**4th Civil No. D065364**

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# IN THE COURT OF APPEAL
# STATE OF CALIFORNIA
# FOURTH APPELLATE DISTRICT
# DIVISION ONE

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**DEPUTY SHERIFFS' ASSOCIATION OF SAN DIEGO COUNTY,**

*Plaintiff and Appellant,*

*vs.*

**COUNTY OF SAN DIEGO, SAN DIEGO COUNTY EMPLOYEES' RETIREMENT ASSOCIATION and STATE OF CALIFORNIA,**

*Defendants and Respondents.*

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*Superior Court Of San Diego County, Case No. 37-2013-00029085-CU-MC-CTL*
*Honorable Timothy B. Taylor, Judge Presiding*

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# *AMICUS CURIAE* BRIEF PEACE OFFICERS RESEARCH ASSOCIATION OF CALIFORNIA (PORAC)

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## CERTIFICATE OF INTERESTED PARTIES AND DISCLOSURE

Pursuant to California Rule of Court 8.208, the Peace Officers Research Association of California ("PORAC") certifies that it is a membership association with no shareholders. As such, PORAC and its counsel certify that no other person or entity has a financial or other interest in the outcome of the proceeding that the amicus and its counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Pursuant to Rules of Court 8.200(c) it is certified that no other entity or individual other than the undersigned counsel for amicus curiae applicant PORAC and the PORAC Legal Defense Fund authored this brief, nor did any other individual make any direct or indirect monetary contribution towards financing this submission.

Dated: July 17, 2014

TEAGUE P. PATERSON

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## APPLICATION AND STATEMENT OF INTEREST OF AMICUS CURIAE

The Peace Officers Research Association of California ("PORAC") was incorporated in 1953 as a professional federation of local, state and federal law enforcement associations. It was formed by peace officers for the purpose of advancing the mutual interests of California peace officers through collective effort. From its inception, and continuing to the present, PORAC has been at the forefront of advancing the welfare of law enforcement personnel, whether economic, professional or social. Today, PORAC consists of approximately 880 peace officer member organizations, and represents the interests over 64,000 public safety officers employed by the state, its counties, cities and other subdivisions, as well as the federal government. Through its leadership in advocating on behalf of peace officers, PORAC is now the largest law enforcement association in the state and the largest statewide peace officer association in the nation.

PORAC's activities are exclusively focused on advancing the mutual interests of California peace officers in the areas of employment, professionalism and education, health and welfare, survivor and disability benefits, and retirement security. PORAC advances these goals through a number of means, including research and collective bargaining support, legislative affairs and political action, litigation in federal and state courts, training and education, and by sponsoring benefit programs available to peace officer members and their survivors. Through its legislative affairs efforts, PORAC has initiated or shaped important legislation affecting peace officer safety, training standards, disability and survivorship, and a myriad of other laws that preserve and protect the welfare of California peace officers. PORAC also sponsors and administers the PORAC Legal Defense Fund which provides counsel to public safety officers in personnel

matters, and is also involved in matters that advance the rights of peace officers under state and federal laws.

PORAC's institutional interest in this case is strong. PORAC has been involved in shaping peace officer collective bargaining for over half a century. Its long-standing and successful effort to preserve and improve peace officer retirement security has also been a central component of its mission. (*See, e.g.*, Exhibit A of PORAC's Request for Judicial Notice, submitted herewith). This case involves the interaction of these two topics. If the trial court's decision were to be endorsed, it would threaten to unravel long-standing precedent that PORAC and its members have been involved in developing, and have come to rely upon. The points and authorities below address these concerns and illustrate that the trial court's ruling is inconsistent with both established precedent and the collective bargaining rubric the Legislature has required of not only peace officer associations, but all California public employee unions.

For the foregoing reasons, PORAC respectfully requests the Court to accept this application and to give due considerations to the points and authorities discussed below.

Dated: July 17, 2014

Respectfully submitted,

By: 

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## INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus curiae, the Peace Officers Research Association of California ("PORAC"), respectfully urges the Court to reverse the trial court's decision. The trial court erred by failing to acknowledge the supremacy of the California Constitution over conflicting legislative action.

The issue presented is whether a binding contract that has been negotiated and entered into between a county and its deputy sheriffs' collective bargaining representative, in accordance with procedures mandated by the Legislature, can be impaired by subsequent legislative action. Binding precedent, girded by bedrock principles of constitutional supremacy, require the answer "no." The trial court reached a different conclusion.

The contract at issue here is a collective bargaining agreement[1] that was negotiated, executed and adopted by formal legislative action of the County of San Diego's governing body ("County"), pursuant to the legislative mandates set forth in the Meyers-Milias-Brown Act, Government Code sections 3500, *et seq*. ("MMBA"). Such contracts are binding and constitutionally-protected from impairment.

Here, the contract set forth defined levels of pension benefits to be provided by the County to its sheriff's deputies hired during its term.[2] For half a century, the State of California has ordered its instrumentalities to

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[1] Such agreements may also be titled "Memoranda of Understanding" or "Memoranda of Agreement." For purposes of consistency we use the general term "collective bargaining agreement" or "CBA" throughout.

[2] The trial court considered two separate pension-related provisions contained in the parties' collective bargaining agreement: (1) the level of bargained-for pension benefits, that is the pension annuity defined as a factor of years of service, retirement age and percentage of pay multiplier, and (2) the percentage of the cost of such benefits born by employees during the term of the contract. PORAC's brief is primarily focused on the former, that is, the bargained-for level of benefits earned by employees who perform service during the term of the collective bargaining agreement.

negotiate over pension and retirement benefits, as a "mandatory subject of bargaining," and further requires them to execute binding, written contracts when an agreement is reached over such pension benefits (as well as any other mandatory subjects of bargaining).

Nonetheless, the trial court found that an intervening legislative enactment, the Public Employees Pension Reform Act of 2012 (Stats. 2012, c. 296 (A.B.340)) ("PEPRA"), permissibly obligated the County to breach its contract with Appellant by reducing its previously-agreed upon pension benefits required under the collective bargaining agreement. It did so without any justification of fiscal necessity. Turning constitutional principles on their head, the trial court held that the Legislature retains paramount authority to upend the collective bargaining agreements that it previously mandated its instrumentalities to negotiate and execute.

