohibit its future amendment did not prevent the petitioner from acquiring "a vested contractual right while employed." (*Id.* at p. 867.) To the contrary, the Court concluded that, having performed services for four years under a statutory scheme that included the pre-amendment version of section 9359.1, that statute, not its amended version, "form[ed] the basis by which petitioner's reasonable pension expectations must be measured." (*Id.* at pp. 867-868; *Bellus, supra,* 69 Cal.2d at p. 350 ["general rule that pension plans be liberally construed to promote their beneficent purpose … rests on the same duty of fair dealing and obligation to protect the reasonable expectations of those whose reliance is induced"]; *Frank, supra,* 56 Cal.App.3d at p. 245 ["reasonable expectations" to disability retirement

rights "were thwarted" by subsequent amendment].)[5] It therefore applied the *Allen* rule (*see Allen v. City of Long Beach, supra)*, invalidating the statute on the ground that "changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages." (*Betts, supra*, 21 Cal.3d at pp. 864-865.)

Olson v. Cory involved a statutory amendment designed to limit cost of living increases to judges' salaries. (27 Cal.3d at pp. 534-535.) This Court concluded that the amendment violated two distinct vested rights: first, judges already serving a term of office prior to the amendment "had a vested right … to an annual increase in salary equal to the full increase in the [consumer price index]," which section 68203 had provided before it was amended (*Id*. at p. 536); and second, the amendment impaired the vested rights of retired judges by withdrawing rights under the prior version of section 68203 that had been earned while employed. (*Id*. at pp. 537-538.) "Such modification of pension benefits works to the disadvantage of judicial pensioners by reducing potential pension increases, and provides no comparable new benefit." (*Id*. at p. 538.) The protection of potential pension increases in *Olson v. Cory* resonates here because of the emphasis

[5] Individual petitioners' reliance on the future ability to purchase is also set forth in the record. (JA at p. 160 ["Petitioners knew the benefit would be there (at any point before retirement) because CalPERS represented it would."]; JA at pp. 157-158, 164-165.)

the lower court erroneously placed on the right to purchase additional service credit as an unexercised option. (Slip Op. at p. 13.)

Retired Employees did not appear to break from these precedents. It demanded higher proof of the creation of a vested right because it was being asked to imply vested rights. (52 Cal.4th at p. 1190.) The case involved a county's longstanding practice of pooling retirees' health insurance premiums with those of active employees, which reduced the cost to the former. (*Id*. at p. 1177.) No statute or other enactment provided this benefit, only a practice. When the county tried to change its practice, retirees sued asserting that they had an implied vested right to pooled healthcare premiums. (*Id*. at pp. 1177-1178.) It was only in the absence of any explicit statutory language that the Court considered whether an implied vested right could be found.

Answering in the affirmative, the Court stated a vested right is created "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]." (*Id*. at p. 1187, citing *Valdes v. Cory*, *supra*, 139 Cal. App.3d at p. 786.) It found further that a legislative intent to grant contractual rights can be implied from a statute if it contains an unambiguous element of exchange of

consideration by a private party for consideration offered by the state." (*Retired Employees, supra*, 52 Cal.4th at p. 1186.)[6]

But no implication is necessary here—the benefit was stated plainly in section 20909. Under *Betts* and *Olson v. Cory* and dozens of other pension cases[7], nothing more was required.

---

[6] *Retired Employees* relied, *inter alia*, on two pension cases, *Valdes v. Cory, supra*, 139 Cal.App.3d 773 and *California Teachers Assn. v. Cory* (1984) 155 Cal.App.3d 494, in which the Third District Court of Appeal found implied contractual obligations which constrained the Legislature's efforts to divert funds statutorily-obligated to be paid to CalPERS plans. The court did so on the strength of "unmistakable" assurances it found in the language of the governing statutes which it found showed a "commitment to permanency" of funding of "critical importance" to the "underlying contractual promise to pay the pensions." (*California Teachers Assn., supra*, 155 Cal.App.3d at pp. 506, 509 ["The legislature's clear manifestation of intent to contract does not require explicit statutory acknowledgement."])

