MESSING ADAM & JASMINE

THE LABOR BEAT

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On the Home Front

IT'S A BIRD, IT'S A PLANE, IT'S OUR SUPER LAWYERS!

Different year, same story: We are pleased to report that Messing Adam & Jasmine attorneys were honored — again — on the Northern California Super Lawyers list published in July. **Gary Messing** celebrates sixteen years on the list, **Gregg Adam** seven years, and **Jason Jasmine** now has five Super Lawyer years after six years as a Rising Star. **Jim Henderson** has earned the distinction ten times.

After a rigorous selection process including peer nominations and evaluations combined with independent research – taking peer recognition and professional achievement into consideration – approximately 5% of lawyers in Northern California are selected as Super Lawyers. Rising Stars involves a similar process but limits recipients to those attorneys who are under 40 years of age and/or have been practicing for less than 10 years. No more than 2.5% of the lawyers in the Northern California are selected for this honor.

Gary, Gregg, Jason, and Jim (whom we affectionately call Hender) are named to this prestigious list year after year not only because they are top-notch lawyers, but because their excellence is recognized by their peers. We at MAJ continue to be proud of them and honored to be a part of the team.

SPEAKING OF HENDER ...

Please join us in congratulating **Jim Henderson** on his recent retirement. A highly experienced litigator and a mentor to newer attorneys, Jim spent well over 40 years at MAJ and its predecessor firm, Carroll, Burdick & McDonough. While we are sad to see him go, we wish him the absolute best in his retirement.

Fighting The Good Fight

CAL FIRE LOCAL 2881 MITIGATES PAY REDUCTION

In May 2020, Governor Newsom declared that he would impose 10% pay cuts on all state employee groups unless unions negotiated how equivalent savings would be implemented by July 2020. After intense negotiations over less than a week, an agreement was reached between the State and the CAL FIRE Local 2881 bargaining team.

The agreement is complex, and comes in the middle of an MOU that commenced in 2017 and extends to June of 2021. While most of the other state bargaining units accepted agreements that were premised on an initial pay reduction of between 9% and 10%, Local 2881 ended up with the premise of a 7.5% base salary reduction. Local 2881 also deferred for one year salary adjustments ranging from 2% to 2.5% that were to take effect in July 2020.

Mitigating these decreases, bargaining unit members who are on a firefighter schedule will receive 16 hours of leave time per pay period under the personal leave program (PLP). Bargaining unit members who are not firefighters and who work a 40-hour work period will receive 14 hours of PLP.

Additionally, as with many other bargaining units, the reductions in pay do not reduce salary levels for the purpose of determining overtime, retirement, or cash out of leave credits upon separation of employment. The impact of the pay reduction was also mitigated by the suspension of employees' 4.4% contribution to the retiree medical fund that is administered by the State for a period of one year (although the State continues making its matching contributions during the suspension of the employees' contributions). Also, employees will earn overtime for all hours worked over 53 per week, instead of those over 56 hours.

The 40-hour employees whose normal job duties subject them to extreme fire conditions received an extension of "Fire Mission Pay" that has, up to now, only been awarded for part of the year. The extension of this 5% pay differential to cover the entire year recognizes the fact that there is no longer a "fire season" because fires are now an all-year phenomenon.

Gary Messing was the chief negotiator for Local 2881, having served in that capacity since he was appointed Chief Counsel for the Union in 2008. The bargaining team was also led by State Rank and File Representative **Darren Dow**. The bargaining team put in long hours, and their efforts were bolstered by the groundwork previously laid by the President, **Tim Edwards**, and the political team of **Aaron Read & Associates, LLC**. The Union's bargaining team included Fire Captain **Nick Sandahl**, Fire Captain **Josh Baker**, Fire Prevention Specialist II **Suzi Brady**, Fire Captain **Chris Placke**, Fire Captain **Liz Brown**, Battalion Chief **Jeremy Salizzoni**, and Battalion Chief **Chris Carrera**.

NEVADA COUNTY MANAGEMENT EMPLOYEES GET TWO-YEAR DEAL

A worldwide pandemic creates less than ideal circumstances to negotiate a successor MOU. But in Nevada County, the Management Employees Association and the County were able to come to an agreement on a successor MOU for a two-year term. The MOU provides substantial enhancements—especially given the circum-

stances—and reduces the uncertainties plaguing many public employees at the moment.

The agreement provides for general salary increases of 3% in year one and 2% in year two. It also includes enhanced uniform reimbursements and enhanced dental and vision benefits. The security and economic increases provided by this two-year deal ensured its overwhelming ratification by the MEA membership. **Jason Jasmine** was the chief negotiator and the bargaining team consisted of **Rob Choate, Michelle Bodley,** and **Andrew Trygg.** The MEA was pleased to have worked so efficiently with the County to reach a mutually beneficial deal.

YOLO DSA SIGNS THREE-YEAR PACT

The Yolo County Deputy Sheriff's Association signed off on a three-year agreement commencing July 2020. In the first year of the agreement, Deputies will receive an equity adjustment of 4% and DA Investigators will receive a 3% increase. In the later years of the agreement, a salary survey of comparable jurisdictions will be conducted and only increases will be implemented as a result of the survey. In the final year of the contract, the parties will meet to try and reach mutual agreement on improvements to the salary survey.

The agreement also included items such as a $300 per year boot allowance for all represented classifications in the bargaining unit, an increase in the DSA release time bank, positive adjustments as a result of statutory changes in pregnancy leave and total disability leave for pregnancy.

