Alameda County Employees' Retirement Association
BOARD OF RETIREMENT

OPERATIONS COMMITTEE/BOARD MEETING NOTICE and AGENDA

THIS MEETING WILL BE CONDUCTED VIA TELECONFERENCE [SEE EXECUTIVE ORDER N-29-20 ATTACHED AT THE END OF THIS AGENDA.]

ACERA MISSION:

To provide ACERA members and employers with flexible, cost-effective, participant-oriented benefits through prudent investment management and superior member services.

Wednesday, June 2, 2021
10:30 a.m.

ZOOM INSTRUCTIONS	COMMITTEE MEMBERS	
The public can view the Teleconference and comment via audio during the meeting. To join this Teleconference, please click on the link below. https://zoom.us/join Meeting ID: 863 2393 0009 Password: 803051 For help joining a Zoom meeting, see: https://support.zoom.us/hc/en-us/articles/201362193	**JAIME GODFREY, CHAIR**	**APPOINTED**
	LIZ KOPPENHAVER, VICE CHAIR	**ELECTED RETIRED**
	OPHELIA BASGAL	**APPOINTED**
	KEITH CARSON	**APPOINTED**
	HENRY LEVY	**TREASURER**

This is a meeting of the Operations Committee if a quorum of the Operations Committee attends, and it is a meeting of the Board if a quorum of the Board attends. This is a joint meeting of the Operations Committee and the Board if a quorum of each attends.

The order of agenda items is subject to change without notice. Board and Committee agendas and minutes, and all documents distributed to the Board or a Committee in connection with a public meeting (unless exempt from disclosure), are available online at www.acera.org.

Note regarding public comments: Public comments are limited to four (4) minutes per person in total.

Note regarding accommodations: The Board of Retirement will provide reasonable accommodations for persons with special needs of accessibility who plan to attend Board meetings. Please contact ACERA at (510) 628-3000 to arrange for accommodation.

OPERATIONS COMMITTEE/BOARD MEETING

Call to Order: **10:30 a.m.**

Roll Call:

Public Input (Time Limit: 4 minutes per speaker)

Action Items: Matters for Discussion and Possible Motion by the Committee

1. **Discussion and possible motion(s) to recommend to the Board changes to ACERA's practices regarding the inclusion of leave sell back and leave cash out in Tier 1, 2 and 3 members' "compensation earnable" and "final compensation."**

   -Jeff Rieger

2. **Discussion and possible motion(s) to recommend to the Board possible changes to ACERA's fiduciary insurance coverage.**

   -Jeff Rieger

Information Items: These items are not presented for Committee action but consist of status updates and cyclical reports

1. **Operating Expenses as of 04/30/2021**

   -Margo Allen

2. **Board of Retirement 2021 election for the second member seat to represent the general membership on the Board of Retirement.**

   -Margo Allen

3. **Update on Disability Cases Provided by Managed Medical Review Organization (MMRO)**

   -Sandra Duenas

Trustee Remarks

Future Discussion Items

Establishment of Next Meeting Date

August 4, 2021, at 9:30 a.m.

Adjournment

EXECUTIVE DEPARTMENT
STATE OF CALIFORNIA

EXECUTIVE ORDER N-29-20

WHEREAS on March 4, 2020, I proclaimed a State of Emergency to exist in California as a result of the threat of COVID-19; and

WHEREAS despite sustained efforts, the virus continues to spread and is impacting nearly all sectors of California; and

WHEREAS the threat of COVID-19 has resulted in serious and ongoing economic harms, in particular to some of the most vulnerable Californians; and

WHEREAS time bound eligibility redeterminations are required for Medi-Cal, CalFresh, CalWORKs, Cash Assistance Program for Immigrants, California Food Assistance Program, and In Home Supportive Services beneficiaries to continue their benefits, in accordance with processes established by the Department of Social Services, the Department of Health Care Services, and the Federal Government; and

WHEREAS social distancing recommendations or Orders as well as a statewide imperative for critical employees to focus on health needs may prevent Medi-Cal, CalFresh, CalWORKs, Cash Assistance Program for Immigrants, California Food Assistance Program, and In Home Supportive Services beneficiaries from obtaining in-person eligibility redeterminations; and

WHEREAS under the provisions of Government Code section 8571, I find that strict compliance with various statutes and regulations specified in this order would prevent, hinder, or delay appropriate actions to prevent and mitigate the effects of the COVID-19 pandemic.

NOW, THEREFORE, I, GAVIN NEWSOM, Governor of the State of California, in accordance with the authority vested in me by the State Constitution and statutes of the State of California, and in particular, Government Code sections 8567 and 8571, do hereby issue the following order to become effective immediately:

IT IS HEREBY ORDERED THAT:

1. As to individuals currently eligible for benefits under Medi-Cal, CalFresh, CalWORKs, the Cash Assistance Program for Immigrants, the California Food Assistance Program, or In Home Supportive Services benefits, and to the extent necessary to allow such individuals to maintain eligibility for such benefits, any state law, including but not limited to California Code of Regulations, Title 22, section 50189(a) and Welfare and Institutions Code sections 18940 and 11265, that would require redetermination of such benefits is suspended for a period of 90 days from the date of this Order. This Order shall be construed to be consistent with applicable federal laws, including but not limited to Code of Federal Regulations, Title 42, section 435.912, subdivision (e), as interpreted by the Centers for Medicare and Medicaid Services (in guidance issued on January 30, 2018) to permit the extension of

otherwise-applicable Medicaid time limits in emergency situations.

2. Through June 17, 2020, any month or partial month in which California Work Opportunity and Responsibility to Kids (CalWORKs) aid or services are received pursuant to Welfare and Institutions Code Section 11200 et seq. shall not be counted for purposes of the 48-month time limit set forth in Welfare an Institutions Code Section 11454. Any waiver of this time limit shall not be applied if it will exceed the federal time limits set forth in Code of Federal Regulations, Title 45, section 264.1.

3. Paragraph 11 of Executive Order N-25-20 (March 12, 2020) is withdrawn and superseded by the following text:

   Notwithstanding any other provision of state or local law (including, but not limited to, the Bagley-Keene Act or the Brown Act), and subject to the notice and accessibility requirements set forth below, a local legislative body or state body is authorized to hold public meetings via teleconferencing and to make public meetings accessible telephonically or otherwise electronically to all members of the public seeking to observe and to address the local legislative body or state body. All requirements in both the Bagley-Keene Act and the Brown Act expressly or impliedly requiring the physical presence of members, the clerk or other personnel of the body, or of the public as a condition of participation in or quorum for a public meeting are hereby waived.

   In particular, any otherwise-applicable requirements that

   (i) state and local bodies notice each teleconference location from which a member will be participating in a public meeting;

   (ii) each teleconference location be accessible to the public;

   (iii) members of the public may address the body at each teleconference conference location;

   (iv) state and local bodies post agendas at all teleconference locations;

   (v) at least one member of the state body be physically present at the location specified in the notice of the meeting; and

   (vi) during teleconference meetings, a least a quorum of the members of the local body participate from locations within the boundaries of the territory over which the local body exercises jurisdiction

   are hereby suspended.

   A local legislative body or state body that holds a meeting via teleconferencing and allows members of the public to observe and address the meeting telephonically or otherwise electronically, consistent with the notice and accessibility requirements set forth below, shall have satisfied any requirement that the body allow

members of the public to attend the meeting and offer public comment. Such a body need not make available any physical location from which members of the public may observe the meeting and offer public comment.

Accessibility Requirements: If a local legislative body or state body holds a meeting via teleconferencing and allows members of the public to observe and address the meeting telephonically or otherwise electronically, the body shall also:

(i) Implement a procedure for receiving and swiftly resolving requests for reasonable modification or accommodation from individuals with disabilities, consistent with the Americans with Disabilities Act and resolving any doubt whatsoever in favor of accessibility; and

(ii) Advertise that procedure each time notice is given of the means by which members of the public may observe the meeting and offer public comment, pursuant to subparagraph (ii) of the Notice Requirements below.

Notice Requirements: Except to the extent this Order expressly provides otherwise, each local legislative body and state body shall:

(i) Give advance notice of the time of, and post the agenda for, each public meeting according to the timeframes otherwise prescribed by the Bagley-Keene Act or the Brown Act, and using the means otherwise prescribed by the Bagley-Keene Act or the Brown Act, as applicable; and

(ii) In each instance in which notice of the time of the meeting is otherwise given or the agenda for the meeting is otherwise posted, also give notice of the means by which members of the public may observe the meeting and offer public comment. As to any instance in which there is a change in such means of public observation and comment, or any instance prior to the issuance of this Order in which the time of the meeting has been noticed or the agenda for the meeting has been posted without also including notice of such means, a body may satisfy this requirement by advertising such means using "the most rapid means of communication available at the time" within the meaning of Government Code, section 54954, subdivision (e); this shall include, but need not be limited to, posting such means on the body's Internet website.

All of the foregoing provisions concerning the conduct of public meetings shall apply only during the period in which state or local public health officials have imposed or recommended social distancing measures.

All state and local bodies are urged to use sound discretion and to make reasonable efforts to adhere as closely as reasonably possible to the provisions of the Bagley-Keene Act and the Brown Act, and other applicable local laws regulating the conduct of public meetings, in order to maximize transparency and provide the public access to their meetings.

IT IS FURTHER ORDERED that as soon as hereafter possible, this Order be filed in the Office of the Secretary of State and that widespread publicity and notice be given of this Order.

This Order is not intended to, and does not, create any rights or benefits, substantive or procedural, enforceable at law or in equity, against the State of California, its agencies, departments, entities, officers, employees, or any other person.

IN WITNESS WHEREOF I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this 17th day of March 2020.

GAVIN NEWSOM
Governor of California

ATTEST:

ALEX PADILLA
Secretary of State

To: Operations Committee

From: Jeff Rieger, Chief Counsel

Meeting: June 2, 2021

Subject: "Straddling" and Related Issues

INTRODUCTION

The Supreme Court's opinion in *Alameda County Deputy Sheriff's Association v. Alameda County Employees' Retirement Association* (2020) 209 Cal.5th 1032, includes a statement that some believe requires ACERA to change its practices with respect to how much leave sell back and cash out[1] may be included in Tier 1, 2 and 3 members' "final compensation." The California Attorney General ("AG"), which represents the State in that litigation, has expressed an intent to seek a court order requiring ACERA to eliminate the practice of "straddling," which is described below.

Staff is bringing the practice of straddling, and several other practices relating to inclusion of leave sell back and cash out in members' final compensation, to the Operations Committee, and ultimately the Board, for consideration, so that the Board can decide whether any changes to ACERA's current practices are warranted. This memorandum was provided to counsel to all parties in the litigation on May 21, 2021. Staff recommends that the Committee allow those parties, and any other party that wishes to be heard, a reasonable opportunity to present their views on this matter, subject to the Committee Chair's reasonable time-management. At this meeting, the Committee may recommend specific actions for the Board to take at its June 17, 2021 meeting or it may seek further information for consideration at a future meeting of the Committee or the Board.

BACKGROUND OF "STRADDLING"

ACERA members' retirement allowances are calculated, in part, based on their "final compensation." For Tier 1, 2 and 3 members, "final compensation" is comprised of the member's highest one-year (Tiers 1 and 3) or three-year-average (Tier 2) of "compensation earnable." Gov't Code § 31461 defines "compensation earnable" to include some leave sell back and cash out.

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[1] Leave "sell back" is when an employee sells the value of accrued leave hours to the employer during service. Leave "cash out" is when an employee cashes out the value of accrued leave at termination. Gov't Code § 31461 allows the member to include both types of pay in "compensation earnable," so long as the amount does not exceed that which was "earned and payable" in "each 12-month period" of the final compensation period.

In September 2012, the Legislature passed AB 197, which amended the definition of "compensation earnable," effective January 1, 2013, so that amounts received from leave sell back and cash out included in final compensation cannot exceed "that which may be earned and payable in each 12-month period" of the final compensation period.

The question at hand is whether AB 197 eliminated a practice informally known as "straddling." Here is how straddling works:

- Assume that a Tier 2 member with a three-year "final compensation" period earns 160 hours of vacation per year of service and may sell back 80 hours per fiscal year, per the member's MOU.

- If that member retires January 1, 2021, the three-year "final compensation" period from January 1, 2018 to January 1, 2021 will "straddle" four fiscal years (2017-2018, 2018-2019, 2019-2020 and 2020-2021). This enables the member to sell back 80 hours of leave four times, totaling 320 hours, in the three-year "final compensation period."

- In two of the 12-month periods, the member earned 160 hours and could sell back 80 hours. In those 12-month periods, 80 hours of leave were "earned and payable" under the common usages of those words. In one of the 12-month periods, the member earned 160 hours and could sell back 160 hours (80 hours twice). In that 12-month period, 160 hours were "earned and payable" under the common usages of those words.

- The total amount of "compensation earnable" the member earned in the three-year period is divided by three to determine the three-year-average "final compensation." Thus, the value of 106.67 hours (1/3 of 320) is included in the member's "final compensation." Without straddling, the member could include only the value of 80 hours (1/3 of 240).[2]

ACERA has allowed the practice of straddling ever since implementing AB 197 in July 2014, so long as the amount of included leave does not exceed the amount that was "earned and payable" in the final compensation period.[3] No party sought to eliminate straddling in the *ACDSA v. ACERA* litigation (or otherwise) until 2021 when the AG expressed an intent to pursue a claim that AB 197 eliminated all versions of straddling, based on a paragraph that appears in the Background section of the Supreme Court's opinion in *ACDSA v. ACERA*.

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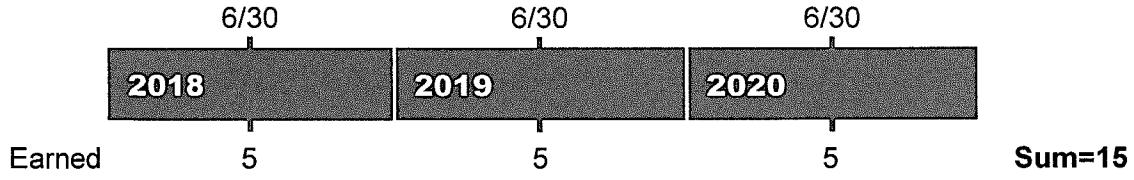
2 With straddling, Tier 1 and 3 members can include two years of sell back or cash out in a one-year "final compensation." Tier 4 members cannot include any leave sell back or cash out in their "final compensation," so straddling has no impact on Tier 4 members.

3 A court order prevented ACERA from applying AB 197 until July 11, 2014.

THE HISTORY OF STRADDLING AT ACERA

1997-2003: In *Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, the California Supreme Court ruled that leave time converted to cash was included in "compensation earnable." Litigation proceeded across the state regarding CERL systems' implementation of *Ventura*. Some systems settled and some litigated to conclusion. *See In Re Retirement Cases* (2003) 110 Cal.App.4th 426.

1999-2014: ACERA entered into and followed a court-approved settlement agreement. Exhibit A (without attachments). Under that settlement agreement, leave earned during the final compensation period was included in a member's final compensation, if the leave could either be sold back during service or cashed out at termination. *Id.* at pp. 7, 11. The following chart shows how ACERA would determine maximum inclusion of leave converted to cash for a member who earned five weeks of leave per year of service and could sell back three weeks of leave per fiscal year (the number of "payable" weeks during the final compensation period was not relevant under the settlement agreement).



2003-2004: In *Salus v. San Diego County Employees Retirement Association* (2004) 117 Cal.App.4th 734 and *In re Retirement Cases* (2003)110 Cal.App.4th 426, the courts held that payments payable only at termination cannot be included in final compensation. ACERA did not follow *Salus* and *In Re Retirement*, because the Settlement Agreement provided that later court rulings would not impact the binding terms of the Settlement Agreement. Exhibit A, at Par. 4, 6, 7 and 8.

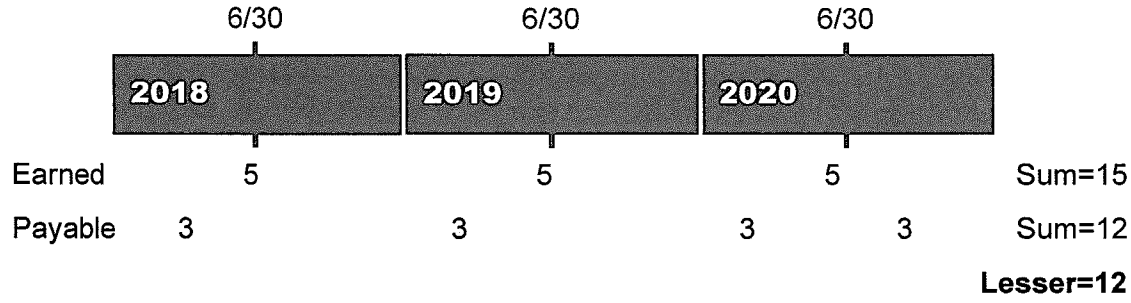
September 12, 2012: AB 197 was passed, effective January 1, 2013, providing that leave converted to cash could be included only if it was both "earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid." The amendments to Gov't Code § 31461 were expressly "intended to be consistent with and not in conflict with the holdings in *Salus v. San Diego County Employees Retirement Association* (2004) 117 Cal.App.4th 734 and *In re Retirement Cases* (2003)110 Cal.App.4th 426."

December 2012-July 2014: After ACERA announced its intent to comply with AB 197, the trial court ordered a stay in response to litigation claims that the law was unconstitutional. ACERA took a neutral position on the constitutional question. The State intervened to argue that AB 197 is constitutional, but did not seek an order eliminating straddling. Exhibit B, at Par. 13. ACERA's counsel sought guidance from the trial court on straddling, but the court refused to provide guidance. Here is how the trial court later described that history:

> [T]he record before Judge Flinn did not focus on the straddling issue; when it was raised at the November 19, 2013 case management conference he stated he had

not decided the straddling issue in his Decision Upon Preliminary Issues, and his Final Decision did not address straddling either. Thus, it cannot be said that Judge Flinn decided the straddling issue. Exhibit C, at p. 8.

July 2014-Present: The trial court lifted the stay and issued a writ requiring ACERA to implement AB 197. Exhibit D. ACERA followed its understanding that AB 197 (a) codified the rulings in *Salus* and *In Re Retirement* regarding termination leave cash out and (b) added the "payable" requirement. Since July 2014, ACERA includes termination leave cash out only to the extent that the amount of cashed out leave hours could have been sold back during the final compensation period before termination. The following chart shows how ACERA has determined maximum inclusion of leave cash out for a member who earns five weeks of leave per year of service and can sell back three weeks of leave per fiscal year, since July 2014.



AG's Briefing in *ACDSA v. ACERA*: In some portions of the AG's briefing to the Supreme Court, the AG directly criticized straddling, but never explained why ACERA's practices purportedly fail the "earned and payable" requirement under the common usages of those terms. In other parts of the AG's briefing to the Supreme Court, the AG made arguments that clearly would permit the type of straddling ACERA allows. For example, the AG wrote: "Properly understood within that context, the phrase 'an amount that exceeds that which may be earned and payable in each 12-month period' refers to *leave amounts* exceeding what may be accrued and cashed out during the final compensation period." Exhibit E at p. 35 (ital. in orig.). ACERA's practices since July 2014 align with that proposed statutory construction of AB 197 in the AG's brief, as illustrated in the graphic immediately above.

July 2020: While holding that AB 197 was constitutional (the issue that was before the Supreme Court), the Supreme Court made what appear to be contradictory statements as they pertain to straddling (which was not before the Court).

- In the Background section, the Court suggested straddling is eliminated.

> The State points to an additional function of section 31461, subdivision (b)(2) and (4). Prior to PEPRA's amendment, even in counties that limited the amount of leave time that could be cashed out in a calendar year, employees were able to double the amount of cashed out leave time received during a final compensation year by designating a final compensation year that straddles two calendar years, for example, July 1 through June 30. By cashing out leave time in the second half of the prior calendar year and the first half of the subsequent calendar year, a retiring

> employee could double the amount of cashed out leave time received in the final compensation year. By limiting the inclusion of cashed out leave time to that "earned and payable" in a "12-month period," subdivision (b)(2) and (4) prevent this practice. *Alameda,* 209 Cal.5th at 1062-63.[4]

- Then, in the Discussion section, the Court provided a definition of "earned and payable" that permits straddling:

> Although, in practice, an employee can accrue only a limited amount of leave time in a final compensation period, there is no similar practical constraint on the amount of leave time that can be cashed out during that time. The Court of Appeal's interpretation therefore renders subdivision (b)(2) pointless, ... A better reading requires "earned and payable" to refer to the amount of leave time that can be accrued during the final compensation period. *Id.* at 1096, fn.31.[5]

Since July 2020: At least four CERL systems (San Bernardino, Ventura, Sacramento and Mendocino) have eliminated straddling, reportedly based on the statement in the Background section of the Supreme Court opinion. The Ventura system is in litigation regarding its decision to eliminate straddling. In that litigation, the primary plan sponsor, Ventura County, has opposed the retirement board's elimination of straddling. At least two CERL systems had eliminated straddling before the Supreme Court's opinion (Marin and Contra Costa). In many other CERL systems, straddling is not possible (whether or not the system would allow it), because the employers either do not allow leave sell back or the employers require members to wait more than 12 months between sell backs. Based on informal polling of other CERL systems, we are not aware of any other CERL system that currently permits straddling, except for one system (San Mateo) that may allow straddling for a small subset of members in that system who are able to sell back accrued leave. In the remand proceedings in the *ACDSA v. ACERA* litigation, the AG has cited the above quote from the Background section of the Supreme Court's opinion to claim that AB 197 eliminated all straddling. Exhibit F. The AG has not provided a definition of the

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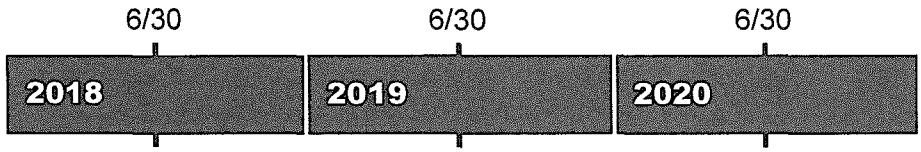
[4] The Background section of an opinion is not where a court typically reaches legal conclusions. The Background section is where the court describes the factual background and the parties' contentions in the case. Here, the Supreme Court begins the above quote with: "The State points to ...", which is not indicative of a legal conclusion based on the Supreme Court's consideration of opposing arguments on a disputed question of law. Rather it is indicative of a recitation of a parties' untested contention. Further, because the Supreme Court did not provide any numbers with its statement, it is not clear whether the Court was addressing all straddling or just straddling that results in a member receiving more than was "earned" in the applicable period. The latter reading comports more with the Court's later discussion in the Discussion section.

[5] The Supreme Court's focus on leave accrual appears throughout the opinion. *See e.g., Alameda*, 209 Cal.5th at 1096 ("Restricting the inclusion of such payments to those earned in the final compensation period promotes the underlying theory established by the general language of section 31461. Leave time earned prior to the final compensation period is, necessarily, awarded in return for work performed prior to that period.") A similar focus on leave accrual is also found throughout the early Legislative History of AB 197. *See, e.g.*, Exhibit G, at Section 1(c). (Stating a legislative purpose: "To prohibit final settlement pay and multiple year accruals of vacation time, annual leave, personal leave, or sick leave from being included in retirement calculations") (underlining added).

phase "earned and payable" to support that position. The following chart shows how ACERA would have to determine maximum inclusion of leave cash out for a member who earns five weeks of leave per year of service and can sell back three weeks of leave per fiscal year, if all straddling is impermissible.



Earned	5	5	5	
Payable	3	3	3	
Lesser	3	3	3	**Sum=9**

RECENTLY IDENTIFIED ISSUES WITH ACERA'S PRACTICES

In the process of analyzing the straddling issue, three additional issues with ACERA's practices have come to light.

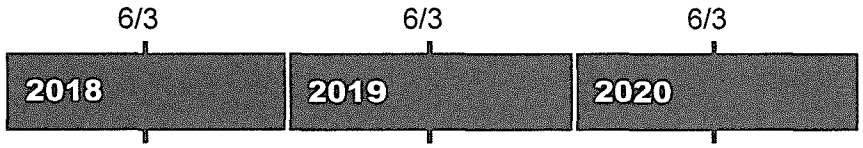
- ACERA does not account for the statutory language "in each 12-month period during the final average salary period" when determining the actual number of hours of sell back or cash out that may be included in a member's final compensation. Instead, ACERA aggregates the total amount "earned and payable" throughout the entire final compensation period. This arguably results in the inclusion of too many hours of leave sell back or cash out in some members' final compensation. Although this practice comports with the Supreme Court's definition of "earned and payable" in footnote 31 of its opinion ("amount of leave time that can be accrued during the final compensation period") it does not seem to be consistent with the "in each 12-month period" language of the statute.

- ACERA includes in final compensation the value of the leave hours at the highest salary rate available to the member for sell backs or cash outs (usually cash out at termination), rather than the salary rate that applied when those hours were actually "payable" in each "12-month period" of the final compensation period. The statute refers to the "amount" of "payments" (not the amount of leave hours) that are payable in each 12-month period. If a member receives a raise in the last three years before retirement, ACERA's current practice arguably results in a slight overstatement of the member's final compensation.

- When determining how much leave was "earned," ACERA applies the member's leave accrual rate at retirement to the entire final compensation period, rather using the member's accrual rates in each of the 12-month periods in the final compensation period. For example, if a Tier 2 member accrues three weeks of vacation throughout most of the final compensation period, but starts accruing four weeks annually right before retirement, ACERA assumes that the member earned

> 12 weeks of vacation (three four-week increments) during the final compensation period, when the member earned just a bit more than nine weeks of vacation.

The following chart shows how ACERA would determine inclusion of leave cash out for a member who earns five weeks of leave per year of service and can sell back three weeks of leave per fiscal year, under a reading of the statute that accounts for what is "earned and payable" in each 12-month period (assuming straddling is permitted at all).



Earned	5	5	5	
Payable	3	3	3 + 3 = 6	
Lesser	3	3	5	**Sum=11**

ANALYSIS

The Board Should Exercise Its Best Judgment On The Straddling Question

For the reasons explained below, the question of whether any straddling practice is permitted under AB 197 is uncertain. The plain language of Gov't Code § 31461 appears to permit straddling so long as the member does not include more that was earned in the applicable period, but several other factors support the conclusion that the courts may find that the statute does not permit straddling. Under these circumstances, the Board should consider all relevant information in this open and public process, give due consideration to this memorandum, as well as the AG's arguments and any other parties' input, and then exercise its best judgment.

The Plain Language of AB 197 Appears to Allow for Straddling

A court analyzing ACERA's governing law described the rules of statutory construction:

> When engaging in statutory construction, we begin with the statutory language because it is generally the most reliable indication of legislative intent. If the statutory language is unambiguous, we presume the Legislature meant what it said, and the plain meaning of the statute controls. If the language is susceptible of multiple interpretations, the court looks to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. After considering these extrinsic aids, we must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences. Pension legislation must be liberally construed and applied to the end that the beneficent results of such legislation may be achieved. Any ambiguity

> or uncertainty in the meaning of pension legislation must be resolved in favor of the pensioner, but such construction must be consistent with the clear language and purpose of the statute. *Irvin v. Contra Costa County Employees' Retirement Assn.* (2017) 13 Cal.App.5th 162, 170-71 (internal marks and citations omitted).

Here, the plain language of the statute appears to allow for straddling. If a member earns 160 hours of leave per year of service and is able to sell back 160 hours of leave in that same year, the amount was "earned and payable" in that "12-month period" under the plain meaning of "earned and payable." The fact that the member cashed out 80 hours in two different fiscal years makes no difference under the plain meaning of a statute that refers to each "12-month period" in the final compensation period. The statue does not refer to how much is "payable" in a fiscal year.

If the Legislature intended to eliminate straddling, it could have done so explicitly by either (a) tying the concept of "payable" to fiscal years, rather than each 12-month period of the final compensation period, or (b) defining straddling and expressly prohibiting it. The Legislature did not do either of those things. To the contrary, in Gov't Code § 31461, the Legislature cited *Salus* and *In Re Retirement Case* as the guiding precedent. Those cases were about termination pay, not straddling. I cannot find any form of the word "straddle" anywhere in over 1300 pages of Legislative History materials that I obtained from Legislative Intent Services (a company that compiles Legislative History).[6] Indeed, the Bill Analysis stated the Legislature's intent: "Clarify the intent of the conference report with regard to current members of [CERL] retirement systems ... by specifying that payments for termination pay and leave, as specified, may not exceed what is earned in a year and payable, consistent with the applicable court cases in regard to this issue." Exhibit H. Further, in the legislative process, the Legislature initially included the "payable" requirement, but that requirement was missing in a later version of the bill, and then it was added back. The Legislative History explains: "The second amendment [adding "payable"] clarifies provisions designed to reign in pension spiking by current '37 Act retirement system members to the extent allowable by court cases that have governed compensation earnable in that system since 2003. These cases allowed certain cash payments to be included in compensation for the purpose of determining a benefit, but only to the extent that the cash payments were limited to what the employee earned in a year. This amendment is needed due to a concern that was raised that, as written, the conference report could, increase the ability of some current employees to spike their pensions rather than achieving the intended outcome of reducing spiking opportunities." *Id.* If the Legislature had not included "payable," AB 197 would not have required ACERA to change its practices under the settlement agreement. When ACERA changed its practices in July 2014, it added the "payable" requirement.

For all of these reasons, straddling appears to be permitted, based on the plain language of Gov't Code § 31461 and its Legislative History.[7]

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[6] More Legislative History may be available after the preparation of this memorandum (the pandemic caused delays), but it is unlikely that any additional materials will be materially different.

[7] In defending its decision to eliminate straddling, the Ventura retirement system has argued that the word "each" in the phrase "that which may be earned and payable in each 12-month period" demonstrates the Legislature's intent to allow only the amount of leave sell back or cash out that could have been uniformly converted to cash in all three of the 12-month periods of a three-year

Other Factors Weigh Against Straddling

Notwithstanding the fact that the plain language and Legislative History of Gov't Code § 31461 appear to allow for straddling, there are several factors that suggest that the courts may rule that AB 197 eliminated straddling.

First, it is undeniable that the language in the Background section of the Supreme Court opinion appears to state that straddling is not permitted. It may be difficult to convince courts that the Supreme Court was either (a) reciting the State's argument on an issue that was not before the Supreme Court, but used language that read like a legal conclusion, or (b) referring only to straddling that causes the member exceed what was "earned" in the applicable period.

Second, the larger theme throughout the Supreme Court's opinion is that AB 197 was designed to prevent practices that result in the inclusion of amounts "final compensation" that a member could not regularly receive throughout a career. *See Alameda*, 209 Cal.5th at 1094-1098. Throughout a member's career, a member can receive on average only one fiscal year's worth of leave sell back per 12-month period. Allowing a member to include two years' worth of sell back or cash out in one 12-month period of the final compensation period is arguably the kind of perceived "manipulation" that AB 197 was designed to eliminate. Thus, a finding that AB 197 eliminated straddling arguably "comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute...." *Irvin*, 13 Cal.App.5th at 170-71.

Third, the trend of other retirement systems eliminating straddling and the fact that AG opposes straddling will make it more challenging to defend the practice. It is worth noting that, in a non-final ruling, a court held that the board of retirement in Contra Costa County had authority to eliminate straddling (this does not mean it was required to do so). That court found reasonable that board's reading of AB 197 under which "payable" leave hours accrue incrementally. Exhibit I. Under that theory, if a member can sell back 80 hours per fiscal year, the member is only "earning" 80 "payable" hours per year of service and therefore cannot include more than 80 hours in a 12-month period, even if the member was able to sell back 160 hours that 12-month period.[8]

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final compensation period. I believe there are three problems with this argument. First, the word "each" does not necessarily refer to multiple things that must be uniform. If the Legislature had intended uniformity across all three 12-month periods, it should have used some form of the word "uniform" in the statute. Second, the amounts paid during "each 12-month period" of the final compensation period are expected to vary, because (a) even if a member can sell back the same number of leave hours, the rate for converting leave hours to cash ordinarily will increase from year to year as the member's salary increases, and (b) a member's leave accrual rate and/or amount the member can sell back may change during the final compensation period. Third, many members (including ACERA's Tier 1 and 3 members) have a one-year final compensation period. The argument that focuses on the word "each" falls apart when applied to one-year final compensation, because there is only one "12-month period" and that one "12-month period" can include two fiscal years' worth of leave sell backs.

[8] I believe this is the best argument to support the view that AB 197 eliminated straddling. A review of current MOUs, however, shows that leave hours accrue incrementally, but "payable" hours are capped by fiscal year. *See* https://www.acgov.org/hrs/divisions/elr/mou.htm. Further, the

In sum, the plain meaning and Legislative History of the words in Gov't Code § 31461 seem to allow for straddling, but several other factors cut the other way. Under these circumstances, there is no clear correct answer and therefore the Board should exercise its best judgment on the straddling question, after giving due consideration to this memorandum and all other information before the Board in this open and public process.