[7] *See, e.g., Wilson, supra*, 52 Cal.App.4th at p. 1137 [invalidating legislation substituting in-arrears financing of pension system in place of actuarial-based funding]; *DeCelle v. City of Alameda* (1963) 221 Cal.App.2d 528 [modification of pension system precluding pension upon such discharge was detrimental to employee]; *United Firefighters of Los Angeles City, supra*, 210 Cal.App.3d 1095 [3% cap on pension cost of living adjustments was unconstitutional as applied to employees hired prior to enactment of charter amendment]; *Pasadena Police Officers' Association, supra*, 147 Cal.App.3d 695 [amendments substantially reducing cost of living benefits of pension plan were invalid]; *Teachers Retirement Bd. v. Genest, supra*, 154 Cal.App.4th 1012 [legislation reducing state's obligation to fund retirees' supplemental benefit maintenance account was invalidated]; *Chapin v. City Commission of Fresno* (1957) 149 Cal.App.2d 40 [ordinance changing method of computing retirement benefits invalid]; *Protect Our Benefits, supra*, 235 Cal.App.4th at pp. 619, 628-629, [invalidating charter amendment which added additional condition precedent to receipt of supplemental cost of living allowances].

C. The Modification Of Section 20909 Was Unconstitutional Because It Was Not Necessary To Preserve And Maintain The System

Modification of a vested pension benefit is reasonable only if it "bear[s] some material relation to the theory of a pension system and its successful operation…." (*Allen v. City of Long Beach*, *supra*, 45 Cal.2d at p. 130; *Wallace, supra*, 42 Cal.2d at p. 184 [reasonable modification allowed if it "maintain[s] the integrity of the system and carr[ies] out its beneficent purpose"].) Petitioners unsuccessfully challenged the amendment to section 20909 in the trial court and appellate court on the basis that it had no material relation to the theory of a pension system and its successful operation. (JA at p. 213 [points and authorities in support of petition]; Appellants' Opening Brief at pp. 16-18 and Reply Brief at p. 8.)[8]

Unlike the extensive body of case law addressing the comparable benefit prong (see *supra* at Section V and *infra* at Section VI.D), the cases interpreting the material relation prong have been relatively few. However, in three decisions this Court has set a clear precedent of rejecting claims that reducing costs, mollifying taxpayers or changing unpopular benefits establish a sufficient material relation to justify modifying pension benefits.

[8] The opinion below erred when it stated that Petitioners did not challenge the material relationship prong. (Slip Op. at p. 13.)

In *Wallace v. City of Fresno* in 1954, the Court concluded that an amendment to a city ordinance which terminated pension rights if an employee was convicted of a felony after retirement:

> … does not appear to have any material relation to the theory of the pension system or its successful operation. Rather, the change was designed to benefit the city and … to meet the objections of taxpayers who would be opposed to contributing funds for the maintenance of a pensioner who had been convicted of a felony.

(42 Cal.2d at p. 185.) The Court invalidated the amendment. (*Id*.)

In *Allen v. City of Long Beach* in 1955, the Court ruled that a charter amendment which raised employee contributions, changed a "fluctuating" benefit to a "fixed" one, and added retroactive contributions for military leave, bore no material relation to the integrity or successful operation of the pension system. (45 Cal.2d at p. 131.) The Court looked askance at the city's claim that the changes were justified to appease disgruntled new employees who did not receive earlier pension benefits. (*Id*. at p. 133.) The *Allen* court offered an important proviso: the "necessary to preserve the pension system" analysis is determined by looking at the effect on those in the pension system *at the time of the change*. (*Id*.)

Finally, in *Abbott* in 1958, this Court concluded that city charter amendments which substituted fixed pension benefits for fluctuating ones failed the material relation test. (50 Cal.2d at p. 455.) It rejected the city's claims that without the amendments "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." (*Id*.) "This plea, based on speculation only, is without merit. Rising costs alone will not excuse the city from meeting its contractual obligations, the consideration for which has already been received by it." (*Id*.)

