

Supreme Court Case No. S239958

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CAL FIRE LOCAL 2881, et al.

Petitioners and Appellants,

v.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
(CalPERS),

Defendant and Respondent,

and

THE STATE OF CALIFORNIA,

Intervener and Respondent.

Appeal from the Court of Appeal, First Appellate District, Division Three
Civil Case No. A142793
Alameda County Superior Court Case No. RG12661622
The Honorable Evelio M. Grillo, Presiding Judge

**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF
AND BRIEF OF LOS ANGELES COUNTY EMPLOYEES
RETIREMENT ASSOCIATION IN SUPPORT OF
NEITHER PARTY**

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**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF
OF LOS ANGELES COUNTY EMPLOYEES RETIREMENT
ASSOCIATION IN SUPPORT OF NEITHER PARTY**

Pursuant to Rule 8.520(f), California Rules of Court, Los Angeles County Employees Retirement Association (“LACERA”) requests permission to file the attached amicus curiae brief in this case, *Cal Fire Local 2881, et al. v. California Public Employees’ Retirement System* (“CalPERS”), Supreme Court Case No. S239958.

INTEREST OF APPLICANT

Pursuant to the County Employees Retirement Law of 1937, Government Code § 31450 et seq. (CERL), LACERA administers defined retirement plan benefits for the employees of Los Angeles County and outside districts. LACERA is an entity that is separate and distinct from the County (*Traub v. Board of Retirement of the Los Angeles County Employees Retirement Assn.* (1983) 34 Cal.3d 793, 798-799) and does not set the benefits—that is done by the governing bodies of the County and districts. The three primary duties of LACERA are: 1) fiduciary responsibility for investments of the retirement funds, 2) setting employer contributions, and 3) providing member services to more than 165,000 members, including close to 62,000 benefit recipients. LACERA’s core mission is to produce, protect, and provide the promised benefits.

The California Constitution gives public pension trustees plenary power over administration of the system and confirms that a “retirement board’s duty to its participants and their beneficiaries shall take precedence over any other duty.” (Cal. Const., art. XVI, § 17(b).) Article XVI, section 17(e) gives public retirement boards “the sole and exclusive power

to provide for actuarial services in order to assure the competency of the assets” of the system. CERL mandates that the retirement Board set contribution rates of members and plan sponsors based on an actuarially reasonable funding methodology and schedule. (Gov. Code, § 31453.)

In the course of performing these duties, LACERA manages assets that, as of June 20, 2017, totaled \$52.7 billion. That amount represents the assets available for future payments to retirees and their beneficiaries. The primary sources that finance the promised benefits LACERA provides are investment income and the collection of member (employee) and plan sponsors (employers) retirement contributions.

As one of the largest public employee defined benefits administrators in the state, LACERA has a direct interest in legal issues that impact the administration of retirement benefits. Most specifically, LACERA requests permission to file an amicus curiae brief in support of neither party, but simply to provide the Court with insight concerning administrative and fund management issues that will be directly affected by the issues the Court addresses in this case.

Specifically, LACERA will explain to the Court that if it determines that the option to purchase airtime credit is not a vested pension right, it should not address the second issue presented, i.e., whether assuming such a right was vested, whether withdrawal of this right through the enactment of the Public Employees’ Pension Reform Act of 2013 (“PEPRA,” Gov. Code, §§ 7522.46, 20909, subd. (g)), violates the contracts clauses of the federal and state Constitutions. The latter issue requires the Court to address the scope of the “California Rule,” as articulated in its decisions in *Allen v. City of Long Beach* (1955) 45 Cal.2d 128 (“*Allen P*”) and *Allen v.*

Public Employees' Retirement System (1983) 34 Cal.3d 114 (“*Allen II*”), i.e., whether impairment of a vested pension right must be offset by comparable new advantages. Forbearance by the Court in such circumstances is dictated by the accepted principle that courts should not decide issues that are not essential to resolution of a case, particularly constitutional issues. In addition, the Court has before it a more appropriate vehicle to address the interplay between the California Rule and PEPR in *Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.* (2016) 2 Cal.App.5th 674 (“*Marin*”), review granted Nov. 22, 2016, S237460.