State and Federal courts routinely apply the contract clause to protect public-sector collective bargaining agreements from legislative impairment. This holds true with respect to all employees, current and subsequently hired, who are employed during the term of the particular agreement. Evidently, the trial court's conclusion cannot stand.

Until PEPRA's enactment, the Legislature has never intervened, or reserved authority, to remove from the 'bargaining table' local employee compensation including pension benefits. Rather, as detailed below, its prior enactments have mandated such negotiations. When the Legislature has attempted to intervene and mandate changes that interfere with existing collective bargaining agreements, the Supreme Court has rebuked it, striking down the legislation as an unconstitutional impairment of contract.

It may be that the Legislature can appropriately intervene in local government collective bargaining, and may corral or extend negotiable topics. If so, its actions are nonetheless subservient to the contract clause,

Article I, section 9 of the California Constitution. Any other conclusion renders such contracts -- and the contract clause itself -- illusory.

Absent a dire and critical fiscal emergency of a type never-before witnessed by California courts, the Legislature was powerless to mandate a reduction in the agreed-upon pension benefits negotiated between the San Diego Deputy Sheriffs Association and the County during the term of the parties' binding collective bargaining agreement. As explained below, a reversal of the trial court's decision is necessary to return the Constitution to its rightful status as the organic source of the Legislature's authority and, importantly, its limits.

### A. The Legislature Has Mandated that Unions and Local Governments Must Bargain and Enter Into Binding Contracts Governing the Terms and Conditions of All Employees Who Work During Their Term; Such Contracts are "Indubitably Binding" and May Not Be Subsequently Impaired.

In essence the trial court concluded that the parties' collective bargaining agreement, which provides for a specified level of pension benefits, does not create "vested" contractual rights for employees hired on or after January 1, 2013, because the County and SDCERA must abide by the terms of PEPRA. That may be so, or it may not. In either event it is irrelevant, because the issue of vested rights was not before the trial court. Rather, the issue presented was whether the Legislature may alter the agreed-upon terms of the parties' collective bargaining agreement during its term.

The parties' relationship is governed by the Meyers-Milias-Brown Act, a statute that governs local government and agency employee relations. (Government Code 3500, *et seq*.).[3] It obligates local governments to negotiate with their employees' designated collective

[3] Unless otherwise specified, all statutory references are to the Government Code.

bargaining representative over all topics within the "scope of representation," and further requires execution of an agreement when negotiations are successful, as they were between Appellant and Respondent County. (*Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 657 (In Bank) ["To effect these goals the [MMBA] gives local government employees the right to organize collectively and to be represented by employee organizations (§ 3502), and obligates employers to bargain with employee representatives about matters that fall within the "scope of representation"]; *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1182 ("*REAOC*") ["Under the Meyers–Milias–Brown Act local governments are authorized to meet and confer with their employees' authorized bargaining representative regarding wages, hours, and other terms and conditions of employment, and to enter into and approve written memoranda of understanding to memorialize their agreements."]; *San Joaquin County Employees' Assn., Inc. v. County of San Joaquin* (1974) 39 Cal.App.3d 83, 88 ["[T]he entire import of the Meyers–Milias–Brown Act is to permit as much flexibility in employee-governmental agency relations with regard to all aspects in the employer-employee milieu as a voluntary system will permit."].)

As has been consistently recognized by the California Supreme Court, such agreements are "indubitably binding." (*Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 337-38; *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 304 ("*SCOPE*") ; *REAOC,* 52 Cal.4th at 1182 ["When agreements of employment between the state and public employees have been adopted by governing bodies, such agreements are binding and constitutionally protected."]; and see *University of Hawai'i Professional Assembly v. Cayetano* (9th Cir. 1999) 183 F.3d 1096, 1102 ("*Cayetano*").)

Courts have recognized that changes to wages or fringe benefits are at the "heart" of labor agreements, and the Legislature may not over-ride them. (*SCOPE,* 23 Cal.3d at 305). Moreover, as detailed in the next section, pension and retirement benefits are a mandatory subject of bargaining under the MMBA (and the National Labor Relations Act, on which the MMBA was predicated)

A review of *SCOPE* is instructive. In the wake of the adoption of Proposition 13 by the electorate, the Legislature passed a law applicable to all public employers within the state that prohibited wage increases greater than the cost of living adjustment applicable to the state's direct employees. (*SCOPE*, 23 Cal.3d at 305). The Court found the law unconstitutional with respect to the future wage escalators already provided for under existing local government collective bargaining agreements. (*Id*.) Like PEPRA, the law reviewed in *SCOPE* was an act of the Legislature made applicable to all state and local government employers. (*Id*.) In holding that collective bargaining agreements negotiated under the MMBA are binding contracts, the Court recognized the application of long-standing heightened constitutional protections applicable to contracts involving governmental entities. (*SCOPE*, at 310-11). In reaching this conclusion the SCOPE Court discussed and applied federal contract clause analysis. (*Id*.)

The federal constitution, Article I, section 10, affords the same protection to collective bargaining agreements as does the California Constitution's contract clause. Federal authorities overwhelmingly prohibit state legislatures from impairing public employee collective bargaining agreements through subsequent legislative action. For example, in *University of Hawai'i Professional Assembly v. Cayetano* (9th Cir. 1999) 183 F.3d 1096 ("*Cayetano*") , a public employee union challenged the implementation of Hawai'i Act No. 355. That new law shifted payment of public employees' wages from a prospective to an arrears basis. The Ninth

Circuit agreed that the change impaired existing public sector unions' collective bargaining agreements, in violation of the Federal contract clause, noting that Hawai'i's public labor relations law covered the topic of wages and that the method of payment was a mandatory subject of bargaining. (*Id*. at 1102). The Ninth Circuit noted that the CBAs did not explicitly designate the particular basis of payment, but the court recognized that compensation was a core concern of the agreements and the legislature was powerless to upset the settled contractual expectations of the parties, notwithstanding the contract's silence on the particular issue. (*Id*.)