Gary Messing was the chief negotiator for the DSA and the bargaining team was led by DSA President **Jeremy Hembree**. The rest of the bargaining team consisted of DA Investigators **Aaron Moe, Paul Helligus** and Deputies **Mark Saunders, Erin Forster, Alex Ingman, Tommy Hayes** and **Jose Gonzalez**. President Hembree noted that the County bargaining team conducted itself in a respectful and collegial manner in allowing the parties to reach a mutual agreement that was well-supported by the DSA membership

In The News

LEGISLATURE HURRIES TO PASS POLICING REFORM BILLS BY DEADLINE

By David Kruckenberg

At midnight on August 31st, the constitutional deadline to pass regular bills came upon the Legislature. After multiple disruptions due to the coronavirus pandemic, legislators scrambled to pass bills before the deadline, including several proposed in response to the public call for policing reform. Law enforcement and community groups have closely watched those bills that could make significant changes to the law.

Two of the most significant bills proposed—S.B. 731 by Senator Bradford and S.B. 776 by Senator Skinner—failed to pass. S.B. 731 would have stripped peace officers and law enforcement agencies of qualified immunity against certain civil rights lawsuits under California law. It also would have created a process for peace officers to be decertified by the state P.O.S.T. Commission and thereby lose their peace officer status. S.B. 776 would have significantly broadened the scope of peace officer personnel records subject to disclosure under the California Public Records Act. Although S.B. 776 made it closer to the finish line than S.B. 731, the authors of both bills ran out of time to get the necessary votes.

However, the Legislature passed several bills that could make significant changes to law enforcement in the state. Two bills passed that may result in officers facing multiple investigations that could lead to discipline or criminal charges. A.B. 1506 by Assemblymember McCarty would require the Attorney General to investigate all officer-involved shootings that result in the death of a person who is not in possession of a "deadly weapon," as defined. Another bill by Assemblymember McCarty, A.B. 1185, would authorize a county to create a civilian oversight board and/or an inspector general's office to assist the board of supervisors in their oversight of the county sheriff. These oversight boards and inspectors general would have the power to issue subpoenas to compel persons and agencies to produce documents and provide witness testimony. Both of these bills raise concerns about officers facing potential double jeopardy.

A pair of bills directly related to policing of protests also passed. S.B. 629 by Senator McGuire would allow journalists to enter areas that police close to the public in response to a protest. It would also exempt journalists from citation for failure to disperse, violation of curfew, and willful obstruction of a peace officer under Penal Code section 148(a)(1). S.B. 480 by Senator Archuleta would prohibit officers from wearing camouflaged uniforms that resemble military uniforms. Uniforms with sufficient markings to identify them as peace officers would be exempt. SWAT and sniper teams and officers of the state Department of Fish & Wildlife would be entirely exempt.

Several other bills considered to be part of the Legislature's broader response to the call for policing reform include A.B. 1196 by Assemblymember Gipson, which would prohibit a law enforcement agency from authoriz-

ing officers to use any choke hold or carotid restraint. No exception would be made, even for situations that justify use of deadly force. Also, A.B. 846 by Assemblymembers Burke and Irwin would add to the qualifications for obtaining peace officer certification. Specifically, it would require an applicant to be found "free from any … bias against race or ethnicity, gender, nationality, religion, disability, or sexual orientation." This would include implicit bias, and it would be up to the P.O.S.T. Commission to develop standards for determining whether an applicant is free from such bias. Finally, S.B. 203 by Senator Bradford would expand a protection in existing law so that all persons under 18 years old must receive legal counsel before they are subjected to a custodial interrogation or waive their Miranda rights. Current law only applies to persons under 16 years old and is set to expire on January 1st, 2025. This bill would permanently enshrine this in law.

Governor Newsom has until September 30th to sign or veto those bills that passed the Legislature. Additionally, the Governor has indicated he is considering calling a special session for legislators to take up some of the issues they did not fully address by the August 31st deadline. Obvious topics for a special session include relief from the state's housing crisis and the coronavirus pandemic's impact on health and the economy. But legislators and members of the public, including the Los Angeles Police Protective League and the San Francisco Police Officers Association, are urging the Governor to call a special session on policing reform. If Governor Newsom calls a special session, legislators will have one more chance to pass bills before their terms end in November.

"I'M STILL STANDING!" THE CALIFORNIA RULE AFTER *ALAMEDA*

by Gregg Adam

The biopic Rocketman concludes with Elton John's hit "I'm Still Standing," which was written in 1983, and signaled a sharp turnaround from a darker place in the maestro's career. After Thursday's decision in *Alameda County Deputy Sheriffs' Association v. Alameda County Employees' Retirement Association*, the California Rule can also sing "I'm Still Standing;" however, its future prospects appear somewhat murkier.

Some preliminary takeaways:

1. The California Rule Still Stands But Its Central Plank Is Removed

The Court felt compelled to state unequivocally, at the end of the opinion, that the California Rule remained intact:

> The State, at least implicitly, and amicus curiae California Business Roundtable, explicitly, urge us to use this decision as an occasion to reexamine and revise the California Rule … however, we have no jurisprudential reason to undertake a fundamental reexamination of the rule. **The test announced in *Allen I*, as explained and applied here, remains the law of California**. (Slip Op. at p. 90, emphasis added.)