Finally, in the event the Court determines that the option to purchase airtime credit is a vested pension benefit, LACERA will explain why the California Rule should be retained and the impact that abandonment of the Rule would have on defined benefit plan administrators such as LACERA.

CONCLUSION

For all the foregoing reasons, LACERA respectfully requests permission to file the attached amicus curiae brief.

Respectfully submitted,

DATED: February 21, 2018

GREINES, MARTIN, STEIN & RICHLAND LLP
Timothy T. Coates

BY: /s/ Timothy T. Coates
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CERTIFICATE OF AUTHORSHIP

In accordance with Rule 8.520(f)(4), the undersigned hereby states that the proposed amicus brief was authored solely by counsel for Los Angeles County Employees Retirement Association and no person or entity outside of Los Angeles County Employees Retirement Association made any monetary contributions to assist its preparation.

DATED: February 21, 2018

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**BRIEF OF AMICUS CURIAE LOS ANGELES COUNTY
EMPLOYEES RETIREMENT ASSOCIATION (“LACERA”) IN
SUPPORT OF NEITHER PARTY**

INTRODUCTION

This case presents two issues for review by this Court. First, whether the option to purchase airtime constitutes a vested contract right and second, assuming it is a vested contract right, whether the elimination of that benefit violates the contracts clauses of the state and federal Constitutions. In the event the Court determines that the option to purchase airtime is not a vested contract right, the case can and should be resolved without addressing the second issue. This approach is consistent with basic principles of judicial review and especially appropriate where, as here, the Court currently has on its docket a case that directly presents the issue for review.

Should the Court address the second issue in this case, either because it concludes that the option to purchase airtime is a vested pension benefit or as an exercise of the Court’s discretion, LACERA urges the Court to retain the California Rule which allows for reasonable adjustment of pension benefits in a stable fashion that avoids volatility in calculating and planning for payment of pension benefits for organizations such as LACERA.

ARGUMENT

I. IF THE COURT DETERMINES THAT THE OPTION TO PURCHASE AIRTIME IS NOT A VESTED CONTRACT RIGHT, IT SHOULD NOT ADDRESS THE CIRCUMSTANCES IN WHICH IMPAIRMENT OF A VESTED PENSION RIGHT VIOLATES THE CONTRACTS CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS, AND MOST SPECIFICALLY, THE SCOPE OF THE CALIFORNIA RULE AS ARTICULATED IN THIS COURT’S DECISIONS IN *ALLEN I* AND *ALLEN II*.

A. In The Event The Court Determines That The Option To Purchase Airtime Is Not A Vested Contract Right, Basic Principles Of Judicial Review Dictate That The Court Not Reach The Second Issue Presented, As It Is Unnecessary For Resolution Of The Case.

One of the fundamental principles of judicial review is that appellate courts not decide issues that are not strictly necessary to resolution of the case as between the parties. Thus, this Court has repeatedly refused to address issues where it was unnecessary to the ultimate disposition of the case. (See, e.g., *Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.* (2017) 3 Cal.5th 1118, 1138 [“[W]e need not decide which test applies because, as explained below, the statute is not facially invalid under either test.”]; *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1251, fn. 3 [“Because we hold that, as a matter of statutory interpretation, the payment of property taxes is not required under section 526a, we need not reach

Weatherford’s argument that construing the statute to apply only to property owners violates equal protection.”]; *Webb v. Special Elec. Co., Inc.* (2016) 63 Cal.4th 167, 179 [“Because substantial evidence supports the jury’s verdict, and Special Electric did not have a complete defense as a matter of law, the entry of JNOV was unjustified. In light of this conclusion, we need not reach plaintiffs’ claims of procedural error.”]; *Center for Biological Diversity v. California Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 221, fn. 5 [because court determined that state agency’s approval of an environmental impact report (EIR) was defective based on use of an improper model, it need not decide whether a recently enacted regulatory guideline applied to the EIR].)