Similarly in *Toledo Area AFL-CIO Council v. Pizza* (6th Cir. 1998) 154 F.3d 307, 325, involving a state campaign finance reform statute, the court found the statute impermissibly impaired a public employee union's collective bargaining agreement even though the statute was permissible under first amendment grounds. But because the law "obliterated the negotiated dues and union PAC checkoff provisions existent in current CBAs [it], therefore, constituted an impermissible impairment of contract." (*Id*. at 372 ["In summary, we find that the state's application of the wage checkoff ban to pre-existing CBAs promising public employees the right to wage checkoffs for certain political causes is a substantial impairment of these contracts."])

Notably, none of the state or federal precedents discussed above distinguish between current or subsequently-hired employees and, indeed, the holdings applied equally to employees employed during the term of the collective bargaining agreements, whether they were hired before or after the intervening legislative enactments.

These authorities are not contradicted by *California Association of Professional Scientists v. Schwarzenegger* (2006) 137 Cal.App.4th 371 ("*CAPS*") under which the trial court here incorrectly held that a collective bargaining agreement is, in essence, an illusory contract subject to the

whims of legislative action. In *CAPS*, the Third District Court of Appeal found that an amendment adopted by the Legislature applicable to state employee retirement benefits did not impair the state employees' collective bargaining agreement with respect to future employees. That decision hinged solely on the particular contract language, which merely cross-referenced the statutory scheme and specifically anticipated elections of benefits by employees under the scheme, with no reference to whether the benefits itemized in the cross-referenced statute would remain in effect. (*Id*. at 364). Recognizing the principle that such an agreement secures terms and conditions for all employees who work during its term, the Court noted, "[w]hen a collective bargaining agreement purports to secure pension rights for future employees, it may well be that the federal and state contract clauses protect the rights of future employees as much as the rights of existing employees." (*Id*. at 383). Yet, because the *CAPS* contract did not secure such rights by defining the benefits to be provided under it, the court held, the contract was not impaired.

Here the collective bargaining agreement between Appellant and the County provided for a defined level of benefits applicable throughout its term. Being an essential condition of the contract, it was subsequently breached when the Legislature mandated a reduced level of benefits prior to its expiration. That PEPRA was the result of the Legislature's action, rather than an act on the part of the County, is irrelevant under the contract clause. The *SCOPE* Court observed that tolerating a contractual impairment mandated by the state, which is not party to the agreements it purports to override, would "require us to hold that the state may compel a local entity to impair an obligation which the local entity itself would be precluded from breaching under the contract clause." (*See SCOPE,* 23 Cal.3d at 314 n. 17.) Consequently, PEPRA impermissibly impairs collective bargaining agreements to the extent those agreements, like the

one here, were negotiated to provide a specified level of benefits.

### B. Pension and Retirement Benefits are a Mandatory Subject of Bargaining; The Legislature Has Mandated Local Governments and Their Employees' Unions to Negotiate Over Such Benefits for Present and Future Employees and to Reduce the Agreement to Writing.

The trial court erred by holding that "pension rates remain in the exclusive purview of the Legislature." That may be the general rule applicable to the rights of individual employees under California's "vested rights" doctrine, a doctrine that pre-dates public sector collective bargaining in California, but the Appellant's challenge was not predicated on that doctrine. Rather, the Appellant sought to enforce the terms of its contract, which was negotiated through the give-and-take of collective bargaining under a process mandated by the Legislature.

Under the MMBA, pension and retirement benefits are a mandatory subject of bargaining.[4] This point is important: By adopting the MMBA the Legislature obligated its subdivisions to negotiate and enter into agreements over pension and retirement benefits with their employees' unions. As noted in *SCOPE*, and acknowledged in *CAPS*, the terms of a collective bargaining agreement may not be impaired absent a substantial justification that passes muster under the contract clause.

The legislative mandate to bargain over pension benefits is found not merely in the MMBA, but in retirement statutes as well. The Public Employee Retirement Law ("PERL," which governs CalPERS participation) specifically limits a local agency's ability to alter pension benefits for future employees unless the employer has engaged in collective

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[4] *Titmus Optical Co., Inc.* (1972) 205 NLRB 159; *see also Oakland Unified School District* (4/23/80) PERB Decision No. 126, 4 PERC 11072, aff'd (1981) 120 Cal.App.3d 1007; Operating *Engineers Local 3 v. City of Santa Rosa*, 36 PERC ¶ 94 (2011); *Madera Unified School District (*2007) PERB Decision No. 1907.

bargaining. (Government Code section 20475). By its terms, section 20475 allows local governments to reduce CalPERS-provided pension benefits but only for future employees and *only* if the employing entity has fully complied with the MMBA.[5] Introduced as AB 1721 in 1979, the bill amended the PERL to permit more flexibility by permitting "two-tier" pension structures. Although the statute did not initially include a provision requiring compliance with the MMBA, the bill was amended to incorporate the obligations of the MMBA. (See PORAC RJN, Exh. A). The enrolled bill summary states that "the Bill was amended on the Senate floor to subject such contract amendments to the meet and confer provision of Government Code section 3505 [of the MMBA]." (*Id.*) Thus, there can be no doubt that the Legislature intends unions to bargain over and enter into collective bargaining agreements regarding the retirement benefits provided to employees hired during their term. Such agreements are "indubitably binding," and the Legislature may not subsequently upend them.

There is no precedent that justifies the trial court's pronouncement that the Legislature may override its or its subdivisions' collective bargaining agreements merely because the subject matter involves pensions. The one court to have touched on the issue, and on which the trial court improperly relied, is *CAPS*, which indicated in *dicta* that negotiated pension benefits "may well be" protected, stating:

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[5] Gov. Code section 20475 provides: "Notwithstanding Section 20474, a contracting agency may amend its contract or previous amendments to its contract, without election among its employees, to reduce benefits, to terminate provisions that are available only by election of the agency to become subject thereto, to provide different benefits or provisions or to provide a combination of those changes with respect to service performed after the effective date of the contract amendment made pursuant to this section, if the contracting agency has fully discharged all of the obligations imposed by Chapter 10 (commencing with Section 3500) of Division 4 of Title 1 with respect to the contract amendments…"

> The foregoing authorities, however, do not speak to the situation where a collective bargaining agreement exists. When a collective bargaining agreement purports to secure pension rights for future employees, it may well be that the federal and state contract clauses protect the rights of future employees as much as the rights of existing employees. We need not decide that issue….

