

1 Gregg McLean Adam, No. 203436
2 Gonzalo C. Martinez, No. 231724
3 Amber L. West, No. 245002
4 **CARROLL, BURDICK & McDONOUGH LLP**
5 Attorneys at Law
6 44 Montgomery Street, Suite 400
7 San Francisco, CA 94104
8 Telephone: 415.989.5900
9 Facsimile: 415.989.0932
10 Email: gadam@cbmlaw.com

11 Attorneys for Plaintiff and Cross-Defendant
12 San Jose Police Officers' Association

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF SANTA CLARA

15 SAN JOSE POLICE OFFICERS'
16 ASSOCIATION,

17 Plaintiff,

18 v.

19 CITY OF SAN JOSE, BOARD OF
20 ADMINISTRATION FOR POLICE
21 AND FIRE DEPARTMENT
22 RETIREMENT PLAN OF CITY OF
23 SAN JOSE, and DOES 1-10, inclusive,

24 Defendants.

No. 1-12-CV-225926
(and Consolidated Actions
1-12-CV-225928, 1-12-CV-226570,
1-12-CV-226574, 1-12-CV-227864,
and 1-12-CV-233660)

**PLAINTIFF AND CROSS-DEFENDANT
SAN JOSE POLICE OFFICERS'
ASSOCIATION'S POST-TRIAL BRIEF**

Trial: July 22, 2013
Judge: Hon. Patricia Lucas

25 AND RELATED CROSS-COMPLAINT
26 AND CONSOLIDATED ACTIONS

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1 INTRODUCTION

2 The evidence in this case unambiguously proved that Measure B violates the
3 vested pension and other retirement rights of Police Officers represented by plaintiff San
4 Jose Police Officers' Association ("SJPOA"). Those rights cannot be legislated away by
5 Defendant City of San Jose ("City") or the voters because such rights are protected by the
6 California Constitution and the parties' collective bargaining agreement ("memorandum
7 of agreement" or "MOA").¹ Indeed, despite the City's characterization of those pension
8 rights as overly generous, its own witness testified that what it paid its employees "were
9 commonly held benefits across the State of California." (RT 521:10-13, 522:2-6.)

10 The City offered no evidence justifying its violation of these rights. Although
11 it generally offered evidence the City desired to reduce its employee costs due to the Great
12 Recession, the evidence demonstrated that the City Manager and City Council did not
13 believe that the City of San Jose's fiscal condition warranted a declaration of fiscal
14 emergency. More importantly, the City offered no evidence that the Police and Fire
15 Retirement Plan ("P&F Retirement Plan") itself is insolvent. And it offered no evidence
16 that employees received comparable advantages to offset the detriments imposed by
17 Measure B. Finally, the City's core argument that it intended to create no rights in
18 "perpetuity" rings hollow, as it has repeatedly and willingly enacted Charter sections and
19 ordinances giving Police Officers vested rights in exchange for Officers' service to the
20 City of San Jose and monetary contributions into the P&F Retirement Plan.

21 SJPOA is entitled to prevail on all its claims because decades of case law limit
22 the discretion that a government employer like the City of San Jose has over the pension
23 rights of its employees once they vest. For the same reason, SJPOA is also entitled to
24 judgment in its favor on the City's federal claims, which merely parrot SJPOA's
25 constitutional claims.

26 _____
27 ¹ SJPOA sued defendant Board of Administration for Police and Fire Department
28 Retirement Plan of the City of San Jose ("P&F Retirement Board" or "Board") solely as a
necessary and indispensable party. The Board administers the retirement plan, but has no
authority over any changes to its terms. SJPOA seeks no direct relief against the Board.

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ARGUMENT

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**I. SJPOA MET ITS BURDEN OF SHOWING THE SAN JOSE CHARTER AND SJMC
CREATED VESTED PROPERTY RIGHTS PROTECTED BY THE CALIFORNIA
CONSTITUTION, AND THAT MEASURE B UNLAWFULLY IMPAIRS THOSE RIGHTS**

The evidence at trial proved SJPOA's Contracts Clause claim because the union presented evidence of the existence of a vested right and substantial impairment by the City.