This principle is applied with particular rigor where the resolution of a particular issue will avoid the Court having to address an issue of constitutional law. As this Court has observed, “[W]e do not reach constitutional questions unless absolutely required to do so to dispose of the matter before us.” (*People v. Williams* (1976) 16 Cal.3d 663, 667; *Palermo v. Stockton Theaters, Inc.* (1948) 32 Cal.2d 53, 66 [“It seems to us that good judicial practice, as well as legal precedent, requires that we dispose of the case on the now thoroughly established grounds which are set forth hereinabove rather than to gratuitously make opportunity for either reaching or declaring views on the suggested constitutional question.”].)

Here, should the Court determine that the option to purchase airtime is not a vested pension right, these basic principles dictate that the Court not address the second question presented, which concerns the test for determining whether or not a vested pension right has been impaired so as

to run afoul of the contracts clauses of the state and federal Constitutions and, more specifically, the nature and extent of the California Rule as applied to the question. Put simply, if the Court does not have to reach this complex constitutional issue in this case, it should not do so. Moreover, as we explain, this is particularly true where, as here, the issue is presented in another case on the Court's docket.

B. The *Marin* Case Presents An Appropriate Vehicle To Address The Nature And Extent Of The California Rule.

There is already a case before this Court which directly addresses application of this Court's decisions in *Allen I* and *Allen II* to a reduction of what is contended to be vested pension rights following the Legislature's enactment of PEPRA in 2013. As noted, here the question is whether the option to purchase airtime constitutes a vested right and if it does, whether under *Allen I* and *Allen II*, any impairment of that right must be offset by comparable new advantages in order to avoid running afoul of the contracts clauses of the state and federal Constitutions.

Prior to granting review in this case, this Court granted review in *Marin, supra*, 2 Cal.App.5th 674. In *Marin*, Division 2 of the First Appellate District, affirmed an order sustaining a demurrer without leave to amend in a constitutional challenge to PEPRA and related legislation. The *Marin* court rejected the contention that in *Allen I* and *Allen II*, this Court held that for a pension modification to be sustained as reasonable (and hence not run afoul of the contracts clauses of the state and federal Constitutions), any detrimental change must be accompanied by a comparable new advantage. (2 Cal.App.5th at pp. 694-700.) Instead, the

court stated that in *Allen II*, this Court had suggested that vested rights jurisprudence generally requires only that detrimental pension modifications *should* (i.e., not *must*) be accompanied by comparative newer advantages, but that it was not a requirement. In short, ““a recommendation, not . . . a mandate.”” (2 Cal.App.5th at p. 699.) After granting review, this Court stayed briefing in *Marin* pending disposition of *Alameda County Deputy Sheriff’s Assn. v. Alameda County Employees’ Retirement Assn.* (2018) 19 Cal.App.5th 61, 227 Cal.Rptr.3d 787 (“*Alameda*”).

On January 8, 2018, Division Four of the First Appellate District issued its decision in *Alameda*. As a result, presumably briefing can now commence in the *Marin* case.^{1/} That briefing will directly address the constitutional claim presented here concerning the California Rule, specifically, whether, for assessing impairment of contract rights for purposes of the contracts clause of the state and federal Constitutions, any reduction of a pension benefit must be offset by a comparable benefit. Because that issue is squarely presented in *Marin*, there is no reason for the

^{1/} The *Alameda* court agreed with the *Marin* court’s view of *Allen I* and *Allen II* as not *requiring* an offsetting benefit to be conferred on an employee when a vested pension right is impaired. (227 Cal.Rptr.3d at p. 830.) Instead, “when no comparative new advantages are given, the corresponding burden to justify any changes with respect to legacy members will be substantive.” (*Id.* at p. 832.) However, the *Alameda* court departed from *Marin* in holding that the reasonableness of any of the modifications at issue had to be judged independently as to each of the three county systems, and more specifically, that a lower court had to assess the impact of the reduction of benefits on the legacy members in question, as well as the impact of these changes on each system. (*Ibid.*) The court thus remanded for additional, likely protracted, proceedings. (*Id.* at p. 837.)

