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

SUPPLEMENTAL BRIEF OF PETITIONERS AND APPELLANTS

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
Yonatan L. Moskowitz, Bar No. 306717
yonatan@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.

Petitioners respectfully submit this Supplemental Brief in compliance with Rule 8.520, subdivision (d) in response to the Supplemental Brief filed by the State on November 20, 2018.

The State's Supplemental Brief oversells the import of *Hipsher v. Los Angeles County Employees Retirement Association* (2018) 24 Cal.App.5th 740, review granted September 12, 2018 (S250244) (Willhite, J., concurring). The brief breaks no new ground because *Hipsher* itself offers no new analysis of the questions presented in this case, so dependent is it on the analysis of *Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.* (2016) 2 Cal.App.5th 674, review granted November 22, 2016 (S237460), a case which has been amply dissected by the parties and their amici.

Hipsher unapologetically casts its lot with the revisionist view of this Court's comparable new advantages rule first fashioned in *Marin Association of Public Employees* and embraced in the opinion below in this case and, to a lesser degree, in *Alameda County Deputy Sheriffs' Association v. Alameda County Employees' Retirement Assn.* (2018) 19 Cal.App.5th 61, review granted March 28, 2018 (S247095).[1] Yet in doing

[1] For an opinion that professed to "not disagree with …[m]uch of [*Marin Association of Public Employees*'] vested rights analysis," *Alameda County Deputy Sheriffs' Association v. Alameda County Employees' Retirement Assn.* drew sharp distinctions with *Marin Association of Public Employees* in four key areas and ultimately "decline[d] to follow [*Marin Association of Public Employees*]." (19 Cal.App.5th at pp. 120-122 because *Marin*

so, *Hipsher* puts itself directly at odds with the reading of the comparable new advantages rule offered by every California appellate court to consider it between 1955 and 2016, including this Court on at least six occasions. (Petitioners' Opening Br., at pp. 21-22; 45-47.)

And far from "further analyzing the language specifically relied upon by the Union from *Allen v. Board of Administration*" (State Supp. Br. of Nov. 20, 2018, at p. 2), *Hipsher* presents nothing original on this point. Instead, over a mere four sentences, the court adopts, wholesale and uncritically, *Marin Association of Public Employees*' view that this Court's comparable new advantages rule is discretionary not mandatory (24 Cal.App.5th at pp. 753-754) – a reasoning forcefully dispelled by Petitioners and their amici. (See Petitioners' Opening Br., at pp. 45–47; Petitioners' Reply Br., at pp. 24–27; Petitioners' Consolidated Ans. to Amici Br., at pp. 28-32; Amicus California State Teachers' Retirement System, at pp. 9–21; Amicus Orange County Attorneys Association, at pp. 16–24; Amicus Los Angeles Police Protective League, at pp. 10–17; Amicus Amalgamated Transit Union Local 1225, at pp. 18–21; Amicus

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Association of Public Employees: (1) failed to determine what the changes caused by the new law were; (2) "improperly relied on its general sense of what a reasonable pension should be"; (3) "too quickly dismissed what could amount to significant financial disadvantages to legacy members as 'quite modest'; and (4) wrongly focused on generalized concerns about pension costs instead of the impact of the statutory changes to the County retirement association.)

Californians for Retirement Security, at pp. 12–17; Amicus American Federation of State, County and Municipal Employees, at pp. 25–27; and Amicus Deputy Sheriffs' Association of Alameda County, at pp. 17–20.)

Freed in its own mind from any obligation to follow *stare decisis*, *Hipsher* breaks from this Court's opinion in *Wallace v. City of Fresno* (1954) 42 Cal.2d 180 on the basis that pension rights of active employees may be freely diminished, buttressing its reasoning by citing a 1941 court of appeal case which pre-dates *Kern v. City of Long Beach* (1947) 29 Cal.2d 848. (*Hipsher*, *supra*, 24 Cal.App.5th at pp. 754-755, citing *MacIntyre v. Retirement Board of City and County of San Francisco* (1941) 42 Cal.App.2d 734.) Citing *Betts v. Board of Administration* (1978) 21 Cal.3d 859, *Hipsher* presents Mr. Hipsher's felony conviction as a "condition subsequent" that "defeats" his pension rights. (24 Cal.App.5th at p. 752.) But that inverts the proper analysis: the test is not whether the felony conviction is grounds for forfeiture under the new statute (Gov. Code § 7522.72) but whether the new statute was a reasonable modification of the vested pension rights (which the court conceded existed (24 Cal.App.5th at p. 752 ["Here it is clear that Hipsher had a vested contractual right to certain retirement benefits"])) of a pre-Public Employees' Pension Reform Act ("PEPRA") (Assem. Bill No. 340 (2011-2012 Reg. Sess.) employee such as Mr. Hipsher. (*Wallace, supra,* 42 Cal.2d at p. 185.) Whatever the wisdom of the new felony forfeiture rule that was

under review in *Hipsher*, the Legislature had not previously adopted it before the passage of PEPRA. And to the extent the Legislature failed to include the condition subsequent that was later added, it cannot force on employees a disadvantageous new condition without comparable new advantages. (See *Allen v. Bd. of Admin.* (1983) 34 Cal.3d 114, 120; *Wallace, supra,* 42 Cal.2d at p. 185.)

The State uses *Hipsher* as a proxy to reprise its arguments to overturn 60 years of constitutional jurisprudence, moralizing on the basis of the unlawful acts of one individual. But the State's supporting c either incorrect,[2] or they are points Petitioners have rebutted before. (E.g., airtime is not anomalous [Petitioners' pp. 27-28; Reply Br. at pp. 2-4; Petitioners' Consolidated Ans. to Amici Br., at pp. 24-27, 39-41]; the comparable new advantages rule is mandatory [Petitioners', at pp. 44-50; Opening Br.

[2] The State's cites to the record on page way support its conclusion that the benefits at issue in this case created an "unworkable liability" (*ibid.*, citing JA 392), or that the short (*ibid.*, citing JA 314-315, 392). And although JA 316-321 do show that the benefit at issue was originally insufficiently funded, that is an error in administration and not a basis to nullify the original statutory benefit. Moreover, the concerns expressed over the difficulty to accurately project the costs of the benefit are undercut by the fact that there is no discernable difference between the purchase of these service credits and military service credits (Gov. Code §§ 21020, 21024, 21032, 21033, Petitioners' at p. 32), for example, or full service credit for union leave (Gov. Code § 3558.8, see Petitioners' October Br. at pp. 2-3). All actuarial estimates are just that – estimates – based on many changing factors (average age of mortality, length of service, increases in compensation, etc.).