The San Jose Charter ("Charter") expressly requires the City to have a retirement system for its employees. (Ex. 701 [Charter § 1500].) It directly creates minimum pension rights, and expressly authorizes ordinances creating additional retirement rights. (*Id.* [Charter § 1504, esp. subd. (e)].) The City's authority over the retirement system is constrained by the California Constitution, which protects employees' property rights under the P&F Retirement Plan. (See *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 170 ["the charter represents the supreme law of the City, subject only to conflicting provisions in the federal and state Constitutions and to preemptive state law"].) Indeed, the California Supreme Court long ago conclusively rejected the argument that a charter city may unilaterally alter or abolish its retirement system at will. (See *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 855.)

Under settled California law,² public employee pension benefits are deferred compensation and thus a form of property protected by the California Constitution. (Cal. Const. art I, § 9 [Contracts Clause].) "A public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon

² The City invites this Court to rely on federal cases with an unduly narrow construction of California's vested rights doctrine. Those cases do not control here. California law is intentionally more protective of public employee pension rights than is federal law. The California Supreme Court has held that "*California law places earned pension rights of public officers and employees under the protection of the contract clause regardless of any characterization adopted by the federal courts.*" (*Legislature v. Eu* (1991) 54 Cal.3d 492, 534 [italics original], quoting *Lyon v. Flournoy* (1969) 271 Cal.App.2d 774, 781; *Walsh v. Board of Administration* (1992) 4 Cal.App.4th 682, 697-698 [comparing state and federal law and concluding "under California law there is a strong preference for construing governmental pension laws as creating contractual rights for the payment of benefits"].)

1 acceptance of employment. Such a pension right may not be destroyed, once vested,
2 without impairing a contractual obligation of the employing public entity.” (*Betts v.*
3 *Board of Administration* (1978) 21 Cal.3d 859, 864; *Allen v. City of Long Beach* (1955)
4 45 Cal.2d 128, 131; *Kern, supra*, 29 Cal.2d at p. 855 [an “employing governmental body
5 may not deny or impair the contingent liability [of pensions] any more than it can refuse
6 to make the salary payments which are immediately due”]); *Carman v. Alvord* (1982) 31
7 Cal.3d 318, 325; *Frank v. Board of Administration* (1976) 56 Cal.App.3d 236, 242.)
8 These rights vest in such a sense that they cannot be destroyed by charter amendment
9 even before the time for retirement has arrived. (*Kern, supra*, 29 Cal.2d at pp. 855-856.)

10 Charters and municipal codes are valid and enforceable sources of vested
11 property rights. (See *International Assn. of Firefighters v. San Diego* (1983) 34 Cal.3d
12 292, 302 (“*IAF*”) [charter, ordinances, and municipal codes]; *Retired Employees*
13 *Association of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1194
14 (“*REAOC*”) [ordinances].)

15 The Charter and SJMC sections that define the P&F Retirement Plan created
16 such vested rights. “[W]here ... services are rendered under ... a pension statute, the
17 pension provisions become a part of the contemplated compensation for those services
18 and so in a sense a part of the contract of employment itself.” (*O’Dea v. Cook* (1917) 176
19 Cal. 659, 661-662.) The right to pension benefits vests at employment, even if the
20 entitlement to benefits does not fully mature until retirement or disability. (See *Wallace v.*
21 *City of Fresno* (1954) 42 Cal.2d 180, 183-185 [rejecting as invalid amendment where “the
22 change was designed to benefit the city and ... to meet the objections of taxpayers...”].)
23 “[T]he well-recognized rule [is] that all pension laws are liberally construed to carry out
24 their beneficent policy.” (*Bellus v. City of Eureka* (1968) 69 Cal.2d 336, 345.)