(*CAPS*, 137 Cal.App.4th at 383.)

Here, the essence of the trial court's analysis results in the following untenable conclusion: Although the Legislature has mandated its subdivisions to enter into contracts with their employees' unions, and has mandated that they negotiate over pension benefits and reduce such agreements to writing, the Legislature nevertheless retains the right to impair or revoke portions of the contract. In other contract-clause contexts this analysis, which results in an illusory contract, has been described by courts as "absurd."[6]

The trial court's decision that "the [collective bargaining] agreement must include language showing that the State promises not to change pension benefits for future employees" is also unsupportable. There exists no precedent to support the trial court's proposition that, for contract clause purposes, in order for a public contract to be binding, the contract must include an express relinquishment of legislative authority over the matter. (*See, e.g.* Civil Code section 1635 ["All contracts, whether public or

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[6] (*Southern California Gas Co. v. City of Santa Ana* (9th Cir. 2003) 336 F.3d 885, 893 ["We cannot read the 1938 Franchise in a way that reserves to Santa Ana the power to unilaterally alter the terms of the agreement. Such an interpretation is absurd"]; (citing *Cont'l Ill. Nat'l Bank & Trust Co. v. Washington* (9th Cir.1983) 696 F.2d 692, 698–700; *U.S. Trust Co. of New York v. New Jersey* (1977) 431 U.S. 1, 25 n. 23 ["A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity"]; see also *Energy Reserves Group, Inc. v. Kan. Power & Light Co.* (1983) 459 U.S. 400, 412 n.14 ["When a State itself enters into a contract, it cannot simply walk away from its financial obligations"].)

private, are to be interpreted by the same rules, except as otherwise provided by this Code."].) Rather, as detailed below, a *heightened* contract clause analysis applies to public contracts to which a governmental entity is a party. The trial court's decision reverses this established precedent, imposing a lesser standard that effectively renders contracts with public entities illusory.

Unlike in *CAPS*, the collective bargaining agreement here provided for specified pension levels, expressed as an annuity multiplier applicable to employees working or hired during its terms. Such terms are essential conditions of the contract. It is axiomatic that a provision providing for a specified compensation or benefit manifests an intent to be bound and does not require any additional assurances that the provision will not be breached in the future. (Civil Code section 1549 ["A contract is an agreement to do or not to do a certain thing".])

Finally, there is no reason that a different rule should apply to pension benefits than as to other forms of compensation absent a specific Legislative enactment that removed, or constrained, the subject from the state's collective bargaining mandate. Until PEPRA there had been no such enactment under the MMBA. Indeed, Prior to PEPRA, the Legislature endorsed the concept of negotiating over pension benefits, and mandated its subdivisions to do so.[7] The resulting contracts, executed in accordance

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[7] Not all state labor relations laws are as broad as the MMBA, which was adopted to afford autonomy and flexibility on the local level. For example, the Educational Employees Relations Act ("EERA") contains a "supersession" provision that removes from collective bargaining provisions covered by the Education Code. (*See* Government Code section 3540; *San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 866). Because teachers' pensions are set forth in the Education Code, e.g. Education Code section 22000 *et seq.,* negotiation over pensions is removed as a subject of bargaining between school districts and their teachers' unions. The MMBA is devoid of any

with those mandates, must necessarily receive the same respect and protection as any other public contract.

If the trial court's conclusion were adopted, any contracts negotiated pursuant to the MMBA would be meaningless, as their terms would necessarily be subject to amendment by the Legislature. Rather, it is apparent that by negotiating an agreement that provided for specified pension levels, negotiated in conformity with state law through a process mandated by state law, the specified pension benefits are a binding provision of the contract that are protected from impairment.

No waiver of Legislative authority is required for such an agreement to be binding.

### C. The Trial Court's Distinction Between Current and Future Employees is a 'Red Herring' In the Context of Collective Bargaining.

As noted above, settled precedent holds that actions of the Legislature are unconstitutional when they impair public-sector collective bargaining agreements. The trial court's distinction between "current" and "future" employees is a distinction without a difference when analyzed under state collective bargaining law. Until now, no case has held that an impairment to a collective bargaining agreement that affects only "future" employees hired during its term saves the statute under the contract clause.

It is established that the MMBA obligates unions and public employers to negotiate over benefit changes for future employees. (*e.g. Operating Engineers Local 3 v. City of Santa Rosa*, 36 PERC ¶ 94 (2011) [future employees' retirement benefits is regarded a mandatory topic of bargaining]; *Madera Unified School District* (2007) PERB Decision No. 1907 [pension benefits for future employees, e.g. second tier, is a

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"supersession" language, and explicitly assures to local governments and agencies authority over these matters. (Government Code section 3500).

mandatory subject of bargaining]; *Huntington Beach Union High School District* (2003) PERB Decision No. 1525 [no distinction between the negotiability of a proposal that fell within the scope of representation as to occupied positions (current employees) and vacant positions (future employees)].)