Court to address the issue here should it conclude that the option to purchase airtime is not a vested pension right.

II. IF THE COURT ADDRESSES THE CONSTITUTIONAL CLAIM PRESENTED IN THIS CASE, IT SHOULD REAFFIRM THE CALIFORNIA RULE, WHICH ALLOWS REASONABLE ADJUSTMENT OF VESTED PENSION BENEFITS WHILE AVOIDING VOLATILE DISRUPTIONS WHICH MAKE IT DIFFICULT FOR DEFINED BENEFIT ADMINISTRATORS TO PERFORM THEIR CORE FUNCTIONS.

For over 60 years, public employee pension benefits have been governed by the California Rule, initially articulated by this Court in *Allen I* and further refined in *Allen II*. Specifically, in *Allen I*, the court noted that vested pension benefits could only be reduced consistent with the contracts clauses of the state and federal Constitutions, to the extent the alteration bears “some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.” (45 Cal.2d at p. 131.)

In *Allen II*, the court stated that principle in even stronger terms, noting:

A constitutional bar against the destruction of such vested contractual pension rights, however, does not absolutely prohibit their modification. With respect to active employees, we have held that 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 disadvantage to employees, *must* be accompanied by comparable new advantages.

(34 Cal.3d at p. 120, emphasis added.)

Respondents here seek to overturn the California Rule, contending that reduction of benefits under PEPRA would not require that some offsetting advantage be conferred on employees in order to avoid running afoul of the contracts clauses of the state and federal Constitutions. Yet, as a plan administrator with broad responsibilities to manage pension assets, set contribution rates and apprise members of the nature and extent of the benefits and funds to secure their payment, LACERA submits that the stability provided by the California Rule counsels against its rejection.

As indicated in this case, in the *Marin* case, and in the *Alameda* case, the California Rule is regarded as an impediment to significant downward adjustments to the pension benefits of active employees. The contention is, that by sidestepping the rule, it would be easier to make substantial reduction of pension benefits. However, such ready reductions to pension benefits will have a direct adverse impact on the manner in which LACERA and other organizations that administer defined benefit plans perform their core functions.

First, the California Constitution provides that “the retirement board of a public pension or retirement system shall have plenary authority and fiduciary responsibility for investment of moneys and administration of the system” and shall have the sole and exclusive fiduciary responsibility over the assets of the public pension or retirement system. (Cal. Const., art. XVI, § 17.) If the promised benefit is easily modified it creates havoc on retirement systems that are responsible for investing to pay a defined

benefit in the future. In other words, if the “promised” benefit is constantly fluctuating it makes it very difficult for retirement boards to set forth investment strategies to pay benefits.

Aside from investment income, the primary source of those benefits consists of retirement contributions by member employees and employers. LACERA is funded on an actuarial basis. As a result, determinations of contribution rates relate to determination of benefits. Government Code § 31453 set forth the Board’s authority to perform actuarial valuations in order to determine what the County’s yearly contribution rate to the pension fund will be. Sound financial planning requires some degree of certainty as to what contributions will be on an ongoing basis. To the extent that pension benefits may be frequently adjusted, this creates volatility that makes it even more difficult to engage in the sort of long-term financial planning that allows LACERA and other organizations that administer defined retirement plans to assure that there are adequate assets to meet projected needs.