25 The California Supreme Court re-affirmed these core principles in *Retired*
26 *Employees Association of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th
27 1171 (“*REAOC*”). The City insists that *REAOC* created a presumption against vested
28 rights. But even if true, that is not an onerous burden because *REAOC* held that any such

1 presumption is extinguished “when the statutory language *or* circumstances
2 accompanying its passage clearly evince a legislative intent to create private rights of a
3 contractual nature enforceable against the [government body],” citing a pension case—
4 *Valdes v. Cory* (1983) 139 Cal.App.3d 773, 786—for that formulation. (52 Cal.4th at
5 p. 1187 [emphasis added; quotations omitted].) Indeed, the Supreme Court approvingly
6 relied on another pension case, *California Teachers Assn. v. Cory* (1984) 155 Cal.App.3d
7 494, for the proposition that “a legislative intent to grant contractual rights can be implied
8 from a statute if it contains an *unambiguous element of exchange* of consideration by a
9 private party for consideration offered by the state.” (52 Cal.4th at p. 1186, emphases
10 added; *Olson v. Cory* (1980) 27 Cal.3d 532, 540 [“a public employee’s pension rights are
11 an integral element of compensation”].) This element of exchange (deferred
12 compensation in return for employee labor) is at the core of the vested rights doctrine.

13 Although pensions are deferred compensation, “pension rights fall into a
14 different category than salary rights” and “there are strict limitations on the conditions
15 which may modify the pension system in effect during employment.” (*Legislature v. Eu*
16 (1991) 54 Cal.3d 492, 529-530.) Accordingly, *the City had the burden* of showing any
17 impairment was constitutionally reasonable, i.e., the modifications “must bear some
18 material relation to the theory of a pension system and its successful operation, and
19 changes in a pension plan which result in disadvantage to employees should be
20 accompanied by comparable new advantages.” (See *Betts, supra*, 21 Cal.3d at p. 864.)

21 The evidence at trial demonstrated that Police Officers’ pension benefits in the
22 Charter and SJMC are protected property rights, and that Measure B substantially
23 infringed on those rights without justification.

24 **A. Sections 1506-A and 1507-A Violate Police Officers’ Right to City**
25 **Payment of UAAL**

26 Section 1506-A of Measure B mandates an employee salary reduction,
27 effective June 23, 2013, of 4% per year with a 16% maximum deduction to pay for up to
28 half of “any” UAAL. (Ex. 38.) Section 1507-A implements the “Voluntary Election

1 Program” (“VEP”) whereby employees retain the vested right to City payment of UAAL
2 only if they give up other valuable pension rights. (*Id.*) But this Court already correctly
3 ruled that—as a matter of law—“it is the obligation of the City to make up any unfunded
4 actuarially accrued liabilities (‘UAAL’). (MSA Order at 5:7-9.) Defendants have not
5 identified any language that imposes an obligation on employees to pay for unfunded
6 liabilities.” (*Id.*) Indeed, the facts at trial proved Police Officers have a vested right to
7 City payment of UAAL in the SJMC.

8 **1. The SJMC and Charter Established That Officers Have a**
9 **Vested Right to City Payment of UAAL**

10 The evidence is overwhelming that the City is *expressly* responsible for all
11 UAAL under the SJMC for the retirement pensions.³ *First*, consistent with the Charter,
12 SJMC 3.36.1520 (“Current service contributions”) requires an actuarially sound system
13 (i.e., a fully funded system), but it specifically exempts Police Officers from paying
14 UAAL:

15 *The retirement board shall determine and fix, and from time to time*
16 *it may change, the amount of monthly or biweekly contributions for*
17 *current service which must be required of the City of San José and*
18 *of members of this plan to make and keep this plan and the*
19 *retirement system at all times actuarially sound. For the purpose of*
20 *this section, ... “contributions for current service” for members*
21 *employed in the police department shall mean the sum of the*
22 *normal costs for each actively employed member in the police*
23 *department as determined under the entry age normal actuarial cost*
method, divided by the aggregate current compensation of such
members. Rates for current service shall not include any amount
required to make up any deficit resulting from the fact that previous
rates of contribution made by the city and members were
inadequate to fund benefits attributable to service rendered by such
members prior to the date of any change of rates, and shall not
include any amount required for payment of medical or dental
insurance benefits.

24 (Ex. 31 [SJMC 3.36.1520.A] (emphases added).) Requiring that the City maintain an
25 actuarially sound system while simultaneously exempting Police Officers from paying
26 “any deficit” in the retirement system means the City bound itself to pay for any UAAL.