On this point, California labor law follows federal precedent developed under the National Labor Relations Act ("NLRA"). (*See Social Workers' Union, Local 535 v. Alameda County Welfare Dep't* (1974) 11 Cal.3d 382, 391; *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 658 (In Bank) ["Thus, because the federal precedents reflect the same interests as those underlying section 3504, they furnish reliable authority in construing that section."]) Federal precedent confirms that future employees' retirement benefits are a mandatory subject of bargaining. (*Road Sprinkler Fitters Local 669 v. NLRB* (D.C. Cir. 1986) 789 F.2d 9, 16 ["the Union has bargaining rights with respect to all mandatory subjects of bargaining for all current and future employees…." ]; *NLRB v. Laney & Duke Storage Warehouse Co.* (5th Cir. 1966) 369 F.2d 859, 866 ["a union may legitimately bargain over wages and conditions of employment which will affect employees who are [] hired in the future"]; *Houston Chapter, Associated General Contractors* (1963) 143 NLRB 409, 411-12 ["[W]e do not deem the Supreme Court to have limited [the NLRA's] definition of 'employees' to those individuals already working for the employer. Rather, the Court contemplated prospective employees as also within the definition."]; *Time-O-Matic, Inc. v. NLRB.* (7th Cir. 1959) 264 F.2d 96, 99 ["…prospective employees [] are employees for purposes of the [NLRA]."]; *Reliance Ins. Companies v. NLRB.* (8th Cir. 1969) 415 F.2d 1, 6 ["An applicant is thus treated as an employee within the meaning of [the NLRA]"]; *NLRB. v. Tom Joyce Floors, Inc.* (9th Cir. 1965) 353 F.2d 768 [accord].)

Because peace officers are prohibited from enforcing their bargaining demands through the concerted withholding of their labor, when the bargaining parties are unable to reach an agreement state law authorizes an arbitrator to determine the final terms of the agreement through a process known as "interest arbitration." This point is important, as the purpose of interest arbitration is to secure future contractual rights for both current and future employees under the eventual contract. This process was cogently described in *County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 341-42:

> [W]e pause briefly to explain the nature of interest arbitration, since the legal effect of this type of arbitration is relevant to our analysis. Interest arbitration concerns the resolution of labor disputes over the formation of a collective bargaining agreement. It differs from the more commonly understood practice of grievance arbitration because, unlike grievance arbitration, it focuses on what the terms of a new agreement should be, rather than the meaning of the terms of the old agreement. **Put another way, interest arbitration is concerned with the acquisition of future rights**, while grievance arbitration involves rights already accrued, usually under an existing collective bargaining agreement. An interest arbitrator thus does not function as a judicial officer, construing the terms of an existing contract and applying them to a particular set of facts. **Instead, the interest arbitrator's function is effectively legislative, because the arbitrator is fashioning new contractual obligations.**

(Internal cites and quotes omitted, emphasis added). Evidently, the trial court's distinction between current and future employees is irrelevant to the question of whether the Legislature has impaired a public employee union's collective bargaining agreement. Because the Legislature has mandated a duty to bargain with respect to all employees, and has authorized its subdivisions to enter into binding contracts with respect to the agreements reached, the trial court's basis for distinguishing *SCOPE* and similar holdings based on an employee's hire date is no distinction at all.

### D. PEPRA Unconstitutionally Impairs the Collective Bargaining Agreement; The Legislature is Powerless to Override the Terms of Existing Collective Bargaining Agreements.

It must be noted that the Legislature's adoption of PEPRA, which applies exclusively to its and its subdivisions' own employees, is not akin to the regulation of minimum labor standards under which the Legislature may upset private contractual relationships. (*Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 242; *Ching Young v. City and County of Honolulu* (9th Cir. 2011) 639 F.3d 907, 913-14 ["despite its seemingly absolute language, the clause does not prohibit a State from acting 'for the general good of the public.'"].) PEPRA does not apply to, nor purport to regulate, generally-applicable employment standards, or any private relationships.

Rather, a more stringent rule applies when the state seeks to impair its or its subdivisions' own contracts, referred to as "public contracts." "[I]mpairments of a state's own contracts ... face more stringent examination under the Contract Clause than would laws regulating contractual relationships between private parties." (*Allied Structural Steel,* 438 U.S. at 244, n. 15). In other words, "the Contract Clause is especially vigilant when a state takes liberties with its own obligations." (*Cayetano,* 183 F.3d at 1105). "If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." (*U.S. Trust Co,.* 431 U.S. at 25-26 (emphasis added).) It is for this reason that the trial court's adoption of a new and less-stringent standard, which requires the state to explicitly waive its right to upend an otherwise binding contract, is unsupportable.

Time and again, this stricter "public contract" standard has been applied to collective bargaining agreements entered into between public

entities and their employees' representatives. (*Glendale,*15 Cal.3d at 337-38; *SCOPE,* 23 Cal.3d at 304; *REAOC*, 52 Cal.4th at 1182; and see *Cayetano*, 183 F.3d at 1102.)

Here, PEPRA is subject to the stricter standard because it is not a generally-applicable regulation, but rather specifically applies to the pension benefits the state and its subdivisions may provide. "Where, as here, a state interferes with its own contractual obligations, we must examine the state's conduct with a higher level of scrutiny," (*Ching Young*, 639 F.3d at 913-914; *SCOPE*, 23 Cal.3d 312-13).

"An impairment of a public contract is substantial if it deprives a private party of an important right, thwarts the performance of an essential term, defeats the expectations of the parties, or alters a financial term." (*Southern California Gas Company v. City of Santa Ana* (9th Cir.2003) 336 F.3d 885, 890.) Retirement benefits are a key financial term of a collective bargaining agreement, and are a mandatory (and often primary) subject of bargaining.

A reduction in pension terms is a significant impairment because, as held by our Supreme Court, collective bargaining agreements are the sum of their parts; their various terms are "inextricably interwoven" in the give-and-take of bargaining. (*SCOPE,* 23 Cal.3d at 305 ["other provisions [of a CBA], including those relating to fringe benefits, are inextricably interwoven with those relating to wages…"].)[8] Under California law, retirement benefits are recognized as a form of compensation. (*Sweesy v.*

[8] For this reason too, the trial court's distinction between current and future employees hired during the term of the collective bargaining agreement is misplaced. The terms of the contract represent compromises on both sides in the give-and-take of bargaining, and affect all employees equally regardless of their hire date. Indeed, public employers are prohibited from negotiating individualized terms with employees who are hired into a collective bargaining unit.

*Los Angeles County Peace Officers' Retirement Bd.* (1941) 17 Cal.2d 356; *REAOC*, 52 Cal.4th at 1183.)