Three ACERA Practices Should Be Changed

As explained previously, in the process of analyzing the straddling issue, it has come to light that three ACERA practices do not appear to comport with the best reading of Gov't Code § 31461. The recommended change are:

Recommend Change No. 1: For Tier 2 members, if ACERA continues to allow straddling, ACERA should determine how much leave time was earned and payable in each 12-month period of the final compensation period, rather than aggregating how much is earned and payable in the entire final compensation period. This issue does not impact Tier 1 or Tier 3 members because they have only one 12-month period in their final compensation period. This change also will not impact the majority of Tier 2 members, but for some Tier 2 members this change will result in either one or two fewer weeks of leave sell back or cash out in their three-year final compensation period (i.e., 1/3 week or 2/3 week less in their final compensation).

Recommended Change No. 2. When determining the value of leave sell back or cash out, ACERA should use the amount that the member would have received if the member had completed the sell back in each 12-month period of the final compensation period, rather than using the highest rate the member was able to sell back or cash out (usually cash out at termination). This should have a relatively minor impact on members' retirement allowances.[9]

Recommended Change No. 3. When determining how much leave was "earned," ACERA should use the actual accrual rate throughout the final compensation period (which may

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Supreme Court's analysis of the phrase "earned and payable" undermines a payable-hours-accrued-incrementally theory, because the Supreme Court found that "earned" and "payable" are distinct concepts: "Although, in practice, an employee can accrue only a limited amount of leave time in a final compensation period, there is no similar practical constraint on the amount of leave time that can be cashed out during that time." *Alameda*, 209 Cal.5th at 1096, fn.31.

[9] For example, using ACERA's current practices that include straddling, assume that a Tier 2 member could sell back two weeks of vacation per fiscal year. Further assume that the member's salary was $100,000 in the first 12-month period of the final compensation period, $105,000 in the second 12-month period, and $110,000 in the third 12-month period. Under current practices, if the member cashed out eight or more weeks at termination, ACERA will include eight weeks at the $110,000 salary. This results in $5,641 in the member's final compensation (value of eight weeks with an $110,000 salary, divided by 3). Under the proposed change, the member would likely have two weeks at a $100,000 salary, two weeks at a $105,000 salary and four weeks at an $110,000 salary (the straddle year). This results in $5,449 in the member's final compensation (value of eight weeks at an average salary of $106,250, divided by 3). That is a $192 difference in final compensation. If, for example, the member's allowance is 50% of final compensation, the annual difference will be $96 (before cost of living increases).

change), rather than apply the accrual rate at termination to the entire final compensation period. This change will impact only those members whose accrual rate changes during the final compensation period. Indeed, it will impact on a portion of those members, because the "payable" limitation more often is the cap than the "earned" limitation.

SUMMARY OF RECOMMENDATIONS

1. After considering all of the information the Committee and the Board may receive in this open and public decision-making process, the Board exercise its best judgment as to whether ACERA should continue to permit straddling for members who retire after the Board makes its decision.

2. Direct staff to make the following changes for members who retire after the Board makes its decision:

   - If ACERA continues to permit straddling, direct staff to account for the amount of leave time that was "earned and payable" in each "12-month period," rather than aggregating the amount that is "earned and payable" throughout the entire final compensation period.

   - Whether or not ACERA continues to permit straddling, direct staff to determine the amount that was "payable" in each 12-month period by using the rate of pay that applied in each 12-month period.

   - Whether or not ACERA continues to permit straddling, direct staff to determine how much leave was actually "earned" throughout each 12-month period, rather than attributing the member's accrual rate at termination to the entire final compensation period.

Exhibit A

SETTLEMENT AGREEMENT

This Settlement Agreement is made and entered into by and between Alameda County Employees' Retirement Association, a public entity organized and existing under the Constitution and laws of the State of California, Cal. Gov't. Code section 31450 et seq.; the County of Alameda, a county organized and existing under the Constitution and laws of the State of California, Cal. Const. Art. 11, Cal. Govt. Code section 23000; Howard T. Garrigan and Clarence G. Quist, on their own behalf as individuals who retired from employment with the County and are receiving retirement allowances from the Association, and on behalf of all other individuals who are receiving retirement allowances from the Association and their beneficiaries and successors in interest; Richard Hendrix and Donna Rolle, on their own behalf as active members of the Association, and on behalf of all other active members of the Association, and their beneficiaries and successors in interest; Operating Engineers Local 3, AFL-CIO; and the International Federation of Professional and Technical Engineers, Local 21, AFL-CIO, with reference to the following:

DEFINITIONS

The following definitions are used throughout this agreement:

1. "ACERA" or the "Association" - the Alameda County Employees' Retirement Association, a public entity organized and existing under the Constitution and laws of the State of California, Cal. Gov't. Code § 31450 et seq.

2. "Action" - the present action for declaratory relief filed by the Association, entitled Alameda County Employees' Retirement Association v. County of Alameda et al., Case No. 797354-7.

3. "Active Members" - all active members of the Alameda County Employees' Retirement Association.

4. "Agreement" - this Settlement Agreement.

5. "Board of Retirement" - the Board of Retirement of the Association.

6. "CERL" - The County Employees' Retirement Law of 1937, as amended, Cal. Gov't. Code § 31450 et seq.

7. "Class Representatives" - the four individual Plaintiff-Intervenors in the Action, namely Howard T. Garrigan, Clarence G. Quist, Richard Hendrix and Donna Rolle, who have intervened on their own behalf as individuals and on behalf of all Retired, Deferred and Active Members of the Association.

8. "Compensation earnable" - the average compensation as determined by the Board of Retirement, for the period under consideration upon the basis of the average number of days ordinarily worked by persons in the same grade or class of positions during the period, and at the same rate of pay.

9. "Compensation" - the remuneration paid in cash out of county or district funds, plus any amount deducted from a Member's wages for participation in a deferred compensation plan established pursuant to Chapter 8 (commencing with Section 18310) of Part 1 of Division 5 of Title 2 or pursuant to Article 1.1 (commencing with Section 53212) of Chapter 2 of Part 1 of Division 2 of Title 5, but not including the monetary value of board, lodging, fuel, laundry, or any other advantages in kind furnished to a Member, Cal. Gov't. Code § 31460.

10. "Contributions"- amounts paid by a Member or by an employer to the Association's retirement fund.

11. "Coordinated Proceedings"- Judicial Council Coordination Proceeding No. 4049, now pending in the Superior Court of the State of California in and for the County of San Francisco before the Honorable Stuart R. Pollak, Judge, covering similar claims filed by retirees of other counties covered by CERL, other counties and other boards of retirement, all addressing issues similar to those raised in the Action.

12. "Cost of Living Adjustment" - Any adjustment in Retirement Allowances, pursuant to Article 16.5 of CERL, Cal. Gov't. Code § 31870 et seq., not including any benefits paid from the Supplemental Retiree Benefits Reserve under Article 5.5 of CERL, Cal. Gov't. Code §§ 31610-19.

13. "County" - the County of Alameda, a county organized and existing under the Constitution and laws of the State of California, Cal. Const. Art. 11, Cal. Govt. Code section 23000.

14. "Deferred Members" - Members leaving employment, reserving the right to be granted a deferred Retirement Allowance pursuant to Article 9 of CERL, Cal. Gov't. Code § 31700 et seq.

15. "Eligible Members"- Members whose job classification and description would have rendered them eligible for an increase in their Retirement Allowances if the New Definitions had been in effect on the effective date of their retirement.

16. "Final compensation" - the average annual "Compensation earnable" during any three years elected by a Member at or before the time he or she files an application for retirement, or, if he or she fails to elect, during the three years immediately preceding his or her retirement, or the average annual "Compensation earnable" by a member during any year elected at or before the time he or she files an application for retirement, or, if he or she fails to elect, during the year immediately preceding his or her retirement, whichever is applicable. For purposes of determining "Final compensation," compensation shall be deemed "Compensation earnable" when earned, rather than paid, pursuant to Cal. Govt. Code, § 31461.

17. "Garrigan" - Howard T. Garrigan, a Retired Member of the Association and one of the individual Plaintiff-Intervenors in the Action.

18. "Guelfi" - the decision of the California Court of Appeals, entitled Guelfi v. Marin County Employees' Retirement Association, 145 Cal. App. 3d 297, 193 Cal. Rptr. 343 (1983).

19. "Hendrix" - Richard Hendrix, an Active Member of the Association and one of the individual Plaintiff-Intervenors in the Action.

20. "Implementation Date" - the date of entry of a final order by the court in the Action certifying a class for the purposes of settlement, approving the terms of this Agreement and dismissing the Action.

21. "Members" - All Active Members, Retired Members and Deferred Members of the Alameda County Employees' Retirement Association, as those terms are defined herein.

22. "New Definitions" - the new definitions of "Compensation earnable" and "Final compensation" that were adopted by resolution of the Board of Retirement at its public meeting on April 8, 1998, as amended.

23. "Parties" - the parties to this Agreement.

24. "Quist"- Clarence G. Quist, a Retired Member of the Association and one of the individual Plaintiff-Intervenors in the Action.

25. "Retired Members"- all individuals who retired from employment with the County or any participating District and who receive Retirement Allowances from the Association, as well as any other individuals receiving Retirement Allowances from the Association including beneficiaries and successors in interest of Members or former Members.

26. "Retirement Allowance"- the payments which the Association is required by CERL to make to Retired Members, inclusive of every retirement allowance, optional death allowance and annual death allowance paid pursuant to CERL.

27. "Rolle" - Donna Rolle, an Active Member of the Association and one of the individual Plaintiff-Intervenors in this Action.

28. "Ventura" - the decision of the California Supreme Court rendered final on October 1, 1997, entitled, Ventura County Deputy Sheriffs' Association v. Board of Retirement of the Ventura County Employees' Retirement Association, 16 Cal. 4th 483, 66 Cal. Rptr. 2d 304, 940 P.2d 891 (1997).

RECITALS

WHEREAS, CERL establishes a comprehensive system for the payment of Retirement Allowances to Members; and

WHEREAS, the Board of Retirement of ACERA is entrusted with "the management of the retirement system" for the Members of the Association and is constitutionally required to discharge its duties "solely in the interest of and for the exclusive purposes of providing benefits to participants and their beneficiaries, minimizing employer contributions thereto, and defraying reasonable expenses of administering the system," the first of which duties "shall take precedence over any other duty." Cal. Const., Art. XVI, § 17; and

WHEREAS, CERL requires the Board of Retirement to calculate each Member's Retirement Allowance on the basis of his or her "final compensation" (Cal. Gov't. Code §§ 31462 and 31462.1), which in turn requires the Board to calculate "final compensation" by first determining the Member's "compensation," and then the Member's "compensation earnable;" and

WHEREAS, CERL defines "compensation" as follows:

> "Compensation" means the remuneration paid in cash out of county or district funds, plus any amount deducted from a member's wages for participation in a deferred compensation plan established pursuant to Chapter 8 (commencing with Section 18310) of Part 1 of Division 5 of Title 2 or pursuant to Article 1.1 (commencing with Section 53212) of Chapter 2 of Part 1 of Division 2 of Title 5, but does not include the monetary value of board,

lodging, fuel, laundry, or other advantages furnished to a member. Cal. Gov't Code § 31460;

and

WHEREAS, CERL defines "compensation earnable" as follows:

> "Compensation earnable" by a member means the average compensation as determined by the board, for the period under consideration upon the basis of the average number of days ordinarily worked by persons in the same grade or class of positions during the period, and at the same rate of pay. The computation for any absence shall be based on the compensation of the position held by the member at the beginning of the absence. . . . Compensation, as defined in Section 31460, that has been deferred shall be deemed "compensation earnable" when earned, rather than when paid. Cal. Gov't Code § 31461;

and

WHEREAS, CERL defines "final compensation" on either a three-year or one-year basis, so that for some Members the following definition of "final compensation" is applicable:

> "Final compensation" means the average annual compensation earnable by a member during any three years elected by a member at or before the time he files an application for retirement, or, if he fails to elect, during the three years immediately preceding his retirement. If a member has less than three years of service, his final compensation shall be determined by dividing his total compensation by the number of months of service credited to him and multiplying by 12 Cal. Gov't. Code § 31462;

and for other Members the following definition of "final compensation" is applicable:

> "Final compensation" means the average annual compensation earnable by a member during any year elected by a member at or before the time he files an application for retirement, or, if he fails to elect, during the year immediately preceding his retirement. Cal. Gov't Code § 31462;

and

WHEREAS, the Court of Appeal in Guelfi v. Marin County Employees' Retirement Association, 145 Cal. App. 3d 297, 193 Cal. Rptr. 343 (1983), ruled that a variety of additional and nonstandard payments to county employees should be excluded

from the calculation of "compensation earnable" under CERL, and that "compensation earnable" should be limited to salary payments uniformly paid to all employees in a given employment classification; and

WHEREAS, following the holding of the Court of Appeal in Guelfi, the Board of Retirement calculated "compensation earnable," for purposes of determining a Member's Retirement Allowance, on the basis of the salary received by other employees in the Member's same job classification, and excluded certain additional payments made to Members, such as compensation in lieu of accrued vacation and the like, from "compensation earnable;" and

WHEREAS, on August 14, 1997, the Supreme Court of the State of California entered its original judgment in the case of Ventura County Deputy Sheriffs' Association v. Board of Retirement of the Ventura County Employees' Retirement Association, 16 Cal. 4th 483, 66 Cal. Rptr. 2d 304, 940 P.2d 891 (1997), which decision was rendered final when the Court denied a petition for rehearing on October 1, 1997; and

WHEREAS, the Court in the Ventura decision disapproved of Guelfi in part, and held that "compensation earnable," for purposes of calculating the amount of a Member's Retirement Allowance, should not be limited to pay received by all employees in the same grade or class as the employee; and

WHEREAS, the Court in Ventura also held that its ruling should be applied retroactively with respect to those plaintiffs before it, but refrained from ruling on retroactivity with respect to retirees in other counties, where the relevant facts might differ; and

WHEREAS, as a result of the decision in Ventura, the Board of Retirement formed a subcommittee to develop background information, held public meetings, obtained the advice of independent counsel for assistance in implementing the Ventura decision, and subsequently adopted formal motions on these matters; and

WHEREAS, at its public meeting on April 8, 1998, the Board of Retirement passed a resolution, as subsequently amended, providing new definitions of

"compensation earnable" and "final compensation" to be interpreted consistently with CERL (the "New Definitions") which, as amended, provides as follows:

> "Compensation earnable," for purposes of calculating pensionable compensation, shall include all items of remuneration paid to County and district employees in cash for services rendered or special skills, including base salary; shift premiums; incentive pay or pay premiums that recognize special duties, qualifications, or skills; allowances automatically paid to designated employees in recognition of expenses related to employment without reference to the actual expense incurred; nonstandard compensation relating to paid time off in lieu of overtime pay, no matter how designated on the relevant payroll system, taken during the regular course of employment, but excluding any amount paid in cash in a lump sum either prior to or upon termination and provided such nonstandard compensation does not increase the Member's compensation earnable or accrued retirement credit above the average compensation earnable and accrued retirement credit of other Members in the same job classification; other leave paid as salary or as lump sum(s) in lieu of paid leave and pay for hours worked above forty hours per week where those hours are ordinarily worked by the employee in the employee's permanent work assignment, mandated by the County or applicable Memorandum of Understanding;
>
> "Final compensation" shall be the average compensation earnable by a Member during the period determined to be the Member's final compensation period as elected by the Member, that is, the average annual compensation during the one year, or averaged over three years where applicable, except that vacation leave and/or sick leave paid as a lump sum shall be recognized as final compensation only to the extent that it is earned during the final compensation period and, in the case of a three-year final compensation period, shall be the annual average of the leave earned. All lump sum cash payments for accrued, unused paid leave of any kind other than vacation leave and/or sick leave shall be excluded from final compensation.

and

WHEREAS, on April 8, 1998, the Board also passed, among others, the following resolutions:[1]

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[1] For the purposes of these resolutions, the term "retirees" includes the eligible retired members, their survivors and beneficiaries.

1. RETIREE ELIGIBILITY:

   A. That all ACERA retirees . . . are eligible for an increase in their retirement allowance, based on their inability to include in their compensation earnable at the time of their retirement, any cash payments now permitted to be included as a result of Ventura.

   B. That such increases are to be granted from October 1, 1997 forward.

2. RETROACTIVITY:

   A. That the Ventura decision requires ACERA to pay all retirees, who are eligible for an increased allowance as outlined in No. 1 above, an additional amount equal to the increase in their allowance that would have been payable to eligible retirees during the period from October 1, 1994, through September 30, 1997;

and

WHEREAS, the County opposed retroactive application of the Ventura decision and also opposed the application of the decision to all Retired Members prospectively, regardless of when they retired; and

WHEREAS, various unions, acting on behalf of some of the Members, asserted different positions with respect to vacation accrual, vacation sell back, and contributions from the Members with respect to payments made pursuant to the Ventura decision; and

WHEREAS, in order to resolve these differences, the Association filed an action in the Superior Court of the State of California, County of Alameda, entitled Alameda County Employees' Retirement Association v. County of Alameda et al., Case No. 797354-7 (the "Action"), seeking a declaration with regard to the respective interpretations of the Ventura decision, and specifically seeking clarification of the issues of eligibility, retroactivity, vacation accrual and contributions by Members in exchange for increased benefits pursuant to the Ventura decision; and

WHEREAS, the County filed an answer to the Association's complaint disputing the Association's contention that all Members whose Retirement Allowances were not

previously computed in accordance with the Ventura decision are entitled to a recalculation of their Retirement Allowances regardless of their respective dates of retirement, asserting instead that the Ventura decision should only be applied to Members retiring after the date of the Ventura decision, and disputing that Retired Members are entitled to the payment of such recalculated Retirement Allowances retroactive to October 1, 1994, which is a period of three (3) years preceding the date of the Ventura decision, contending instead that there should be no recalculation of the Retirement Allowances for any Member whose effective date of retirement was prior to the date of the Ventura decision; and

WHEREAS, Operating Engineers Local 3 filed an answer to the Association's complaint disputing the Association's contention that Active and Retired Members may be assessed for Contributions from Compensation they previously received from the County which the Association did not consider "compensation earnable" at that time but which the Association now considers "compensation earnable" in light of the Ventura decision, asserting instead that those Members should not be assessed for any Contributions from Compensation which they earned prior to the date of the Ventura decision; and

WHEREAS, Garrigan, Quist, Hendrix and Rolle (the "Class Representatives") filed a complaint in intervention in the Action alleging that the funds which the Association proposed to use to meet the costs of compliance with the Ventura decision could not lawfully be used for that purpose, and disputing the Association's contention that Active and Retired Members may be assessed for Contributions based upon Compensation which the Association did not consider "compensation earnable" at the time but which the Association now considers "compensation earnable" in light of the Ventura decision, and disputing the County's contentions that (1) the Ventura decision should only be applied to Members retiring after the date of the Ventura decision and (2) that there should be no recalculation of Retirement Allowances of any Member who retired prior to the date of the Ventura decision; and

WHEREAS, although now in part styled as a class action, no class has yet been certified in the Action; and

WHEREAS, pursuant to a petition filed with the Judicial Council, the Action was included in Judicial Council Coordination Proceeding No. 4049, now pending in the Superior Court of the State of California in and for the County of San Francisco before the Honorable Stuart R. Pollak, Judge, covering similar claims filed by retirees of other counties covered by CERL, other counties and other boards of retirement, all addressing issues similar to those raised in the Action (the "Coordinated Proceedings"), but has, pursuant to an Order dated March 22, 1999, been remanded to the Superior Court of the State of California, County of Alameda, for approval of this Agreement; and

WHEREAS, on July 24, 1998, the County began deducting Contributions from Compensation paid to Active Members which was not previously considered "compensation earnable" prior to the Ventura decision, and ceased to deduct Contributions for various forms of Compensation which the Association no longer considers "compensation earnable" in light of the Ventura decision; and

WHEREAS, the Parties hereto desire to resolve the disputes encompassed by the Action through a settlement, which (1) accomplishes their common goal of avoiding unwarranted litigation and unnecessary delay in the adjustment of retirement benefits to the Members and their beneficiaries, (2) enables the Association to comply with the Ventura decision, and (3) allows a portion of the Association's deferred investment gains to be used to fund the estimated costs of the settlement in a manner consistent with the constitutional mandate that the Board of Retirement discharge its duties "solely in the interest of and for the exclusive purposes of providing benefits to participants and their beneficiaries, minimizing employer contributions thereto, and defraying reasonable expenses of administering the system;"

AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants, conditions, and promises contained herein, the Parties hereby agree as follows:

1. Payment of Increased Retirement Benefits. The Association shall, pursuant to the Ventura decision, consistent with CERL and the Resolutions of the Board of Retirement passed at its meeting on April 8, 1998, as amended, and with Resolutions to be adopted by the Board implementing the Agreement:

(a) apply the New Definitions to the calculation of Retirement Allowances to be paid to all Members whose effective dates of retirement occur on or after October 1, 1997, provided there is evidence which shows to the satisfaction of the Board, that the Member's job classifications and descriptions render that Member eligible for an increase in his or her Retirement Allowance under the New Definitions;

(b) following entry of a final order in the Action pursuant to paragraph 3 below certifying a class for the purposes of settlement and approving the terms of this Agreement (the "Implementation Date"), apply the New Definitions to the calculation of Retirement Allowances to be paid after the Implementation Date and provide, as soon as practicable, increased Retirement Allowances (including all Cost of Living Adjustments which were made to the Member's Retirement Allowance during the period from the date of the Member's retirement to the date of payment of such increased Retirement Allowance), to any Retired Member of the Association no matter when the Member's effective date of retirement, provided there is evidence which shows to the satisfaction of the Board that the Retired Member's job classification and description would have rendered the Member eligible for an increase in his or her Retirement Allowances if the New Definitions had been in effect on the effective date of the Member's retirement;

(c) pay to all Eligible Members a lump sum amount equal to the difference in the Retirement Allowances such Members have received and the amount they would have received had the Implementation Date been October 1, 1997, such payment to

be made without interest and without deducting any amount that such Eligible Member might have been required to pay in the form of Contributions under the New Definitions. Said lump sum amount shall be inclusive of all Cost of Living Adjustments which were made to such Eligible Member's Retirement Allowance during the period from the date of the Member's retirement to the date of payment of such lump sum amount;

(d) pay to all Eligible Members whose effective dates of retirement were prior to October 1, 1997, an amount equal to the difference in the Retirement Allowances such Members received and the amount they would have received through September 30, 1997, had the Implementation Date been October 1, 1994, such payment to be made together with interest at the rate of eight percent (8%) per annum from October 1, 1997, to the date actually paid, but without deducting any amount that such Eligible Member might have been required to pay in Contributions under the New Definitions during the period. Said lump sum shall be inclusive of all Cost of Living Adjustments which were made to such Eligible Member's Retirement Allowances during the period from the date of the Member's retirement to the date of payment of such lump sum amount;

(e) process the determinations for Retired Members commencing with those Members whose effective dates of retirement are the most recent;

(f) set up a review and appeals process as set forth in Attachment A, so that any Retired Member who believes that the recalculation of his or her Retirement Allowance is in error, whether as a result of mathematical or computational error or by reason of any inclusion or exclusion of any category of compensation, job classification, seniority, status, cost of living adjustment or other basis for the determination, shall have the right of appeal to an ombudsman to be appointed by the Board of Retirement for this purpose. The ombudsman shall review the determination and any submission by or on behalf of the Retired Member or his or her representative, and make recommendations to the Board of Retirement which

shall be approved or denied by the Board of Retirement within thirty (30) days of the receipt of the recommendation from the ombudsman.

2. Payment for Increased Benefits. The Parties agree that the financial obligation to be incurred by the Association to pay the increases in Retirement Allowances contemplated by paragraph 1 above, may, upon certification by the Associations' actuary in the form attached hereto as Attachment B that the payment of such obligation does not threaten the financial stability of the Association, be met by the Association by the immediate recognition by the Association of approximately two hundred and fifty-nine million dollars ($259,000,000) in deferred gains on the Association's investments, generally in accordance with the Memorandum regarding Ventura Funding dated May 1, 1998, a copy of which is attached as Attachment C, and more specifically in accordance with the Association's letter to the Alameda County Administrator dated March 2, 1999, with an attachment thereto, and an April 19, 1999 letter from William M. Mercer, Inc. to the Association, both of which are attached as Attachment D. Pursuant to the letters in Attachment D, the Association agrees immediately to recognize approximately two hundred and fifty nine million dollars ($259,000,000) in deferred investment gains for the exclusive use and purpose of fully offsetting the projected funding liabilities set forth in paragraph 1 above. The parties so agree even if the effect of the Association's meeting such obligation is to alter the rate at which the County would otherwise make Contributions to the Association. The Parties further agree that the use of the Association's funds and the recognition of deferred gains on the Association's investments in this manner and for this purpose shall not constitute a precedent which may be used in any court of law or otherwise to justify the use of the Association's funds in this manner or any similar manner in the future to meet any other liabilities of the Association, whether foreseeable or unforeseeable.

3. Dismissal of the Action. Upon entry of a final order in the Action certifying a class for settlement purposes and approving the terms of this Agreement, the Parties, through their respective counsel, will cause the Action to be dismissed with prejudice with each party to bear its own fees and costs except as otherwise may be ordered by the court pursuant to the provisions of paragraph 5 of this Agreement.

4. Court Approval and Benefits of Class Certification. The Parties acknowledge that resolution of the Action requires court approval, and upon execution, the Parties, through their respective counsel, shall promptly take steps to present this Agreement to the Superior Court for approval. In addition, the Parties agree that they intend the benefits of class certification to extend to the Association, the County and all contract employers, including, but not limited to, the Alameda County Housing Authority, the Livermore Area Recreation and Park District, the Alameda County School District and the Alameda County Health Care Authority, and to all Active and Retired Members of the Association. The parties also intend that all Members shall be bound by the terms of this Agreement, and that an order of final class certification shall be entered concurrently with the order approving this Agreement. Accordingly, prior to seeking entry of an order from the Superior Court approving this Agreement, the Parties agree to jointly request the Court to certify a class consisting of all Members, whether Retired Members, Deferred Members or Active Members, and including their beneficiaries and successors in interest, in order that all Members and their beneficiaries and successors in interest shall be bound by the terms of this Agreement. The Association agrees to notify all Retired Members, and to notify all Active Members of contract employers and Deferred Members, and the County agrees to notify all other Active Members (1) of the terms of this Agreement, (2) of the date set for hearing on a joint motion of the Parties for approval of this Agreement, (3) of the fact that such Members have the right to appeal at the hearing and advise the Court of any objections they may have to the terms of this Agreement and the entry of an order approving this Agreement, and (4) of the fact that all the Members will in any event be bound by the terms of this Agreement in the event that it is approved by the Court.

5. Class Representatives' Attorneys' Fees. The Parties agree that upon motion by the law firm representing Class Representatives Garrigan and Quist in this action, the Court shall determine, concurrently with its determination of the joint motion for approval of this Agreement, an amount to be paid as attorneys' fees for its representation of the class of Retired Members and their beneficiaries and successors in interest. The parties further agree that the amount to be paid to the law firm as its

attorneys' fees shall be deducted from funds allocated by the Board of Retirement to meet the obligations imposed by this Agreement and by the Ventura decision, subject to the condition that such amount shall be established by the Court and shall in no event exceed the amount which would result if the fee agreement between the Class Representatives and the law firm, which provides for payment by the Class Representatives to the law firm of one percent (1%) of the retroactive retirement allowance adjustments and interest thereon that they recover by reason of this agreement and excludes any deduction or payment of attorneys' fees to the law firm from or on account of increases in prospective retirement allowance payments resulting from this agreement, is also applied to the retroactive retirement allowance adjustments and interest thereon which all other class members recover by reason of this agreement. The Association reserves the right to comment on and/or oppose the Class Representatives' attorneys' fee application.

6. Mutual Releases. Upon dismissal of the Action following approval by the Court of the terms of this Agreement, the Parties, and each of them, and their respective affiliates, boards, divisions, officers, Board members, members, attorneys, servants, representatives, employees, heirs, predecessors, successors, assigns and partners, past, present and future, and all other persons and entities acting on their behalf, will forever discharge and release each other, and their respective affiliates, boards, divisions, officers, Board members, members, attorneys, servants, representatives, employees, heirs, predecessors, successors, assigns and partners, past, present and future, and all other persons and entities acting on their behalf, from any and all claims, debts, costs, expenses, damages, injuries, liabilities, demands, and causes of action of any kind, nature and description, whether known or unknown, suspected or unsuspected, fixed or contingent, which each then has, owns or claims to have or own, or at any time had, owned or claimed to have or own, upon or by reason of any matter, cause or thing, arising out of or in any way related to the Action except for any claims Members may have against the Association for the individual award or determination of increased benefits to be paid in accordance with the terms of this Agreement.

7. Acknowledgment of Risk. Each of the parties to this Agreement acknowledge, by entering into this Agreement, that they are fully cognizant of the

possibility and risk that later court rulings or decisions may be made or reached, whether by other courts or counties or boards of retirement, or as a result of or part of the Coordinated Proceedings, that are different from or at odds with the terms of this Agreement, and which might suggest or mandate a different result or resolution of the claims presented in this Action and resolved by this Agreement, for example, with respect to the payment of amounts pursuant to paragraph 1(d) above pursuant to the Board of Retirement's resolutions concerning the retroactive effect of the Ventura decision, and have been fully advised of such risks and possibilities, and nevertheless enter into this Agreement with full recognition of the risks, costs and benefits of so doing, fully intending to be bound to its terms.

8. Civil Code Section 1542. Each of the Parties to this Agreement acknowledges its waiver of its rights under Civil Code Section 1542 and that the Party has been advised by its attorneys concerning, and is familiar with, the provisions of Section 1542 of the California Civil Code, which reads as follows:

> **A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.**

9. Advice of Counsel. Each of the Parties to this Agreement acknowledges that he, she or it has been fully advised as to the legal and binding effect of this Agreement and the releases contained in it and, having been fully apprised by their lawyers, freely and voluntarily sign this Agreement.

10. Integrated Agreement. Each of the Parties represents that they have not relied on any promise, inducement, representation, or other statement made in connection with this Agreement that is not expressly contained herein, and that this Agreement contains the entire agreement between the Parties. All other prior agreements, arrangements or understandings, oral or written, are merged into and superseded by the terms of this Agreement and the Court approval to be obtained pursuant to paragraph 4 above.

11. Ownership of Claims. Each of the Parties to this Agreement warrants and represents to each other that they have not heretofore assigned or transferred, or purported to assign or transfer, to any person or entity, any claim or cause of action arising out of or related to the matters released herein or any portion thereof or interest therein except as otherwise provided herein, and each agrees to indemnify, defend, and hold the others harmless from and against any and all claims based on or arising out of any such assignment or transfer, or purported assignment or transfer of such claims.

12. Authority. Each of the Parties to this Agreement and any representative of any Party who executes this Agreement hereby represents, warrants and covenants that they have the full power and authority to execute, deliver and perform this Agreement and have duly authorized the execution, delivery and performance of this Agreement.

13. No Oral Modification. This Agreement cannot be altered, amended, or modified in any respect, except by a writing specifically denominated as an amendment to this Agreement and duly executed by all of the Parties.

14. California Law Applies. This Agreement shall be construed under and interpreted in accordance with the laws of the State of California applicable to contracts between California domiciliaries which are to be performed wholly within the State of California except to the extent that federal law applies.

15. Attorneys' Fees for Enforcement. If any arbitration proceeding, or any action, at law or in equity, is brought to enforce or interpret the provisions of this Agreement or any claim arising out of or relating to this Agreement, the substantially prevailing party shall be entitled to recover their reasonable attorneys' fees, in addition to any other relief to which they may be entitled.

16. Binding Effect. This Agreement will bind, and will inure to the benefit of each of the Parties to it or who are benefited by it, and their affiliates, boards, divisions, officers, Board members, members, attorneys, servants, representatives, employees, heirs, predecessors, successors, assigns and partners, past, present and future, and all other persons and entities acting on their behalf.

17. Severability of Parts. If any portion, provision or part of this Agreement is held, determined or adjudicated to be invalid, unenforceable or void for any reason whatsoever, each such portion, provision or part shall be severed from the remaining portions, provisions or parts of this Agreement and shall not affect the validity or enforceability of such remaining portions, provisions or parts.

18. Headings. The headings in this Agreement are descriptive only, and do not constitute any portion of the terms of this Agreement.

19 Admissions. It is understood and agreed that this is a compromise settlement of disputed claims and that the facts or terms of this Agreement should not be construed to be an admission of any liability or obligation whatsoever by any Party to any other Party or any other person whatsoever.

20. Counterparts. This Agreement may be executed in any number of counterparts, all of which taken together shall constitute one and the same instrument, and any of the Parties hereto may execute this Agreement by signing any such counterpart.

21. Execution Date. This Agreement shall be deemed to have been executed on the latest date of signature set forth below.