Since *Abbott*, the most detailed analysis of the material relation prong was in *Claypool v. Wilson*, *supra*, 4 Cal.App.4th 646. Noting that case law is "sparse" (*id*. at p. 666), the court analyzed *Allen v. City of Long Beach* and *Wallace*, but not *Abbott*, and concluded:

> *Wallace* and *Allen* show that considerations external to the functioning of the pension system, such as increased taxpayer hostility to felons or jealousy of employees not covered by the system will not justify a change. The justification must relate to considerations internal to the pension system, e.g., its preservation or protection or the advancement of the ability of the employer to meet its pension obligations. Changes made to affect economies and save the employer money do "bear some material relation to the theory of a pension system and it successful operation…." (*Betts* … 21 Cal.3d at p. 864]. That is not to say that a purpose to save the employer money is sufficient justification for change. The change must be otherwise lawful and must provide comparable advantages to the employees whose contract rights are modified. We hold only that the monetary objective will not invalidate a modification which is otherwise valid.

(*Claypool*, *supra*, 4 Cal.App.4th at p. 666.)

The court's belief in the quoted text that "[c]hanges made to affect economies and save the employer money do 'bear some material relation to the theory of a pension system and it successful operation'" quotes *Betts* at page 864; however, *Betts* never reached that conclusion. Nor has this Court done so before or after *Claypool*.

In fact, the idea that monetary savings for the employer alone is a lawful ground for modification had troubled the same court in a vested rights pension case only eight years before: "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 Contracts Clause would provide no protection as all." (*California Teachers Assn. v. Cory, supra*, 155 Cal.App.3d at p. 511, quoting *United States Trust Co. v. New Jersey* (1977) 431 U.S. 1, 25-56, and also citing *Sonoma County Org. of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 307-309.) *County of Sonoma* invalidated as an impairment upon contract a state statute that declared null and void any agreement by a local agency to pay its employees a cost-of-living adjustment greater than that received by state employees. (*Id*. at pp. 304-305.) In doing so, this Court stressed that even in the limited circumstances when an impairment of contract is permitted due to fiscal exigencies, such measures are upheld only when, *inter alia*, "legislation was temporary and limited to the exigency which provoked the legislative response." (*Id*. at pp. 305-306.)

And even if it departed from this Court's decisions on material relations, *Claypool* reiterates that the modification "must provide comparable advantages to the employees whose contract rights are modified," something, as discussed in part D below, PEPRA failed to do for those deprived of rights under section 20909.

Turning to the modification of section 20909, and heeding the teachings of *Wallace*, *Allen*, and *Abbott*, it seems clear that the change was not motivated by the theory of a pension system and its successful operation.[9] The Legislature made no findings regarding the solvency of CalPERS or any other system – PEPRA was applied "to all state and local public retirement systems and to their participating employers …," *in toto*, one-size-fits-all. (§ 7522.02 ["Application"].) The Act itself offered no justification for amending pension laws. (Assem. Bill No. 340 (2011-2012 Reg. Sess.)) available at http://www.leginfo.ca.gov/pub/11-

---

[9] The only reference to the purchase of additional service credit was in AB 340:

> (5) Existing law permits members of PERS, STRS, and county, city, and district retirement systems that have adopted specified provisions, to purchase up to 5 years of nonqualified service credit by making specified contributions to the system.
>
> This bill, on and after January 1, 2013, would prohibit a public retirement system from allowing the purchase of nonqualified service credit, as described above, except as specified.

12/bill/asm/ab_0301-0350/ab_340_bill_20120912_chaptered.pdf.) The court of appeal quoted *Marin Association of Public Employees*, *supra*, 2 Cal.App.5th at pp. 704-705 for the proposition that "the catalyst for the Pension Reform Act was dire financial predictions necessitating urgent and fundamental changes to improve the solvency of various pension systems." But *Marin Association of Public Employees* cited no legislative findings of this supposed "ticking fiscal time bomb," only a Congressional Budget Office report, the 2011 Little Hoover Commission report and various journal and think tank articles. (2 Cal.App.5th at pp. 680-682.)

Prompted by Governor Brown's Twelve Point Pension Reform Plan, October 27, 2011 (see https://www.gov.ca.gov/news.php?id=17296), the only reference to section 20909 was the Governor's desire to "ban[] abusive practices like 'spiking' and 'air time.'" (*Id.*) ("Air time" is the—usually pejorative—term used (including by the trial court) to describe the purchase of additional service credit (see, e.g., JA at p. 385) and the court of appeal (Slip Op. at p. 1).) Governor Brown's post bill-signing comment that PEPRA was "the biggest rollback to public pension benefits in the history of California pensions … reducing costs by up to $55 billion in PERS and billions more in other local pension systems" (see https://www.gov.ca.gov/news.php?id=17720), only adds to the belief that the entire statutory scheme, including the modification to section 20909, was designed to mollify taxpayers and reduce costs—bases repeatedly

rejected by this Court as having no material relation to the theory of a pension system and its successful operation. (*Wallace, supra,* 42 Cal.2d at p. 185; *Allen, supra*, 45 Cal.2d at p. 133; *Abbott, supra*, 50 Cal.2d at p. 455.)