Lesser financial impairments than those imposed here have been found to be "substantial" under the contract clause. In *SCOPE*, as noted above, the high court applied the stringent "public contract" analysis to a state law that placed a cap on annual cost-of-living pay increases that state subdivisions could provide to their employees. The cap was below what some cities and counties had agreed to provide under MMBA-bargained agreements. A unanimous Court held that the law unconstitutionally, and substantially, impaired the collective bargaining agreements. (*SCOPE*, 23 Cal.3d at 304–305). The *SCOPE* decision is hardly singular, but fits within a line of cases rejecting as substantial impairments similar alterations to the terms of employment provided by a contract. (*Olson v. Cory* (1980) 27 Cal.3d 532 [striking down statutory limitations on judicial cost of living raises as substantial impairments]; *Olson v. Cory* (1983) 35 Cal.3d 390 [same]; *Mendly v. County of Los Angeles* (1994) 23 Cal.App.4th 1193, 1233 [pension changes substantial impairments].) The federal precedent discussed above, *Cayetano,* and *Toledo Area AFL-CIO Council,* each found the respective legislative impairments of the collective bargaining agreement to be substantial.

Rather than engage with this precedent, the trial court ignored it stating: "The Legislature alone sets the boundaries of what pension benefits may be offered to public employees" and "[t]hose boundaries cannot be altered by private agreement," citing *Oden v. Bd. of Admin'n* (1994) 23 Cal.App.4th 194, and *Barrett v. Stanislaus County Employees Retirement Assn.*, (1987) 189 Cal.App.3d 1593. This finding is both misplaced and unsupported by the precedent cited in its support.

First, the collective bargaining agreement is not a "private agreement" but a public contract duly adopted by the governing body of a

governmental entity that is a subdivision of the state. (*REAOC*, 52 Cal.4th at 1182.) Second, the collective bargaining agreement did not extend beyond or exceed the boundaries of any statutory authorization pertaining to pension benefits. Rather, when it was negotiated and executed it complied in all respects with existing pension laws. For that reason *Oden* and *Barrett* are unfitting: neither case involved a change in the law that impaired the obligations of a contract. Instead, each case involved application of existing law relating to the administration of pension benefits. In *Oden*, the court found that employer "pick-up" contributions to pension plans (where the employer pays some or all of the employee's pension contribution which, under IRS "pick-up rules," is excludable as taxable income), did not fall under the existing definition of pensionable compensation. Similarly, *Barrett* involved reclassification of employees from miscellaneous to safety status, entitling them to a more favorable pension formula, but also requiring arrears contributions for the retroactive recognition of prior years of service. The reclassification was legal, but the employees complained they should not be responsible for arrears contributions. Again, applying preexisting law, the court found that the arrears contributions were required. There was no contract clause issue in either case, they simply involved the judicial interpretation of existing law.

Respondent's reliance on *California Teachers Assn. v. Cory* (1984) 155 Cal.App.3d 494, 509 ("*Cory*") is similarly misplaced. *Cory* involved an interpretation of existing law that entitled CalSTRS participants to enforce the state's obligation to fund CalSTRS. Although the State cites the case for the proposition that the Legislature may change the terms of pension statutes, in fact the Court held: "Interpreting the contract to permit alteration at will would entirely defeat the bargain to provide some assurance that moneys will be available to fund the pension when due." (*Id.* at 509). As noted in footnote 8, above, unlike the MMBA, the EERA

specifically removes from collective bargaining matters determined under the Education Code, which includes pension benefits, and so *Cory* is of no application or use here.

California law is replete with Supreme Court decisions limiting the Legislature's power to impair CBAs and other public contracts, including contracts involving pension benefits. Consequently, PEPRA unconstitutionally impaired the parties' collective bargaining agreement.

### E. The Legislature Did Not Intend to Override Existing Labor Agreements When It Adopted PEPRA.

The trial court assumed, without discussing, that by adopting PEPRA the Legislature intended to impair existing collective bargaining agreements where such agreements provided for specified levels of pension benefits. A statute's terms are not to be construed as mandatory when doing so necessitates an unconstitutional result. Indeed, "the cardinal rule of statutory construction require[s] courts to interpret ambiguous statutes to avoid constitutional invalidity …." (*People v. Goebel* (1987) 195 Cal.App.3d 418, 424; *see also American Nat'nl. Bank v. Peacock* (1985) 165 Cal.App.3d 1206, 1212 ["statute should be judicially construed in such a manner to avoid unconstitutional results."].) As applied by the trial court, PEPRA achieves an unconstitutional result. Appropriate judicial review requires PEPRA to be construed, if feasible, in a manner that permits the statute to stand, as opposed to being rejected as unsalvageable. The Court may even reform or re-write the unconstitutional provision in order to save it. (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 660-61.)

To be sure, Section 75522.20, added by PEPRA, employs the term "shall," however this term does not unambiguously mandate the County to breach its collective bargaining agreement, nor indicate that the statute cannot be saved as applied here. As the California Supreme Court has noted, "[a]lthough the 'shall'/'may' dichotomy… is a familiar interpretive

device, it is not a fixed rule of statutory construction." (*People v. Ledesma* (1997) 16 Cal.4th 90, 95; and citing 1A Sutherland, Statutory Construction (5th ed. 1993) pp. 763-769 ["shall" can be construed as either mandatory or directory as well as denote future operation]; Evans, Statutory Interpretation (1989) pp. 237-239 ["may" can be permissive or empowering].).

Further, "it is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend." (*Id.* (citing cases).) The trial court should have presumed the Legislature did not intend to pass legislation that would be unconstitutionally applied or that would impair existing contracts. Since the Legislature is presumed to be aware of existing laws when it legislates (*In re Lance W.* (1985) 37 Cal.3d 873, 980 n.11), including *SCOPE*, the MMBA and section 20475 of the PERL, PEPRA should be interpreted to avoid an unconstitutional result that is otherwise mandated by the County's inflexible interpretation.