Within the 90-page main opinion, however, the Court rewrote a key part of the rule. Recall that the California Rule, until now, was a three-part test, first articulated in *Allen v. City of Long Beach* in 1955 *(Allen I),* and later refined in a series of decisions through *Legislature v. Eu* in 1991. It provided that public employee pension rights may be changed only when (1) the change is reasonable, (2) it is materially related to the theory of pension system, and (3) any disadvantages to employees are offset by comparable advantages.

Under the Court's ruling today, parts 1 and 2 remain. The Court had "no difficulty" concluding that legislative intent in PEPRA "to align the express language of a pension statute more closely with its intended manner of functioning directly relates to both the theory of a pension system and its successful operation." (Slip Op. at pp. 77, and longer discussion at pp. 76-82.)

But the Court significantly revamped the third prong. Whereas before, negative pension changes had to be offset by comparable advantages, now they are only required "[w]hen preserving the value of public employee pension rights does not disserve the Legislature's constitutionally permissible pension reform objectives, the contract clause requires it to preserve that value." (Slip Op. at p. 87.)

Weighing whether the value of pension rights "disserve" the Legislature's constitutionally permissible pension reform objectives seems a bit like weighing solids against gas.

2. Unanimity But Ambiguity

With important decisions, High Courts love to combine unanimity with the penmanship of a chief justice. And so it was here. Chief Justice Tani Cantil-Sakauye crafted the lengthy opinion and all of her colleagues signed onto it. But unanimity often involves horse-trading, justices offering support in return for incorporating their edits. That can create ambiguity. For example, as stated above, the new formulation of the third prong seems academic and conceptual rather than practical.

Some commentaries suggest this is a narrow ruling. We hope they are right, but we fear not. Perhaps Arnold Schwarzenegger's most memorable contribution to the lexicon of California politics was his 2003 campaign

zinger that Ariana Huffington had a loophole so big in her tax returns that he could drive his Hummer through it. We fear that the exception to the offsetting advantages rule is the same – so big it will swallow the rule.

3. What Great Recession?

On May 5, after oral argument, we wrote "Don't expect the economic impacts of the pandemic to play a significant role in the decision." We got that bit right … but we assumed the economic impacts of the 2008 Great Recession would play a significant part. Not so. Despite the Great Recession providing much of the impetus for PEPRA and the foundation upon which the *Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn (Marin)* and *Alameda* court of appeal decisions, in 2015 and 2018, respectively, upheld the Legislature's changes, the Supreme Court ignored the supposed economic justification for PEPRA and focused only on references to spiking in the legislative history. This was probably wise since PEPRA's legislative record was largely devoid of evidence of the economic collapse that the professors of doom cited in *Marin* foretold.

But by ignoring the economic rationale, which also underpinned the Governor's arguments, the Supreme Court leaves those issues unanswered – leaving the door ajar for future challenges based on economic necessity. In fact, the Court clearly left the door open to a future challenge to the California Rule itself. (See the block quote in part 1.)

4. "Should" Beats Out "Must"

As we noted in our commentary after oral argument, the Court seemed likely to resolve the "should" versus "must" debate that the Marin decision was premised on. And so it did – according to the Court, the "one-time use of 'must' in *Allen v. Board of Administration (Allen II)* in 1983 appears to have been inadvertent, and it should not be understood to have changed the *Allen I* standard."

Perhaps, but coming 37 years after the *Allen II* decision, the Court's statement seems flippant. Dozens of appellate decisions since 1983 invariably, until Marin in 2015, understood *Allen II* to, if not change the *Allen I* standard, at least clarify it. (For example, *United Firefighters of Los Angeles City v. City of Los Angeles* (1989); *Pasadena Police Officers Association v. City of Pasadena* (1984); *Teachers Retirement Bd. v. Genest* (2007); *Association of Blue Collar Workers v. Wills* (1986); *Protect Our Benefits v. City and County of San Francisco* (2015).)

Those decisions set up a clear understanding among retirement boards, practitioners, employees, and employers that the California Rule required that changes which cause disadvantages to pension benefits must be offset by comparable advantages. The Supreme Court disturbed none of those decisions. Yet in *Alameda*, it ignored them, and almost every other intermediate appellate court decision as if they did not exist. Instead, to justify the newfound flexibility it found in the California Rule, the Court reached back to 1947 and *Kern v. City of Long Beach*:

> It might have been possible to adopt a rule requiring that any disadvantages imposed by a pension modification must be offset by comparable new advantages. But in *Kern* we effectively disavowed such a rule, holding, "The employee does not have a right to any fixed or definite benefits, but only to a substantial or reasonable pension. There is no inconsistency therefore in holding that he has a vested right to a pension but that the amount, terms and conditions of the benefits may be altered."

But here's the problem: *Kern* didn't "disavow" a rule requiring that any disadvantages imposed by a pension modification must be offset by comparable new advantages. Kern simply said benefits could be altered. Building on Kern, eight years later, *Allen I* added its rule that "changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages." Every Court that considered the issue since, until *Marin*, and now *Alameda*, whether they used "must" or "should," REQUIRED that any disadvantages caused by the alteration had to be offset by advantages.

In other words, for 65 years, every court understood *Allen* I to stand for a proposition that the Supreme Court now says they should not have.