27 _____
28 ³ This argument does not apply to UAAL for retiree healthcare because by its terms SJMC
3.36.1520 excludes retiree healthcare benefits.

1 **Second**, SJMC 3.36.1550 (“Contributions for prior service benefits”) makes
2 that obligation even more explicit:

3 [E]xcept as provided in Section 3.36.1555, *the City of San José*
4 *shall contribute* to the retirement fund, monthly, **all such amounts**
5 *as the retirement board shall find must be contributed to the fund, to*
6 *make this plan actuarially sound to the extent that such amounts*
are not provided by member and city’s current service contributions
as provided for in Section 3.36.1520.

7 (Ex. 31 POA005986 [SJMC 3.36.1550.D] [emphases added].)⁴ This language is
8 mandatory and expressly binds the City to pay “all such amounts” necessary to “make this
9 plan actuarially sound.” It contemplates no exception or limitation on the City’s
10 obligation to pay all UAAL.

11 While Section 3.36.1555 does contemplate that employees pay “prior service”
12 contributions that is *only* in exchange for new “increased benefits”—consistent with the
13 law on vested pension rights—and even then only in an amount that makes up for past
14 contributions that *employees* would have paid had that benefit existed previously. (*Id.* at
15 31 [SJMC 3.36.1555.A-B] [emphases added].) At trial, the unions’ actuarial expert
16 Thomas Lowman, and City witness Alex Gurza, testified that when benefits were
17 increased retroactively, employees paid the normal costs of those enhancements as prior
18 service costs. That is because a retroactive benefits increase results in accumulated costs
19 arising from the delay between the start of the improved benefits and the start of
20 employees’ payments the improved benefit. (See RT at 228:12-229:7 [Lowman
21 explaining that where benefits are enhanced retroactively this created accumulated normal
22 costs that are then amortized and paid over time]; RT 282-17 – 285:15; RT 313:03-22;
23 RT at 952:10-18 [Gurza testifying that past service costs are actually accumulated normal
24 costs].) Indeed, Section 3.36.1555 itself only applies to three specifically identified
25 increases to the formula used to calculate Ordinance No. 27721. (Ex. 31 POA005929,
26 POA005986-POA005987; Ex. 14 retirement benefits—i.e., those increases granted in

27 _____
28 ⁴ SJMC 3.36.1550.C contains a substantially similar provision making the City
responsible for UAAL generated by the plan predating the 1961 P&F Retirement Plan.

1 SJMC 3.36.805, 3.36.1020.B.3, and [Ordinance No. 27721]) The City is required to pay
2 any remaining UAAL. (See Ex. 31 [SJMC 3.36.1550].)

3 Municipal ordinances can properly “manifest[] an express intent to cover past
4 [UAAL]” and give rise to a vested right. (*Association of Blue Collar Workers v. Wills*
5 (1986) 187 Cal.App.3d 780, 789.) *Wills* found that city ordinances substantially similar to
6 SJMC 3.36.1520 and 3.36.1550 created such rights (*id. at p. 792* [“the nature of the vested
7 right has been identified”]), and held that “[t]he right vested in the employees is their
8 reasonable expectation that the city would meet its statutory obligations to finance the
9 unfunded liability for past accumulated debt.” (*Ibid.* [“The employees here lost a right to
10 have the city finance the [UAAL]”; see also fn. 2 [Fresno Municipal Code sections 2-1821
11 and 2-1822].) It thus rejected Fresno’s attempt to force employees to pay for UAAL
12 through unilateral payroll deductions because the municipal code expressly made the city
13 responsible for UAAL. (*Id. at pp. 789, 794* [“Because the pension cases treat the
14 municipal code as a contract between the parties, a violation of the code necessarily
15 becomes a violation of the contracts clause”].)