The material relation prong is a greyer area than the typical black-and-white of whether any offsetting comparable advantage was afforded; however, even accepting *Claypool's* statement that "[c]hanges made to affect economies and save the employer money" are permissible (4 Cal.App.4th at p. 666) and allowing consideration of such external factors, on this record, looking directly at the modification of section 20909 and its effect on employees in the pension system at the time of the change (*Allen, supra*, 45 Cal.2d at p. 131), no evidence supports the view that preventing employees from purchasing additional service credit—the cost of which is borne exclusively by the employee (§ 21052)—achieves economies, saves the employer money, or even avoids "spiking," especially considering that consideration by most employees through state service had already been completed or partially completed. (*Abbott, supra*, 50 Cal.2d at p. 455; *California Teachers Assn. v. Cory*, *supra,* 155 Cal.App.3d at pp. 511-512, citing *United States Trust Co., supra*, 431 U.S. 1 [applying strict scrutiny review to impairment of pension obligations by state, given its self-interest].)

The lack of any evidence or findings to justify the elimination of the right to purchase additional service credit is important. "An issue of prohibited impairment arises when the scope of the legislative impairment is not narrowly tailored to conform with an ostensible, innocent government purpose." (*California Teachers Assn. v. Cory*, *supra*, 155 Cal.App.3d at p. 511.) Nor should the Court be sympathetic to arguments that the elimination of the right to purchase additional service credit is somehow minimal: "The concept of 'minimal impairments' has no proper application as a vague license for the state to impair its own obligations so long as it is only 'a little bit.'" (*Wilson, supra,* 52 Cal.App.4th at p. 1153, quoting *California Teachers Assn. v. Cory*, *supra*, 155 Cal.App.3d at p. 511.)

D. The Repeal Of Section 20909 Was Unconstitutional Because It Was Not Accompanied By Comparable Pension Advantages To Existing Employees

As explained above in part V, decisions of this Court from *Allen v. City of Long Beach, supra* 45 Cal.2d 128 to *Legislature v. Eu*, *supra*, 54 Cal.3d 492, and appellate decisions through *Protect Our Benefits*, *supra*, 235 Cal.App.4th 619, have required that disadvantageous modifications to public employee pension benefits "must" or "should" be offset by comparative advantages. "Must" and "should" have been treated synonymously as creating a legal obligation to offset reductions in

pensions. (*Allen v. City of Long Beach, supra,* 45 Cal.2d at p. 131 [city charter amendment "substantially decreases plaintiffs' pension rights without offering any commensurate advantages,"]; *Abbott, supra*, 50 Cal.2d at p. 455 [invalidating charter amendments that reduced pension payments to pensioners previously employed]; *Betts, supra*, 21 Cal.3d at pp. 867-868; *Olson v. Cory, supra*, 27 Cal.3d at p. 541; *Eu, supra*, 54 Cal.3d at p. 529—but see *Marin Association of Public Employees, supra,* 2 Cal.App.5th 674 [determining that this Court meant "should" when it used "must" and holding that "'should' does not convey imperative obligation, no more compulsion than 'ought' […] 'should' is a 'recommendation, not … a mandate,'" and permitting retirement board to cease including certain premiums in pension calculations].)

Betts instructs about the Contracts Clause restricting legislative power. *Olson v. Cory* highlights that a statute may be constitutional to some employees but unconstitutional to others depending upon what rights existed during the employees' employment. Petitioners do not dispute the validity of repeal as applied to new employees, but contend that any reductions that are applied to existing employees violate the Contracts Clause.