5. Are Retirees Safe?

Retiree pension benefits have traditionally been perceived to enjoy greater protections than those of active employees. In *Allen II* in 1955, for example, the Supreme Court stated: "As to retired employees, the scope of continuing governmental power may be more restricted, the retiree being entitled to the fulfillment of the contract which he already has performed without detrimental modification." However, for support, the Court cited *Lyon v. Flournoy*, an intermediate appellate court decision from 1969, and as discussed above, the Supreme Court almost entirely disregarded intermediate appellate decisions in its ruling. Plus, if *Allen II's* use of "must" was inadvertent, what of its statement that "governmental power may be more restricted" vis-à-vis retirees?

Anyone who retired before PEPRA took effect on January 1, 2013 would appear to have nothing to fear from this decision. Those who retired after that date could be affected if the retirement system did not make the changes that the Supreme Court says PEPRA required. Re-

tirement Boards could try to reduce the benefit going forward or they could try to claw back benefits to January 1, 2013. If the latter occurs, footnote 18 of the *Alameda* decision suggests retirees and employees would have claims for reimbursement for overpaid contributions, perhaps with interest.

Significant legal questions are presented on all these issues.

6. The Court Is Trending The Wrong Way

From *Kern* to *Eu*, in a series of landmark decisions, the California Supreme Court created the California Rule. The Rule held through courts dominated by Republican gubernatorial appointments. Now, however, with the Court's majority comprised of Jerry Brown appointees, in two consecutive decisions, in close sequence, the Court has seemingly gone out of its way to rule against pension rights.

In *Cal Fire Local 2881 v. California Public Employees' Retirement System* (2019), the Court upheld PEPRA and ruled against the employees and their union. The right to purchase additional retirement service credit after the employee provided at least five years of service directly impacted the employee's retirement formula. Yet, the Court ruled that the benefit was not a pension benefit.

Now, in *Alameda*, the Court reformulated the third prong of the *Allen I* test to allow a constitutionally-permissive change to reduce benefits without offsetting advantages to the employee.

7. For All Its Flaws, Could Alameda Have Been Worse?

There is certainly much to grumble about in the decision. But considering that a progressive Democratic governor advocated for the elimination of any protections for future accruals, the decision could have been far worse. And notwithstanding the fluidity with which the Court skirted decades of precedents, at a time when pension systems are under renewed stresses from the economic crisis, might not a rule that allows the Legislature to prevent manipulations of benefits beyond the levels they are funded help to preserve defined benefit systems for the long run? Perhaps a new line can be drawn to prevent further fracture of the rule.

8. So What Comes Next?

The Court has three other public employee pension cases on review:

Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn. (2016) 2 Cal.App.5th 674, which is closely related to *Alameda*;

Hipsher v. Los Angeles County Employees Retirement Assn (2018) 24 Cal.App.5th 740, involving forfeiture of pension benefits after a criminal conviction; and

McGlynn v. State of California (2018) 21 Cal.App.5th 548, judges elected pre-PEPRA and promised pre-PEPRA benefits but took office post-PEPRA and given reduced post-PEPRA benefits.

It is possible that all of these decisions may be returned to the lower courts with direction to reanalyze them in light of *Alameda*. If that happens, it will signal that the Supreme Court, after *Cal Fire* and *Alameda*, believes its work reformulating the California Rule is done for now.

TAKEAWAY: As the Supreme Court emphasized, the California Rule remains intact, albeit weakened. While no employer should plan on trying to reduce the core pension benefits promised employees, such as pension formula and retirement age, courts do, nonetheless, seem more apt to justify modifications of pension benefits on the fringes, particularly unusual benefits held by a limited number of employees. Legislation – and litigation – testing this new analysis is inevitable.

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AROUND THE STATE

APPEALS COURT SHOWS ONCE AGAIN THAT OFFICERS SHOULD NOT EXPECT HELP FROM THE COURTS IN DISCIPLINE APPEALS

By David Kruckenberg

One of America's fundamental values is that any person who has been wronged by the government should be able to seek justice through the courts. But as plaintiffs have frequently seen in recent cases, California courts give significant deference to State and local government decisions. A recent appellate court decision reminds us that this is especially true in public employee discipline appeals.

In 2010, Deputy Meghan Pasos was one of three deputies involved in a use of force incident in a Los Angeles County jail facility. In her internal affairs interview, she acknowledged knowing that one of the other deputies injured an inmate during an in-cell interaction while Pasos acted as the lookout. She also acknowledged that she did not report this use of force because she was afraid of being "labeled as a rat" and of repercussions from her fellow deputies. But she stated that she regretted her decision and had learned her lesson. Neither of the other two deputies reported the use of force. Pasos continued to work in the jails until being placed on paid administrative leave in 2011.

Facing significant public scrutiny over reports of exces-

sive force being used in the jails, Sheriff's Office managers felt that the behavior of Pasos and the other two deputies added to the department's embarrassment. Managers decided to make an example of them and send a clear message to employees that adhering to the so-called "code of silence" would not be tolerated. In 2013, the Sheriff's Office terminated all three deputies. The department's disciplinary guidelines provided that failure to safeguard an inmate and failure to report a use of force warranted multi-day suspensions. But the Sheriff's Office relied on general performance and behavior policies to justify termination.

Pasos appealed to the County's Civil Service Commission. At hearing, it was undisputed that she had never received prior formal discipline in her position. At least one witness also testified that the Sheriff's Office had never previously terminated a deputy for failing to report another deputy's use of force on an inmate. Nevertheless, the Commission upheld Pasos' termination because it found that her conduct was egregious, brought discredit to the Sheriff's Office, and exposed it to potential legal liability.