Under the *Kopp* rule, the Court may reform or re-write the unconstitutional provisions of PEPRA to save it. (*Kopp,* 11 Cal.4th at 660-661 ["a court may reform--i.e., 'rewrite'--a statute in order to preserve it against invalidation under the Constitution, when we can say with confidence that (i) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body, and (ii) the enacting body would have preferred the reformed construction to invalidation of the statute"].) Portions of PEPRA reflect a legislative intent to preserve existing collective bargaining agreements, and likely the Legislature would prefer the offending provisions of the statute to be effective upon a collective bargaining agreement's expiration, rather than not at all.

Nonetheless, neither the statute nor any of its legislative history

evidences an intent to impair preexisting collective bargaining agreements. An absence of language intended to preserve binding contracts is not evidence of the Legislature's intent to override them. As indicated by the legislation at issue in *SCOPE*, when the Legislature wishes to attempt an override of existing collective bargaining agreements, it knows how to do so. (*SCOPE*, 23 Cal.3d at 304-305, n. 23 [legislation declared provisions of conflicting CBAs "null and void."].) That portions of PEPRA omit language attempting to override existing collective bargaining agreements, demonstrates with equal force an intent *not* to override contractual obligations as it does an intent to unconstitutionally override them.

To be sure, PEPRA includes certain exceptions with respect to collective bargaining agreements, namely relating to its 50% normal-cost sharing provisions (Government. Code section 7522.20). This constitutional sensitivity in some portions of the statute, but not in others, should not be inferred as a legislative endorsement of constitutional impairment under the "*expressio unius…*" maxim. As stated by the California Supreme Court: "It is settled that the inference embodied in the maxim *Inclusio unius est exclusio alterius* is not to be drawn when to do so would frustrate a contrary expression of legislative will, whether found in a statute *or in the Constitution*." (*Fields v. Eu* (1976) 18 Cal.3d 322, 332 (citations omitted, emphasis added).) In addition, while PEPRA provides that the new pension levels apply "notwithstanding any other law" (section 7522.02(a)(1)), as noted by the Ninth Circuit "[w]e have repeatedly held that the phrase 'notwithstanding any other law' is not always construed literally." (*Oregon Natural Resources Council v. Thomas* (9th Cir. 1996) 92 F.3d 792, 796). Indeed, the phrase cannot be construed to override constitutional law.

The Legislature's failure to repeal or explicitly exempt section 20475 is further indication of the Legislature's intent to honor existing

collective bargaining agreements that result from the meet and confer obligations the Legislature previously imposed. As indicated in PORAC's Request for Judicial Notice, section 20475's legislative history reveals that the Legislature adopted AB 1721 to permit "two-tier" pension benefit arrangements, allowing public agencies to provide future or new hires with reduced benefits, but only if bargained under the MMBA. (PORAC RJN, Exh. A.) Since PEPRA did not specifically curtail section 20475 and the obligations it imposes, the statutes must be appropriately reconciled and harmonized.

PEPRA does not mandate over-riding or re-writing existing collective bargaining agreements, and the trial court erred in assuming it does.

### F. The Trial Court Erred by Invoking and Relying Upon the "Vested Rights" Doctrine.

The trial court below, and the Respondents here, resort to California's "vested rights" doctrine to justify what is otherwise an evident unconstitutional impairment of contract. California's "vested rights" doctrine, which has its origins in *O'Dea v. Cook* (1917) 176 Cal. 659, 661-662, and subsequently developed under *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852-853, *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131, and their progeny, holds that individual public employees obtain a vested right to earn a pension under the terms offered at the commencement of their employment. Notably, this doctrine was developed prior to the Legislature's authorization of public employee collective bargaining and prior to the enactment of the MMBA and its predecessors.[9] Moreover, the "vested rights" doctrine was intended as a shield, to protect employees from

[9] The MMBA was enacted in 1968, and represented a substantial revision and expansion of its predecessor, the George Brown Act. (*See Glendale*, 15 Cal.3d at 336 (J. Tobriner).)

changes to the pension benefits they are working toward. The trial court, however, turns the doctrine into a sword, by interpreting it not as a curtailment of Legislative authority, but as one that grants the Legislature authority to supersede all other applicable state law and the Constitution itself.

In the public pension context, there are at least two manners by which a public employer might violate the constitutional proscription against the impairment of contract, depending on the facts of a particular case. The two categories are: (1) breaching an CBA's provisions, or (2) impairing an individual employee's vested right. The Supreme Court in *REAOC* noted that collective bargaining agreements can create individually-held vested rights. However, that does not mean that the "vested rights doctrine" trumps the application of the contract clause to collective bargaining agreements when they contain provisions pertaining to pension benefits. Likewise, unions are powerless to waive individual employee's "vested rights" through the bargaining process. As stated in *San Bernardino Public Employees Assn. v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1225, vested rights may not be bargained away because they are protected by "statutory source [that] gives the employees *additional* protection or entitlement to future benefits." (emphasis added).

Impairment of an individual employee's vested pension benefits is analyzed under the "vested rights" doctrine because pension benefits are a form or deferred compensation, and the opportunity to earn them is an inducement for employment. For that reason a public sector employee has an individual, constitutionally-protected "vested right" when she commences employment under the terms of a pension statute. (*Kern,* 29 Cal.2d 848.) The constitutional protection afforded collective bargaining agreements under the contract clause is a distinct doctrine, as discussed above. It is not subsumed by the individually-held "vested rights" doctrine.

This issue is no different, and no more complex, than the interplay between collective bargaining and any other individually-held statutory or constitutional right. Unfortunately, Respondents successfully confused the issue by setting forth a misapprehension of *Claypool v. Wilson* (1992) 4 Cal.App.4th 646, which was adopted by the trial court, when it stated: "The contractual basis of a pension right is the exchange of an employee's services for the pension right offered by statute" (citing *Claypool*.) Yet neither *Claypool*, nor any other judicial decision, stands for such an exclusive proposition. This is evidenced by the fact that, until PEPRA, the Legislature did not mandate contribution rates for local employees and when it did so, via PEPRA, it specified a "standard" subject to collective bargaining and only after preexisting collective bargaining agreements had expired. Moreover, in *REAOC* the Supreme Court specifically rejected the trial court's clipped view of local authority involving retirement benefits.