Dated: 5-20-99

ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION

By: _____

Name: Liz Koppenhaver

Capacity: Vice Chair

Dated: 6/1/99

COUNTY OF ALAMEDA

By: _____

Name: William Rundstrom

Capacity: Attorney for Alameda County

Dated: 6/3/99

OPERATING ENGINEERS
INTERNATIONAL UNION, LOCAL #3

By: Stewart Weinberg

Name: Stewart Weinberg

Capacity: attorney

Dated: 6-3-99

INTERNATIONAL FEDERATION OF
PROFESSIONAL AND TECHNICAL
ENGINEERS, LOCAL #21, AFL-CIO

By: David Novogradsky

Name: David Novogradsky

Capacity: Executive Director

CLASS REPRESENTATIVES

Dated: 6-2-99

Howard T. Garrigan

Dated: 6-2-99

Clarence G. Quist

Dated: 6-2-99

Richard Hendrix

Dated: 6-2-99

Donna Rolle

APPROVED AS TO FORM AND CONTENT

Dated: 6-2-99

DAVIS & RENO
DUANE W. RENO

By: _____
Duane W. Reno
Attorneys for Class Representatives HOWARD T. GARRIGAN, CLARENCE G. QUIST, RICHARD HENDRIX and DONNA ROLLE on behalf of themselves and all Active and Retired Members of the Association

Dated: 6-2-99

DAVIS & RENO
DUANE W. RENO

By: _____
Duane W. Reno
Attorneys for INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL #21, AFL-CIO

Dated: 6/3/99

VAN BOURG, WEINBERG, ROGER & ROSENFELD
STEWART WEINBERG

By: _____
Stewart Weinberg
Attorneys for OPERATING ENGINEERS INTERNATIONAL UNION, LOCAL #3

Dated: 6/4/99

BAKER & McKENZIE
JONATHAN S. KITCHEN
VIRGINIA L. GIBSON

By: _____
Jonathan S. Kitchen
Attorneys for ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION

Dated: 6/1/99

RICHARD E. WINNIE
County Counsel
WILLIAM E. RUNDSTROM
Assistant County Counsel

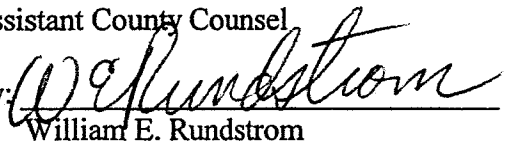
By: 
William E. Rundstrom
Attorneys for the COUNTY OF ALAMEDA

Exhibit B

KAMALA D. HARRIS
Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
CONSTANCE L. LELOUIS
Supervising Deputy Attorney General
REI R. ONISHI
Deputy Attorney General
ANTHONY P. O'BRIEN
Deputy Attorney General
State Bar No. 232650
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 323-6879
Fax: (916) 324-8835
E-mail: Anthony.OBrien@doj.ca.gov
Attorneys for the State of California

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

ALAMEDA COUNTY DEPUTY SHERIFFS' ASSOCIATION, et al.,

Plaintiffs/Petitioners,

v.

ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION, et al.,

Defendants/Respondents,

ALAMEDA COUNTY MANAGEMENT EMPLOYEES' ASSOCIATION; KURT VON SAVOYE; INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 21; TEAMSTERS LOCAL 856, HASANI TABARI and DANIEL LISTER; SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1021 and AMY DOOHA; BUILDING TRADES COUNCIL OF ALAMEDA COUNTY and MIKE HARTEAU; and THE STATE OF CALIFORNIA,

Intervenors.

Case No. RG12658890

THE STATE OF CALIFORNIA'S COMPLAINT IN INTERVENTION

Judge: The Honorable Evelio Grillo
Trial Date: Not Yet Set
Action Filed: December 6, 2012

By leave of court, the State of California ("the State") files this complaint to intervene in this action to defend the constitutionality of Assembly Bill (AB) No. 197 (2011-2012 Reg. Session). AB 197 prevents public employees from spiking retirement benefits with lump sum payments from unused leave time and payments made solely due to the termination of the member's employment. The State opposes the claims of petitioners Alameda County Deputy Sheriffs' Association, Jon Rudolph, James D. Nelson, Robert Brock, Rocky Medeiros, and Darlene Hornsby ("petitioners") alleging that AB 197 is unconstitutional on its face. (Petn., pp. 14-15, 18-19.) The Governor has directed the State to intervene in this case because respondents Alameda County Employees' Retirement Association (ACERA) and the ACERA Board ("respondents") refuse to defend AB 197's constitutionality.

RIGHT TO INTERVENE
(Code Civ. Proc., § 387, subd. (b).)

1. In 2012, the Legislature and Governor worked together to enact historic pension reform legislation that capped pension benefits, increased the retirement age, and stopped abusive pension spiking.

2. A component of those reforms was AB 197, an act which applies to counties that have opted in to the County Employees' Retirement Law of 1937 ("CERL" or "1937 Act") (Gov. Code, § 31450, et seq.).[1] AB 197 was designed to help ensure the financial solvency of 1937 Act county retirement systems by ending a practice that allows employees to spike the value of their pensions by cashing out vacation or sick leave credits right before they retire.

3. AB 197 codifies long-standing rules that allow certain cash payments to be counted for the purpose of determining final pension benefits, but only to the extent the payments were earned and could be cashed out in the regular course of employment, consistent with the holding in *Ventura County Deputy Sheriffs' Association v. Board of Retirement* (1997) 16 Cal.4th 483, 488, 497-98 (annual cash payments given in lieu of leave time must be included in final

[1] Under state law, a county may provide retirement benefits to its employees in three ways. It may: (1) establish an independent system, (2) contract with the California Public Employees' Retirement System (CalPERS), or (3) establish a system under the 1937 Act.

compensation when calculating retirement benefits); see also *In re Retirement Cases* (2003) 110 Cal.App.4th 426, 475-476 (where an employee cannot or does not elect to receive cash in lieu of accrued time off before retirement, the benefit remains one of time rather than cash; "termination pay that is received upon retirement is not required under CERL to be included in the calculation of pension benefits"); and *Salus v. San Diego County Employees Retirement Assn.* (2004) 117 Cal.App.4th 734, 740-741 (same).

4. Consistent with the holdings in these cases, AB 197 updated the definition of "compensation earnable" in Government Code section 31461 to reflect the exclusion of various payments, such as unused leave time and payments made at the termination of employment, unless those payments were earned and payable in each 12-month period during the employee's final average salary period. (Gov. Code, § 31461, subd. (b).)

5. The writ petition seeks both a judgment declaring AB 197 unconstitutional and injunctive relief prohibiting respondents from excluding vacation and sick leave pay as final compensation for determining retirement benefits. (Petn., pp. 22-23.)

6. Parties other than the State can and do defend the constitutionality of state law in the superior courts. This is underscored by the fact that the Attorney General receives notice that a law has been declared unconstitutional only after the fact. (See Code Civ. Proc., § 664.5 [Attorney General receives notice *after* a state statute has been declared unconstitutional by a superior court]; Cal. Rules of Court, rule 2.1100 [within 10 days *after* entry of judgment declaring statute unconstitutional, parties must serve Attorney General with a copy of the judgment]; *id.*, rule 8.29 [on appeal of constitutionality of state statute, Attorney General must be served with copies of briefs or petitions].)

7. Notwithstanding their ability to defend AB 197, on February 1, 2013, respondents filed an answer stating that they take no position on the constitutionality of the act and would not contest petitioners' claim of unconstitutionality. (Respondents' Answer, p. 3:4-5.)

8. Upon discovering that respondents would not defend state law, the Governor directed the Attorney General to intervene in this matter to ensure a proper defense of AB 197.

9 The State has a stake in the subject matter of the litigation—which directly questions the constitutional validity of AB 197—because it is interested in ensuring that its duly enacted laws are upheld. (Cal. Const., art. V, §§ 1, 13 [empowering the Governor and the Attorney General to enforce state law when necessary].)

10. Moreover, adjudication of the State's interests will not delay or unduly expand the trial of this action. Instead, the State's involvement will assist the Court by framing the disputed legal issues and explaining why AB 197 is constitutional on its face.

11. Because other county retirement associations and their boards are likewise refusing to defend AB 197, the State is also requesting intervention in three other matters filed in recent weeks questioning AB 197's constitutionality:

(1) *Contra Costa County Deputy Sheriffs' Association, et al. v. Contra Costa County Employees' Retirement Association, et al.* (Contra Costa County Superior Court, Case No. CIVMSN 12-1870);

(2) *American Federation of State, County, and Municipal Employees, et al. v. Merced County Employees' Retirement Association* (Merced County Superior Court, Case No. CV003073); and

(3) *Marin Association of Public Employees, et al. v. Marin County Employees' Retirement Association, et al.* (Marin County Superior Court, Case No. CIV 1300318).

12. The State is exploring the possibility of coordinating or consolidating this matter with the three matters noted above to address the initial questions regarding AB 197's constitutionality. Coordination or consolidation may both conserve judicial resources and avoid inconsistent trial court decisions.

13. The State's sole purpose in intervening in this matter is to defend petitioners' challenge to the facial validity of AB 197, and to assist the Court in determining what can be properly deemed "compensation earnable" under Government Code section 31461. The State does not take a position regarding the Court's secondary inquiry of whether respondents have properly complied with the statute and applicable case law, but intends to provide a framework to assist the Court in evaluating those issues.

WHEREFORE, the State prays for judgment as follows:

1. That the petition be denied insofar it challenges the constitutionality of AB 197.

2. That the Court decline to issue the declaration requested by petitioners and issue, instead, a declaration that AB 197 is consistent with the United States and California Constitutions.

3. That the Court deny the injunctive relief requested by petitioners.

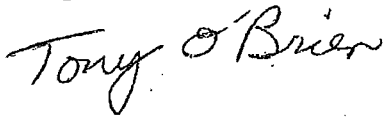
4. That the State recover its costs of suit.

5. That the Court grant such other relief as it may deem proper.

Dated: March 7, 2013

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
CONSTANCE L. LELOUIS
Supervising Deputy Attorney General
REI R. ONISHI
Deputy Attorney General



ANTHONY P. O'BRIEN
Deputy Attorney General
Attorneys for the State of California

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Exhibit C

CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 17
HEARING DATE: 05/08/15

1. TIME: 10:00 CASE#: MSN12-1870
CASE NAME: CCC DEPUTY SHERIFFS ASSOC VS.
HEARING ON STATUS REVIEW RE: C.C.C.EMP. RET. ASSOC. RETURN ON WRIT OF MANDATE
**** TENTATIVE RULING: ****

Requests for Judicial Notice

All requests for judicial notice are unopposed and granted.

Has CCCERA and its Board of Retirement complied with the Writ of Mandate?

Because this case has been re-assigned to this Court after Judge Flinn gave it so much attention, the Court sets out its understanding of the prior proceedings. If a party believes any part of this statement is inaccurate, the Court would appreciate learning that at oral argument.

On January 9, 2015, Alameda County Employees' Retirement Association, Contra Costa County Employees' Retirement Association (CCCERA) and Merced County Employees' Retirement Association appeared, as ordered, to show compliance with the writ of mandate issued by the Court on July 7, 2014. On that date, the Court disposed of the matter with respect to the Alameda and Merced County Employees' Retirement Associations. However, there was a dispute with respect to whether or how CCCERA and its Board of Retirement had complied. After discussion, the Court set a schedule for briefing that issue, which is now on for decision. Thus, this tentative ruling addresses only the compliance of CCCERA and its Board of Retirement.

Petitioners are individual employees of Contra Costa County agencies and recognized employee organizations appearing in their representative capacities.

Respondent CCCERA is a retirement association formed pursuant to CERL. Among other things, CERL sets forth the method for determining the employee's retirement benefit, which is typically based on "compensation earnable" in his or her final compensation year. (See generally Gov. Code §§ 31450 *et seq.*) CERL was amended by AB 197, which, among other changes, excluded certain specific items from "compensation earnable" for the purposes of determining the employee's income in the final compensation year. (See Gov. Code §31461(b).)

In prior rulings, the Court permitted others, including the State of California, to participate in the litigation. The proofs of service filed in this case identify both "intervenors" and "joinders." However denominated, there were more than three dozen parties before the Court.

The Verified Petition for Writ of Mandate, filed by Petitioners on November 27, 2012 was, in places, broadly worded. So, for example, the first paragraph stated:

> This action seeks to compel the Contra Costa County Employee's Retirement Association ("CCCERA") to continue to calculate the pensions of its members hired prior to January 1, 2011 in a manner consistent with its policies in effect since 1997 and in a manner consistent with its binding promises to its members. This action also seeks a declaration from the Court that the CCCERA policy enacted by the Retirement Board is unconstitutional as it is in violation of Petitioners' vested rights. Finally, Petitioners request an injunction to prohibit the Retirement Association from implementing its new policy.

However, in other places, the relief requested was more focused. Paragraphs 11 through 21 focused on "lump sum payment at termination" and "annual sale of vacation" as pay items includable in the calculation of final compensation.

In paragraph 22, it focused specifically on the October 30, 2012 change made to CCCERA's policy: "...'terminal pay' will not be included in the calculation of Final Average Salary for retirement benefit purposes."

The Prayer of the Petition sought

> A writ of mandate...commanding CCCERA and the Retirement Board to provide pension benefits to CCCERA members hired prior to January 1, 2011 in accordance with the promises made during their employment...including the promise to include terminal pay in the calculation of retirement benefits.

As the litigation progressed, the parties prepared a joint statement of stipulated facts. The First Amended Joint Statement of Stipulated Facts was filed in August 2013. Again, the focus was

on the "terminal pay" issue. Paragraph 24 described the facts that gave rise to the litigation:

> ...the Retirement Board passed a motion by a majority vote that effective January 1, 2013, it would implement a new policy regarding the calculation of retirement benefits for those members retiring on or after that date. The new policy would exclude terminal pay (such as unused accruals of vacation, personal holiday, sick leave or holiday compensatory time off) from being included in "compensation earnable" and "final compensation" except to the extent the amounts were both earned and payable during the member's final compensation period of service...

Over time, the Court and the parties, through case management conferences, and a case management order, shaped the issues to be briefed and decided. Eventually, the Court set two issues for decision.

The first was addressed in Judge Flinn's November 8, 2013 Decision on Preliminary Issues, which stated:

> "Preliminary Opinion addresses the issue of whether or not some of the practices being followed by the respondent boards in determining 'compensation earnable' and 'final compensation', as defined in Government Code § § 31461 and 31462, were unauthorized by law prior to the enactment of AB 197 (amending Government Code § 31461) so as to possibly prevent "legacy employees" from having a vested right to having their retirement calculated by the method being used prior to AB 197." Decision on Preliminary Issues, p.1.

In describing "The issue of 'timing'" the Court wrote,

> To a large extent the dispute between the parties relates to the inclusion of monies that are indisputably 'compensation' but which represent 'cash outs' of such unused items as vacation, annual leave, personal leave, sick leave and compensable time off. The dispute is as to payments that have been included in the calculation of 'compensation earnable' , and thus in 'final compensation', even though the employee became entitled to take the 'time off' in a period of time other than the final compensation window. The practice of collecting a 'cash out' of unused time that became available in years prior to the final compensation period, and in some cases amounting to substantially more than could be

> available in the single period, has recently been described by the term 'pension spiking'. Whatever the jargon, however, this Court is simply tasked with determining what method of pension determination, if any, has become a 'vested right' of those in employment prior to January 1, 2013." (Id. p.4)

It appears that the principal disputants were Petitioners and Intervenor, the State of California. (Id., p. 5.) The State took the position that "the boards were unable to include in final compensation any 'cash out' of leave time or other compensation rights that were not earned in the period of employment chosen by the retiree for the calculation of his or her monthly retirement payment." (Id. p. 5.) Petitioners argued the contrary.

The Court found that the State's position was more correct. "The Court finds no ambiguity in the meaning of § 31461. A clear purpose of both the full statute and its last sentence is to prevent the 'spiking' that is here at issue....[T]he employee has 'compensation' when he is granted the right to take time off and still be paid and therefore that is when it is 'earned.' The last sentence of § 31461 tells us that it is 'earnable' at the time when the employee incurs the right, not at the time of the cash-out. Compensation can only be 'earnable' at one time; it cannot become 'earnable' again and again." Id. p. 6. "§ 31461...was intended to limit compensation earnable to that which was earned and payable in the final year." Id. p. 15.

(Other issues were decided in that Decision on Preliminary Issues, but they are not directly relevant to the question now before the Court.)

That did not end the case. For the question remained whether any employees had a vested right to have their pensions calculated in a different manner. That was the subject of phase two briefing.

However, after the decision in phase one, and before the briefing in phase two, Judge Flinn convened a case management conference on November 19, 2013. In connection with that case management conference, Respondents, including CCCERA, filed a case management conference statement. (Respondents' Request for Judicial Notice, Exhibit 1.)

Respondents sought "clarification" of the Court's Decision Upon Preliminary Issues. Among the questions they put before the Court in their case management conference statement was the "straddling" question. (Id. p.2-3.) They wrote,

> "These fact situations arise under the Respondents' settlement agreements and accompanying board policies. Court direction on the application of the Decision Upon Preliminary Issues to these situations will assist the parties and counsel in effectively and expeditiously briefing the issues before the Court for the anticipated December 10, 2013 hearing on the remaining phases of this litigation." (Id. p.3.)

That was the subject of discussion at the November 19, 2013 case management conference. (See Respondents' Request for Judicial Notice, Exhibit 2.) With respect to the straddling question, Judge Flinn said,

> "Straddles is a serious question. Is 'earned' the first day of the year? Is 'earned' the last day of the year? Is 'earned' prorated over the year? Probably logic tells you it's prorated, but I didn't decide that. I'm just thinking out loud with you." (Id. p. 36)

When Respondents' counsel urged the Court to consider the issues "teed up" in the case management conference statement, the Court tentatively declined, saying,

> "What it [the writ] probably won't do is list – the writ probably won't list 55 hypotheticals, but we'll hear from everybody. (Id.)

After phase two briefing and further rounds of hearings on the text of the final decision, Judge Flinn, on May 12, 2014, issued his Final Statement of Decision Upon All Issues Following Hearing of October 31, 2013, December 10, 2013, February 11, 2014, March 7, 2014 and April 25, 2014. That did not address the straddling issue with any more specificity than the Decision Upon Preliminary Issues. Simultaneously, he entered Judgment.

On July 7, 2014, consistent with the Judgment, the Court issued a Writ of Mandate. It has three essential commands. (See Writ, attached as Exhibit 5 to Liederman Decl.)

Paragraph 1 commanded CCCERA "to continue to implement your policies and practices for calculating 'compensation earnable' in effect prior to January 1, 2013 for CCCERA members who first became members prior to January 1, 2013 ("Legacy Members") and whose effective

dates of retirement are within sixty (60) days following the date of entry of Judgment in this action (the 'Stay Period')". There is no dispute; CCCERA complied with this paragraph of the writ.

Paragraph 2 commanded CCCERA: "Following the Stay Period, to implement the provisions of Assembly Bill 197 (2011-2012 Reg. Sess.)("AB 197"), that relate to the inclusion of leave cash-outs under the Government Code section 31461, subdivisions (b)(2) and (4) in accordance with the terms thereof, except as to Legacy Members who became members of CCCERA prior to January 1, 2011, who retire after the date of the Stay Period and who meet all of the following criteria (the 'Estoppel Class'). Members of the Estoppel Class shall be permitted to include in the calculation of 'compensation earnable' the additional amounts set forth in criteria (e) below....[Subparagraphs a through e omitted.] The amount shall not include, under any circumstances, any amounts payable only at termination. Amounts payable, even if not paid, prior to the end of employment are not considered 'payable only at termination.'" There is no dispute that CCCERA complied with the specific terms of this command that begin with the phrase "except as to Legacy Members" and continuing through the end of that paragraph.

Paragraph 3 commanded CCCERA to take certain actions with respect to the other issues in the case; including compensation for time spent "on-call" and "standby". There is no dispute; CCCERA complied with this paragraph of the writ.

There is, then, only one question that remains with respect to whether CCCERA complied with the writ. The first three lines of paragraph 2 of the writ compel CCCERA to "implement the provisions of [AB 197] that relate to the inclusion of leave cash-outs under Government Code section 31461, subdivisions (b)(2) and (4) in accordance with the terms thereof...." The question is whether that required CCCERA to adopt an anti-straddling rule.

Here is how that question arises.

After the writ issued CCERA evaluated how to comply with it. In its deliberations, it returned to the question of straddling that was contained in its November 12, 2013 case management conference statement.

Straddling operates like this: For the purposes of determining an employee's retirement benefit, an employee has a "final compensation year," (see Gov. Code § 31462) the value of which is input into a statutory formula to determine the retirement benefit. An employee can select his or

her final compensation year, and it need not be a strict calendar year – for example, it could run from July of one year through June of the next. Naturally, the higher the compensation in that period, the greater the retirement benefit. One way to enhance that compensation is through cashing out of accrued leave in the final compensation year, as that leave time increases the income in the final compensation year and increases the ultimate retirement benefit.

By way of example, say an employee accrues 240 hours of leave over the year at 20 hours per month. Of those 240 hours, the employee can "sell back" 80 each calendar year. But the calendar year and the final compensation year are not necessarily the same. Thus, selecting a final compensation period that included – or "straddled" – two calendar years (e.g., June 2011 through May 2012), the employee could effectively have *two 80-hour cash-outs* included as compensation earnable for purposes of determining the employee's final compensation year and hence his or her retirement benefit.

CCCERA had, historically, permitted straddling. However, in July 2014 it changed its policy to eliminate straddling. Initially, by way of a Frequently Asked Questions (FAQ) document, it informed its members that it had not made a decision but would consider the issue on June 25, 2014. At that meeting, a motion was made to eliminate straddling. However the Board was evenly divided and the motion failed. On or about June 27, 2014, it informed its members – again through a FAQ – that it was keeping the straddling policy in place. But several days later, counsel for CCCERA opined that CCCERA had to take affirmative action; in other words, the Writ eliminated prior practices of CCCERA, so CCCERA could not simply leave the policy in place but had to affirmatively decide a new policy. CCCERA took up the issue at its July 9, 2014 meeting and decided to eliminate straddling. It changed its FAQ to so indicate shortly thereafter. (See CCCERA's Request for Judicial Notice at Exhs. 6, 7, 9, 10, 11.)

CCCERA now seeks, through this Return on Writ, the Court's confirmation that either the writ *required* it to eliminate straddling (the position more forcefully advocated by Intervenor State of California) or – at a minimum – that doing so was within its discretion. Petitioners contend that straddling is permitted under operative law, not specifically banned by the writ, and thus CCCERA exceeded the scope of the writ in rendering its decision. Therefore, its decision should not be approved in this Return on Writ. Alternatively, Petitioners argue the matter should be decided in proceedings had on the separate Petition they have filed.

In its briefing for this hearing, CCCERA commendably acknowledges, "The Court Did Not Make a Specific Ruling on Straddling..." (Contra Costa County Employees' Retirement Association and its Board of Retirement's Opening Brief In Support Of Return On Writ Of Mandate, heading II.A.) Rather, it argues that the Court's determination that only amounts that are both earned and payable in the final compensation period may be included in 'final compensation." In effect,

it says the principle enunciated by Judge Flinn in his Decision Upon Preliminary Issues, and repeated in his Final Statement of Decision, provides the rule of decision on the straddling issue.

The State of California takes a more forceful position. The first portion of paragraph 2 of the writ requires CCCERA, "Following the Stay Period, to implement the provisions of Assembly Bill 197 (2011-2012 Reg. Sess.)("AB 197"), that relate to the inclusion of leave cash-outs under the Government Code section 31461, subdivisions (b)(2) and (4) in accordance with the terms thereof [except as to the Estoppel Class]." The State of California argues that implementation of AB 197 requires the elimination of straddling.

Unfortunately, the record before the Court is very thin. As Petitioners note, the record before Judge Flinn did not focus on the straddling issue; when it was raised at the November 19, 2013 case management conference he stated he had not decided the straddling issue in his Decision Upon Preliminary Issues, and his Final Decision did not address straddling either. Thus, it cannot be said that Judge Flinn decided the straddling issue.

As Judge Flinn noted in his Final Decision, "It becomes clear upon reviewing the entire landscape of California's appellate jurisprudence regarding vesting of pension rights, that the fact and circumstances involved are critical to any determination." Final Decision, p. 9.

Based on the case management conference held on January 9, 2015, the Court understood the parties were prepared to augment the facts and brief the straddling issue. However, very little has been done to augment the facts. There is no additional stipulated set of facts as there was with respect to the issues before Judge Flinn.

The only information that has been added (other than a record of CCCERA's post-writ actions on the straddling issue and the documents and transcripts that relate to it) is contained in Exhibit 3 to the Request for Judicial Notice. That is a Memorandum of Understanding Between Contra Costa County and Deputy District Attorneys' Association.

However, the Court is concerned that an insufficient record has been made. The Court does not have "the facts and circumstances [that] are critical to any determination." For example, given the post-writ timing of the straddling decision, it is not clear whether the Estoppel Class defined by Judge Flinn (who knew nothing of the post-writ straddling decision) is the appropriate estoppel class – or indeed if any class is appropriate.

The State of California may ultimately be correct; straddling may be prohibited by the "earned and payable" rule. But that should be decided upon a proper record. The record of this case was not framed to address that issue. The Court is concerned that it cannot fully evaluate the matter (particularly with respect to the estoppel issue) without a proper record.

It is clear that Judge Flinn did not specifically decide the straddling issue. He said as much. Since he told the parties he did not decide that issue, it seems unlikely that he commanded CCCERA either to terminate its straddling policy or to maintain it. Thus, the Court finds that CCCERA and its Board of Retirement have complied with the writ dated July 7, 2014. The writ is discharged as to them.

By discharging the writ, the Court makes no finding with respect to the straddling issue or with respect to whether the rule of decision enunciated by Judge Flinn requires an end to straddling. That question will remain to be adjudicated in proceedings had with respect to the petition filed on August 21, 2014. All issues, including whether Judge Flinn's Final Decision has any issue preclusion effects, will be decided in that proceeding.

Exhibit D

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

ALAMEDA COUNTY DEPUTY SHERIFFS' ASSOCIATION, et al, Petitioners, v. ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION; BOARD OF THE ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION; et al., Respondents.	Case No. G12658890 a part of consolidated action MSN12-1870 **WRIT OF MANDATE TO ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION AND ITS BOARD** The Honorable David B. Flinn
AND RELATED PETITIONS IN INTERVENTION	

To: Respondents Alameda County Employees' Retirement Association and the Board of Retirement of the Alameda County Employees' Retirement Association (collectively, "ACERA"):

WHEREAS, on May 12, 2014, Judgment was entered into this action, ordering that a Preemptory Writ of Mandamus be issued from this Court to ACERA.

THEREFORE, PURSUANT TO THE JUDGMENT ENTERED IN THIS ACTION, YOU ARE HEREBY COMMANDED to do the following:

1. To continue to implement your policies and practices for calculating "compensation earnable" in effect prior to January 1, 2013 for ACERA members who first became members prior to January 1, 2013 ("Legacy Members") and whose effective dates of retirement are within sixty (60) days following the date of entry of Judgment in this action (the "Stay Period"). On the sixty-first (61st) day following the date of entry of the Judgment, this command shall be of no further force or effect.

2. Following the Stay Period, to refrain, as to Legacy Members, from automatically excluding from "compensation earnable" all "on-call," "standby" or similar pay code compensation. Instead, you are directed to make a determination as to each individual member whether: (a) ACERA included such compensation in "compensation earnable" prior to AB 197; and (b) the work was required of the Legacy Member to be served during the "final compensation" period and was ordinarily worked by persons in the same grade or class of positions as the Legacy Member, at the same rate of pay, during that period. If the determination demonstrates to ACERA that the compensation meets all of the foregoing conditions, you are directed to include such amounts in "compensation earnable." If the determination demonstrates to ACERA that the compensation does not meet all of the foregoing conditions, you are directed to exclude such amounts from "compensation earnable." Notwithstanding the foregoing, ACERA may exclude any such compensation it determines the member received to enhance his or her retirement benefit, pursuant to Government Code section 31461, subdivision (b)(1).

YOU ARE FURTHER COMMANDED to make a return of this Writ of Mandamus before this Court within 90 days from the date a copy of this Writ is served on you, showing what you have done to comply with this writ of mandate.

Leah T. Wilson

DATED: JUL 10 2014

Clerk of the Superior Court

SUPERIOR COURT OF CALIFORNIA EUREKA COUNTY OF ALAMEDA

By Scott Sanchez
Deputy Clerk

Exhibit E

In the Supreme Court of the State of California

Alameda County Deputy Sheriffs' Association et al.,

Plaintiffs and Appellants,

v.

Alameda County Employees' Retirement Assn. and Bd. of the Alameda County Employees' Retirement Assn. et al.,

Defendants and Respondents,

and

The State of California,

Intervenor and Respondent.

Case No. S247095

First Appellate District Division Four, Case No. A141913
Contra Costa County Superior Court, Case No. MSN12-1870
Hon. David B. Flynn (Ret.), Judge

INTERVENOR AND RESPONDENT STATE OF CALIFORNIA'S OPENING BRIEF ON THE MERITS

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

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ISSUES PRESENTED

A public employee's pension is typically calculated using a formula set in statute. The formula uses the number of years of the employee's service, the pension-eligible (pensionable) compensation earned by the employee in their final compensation period, and an age-based multiplier. The Legislature sets the parameters for what pay items, on top of an employee's final salary, can be included in pensionable compensation. The issues presented in this case are:

1. Under Government Code section 31461, subdivision (b)(2), is a cashout of unused leave excluded from pensionable compensation to the extent that the amount of leave cashed out exceeds the amount of leave that may be earned during each 12-month period of the final compensation period?

2. Can the Legislature, consistent with the contract clauses of the federal and state Constitutions, exclude from an employee's future pensionable compensation a specific pay item that has yet to be earned during that employee's final compensation period?

3. Where the Legislature has always excluded a pay item from pensionable compensation, can a court rely on principles of equitable estoppel to compel a government agency to include the pay item in the future pensionable compensation of thousands of public employees?

INTRODUCTION

"The practice known as 'pension spiking,' by which public employees use various stratagems and ploys to inflate their income and retirement benefits, has long drawn public ire and legislative chagrin." (*Marin Association of Public Employees v. Marin County Employees' Retirement Association* (2016) 2 Cal.App.5th 674, 679, review granted Nov. 22, 2016 (S237460) (*Marin*).) For decades, the Legislature has tried to close loopholes and clarify the law to end the most abusive practices. But pension spiking, especially under the County Employees' Retirement Law of 1937 (CERL; Gov. Code, § 31450 et seq.[1]), has proven resilient, evolving quickly in response to new legal developments and cloaking itself within the complex nuances of 20 separately-administered county systems.

The practices at issue in this case are particularly egregious because they were *never* lawful. For years, the retirement systems in Contra Costa, Alameda, and Merced counties flouted CERL's clear limitations, ignoring explicit warnings from their legal counsel. In the flush times of the dot-com bubble, this rule-bending was largely ignored. Then, amidst the worst economic downturn since the Great Depression, investment returns abruptly dropped and unfunded liabilities skyrocketed. Between 2008 and 2012, the percentage of funded pension liabilities in Merced County's retirement system plunged from 70.5 percent to just 54.2 percent.[2] Unfunded liabilities for Contra Costa County's retirement system reached

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[1] All further undesignated references are to the Government Code.

[2] Compare Buck Consultants, *Report on the Actuarial Valuation as of June 30, 2008* (2009) p. 3 <https://www.co.merced.ca.us/ArchiveCenter/ViewFile/Item/605>, with EFI Actuaries, *Actuarial Review and Analysis as of June 30, 2012* (2013) p. 1 <https://www.co.merced.ca.us/ArchiveCenter/ViewFile/Item/609> [as of May 4, 2018].

$2.3 billion.[3] Some estimates placed unfunded liabilities across the 20 CERL systems in the hundreds of billions of dollars. (*Marin, supra*, 2 Cal.App.5th at p. 680.)

As the systems attracted greater scrutiny, once-obscure practices were exposed. In this case, employees in Contra Costa, Alameda, and Merced counties could spike their final pensionable compensation by tens of thousands of dollars by volunteering for thousands of hours of "standby" shifts in their final year of employment.[4] Managers were sometimes given unexplained payments on the eve of their retirement specifically to enhance their pensions.[5] And employees were allowed to include in their final compensation cashouts of hundreds of unused leave hours from multiple years. Such practices could result in the inflation of an employee's lifetime pension benefits by easily over $1 million *per employee*. (17 CT 4958.)[6]

In 2012, the Governor and Legislature responded to growing public outrage by enacting AB 340 and AB 197 (together, "AB 197") to clarify the unlawfulness of a number of spiking schemes under CERL, including those outlined above. Employee unions sued, claiming that AB 197's limitations on pension spiking violated the "vested rights" of "legacy employees."

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[3] Segal Company, *Actuarial Valuation and Review as of December 31, 2012* (2013) p. iii <https://www.cccera.org/sites/main/files/file-attachments/actuarial_val_report_2012.pdf> [as of May 4, 2018].

[4] Borenstein, *On-Call Pension Spike Provides Huge Boost to Retirement Pay* (June 25, 2013) East Bay Times <https://www.eastbaytimes.com/2013/07/25/daniel-borenstein-on-call-pension-spike-provides-huge-boost-to-retirement-pay/> [as of May 4, 2018].