The unbroken line of this Court's decisions has been supplemented over the past sixty years by many court of appeal decisions representing

virtually all the appellate districts which have uniformly understood that the comparable new advantages test is a constitutional mandate.[10]

---

[10] See, e.g., *Wilson, supra*, 52 Cal.App.4th 1109, 1137 [disadvantage to employees "must" be accompanied by comparable new advantages—invalidating legislation substituting in-arrears financing of pension system in place of actuarial-based funding]; *Frank, supra*, 56 Cal.App.3d 236 [disadvantages to employees "must" be accompanied by comparable new advantages and invalidating exclusion of industrial disability benefits for custodial employee]; *Lyon v. Flournoy* (1969) 271 Cal.App.2d 774 [reiterating "must" standard but finding that a retiree's widow was not entitled to increased calculation based upon legislator salary level that occurred only after the retiree's retirement]; *DeCelle v. City of Alameda* (1963) 221 Cal.App.2d 528 [modification of pension system precluding pension upon such discharge was detrimental to employee]; *United Firefighters of Los Angeles City, supra*, 210 Cal.App.3d 1095 [3% cap on pension cost of living adjustments was unconstitutional as applied to employees hired prior to enactment of charter amendment]; *Pasadena Police Officers' Association, supra,* 147 Cal.App.3d 695 [amendments substantially reducing cost of living benefits of pension plan were invalid, notwithstanding that they purported to be prospective only]; *Teachers Retirement Bd. v. Genest, supra,* 154 Cal.App.4th 1012 [legislation reducing state's obligation to fund retirees' supplemental benefit maintenance account was unconstitutional impairment of contract]; *Abbott v. City of San Diego* (1958) 165 Cal.App.2d 511 [benefits subsequently obtained by other employees cannot operate to offset detriments imposed on those with existing pension rights]; *Chapin v. City Commission of Fresno* (1957) 149 Cal.App.2d 40 [ordinance changing method of computing retirement benefits resulted in substantial disadvantage not accompanied by comparable new advantages invalid]; *Wisley v. City of San Diego* (1961) 188 Cal.App.2d 482 [increases in rate of employee contributions held unreasonable where not accompanied by new pension advantage]; *Ass'n of Blue Collar Workers, supra*, 187 Cal.App.3d 780 [requirement that employees pay for past, unfunded liability in fund for past service imposed detriment without corresponding advantage and unconstitutionally impaired obligation of contract]; *Amundsen v. Public Employees' Retirement System* (1973) 30 Cal. App. 3d 856 [where disadvantage under amendments was accompanied by comparable advantages of decreased employee contributions and substantially higher pension upon retirement, no unconstitutional impairment]; *Protect Our Benefits, supra,* 235 Cal.App.4th at p. 630 ["[t]his diminution in the

No comparable pension advantage was offered to existing employees when section 20909 was repealed so, under all of these authorities, the repeal of section 20909 was unconstitutional.

E. *Stare Decisis* Principles Weigh Heavily Against Overruling *Allen v. City Of Long Beach* And Its Progeny

Neither CalPERS nor the Attorney General has thus far advocated for this Court to abandon or modify its vested rights cases. In the appellate court, CalPERS took no position on the merits of the case. The Attorney General disputed only whether the right to purchase additional service credit was a pension benefit subject to vested rights protections.

But unprompted by the parties, the court of appeal offered a secondary justification for its ruling: that even if the right to purchase additional service credit was a pension benefit, the Legislature maintained the power to eliminate the right without providing any comparable advantage to adversely affected employees. (Slip Op. at pp. 12-15.) In so doing, it relied on *Marin Association of Public Empl*oyees and that panel's re-, or de-, construction of this Court's pension rulings.

Stare decisis anchors our nation's legal system, providing "a fundamental jurisprudential policy that prior applicable precedent [of an appellate court] usually must be followed [by that court] even though the

---

supplemental COLA cannot be sustained as reasonable because no comparable advantage was offered to pensioners or employees in return"].

case, if considered anew, might be decided differently by the current justices." (*Moradi–Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 296.) "[E]ven in constitutional cases, the doctrine [of stare decisis] carries such persuasive force that we have always required a departure from precedent to be supported by some "special justification." (*Dickerson v. United States* (2000) 530 U.S. 428, 443.) "[A]ny departure from the doctrine of stare decisis demands special justification," and therefore the "burden borne by the party advocating the abandonment of an established precedent is greater when the Court is asked to overrule a point of statutory construction." (*People v. Partida* (2005) 37 Cal.4th 428, 442-443, citing *People v. Latimer* (1993) 5 Cal.4th 1203, 1213, and quoting *Patterson v. McLean Credit Union* (1989) 491 U.S. 164, 172.)