Pasos then filed a lawsuit in Superior Court challenging the Commission's decision. The trial court judge affirmed the Commission's factual findings against Pasos. But the judge also ruled that the Commission abused its discretion by approving Pasos' termination. The judge found that Sheriff's Office managers (and thereby the Commission) were "caught up in the whirlwind of negative publicity about inmate abuse at the jail" and decided to terminate Pasos and the other two deputies "to deflect media and public criticism."

However, the County appealed its loss in Superior Court. And in *Pasos v. L.A. County Civil Service Commission* (August 18, 2020), the Second District Court of Appeal reversed the trial judge's ruling. The Court of Appeal ruled that the trial judge improperly inserted his own opinion, when he was required to defer to the local government's discretion except where "reasonable minds cannot differ on the appropriate penalty." The Court cited several prior appellate decisions that require courts to consider whether an officer's conduct resulted in or is likely to result in "harm to the public service." Multiple of these prior decisions involved courts reversing actions by State and local government entities granting officers' disciplinary appeals. In fact, one of these involved another division of the Court of Appeal reversing a decision by the Commission to grant the termination appeal of one of the other deputies involved in the same incident as Pasos. Overall, the Court of Appeal's decision in *Pasos* reinforced the principle that the courts will give significant deference to law enforcement agencies' disciplinary decisions.

This case serves as an important reminder for law enforcement officers facing potential discipline. Although every public employee who is suspended or terminated has the option of pursuing their appeal in court, law enforcement officers should not rely on this. Instead, every effort should be made at the earliest stages to gather and present evidence to defend against the charges and proposed discipline. The best chance a law enforcement officer has of avoiding excessive discipline is by persuasively making their case at the internal affairs interview, the pre-disciplinary *Skelly* hearing, and the administrative appeal.

FATE OF NO-MONEY BAIL SYSTEM ON THE NOVEMBER BALLOT

By Monique Alonso

In August 2018, the California Legislature passed S.B. 10, joining a handful of other states to do away with the cash bail system for criminal defendants. S.B. 10 provided that, beginning in October 2019, pre-trial detention would no longer be dictated by a defendant's ability to raise money to make bail. Rather, it would fall entirely to a judge's discretion, aided by data entered into a computer program to assess the risk of releasing the defendant. Instead of setting a dollar figure, the judge would assess whether a suspect was a low, medium, or high risk for flight or to public safety.

At the time, opponents to the bill were strange bedfellows. Opponents were led by the bail bond industry who saw their livelihood swept away with the stroke of a pen and criminal justice reform groups who thought the bill did not go far enough and created additional hurdles by increasing judicial and prosecutorial discretion guided by unspecified criteria. Almost immediately, the bail bond industry led a coalition to reverse the Legislature's action. Notably, criminal reform groups did not join them. This November, citizens will take a referendum vote on whether to repeal S.B. 10, which has been on hold since January 2019.

S.B. 10 sought to overhaul the prevailing bail system, in which defendants are released pending trial depending on whether they have enough money to post bail. Proponents of the bill argued that access to cash has no bearing on whether a suspect is a genuine threat to public safety. They also argued that it disproportionately penalizes lower income citizens and increases incarceration in the state's overcrowded jails. To address these issues, S.B. 10 eliminated cash bail for all crimes and provided that pre-trial assessment tools would gather information and provide reports to aid judges in the decision about whether a defendant is a risk to the public or a flight risk before trial. In addition, such pre-trial as-

sessment tools would recommend the conditions for release. The mandated pre-trial assessment tools would include computer programs that measure risk after inputting arrest and conviction history along with other unspecified data. Counties would create or purchase their own tools, ultimately subject to approval by the state Judicial Council, an oversight body controlled by California's judges.

While criminal reform groups initially backed S.B. 10, they withdrew support when the bill's author added the mandate of a non-uniform, data-based pre-trial assessment system. These groups believed this would actually increase pre-trial detention by judges and prosecutors without providing for necessary oversight. With no policy determining the type of data to be considered in a pre-trial assessment tool, and no uniformity across counties for those tools, these groups argue that the bill leaves the door open to pre-trial detention decisions being made on racially discriminatory or other impermissible grounds.

Following the passage of S.B. 10, a coalition opposed to the bill successfully collected enough signatures for a statewide ballot initiative, which suspended implementation of the law. Proposition 25 is now a referendum on the November ballot requiring a majority of voters to approve S.B. 10 before it can take effect. If a majority approves Proposition 25, the law will take effect and cash bail will be eliminated; a majority "No" vote will defeat S.B. 10, repeal the law, and require the state to continue to use a cash bail system.

APPEALS COURT DISMISSES POLICE OFFICER'S DAMAGES CLAIMS FOR NOT COMPLYING WITH GOVERNMENT CLAIMS ACT FILING DEADLINE

By Steve Kaiser

James Willis was hired as a police officer by the City of Carlsbad in 2008 and consistently received positive performance reviews from his supervisors. In 2012, he wrote and publicly distributed an anonymous email critical of another detective in his unit, triggering a Police Department investigation in which Willis acknowledged writing the email. In January 2013, Willis' supervisors removed him from his detective assignment and returned him to patrol. He then filed a whistleblower retaliation complaint under Labor Code section 1102.5 with the state Labor Commissioner. Later in 2013, he received a written reprimand for writing the anonymous email instead of reporting his concerns to his supervisors. In response to his internal appeal, a manager rescinded the written reprimand but left the sustained finding of misconduct in Willis' personnel file. In 2013, 2014, and 2015, the Department denied Willis' requests for transfer back to a detective assignment. But he promoted to corporal in 2014 and continued to receive positive performance reviews. In early 2015, he was elected president of the Carlsbad Police Officers Association. On behalf of the POA, he objected to the Department's implementation of what he described as an illegal quota system. And in July 2015, Willis applied for but did not receive a promotion to sergeant.