[5] Borenstein, *Fire Board Aided Chief's Pension Spike* (Aug. 6, 2009) East Bay Times <https://www.eastbaytimes.com/2009/08/06/daniel-borenstein-fire-board-aided-chiefs-pension-spike-2/> [as of May 4, 2018].

[6] References to the Clerk's Transcript (CT) are described by volume number and page number. For instance, volume 30, page 9015 is identified as "30 CT 9015."

Largely dismissing these claims, the trial court affirmed the application of AB 197's limitations to legacy employees, with two very narrow exceptions. However, the Court of Appeal partially reversed. The Court of Appeal did not dispute that AB 197 did not affect anyone who had already retired and applies only to pay items earned after its effective date. The court also agreed with the trial court that many of the practices prohibited under AB 197 were *already* clearly prohibited under the law. Finally, the court below did not dispute that the statutory definition of pensionable compensation has always been regulated by the Legislature and subject to legislative clarification in the past. Nonetheless, it blocked the application of most of AB 197's provisions to legacy employees in the three counties, embracing the theory that employees hired before AB 197's effective date have a right to spike their pensions in perpetuity, free from AB 197's limitations.

This decision should be reversed. It rests on a faulty construction of CERL as it existed before AB 197, as well as misinterpretations of key provisions of AB 197 itself. More fundamentally, the decision errs by adopting an expansive theory of vested rights that is internally incoherent, in conflict with basic contract clause principles, and inconsistent with a proper understanding of the Legislature's police power and exclusive authority to define the parameters of pensionable compensation. At a time when taxpayers are already struggling to pay for *legitimate* pension liabilities, they should not be forced to absorb unlawfully calculated pension liabilities as well. State and local governments also must have flexibility to adjust the pensionability of specific pay items that have not yet been earned.

The State respectfully requests that this Court vacate the lower court's decision and confirm that AB 197's application to legacy employees is consistent with contract clause principles, without exception.

BACKGROUND

I. PENSIONABLE COMPENSATION UNDER CERL

The Legislature enacted CERL to provide the legal and policy framework for counties to establish their own independent retirement systems. Twenty counties—including the three involved in this litigation—have elected to provide retirement benefits to their employees under CERL's provisions.

Each county's system is administered by its own retirement board. (§ 31520.) A core responsibility of the retirement board is calculating the pension of an employee who has retired. To do so, a board must first calculate the pensionable compensation that the employee earned during the employee's final compensation period. That requires the board to take an employee's "compensation"—that is, "remuneration paid in cash" (§ 31460)—and determine "compensation earnable" by filtering out compensation for overtime work and other periods not based on "the average number of days ordinarily worked" by similarly situated employees. (§ 31461.) The board must then identify the "compensation earnable" received during the single, contiguous 365-day period chosen by the employee as their "final compensation" period (usually the last year of employment when salary and benefits are at their highest). (§ 31462.1.)[7] Compensation that is payable only outside the final compensation period (for example, a payment made only upon retirement) is excluded from pensionable compensation. (See *Salus v. San Diego County Employees Retirement Ass'n* (2004) 117 Cal.App.4th 734, 739-740.)

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[7] Some employees may be subject to a three-year final compensation period under section 31462, in which case their "final compensation" is the average of each of those final three years.

This Court confirmed many of these principles in *Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, when it was asked to consider whether various pay items qualified as pensionable compensation under CERL. This Court determined that a number of items paid in cash, including annual cashouts of unused leave hours, were properly treated as pensionable, even when not paid uniformly to all employees in the same job classification. (See *id.* at pp. 495-506.) At the same time, nothing in the *Ventura* decision suggested any alteration to CERL's longstanding rules limiting pensionable compensation to the compensation that is both earned and payable during the final compensation period.

II. PENSION SPIKING IN CONTRA COSTA COUNTY

In December 1997, the Contra Costa County Employees' Retirement Association (CCCERA) adopted a new pensionable compensation policy. Part of the policy was intended to recognize certain pay items addressed in *Ventura* as pensionable. Another part, however, introduced a pay item never addressed in *Ventura*. CCCERA would begin allowing employees to include in their final compensation not only the normal annual cashout of unused leave hours, but also a separate cashout payable only at retirement for additional unused leave hours, equivalent to the number of hours that could be accrued during the final compensation period. (17 CT 4923.) This latter cashout was commonly referred to as "terminal pay" or "termination pay."

The following example of an actual employee was described by CCCERA's counsel to help elucidate how terminal pay was incorporated into final compensation:

An employee's MOU allowed the employee to accrue 240 hours of vacation per year, and to "sell back" or "cash out" up to 80 hours of unused vacation annually. (17 CT 4958.) While the employee therefore *earned*

240 hours of vacation per year, only the cashout of 80 hours was *payable* during the employee's final compensation period. (*Ibid.*) And because CERL restricted the inclusion of cashouts of leave to only what the employee could both earn and cash out during the final compensation period (17 CT 4953), CERL permitted including a cashout of only up to 80 leave hours in the employee's final compensation.[8]

After *Ventura*, however, CCCERA began allowing an employee to include in their final compensation *both* the annual cashout of up to 80 hours of unused leave *and* the separate terminal pay cashout that the employee would receive only at retirement. (17 CT 4958.) With respect to that latter cashout, the employee could cash out as many leave hours as the employee could accrue under their MOU during the final compensation period—in this case, up to 240 hours. (*Ibid.*) They were allowed to do this even if they had *already* cashed out 80 hours of unused leave accrued from the year. And because CCCERA included *both* cashouts in final compensation, an employee's final compensation could include the cashout of 80 hours *plus* the terminal pay cashout of 240 hours (*ibid.*)—together, 320 total hours of unused leave. That was not only significantly more than the 240 hours that an employee could *accrue* during the final compensation period. It was *four times greater* than the 80 hours which CERL actually allowed to be cashed out and included in pensionable compensation (because only 80 hours could be both accrued and cashed out under the employee's MOU during the final compensation period).

In addition, the employee could further spike their final compensation by "straddling" their final compensation period over two fiscal years. (17 CT 4956, 4967.) Because the employee could cash out 80

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[8] Any part of the cashout excluded from pensionable compensation was still kept by the employee.

hours of unused leave in *each* of the two fiscal years, straddling permitted an *additional* 80-hour cashout of unused leave from the *second* fiscal year to be included in final compensation. (17 CT 4958.) With both straddling and terminal pay, the employee could easily inflate their final compensation with cashouts of 400 total hours of unused leave—*five times greater* than the 80 hours which CERL actually allowed.

To support these inflated benefits, the mandatory contributions of public *employers* were markedly increased. In contrast, *employees* were not required to make any additional contributions. (19 CT 5482 ["[T]here will be *no change in member basic benefit contribution rates* as a result of the new terminal pay assumptions," italics added]; 19 CT 5491 [terminal pay assumptions "Applied to *Employer rate only*," italics added].)

CCCERA's practices were directly contrary not only to CERL, but also to explicit legal direction provided by its own lawyers immediately following *Ventura*. Those lawyers specifically advised CCCERA that a leave cashout at termination (i.e., terminal pay) was only pensionable "up to the amount that could be legitimately cashed out by the employee *during* the final compensation period." (17 CT 4937, italics added; see also *ibid.* [advising that a leave cashout is *not* includible in pensionable compensation if it represents "vacation time earned outside of the final compensation period"].) In other words, where only 80 hours of leave could be cashed out during the final compensation period, no more than 80 hours' worth of terminal pay was pensionable (assuming no other leave cashout had been already included). But, as discussed above, CCCERA ignored these restrictions and permitted retiring employees to inflate their pensions with hundreds of unused leave hours in excess of the leave amount accruable during their final compensation period.

Over a year after CCCERA began these practices, it reached a settlement to resolve claims brought by a group of members who had

already retired. The 1999 *Paulson* settlement applied only to employees who had already retired as of September 30, 1997 and provided that *those* retirees should have their pensions re-calculated, in line with the practices adopted by CCCERA in 1998. (16 CT 4743-4744.)

Not long afterward, courts began showing that CCCERA was misguided. The San Francisco County Superior Court concluded that CERL did *not* in fact require terminal or termination pay to be included as pensionable compensation, because such pay was not receivable during the final compensation period, but only upon retirement. (*In re Retirement Cases* (2003) 110 Cal.App.4th 426, 474 [summarizing trial court's analysis].) In 2003, the First District Court of Appeal affirmed, concluding that CERL's "language is not ambiguous." (*Id.* at p. 475.) In 2004, another court of appeal ruled that "postretirement payments for unused leave . . . are not part of an employee's final compensation within the meaning of CERL." (*Salus*, *supra*, 117 Cal.App.4th at p. 740.) That court worried that such payments would create "the risk of substantial distortion" in what pension benefits are paid to employees across CERL counties. (*Id.* at p. 741.) Other CERL counties ensured that their policies were consistent with these rulings. CCCERA, in contrast, declined to revise its practices.

In 2009, CCCERA's counsel *again* advised CCCERA that its practices were contrary to CERL, not compelled by *Ventura*, and should be changed. (17 CT 4952-4957.) CCCERA finally amended its policy in 2010 to limit the inclusion of leave cashouts to amounts that were both earned and payable during the final compensation period. (17 CT 5067.)

However, employee groups opposed the changes and threatened litigation. In the end, the new policy was applied only to employees hired on or after January 1, 2011. (17 CT 5068.) While (as CCCERA's counsel noted) the *Paulson* settlement did not pose any legal obstacle to ending CCCERA's prior practices (17 CT 4955, 4957), employees hired *before*

2011 continued to benefit from the pre-2011 practices, which substantially inflated their pensions in ways not possible for employees in the vast majority of other CERL counties whose retirement boards adhered to the law.

III. PENSION SPIKING IN ALAMEDA COUNTY

In April 1998, the Alameda County Employees' Retirement Association (ACERA) adopted a policy to implement *Ventura*. While the policy expressly promised fidelity to CERL (23 CT 6774), it also allowed employees to inflate their pensions beyond CERL's strict parameters. Like CCCERA's 1998 policy, ACERA's policy allowed employees to include in their pensionable compensation not only annual cashouts of unused leave, but also an additional cashout payable only at retirement for other unused leave hours. (23 CT 6770, 6774.) Both cashouts were included in pensionable compensation so long as the number of hours cashed out did not exceed the number of hours that could be accrued during the final compensation period. (23 CT 6770.) Thus, if an employee accrued 240 hours during the final compensation period and could cash out 80 hours annually, the employee could include the 80-hour cashout *as well as* a cashout at retirement for up to 160 more leave hours (equaling a total of 240 hours, since that was the number of accruable hours annually). In this way, ACERA's policy enabled employees to inflate their final compensation with cashouts of leave often three times greater than what CERL actually permitted. "Straddling" practices allowed employees to spike their pensions even further.

Like in Contra Costa County, ACERA's policy was adopted independent of pending litigation. Indeed, ACERA's 1998 policy was in effect for over a year before ACERA entered into an agreement settling litigation that *ACERA* had initiated. (23 CT 6771.) While resolving issues related to employees who had already retired, the 1999 settlement

agreement merely reaffirmed the 1998 policy as to the pensionable compensation of members retiring after *Ventura*. (23 CT 6774.) Like in Contra Costa County, the burden of funding the new policy was to be borne entirely by *employers*. (23 CT 6798.)

While the settlement agreement's express terms required consistency with CERL (23 CT 6774), ACERA did not revisit its policy after the decisions in *In re Retirement Cases* and *Salus*.

IV. PENSION SPIKING IN MERCED COUNTY

The Merced County Employees' Retirement Association (Merced CERA) settled post-*Ventura* litigation in 2000. (5 CT 1324-1336.) For employees retiring after *Ventura*, the agreement generally limited the inclusion of leave cashouts in pensionable compensation up to the amount that was actually cashed out by an employee during the final compensation period—not to exceed one year's annual leave accrual. (5 CT 1330.) The agreement further provided that under no circumstances could an employee include more than 160 hours of cashed-out leave in their pensionable compensation. The parties also agreed that "under no circumstances" would current employees "be required to make additional contributions to the system, to offset any projected funding liabilities as a result of the increased benefits paid under this agreement," subject to future reconsideration. (5 CT 1331.)

In implementing the agreement, Merced CERA staff failed to follow these rules. They allowed employees to include however much leave they sold back annually (which was typically limited to between 20 and 80 hours) *plus* a cash-out of up to 160 hours, accrued at any point in time. (10 CT 2702-2703.) Including these dual payouts in pensionable compensation flouted CERL's parameters, as well as the absolute 160-hour cap in the settlement agreement itself.

In 2006, Merced CERA's failure to follow the settlement agreement's plain language came to light. (10 CT 2703.) Merced CERA sought a judicial declaration regarding the meaning of the terms of the settlement agreement. (*Ibid.*) Notwithstanding the agreement's plain language, the Merced County Superior Court affirmed the prior staff practices as consistent with the 2000 settlement agreement. (10 CT 2703-2706.) The court's 2007 decision misunderstood key provisions of the agreement (10 CT 2704-2705), misconstrued *Salus* and the scope of *Ventura* (10 CT 2705), and simply ignored *In re Retirement Cases*. Despite the clear contradiction between the court's decision and established appellate authority, Merced CERA declined to appeal.

V. AB 340 AND AB 197

In 2011, the Little Hoover Commission advised the Governor and Legislature that pension-spiking practices had become "widespread throughout local government," generating "public outrage that cannot continue to be ignored." (*Marin*, *supra*, 2 Cal.App.5th at p. 682, quoting Little Hoover Com., Public Pensions for Retirement Security (Feb. 2011), at pp. 36, vi.) "The spiking games must end." (*Ibid.*, quoting Little Hoover Com., *supra*, at p. 46.) The Commission further urged the State to "exercise its authority—and establish the legal authority—to reset overly generous and unsustainable pension formulas for both current and future workers." (*Id.* at pp. 681-682, quoting Little Hoover Com, *supra*, at p. 53.)

In the face of this concern over both the integrity and solvency of CERL systems, the Governor and Legislature enacted AB 340 and AB 197. According to AB 340's author, California's public pension systems had been "tainted" by employees who had "taken advantage of the system," in part due to CERL's "very broad and general definition of 'compensation earnable.'" (*Marin*, *supra*, 2 Cal.App.5th at p. 682, fn. 2, quoting AB 340 legislative history.) AB 340 was intended to "address these abusive

practices" by "eliminat[ing]" the "ability for employees to manipulate their final compensation calculations." (*Ibid.*) AB 197, in turn, was passed soon after AB 340's enactment in order to clarify some of AB 340's provisions[9] and further "rein in pension spiking by current members of the system to the extent allowable by court cases that have governed compensation earnable in that system since 2003." (Supplemental Clerk's Transcript 114-116.)

The two bills (together, "AB 197") preserved the prior language in the definition of "compensation earnable" as subdivision (a) of section 31461, but added new subdivisions (b) and (c). Subdivision (b) clarifies that "compensation earnable" "does not include, in any case, the following:"

- Payments determined by a retirement board "to have been paid to enhance a member's retirement benefit." (§ 31461, subd. (b)(1).)
- Payments for unused leave amounts exceeding the amount "which may be earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid." (§ 31461, subd. (b)(2).)
- "Payments for additional services rendered outside of normal working hours." (§ 31461, subd. (b)(3).)
- "Payments made at the termination of employment, except those payments that do not exceed what is earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid." (§ 31461, subd. (b)(4).)

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[9] Borenstein, *Pension Reform Bill Loophole Would Expand Spiking Opportunities* (Aug. 30, 2012) Mercury News <https://www.mercurynews.com/2012/08/30/daniel-borenstein-pension-reform-bill-loophole-would-expand-spiking-opportunities/> [as of May 4, 2018].

Subdivision (c), in turn, clarifies that subdivision (b) is intended to codify the statutory construction of the prior version of section 31461 by the courts in *Salus* and *In re Retirement Cases*. (§ 31461, subd. (c).)

VI. THE RETIREMENT BOARDS' IMPLEMENTATION OF AB 197

Following passage of AB 197, CCCERA, ACERA, and Merced CERA began adopting AB 197's requirements. (16 CT 4730-4731; 1 CT 188; 41 CT 12132-12135.) Their new policies, effective January 1, 2013, continued to permit retiring employees to receive annual leave cashouts and terminal pay, and to incorporate those payments into their final compensation. However, the amount of such payments to be included in final compensation was capped by what was both earned and payable during the final compensation period. In practice, this meant that employees typically could include in their final compensation a leave cashout up to the amount of leave that under their MOU they were able to both accrue and cash out annually. In Contra Costa County, implementing AB 197 largely meant applying CCCERA's existing policy for employees hired after January 1, 2011 to employees hired before that date. (18 CT 5199.)

In light of AB 197's exclusion of pay for services rendered outside normal working hours, the new policies in Alameda and Merced counties also prospectively precluded employees from including pay for standby or on-call shifts in their final compensation. (42 CT 12336; 41 CT 12132-12135.) ACERA additionally excluded a number of pay categories from pensionable compensation under section 31461, subdivision (b)(1). (24 CT 7174; 37 CT 11017–38 CT 11054.)

In 2014, CCCERA ended straddling, pursuant to AB 197.[10] ACERA has refused to change its straddling policy.

VII. THE TRIAL COURT'S DECISION

Claiming that "vested rights" under prior retirement board policies and practices had been violated, various public employees and public employee unions in Contra Costa, Alameda, and Merced counties (collectively, "unions") filed writs of mandate challenging the retirement boards' actions under the contract clauses of the state and federal Constitutions.

The unions argued that the boards' implementation of AB 197 impaired legacy employees' vested rights to include four pay items in their pensionable compensation: (1) payments made specifically to enhance a member's pension; (2) cashouts of unused leave in excess of the amount of leave that may be accrued during the final compensation period; (3) payments for services rendered outside normal working hours; and (4) payments made at the termination of employment, to the extent that they exceed what is both earned and payable during the final compensation period. The unions obtained stays enjoining the implementation of AB 197 as applied to legacy employees.

After the retirement boards declined to defend the constitutionality of AB 197, the State intervened. The actions in the three counties were consolidated in the Contra Costa County Superior Court. Multiple rounds of briefing and hearings extended over a year. In May 2014, the trial court issued a final statement of decision, largely denying the petitions, but with two narrow exceptions.

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[10] Unions challenged CCCERA's prohibition on straddling. In 2016, the Contra Costa County Superior Court determined that AB 197 barred straddling. However, final resolution of that litigation remains, pending the resolution of this matter.

With respect to leave cashouts and terminal pay, the court found that AB 197 simply clarified exclusions that already existed in the law and thus did not violate any vested rights. Nonetheless, the court determined that the retirement boards should be estopped from applying AB 197 to a small number of employees in Contra Costa and Merced counties.

The court found the analysis of AB 197's other two exclusions to be less straightforward. While determining that payments for on-call shifts assumed *voluntarily* by an employee had never been pensionable, the court concluded that payments for *required* shifts might have been pensionable under certain circumstances. In the case of the latter, AB 197 appeared to infringe legacy employees' vested rights. Finally, with respect to AB 197's exclusion of pension-spiking enhancements, the court denied the petitions without prejudice, reasoning it was too early to tell if anyone's vested rights had been violated.[11]

VIII. THE COURT OF APPEAL'S DECISION

The Court of Appeal affirmed the trial court's decision in part, reversed in part, and remanded for further proceedings. The Court of Appeal agreed with the trial court that CERL had never authorized the inclusion of leave cashouts or terminal pay in pensionable compensation beyond what AB 197 allowed. Accordingly, no vested rights as to those items were violated. (See *Alameda County Deputy Sheriffs' Association v. Alameda County Employees' Retirement Assn.* (2018) 19 Cal.App.5th 61, 100-104.) Nonetheless, citing the settlement agreements into which the retirement boards had entered, the court estopped the retirement boards

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[11] On July 12, 2014, the trial court's stay of AB 197 dissolved. (44 CT 12889.) Because of the trial court's stay, AB 197's provisions were never applied to employees who retired between January 1, 2013 and July 12, 2014.

from applying AB 197's limitations on terminal pay to legacy employees. (See *id.* at pp. 126-129.)

With respect to the inclusion of payments for services rendered outside of normal working hours and payments made to enhance a member's retirement benefit, the Court of Appeal determined that legacy members had vested rights that AB 197 appeared to modify. (See *supra*, 19 Cal.App.5th at pp. 110-113.) The court then set forth legal standards to evaluate the reasonableness of detrimental changes to vested pension rights, and remanded for further determinations in accordance with those standards. (*Id.* at pp. 123.)

On March 28, 2018, this Court granted the petitions for review filed by the State, the Central Contra Costa Sanitary District, and the Alameda County Deputy Sheriffs' Association.

STANDARD OF REVIEW

"The ultimate questions of whether vested contractual rights exist and whether impairments are unconstitutional present questions of law subject to independent review. The question whether there is an impairment is a mixed question of fact and law." (*Bd. of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1129.) Other questions of constitutional and statutory construction presented in this appeal are also subject to de novo review. (*Ibid.*) The substantial evidence standard of review applies to a trial court's factual findings in granting or denying a writ of mandate. (*City of San Diego v. San Diego City Employees' Ret. System* (2010) 186 Cal.App.4th 69, 78.)

"The party asserting a contract clause claim has the burden of making out a clear case, free from all reasonable ambiguity, [that] a constitutional violation occurred." (*Deputy Sheriffs' Association of San Diego County v. County of San Diego* (2015) 233 Cal.App.4th 573, 578.) The party must also overcome the presumption in favor of a law's constitutionality, which

resolves "any doubt as to the Legislature's power to act . . . in favor of the Legislature's action." (*Cal. Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 253.)

ARGUMENT

The U.S. Constitution prohibits any state from passing a law "impairing the Obligation of Contracts." (U.S. Const. art. I, § 10, cl. 1.) A parallel provision is contained in article I, section 9 of the California Constitution. This Court adjudicates claims under the federal and state contract clauses using the same standard. (See, e.g., *Allen v. Board of Administration* (1983) 34 Cal.3d 114, 119-125 (*Allen II*); *Campanelli v. Allstate Life Ins.* (9th Cir. 2003) 322 F.3d 1086, 1097 ["The California Supreme Court uses the federal Contract Clause analysis for determining whether a statute violates the parallel provision of the California Constitution"].)

Analysis of a contract clause claim involves a two-part inquiry. The first part explores "the nature and extent of any contractual obligation." (*Deputy Sheriffs' Assn.*, *supra*, 233 Cal.App.4th at p. 578, quotation marks omitted.) Here, the threshold question is whether, before AB 197 excluded from pensionable compensation irregular ad hoc payments, excess leave cashouts, and payments for services rendered outside normal working hours, legacy employees ever acquired vested rights to the future inclusion of those pay items. If legacy employees never acquired vested rights to the future inclusion of these items, then even the unions do not dispute that their contract clause claims fail. If, however, legacy employees acquired vested rights to items excluded from pensionable compensation by AB 197, then this Court must undertake a second inquiry into "the scope of the Legislature's power to modify" the vested rights at issue. (*Teachers' Retirement Bd. v. Genest* (2007) 154 Cal.App.4th 1012, 1027; see also *Allen II*, *supra*, 34 Cal.3d at p. 119.)]

The unions' claims fail at both stages of this analysis. Legacy employees never acquired vested rights to enhance their pensions contrary to AB 197's prohibitions because the pension-spiking practices at issue were never consistent with prior law. To the extent that the prior law was unclear, the Legislature never relinquished its power to clarify the law as to the pensionability of pay items that had not yet been earned. Thus, even in the case that legacy employees were not previously barred from certain spiking practices, the lower court erred by assuming that employees had "vested rights" to spiking going forward. Neither the federal nor the state contract clause precludes altering the pensionability of pay that is yet to be earned. Those clauses also do not forbid the type of minimal alterations to vested rights that AB 197, at most, effected.

Finally, unlawful pension spiking is not subject to protection under principles of equitable estoppel. This Court should reverse the lower court's misapplication of estoppel and confirm AB 197's application to legacy employees without exception.

I. THE PENSION-SPIKING PRACTICES PROHIBITED BY AB 197 WERE NEVER PERMITTED UNDER CERL

A. Government Code Section 31461, Subdivision (b)(1)

1. Subdivision (b)(1) must be interpreted according to the Legislature's narrow intent

The court below misconstrued two of AB 197's provisions: subdivision (b)(1) and subdivision (b)(2). In the case of subdivision (b)(1), the court misunderstood the provision's breadth, mistaking a narrow provision for an extremely broad one. This mistake in statutory construction, in turn, led the court to find a likely impairment of vested rights where none exists.

Subdivision (b)(1) was enacted to eliminate the practice of inflating pensions with irregular, ad hoc payments bestowed upon employees specifically to enhance their pensions. The provision excludes from pensionable compensation "[a]ny compensation determined by the board to have been paid to enhance a member's retirement benefit." As enumerated in the provision itself, payments that *might* fall within its scope include: (A) payments made in the final compensation period in lieu of in-kind benefits provided before; (B) one-time or ad hoc payments not received by similarly situated members; and (C) payments made solely due to the termination of employment. (§ 31461, subd. (b)(1)(A)-(C).)

In contrast to AB 197's other provisions, subdivision (b)(1) requires a specific factual determination by the retirement board regarding a payment's purpose. As a result, subdivision (b)(1) does not permit the categorical exclusion from pensionable compensation of payments in categories (A), (B), and (C), but rather provides only that such payments *may* be excluded, depending on the board's determination of the payment's purpose. Section 31542, subdivision (a), which was enacted contemporaneously with AB 197, further requires that a retirement board "establish a procedure for assessing and determining whether an element of compensation was paid to enhance a member's retirement benefit." This procedure must include the opportunity for the member and employer to present evidence that compensation was *not* paid to enhance a member's retirement benefit. (§ 31542, subd. (a).)

In construing subdivision (b)(1), the Court of Appeal ignored this Court's instruction to interpret statutes in a manner "that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statutes' general purposes." (*Commission on Peace Officers Standards and Training v. Superior Court* (2007) 42 Cal.4th 278, 290.) Believing that "an argument can be made" that any item of

compensation received during a member's final compensation period was "paid, at least to some extent, to enhance that member's pension," the court concluded that subdivision (b)(1) could be applied potentially to "*every item of compensation received by a CERL employee*." (*Supra*, 19 Cal.App.5th at p. 113, italics added.) The only question, from the court's perspective, was what the "employer's subjective intent" was when it made the payment. (*Id.* at p. 111.)

That construction is plainly inconsistent with the Legislature's narrow purpose in enacting subdivision (b)(1), which was to target irregular ad hoc payments whose real basis was enhancing a member's pension. Reflecting its confusion, the court insisted that "any number of premium payments" might fall within the scope of subdivision (b)(1). (*Supra*, 19 Cal.App.5th at p. 112.) This is incorrect. Premium payments are paid to compensate an employee for special skills or qualifications of value, not "to enhance a member's retirement benefit." As such, they fall outside subdivision (b)(1)'s scope.

The court's construction is also impossible to reconcile with section 31529, subdivision (c). That provision designates payments that a member "was entitled to receive pursuant to a collective bargaining agreement" as *not* "hav[ing] been paid to enhance a member's retirement benefit," and thus as outside the scope of subdivision (b)(1). Since the vast majority of payments received by CERL members are paid pursuant to a collective bargaining agreement (this is true particularly in the case of rank-and-file employees), section 31529 further confirms that subdivision (b)(1) is principally aimed at manipulative practices benefitting management-level employees, and not "every item of compensation" payable to a CERL employee.

2. Irregular ad hoc payments whose real purpose is to enhance a member's pension were never pensionable under CERL

The lower court's misconstruction of subdivision (b)(1) led it to erroneously conclude that subdivision (b)(1) threatened legacy employees' vested rights. On the ground that subdivision (b)(1) potentially subjected "every item of compensation received by a CERL employee" "to an after-the-fact re-characterization as an impermissible enhancement," the court worried that subdivision (b)(1) threatened to "significantly impair the stability and predictability of a member's anticipated pension benefit." (*Supra*, 19 Cal.App.5th at p. 113.)

In fact, as described above, subdivision (b)(1) excludes from pensionable compensation only irregular, ad hoc payments whose real purpose is enhancing a member's pension. Such payments were never pensionable under CERL. Indeed, the idea of basing a public employee's pension on payments intended to spike the member's retirement benefit, and not exclusively on compensation for faithful service, contradicts the fundamental theory of a pension system. (Cf. *MacIntyre v. Retirement Board of City and County of San Francisco* (1941) 42 Cal.App.2d 734, 736.)

That, in turn, is fatal to the unions' vesting argument. In a system established and operated under CERL, the right to the inclusion of a particular pay item in pensionable compensation is defined exclusively by CERL. (See *In re Retirement Cases*, *supra*, 110 Cal.App.4th at pp. 453-454.)[12] Because CERL never required that the payments excluded by subdivision (b)(1) be pensionable, employees never could have acquired a

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[12] The unions declined to appeal the lower court's decision that boards have no discretion to make items pensionable beyond CERL's parameters. (*Supra*, 19 Cal.App.5th at pp. 96, 105.)

vested right to the pensionability of those payments. By excluding those payments, subdivision (b)(1) could not have impaired any vested rights.

The unions' argument to the contrary is entirely premised on the claim that *Ventura* interpreted CERL to require *any* cash payment, except overtime, to be treated as pensionable. This is the same claim advanced by the unions for why all forms of pension spiking were permissible before AB 197. It should be rejected.

Contrary to the unions' contention, *Ventura* interpreted CERL in light of the specific kinds of payments at issue in that case. Those payments were remuneration for past services, special skills, qualifications, and longevity. (See *supra*, 16 Cal.4th at pp. 497-501.) Because none of those payments were primarily designed to enhance a member's pension benefit, *Ventura*'s holding does not encompass the payments excluded under subdivision (b)(1). (See *Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1134 [cases not authority for propositions not considered or decided].)

To be sure, *Ventura* addressed in dicta "cash payments made in lieu of providing" in-kind advantages, and suggested that such payments are pensionable. (*Supra*, 16 Cal.4th at p. 497.) These payments are similar to ones that subdivision (b)(1)(A) identifies as susceptible to abuse and worth special scrutiny by retirement boards. Nothing the *Ventura* court said in that brief discussion, however, indicates that those payments are pensionable had they been converted to cash in an employee's final year specifically to enhance that employee's pension. That issue is simply not addressed by *Ventura*.

In sum, because subdivision (b)(1) merely clarified the law, it could not have impaired any vested rights. It did not make non-pensionable what had previously been pensionable.

B. Government Code Section 31461, Subdivision (b)(2)

1. Subdivision (b)(2) must be interpreted according to the Legislature's anti-spiking purpose

The Court of Appeal agreed with the trial court that neither subdivision (b)(2) nor subdivision (b)(4) impair vested rights, because they merely clarify existing exclusions in CERL. With respect to subdivision (b)(4), which excludes from pensionable compensation termination pay, the court correctly concluded that this provision does not impair any vested pension rights, because "even prior to [AB 197], the plain language of CERL excluded terminal pay from compensation earnable for pension purposes." (*Supra*, 19 Cal.App.5th at p. 103.)[13]

While the Court of Appeal also reached the right conclusion regarding subdivision (b)(2)'s consistency with prior law, it did so based on an erroneous construction of the statute. According to the court, subdivision (b)(2) simply requires leave cashouts to be payable during the final compensation period in order to be pensionable. (*Supra*, 19 Cal.App.5th at p. 100.) And because that is no different than what CERL requires of any other compensation, subdivision (b)(2) simply restates existing law and therefore could not have impaired any vested rights. (*Ibid.*)

In fact, subdivision (b)(2) clarifies existing law, but with respect to a different point than what the Court of Appeal understood. Subdivision (b)(2) clarifies that leave cashouts are only pensionable to the extent that the leave amount cashed out does not exceed the leave amount accrued during the final compensation period. This provision was enacted to address, among other issues, the problem of "straddling."

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[13] The unions declined to appeal this aspect of the decision.

Some employees "straddle" their final compensation period over two calendar years—for example, from July 1 of one year to June 30 of the next. In *each* of the two calendar years, the employees cash out the maximum amount of leave they can annually sell back—for example, 80 hours per year. Because the employees technically receive both 80-hour cashouts between July 1 of one year and June 30 of the next, the retirement boards allow them to inflate their pensionable compensation with *both* cashouts, reflecting 160 hours of leave cashed out from two years. Subdivision (b)(2) was enacted to clarify that employees may only include in their pensionable compensation cashouts equivalent to the amount of leave *both* accrued *and* cashed out during the final compensation period (in this case, 80 hours).

Misunderstanding subdivision (b)(2)'s purpose, the lower court incorrectly assumed that the operative qualifier in subdivision (b)(2)—"in an amount that exceeds that which may be earned and payable in each 12-month period during the final average salary period"—refers to leave cashouts. This assumption led the court, in turn, to believe that the main task in interpreting subdivision (b)(2) was determining what it means for *leave cashouts* to be "earned and payable" during the final compensation period. (*Supra*, 19 Cal.App.5th at p. 98.) Ultimately, the court concluded, leave cashouts are "earned" when members convert their leave into cash and are "paid." As a result, so long as a "member exercises his or her employer-granted option to convert the leave into cash during the final compensation period," "leave cash-outs must be included in a member's pensionable compensation—regardless of when the leave time was accrued." (*Id.* at p. 100.) And as for why the Legislature specifically added the word "payable" to subdivision (b)(2) if the terms "earned" and "payable" are essentially synonymous, the court explained that "payable" was "simply a clarification that, once the right to compensation is *earned* in

the final compensation period it is includable in compensation earnable, even if it happens to be actually *paid* at a later time." (*Id.* at pp. 103, fn. 17.)