The *REAOC* Court noted that the Legislature's authority to set terms of employment through statute were developed, and historically focused "on the conflict between the public employee's particular claim and the governing statute or ordinance," and the Court cautioned that "our often quoted language that 'public employment is not held by contract' has limited force where, as here, the parties are legally authorized to enter (and have in fact entered) into bilateral contracts to govern the employment relationship [under the MMBA]." (*REAOC*, 52 Cal.4th at 1181-1182.)

Simply, the question of impairment of the collective bargaining agreement is distinct from the question of a right vested in the individual, and such a right, vested in an individual, does not trump the otherwise applicable mandates to negotiate and enter into collective bargaining agreements that provide for specified levels of pension benefits during their term. Therefore *Claypool* has no place in these proceedings, as it involved a challenge by employees to legislation that re-defined their pension rights

under the preexisting statute, and did not implicate any written contract, let alone an unexpired collective bargaining agreement.

For this reason the trial court also erred when it held that pension matters "remain within the exclusive purview of the Legislature." That cannot be the case when the Legislature has specifically mandated local governments to bargain with their employees' unions over retirement benefits and to enter into contracts reflecting their agreements. To reiterate, the Supreme Court in *REAOC* specifically rejected the trial court's conclusion when "the parties are legally authorized to enter (and have in fact entered) into bilateral contracts to govern the employment relationship." (*Id.*)

Until PEPRA, the Legislature had *never* mandated a specified benefit for local government employees nor removed pensions as a subject of bargaining. Under PEPRA the Legislature has curtailed the scope of bargaining related to pensions, but to the extent this change substantially impairs existing collective bargaining agreements, it is unconstitutionally applied.

The trial court's ruling requires the conclusion that a collective bargaining agreement cannot be impaired unless an individually-ascertainable employee's rights have also been impaired under the distinct and separate "vested rights" doctrine. That holding is novel and unsupported by precedent. More importantly, it contradicts settled precedent pertaining to the law of collective bargaining and the constitutional protections afforded the contracts that result from its mandate.

### G. The Impairment of the Parties' Collective Bargaining Agreement Is Not Justified by Fiscal Necessity.

Because the trial court determined PEPRA did not impair any constitutionally-protected contractual obligations, it made no findings with respect to whether an impairment would be justified by a public emergency. The trial court did, however, note that PEPRA was intended to put the State's "fiscal house in order." Courts have long-refused to justify an impairment of public contract on a contention of fiscal emergency. (*Pasadena Police Officers' Ass'n v. City of Pasadena* (1983) 147 Cal.App.3d 695, 704 fn.3 ["Suggestions of fiscal emergency have been rejected on the particular facts of several cases.] (citing cases); *SCOPE*, 23 Cal.3d at 314, n. 17 ["As we have seen, *United States Trust Company* holds that a state cannot refuse to meet its own financial obligations because it would prefer to spend the funds to promote the public good rather than the welfare of its creditors or for what it regards as an important public purpose."])

Even though the impairment in *SCOPE* was more limited than in this case, it was predicated on the prediction of a dire fiscal crisis (as opposed to a desire to put a "fiscal house in order") and was nevertheless deemed unjustified. (*SCOPE,* 23 Cal.3d at 312-13.) Like the agency in *SCOPE*, here the Respondents cannot meet the "threshold burden of establishing an emergency existed." (*Id*. ["only on rare occasions and in extreme circumstances do rights fixed by the terms of a contract give way to a greater public need"]; *U.S. Trust Co*., 431 U.S. at 26 ["A governmental entity can always find a use for extra money, especially when taxes do not have to be raised" and "[i]f a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all."].)

Further, the Legislature failed to make any specific findings regarding the County's finances and ability to meet its contractual obligations when it adopted PEPRA. That failing is fatal: Any fiscal-necessity justification must be asserted with respect to the County's finances, and not the State's. (*SCOPE*, 23 Cal.3d at 314 n. 17 ["Acceptance of this theory would require us to hold that the state may compel a local entity to impair an obligation which the local entity itself would be precluded from breaching under the contract clause."]) The unconstitutional impairment of the Appellant's collective bargaining agreement is not justified.

## CONCLUSION

The Constitution is the genesis of all state law and policy. The issue presented here must be resolved in accordance with this paramount law, which prohibits the impairment of contracts. Collective bargaining between state subdivisions and their employees is also a stated policy goal. Indeed the state has mandated a duty on the part of its subdivisions to negotiate and enter into contracts that set the terms and conditions of employment of their employees, including pension benefits. These policies, founded on the contract clause and labor relations law are intertwined, as the state Supreme Court consistently holds that public sector collective bargaining agreements are binding and protected from impairment by the contract clause.

With the passage of PEPRA, the Legislature may have revisited this policy with respect to pensions, but it did so in a manner that impaired existing contracts. The Constitution nevertheless prevails, and for good reason: there is no sound basis to permit the impairment of collective bargaining agreements involving pensions and not other topics of bargaining over which the state has mandated its subdivisions to negotiate.

Thus, the trial court's decision, if approved, would upend these long-established fundamental principles and render all collective bargaining agreements illusory, as they would be subject to amendment by the Legislature. Accordingly, PORAC urges the Court to reverse.

Dated: July 17, 2014 Respectfully submitted,

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## CERTIFICATE OF BRIEF LENGTH

I, Teague P. Paterson, declare under penalty of perjury under the laws of the State of California that the word count for this brief, excluding Tables of Contents, Tables of Authority, Proof of Service and this Certification is 8,779 words as calculated utilizing the word count feature of the Microsoft Word software on which this document was drafted.

Dated: July 17, 2014

Signed: _____

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Caption: Deputy Sheriffs' Association of San Diego County v. County of San Diego, et al.
Filed: IN THE COURT OF APPEAL, Fourth Appellate District, Division I

I declare that I am employed in the County of San Diego, State of California. I am over the age of eighteen (18) years and not a party to this action. My business address is First Legal Network, 111 - 6th Avenue, Suite 204, San Diego, California 92101. On July 17, 2014, I served the following document(s):

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I certify (or declare) under penalty of perjury that the foregoing is true and correct. Executed on July 17, 2014, at San Diego, California.

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