In December 2015, Willis filed a government claim with the City, alleging that the Department unlawfully retaliated against him from 2013 to 2015. Specifically, he cited the 2013 transfer to patrol, the 2013 written reprimand, the denied transfer requests from 2013 to 2015, and the 2015 denial of promotion to sergeant. Willis then filed a lawsuit in Superior Court to pursue his whistleblower claims for damages.

The trial court judge ruled that Willis could not pursue most of his claims because he did not file a government claim with the City until more than six months after most of the events he described in his complaint. And on the remaining claim for the 2015 denial of promotion, the judge allowed the City to present Willis' 2012 anonymous email as evidence in support of the Department's decision not to promote him. Ultimately, the jury found that although Willis proved the Department retaliated against him, the City proved that, even so, the Department would not have promoted him because of legitimate concerns about his character. This resulted in a jury verdict in the City's favor. Willis filed an appeal.

In *Willis v. City of Carlsbad* (2020), the Court of Appeal affirmed the trial judge's ruling that because Willis did not timely submit a government claim with the City, Willis could not pursue most of his claims for damages. The Court ruled that Willis did not substantially comply with this requirement by filing a claim with the Labor Commissioner in 2013, since he could not prove that the City ever received notice of his claim.

Willis also argued that his failure to meet the six-month deadline should be excused under the "continuing violation theory." But the Court ruled that this legal theory did not apply to Willis' claims because each of the Department's allegedly retaliatory acts were discrete and permanent. For example, the denials of transfer each resulted in an allegedly less qualified officer receiving the detective assignment Willis sought. Each of these instances provided notice to Willis that the Department had made a permanent decision to mistreat him and that he should file a government claim with the City. His failure to file a timely government claim deprived the City of the opportunity to investigate his claims, contrary to the purpose of the Government Claims Act.

The Court of Appeal also ruled that the trial judge did not

abuse his discretion by allowing the City to use Willis' 2012 anonymous email as evidence to rebut Willis' retaliation claim. The City used the email to show that the Department considered it to be indicative of Willis' overall lack of character, which justified denying him promotion to a supervisory position. Willis argued that the City should not be allowed to use the email because it amounted to a violation of his rights under the Public Safety Officers Procedural Bill of Rights Act ("POBR"). That is, denying him promotion in 2015 "on grounds other than merit" for his 2012 email violated the POBR requirement that the Department complete an investigation of his alleged misconduct within one year. Willis also argued that the trial judge should have allowed him to present evidence to the jury that the City's use of the 2012 email violated his POBR rights.

On this point, the Court ruled that the trial judge properly excluded Willis' assertions about POBR violations as irrelevant because they did not apply to these facts. The Court found that the City properly used the 2012 email as evidence that the Department denied Willis promotion for a merit-based reason and not as a belated punitive action in violation of POBR. This merit-based reason was Willis' overall lack of character, making him unsuitable for a supervisory position.

This case is notable for two reasons. First, it is an emphatic reminder of the need to file a timely government claim in order for legal claims against a public employer to be viable. Even when there are facts that support the existence of a continuing violation, the trial judge may disagree. Second, even when there is a possible POBR violation, the trial judge may find that the facts and evidence underlying the alleged violation are admissible. In this case, the trial judge found that managers' consideration of Willis' 2012 email independent of the written reprimand made it admissible despite the alleged POBR violation.

GOVERNMENT AGENCIES CANNOT CHARGE REQUESTORS FOR THE COST OF REDACTING SENSITIVE PUBLIC RECORDS

By David Kruckenberg

Since the enactment of A.B. 748 and S.B. 1421 in 2018, public agencies have been struggling to respond to a multitude of requests for peace officer personnel records newly accessible under the California Public Records Act (PRA). In a significant blow to public agencies, the California Supreme Court ruled that agencies cannot charge requesters for the cost of making redactions to protect confidential information in electronic records.

The PRA allows public agencies to redact information from records before disclosing them to the public. This ensures agencies can meet their obligation to disclose public records without releasing information that remains confidential. The PRA also allows agencies to charge requesters for certain costs of responding to records requests. In 2000, the Legislature amended the PRA to clarify the public's ability to obtain copies of electronic records and what costs agencies may charge requestors.

In *National Lawyers Guild v. City of Hayward* (May 28, 2020, No. S252445), the California Supreme Court ruled that public agencies cannot charge requesters the cost of making redactions to electronic records that are subject to disclosure. In December 2014, the City of Hayward Police Department assisted with policing demonstrations in the City of Berkeley following news that grand juries in New York and Missouri did not indict police officers involved in the deaths of Eric Garner and Michael Brown. The National Lawyers Guild requested public records relating to the Police Department's policing of the demonstrations.

The City complied with the Guild's request, providing a significant number of text-based electronic records, such as logs and reports. But it took City employees over 40 hours of work to prepare redacted copies of police officers' body-worn camera footage. The City charged the Guild over $3,000 for these hours of work. The Guild paid under protest and then sued for a refund.