Like the lower court's construction of subdivision (b)(1), this construction fails "to determine the Legislature's intent so as to effectuate the law's purpose." (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) As construed by the court, subdivision (b)(2) does not end the practice of straddling but *legalizes* it for new generations of employees. In addition, under the court's interpretation, the sole effect of subdivision (b)(2) is to exclude leave cashouts from pensionable compensation if they are not payable during the final compensation period. But such an interpretation effectively renders the enactment of subdivision (b)(2) an "idle act[]" (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22), since it has long been clear that all pay items are subject to that condition. Moreover, by reading the word "earned" to be merely synonymous with "payable," the court's interpretation contradicts the statutory canon presuming that "the Legislature intended every word, phrase and provision . . . in a statute . . . to have meaning and to perform a useful function." (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476.)[14]

Subdivision (b)(2) must be read instead in the context of AB 197's anti-spiking purpose. Properly understood within that context, the phrase "an amount that exceeds that which may be earned and payable in each 12-month period" refers to *leave amounts* exceeding what may be accrued and cashed out during the final compensation period. That reading is not only consistent with "the plain and commonsense meaning" of subdivision

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[14] The Court of Appeal's theory is also not consistent with the legislative history. Before the term "payable" was added to subdivision (b)(2) through AB 197's enactment, AB 340 *already* included the language "regardless of when reported or paid" in subdivision (b)(2).

(b)(2) (*People v. Skiles* (2011) 51 Cal.4th 1178, 1185), but also best serves the statute's purpose of ensuring that employees cannot inflate their pensions with cashouts of leave exceeding the amount of leave accruable during the final compensation period.

Further support for this interpretation comes from the 2010 CCCERA rules on which the Legislature patterned subdivision (b)(2). (17 CT 5067.) CCCERA's rules were adopted specifically to end straddling as to employees hired on or after January 1, 2011, and employ variations of the phrase "earned and payable" in connection with *amounts of leave*, not leave cashouts. For example, under the CCCERA rules, "leave amounts sold back" are excluded from pensionable compensation to the extent that *the leave amounts* "exceed the amount [of leave] that was both earned and cashable during service." (17 CT 5067.)

For all these reasons, this Court should reject the lower court's interpretation of subdivision (b)(2). That provision must be construed instead to advance the Legislature's clear anti-spiking purpose and therefore to exclude from pensionable compensation cashouts for leave in excess of the leave amount accruable during the final compensation period.

2. CERL never allowed the inclusion of cashouts for unused leave in an amount in excess of how much leave was accrued during the final compensation period

The unions argue that if the Court of Appeal interpreted subdivision (b)(2) incorrectly, then subdivision (b)(2) would impose new limitations on leave cashouts, in violation of legacy employees' vested rights. These rights, the union insists, were established in *Ventura*.

Once again, the unions' reliance on *Ventura* is misplaced. *Ventura* dealt with a leave program that allowed an employee to sell back up to 40 hours of leave annually, plus an additional 40 hours once the employee had accrued 400 leave hours. (*Supra*, 16 Cal.4th at p. 488, fn. 6.) This Court

held that both cashouts were pensionable. Together, these annual cashouts amounted at most to 80 hours of annual leave—*less* than the amount of leave that could be accrued during the year. Thus, nothing in *Ventura* suggested that cashouts of leave *in excess* of what is accrued during the final compensation period were ever pensionable under CERL. Moreover, the unions' understanding of *Ventura* is inconsistent with the retirement boards' post-*Ventura* settlement agreements and pre-AB 197 stated policies. (See 5 CT 1330 [Merced CERA restricting the amount of "accrued vacation and holiday leave" that is pensionable to no more than "one year's annual leave accrual"]; 17 CT 5067 [CCCERA excluding from pensionable compensation "leave amounts sold back during any twelve-month period that were accrued over two or more fiscal or calendar years, and that exceed the amount that was both earned and cashable during service in that twelve-month period"] 23 CT 6770 [ACERA recognizing leave cashout as pensionable "only to the extent that it is earned during the final compensation period"].)

To limit the variability of pensions "on the basis of accrued and unused leave, rather than on the basis of age, years of service and salary," the Legislature has always limited the pensionability of leave cashouts to no more than the amount of leave that can be accrued during the final compensation period. (*Salus*, *supra*, 117 Cal.App.4th at p. 740.) And because subdivision (b)(2) only "clarif[ies] [the] statute's true meaning" (*Hudson v. Board of Amin.* (1997) 59 Cal.App.4th 1310, 1322, quotations omitted), its exclusions could not have violated any vested rights.

C. Government Code Section 31461, Subdivision (b)(3)

The lower court also concluded that subdivision (b)(3)—which excludes payments for services outside normal working hours from pensionable compensation—potentially impairs legacy employees' vested

rights. According to the court, before AB 197, CERL allowed employees to include in pensionable compensation pay for "on-call duty [that] was part of their regular work assignment." (*Supra*, 19 Cal.App.5th at pp. 107-108.) Because AB 197 excludes such pay, the court determined that employees' vested rights may have been impaired.

This analysis misapprehends the pre-AB 197 law. The operative test set forth in the pre-AB 197 law has always been whether a given pay item is based on "the average number of days ordinarily worked by persons in the same grade or class of positions during the period." (§ 31461.) The term "'[o]rdinarily' in its customary usage means normally." (*O'Bryan v. Superior Court of Los Angeles County* (1941) 18 Cal.2d 490, 500-501; see *Ventura*, *supra*, 16 Cal.4th at p. 500 ["In common usage, 'ordinarily' means 'in the ordinary course of events' or 'usually'"].) Thus, CERL has always looked at whether a pay item is based on the time "normally" worked by similarly-situated employees, and if it is not, excluded it from pensionable compensation. Overtime pay is understood to be generally excluded from pensionable compensation under this test. (See *Ventura*, *supra*, 16 Cal.4th at pp. 500, 504.)

Like overtime pay, an employee's standby pay is not based on the "days" "normally" worked by similarly-situated employees. The lower court should have therefore concluded that it was never pensionable under CERL. (See *Ventura*, *supra*, 16 Cal.4th at pp. 500 ["the Board must make its determination upon the basis of the number of 'days' ordinarily worked. The choice of the word 'days' rather than 'hours' or some other temporal measure suggests reference to a standard work week (or month) and not to any extra hours put in as overtime," quotations omitted].) Yet, while acknowledging that CERL has never included pay for standby shifts voluntarily assumed by an employee, the court reached a different conclusion regarding pay for other types of standby shifts that are "part of

[the employee's] regular work assignment." (*Supra*, 19 Cal.App.5th at p. 108.) Such pay, the court concluded, had been pensionable up until AB 197. (*Ibid.*)

But the pre-AB 197 law contained no such distinction. The lower court never explained why CERL allegedly treated pay for simply "standing by" outside normal working hours (i.e., *not* working) *more* advantageously than pay for *working* overtime. And neither of the cases cited by the court supports its reasoning. In *Shelden v. Marin Cty. Employees Ret. Assn.* (2010) 189 Cal.App.4th 458, 463-464, the court held that the overtime pay at issue was *not* pensionable under CERL precisely because the overtime was outside of the employee's "normally scheduled or regular working hours." Significantly, the *Shelden* court noted that the employee's supervisor had approved the assignment of the overtime work at issue (*id.* at p. 460), and that the employee had "regularly" performed the work once a week for four years (*id.* at p. 464). Nonetheless, applying the same test set forth in subdivision (b)(3)—whether the overtime work was within the employee's normal working hours—the court decided the regularly scheduled overtime was not pensionable.

The Court of Appeal also places more weight on *Ventura* that it can bear. Even as it acknowledged that "there is no specific analysis in [*Ventura*] regarding on-call pay as a component of compensation earnable" (*supra*, 19 Cal.App.5th at p. 106), the court attempted to discern larger principles from *Ventura*'s treatment of meal period payments. Based on the pensionability of $60 biweekly payments for meal periods during which sheriffs remained on call, the Court of Appeal inferred a broader rule regarding the pensionability of payments for standby shifts that are part of an employee's regular work assignment. But the facts of *Ventura* do not justify this broad inference.

While the short meal periods in *Ventura* were part of the employees' regular work assignment, they were also always attached to the employees' mandatory, normally scheduled working hours. (See *Alameda County*, *supra*, 19 Cal.App.5th at p. 108 ["it seems highly likely that the employees at issue in [*Ventura*] were receiving on-call pay because they were required to remain subject to call during lunch as part of their regularly scheduled work assignment"].) Consequently, far from suggesting that all pay for regularly-assigned standby shifts was pensionable before AB 197, *Ventura* merely confirms that there are cases in which short on-call periods fall within normally scheduled working hours. In such cases, the pay may be pensionable. Pensionability in such isolated instances, however, does not justify treating standby pay more generally as pensionable. Indeed, a similar exception has long applied to overtime pay. (See § 31461.6 [excluding "overtime premium pay" from "compensation earnable" except when overtime hours are "worked within the normally scheduled or regular working hours" of the employee].) Despite this exception, overtime pay is still generally treated as *excluded* from pensionable compensation.

II. EMPLOYEES NEVER ACQUIRED A VESTED RIGHT TO THE PENSIONABILITY OF FUTURE PAY ITEMS NOT YET EARNED

None of the spiking practices now prohibited under AB 197 were ever allowed under CERL. But even if CERL did not previously bar all of the practices prohibited under subdivisions (b)(1), (b)(2), and (b)(3), those provisions still could not have impaired any vested rights, because they only operate prospectively. (See *Marin*, *supra*, 2 Cal.App.5th at p. 708 ["The Legislature's change to the definition of compensation earnable was expressly made purely prospective by [AB 197]"].) Significantly, AB 197 does not affect the pension of anyone who retired before its effective date. Nor does it *retroactively* re-characterize the pensionability of any item that

was earned and already included in an employee's final pensionable compensation before AB 197's effective date.

The Court of Appeal erred by disregarding AB 197's prospective character and simply *assuming* that AB 197 impaired vested rights. Believing enhancement payments and certain standby payments were pensionable before AB 197, the court assumed that legacy employees automatically acquired vested rights to the inclusion of those payments in their *future* pensionable compensation, *even if the payments have not yet been earned.* (See *supra*, 19 Cal.App.5th at pp. 113, 122-123.) But no analysis of "the nature and extent of any contractual obligation" was done. (*Deputy Sheriffs' Assn.*, *supra*, 233 Cal.App.4th at p. 578.) Nor did the court provide any explanation for where such rights came from or how they were established.

In fact, the unions have consistently failed to show that legacy employees actually had vested rights to include future pension-spiking enhancements, excess leave cashouts, and standby pay in their future pensionable compensation. To support their assertion of these vested rights, the unions rely upon retirement board policies regarding pensionable compensation that they claim were consistent with CERL and *Ventura* before the enactment of AB 197. But, to the extremely limited extent that these policies even addressed pension-spiking enhancements, leave cashouts, and standby pay,[15] none of the policies purported to guarantee employees the pensionability of those pay items in perpetuity, regardless of legislative changes. Rather, the policies promised—and employees agreed—"to have their 'compensation earnable' and 'final compensation'

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[15] Neither of the post-*Ventura* settlements applicable to legacy employees even *addressed* the pensionability of the items excluded by subdivisions (b)(1) and (b)(3).

calculated pursuant to CERL." (*In re Retirement Cases*, *supra*, 110 Cal.App.4th at pp. 453-454, italics added; see also 5 CT 1330 [requiring "payment of increased retirement benefits" by Merced CERA to be "consistent with CERL"]; 23 CT 6769-6770, 6774 [requiring "definitions of 'compensation earnable' and 'final compensation'" adopted in ACERA's policies and *Ventura* settlement "to be interpreted consistently with CERL"].) Repeatedly and consistently, the retirement boards reinforced this understanding by advising employees that CERL's provisions would ultimately govern the calculation of their pension. (See, e.g., 24 CT 7094 ["No statement in this handbook is a legally binding interpretation, enlargement, or amendment of the provisions in the CERL or ACERA's policies. If conflict arises between this handbook and the CERL, the decision will be based on the CERL . . . and not on information contained in this handbook"].)

CERL, in turn, "is subject to the implied qualification that the [Legislature] may make modifications and changes in the system." (*Miller v. State of California* (1977) 18 Cal.3d 808, 816; *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 855.) The Legislature has never relinquished its "essential powers" to regulate county retirement systems (*Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1189), and in fact has exercised this power repeatedly to modify the parameters of the definition of pensionable compensation applying to active employees. (See, e.g., *Ventura*, *supra*, 16 Cal.4th at pp. 504-505 [discussing amendments in 1951, 1972, and 1993]; see also § 31461.5 [enacted in 1998 to clarify that "salary bonuses and any other compensation incentive payment" were not pensionable]; § 31461.6 [enacted in 2000 to clarify when overtime pay is pensionable].) Any policies regarding pensionable compensation were therefore "structured against the background of" this very extensive legislative regulation.

(*Energy Reserves Group, Inc. v. Kansas Power and Light Co.* (1983) 459 U.S. 400, 416.) No policy was exempt from compliance with CERL *and its amendments*, and legacy employees understood that when they reached their final compensation period, the definition of pensionable compensation in effect would govern the calculation of their pension. (See *U.S. Trust Co. of New York v. New Jersey* (1977) 431 U.S. 1, 22 ["One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them," quotations omitted].)

That legacy employees lacked vested rights to the pensionability of future compensation is also consistent with well-established contract clause principles. The contract clauses generally do not protect public employees' rights to future items of compensation, which have not yet been earned through service. (See *United States v. Larionoff* (1977) 431 U.S. 864, 879 [prospective reductions of pay do not violate the Contract Clause, "even if that reduction deprived members of benefits they had expected to be able to earn"]); *Taylor v. City of Gadsden* (11th Cir. 2014) 767 F.3d 1124, 1135 ["before a public employee renders services, the amount of promised compensation can be freely amended"]; see also *Maryland State Teachers Ass'n, Inc. v. Hughes* (D. Md. 1984) 594 F.Supp. 1353, 1360 ["A very important prerequisite to the applicability of the Contract Clause at all to an asserted impairment of a contract by state legislative action is that the challenged law operate with retrospective, not prospective effect"].)

The unions' theory gets the logic behind vested pension rights backward. Under the theory of vested pension rights, it is the performance of a service that "earns" compensation, and gives rise to a vested right to payment of deferred compensation for that service. (See *Miller*, *supra*, 18 Cal.3d at p. 815.) So where an employee has not yet provided a service during their final compensation period, the employee could not possibly have earned any compensation (deferred or otherwise) for that service. The

unions, in contrast, insist that the right to deferred compensation for a service may *precede* the actual performance of that service, and thereby block the Legislature from modifying the terms of compensation earned in the future for that service.

That "would be a significant, unprecedented change that goes beyond any known theory of deferred compensation." (Monahan, *Statutes as Contracts? The "California Rule" and Its Impact on Public Pension Reform* (2012) 97 Iowa L. Rev. 1029, 1061.) The unions' theory is also inconsistent with the well-established "unmistakability" doctrine. Here, the Legislature has never so much as *suggested* relinquishing its sovereign power to modify the terms of future compensation, let alone expressed such an intent "clearly and unequivocally." (*Retired Employees*, *supra*, 52 Cal.4th at p. 1185.)

Finally, the unions' theory is not supported by this Court's jurisprudence. This Court has repeatedly held that employees cannot be shifted from fluctuating pension systems to far less generous fixed pension systems. (See, e.g., *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 867-868; *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131-133 (*Allen I*).) It has also held that employees on the brink of retirement cannot be suddenly divested of their pensions. (See *Kern*, *supra*, 29 Cal.2d at pp. 855-856.) None of these cases addresses the issue of whether the Legislature can adjust the pensionability of a specific pay item before it is earned during the final compensation period.

Legislature v. Eu (1991) 54 Cal.3d 492, is the lone case dealing with a purely prospective change to legacy employees' vested rights, but it also does not support the unions' position. That case addressed the prospective *termination* of all pension rights, and held that, to protect an employee's vested right from complete divestment in such cases, an employee may in some circumstances have a vested right to earn additional pension benefits

through continued service. (See *id.* at pp. 530-532.) However, nothing in *Eu* holds that that an employee has a vested right to earn such additional benefits based on the continuation of every single term fixed in a statute. Instead, the consistent principle emphasized by this Court is that "the amount, terms and conditions of [active employees' pension] benefits may be altered" (*Kern, supra*, 29 Cal.2d at p. 855) in order to adjust to "changing conditions" and "maintain the integrity of the system." (*International Assn. of Firefighters v. City of San Diego* (1983) 34 Cal.3d 292, 300.)

Flexibility with respect to the pensionability of future remuneration for future service is consistent with the approach of not only this Court and the federal courts, but also other state courts that have approached this issue. (See, e.g., *Moro v. State* (Or. 2015) 351 P.3d 1, 37 [rejecting claim that pension benefits cannot be "changed prospectively . . . for work that is yet to be performed"]; *AFT Michigan v. Michigan* (Mich. 2014) 846 N.W.2d 583, 594 ["the Legislature cannot diminish or impair accrued financial benefits, but we think it may properly attach new conditions for earning financial benefits which have not yet accrued"]; *Scott v. Williams* (Fla. 2013) 107 So.3d 379, 388-389 [legislature has authority "to amend a retirement plan prospectively, so long as any benefits tied to service performed prior to the amendment date are not lost or impaired"].) Such flexibility is also consistent with basic notions of fairness. No unfairness or detrimental reliance arises when employees understand the non-pensionability of a payment before performing the service earning that payment.

By simply *assuming* that legacy employees had acquired vested rights to the future pensionability of spiking enhancements and standby pay not yet earned, the lower court embraced a dangerously expansive theory of vested rights that threatens to divest legislative bodies of the power to

address the deepening crisis of unfunded pension liabilities. Absent explicit legislative promises, neither the federal nor state contract clause protects a right to the pensionability of un-accrued compensation. To avoid further "limit[ing] drastically the essential powers" of the elected branches (*Retired Employees*, *supra*, 52 Cal.4th at p. 1185), this Court should reverse the lower court.

III. EVEN IF AB 197'S EXCLUSIONS IMPACTED LEGACY EMPLOYEES' VESTED RIGHTS, THE EXCLUSIONS WERE PERMISSIBLE UNDER THE CONTRACT CLAUSES

Even assuming arguendo that AB 197 impacted legacy employees' vested rights to the pensionability of certain ad hoc and standby payments, it would not follow that the statute violated the contract clause of the state or federal Constitution.

This Court has repeatedly noted that "[n]ot every change in a retirement law constitutes an impairment of the obligation of contracts . . . . Nor does every impairment run afoul of the contract clause." (E.g., *Allen II*, *supra*, 34 Cal.3d at p. 119.) The constitutional prohibition against impairing contracts "is not an absolute one and is not to be read with literal exactness like a mathematical formula." (*Ibid.*, quotations omitted.) Rather, it should always be "construed in harmony" with "the principle of continuing governmental power" (*id.* at p. 120), including "the essential attributes of sovereign power necessarily reserved by the States to safeguard the welfare of their citizens." (*U.S. Trust*, *supra*, 431 U.S. at p. 21.)

Disregarding these principles, the Court of Appeal remanded to the trial court to conduct a "systematic vested rights analysis" that would evaluate the impact of AB 197's exclusions on legacy employees "in the context of each county's particular CERL system." (*Supra*, 19 Cal.App.5th at p. 123.) In so doing, the court entirely ignored a threshold issue that,

properly analyzed, would have obviated remand. That issue is the severity of the alleged impairment, which is fundamental because it "measures the height of the hurdle the state legislation must clear." (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 830, quotations omitted.) Severe impairment "will push the inquiry to a careful examination of the nature and purpose of the state legislation." (*Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 245.) "Minimal alteration of contractual obligations may end the inquiry at its first stage." (*Allen II*, *supra*, 34 Cal.3d 114, 119, quotations omitted.)

The Court of Appeal erred by failing to consider this threshold issue. Compounding its error, the court advised the trial court on remand to subject any impairment to heightened scrutiny, without regard to the impairment's severity, and to look upon "relatively modest" modifications as strongly suggestive of unconstitutional impairment. (*Supra*, 19 Cal.App.5th at p. 123.) This Court should reverse. To the extent that AB 197's exclusions affected vested rights, they were no more than a minimal alteration.

A. AB 197's Exclusions Did Not Rise to the Level of Substantial Impairment

As this Court has repeatedly noted, until a pension becomes payable, an "employee does not have a right to any fixed or definite benefits but only to a substantial or reasonable pension." (*Betts*, *supra*, 21 Cal.3d at p. 863; *Miller*, *supra*, 18 Cal.3d at p. 816.) That right to a substantial or reasonable pension is not "rigidly fixed by the specific terms of the legislation in effect during any particular period in which [they] serve." (*Kern*, supra, 29 Cal.2d at p. 855.)

Applying these principles in *Packer v. Board of Retirement* (1950) 35 Cal.2d 212, 218-219, this Court upheld the constitutionality of statutory modifications of active peace officers' vested pension rights. Among other

changes, the amendments substantially narrowed the circumstances under which a peace officer's widow or children could receive a pension (*id.* at p. 213), and lowered the defined pension benefit payable in cases where a peace officer's retirement "resulted from a nonservice disability" (*id.* at pp. 218-219). Nonetheless, the Court concluded that these changes did not amount to an unconstitutional impairment because "the basic conditions under which a county peace officer could obtain a pension were substantially unchanged." (*Id.* at p. 218.) Taking into account "the total value of all pension rights," the Court determined that it was "reasonably clear" that peace officers "retained rights to substantial pension benefits." (*Id.* at p. 219.)

This analysis is instructive here. That legacy employees can no longer increase their pensions with spiking enhancements or pay for standby shifts related to their regular work assignments did not meaningfully alter "the basic conditions" under which they could earn a pension. Under AB 197, pensionable compensation still includes base salary, limited cashouts of unused leave, and premium payments. Compensation both earned and payable during the final compensation period continues to be pensionable. And both the definition of the final compensation period and the defined benefit formula applicable to legacy employees remain the same. In sum, the alleged modifications at issue here are different in kind from those in *Allen I*, or *Betts*, or *Eu*, all of which involved radical changes to active employees' defined benefit formulas. Here, legacy employees "retained rights to substantial pension benefits," even more so than the officers in *Packer*. And to the extent that there were changes, they were "mild," and "hardly burdensome" for legacy employees. (*City of El Paso v. Simmons* (1965) 379 U.S. 497, 516.)

The Legislature's amendments to CERL were also consistent with legacy employees' reasonable expectations. As discussed above, legacy

employees "agreed to have their 'compensation earnable' and 'final compensation' calculated pursuant to CERL." (*In re Retirement Cases*, *supra*, 110 Cal.App.4th at pp. 453-454.) Because CERL "is subject to the implied qualification that the [Legislature] may make modifications and changes in the system" (*Kern*, *supra*, 29 Cal.2d at p. 855), and has in fact been amended repeatedly over the years, any assumption that the definition of pensionable compensation was immutable was not reasonable. (*Miller*, *supra*, 18 Cal.3d at p. 816 ["pension rights are not immutable"]; *Kern*, *supra*, 29 Cal.2d at p. 855 ["the amount, terms, and conditions of benefits may be altered"]; cf. *Calfarm*, *supra*, 48 Cal.3d at p. 830 ["Insurance . . . is a highly regulated industry, and one in which further regulation can be anticipated. . . . Neither the company nor a policyholder has the inviolate rights that characterize private contracts"].) Particularly where alterations to that definition were modest, that should end the inquiry. (See *Allen II*, *supra*, 34 Cal.3d at p. 124 ["Laws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of a contract," quotations omitted.]). The lower court erred in instructing the trial court otherwise.

B. AB 197's Exclusions Were Reasonable and Necessary to Serve Important Public Purposes

Were this Court to determine that AB 197's exclusions amounted to a substantial impairment of legacy employees' vested rights, it should still conclude that there was no contract clause violation. Even a substantial impairment may not run afoul of the contract clause if it was "reasonable and necessary to serve an important public purpose." (*U.S. Trust*, *supra*, 431 U.S. at p. 25; see also *Terry v. City of Berkeley* (1953) 41 Cal.2d 698, 702 ["reasonable changes detrimental to the pensioner may be made in pension provisions for public employees or their beneficiaries before the

happening of the contingency"].) The important public purpose "need not be addressed to an emergency or temporary situation." (*Energy Reserves*, *supra*, 459 U.S. at p. 412.) In the pension context, "alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation." (*International Assn.*, *supra*, 34 Cal.3d at p. 301.)

AB 197's exclusions easily satisfy the test for "reasonableness and necessity." To the extent that employees could spike their pensions with irregular ad hoc payments and thousands of hours of standby pay in their final year, unforeseen loopholes within the law were to blame. These loopholes allowed employees to game the system and inflate their pensions in ways never completed by the Legislature, with heavy multi-decade financial repercussions for county taxpayers. Closing these loopholes was necessary to reducing manipulation of CERL systems, ensuring that like payments (standby pay and overtime pay) were treated consistently, and ultimately protecting county taxpayers from abusive practices. (See *Allen II*, *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," quotations omitted]; see also *Energy Reserves*, *supra*, 459 U.S. at 412 ["elimination of unforeseen windfall profits" is "legitimate state interest"].)

Moreover, there are compelling reasons to defer to the Legislature's judgment as to reasonableness and necessity here. The relative modesty of AB 197's exclusions suggests that "the height of the hurdle the state legislation must clear" is relatively low. (*Calfarm*, *supra*, 48 Cal.3d at p. 830.) And because the State has not acted "to repudiate debts it has incurred under a contract" or otherwise impair its own financial obligations, there is no reason why this Court should second-guess the Legislature's use of its police power "to achieve the legitimate purpose of promoting the

welfare of its people." (*Interstate Marina Dev. Co. v. Cty. of Los Angeles* (1984) 155 Cal.App.3d 435, 448; see also *U.S. Trust*, *supra*, 431 U.S. at p. 25; *City of El Paso*, *supra*, 379 U.S. at pp. 508-509 [legislature has "wide discretion . . . in determining what is and what is not necessary," quotations omitted].) Particularly in light of these factors, this Court should reverse the lower court and conclude that any impairment of vested rights did not violate the contract clause of the state or federal Constitution.

IV. THE COURT OF APPEAL MISAPPLIED EQUITABLE ESTOPPEL

On the ground that "even prior to [AB 197], the plain language of CERL excluded terminal pay from compensation earnable for pension purposes," the Court of Appeal agreed that employees had no vested right to the inclusion of terminal pay. AB 197's exclusion of terminal pay from pensionable compensation thus could not have violated any vested rights.

Nonetheless, the Court of Appeal blocked the application of AB 197's restrictions on terminal pay to legacy employees in Contra Costa, Alameda, and Merced counties under the doctrine of equitable estoppel. This unprecedented application of estoppel compels retirement boards to *violate* AB 197 as to thousands of employees, even employees who are still decades from retiring. As a matter of law, such estoppel is unavailable here. Even if that were not the case, this Court should still reverse the lower court to protect the basic separation of powers underlying our system of government.

A. The Requisite Elements for Equitable Estoppel Were Not Satisfied

The doctrine of equitable estoppel "provides that a person may not deny the existence of a state of facts if that person has intentionally led others to believe a particular circumstance to be true and to rely upon such belief to their detriment." (*McGlynn v. State of California* (2018) 21 Cal.App.5th 548, 561.) Four elements must be present in order to apply

equitable estoppel: "(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. (*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305.) "When the evidence is not in conflict and is susceptible of only one reasonable inference, the existence of an estoppel is a question of law." (*Ibid.*)

Here, the lower court erred as a matter of law in concluding that these elements had all been satisfied. In fact, none were satisfied. While the court pointed to "widespread and long-continuing misrepresentations by both employers and the Boards regarding the ability of legacy members to include terminal pay in pensionable compensation" (*supra*, 19 Cal.App.5th at p. 127), such "misrepresentations" were inaccurate legal interpretations, not misrepresented or concealed *facts*. That distinction is critical. It is "black-letter" law that "where the material facts are known to both parties and the pertinent provisions of law are equally accessible to them, a party's inaccurate statement of the law . . . cannot give rise to an estoppel." (*Jordan v. City of Sacramento* (2007) 148 Cal.App.4th 1487, 1496.)

Furthermore, "[t]he invocation of estoppel is particularly inappropriate where the party seeking it was represented by counsel at the time of the misrepresentation of law." (*Jordan*, *supra*, 148 Cal.App.4th at p. 1497.) Here, employee unions knew everything that the retirement boards knew—including the state of the law—and entered into settlement agreements under the guidance of their counsel. Indeed, the unions concede that the alleged "misrepresentations" involving erroneous legal interpretations were made *at the unions' urging*. (See Answer to Petitions for Review at p. 26 ["The misrepresentations . . . were founded upon court-approved settlement agreements executed in response to [employee]

litigation" urging the adoption of the misrepresentations].) Moreover, for years after entering into the settlement agreements, union counsel closely monitored all of the boards' communications with employees, and threatened to sue if the boards deviated from the unions' positions—the very positions that the unions are now calling "misrepresentations." (See, e.g., 17 CT 5042-5043 [attorney representing employees in fire protection district threatening CCCERA that "any attempt to reduce the current benefit level for retired or *active members* of CCCERA will be attacked on a variety of legal grounds," italics added].) Under these circumstances, claims that employees were "ignorant of the true state of facts" and long misled by the retirement boards simply do not withstand scrutiny. (See *California Cigarette Concessions, Inc. v. City of Los Angeles* (1960) 53 Cal.2d 865, 871 ["[W]here one acts with full knowledge of plain provisions of law, and their probable effect upon facts within his knowledge, especially when represented by counsel, he can neither claim (1) ignorance of the true facts or (2) reliance to his detriment upon conduct of the person claimed to be estopped, two of the essential elements of equitable estoppel"].)

Driscoll is not to the contrary. In *Driscoll*, this Court estopped a city from applying a statute of limitations to claims filed by widows of former city employees. The city had misadvised the widows that they were ineligible to receive a pension, causing the widows to miss the filing deadline. (See *supra*, 67 Cal.2d at pp. 301-305.) Unlike the legacy employees here, however, the widows were *not* represented by counsel at the time of the city's misrepresentations, and were given specific advice within a confidential relationship "as to the legal effect of the statutory provisions *as applied to [them]*" in particular. (*Id.* at p. 310, italics added.) That is very different from being "merely" informed "as to the content of

the pertinent provisions" of CERL in public, like the legacy employees were here. (*Ibid.*)[16] For these reasons, *Driscoll* does not help the unions.

B. Because Estoppel Directly Contravenes Statutory Limitations, It Is Not Available

Even if the unions could demonstrate that all four elements for estoppel have been satisfied, estoppel is barred by law here, because estoppel may not be used to "contravene directly any statutory or constitutional limitations." (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 28.)

To be sure, courts have estopped "the government from asserting *a procedural barrier*" against a claimant in the public pension context, where the government "caused the claimant's failure to comply with the procedural requirement." (*Feduniak v. California Coastal Com'n* (2007) 148 Cal.App.4th 1346, 1372.) However, where retirement boards lack the statutory authority to treat pay items as pensionable, requiring the boards to do so "based on estoppel is barred as a matter of law." (*City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, 543; see also *McGlynn*, *supra*, 21 Cal.App.5th at p. 562; *Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864, 869-871.) And because the lower court acknowledged that boards never had "the power to include terminal pay in compensation earnable as a matter of discretion" (*supra*, 19 Cal.App.5th at p. 125), that lack of authority alone should have as a matter of law precluded using estoppel to require the boards to make terminal pay pensionable. That bar is especially clear where estoppel is to be applied *prospectively*. (See *City of Oakland v. Oakland Police and Fire Retirement*

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[16] All of the member handbooks on which employees allegedly relied also expressly advised that "[t]he information presented in this handbook should not be construed as legal advice or as a legal opinion on specific facts." (E.g., 24 CT 7094.)

System (2014) 224 Cal.App.4th 210, 243-245; *Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567, 584.)

To circumvent this clear bar, the Court of Appeal invented an exception to it. According to the court, a board's "broad administrative mandate" to settle litigation enables it to promise pension benefits beyond what the Legislature permits, and all three retirement boards exercised such authority to reach settlements after *Ventura*. (*Supra*, 19 Cal.App.5th at pp. 126-127.) This novel exception has two serious flaws.

First, it licenses fraud. If the boards had "administrative" authority to misrepresent the law to resolve litigation (and to continue the misrepresentation years after it became undeniable), then they effectively had authority to make "widespread and long-continuing misrepresentations" to members, and violate the trust placed in a retirement board. (*Supra*, 19 Cal.App.5th at pp. 127-128.)