This strong presumption favoring upholding precedent maintains respect for the rule of law and constrains judicial discretion. It is appropriately applied to this Court's vested rights precedents. The decisions are longstanding—at least sixty years' old—and long-settled: "society adjusts itself to their existence, and the surrounding law becomes premised upon their validity." (*South Carolina v. Gathers* (1989) 490 U.S. 805.) As described extensively in this brief, the rule has been applied

frequently by this and lower courts, most recently in 2015. (*Protect Our Benefits, supra,* 235 Cal.App.4th at p. 630.)[11]

Further, this Court's vested rights decisions have generated substantial reliance among public entities and their employees. Public employers have induced employees to stay or become employed and leave the private sector for better benefits – particularly retirement benefits. Public employees have entered public service in the belief that their pension benefits are guaranteed once they vest. (*Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991, 1000 ["more than in any other situation, courts are inclined to follow precedent when property rights have been founded and vested in accord with an existing rule"].) Public pension systems have carried out their fiduciary responsibilities, including funding estimates based on these existing laws. Respondent CalPERS published its widely-read guide to vested rights which identified service credit benefits, like those at issue in this case, as being protected by the rule. (JA at pp. 229, 234.)

---

[11] Petitioners note that the Supreme Courts of Illinois and Arizona recently restated their state law that vesting occurs at the outset of the employment relationship in invalidating statutes that diminished pension benefits for existing employees. (*In re Pension Reform Litigation,* (Ill. 2015) 118585 (Slip Op. at pp. 19-20; *Fields v. Elected Officials' Retirement Plan* (Ariz. 2014) 320 P.3d 1160, 1165-1168.)

Just as importantly, the vested rights doctrine provides a workable standard that lower courts have applied consistently. California courts understand where the doctrine protects pension benefits against modification (*Betts, supra,* 21 Cal.3d at p. 864) and, just as importantly, where it does not (*Int'l Ass'n of Firefighters, supra,* 34 Cal.3d at pp. 302-303). Compared against the strong presumption for maintaining precedent and the compelling reasons for doing so here, criticisms of the California Rule pale. Petitioner expects critics to cite the costs of public employee benefits. But in enacting PEPRA, the Legislature made no findings that the cost of allowing employees to purchase additional service credits created unsustainable costs. To the contrary, the Legislature designed the costs to be borne entirely by the employee (§ 21052).

Other critics will point to the supposed lack of flexibility. But the California Rule has not prevented terminations, layoffs, non-pensionable pay increases, pay cuts, mandatory retirement, voluntary employee pick-ups and reducing benefits for new employees—as was the central feature of PEPRA (§§ 7522.20 [non-safety], 7522.25 [safety]).

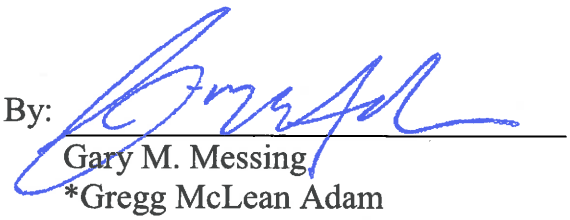
VII.
CONCLUSION

For all of the foregoing reasons, Petitioners ask this Court to reverse the judgment of the trial court and hold that the repeal of section 20909 was

unconstitutional to the extent it impaired the vested contractual rights of then-existing employees.

DATED: June 1, 2017

MESSING ADAM & JASMINE LLP

By: 

Gary M. Messing
*Gregg McLean Adam
Jason H Jasmine
Attorneys for Petitioners and Appellants CAL FIRE Local 2881, *et al.*

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 10,026 words.

DATED: June 1, 2017

MESSING ADAM & JASMINE LLP

By: _____

Gary M. Messing
Gregg McLean Adam
Jason H Jasmine
Attorneys for Petitioners and Appellants CAL FIRE Local 2881, *et al.*

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 June 1, 2017, I served true copies of the following document(s) described as **OPENING BRIEF ON THE MERITS** on the interested parties in this action as follows:

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*

BY FEDEX: I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

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

Executed on June 1, 2017, at San Francisco, California.

Janine Oliker

00035219-2