On appeal, the California Supreme Court ruled that the City must refund the Guild for these charges. The Court found that the 2000 amendments to the PRA allow public agencies to charge requesters for the cost of data extraction, compilation, or programming necessary to produce a record for disclosure. But the Court ruled that the process of deleting information from retrieved data (i.e., redaction) cannot be included as part of these costs. Therefore, an agency may charge requesters for the cost of retrieving responsive information from large databases, but not for the cost of redacting confidential information from the data retrieved.

Cities, counties, school districts, and special districts all formally supported the City in this case, while news organizations, journalist associations, and government transparency groups supported the Guild. Labor organizations largely stayed out of this fight, likely because of their nuanced perspective. On the one hand, labor organizations represent the employees tasked with responding to burdensome records requests and who would benefit from increased funding. On the other hand, labor organizations often use the PRA to obtain information for use in collective bargaining. Overall, this court decision is a win for labor organizations, who will

not have to pay high costs to obtain relevant information from an employer's electronic records.

PROPOSITION 16 WOULD REVIVE AFFIRMATIVE ACTION IN CALIFORNIA

By Wendi J. Berkowitz

When voters approved Proposition 209 in 1996, California became the first state to enact a constitutional amendment banning the use of affirmative action by public entities. Prop. 209 prohibits both discrimination and preferences in public hiring, contracting, and school/university admissions that are based on race, sex, color, ethnicity, or national origin. Proponents argued that this would ensure the state hired, contracted with, and admitted only the most qualified individuals and businesses. However, opponents argued that the need for affirmative action was far from over, and that preferences in hiring, contracting, and admissions continued to be the only method of "leveling the playing field" for those who had been subjected to decades of discrimination.

Under Prop. 209, public employers are prohibited by the State Constitution from taking race, sex, color, ethnicity or national origin into account in making hiring or promotional decisions. Instead, employers rely heavily on standardized tests that are supposed to serve as objective indicators of merit. Although other objective and subjective factors are inevitably taken into account, many still believe that this is the fairest method of evaluating competing applicants and employees.

Twenty-four years have passed since Prop. 209 was enacted, and the state is poised to consider the issue against a radically different landscape. Currently, California is one of only eight states that do not permit affirmative action in hiring, contracting, and school admissions. At the same time, the nation is gripped by protests against racial inequality and demands for change, there is renewed interest in pursuing an Equal Rights Amendment, and there is increased attention to the ubiquity of sexual harassment. When Assembly Member Shirley Weber introduced Proposition 16 to repeal Proposition 209, she argued that our current circumstances are "forcing Californians to acknowledge the deep-seated inequality and far-reaching institutional failures that show that your race and gender still matter."

If Prop. 16 receives a majority of votes in November, affirmative action will once again be permitted in public decision-making in employment, contracting, and school/university admissions, subject to other laws against discrimination. An example of how preferences could be used in affirmative action is a pending lawsuit against Harvard College. Students from minority ethnic groups long considered to be high-achieving argued that Harvard's system that awards coveted places in its freshman class on the basis of metrics other than high test scores creates a racial quota system. They argued that this unfairly benefits lower performers in other ethnic groups at the expense of higher performing members of the supposedly "overrepresented" group. But in the case of *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 397 F.Supp.3d 126 (D. Mass. 2019), a U.S. District Court ruled in Harvard's favor. Harvard admitted that it uses race as "one factor among many" in making admissions decisions (which is currently prohibited in California under Prop. 209). The court found that by accepting non-Asian American student applicants with lower test scores and rejecting the applications of the Asian American plaintiffs, Harvard had not engaged in unlawful racial discrimination. Citing the landmark 1954 desegregation decision in *Brown v. Board of Education,* the court wrote: "It is somewhat axiomatic at this point that diversity of all sorts, including racial diversity, is an important aspect of education." The case is now on appeal at the U.S. First Circuit Court of Appeals. Similarly, if Prop. 16 passes, public employers in California will be permitted to consider an applicant's or employee's race as "one factor among many" in deciding who should receive a job or promotion. But racial quotas and other plainly discriminatory systems will continue to be prohibited under state and federal law.

This is bound to be a hotly contested issue on the November ballot. As the proponents of Prop. 209 said in 1996, it's a question of fairness. It's still a question of fairness.

Across the Country

EMPLOYEES THROUGHOUT THE U.S. CANNOT BE DISCRIMINATED AGAINST BECAUSE OF THEIR SEXUAL ORIENTATION

By Laurie Burgess

In one of several highly anticipated decisions, on June 15th the U.S. Supreme Court ruled in *Bostock v. Clayton County* that Title VII of the Civil Rights Act of 1964—which prohibits employment discrimination based on race, religion, national origin, and sex—extends to discrimination based on sexual orientation.

The Supreme Court ruling addressed three separate cases: two involving gay men and one involving a transgender woman. One case involved a man being terminated from his job as a skydiving instructor after revealing that he was "100% gay" when a female client expressed concern that, by strapping her to him for a

dive, he was making a sexual advance. The other gay male was terminated from his government job helping neglected children after his employer learned that he had joined a gay men's baseball team. The transgender woman was terminated from her position at a funeral home after advising her employer that she was transgender and would begin wearing female clothing to work.