Second, the Court of Appeal's exception effectively usurps the Legislature's exclusive authority to define public employee pension benefits under CERL. Under longstanding law, "only the [legislative body] has the power to grant employee benefits, and [the board] exceeds its authority when it attempts to 'expand pension benefits' beyond those the [legislative body] has *granted*." (*City of San Diego v. Haas* (2012) 207 Cal.App.4th 472, 495.) An agency's settlement with employees has never altered this rule. (See *Longshore*, *supra*, 25 Cal.3d at p. 23 ["The statutory compensation rights of public employees are strictly limited and cannot be altered or enlarged by conflicting agreements between the public agency and its employees"]; *Oden v. Bd. of Administration* (1994) 23 Cal.App.4th 194, 201 ["Statutory definitions delineating the scope of PERS compensation cannot be qualified by bargaining agreements"].) Nor has it mattered if the agreement resolves litigation; any portion of a settlement

agreement that violates state law has hitherto been invalid. (*Summit Media LLC v. City of Los Angeles* (2012) 211 Cal.App.4th 921, 934-937.)

The lower court's decision distorts these basic principles. The rules regarding virtually any pension rule can be litigated. If a retirement board can use its "administrative mandate" to bend the law for thousands of employees at the mere *threat* of litigation (*supra*, 19 Cal.App.5th at p. 126 fn. 26 [extending estoppel to CCCERA active members—even though they were not part of any post-*Ventura* settlement agreement—because such members presented "the threat of litigation"]), its power to grant pension benefits is no longer constrained by statute. This Court should not permit employee groups to be able to effectively amend CERL's provisions county by county by filing litigation and then entering into settlement agreements with retirement boards. The actions of retirement boards "must conform to the legislative will if we are to preserve an orderly system of government." (*Morris v. Williams* (1967) 67 Cal.2d 733, 737.)

C. The Estoppel Decision Effectively Nullifies Duly-Enacted Law in Contra Costa, Alameda, and Merced Counties

Finally, the Court of Appeal's estoppel decision ignores this Court's rule against using estoppel "to defeat the effective operation of a policy adopted to protect the public." (*Longshore*, *supra*, 25 Cal.3d at p. 28, quotations omitted; *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493.) As this Court has recognized, "each case" of governmental estoppel "must be examined carefully and rigidly to be sure that a precedent is not established through which, by favoritism or otherwise, the public interest may be mulcted or public policy defeated." (*Mansell*, *supra*, 3 Cal.3d at p. 495, fn. 30, quotation marks omitted.) Here, AB 197 was enacted to clarify the law and put an end to egregious pension-spiking practices that were eroding the public's trust in the integrity of public pension systems, were

never lawful, and were saddling public employers (and ultimately taxpayers) with hundreds of millions of dollars in liabilities never intended by the Legislature. By estopping the three counties' retirement boards from applying AB 197's provisions to the vast majority of county employees who have yet to retire and *compelling* the boards to spike pensions unlawfully, the decision effectively nullifies the Legislature's policy in three counties, violating this Court's instruction.

The profoundly far-reaching nature of this judicial nullification also threatens the constitutional separation of powers. (See *Bd. of Supervisors v. California Highway Comm'n* (1976) 57 Cal.App.3d 952, 961-962 ["Generally, a court is without power to interfere with purely legislative action, whether the act . . . be at the state level or the local level"]; Cal Const., art. III, § 3.) The lower court's estoppel decision enables *thousands* of legacy employees in three counties to artificially inflate their final pensionable compensation with payments for unused leave that are easily three or more times greater than what was ever permitted by law. Many of the legacy employees ordered to receive this windfall are years, if not decades, from their final compensation period. Once these employees retire, they will then be able to receive inflated pension benefits for as many years or decades that they continue to live. In other words, even decades from now, many employees in Contra Costa, Alameda, and Merced counties will be receiving a pension that was spiked using practices that were never lawful before, during, or after their service. Furthermore, the estoppel order imposes hundreds of millions of dollars of additional pension liability on county governments—costs that were never contemplated by the governing statute and will ultimately be borne by taxpayers.

The effective nullification of the Legislature's policy in three counties further undermines the uniform application of CERL statewide.

While employees in the other 17 CERL counties whose retirement boards faithfully obeyed the law will be subject to governing state law and not reap the benefits of unlawful pension spiking, most employees in the three counties at issue here will be exempt from many of AB 197's anti-spiking provisions and continue to benefit from unlawful practices. "Such inconsistency in the application of a single state statute is inappropriate, if not impermissible." (*Irvin v. Contra Costa County Employees' Retirement Association* (2017) 13 Cal.App.5th 162, 172.)

Finally, the judicial nullification of duly-enacted law cannot be justified by the alleged "injustice which would result from a failure to uphold an estoppel" here. (*Mansell*, *supra*, 3 Cal.3d at pp. 496-497.) No "injustice" arises by limiting the unlawful use of unused leave to spike an employee's pension. Rather, the interests of justice strongly favor applying the same rules to all CERL members and protecting millions of taxpayers—along with their children and grandchildren—from having to finance abusive, unlawful practices.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeal as to any limitation on AB 197's application to legacy employees.

Dated: May 4, 2018

Respectfully submitted,

PETER A. KRAUSE
Legal Affairs Secretary

/s/ Rei Onishi

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

Exhibit F

XAVIER BECERRA
Attorney General

State of California
DEPARTMENT OF JUSTICE

1300 I STREET, SUITE 125
P.O. BOX 944255
SACRAMENTO, CA 94244-2550

Public: (916) 445-9555
Telephone: (916) 210-6002
Facsimile: (916) 324-8835
E-Mail: Anthony.OBrien@doj.ca.gov

March 18, 2021

Sent via e-mail (jrieger@acera.org) and U.S. Mail
Jeff Rieger
Chief Counsel
Alameda County Employees' Retirement Association
475 14th Street
Oakland, CA 94612

RE: *Alameda County Deputy Sheriffs Assn., et al. v. Alameda County Employees' Retirement Assn., et al.*
Superior Court of California, County of Contra Costa, Case No. MSN12-1870

Dear Jeff:

This letter further responds to the question you raised regarding whether the Public Employees' Pension Reform Act of 2013 (PEPRA), as amended by Assembly Bill No. 197 (2011-2012 Reg. Sess.), allows for "straddling" an employee's final compensation period over two separate 12-month periods and then including cashouts of unused leave from both 12-month periods in an employee's final compensation. As we discussed last week, and as recognized by the Supreme Court in *Alameda County Deputy Sheriff's Association v. Alameda County Employees' Retirement Association* (2020) 9 Cal.5th 1032, AB 197 strictly prohibits such a practice.

In *Alameda County*, the Supreme Court noted that AB 197 "was designed to limit pension spiking, the manipulation of compensation to artificially increase a pension benefit." (*Alameda County*, *supra*, 9 Cal.5th at p. 1098.) The Court noted in particular that Government Code section 31461, subdivision (b), "is intended to prevent various forms of manipulation of the compensation earnable calculation," including "the alteration of the normal pattern of an employee's compensation for the purpose of increasing the compensation received during the final compensation period." (*Id.* at pp. 1097-98.) In analyzing the different provisions of section 31461, the Court left no doubt that section 31461, subdivision (b), does not permit straddling:

> The State points to an additional function of section 31461, subdivision (b)(2) and (4). Prior to PEPRA's amendment, even in counties that limited the amount of leave time that could be cashed out in a calendar year, employees were able to double the amount of cashed out leave time received during a final compensation year by designating a final compensation year that straddles two calendar years, for example, July 1 through June 30. By cashing out leave time in the second half

> of the prior calendar year and the first half of the subsequent calendar year, a retiring employee could double the amount of cashed out leave time received in the final compensation year. By limiting the inclusion of cashed out leave time to that "earned and payable" in a "12-month period," *subdivision (b)(2) and (4) prevent this practice.*

(*Id.* at pp. 1062-1063, italics added.)

In light of AB 197 and the Supreme Court's decision in *Alameda County*, most CERL retirement systems have interpreted PEPRA as prohibiting straddling, and have eliminated the practice in its entirety. Indeed, in the immediate aftermath of the *Alameda County* decision, at least four retirement systems adopted resolutions stopping the practice of permitting cashouts of leave in excess of what can be earned and cashed out for each 12-month period. Many CERL systems did not allow straddling even prior to PEPRA. We are not aware of any CERL system other than Alameda County that still permits inclusion of straddled leave payments in pensionable compensation. This abusive practice must finally end.

Please let me know how the ACERA Board decides to proceed in this matter.

Sincerely,

Tony O'Brien

ANTHONY P. O'BRIEN
Deputy Attorney General

For XAVIER BECERRA
Attorney General

APO:

cc: Harvey L. Leiderman, Reed Smith LLP
Maytak Chin, Reed Smith LLP

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Exhibit G

AMENDED IN ASSEMBLY APRIL 14, 2011

AMENDED IN ASSEMBLY APRIL 11, 2011

AMENDED IN ASSEMBLY FEBRUARY 24, 2011

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL No. 340

Introduced by Assembly Member Furutani
(Coauthor: Assembly Member Ma)

February 10, 2011

An act to amend Section 31461 of, and to add Sections 31540, 31540.2, 31541, 31569, and 31680.9 to, the Government Code, relating to county employees' retirement.

LEGISLATIVE COUNSEL'S DIGEST

AB 340, as amended, Furutani. County employees' ~~retirement: postretirement service.~~ *retirement.*

(1) The County Employees Retirement Law of 1937 (CERL) authorizes counties and districts, as defined, to provide a system of retirement benefits to their employees. CERL defines compensation earnable for the purpose of calculating benefits as the average compensation for the period under consideration with respect to the average number of days ordinarily worked by persons in the same grade or class of positions during the period, and at the same rate of pay, as determined by the retirement board.

This bill would prohibit a variety of payments including bonus payments, housing allowances, severance pay, vehicle allowances, and payments for unused vacation, sick leave, or compensatory time off, exceeding what may be earned and payable in a 12-month period, from being included in compensation earnable. The bill would prohibit any

compensation determined by the board to have been paid for the purpose of enhancing a member's retirement benefit from being included in compensation earnable. The bill would except from this prohibition compensation that a member was entitled to receive pursuant to a collective bargaining agreement that was subsequently deferred or otherwise modified as a result of a negotiated amendment of that agreement. The bill would permit a member or employer to present evidence that compensation was not paid for the purpose of enhancing a member's benefit and would permit the board to revise its determination upon receipt of sufficient evidence to that effect.

The bill would also require a county or district, when reporting compensation to a retirement board, to identify the pay period in which the compensation was earned regardless of when it was reported or paid. The bill would authorize the board to assess a county or district a reasonable amount to cover the cost of audit, adjustment, or correction, if it determines that a county or district knowingly failed to comply with these requirements, as specified. The bill would authorize a retirement board to audit a county or district and to require a county or district to provide information, or make information available for examination or copying at a specified time and place, to determine the correctness of retirement benefits, reportable compensation, and enrollment in, and reinstatement to, the system.

(2) CERL generally provides that each person entering employment becomes a member of a retirement system on the first day of the calendar month after his or her entrance into service, unless otherwise provided by regulations adopted by the board. CERL permits people in certain employment classifications to elect membership in the retirement system, including elective officers, and prohibits membership for persons providing temporary technical or professional services under contract.

This bill would require a county or district that fails to enroll an employee into membership within 90 days of when he or she becomes eligible, when the employer knows or should have known that the person was eligible, to pay all costs in arrears for member contributions and administrative costs of $500 per member.

(3) CERL permits members of a county retirement system who have retired to be reemployed without reinstatement into the system in certain circumstances including in a position requiring special skills or knowledge.

This bill, on and after January 1, 2012, would prohibit a person who has been retired for service from a CERL retirement system from being

reemployed in any capacity without reinstatement into the system by a district or county operating a county retirement system established under CERL unless at least 180 days have elapsed since the person's date of retirement, except as specified. The bill would prohibit a person whose employment without reinstatement is authorized under CERL from receiving service credit for that employment. The bill would require that a retired member employed in violation of provisions regarding employment without reinstatement to reimburse the retirement system for any retirement allowance received during that period and pay for administrative expenses incurred in responding to the violation. The bill would also require the county or district to reimburse the retirement system in this regard in specified circumstances.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares that the amendments made to the County Employees Retirement Law of 1937 by this act are intended to achieve the following reforms:

(a) To give the retirement boards the authority and the responsibility to audit and deny compensation items that are identified as being paid for the principal purpose of enhancing a member's retirement benefit.

(b) To require each retirement system to establish accountability provisions for participating employers that include an ongoing audit process and to allow the retirement system to assess penalties on employers for noncompliance.

(c) To prohibit final settlement pay and multiple year accruals of vacation time, annual leave, personal leave, or sick leave from being included in retirement calculations.

(d) To eliminate the practice of working for a participating employer while collecting a retirement benefit, also known as double-dipping, by prohibiting a retiree from returning to work as a retired annuitant or as a contract employee until at least 180 days have elapsed since that person's retirement.

SEC. 2. Section 31461 of the Government Code is amended to read:

31461. (a) "Compensation earnable" by a member means the average compensation as determined by the board, for the period

under consideration upon the basis of the average number of days ordinarily worked by persons in the same grade or class of positions during the period, and at the same rate of pay. The computation for any absence shall be based on the compensation of the position held by the member at the beginning of the absence. Compensation, as defined in Section 31460, that has been deferred shall be deemed "compensation earnable" when earned, rather than when paid.

(b) "Compensation earnable" does not include, in any case, the following:

(1) Payments for unused vacation, annual leave, personal leave, sick leave, or compensatory time off, however denominated, whether paid in a lump sum or otherwise, in an amount that exceeds that which may be earned and payable in a 12-month period.

(2) Payments for additional services rendered outside of normal working hours, whether paid in a lump sum or otherwise.

(3) Bonus payments.

(4) Housing allowance.

(5) Severance pay.

(6) Unscheduled overtime.

(7) Vehicle allowance.

SEC. 3. Section 31540 is added to the Government Code, to read:

31540. (a) Any compensation determined by the board to have been paid for the purpose of enhancing a member's retirement benefit under that system shall not be included in compensation earnable. If the board determines that compensation was paid for the purpose of enhancing a member's benefit, the member or the employer may present evidence that the compensation was not paid for that purpose. Upon receipt of sufficient evidence to the contrary, a board may reverse its determination that compensation was paid for the purpose of enhancing a member's retirement benefits.

(b) Compensation that a member was entitled to receive pursuant to a collective bargaining agreement that was subsequently deferred or otherwise modified as a result of a negotiated amendment of that agreement shall be considered compensation earnable and shall not be deemed to have been paid for the purpose of enhancing a member's retirement benefit.

SEC. 4. Section 31540.2 is added to the Government Code, to read:

31540.2. (a) When a county or district reports compensation to the board, it shall identify the pay period in which the compensation was earned regardless of when it was reported or paid. Compensation shall be reported in accordance with Section 31461 and shall not exceed compensation earnable, as defined in Section 31461.

(b) The board may assess a county or district a reasonable amount to cover the cost of audit, adjustment, or correction, if it determines that a county or district knowingly failed to comply with subdivision (a). A county or district shall be found to have knowingly failed to comply with subdivision (a) if the board determines that either of the following applies:

(1) The county or district knew or should have known that the compensation reported was not compensation earnable, as defined in Section 31461.

(2) The county or district failed to identify the pay period in which compensation earnable was earned, as required by this section.

(c) A county or district shall not pass on to an employee any costs assessed pursuant to subdivision (b).

SEC. 5. Section 31541 is added to the Government Code, to read:

31541. The board may audit a county or district to determine the correctness of retirement benefits, reportable compensation, and enrollment in, and reinstatement to, the system. During an audit, the board may require a county or district to provide information, or make available for examination or copying at a specified time and place, books, papers, data, or records, including, but not limited to, personnel and payroll records, as deemed necessary by the board.

SEC. 6. Section 31569 is added to the Government Code, to read:

31569. A county or district that fails to enroll an employee into membership within 90 days of when he or she becomes eligible, when the employer knows or would reasonably be expected to have known that the person was eligible, shall pay all costs in arrears for member contributions and administrative costs of five hundred dollars ($500) per member as a reimbursement to the system's current year budget.

SEC. 7. Section 31680.9 is added to the Government Code, to read:

31680.9. (a) Except as provided in Section 31680.1, any person who has been retired for service on or after January 1, 2012, as a member of a county retirement system established under this chapter shall not be reemployed in any capacity either as an employee, an independent contractor, or an employee of a third party without reinstatement by a district or county operating a county retirement system established under this chapter unless at least 180 days have elapsed since the person's date of retirement.

(b) A retired person whose employment, without reinstatement, is authorized by this article shall not acquire service credit or retirement rights under this part with respect to that employment.

(c) Any retired member employed in violation of this article shall:

(1) Reimburse the retirement system for any retirement allowance received during the period or periods of employment that are in violation of law.

(2) Contribute toward the reimbursement of the retirement system for administrative expenses incurred in responding to a violation of this article, to the extent the member is determined by the executive officer to be at fault.

(d) Any county or district that employs a retired member in violation of this article shall contribute toward the reimbursement of the retirement system for administrative expenses incurred in responding to a violation of this article, to the extent the county or district is determined by the executive officer of this system to be at fault.

SEC. 8. The provisions of this act shall not be interpreted or applied to reduce the pension of any person who has retired prior to January 1, ~~2011~~ *2012*.

O

Exhibit H

BILL ANALYSIS

(Without Reference to File)

CONCURRENCE IN SENATE AMENDMENTS
AB 197 (Buchanan)
As Amended August 31, 2012
Majority vote

ASSEMBLY:		(May 5, 2011)	SENATE:	39-0	(August 31, 2012)

(vote not relevant)

Original Committee Reference: L.& E.

SUMMARY : Clarifies two section of the conference committee report creating the Public Employees' Pension Reform Act of 2013.

The Senate amendments delete the Assembly version of this bill, and instead:

1)Change the word "required" to "authorized" in a Government Code section intended to allow enhanced bargaining for local and school employers in the California Public Employees" Retirement System (CalPERS) with regard to increased member cost sharing.

2)Clarify the intent of the conference report with regard to current members of retirement systems establish pursuant to the County Employees' Retirement Law of 1937 ('37 Act) by specifying that payments for termination pay and leave, as specified, may not exceed what is earned in a year and payable, consistent with the applicable court cases in regard to this issue.

AS PASSED BY THE ASSEMBLY , this bill increased the amount of liquidated damages that may be awarded to an employee when an employer fails to pay minimum wage to two times the wages unlawfully unpaid, plus interest.

FISCAL EFFECT : Unknown

COMMENTS : AB 340 (Furutani) of this year, contains the report of the Conference Committee on Public Employee's Pension Reform.

A conference report may not be amended once it has been transmitted to the floor of the houses for vote. Two sections of AB 340 have been found in need of technical clarification in order to prevent unintended consequences.

The section eliminates former requirements that employers provide offsetting increases in benefits in exchange for higher member contributions, and it allows employers to bargain increased cost sharing by bargaining unit versus retirement membership class. The section requires that the employer bargain these increases and not be allowed to increase the member share through impasse procedures above the contribution amount "which is required by law."

The first amendment has been requested by the Governor to clarify that the contributions authorized by law is the amount, above which, an employer cannot impose increased contributions through the additional cost-sharing provisions provided by the conference committee report.

The second amendment clarifies provisions designed to reign in pension spiking by current '37 Act retirement system members to the extent allowable by court cases that have governed compensation earnable in that system since 2003. These cases allowed certain cash payments to be included in compensation for the purpose of determining a benefit, but only to the extent that the cash payments were limited to what the employee earned in a year. This amendment is needed due to a concern that was raised that, as written, the conference report could, increase the ability of some current employees to spike their pensions rather than achieving the intended outcome of reducing spiking opportunities.

All new members in the '37 Act retirement systems would be

subject to the new compensation requirements established by the conference committee report. Under those provisions, new public employees would not be able to have terminal or leave pay count toward a pension.

This bill will be transmitted to the Governor with the request that it be signed after AB 340. The two sections in this bill will chapter out the same sections in AB 340, thus correcting the errors described in this analysis.

Analysis Prepared by : Karon Green / P.E., R. & S.S. / (916) 319-3957

FN: 0005893

Exhibit I

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CONTRA COSTA COUNTY

PUBLIC EMPLOYEES UNION, LOCAL NO. 1; et al., Petitioners V. CONTRA COSTA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION; et al., Respondents	Case No. MSN14-1221 **DECISION REGARDING PHASE ONE ISSUE**

I. Introduction

Petitioners consist of (i) two unions and two associations whose members' pension rights are administered by the Contra Costa County Employees' Retirement Association ("CCCERA") and its Board of Retirement ("Board") and (ii) four individuals whose pensions are under CCCERA's jurisdiction.

Respondent, CCCERA is a defined benefit, public employee retirement system, formed pursuant to Article XVI, section 17 of the California Constitution and the County Employees' Retirement Law of 1937 ("CERL"). CCCERA is funded from contributions by both members and their employers, along with investment earnings on those funds. The Board (also a respondent here) governs CCCERA.

On September 10, 2014, the CCCERA Board unanimously voted to change its practice with respect to "straddling." No longer would it permit a retiree to increase his or her pension by including two years' worth of vacation cash-out in his or her final compensation. Petitioners challenge that decision in this case.

Although the case raises several issues, the parties agreed that they would first brief a single question:

> "Whether Government Code section 31461, as amended by AB 197, requires the Board of Retirement to treat as 'compensation earnable' all leave time cashed out under Petitioners' MOUs during the final average compensation period."

This has been referred to as the "Phase One issue."

In their opening brief, petitioners say the question can be restated to read: "whether the revised section 31461 requires CCCERA to continue to permit 'straddling.'" Petitioners' Opening Brief, p.1 lines 13-14. But as became evident during oral argument that is not an entirely accurate paraphrase.

The Phase One issue came on for hearing on June 15, 2016. Peter W. Saltzman and Arthur W. Liou of Leonard Carder represented petitioners Public Employees Union, Local No. 1; International Federation of Professional and Technical Engineers, Local 21; David M. Rolley; Karen Huff; Robert Yates and Susan Guest. Christopher E. Platten and Carol L. Koenig of Wylie, McBride, Platten & Renner represented the Contra Costa County Deputy District Attorneys Association; and Rockne A. Lucia, Timothy K. Talbot, and Zachery A. Lopes of Rains, Lucia Stern, PC represented the Contra Costa County Deputy Sheriffs Association.[1]

Harvey L. Leiderman, Jeffrey R. Rieger, and May-tak Chin of Reed Smith LLP represented Respondent CCCERA and its Board of Retirement. Kenton L. Alm of Meyers, Nave, Riback, Silver & Wilson and Geoff Spellberg and Linda M. Ross of Renne Sloan

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[1] Ms. Koenig was absent on June 15, 2016. It was reported that she was ill and unable to attend. However there was no request to continue the hearing, so it went forward.

Holtzman Sakai LLP represented Central Contra Costa Sanitary District. Douglas J. Woods, Constance L. LeLouis and Anthony P. O'Brien of the Attorney General's office represented Intervenor, State of California.

II. Background

A. The Facts Giving Rise to the Issue

Petitioners enter into memoranda of understanding (MOUs) with either Contra Costa County or a political subdivision of it. Under those MOUs, some employees can "sell back" (or "cash out") a portion of their accrued and unused vacation leave each calendar year.

So, for example, a deputy district attorney with twenty-five years of service earns 20 hours of vacation per month. Joint Statement of Stipulated Facts, Exhibit 3, Section 10.1. That is 240 hours a year. That deputy district attorney may convert 1/3 of her accrued annual vacation (*i.e.* 80 hours) to cash each year. *Id.* at Section 23.[2] She may make that election only once a year. *Id.*

That creates the opportunity for what has been called "straddling." Under CERL, that deputy district attorney may select a final compensation period that includes – or "straddles" – two calendar years, *e.g.*, July 1, 2015 through June 30, 2016. If she sells back 80 hours in December, 2015 and another 80 in, say, May of 2016, she has cashed-out 160 hours in her "final compensation period."

Prior to September 10, 2014 CCCERA included the full value of the 160 hours of compensation as part of an employee's final compensation. In other words, it permitted straddling.

Its September 10, 2014 decision reversed that policy and, instead, determined that it would count only twelve months' worth of cashed out vacation time in an employee's final

---

[2] Different rules apply to employees hired on and after January 1, 2012. *Id.*

compensation. Joint Statement of Stipulated Facts, Ex. 23. In other words, it no longer permitted straddling.

B. Some History

In 1997 the California Supreme Court decided *Ventura County Deputy Sheriffs' Association v. Board of Retirement* (1997) 16 Cal.4th 483. That led to pension litigation in this county. When that litigation was settled, CCCERA adopted a Final Compensation Policy setting forth which pay items are "compensation" for retirement purposes. That permitted straddling. See Joint Statement of Stipulated Facts, Exhibits 7 and 8, particularly footnote 2 on p.6 of Exhibit 8.

In 2009, CCCERA began a series of open public discussions concerning its "Final Compensation Policy." In March 2010 it amended its Final Compensation Policy, which, to the extent germane to this case, continued to permit straddling.[3] Joint Statement of Stipulated Facts, ¶¶15-17.

In September, 2012, the Legislature passed and the Governor signed AB 197, which amended CERL to exclude certain items from "compensation earnable" for the purposes of determining the employee's income in her final compensation year. Leave cash-outs exceeding "that which may be earned and payable in each 12-month period during the final average salary period" were no longer included in the income calculation that determined an employee's retirement benefit. (See Gov. Code §31461(b)(2).)

On October 30, 2012, CCCERA voted to implement AB 197, effective January 1, 2013, by amending its policy for the calculation of retirement benefits. Joint Statement of Stipulated Facts, ¶20, Exhibit 16. That policy continued to allow straddling.

On November 27, 2012, a number of parties filed a petition for writ of mandate against CCCERA and the Board alleging, among other things, that the provisions of AB 197

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[3] There were certain changes made for employees hired after January 1, 2011.

unconstitutionally impaired the vested pension rights of CCCERA members. That case, as well as others were consolidated before Judge David Flinn in this Court as case number MSN12-1870.

On May 12, 2014, Judge Flinn issued his final Statement of Decision. He found that AB 197 was not unconstitutional as applied to existing CCCERA members and directed CCCERA and the Board to implement the new provisions of Government Code section 31461, with a limited exception not relevant to this Petition. That decision is on appeal.

From May through July, 2014, in light of AB 197 and Judge Flinn's decision, CCCERA conducted public sessions in which (among other things) it reconsidered straddling. Ultimately it decided – on July 9, 2014 – to eliminate the practice. On September 10, 2014, CCCERA formally adopted its new policy. Joint Statement of Stipulated Facts, ¶¶ 25-26, Exhibits 20-23. This litigation followed.[4]

C The Law

As noted, the parties have stipulated that one question shall be answered in this phase of the case: "Whether Government Code section 31461, as amended by AB 197, requires the Board of Retirement to treat as 'compensation earnable' all leave time cashed out under Petitioners' MOUs during the final average compensation period."

The parties agree the issue is framed by three sections of CERL. (In this Decision, all statutory citations are to the Government Code unless otherwise noted.) "Compensation" is defined in § 31460. "Compensation earnable" is defined in § 31461. "Final compensation" is defined in § 31462.

---

[4] Initially, the parties sought a decision on whether that change was required by Judge Flinn's ruling. (The issue was raised on the return to the writ of mandate in MSN12-1870.) This Court held that Judge Flinn's ruling was not dispositive of that issue.

In simplest terms, an employee's pension benefit is based on a member's "final compensation" which is the member's average annual "compensation earnable" during a consecutive 12- or 36-month period chosen by the employee.

"Compensation earnable" is defined in § 31461 as follows:

> (a) "Compensation earnable" by a member means the average compensation as determined by the board, for the period under consideration upon the basis of the average number of days ordinarily worked by persons in the same grade or class of positions during the period, and at the same rate of pay. The computation for any absence shall be based on the compensation of the position held by the member at the beginning of the absence. Compensation, as defined in Section 31460, that has been deferred shall be deemed "compensation earnable" when earned, rather than when paid.
>
> (b) "Compensation earnable" does not include, in any case, the following:
>
> > (1) Any compensation determined by the board to have been paid to enhance a member's retirement benefit under that system....
> >
> > (2) Payments for unused vacation, annual leave, personal leave, sick leave, or compensatory time off, however denominated, whether paid in a lump sum or otherwise, in an amount that exceeds that which may be earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid....
> >
> > (4) Payments made at the termination of employment, except those payments that do not exceed what is earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid.
>
> (c) The terms of subdivision (b) are intended to be consistent with and not in conflict with the holdings in *Salus v. San Diego County Employees Retirement*

Association (2004) 117 Cal.App.4th 734 and *In re Retirement Cases* (2003) 110 Cal.App.4th 426.

So, the focus of the debate here is on the meaning of the term "earned and payable in each 12-month period..."

D. Prior Case Law

Although precedent helps to frame the question, it does not answer it. There is no case directly on point. That is understandable, because the parties agree this is a question of statutory interpretation; yet the key pension decisions predate the enactment of AB 197.

General principles are context. So, for example, our Supreme Court has described the question of what elements other than base pay must be included in "final compensation" as "crucial to the proper administration of a CERL pension system, including the ability of the county to anticipate and meet its funding obligation." (*Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, 490.) And it has instructed that "[a]ny ambiguity or uncertainty in the meaning of pension legislation must be resolved in favor of the pensioner, but such construction must be consistent with the clear language and purpose of the statute." (*Id.*)

This rule applies to effectuate obvious legislative intent "...'and should not blindly be followed so as to eradicate the clear language and purpose of the statute and allow eligibility for those for whom it was obviously not intended.'" *In re Retirement Cases* (2003) 110 Cal.App.4th 426, 473 (quoting *Barrett v. Stanislaus County Employees Retirement Assn.* (1987) 189 Cal. App.3d 1593, 1603.)

"Ultimately, the court must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and it must avoid an interpretation leading to absurd consequences. [Citation.]" *In re Luke W.* (2001) 88 Cal.App.4th 650, 655.

The treatment of these principles in precedent is instructive.

1. *Ventura*

In *Ventura,* the California Supreme Court determined that certain types of cash remuneration– including bilingual pay, a field training officer bonus, educational incentive pay, and pay in lieu of annual leave accrual (but not overtime) – should be counted as "compensation earnable" in the calculation of the employee's "final compensation."

2. *In re Retirement Cases*

In re Retirement Cases involved a number of mandamus petitions filed by retired county employees against county retirement boards operating under CERL. Among other things, the employees sought a determination that "termination pay" (the cash paid to an employee upon retirement for the value of his accrued but unused leave time) should be counted as "compensation earnable" for retirement benefit purposes.

The Court of Appeal rejected that argument. Termination pay was not "compensation earnable" because it was only payable at separation and "[s]eparation and retirement occur when employment has terminated." (*In re Retirement Cases* at 474.) It is not includible in "final compensation" which is paid prior to retirement. (*Id.*)

The Court also rejected the employees' argument that the pay became "compensation earnable" when they earned the right to it, as opposed to when it was paid. The right to be paid only arose at retirement, which was separation from service. It did not arise prior to retirement, *i.e.,* during service. (*Id.* at 475.) Thus, if employees did not or could not cash out the time prior to retiring, theirs was an "in-kind" benefit not included in "final compensation." (*Id.*)

3. *Salus*

In *Salus*, former San Diego county employees petitioned for a writ of mandate to compel a county retirement association to include a payment (at separation) for accrued but unused sick leave in the employees' "final compensation."

The trial court denied the petition and the Court of Appeal affirmed. (*Salus* at 740.) The Court held that "final compensation" under CERL involved three requirements: "compensation in the form of cash, rather than in the form of in-kind goods and services or time off; cash earned during a usual work period, as opposed to cash earned for overtime; and cash earned before retirement, rather than at or after retirement." (*Id.* at 736.)

Relying on *In re Retirement Cases*, the Court of Appeal held that the payment was made at retirement and therefore was not includible in the employees' "final compensation". (*Id.* at 740.)

The *Salus* court took note of a potential inequity that would result arise from a contrary ruling. Among the affected employees, the sick leave payments were as little as $2,874 and as much as $41,580. The court found troubling the impact of including those disparate payments in "final compensation" for they could result in significantly disparate pensions for persons otherwise similarly situated. "There is nothing in CERL which suggests that the Legislature intended pensions should vary so widely on the basis of accrued and unused leave, rather than on the basis of age, years of service and salary." (*Id.* at 740.)

4. The legislative view of *In re Retirement* and *Salus*

In AB 197 the legislature endorsed the result in two of those cases – specifying that §31461(b) is "intended to be consistent with and not in conflict with the holdings in *In re Retirement Cases* (2003) 110 Cal.App.4th 426 and *Salus v. San Diego County Employees Retirement Association* (2004) 117 Cal.App.4th 734." (§31461(c))

III. Ruling on the Phase One Issue

A. Central Contra Costa Sanitary District

As noted, the stipulated question in this phase of the litigation is, "[w]hether Government Code section 31461, as amended by AB 197, requires the Board of Retirement to treat as

'compensation earnable' all leave time cashed out under Petitioners' MOUs during the final average compensation period."

