

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.

Case No. S239958

First Appellate District Division Three, Case No. A142793
Alameda County Superior Court, Case No. RG12661622
The Honorable Evelio Martin Grillo, Presiding Judge

**INTERVENER AND RESPONDENT STATE OF CALIFORNIA'S
SUPPLEMENTAL BRIEF PURSUANT TO RULE 8.520(d)**

PETER A. KRAUSE
Legal Affairs Secretary
*REI R. ONISHI
Deputy Legal Affairs Secretary
State Bar No. 283946
Office of Governor
Edmund G. Brown Jr.
State Capitol, Suite 1173
Sacramento, CA 95814
(916) 445-0873
Rei.Onishi@gov.ca.gov
*Attorneys for Intervener and
Respondent State of California*

Pursuant to rule 8.520, subdivision (d), of the California Rules of Court, Intervenor and Respondent State of California respectfully submits this supplemental brief to call attention to new appellate authority that was not available in time to be included in the State's briefing on the merits.

In *Hipsher v. Los Angeles County Employees Retirement Association* (2018) 24 Cal.App.5th 740, review granted September 12, 2018 (S250244), the Second District Court of Appeal rejected the inflexible "California Rule" proposed here for adoption by Petitioners Cal Fire Local 2881 and several of its members (together, the Union). In doing so, the court joined the Court of Appeal here, as well as two additional panels of the First District Court of Appeal, in affirming the State's position that, to be constitutional, "a modification of vested pension rights need not invariably be accompanied by comparative new advantages." (*Hipsher, supra*, 24 Cal.App.5th at p. 754; *Alameda County Deputy Sheriffs' Association v. Alameda County Employees' Retirement Assn.* (2018) 19 Cal.App.5th 61, 121, review granted March 28, 2018 (S247095); *Cal Fire Local 2881 v. California Public Employees' Retirement System* (2016) 7 Cal.App.5th 115, 130-131, review granted April 12, 2017 (S239958); *Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.* (2016) 2 Cal.App.5th 674, 697-699, review granted November 22, 2016 (S237460); see also Answer Br. 35-42.)

Hipsher further analyzed the language specifically relied upon by the Union from *Allen v. Board of Administration* (1983) 34 Cal.3d 114, 131 (Reply Br. 24-27), and concluded that, contrary to what the Union argues, "the term 'must' permeating the *Allen* opinion was not intended to be given the literal and inflexible meaning attributed to it [by petitioner]." (*Hipsher, supra*, 24 Cal.App.5th at p. 754, quoting *Marin, supra*, 2 Cal.App.5th at p. 699.)

Finally, *Hipsher* underscores the “anomalous” results that the Union’s inflexible logic would produce here. (*Hipsher, supra*, 24 Cal.App.5th at p. 754.) The petitioner in *Hipsher* argued that a new law requiring the forfeiture of service credit for periods when a public employee was committing job-related felonies was unconstitutional under the California Rule, because the statute modified vested pension rights but failed to offer offsetting comparable new advantages. (*Id.* at p. 753.) In response, the *Hipsher* court pointed out the “anomalous” outcome that would result from following the logic of the Union’s California Rule: public employees who had abused their positions and the public’s trust could only be subject to limited forfeitures of service credit if the Legislature “reward[ed]” them with comparative new advantages. (*Id.* at p. 754.)

Similarly, if the Union’s position were adopted here, the State would be forced to implement one of two options, either of which would result in the kind of “anomalous” outcome that the *Hipsher* court identified. Either re-establish an unworkable airtime scheme that undermines the theory of a pension system (JA 392); exacerbates serious shortages of firefighters, school staff, and correctional staff (JA 314-315, 393); has a well-documented history of incurring *unfunded* employer liability (directly contrary to the Legislature’s intent) (JA 316-321); and would necessarily continue to incur unfunded liabilities because nobody can accurately project at any single point in time the amount of contributions actually needed to cover the true “increase in employer liability” of an individual’s airtime purchase (Gov. Code, § 21052; Answer Br. 51-52). Or, provide state employees with a “new advantage” that is somehow “comparable” to the

option to purchase fictional service credit and obtain unwarranted windfall pension benefits.¹

However, neither the U.S. Constitution nor the California Constitution *requires* the State to mismanage its affairs and continue a broken program for decades, even after the State has concluded that the program is severely (if not fatally) flawed and cannot be implemented as it had originally intended. (See, e.g., *Allen v. Board of Administration*, *supra*, 34 Cal.3d at p. 120 [“Constitutional decisions have never given a law which imposes unforeseen advantages or burdens on a contracting party constitutional immunity against change,” quoting *City of El Paso v. Simmons* (1965) 379 U.S. 497, 515]; see also *id.* at 125 [“equity and financial responsibility strongly counsel[] against” allowing employees to receive pensions “far outstripping any reasonable expectations” and “dwarfing” what they have contributed, because it “require[s] correspondingly excessive appropriations of general tax funds to maintain the retirement system’s fiscal integrity”].)

The Court of Appeal properly upheld the Legislature’s decision to protect the integrity of public pension systems.

Dated: November 20, 2018

PETER A. KRAUSE
Legal Affairs Secretary



REI R. ONISHI
Deputy Legal Affairs Secretary
*Attorneys for Intervener and
Respondent State of California*

¹ Significantly, the Union has never explained what such a comparable new advantage would look like. (Answer Br. 54.)

CERTIFICATE OF COMPLIANCE

I certify that the attached Intervener and Respondent State of California's Supplemental Brief uses a 13-point Times New Roman font and contains 743 words.

Dated: November 20, 2018

PETER A. KRAUSE
Legal Affairs Secretary

A handwritten signature in cursive script that reads "Rei Onishi".

REI R. ONISHI
Deputy Legal Affairs Secretary
*Attorneys for Intervener and
Respondent State of California*

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Cal Fire Local 2881 v. California Public Employees' Retirement System**
No.: **S239958**

I declare: I am employed in the Office of Governor Edmund G. Brown Jr. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of Governor Brown for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of Governor Brown is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On November 20, 2018, I served the attached **INTERVENER AND RESPONDENT STATE OF CALIFORNIA'S SUPPLEMENTAL BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of Governor Brown at State Capitol, CA 95814, addressed as follows:

Gary M. Messing
Gregg McLean Adam
Messing Adam & Jasmine LLP
235 Montgomery Street, Suite 828
San Francisco, CA 94104
Gregg@majlabor.com
VIA OVERNIGHT MAIL & EMAIL

Preet Kaur
CalPERS Legal Office
P.O. Box 942707
Sacramento, CA 94229-2707
Preet.Kaur@calpers.ca.gov
VIA OVERNIGHT MAIL & EMAIL

Nelson R. Richards
California Attorney General's Office
2550 Mariposa Mall, Room 5090
Fresno, CA 93721

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

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 20, 2018, in Sacramento California.

Alexander Ritchie

Declarant



Signature