The Court's decision was a logical next step clarifying the rights of gay and transgender persons following its 2015 ruling in *Obergefell v. Hodges* that state governments could not ban same-sex marriage. However, given the change in the composition of the Court, this outcome was by no means a given. To the surprise of all, Justice Neil Gorsuch, a President Trump appointee, not only sided with the more liberal justices in this ruling but authored the majority opinion. Justice Gorsuch wrote that "[an] employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex." Because "[it] is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex," firing someone merely for being gay or transgender violates Title VII. Also notable was that Chief Justice Roberts—who voted against the plaintiff in *Obergefell*—joined Justice Gorsuch in the majority decision.

While this case represents another important landmark in the courts extending legal protections to gay and transgender persons, its impact on California will be limited. Discrimination on the basis of an employee's sexual orientation was already expressly prohibited under California's Fair Employment and Housing Act. However, the Court's interpretation of federal law will affect California businesses with employees in other states. Additionally, gay and transgender employees wishing to sue their employers in California for unlawful discrimination can now choose whether to bring their claims in state or federal court.

IT'S CALLED "RESULT-ORIENTED" – A PEEK BEHIND THE CURTAIN OF RECENT US SUPREME COURT CASES OVERTURNING PRECEDENT

By Wendi Berkowitz

A cornerstone of our rule of law in the United States is the concept of "*stare decisis*" – literally translated as "to stand on decided cases." It is a concept rooted in respect for (presumably well-decided) legal precedent, and serves as a guidepost for staying within the bounds of accepted legal conduct. How is anyone to follow the law if the law is constantly in flux, and subject to the (changing) whims of each successive interpreter of the law? Adherence to legal precedent answers this question.

Stare decisis instructs that if a legal principle embedded in a court decision was well-reasoned, especially if it has remained unchanged for a lengthy period of time, then it should stand. *Stare decisis* does not mean, however, that the law is forever unchanging, even if it was wrongly decided. History reminds us that we can and should rethink ill-conceived authority. But who gets to determine what precedents were (and are) well-decided, and which were poorly constructed and thus subject to radical revision or even elimination? The courts, and the judges who comprise those courts, are the ultimate deciders. And the U.S. Supreme Court, when it chooses to take a case up on review, is the final of final words on any subject on which an opinion is rendered.

Understanding the significant power wielded by the judiciary, with none more powerful within this co-equal branch of government than those sitting on the Supreme Court bench, the framers of the Constitution gave the justices life tenure, in an effort to remove them from political concerns. The theory was that if a justice on the Supreme Court was nominated by the President and confirmed by the Senate, to serve for life, then the justice so chosen and vetted would be apolitical, guided solely by the law.

But when dealing with people rather than concepts, humanity intervenes. And while it has always been true that justices' life experiences, moral philosophies and political leanings have influenced their decision-making, it has never been more true than now. As a result, it seems that *stare decisis* has seen its apex, and we now appear to be on the down-slope of adherence to legal precedent. Let me explain more fully, with two recent Supreme Court cases – *Janus v. AFSCME*, 585 U.S. ____, 138 S.Ct. 2448 (2018) and *Ramos v. Louisiana*, 590 U.S. ____ (2020).

Janus was the much-publicized 2018 case in which the Supreme Court overturned the 40 year old precedent set in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1976). The *Abood* Court ruled that it was not a violation of free speech rights for public sector unions to collect union dues from non-members. In *Janus*, the Court reversed that decision, holding that a public sector labor union's collection of union dues from non-members did violate the non-members' First Amendment free speech rights. Ramos, decided in April of this year, dealt with a very different question – whether the Constitution requires a unanimous jury to convict a defendant in state court. The *Ramos* court decided yes, overturning *Apodaca v. Oregon*, 406 U.S. 404 (1972), which had held that a state's decision to allow a non-unanimous jury to convict

a criminal defendant did not violate the Constitution's Sixth Amendment. Thus both *Janus* and *Ramos* overturned decades-long precedent. How and why these two long-standing precedents were eliminated has everything to do with the justices' thoughts on adherence to precedent – *stare decisis*. They knew how they wanted these cases to come out and wrote their opinions accordingly – they were results-oriented. Let's look deeper.

The majority opinion in *Janus* was authored by Justice Samuel Alito. He had long been eager to reverse the rule of law set forth in *Abood*, and his opinion justified doing so by reasoning that unions should not have relied on the precedent set in *Abood* because it stood on a shaky legal principle, and thus unions did not legitimately rely on it. [Note here that one of the key principles upon which *Abood* stood, and which Justice Alito rejected, was that free riders should not be permitted to enjoy the benefits a union provides without paying for it.] In other words: there is a shaky legal principle and therefore, you shouldn't rely on it.

However, Justice Alito also felt that the legal principle upon which the *Apodaca* case stood was shaky. But his conclusion in his *Ramos* opinion (in which he opined that a state should continue to permit its courts to convict on less than a unanimous jury vote), was the opposite of his position in *Janus*. In other words, despite the shaky legal principle, you still have to rely on it (because otherwise, bad things will happen – i.e., defendants convicted on a less-than-unanimous vote will inundate the courts seeking a new trial). What Justice Alito didn't seem to care about was the bad result of overturning *Abood* in *Janus* – the free-rider problem, and thus he was able to avoid the logical logjam he found in *Ramos*, where he disagreed with the precedent (*Apodaca*) but still supported reliance on it as necessary to avoid bad results.

The other justices also engaged in mental gymnastics to support their favored positions in each case, but none so blatantly as Justice Alito. All are guilty of results-orientation. And how it all turns out depends on how many votes can be mustered, or pieced together (regardless of how intellectually inconsistent) on any given issue. Stay tuned.

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