As to Central Contra Costa Sanitary District, the parties agree the answer is "no." See Petitioners' Phase One Opening Brief, 13:26 through 14:7; Central Contra Costa Sanitary District's Phase One Opposition Brief, 1:15-21, 6:1-19. In his final twelve months of employment, a CCCSD employee may cash out more vacation time than he can accrue in any twelve month period. Petitioners concede that CCCERA may exclude from "final compensation" the value of some of the time so cashed out.

So, the answer to the Phase One issue is clearly "no." The CCCSD case demonstrates that and petitioners concede as much.[5]

However, at oral argument, petitioners asked the Court to answer the question as to each of the bargaining units involved in the litigation. There being general agreement that it would advance the litigation to do so (see Section IV, below), the Court proceeds to that task.

B. Petitioners Other Than Those Employed by CCCSD

Petitioners present the case of four other bargaining units. For purposes of this analysis, each has essentially the same substantive provisions in its MOU.[6]

Under each, an employee earns a certain number of vacation hours a month. Essentially, the longer an employee has been employed, the more vacation time she accrues each month.

For ease of analysis, the Court continues to take the case of a deputy district attorney with twenty-five years of service who earns 20 hours of vacation per month. Joint Statement of Stipulated Facts, Exhibit 3, Section 10.1. As noted above, that employee may convert 1/3 of her

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[5] This is why the petitioners' alternate phrasing of the question ("whether the revised section 31461 requires CCCERA to continue to permit 'straddling'?") does not correctly paraphrase the stipulated question.

[6] The parties stipulated at oral argument that the MOUs (other than the CCCSD MOU) have essentially identical terms.

accrued annual vacation to cash each year. *Id.* at Section 23.[7] Typically, the employee may make that election only once a year. *Id.*

Assume she elects the period from July 1, 2015 to June 30, 2016 as her final compensation period; and assume further that she "straddles" in those twelve months – cashing out 160 hours of accrued vacation. Must CCCERA include as pensionable all time cashed out in the final compensation period?

The answer to that is "no."

1. Straddling Requires Cashing in Compensation Earned in a Prior Period

a. The key terms: "compensation" and "compensation earnable"

Section 31460 defines "compensation" as "remuneration paid in *cash*..." Section 31461 defines "compensation earnable" as "the average compensation as determined by the board for the period under consideration...."

However "compensation earnable" may not include "payments for unused vacation...in an amount that exceeds that which may be *earned and payable* in *each* 12-month period during the final average salary period..."

b. The arithmetic

The straddled payments violate the "earned" requirement, because not all of the leave that is paid out in "straddled" years was in fact *earned* during the twelve-month final compensation period.

That can best be understood by returning to our example. Our deputy district attorney accrues 20 hours of leave each month and can cash out 1/3 of that, or 80 hours, each year. Between July and December of 2015, she earns 120 hours of leave. But she can only sell 1/3 of those hours (*i.e.* 40) in 2015. If she wants to "straddle" and sell 80 hours in 2015 she must have another 40 hours of previously-accrued leave in her "time bank." Then she can sell 40 hours of

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[7] Different rules apply to employees hired on and after January 1, 2012. *Id.*

cashable vacation time earned in (or before) the first half of 2015 and the 40 hours earned in the second half of 2015.

The problem is essentially the same in 2016. If she is retiring in on June 30, 2016, then – at the rate of 20 hours a months, she will earn only 120 hours of vacation time in 2016, of which she can sell only one-third, *i.e.* 40 hours. To maximize her "straddle" she must have yet another 40 hours in her time bank – earned from some earlier period.

So to sell 160 hours in the final 12 months of work, she must sell the 80 hours of cashable vacation she earned during those 12 months plus another 80 hours of cashable vacation she earned in an earlier period.

Section 31461(b)(2) allows the inclusion of "unused vacation…in an amount that [does not] exceed that which may be *earned and payable* in each 12 month period during the final average salary period..." Quintessentially, a straddle includes payment for vacation time earned outside the final average salary period.

2. "Compensation earnable" means "cash earnable"

There is an allied point. Under § 31460 "compensation" means "remuneration paid in cash." Therefore, "compensation earnable" in § 31461 means "cash earnable." It does not include other forms of consideration such as vacation time actually taken. (See *Ventura,* 16 Cal.4th at 497-498.)

The MOUs give an employee a certain amount of vacation time each year; in our example, 20 hours a month. But the MOUs say that the employee can convert to cash "up to one third (1/3) of their annual vacation accrual..." See *e.g.* Joint Stipulation of Agreed Facts, Exhibit 2, Section 41.10.A.

Thus, the amount of "compensation" (*i.e.* cash) earned each year is the equivalent of 80 hours of pay. So what is "earned" – as in "earned and payable" in §31461(b)(2) – is the right to

receive cash for 80 hours of time. That is the cap on how much vacation cash-out is includible in the employee's final compensation.

3. Petitioners reading strains the statutory language

a. Petitioners divorce "earned" from "payable"

Petitioners say that one must look at this differently. Again, using our example, they say that in the final six months of 2015 the employee earned 120 hours of vacation and the MOU says that 80 hours is payable in 2015. Therefore, they say 80 hours of cash-out was "earned and payable" in the second half of 2015.

But that is a strained reading of "earned and payable." For the hours being cashed out were not earned in the period in question. The employee earned some hours and cashed out some other hours.

In other words, petitioners divorce "earned" from "payable." In their reading, some hours are "earned" and other hours are "payable."

b. Petitioners ignore the requirement of "remuneration paid in cash"

Petitioners' reading is wrong for another reason. As just explained, "compensation" requires one to count "remuneration paid in cash." (§ 31460.) But the employee does not earn the right to 120 hours of "remuneration paid in cash" when she earns 120 hours of vacation. In a six month period, she earns only 40 hours of "remuneration [payable] in cash." So to say that the employee earned 120 hours of vacation does not mean that she has earned the right to 120 hours' worth of cash. She has not. She earned the right to only 40 hours of cash.

Thus, if the inquiry is what is "earned and payable" between July 1, 2015 and June 30, 2016, one has to consider what "remuneration [payable] in cash" was earned and payable. During those 12 months, the employee earned the right to receive in cash up to 80 hours of vacation time. That is what was earned. Since § 31461 caps "compensation earnable" to an amount "earned and payable," 80 hours is the limit on what may be included; that is all that was

earned, regardless of whether a larger amount was "payable" by cashing in time from a vacation time bank.

4. CCCERA's policy gives meaning to all the words of the relevant statute

"In interpreting [statutory] language, we strive to give effect and significance to every word and phrase." (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1284-1285, citing *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476.)

"Compensation earnable" does not include "payments for unused vacation...that exceeds that which may be earned and payable in *each* 12-month period during the final average salary period..." §31461(b)(2) (emphasis supplied). Petitioners largely ignore the word "each."

The best way to understand "each" is to recognize that a "final average salary period" may be either 12 months or 36 months, depending on the employee's "tier." For those who have a three-year "final average salary period" the statute is quite clear: unused vacation is pensionable in an amount that reflects what can be earned and payable in *each* of those last three years.

At oral argument, petitioners conceded it is mathematically impossible to straddle during *each* year of the last three years of a "final average salary period." For someone in a three-year tier, the amount of vacation time that may be cashed out *each* year is 80 hours. So the word "each" limits the employee to the inclusion of 80 hours in her "compensation earnable."

There is nothing in the history of AB 197 to suggest the legislature intended to treat employees in different tiers differently in this regard. Instead, it appears that the inclusion of the word "each" was intended to underscore the notion that "average compensation" is that which can be earned *each* year – regardless of tier. True, the statutory syntax is awkward. But if we are to give meaning to each word, there appears no better explanation. The Court understands the use of "each" in §31461(b)(2) and (4) to support CCCERA's determination.

5. This Court's reading of the statute is consistent with Judge Flinn's view of §31461

This Court agrees with Judge Flinn's statement in his May 12, 2014 Final Statement of Decision. At page 25 he wrote,

> It is clear from the language of § 31461 when [cash-out of leave time] is earnable...for the statute refers to compensation for an 'absence' to be based upon the compensation at the beginning of the absence. In other words, the right to 'time that is paid without work' is compensation. Webster's Dictionary defines 'earn" as 'to merit or deserve, as by labor or service.' Ventura tells us that it is by earning of the right to be paid without work that we must include the cash-out as 'compensation.' Accordingly, the employee has 'compensation' when he is granted the right to take time off and still be paid and therefore that is when it is 'earned.' The last sentence of § 31461 tells us that it is 'earnable' at the time when the employee incurs the right, not at the time of the cash-out. Compensation can only be 'earnable' at one time; it cannot be earnable again and again.

C. The Standard Applicable to the Writ in Light of Petitioners' Concession With Respect to CCCSD

It was explained at oral argument that the question framed for Phase One was designed to be capable of ending the litigation in petitioners' favor if the answer was "yes." The notion was that the Court might find that § 31461 *required* CCCERA to continue to include in "compensation earnable" *all* leave time cashed out under an MOU. That would make moot the remaining causes of action in the writ petition.

Such a result would be a determination as a matter of law, applicable to all cases. In other words, the Court would find that CCCERA had a clear legal duty to include all such cash-outs as pensionable compensation, and to do otherwise would be contrary to law.

But petitioners concede, as to CCCSD, the answer to the question posed is "no." In other words, the law does not in and of itself require that result.

That means we are left with a question of CCCERA's exercise of discretion. § 31461 defines "compensation earnable" as "the average compensation *as determined by the board....*" Clearly, CCCERA has to make a determination with respect to "average compensation." That is a matter of discretion, and on this record, the Court cannot find that its decision is arbitrary or capricious.

CCCERA's decision is clearly quasi-legislative. *Strumsky v. San Diego County Employees Retirement Association* (1974) 11 Cal. 3d 28, 35 fn.2. ("Generally speaking, a legislative action is the formulation of a rule to be applied to all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts.")

In such matters, the standard to be applied "whether [the agency's] action has been arbitrary, capricious, or entirely lacking in evidentiary support, or whether [it] has failed to follow the procedure and give the notices required by law. " *Id.* quoting *Pitts v. Perluss* (1962) 64 Cal. 2d 365.

Here, the Court has no basis for finding CCCERA's determination with respect to "average compensation" was "arbitrary, capricious, or entirely lacking in evidentiary support." It cannot answer the question posed by the parties, "yes," on that basis.

D. This Result Comports With the Legislative Intent

Although this is not a close question, it does seem that answering the posed question "no" accords with the overall purpose of the legislation.

As CCCERA argued at the hearing, it is clear that the purpose of AB 197 was to give retirement boards the tools to define pensions in a way that accords more nearly with the notion that a pension should be based on an employee's usual compensation – not some amount inflated by a stratagem that can be employed only once in a career.

As the legislature said,

> The intent of this section is to reign [sic] in pension spiking by current members of the system to the extent allowable by court cases that have governed compensation earnable in that system since 2003. These case allow certain cash payments to be included in compensation for the purpose of determining a benefit, but only to the extent that the cash payments were limited to what the employee earned in a year. State of California's Request for Judicial Notice, Exhibit F.[8]

In addition, § 31461(c) was quite clear: "The terms of subdivision (b) are intended to be consistent with and not in conflict with the holdings in *Salus v. San Diego County Employees Retirement Association* (2004) 117 Cal. App. 4th 734 and *In re Retirement Cases* (2003) 110 Cal. App. 4th 426."

Salus sought to avoid wide variances in pensions between similarly-situated employees based on accrued and unused leave; in that case, sick leave. "There is nothing in CERL which suggests the Legislature intended pensions should vary so widely on the basis of accrued and unused leave, rather than on the basis of age, years of service and salary." (*Salus, supra,* 117 Cal.App.4th at 740.)

CCCERA's interpretation of §31461 helps to anchor "compensation earnable" more tightly to "age, years of service and *salary*" rather than to "accrued and unused leave."

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[8] The request for Judicial Notice is unopposed and granted.

IV. Conclusion

For these reasons, the answer to the question posed in Phase One is "no."

At the hearing, the parties seemed to agree that this requires dismissal of the first cause of action in the writ petition. The parties shall meet and confer with respect to whether that relief is appropriate in light of this Phase One ruling. If they agree, they may submit an appropriate form of order effectuating that result. If they disagree, then the Court will entertain an appropriate motion.

Date: June 29, 2016

[Original signed June 29, 2016]

Barry P. Goode
Judge, Superior Court

MEMORANDUM TO THE OPERATIONS COMMITTEE

DATE:	June 2, 2021
TO:	Members of the Operations Committee
FROM:	Jeff Rieger, Chief Counsel Margo Allen, Fiscal Services Officer *km for MA*
SUBJECT:	Review of *Fiduciary Insurance Policy*

ACERA's Chief Counsel and Fiscal Services Officer recommend that the Board consider lowering its fiduciary insurance coverage limits from $25 million to $15 million. This would mean eliminating the excess fiduciary insurance policy that would cover ACERA from $15 million to $25 million, while retaining the primary fiduciary insurance policy that will cover ACERA from $250,000 to $15 million, per Option 2 on page 19 of Alliant's presentation.

The primary reason we believe lowering the coverage limits is worth considering is that we cannot imagine any realistic coverage event that would trigger more than $15 million of coverage. These policies do not cover benefits or contributions. Thus, as a practical matter, the only likely ACERA expenses they will cover are litigation costs. It is hard to imagine any realistic possibility that ACERA would experience $15 million of litigation costs that would be covered under the excess insurance policy.

Further, it is clear from Alliant's presentation that ACERA is on the very high end of coverage compared to ACERA's peers. On page 24 of the presentation, there is one $7 billion fund that has $20 million of coverage, but the other 16 funds with assets of $15 billion or less all have $15 million or less of coverage. Indeed, even if the Board were to reduce ACERA's coverage to $15 million, ACERA would still be on the high end of normal for its peers.

It is also worth noting that the premium for the excess insurance is very high relative to the primary insurance. The premium for the excess insurance ($50,000) is approximately 1/3 of the cost of the primary insurance ($150,000), but the chance of coverage being triggered at a $15 million deductible for the excess insurance is *far lower* than 1/3 of the chance of coverage being triggered at a $250,000 deductible for the primary insurance. Alliant informs us that this high cost for the excess insurance is due to the insurer's own accounting issues relating to carrying a potential $10 million liability on its books, rather than value ACERA receives for its premiums.

Several months ago, we asked Alliant for any information they could provide that would suggest that the excess insurance policy was a good investment and, in our judgment, we have not seen

any such information. To the contrary, the information in their presentation confirms that ACERA is on the very high end of coverage relative to its peers.

Please note that the policy terms available to ACERA this year are substantially less advantageous than in prior years. On page 19 of the Alliant presentation, we can see that, if ACERA retains $25 million in coverage, we can expect the premium to increase by 15% compared to last year, with the deductible substantially increasing from $50,000 to $250,000 (Option 1). The increased deductible substantially diminishes the value of the policies. If it were possible, we would recommend using the savings received from eliminating the excess insurance policy to buy down the deductible. Unfortunately, Alliant advises that it is unlikely we will be able to obtain a lower deductible. With $15 million of coverage, ACERA can expect to see the premium decrease by 13% compared to last year, but that is with the deductible increasing from $50,000 to $250,000.

We and an Alliant representative will be available to answer any questions the Committee may have on this subject at the June 2, 2021 meeting.

Alameda County Employees‘ Retirement Association

Fiduciary & Management Liability Insurance

Policy Period:

July 1 2021 - 2022

Presented by:

- Mike Machete, Executive VP
- Craig Goesel, Senior VP
- Bruno Amici, Account Manager

May 14, 2021

Introduction & Marketing Summary

Company Profile

Alliant

FOUNDED IN
1925

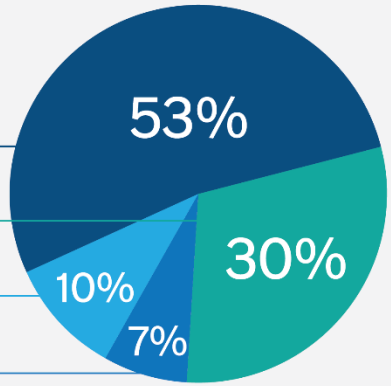
Nationwide distribution
from 110+ offices

$17.2
BILLION
in premium

9th
Largest in U.S.

$1.6
BILLION
in revenue

Ownership



4,000+
employees

Entrepreneurial,
client-focused culture

Executive Summary

Alliant Insurance Services, Inc.. appreciates the opportunity to present our Fiduciary/Cyber Liability insurance programs renewal to **Alameda County Employees' Retirement Association.**

Alliant's experience with large public entities and the development of group purchase programs exposures dates back to 1977 when our organized labor and public entity division was established. Over the past 40 years we have become a nationally recognized leader in this specialized market sector.

As we developed a variety of programs for the public sector we knew that our model and concept could be duplicated nationally for management liability coverage of retirement systems.

As a result, we created the first ever fiduciary and management liability program in the country designed to allow systems to band together and drive down the insurance marketplace in addition to leveraging broader coverage than what typically can be obtained as a standalone entity.

Our strategic alliance with both NASRA and NCPERS allow their members to access our exclusive program; resulting in significant savings to some of the largest systems in the country.

We understand the complexity of retirement exposures and are leading experts in designing coverage that is specifically tailored for our clients' needs. We have an entire claims division that handles claim situations that arise.

We author articles on management liability and the exposures faced by the public sector, we continually keep abreast of public pension issues and consult with our clients on those issues as it relates to insurance exposures and risk management and finally, we are regular speakers at conferences regarding risk management for pension fund trustees for both NASRA and NCPERS.

Why Alliant Insurance Services

- We are an **employee-owned** insurance broker, employing over 4,000 employees among our affiliates
- Alliant Insurance Services is an **independent, full-service** insurance broker (placing Fiduciary Liability Insurance Coverage Summary, Property, Casualty, Life & Health insurance programs)
- We have a **Practice Group dedicated to Organized Labor** (including multi-employer, Taft-Hartley and public pension clients)
- Our experienced staff of professionals consists of **former underwriters** who can better tailor products to meet the evolving needs of Trustees
- Our team leader, Craig Goesel, has over **20 years of experience** in underwriting and placing Management Liability insurance for clients
- We are an **industry expert**; with over 500 clients and $5,000,000 premium placed nationally, we are the **largest broker in the nation** for Taft-Hartley and Public Pension clients
- We **partner** with state and national agencies and associations - including NASRA, IPPFA, IPPAC, MAPERS and TEXPERS - to help Trustees better understand their liability, insurance options and how to reduce their exposures. Alliant is a **CorPERS** member of the National Conference on Public Employee Retirement Systems (NCPERS)
- We act as a **procurement agency** for clients, ensuring that they receive the most comprehensive and favorably priced program through a competitive bid process
- We provide helpful **guidance** on coverage provisions, market selection and limits analysis in a clear, easy to understand, proposal presentation
- We have a **network** of positive relationships in the management liability space (clients, attorneys, consultants, etc.) that would provide **favorable references**
- Alliant Insurance Services has challenged a number of carriers (including ULLICO, Euclid, Beazley and Chubb) in **coverage development** to ensure the most comprehensive coverage meets the unique needs of our clients
- We have a **dedicated claim advocacy** team, and have been successful in **reversing denials** of coverage on behalf of our Taft-Hartley and Public Pension clients

Representative Clients

- State Retirement System of Illinois (SRS)
- Judges Retirement System of Illinois (JRS)
- State University Retirement System of Illinois (SURS)
- California Public Employees' Retirement System (CalPERS)
- The Chicago Municipal Annuity and Benefit Fund
- The Chicago Laborers' Annuity and Benefit Fund
- The Chicago Policemen Annuity and Benefit Funds
- The Chicago Firemen Annuity and Benefit Funds
- Illinois State Board of Investments (ISBI)
- State of Kentucky Teachers' Retirement System
- State of South Carolina Public Employees' Retirement System & Deferred Comp Plan
- Orange County Employees' Retirement System
- Contra Costa County Employees' Retirement System
- Missouri Department of Transportation and Patrol Employees' Retirement System
- Napa County Deferred Comp Plan
- Fresno County Employees' Retirement System
- Merced County Employees' Retirement System & Deferred Comp Plan
- Imperial County Employees' Retirement System
- Mendocino County Employees' Retirement System
- Sacramento County Benefit Plans
- San Bernardino County Employees' Retirement System
- Santa Barbara County Employees' Retirement System
- Sonoma County Employees' Retirement System
- The Retirement Plan for Chicago Transit Authority Employees (CTA Retirement Plan)
- Illinois Secure Choice Savings Program

Procurement Request

- Re: Procurement Request: Fiduciary Liability Insurance: **Alameda County Employees' Retirement Association**

Dear Underwriter:

Alliant Insurance Services, Inc.. requests your participation in the procurement of Fiduciary Liability Insurances for **Alameda County Employees' Retirement Association.** While the program is due to expire on 7/1/21, Alliant will present terms on to the Board of Trustees, as such, I am looking for your responses by 5/19/21 so we can properly draft the renewal presentation and summarize the results in writing prior to the meeting.

Alliant Insurance Services, Inc.. requires our carriers to be admitted to offer this insurance coverage within the State of California and to hold an AM Best's Rating of at least {A- (VII)}. As such, we have only provided this submission to those carriers that currently hold these designations. If your firm's designations fall below these thresholds during the submission process, please immediately alert us.

The **Insured** currently purchases a Fiduciary Liability program as follows:
Annual Aggregate Limit of Liability: $25,000,000
Effective: 7/1/21 – 7/1/22

I attach the following documents for your consideration:
- Most recent actuarial valuation,
- Most Recent financial statements
- Completed application

Alliant Insurance Services, Inc. is not utilizing a wholesaler, procurement firm or other intermediary to secure these renewal terms. As such, we request that you provide responses directly to our team, and no compensation is due to other such parties.

I would be happy to discuss this submission further. Please let me know if you have any questions or concerns.

Thank You & Best Regards,
Craig Goesel
Senior Vice President

2021 Pricing Considerations

- With regard to the economic impact of COVID-19, the industry has started to respond to claim activity against companies. In many cases, there seem to be extenuating circumstances or industries dramatically effected by the pandemic (hospitality, real estate, retail, oil & gas). With that said, it will not take long for more claims to surface. We have witnessed that the current environment has an adverse effect on underwriting appetite, pricing and coverage structure.
- Insurance carriers have not been willing to provide guidance on pricing until we are within 45 days of the expiration date of coverage. However, underwriters price for uncertainty, and this is definitely an uncertain time. Rates for clients were approaching 10% increases *leading up to the pandemic*. However, rates are continuing to climb well north of 30% as we witness the economic impact of this event.
- With the advent of COVID-19 and the related economic impact, the market changed dramatically. The insurance marketplace immediately moved to underwrite to this uncertain landscape and manage their portfolio risk. This has made carriers reduce limit profiles, reduce coverage provisions and exert considerable rate pressure on its clients. Below are a few quotes from industry press releases:
  - *With insurers potentially facing up to $80 billion in losses as a result of pandemic claims, the reality is that the market is "challenging, … Commercial property, umbrella/excess, and directors and officers liability will likely bear the brunt of rate increases … D&O liability risks could see increases anywhere up to 50 percent or higher. - Advisen Report, May 8, 2020*
  - *Professional liability insurance accounts continue to drive prices higher, with a global average increase of 26 percent, up from 18 percent in the fourth quarter of 2019… Within the professional lines, directors and officers liability pushed the average higher. Nearly 95 percent of US clients are seeing an increase for an overall average price hike of 44 percent. Higher frequency and severity of securities litigation drove the increases, which were accompanied by reduced capacity and tighter terms and conditions." The Marsh Global Insurance Market Index, July 12, 2020.*
  - *Commercial insurance prices soared in the second quarter of 2020, to mark 11 consecutive quarters of price increases and the largest year-over-year average increase since the 2012. In the U.S., directors and officers liability prices led the increases, up an average of 59% year-over-year, with more than 90% of D&O clients seeing a price hike. Note: even as clients took on higher retention and lower limits, prices still tended to increase. Most insurance carriers retained their D&O books, however, with not much carrier-switching this quarter. – Advisen, December 13, 2020*

Carrier Responses

Insurance Company	AM Best's Rating	Anticipated Carrier Response *(please note, we have not yet received all responses from the carriers)*
AIG Property Casualty Co.	A (XV)	Declined due to size of the fund and claim activity
Arch Insurance Company	A+ (XV)	Declined due to the funding level.
Axis Insurance	A (XV)	Declined the primary & excess
Ascot	A (VIII)	Declined due to the funding level and size of funds
Chubb Insurance	A++ (XV)	Declined due to size of the fund and claim activity
C.NA Insurance Co	A (XV)	Declined. Carrier informed Gov. entities is out of their appetite.
Hudson Insurance Co., a subsidiary of Odyssey Re Holdings Corp. ("Euclid")	A (XV)	Quoting the primary fiduciary
RLI Insurance	A+ (XI)	Still waiting on their response as to their interest in the primary. They will be quoting the excess layer.
Sompo Insurance Company	A+ (XV)	Declined due to the funding level and size of funds
Markel Ins Co. ("Ullico")	A	Declined due to size of the fund and claim activity

Coverage Summary

Fiduciary Liability Insurance for Public Pension Funds

Fiduciary Liability Insurance for Public Pension Funds

Trustees and staff members of governmental, municipal and quasi-governmental pension plans face increased exposure in their fiduciary roles. Allegations of breaches of duty are costly to defend, and may result in personal liability of the trustees. Alliant Insurance Services experts provide the following summary of typical fiduciary liabilities, and offer solutions to lessen your fiduciary exposure.

PENSION CODE STANDARDS & FIDUCIARY DUTIES

The fiduciary duties under most State Pension Codes mirror standards similar to those outlined in ERISA. These duties include acting solely in the interest of the participants & beneficiaries, adhering to the so-called "prudent investor" standard and other provisions of the State Pension Code.

ENFORCING PROVISIONS & LIMITATIONS ON LIABILITY

State Pension Codes, and ERISA law, typically provide that participants, beneficiaries, fiduciaries and/or the Attorney General may bring suits to enforce fiduciary duties and other provisions of the respective Pension Code.

These Pension Codes often do not provide limitations, or at least not *complete* limitations, on liability. They also make clear that litigation against fiduciaries is permissible. Fiduciaries that breach their duty can be held personally liable to make good to such Fund any losses resulting from such breach.

INSURANCE AUTHORIZATION & INDEMNIFICATION PROVISIONS

Each board and pension fund is often authorized to purchase insurance to protect against liability of trustees, staff and employees which may arise as a result of claims.

State Pension Codes generally permit, but do not guarantee, the indemnification of trustees and employees of the Fund – however, this indemnification is provided for allegations other than willful misconduct or gross negligence (properly structured insurance programs will not exclude allegations of willful misconduct or gross negligence).

IN SUMMARY

State Pension Codes require fiduciaries to adhere to many of the same standards outlined in ERISA. Breaches of established fiduciary duties may translate into *personal liability* for the trustees of public pension funds. These same Pension Codes allow for the purchase of insurance to protect the plan, the trustees and the staff from such liability.

Our professionals at Alliant Insurance Services, Inc.. are experienced in prudently structuring comprehensive fiduciary liability insurance programs to provide trustees with added protection in their roles as fiduciaries of public pension funds.

Fiduciary Liability Insurance for Public Pension Funds

NAMED INSURED
The Pension Fund and/or Retirement Fund
Past, present and futures trustees, directors & officers (including spouses and legal estate).
Past, present and futures employees, staff, plan administrator (including spouses and legal estate).

INSURED WRONGFUL ACTS
Breach of Fiduciary duties; violation of the responsibilities, obligations or duties imposed by Municipal, State or similar Pension Code
Any act error of omission in the performance of counseling participants, providing interpretations, handling records or effecting enrollment.

COVERAGE EXTENDS TO CLAIMS
Written demand for monetary and injunctive relief
Criminal or civil proceedings commenced by service of complaint, return of an indictment and/or agency or regulatory proceeding

LOSSES COVERED INCLUDE
Damages; judgments; settlements; pre- & post- judgment interest
Defense expense
Civil penalties associated with CAP, HIPPA, 502l or 502i

OTHER POLICY PROVISIONS
Annual policy period; annual aggregate limits of liability; higher limits available than those presented
Claims-Made coverage (provides coverage for claims arising from prior acts)
Defense costs within the annual limit

NOTABLE EXCLUSIONS
Coverage does not extend to: outside service vendors; benefits due the participants; fraudulent acts or illegal personal profit; failure to collect contributions; bodily or property damage; failing to comply with Workers Comp, unemployment, Social Security.

Current Program & Renewal Options

(the following pages have intentionally been left blank or incomplete. As of now, we do not have the renewal terms negotiated from the carriers. With that said, we expect to have the renewal terms negotiated by the end of May and deliverable to the client soon thereafter. We will be able t have coverage bound with no break in continuity for the 7/1 effective date)

Coverage Comparison

Coverage Provision	Expiring	Renewal: Euclid	Renewal: RLI
Insureds: • Pension System (FABF) • Past/present/future Trustees • Past/present/future committee members and employees • Spouses, Estates, Heirs, Legal Representatives of an Insured Person	 • Included • Included • Included • Included	 • Included • Included • Included • Included	 • Included • Included • Included • Included
Claims-Made Policy	Included	Included	Included
Prior-acts coverage *(provided the policy will not respond to known incidents that could reasonably give rise to a claim that pre-dated **7/17/07**)*	Included	Included	Included
Duty-to-defend	Included	Included	Included
Choice of counsel by Insured (client)	Included	Included	Included
Non-cancellable by Insured during policy period	Included	Included	Included
Claim expenses included within the limit of liability (may include outside counsel, forensic accountants, actuaries, expert witnesses, etc.)	Included	Included	Included
Punitive Damages: Where Insurable Under Law	Included	Included	Included
Severability (Exclusions and Application)	Included	Included	Included
Waiver of Recourse (a $25 fee-per-trustee does NOT need to be collected)	Included	Included	Included

Coverage Comparison *(con't)*

Coverage Provision	*Expiring Insurance Limit available for:*	Renewal: Euclid Insurance Limit available for:	Renewal: RLI Insurance Limit available for:
Any **breach of responsibilities**, obligations or duties imposed upon fiduciaries of a Plan by an Employee Benefit Law (including IL Pension code). Including, but not limited to: ➢ Breach of Fiduciary Duty ➢ Administration of a Plan ➢ Imprudent investments ➢ Excessive Fees ➢ Failure to supervise or monitor vendors ➢ Breach of HIPAA, HITECH and PPACA	• *Plan Liability: $25,000,000* • *Retention/Deductible: applies* • *Personal Liability: $25,000,000* • *Retention/Deductible: does not apply*	• Plan Liability: $25,000,000 • Retention/Deductible: *applies* • Personal Liability: $25,000,000 • Retention/Deductible: *does not apply*	• Plan Liability: $25,000,000 • Retention/Deductible: *applies* • Personal Liability: $25,000,000 • Retention/Deductible: *does not apply*

Coverage Comparison *(con't)*

Coverage Provision	*Expiring Insurance Limit available for:*	Renewal: Euclid Insurance Limit available for:	Renewal: RLI Insurance Limit available for:
Denial of disability benefits; benefit claims *(note, the actual benefit-due would not be funded by the insurance policy, unless determined to be a personal obligation of a trustee)*	• *Plan Liability: $25,000,000* • *(defenses costs only)* • *Retention/Deductible:$ applies* • *Personal Liability: $25,000,000* • *Retention/Deductible: does not apply*	• Plan Liability: $25,000,000 • (defenses costs only) • Retention/Deductible: *applies* • Personal Liability: $25,000,000 • Retention/Deductible: *does not apply*	• Plan Liability: $25,000,000 • (defenses costs only) • Retention/Deductible: *applies* • Personal Liability: $25,000,000 • Retention/Deductible: *does not apply*
Return of contributions to any employer/entity, if such amounts are or could be chargeable to a Plan. *(note, the actual returned contribution amount would not be funded by the insurance policy, unless determined to be a personal obligation of a trustee)*	• *Plan Liability: $25,000,000* • *(defenses costs only)* • *Retention/Deductible:$ applies* • *Personal Liability: $25,000,000* • *Retention/Deductible: does not apply*	• Plan Liability: $25,000,000 • (defenses costs only) • Retention/Deductible: *applies* • Personal Liability: $25,000,000 • Retention/Deductible: *does not apply*	• Plan Liability: $25,000,000 • (defenses costs only) • Retention/Deductible: *applies* • Personal Liability: $25,000,000 • Retention/Deductible: *does not apply*

Coverage Comparison *(con't)*

Coverage Provision	*Expiring Insurance Limit available for:*	Renewal: Euclid Insurance Limit available for:	Renewal: RLI Insurance Limit available for:
For Failure to Fund a Plan in accordance with any applicable Employee Benefit Law or Plan instrument, or for failure to collect contributions owed to a Plan; provided, that this exclusion will not apply to that portion of Loss payable solely as the personal obligation of such natural person Insured;	• *Plan Liability: $25,000,000* • *(defenses costs only)* • *Retention/Deductible: applies* • *Personal Liability: $25,000,000* • *Retention/Deductible: does not apply*	• Plan Liability: $25,000,000 • (defenses costs only) • Retention/Deductible: *applies* • Personal Liability: $25,000,000 • Retention/Deductible: *does not apply*	• Plan Liability: $25,000,000 • (defenses costs only) • Retention/Deductible: *applies* • Personal Liability: $25,000,000 • Retention/Deductible: *does not apply*
Legal Challenge means challenging the legality of an Employee Benefit Law to which a Plan is subject, or seeking to impose liability upon an Insured based solely upon an Insured's or Plan's compliance with, implementation of, failure to implement, or failure to legally challenge such Employee Benefit Law.	• *Plan Liability: $25,000,000* • *Retention/Deductible: applies* • *Personal Liability: $25,000,000* • *Retention/Deductible: does not apply*	• Plan Liability: $25,000,000 • Retention/Deductible: *applies* • Personal Liability: $25,000,000 • Retention/Deductible: *does not apply*	• Plan Liability: $25,000,000 • Retention/Deductible: *applies* • Personal Liability: $25,000,000 • Retention/Deductible: *does not apply*

Important Exclusions

Coverage Exclusion	
Personal Profit/ Illegal Remuneration	**Excluded** NOTE: defense for allegations of such will be defended until the act is established by a final adjudication in a legal proceeding
Criminal/Fraudulent Acts/Willful violation of any law	**Excluded** NOTE: defense for allegations of such will be defended until the act is established by a final adjudication in a legal proceeding
Bodily Injury, Personal Injury and Property Damage	**Excluded**
Violations of any Workers Compensation, Unemployment Insurance, Social Security or similar Disability Benefits Law	**Excluded**
A demand, suit or other proceeding rendered against the Insured prior to the first date of inception of coverage	**Excluded**
Pollution or Pollutants	**Excluded**
Contractual Liability of Others (other than contractual liability established by the Employee Benefit Plan)	**Excluded**

Anticipated Program Options

	Expiring	Option 1	Option 2	Option 3	Option 4*
Aggregate Limit for each coverage					
Fiduciary Liability	*$25,000,000*	$25,000,000	$15,000,000	$30,000,000	$25,000,000
Funding Claims (Defense only)	*$25,000,000*	$25,000,000	$15,000,000	$30,000,000	$25,000,000
Legal Challenges	*$25,000,000*	$25,000,000	$15,000,000	$30,000,000	$25,000,000
Retentions/ Deductible per claim					
Fiduciary Liability	*$50,000*	$250,000	$250,000	$250,000	$500,000
Funding Claims	*$50,000*	$250,000	$250,000	$250,000	$500,000
Legal Challenges	*$50,000*	$250,000	$250,000	$250,000	$500,000
TOTAL PREMIUM	***$173,411***	**$200,000**	**$150,000**	**$230,000**	**$240,000**
Change	*N/A*	*15%*	*(13%)*	*33%*	*37%*

- *this option 4 has been indicated by RLI – we do not recommend moving as the retention and the pricing are higher.