Second, LACERA has a fiduciary duty to communicate to its members concerning the nature and extent of benefits, as well as factors that may impact those benefits. (*Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374, 392-394.) If the nature and amount of pension benefits effectively becomes a “moving target” due to the ability of local entities to constantly adjust them downward, it makes it extremely difficult for LACERA and other plan administrators to fulfill this duty, given an ever-shifting landscape of what benefits may be provided.

Finally, the litigation that is inevitably spawned by the downward adjustment of pension benefits necessarily creates uncertainty that directly impacts both short-term and long-term financial planning by plan administrators. For example, in this case, the *Marin* case, and the *Alameda* case, the propriety of the benefit adjustment has been in litigation for almost five years, which necessarily makes it extremely difficult to determine precisely what the ultimate defined benefit will be for the affected employees, thus greatly complicating, if not making impossible, the plan administrator's task of projecting what, if any, payments will need to be made, and ensuring sufficient assets to pay the benefits. Given that elimination of the California Rule will likely spawn broader attempts to reduce pension benefits across the state, with each adjustment spawning its own set of litigation, uncertainty in plan administration will soon become a state-wide concern.^{2/}

The California Rule does not bar reduction of pension benefits when the reduction is both reasonable and necessary, and its requirement that some comparable benefit be provided requires that any adjustment be made only after careful consideration. Abandonment of this long-standing rule in favor of an approach that allows frequent and substantial reduction in benefits, ultimately creates uncertainty in the nature and extent of benefits, which makes infinitely more difficult, the long-term planning and clear

^{2/} As noted, in *Alameda*, the Court of Appeal concluded that the reasonableness of the pension adjustment had to be assessed not simply on a system-by-system basis, but also with an eye towards the particular reduction as to the particular employee, which underscores the fact that such proceedings will likely be lengthy and protracted, thus increasing the duration of uncertainty in determining what final benefits will be.

communication with members that plan administrators must engage in while fulfilling their fiduciary duties to their members. For this reason, LACERA respectfully submits that the Court should not abandon the California Rule.

CONCLUSION

For the foregoing reasons, amicus curiae Los Angeles County Employees Retirement Association respectfully requests that should the Court conclude that the option to purchase airtime is not a vested right, that it decline to address the second issue presented in this case, and that should it address the contracts clause issue, that it preserve the California Rule.

Respectfully submitted,

DATED: February 21, 2018

GREINES, MARTIN, STEIN & RICHLAND LLP
Timothy T. Coates

BY: /s/ Timothy T. Coates
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CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies that pursuant to rules 8.204(c)(1) and 8.486(a)(6) of the California Rules of Court, the **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF LOS ANGELES COUNTY EMPLOYEES RETIREMENT ASSOCIATION IN SUPPORT OF NEITHER PARTY** contains _____ words, not including the tables of contents and authorities, the caption page, the verification page, signature blocks, or this certification page.

DATED: February 21, 2018

/s/ Timothy T. Coates
Timothy T. Coates

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On February 21, 2018, I hereby certify that I electronically filed the foregoing **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF LOS ANGELES COUNTY EMPLOYEES RETIREMENT ASSOCIATION IN SUPPORT OF NEITHER PARTY** through the Court’s electronic filing system, TrueFiling.

I certify that participants in the case who are registered TrueFiling users will be served by the electronic filing system pursuant to California Rules of Court, rule 8.70:

***** See Attached Service List *****

I further certify that participants in this case who are not registered TrueFiling users are served by mailing the foregoing document by First-Class Mail, postage prepaid, to the following non-TrueFiling participant(s):

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[Case No. A142793]

The Honorable Evelio Martin Grillo
Alameda County Superior Court - Main
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[Case No. RG12661622]

Executed on February 21, 2018 at Los Angeles, California.

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CAL FIRE Local 2881 v. California Public Employees' Retirement System (State of California)

California Supreme Court Case Number S239958

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