Notes & Subjectivities - Fiduciary

Notes:

i. Coverage provided by:
   a. Markel American Insurance Company (Administered by ULLICO) – Primary
   b. Hudson Insurance Company (Administered by Euclid) – Excess Layer

ii. Annual aggregate limit of liability for all trustees combined;

iii. Retention/deductible applies to each claim;

iv. Carrier *may* implement a $500K retention for all future class-action claims

v. Prior & Pending Litigation date: Fiduciary: 7/17/2007

vi. Please note, the open claim from 2017 is still accruing costs, and is well over $700K of paid defense

The Following Information Required to Issue Policies:

a. Fiduciary application completed, signed & dated with Addendum A Section D. Completed

The premium, terms and conditions outlined in this document are strictly conditioned upon no material change in your risk as presented to underwriters occurring between the date of this document and the inception date of the proposed policy or policies. In the event of such change in your risk including, but not limited to, the submission of a notice of claim (or circumstance that could give rise to a claim) to your current insurance carrier(s), the Insurer(s) offering the terms herein may, in its/their sole discretion, whether or not these terms have been already accepted by you and your organization, modify and/or withdraw them, outright.

Crime Program Summary (Crime)

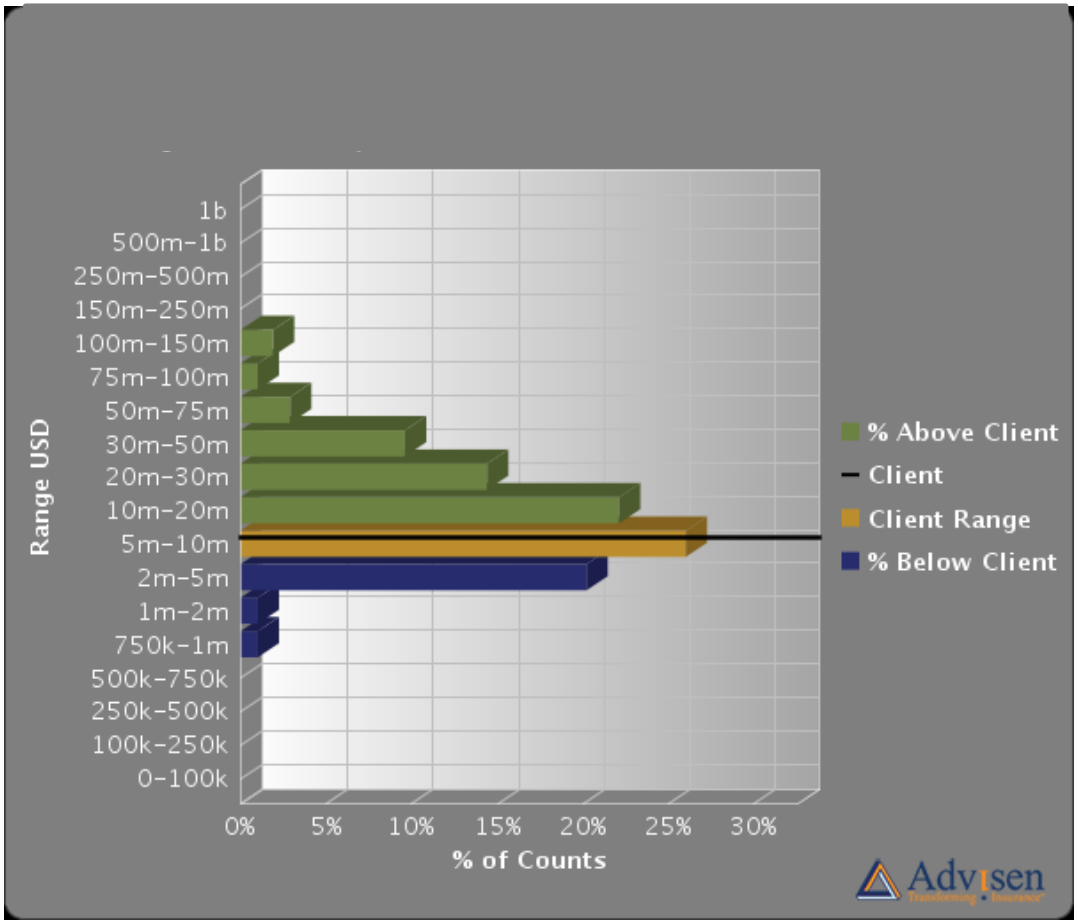
Insuring Agreements	Limit(s) of Insurance	Retention Amount(s)
1. Employee Theft ERISA Fidelity	$5,000,000 $5,000,000	$35,000 $0
2. Depositors Forgery or Alteration	$5,000,000	$35,000
3. Inside the Premises – Money, Securities and Other Property	Not Applicable	Not Applicable
4. Outside the Premises – Money, Securities and Other Property	Not Applicable	Not Applicable
5. Computer and Funds Transfer Fraud	$5,000,000	$35,000
6. Money Orders and Counterfeit Currency	$100,000	$5,000
7. Faithful Performance of Duty	$1,000,000*	$35,000
8. Investigatory Expense Coverage	$5,000	$0
9. Computer Program and Electronics Data Restoration Expense	$100,000	$5,000
10.Cyber Deception [Payment Instruction Fraud Coverage]	$250,000	$35,000

Expiring Pricing = $7,563

Anticipated Renewal Pricing = $8,750 (15% increase)

Limit Benchmarking

Limit Benchmarking



Peer Group: Public Pension Funds (including state & municipal); between $5B and $10B in Assets;

Fiduciary Liability Insurance; peer group size = 82

Limit Profile:

- 54% of peers purchase limits *greater than* $10M
- 26% of peers purchase limits >$5M *up to and including* $10M
- 20% of peers purchase limits *lower than* $5M

- At $25M, ACERA is in the 70th percentile of limits propensity

Current Coverage Profile of Similar Public Funds

Alliant

Illinois				
Type	**Fund Size**	**Limit of Liability**	**Aprox. Premium**	**Aprox. Rate**
Chicago	$ 1 Billion	$10,000,000	$150,000	1.50%
Chicago	$ 1.5 Billion	$10,000,000	$150,000	1.50%
Chicago	$ 3 Billion	$10,000,000	$200,000	1.33%
Chicago	$ 5 Billion	$15,000,000	$200,000	1.33%
County Fund	$ 10 Billion	$15,000,000	$150,000	1.00%
State Fund	$ 14 Billion	$15,000,000	$200,000	1.33%
State Fund	$ 18 Billion	$20,000,000	$250,000	1.25%
State Fund	$ 20 Billion	$30,000,000	$400,000	1.33%
Non-Illinois				
Type	**Fund Size**	**Limit of Liability**	**Aprox. Premium**	**Aprox. Rate**
County Fund	$ 5 Billion	$5,000,000	$200,000	4.00%
County Fund	$ 7 Billion	$20,000,000	$200,000	1.00%
State Fund	$ 7 Billion	$10,000,000	$200,000	2.00%
City Fund	$ 10 Billion	$15,000,000	$150,000	1.00%
County Fund	$ 10 Billion	$5,000,000	$50,000	1.00%
State Fund	$ 10 Billion	$5,000,000	$75,000	1.50%
State Fund	$ 10 Billion	$15,000,000	$100,000	0.67%
State Fund	$ 10 Billion	$15,000,000	$150,000	1.00%
City Fund	$ 15 Billion	$10,000,000	$200,000	2.00%
County Fund	$ 15 Billion	$10,000,000	$200,000	2.00%
State Fund	$ 15 Billion	$5,000,000	$50,000	1.00%
City Fund	$ 20 Billion	$15,000,000	$300,000	2.00%
State Fund	$ 20 Billion	$25,000,000	$100,000	0.40%
State Fund	$ 20 Billion	$30,000,000	$300,000	1.00%
State Fund	$ 25 Billion	$5,000,000	$200,000	4.00%
State Fund	$ 25 Billion	$20,000,000	$200,000	1.00%
State Fund	$ 25 Billion	$25,000,000	$300,000	1.20%
State Fund	$ 30 Billion	$35,000,000	$500,000	1.43%
State Fund	$ 35 Billion	$35,000,000	$500,000	1.43%
State Fund	> $ 100 Billion	$75,000,000	$850,000	1.13%
State Fund	> $ 100 Billion	$100,000,000	$1,000,000	1.00%

Historical Claim Information

- ACERA has tendered 10 claims to the fiduciary liability policy over a 6 year period. Only 2 of these claims have generated payment by the insurance carrier. One of these 2 paid claims remains open.
- Between these two paid claims, the carriers have spent >$700,000 (see below summary). The 2017 claim has incurred costs in excess of $500k and there is no immediate end in sight to this case.

Policy Period	Premium
2017-2018	$117,883
2018-2019	$117,883 (no increase in prem)
2019-2020	$121,482 (3% increase in prem)
2020-2021	$125,927 (4% increase in prem)
Total Premium Collected	**$483,175**
Total Losses Incurred	**$713,450**
Loss ratio	148%

- The carrier is going to be pursuing an increased retention to $250k (and possibly $500k for class action claims). However, their pricing should be relatively fair and within 15% of expiring
- We have managed hundreds of claims tendered to our fiduciary liability carriers. Apx 75%of these claims are managed under $1M in defense costs and indemnity payments. The majority of the large claims are managed well within a $10M limit profile. We have statistics on jumbo-claims below.
- We have records on 5 fiduciary liability claims that have breached a $10M figure (defense and settlement/indemnity). Those claims are briefly summarized below:
    - Claim 1: imprudent investments, investment challenges and allegations of fraud ; ($12.5M settlement + $3M defense costs)
    - Claim 2: imprudent investments, failure to supervise, poor investment decisions (hedge funds) ; ($13M indemnity/settlement + $5M defense costs)
    - Claim 3: class-action claim of lost contributions ($10M indemnity/settlement + $2M defense costs)
    - Claim 4: challenge to long-term care program/plan; ($8M indemnity/settlement+ $5M defenses costs)
    - Claim 5: challenge to guaranteed interest reduction ($11M indemnity/settlement + $2M defenses costs)

Disclosures & Additional Information

Compensation & Premium

Waiver of Recourse

With the enactment of ERISA in 1974, Trustees of employee benefit plans became personally liable for their acts on behalf of the participants of those plans. Fiduciary Liability Policies became very popular, but ERISA only allowed the Trust Funds themselves to purchase insurance to protect the funds - not the respective trustees. Therefore, a nominal fee was charged directly to the Trustees as a way to circumvent this provision.

Although Public Pension Funds are not subject to ERISA law, the various state pension codes often follow in the "spirit of ERISA". In addition, as the Fiduciary Liability policies were originally drafted to protect ERISA plans, the waiver provision followed across Non-ERISA plans.

With that said, we have been successful in petitioning the carriers to waive their recourse to the trustees without having to charge, unless there is a requirement within the respective governing code. As Public Pension Codes typically have no such provision, we no longer need to charge the trustees for the waiver of recourse. The trustees still retain the same full coverage as provided in the past.

Compensation

Alliant Insurance Services, LLC is compensated for our risk management, insurance placement, marketing, policy issuance and other insurance services for this insurance program using a commission based compensation plan.

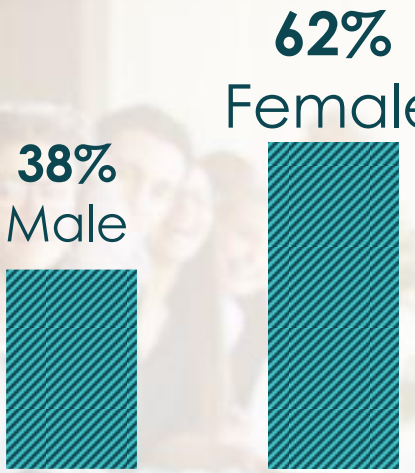
As the different carriers provide distinct commission schedules, we have outlined the *standard* commission schedules from carriers that provide this insurance coverage. However, Alliant Insurance Services, Inc.. has agreed to reduce our compensation *by 10%* for the benefit of combined marketing of the Chicago Public Pension Funds programs. Please note that commissions paid do not influence our recommendations for coverage placements:

Insurance Company	Standard Commission % Paid
Arch	15%
Axis	15%
AIG	15%
Chubb	15%
CNA	12.5%
Euclid	15%
Hartford	15%
Houston Casualty Company	15%
RLI	15%
Travelers	15%
Ullico	15%
XL	12.5%

ENTREPRENEURIAL & DIVERSE

The Alliant Culture

Company-Wide Workforce



Minorities make up **22.3%** of the Alliant Workforce.

Alliant's CEO, Tom Corbett, has pledged his support of the **CEO Action for Diversity & Inclusion™ (CEOAction.com),** the largest CEO-driven commitment to diversity and inclusion.

Executive/ Management Team

51% Female

13% Minority

3% Veterans

Alliant

Diversity and Inclusion

Diversity and Inclusion is one of our organization's critical success factors. Our firm is focused on awareness, education and training, and mentorship in our efforts to hire, retain, and promote diverse employees. Our goals include establishing Employee Resource Groups (ERGs), providing training on issues such as unconscious bias, creating a D&I focused mentorship program, maintaining a continued commitment to in our hiring practices (we are an Affirmative Action employer), and fostering employee awareness.

The former slide and above statement being said, as the leader of the Management Liability and Organized Labor Practice Group, I take this topic very seriously and I have double our efforts in hiring and mentoring women and minorities.

Specifically, I manage a ten person team that is made up of 40% women and 50% minorities. In addition, as we grow our employee base into the next few years, I am committed to growing these percentages even further.

I firmly believe in empowering my employees and all of these individuals referenced above are in client-interfacing roles and two of those individuals are in leadership positions.

We recognize that employing a diverse team will help drive positive change in our organization and have a lasting, positive impact on our industry and client base.

Claims Reporting and Important Disclosures

Claim Reporting

The ramification of the current insurance market condition from the claims prospective is that insurance carriers are much stricter in claims being reported promptly. Therefore, we recommend all of our clients inform us (or your appropriate carrier) as soon as possible when first made aware of an incident, accident, lawsuit, or circumstance which could give rise to a claim.

What could happen if you delay reporting a new claim?

- The carrier could reserve rights against you and offer less than 100% of what is due.
- The claim could be denied in its entirety.

Prompt claim reporting begins with the immediate investigation into the facts and circumstances of an accident, work related injury or allegation. Every such incident, no matter how minor, should be investigated as soon as possible. In order to assist you in preparing and reporting claims, Alliant Insurance Services maintains a directory of accident investigation forms and contact numbers for your insurers claim departments.

If you have difficulty reporting any claim, you can also contact our claim department who will assist in filing the matter with the insurance company. You may call, fax or email your claim materials to our office:

Phone: 312.595.6200 (avalable 24/7)
Fax: 312.595.6506
Email: claimsreporting@alliant.com

Important Disclosures

Our proposal is an outline of the coverage offered by the insurers, based on the information provided by your company – including but not limited to the insurance Application, which we have relied upon in preparing this proposal. If changes need to be made, please notify our office immediately. All changes are subject to review and acceptance by the insurance company. This proposal does not constitute a contract and does not include all the terms, coverage, exclusions, limitations, or conditions of the actual contract language. You must read the policies for those details. For your reference, policy forms will be made available upon request.

In addition to fees, commissions or other compensation retained by Alliant Insurance Services, Inc.. it is understood that in some circumstances other parties necessary to arrange placement of coverage may earn usual and customary commissions and/or fees in the course of providing insurance products. In addition, as is a common practice in the industry, Alliant Insurance Services, Inc.. benefits from programs implemented by certain insurers, wholesale brokers (property & casualty) and administrators (benefits) providing for compensation, in addition to commissions and fees, to be paid to Alliant Insurance Services, Inc.. based upon differing factors. This additional compensation may include non-cash awards and benefits. The insurance you purchase through Alliant Insurance Services, Inc.. may be issued by an insurer, wholesale broker (property & casualty) or administrator (benefits) who has such a program. Further, Alliant Insurance Services, Inc.. may receive fees from premium finance transactions (property & casualty). Additionally, Alliant Insurance Services, Inc.. may share non-identifiable commercial insurance program data with third-parties for benchmarking purposes (property & casualty). Should you have specific questions concerning Alliant Insurance Services, Inc..' compensation or data sharing, please contact your Alliant Insurance Services, Inc.. executive.

Best's Insurance Reports

Best's Insurance Reports, published annually by A. M. Best Company, Inc.., presents comprehensive reports on the financial position, history, and transactions of insurance companies operating in the United States and Canada. Companies licensed to do business in the United States are assigned a Best's Rating which attempts to measure the comparative position of the company or association against industry averages.

A Best's Financial Strength Rating (FSR) is an opinion of an insurer's ability to meet its obligations to policyholders. The Best's Financial Strength Rating is based on analysis, which gives consideration to a number of factors of varying importance. While the analysis is believed to be reliable, we cannot guarantee the accuracy of the rating or the financial stability of the insurance company.

A copy of the Best's Insurance Report on the insurance companies quoted is available upon request.

Best's Ratings

Grade	Description
A++, A+	Superior
A, A-	Excellent
B++, B+	Good
B, B-	Fair
C++, C+	Marginal
C, C-	Weak
D	Poor
E	Under Regulatory Supervision
F	In Liquidation
S	Rating Suspended

Financial Strength Rating

Description		
Class I	$ 0	$1,000,000
Class II	$1,000,000	$2,000,000
Class III	$2,000,000	$5,000,000
Class IV	$5,000,000	$10,000,000
Class V	$10,000,000	$25,000,000
Class VI	$25,000,000	$50,000,000
Class VII	$50,000,000	$100,000,000
Class VIII	$100,000,000	$250,000,000
Class IX	$250,000,000	$500,000,000
Class X	$500,000,000	$750,000,000
Class XI	$750,000,000	$1,000,000,000
Class XII	$1,000,000,000	$1,250,000,000
Class XIII	$1,250,000,000	$1,500,000,000
Class XIV	$1,500,000,000	$2,000,000,000
Class XV	$2,000,000,000	or more

Rating Modifier

Modifier	Descriptor	Definition
u	Under review	A modifier that generally is event-driven (positive, negative or developing) and is assigned to a company whose Best's rating opinion is under review and may be subject to change in the near-term, generally defined as six months.
pd	Public data	Assigned to insurers that do not subscribe to Best's interactive rating process. Best's "pd" Ratings reflect qualitative and quantitative analyses using public data and information.
s	Syndicate	Assigned to syndicates operating at Lloyd's.

MEMORANDUM TO THE OPERATIONS COMMITTEE

DATE: June 2, 2021

TO: Members of the Operations Committee

FROM: Margo Allen, Fiscal Services Officer

SUBJECT: Operating Expenses Budget Summary for the period ended April 30, 2021

ACERA's operating expenses are $811K under budget for the period ended April 30, 2021. Budget overages and surpluses worth noting are as follows:

Budget Surpluses

1. *Staffing:* Staffing is $413K under budget. This amount comprises surplus in staff vacancies of ($153K) and fringe benefits of ($332K), which are offset by overage in temporary staffing of $72K due to vacant positions filled by temporary staff.
2. *Staff Development:* Staff Development is $28K under budget due to savings from unattended staff trainings and conferences.
3. *Professional Fees:* Professional Fees are $26K under budget. This amount comprises surplus in legal fees of ($22K), benefit consultant fees of ($1K) and actuarial fees of ($3K) due to savings from last year accrual.
4. *Office Expense:* Office Expense is $38K under budget. This amount comprises surpluses in printing and postage of ($6K) and office maintenance and supplies of ($11K) are both due to majority staff are working from home, communication expenses of ($2K), bank charges and miscellaneous administration of ($5K), equipment lease and maintenance of ($8K), and minor equipment and furniture of ($6K).
5. *Member Services:* Member Services are $10K under budget. This amount comprises surpluses in disability legal arbitration and transcripts of ($20K), members printing and postage of ($5K), and member training and education of ($2K), which are offset by overage in virtual call center of $7K and disability medical expense of $10K.
6. *Systems:* Systems are $99K under budget. This amount comprises surpluses in software maintenance and support of ($116K) mainly due to delay in IT projects, and minor computer hardware of ($1K), which are offset by overage in business continuity of $16K, and county data processing of $2K.
7. *Depreciation*: Depreciation is $1K under budget, which is mainly related to the disaster recovery fixed assets.

8. *Board of Retirement:* Board of Retirement is $196K under budget. This amount comprises surpluses in board conferences and trainings of ($106K) due to timing difference and unattended trainings and conferences, board compensation of ($2K), board employer reimbursement of ($83K) due to adjustment of previous year's overpayments, and board miscellaneous expenses of ($5K).

Staffing Detail

Permanent vacant positions as of April 30, 2021:

Department	Position	QTY	Comments
Benefits	Administrative Specialist II	2	Vacant - currently budgeted until 12/2021
Benefits	Retirement Support Specialist	1	Vacant - currently budgeted until 12/2021
Benefits	Retirement Technician	1	Vacant - currently budgeted until 12/2021
Benefits	Senior Retirement Technician	1	Vacant - currently budgeted until 12/2021
Investments	Investment Operation Officer	1	Vacant - currently budgeted until 12/2021
Investments	Investment Analyst	1	Vacant - currently budgeted until 12/2021
Total Positions		7	

Pension Administration System Project - as of 4/30/2021					
All amounts are in $	Year-To-Date				
	Actual	Budget	Variance	2021 Budget	2019-20 Actual
Consultant Fees					
Levi, Ray and Shoup	28,337	228,000	(199,663)	683,000	1,085,179
Segal	143,988	128,000	15,988	384,000	800,450
Other expenses	-	16,800	(16,800)	50,000	1,500
Leap Technologies	-	-	-	-	98,970
Total	172,325	372,800	(200,475)	1,117,000	1,986,099
Staffing	169,715	192,000	(22,285)	577,000	881,052
TOTAL	**342,040**	**564,800**	**(222,760)**	**1,694,000**	**2,867,151**

Attachments:

- Total Operating Expenses Summary
- Professional Fees – Year-to-Date – Actual vs. Budget

ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION

TOTAL OPERATING EXPENSES SUMMARY

YEAR TO DATE - ACTUAL VS. BUDGET

April 30, 2021

	Actual *Year-To-Date*	Budget *Year-To-Date*	YTD Variance *(Under)/Over*	2021 *Annual Budget*	% Actual to *Annual Budget*
Staffing	$ 4,804,890	$ 5,217,320	$ (412,430)	$ 16,099,000	29.8%
Staff Development	46,923	74,985	(28,062)	274,000	17.1%
Professional Fees (Next Page)	386,141	412,120	(25,979)	1,128,000	34.2%
Office Expense	147,361	185,500	(38,139)	574,000	25.7%
Insurance	262,942	263,660	(718)	825,000	31.9%
Member Services	120,434	130,200	(9,766)	464,000	26.0%
Systems	320,276	419,240	(98,964)	1,202,000	26.6%
Depreciation	39,010	40,000	(990)	118,000	33.1%
Board of Retirement	56,939	252,960	(196,021)	675,000	8.4%
Uncollectable Benefit Payments	-	-	-	68,000	0.0%
Total Operating Expense	$ 6,184,916	$ 6,995,985	$ (811,069)	$ 21,427,000	28.9%

ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION

PROFESSIONAL FEES

YEAR TO DATE - ACTUAL VS. BUDGET

April 30, 2021

	Actual Year-To-Date	Budget Year-To-Date	YTD Variance (Under)/Over	2021 Annual Budget	% Actual to Annual Budget
Professional Fees					
Consultant Fees - Operations and Projects[1]	$ 110,067	$ 110,920	$ (853)	$ 333,000	33.1%
Actuarial Fees[2]	120,496	123,820	(3,324)	415,000	29.0%
External Audit[3]	103,000	103,000	-	157,000	65.6%
Legal Fees[4]	52,578	74,380	(21,802)	223,000	23.6%
Total Professional Fees	**$ 386,141**	**$ 412,120**	**$ (25,979)**	**$ 1,128,000**	34.2%

	Actual Year-To-Date	Budget Year-To-Date	YTD Variance (Under)/Over	2019 Annual Budget	% Actual to Annual Budget
[1] CONSULTANT FEES - OPERATIONS AND PROJECTS:					
Benefits					
Alameda County HRS (Benefit Services)	42,000	42,000	-	126,000	33.3%
Segal (Benefit Consultant/Retiree Open Enrollment)	42,400	43,320	(920)	130,000	32.6%
Total Benefits	84,400	85,320	(920)	256,000	33.0%
Human Resources					
Lakeside Group (County Personnel)	25,667	25,600	67	77,000	33.3%
Total Human Resources	25,667	25,600	67	77,000	33.3%
Total Consultant Fees - Operations	**$ 110,067**	**$ 110,920**	**$ (853)**	**$ 333,000**	**33.1%**
[2] ACTUARIAL FEES					
Actuarial valuation	39,500	39,500	-	79,000	50.0%
GASB 67 & 68 Valuation	-	-	-	49,000	0.0%
GASB 74 & 75 Actuarial	-	-	-	15,000	0.0%
Actuarial Standard of Practice 51 Pension Risk	-	-	-	40,000	0.0%
Supplemental Consulting	59,996	63,320	(3,324)	190,000	31.6%
Supplemental Retiree Benefit Reserve valuation	21,000	21,000	-	42,000	50.0%
Total Actuarial Fees	**$ 120,496**	**$ 123,820**	**$ (3,324)**	**$ 415,000**	**29.0%**
[3] EXTERNAL AUDIT					
External audit	88,000	88,000	-	132,000	66.7%
GASB 67 & 68	7,800	7,800	-	13,000	60.0%
GASB 74 & 75-External Audit	7,200	7,200	-	12,000	60.0%
Total External Audit Fees	**$ 103,000**	**$ 103,000**	**$ -**	**$ 157,000**	**65.6%**
[4] LEGAL FEES					
Fiduciary Counseling & Litigation					
Nossaman - Fiduciary Counseling	4,757	5,333	(576)	54,000	
Nossaman - Litigation	1,377	16,667	(15,290)	42,000	
Reed Smith - Litigation	35,708	20,000	15,708	30,000	
Subtotal	41,842	42,000	(158)	126,000	33.2%
Tax and Benefit Issues					
Hanson Bridgett	3,881	9,700	(5,819)	29,000	
Subtotal	3,881	9,700	(5,819)	29,000	13.4%
Miscellaneous Legal Advice					
Meyers Nave	6,854	22,680	(15,826)	68,000	
Subtotal	6,854	22,680	(15,826)	68,000	10.1%
Total Legal Fees	**$ 52,578**	**$ 74,380**	**$ (21,802)**	**$ 223,000**	**23.6%**

MEMORANDUM TO THE OPERATIONS COMMITTEE

DATE: June 2, 2021

TO: Members of the Operations Committee

FROM: Margo Allen, Fiscal Services Officer

SUBJECT: **ACERA Board of Retirement 2021 Election Calendar**

Executive Summary
ACERA's 2021 election will be conducted for the second member seat to represent the general membership on the Board of Retirement.

The Alameda County Registrar of Voters (ROV) will manage the vote-by-mail portion of the election. The ROV's scope of services include ballot programming services, ballot printing and assembly, ballot mailing, reissuing lost or damaged ballots, crediting of returned ballots from voters, maintaining ballot statistics, counting of the ballots, and certifying election results. As with all Board elections conducted by the ROV, ballots will be mailed to the home address on file with the employer.

Board of Retirement 2021 Election Calendar

- **Notice of Election** begins on Aug 2 and ends on August 27, 2021 (4 weeks);
- **Nomination Period** begins on August 30 and ends on September 27, 2021 (4 weeks);
- **Review Period of the Candidate Statements** begins on September 29, and ends on October 8, 2021 (10 calendar days);
- **What's Up Newsletter Mailing (Election Edition)** will be October 25, 2021 to active and deferred general members.
- **Ballot Mailing** will be November 10, 2021, to active and deferred general members.
- **Election Period** is between November 10 and December 15, 2021 (35 calendar days);
- **End of the Election and Deadline** for ballots to be returned to the ROV is on December 15, 2021 at 5:00 pm;
- **Ballot Counting** will be on December 16, 2021, beginning at 9:00 am at the ROV's office; and,
- **Election Results** will be announced on December 16, 2021 at the Board of Retirement meeting.

Staff will provide a report on the certified candidates at the October 21, 2019, Board meeting. Questions regarding the election can be directed to Margo Allen (510) 628-3127 or mallen@acera.org.

MEMORANDUM TO THE OPERATIONS COMMITTEE

DATE: June 2, 2021

TO: Members of the Operations Committee

FROM: Sandra Dueñas-Cuevas, Benefits Manager

SUBJECT: **Managed Medical Review Organization (MMRO) Update**

The attached information regarding disability applications processed by Managed Medical Review Organization (MMRO) will be presented at the June Operations Committee meeting.

Attachment

Status Report on Managed Medical Review Organization (MMRO)

Operations Committee Meeting
June 2, 2021
Sandra Dueñas-Cuevas– Benefits Manager

MMRO Performance - Standard Cases

Duration of time to review, exhibit, conduct member outreach before disability packet is distributed to applicant and employer for comment review period	**Average 59 days**
Duration of time from completion of comment period to production and receipt of medical recommendation report	**Average 27 days**

- Duration periods were calculated based on cases completed from June 1, 2020 to present
- Total days consistent from a total of 86 to 86 days when compared to the report previously provided to the Operations Committee in June 2020.
- Cases included in average numbers did not need an Independent Medical Examination (IME), Peer Review, or submit additional records after the initial file was deemed complete

MMRO Performance (continued)

Completed Cases	**36**
Cases in Progress	**19**
Cases Requiring Annual Examination	**1**

Non-Standard Cases

Type of Cases	Number
Cases in need of IME, IPE or Peer Review ➢ These cases will take longer to process due to scheduling of examinations, receipt of report, review time of parties and final completion of medical recommendations	5
Employer Filed Applications ➢ These cases may take longer to process due to additional information needed to make a determination.	3
Contested Cases ➢ The recommendation for these cases are being contested by the employer or the applicant and anticipated to be scheduled for hearing	2

Year Over Year Performance

	ACERA/ Dr. Wagner 2016 – 2017 Average	**MMRO** 2017 – 2018 Average	**MMRO** 2018 – 2019 Average	**MMRO** 2019 – 2020 Average	**MMRO** 2020 – 2021 Average
Phase 1 Exhibiting	263	69	54	52	59
Phase 2 Medical Advisor Report	45	28	40	34	27
Total Days	***308***	***97***	***94***	***86***	***86***