16 **Third**, SJMC 3.36.1520, 3.36.1550, and 3.36.1555 are fully consistent with the
17 Charter. (Exs. 31, 39.) Charter Section 1504(e) expressly authorizes the City Council to
18 “grant greater or additional benefits” beyond those in the Charter. (Ex. 701.) And Charter
19 Sections 1504(b)-(c) require the retirement system (and any new benefits) be actuarially
20 sound. (*Id. at POA007116.*) Read together, these two Charter provisions authorize the
21 City to grant benefits and require it to make sure such benefits are fully funded. SJMC
22 3.36.1520, 3.36.1550, and 3.36.1555 implement these requirements. (Ex. 31.) Thus,
23 while the Charter itself is silent on the allocation of UAAL, it *authorizes* the allocation of
24 all UAAL to the City in the SJMC.

25 **Fourth**, none of these SJMC sections expressly say the City reserves its rights
26 to revoke its payment of all UAAL as to current employees for changed circumstances, let
27 alone without granting employees additional benefits.

1 ***Fifth***, these express provisions are buttressed by the legislative history of the
2 pension system and the City’s own understanding of its obligation to pay all UAAL. The
3 requirement the SJMC now imposes has existed in various forms since at least 1946; that
4 is, the pension system not only ***currently*** requires the City pay all UAAL but has done so
5 ***historically***.

6 **The 1946 Charter amendments expressly allocated UAAL to the City,**
7 much like the current SJMC. These amendments added Charter Section 78a, sub. (2)(k),
8 which required an actuarially sound system and expressly stated that “[a]ny *actuarial*
9 *deficiency* in the fund *shall* be made up over a period of years by gifts, waivers, donations,
10 earnings and contributions *by the City.*” (Ex. 1 at POA005584 [1946 Charter
11 Amendment] (emphasis added).)

12 **The 1961 Charter amendments retained this requirement, but permitted**
13 **the City to require contributions from members *only* for UAAL generated by**
14 **increased benefits.** These amendments left Charter Section 78-A untouched, but added
15 Section 78b which authorized the Council to grant new benefits beyond those in the
16 Charter. Section 78b, subd. (2) required that such new benefits or plans be actuarially
17 sound, and it gave the Council discretion to decide how UAAL for such *new* benefits was
18 to be paid: “the Council . . . may in its discretion provide for the payment by the City of
19 San Jose of all such amounts as must be contributed to the retirement fund on account of
20 such prior service benefits to render the plan and fund actuarially sound . . . , or may
21 require contributions for such purposes by both City and members provided that
22 contributions required of members . . . shall never exceed \$3 for each \$8 contributed . . .
23 by the City.” (Ex. 2 pp. POA005619-POA005620 [1961 Charter Amendments].) Thus,
24 employees paid UAAL *only* in exchange for increased benefits that are applied to prior
25 service.

26 **The 1965 Charter also required an actuarially sound system, but was**
27 **silent on UAAL allocation, thereby authorizing the City Council to allocate UAAL**
28 **by ordinance.** The 1965 Charter added Section 1504(c)—which is still the version in

1 effect today. (Ex. 701.) That Charter section required an actuarially sound system, but
2 apparently gave the Council discretion to allocate UAAL. Accordingly, from 1965 to
3 1971 the Retirement Board used an actuarial method that defined “current contributions”
4 to include UAAL generated by the P&F Retirement Plan such that employees and the City
5 paid UAAL during that time period. However, in 1971 the City Council enacted a
6 resolution declaring the Council’s intent to amend the P&F Retirement Plan so that only
7 the City paid UAAL; it also changed the actuarial method employed to reduce volatility in
8 contribution rates. (See Ex. 3 [Resolution 40129 (“the new rates thereby established by
9 the Board for all such members shall not include any amount required to make up any
10 deficit resulting from the fact that previous rates of contribution thereto . . . were
11 inadequate”)].)

12 The Council formally amended the Retirement Plan in 1979 through Ordinance
13 19690, which enacted the immediate precursors to SJMC 3.36.1520 and 3.36.1550 where
14 the City expressly bound itself to pay for all UAAL. (Ex. 4 at 2-3 [Ordinance 19690].)
15 All current Police Officers were hired after Ordinance 19690 was enacted in 1979 which
16 gives rise to the vested right to City payment of UAAL asserted here. (Ex. 33 ¶ 13)
17 These facts make clear that except for a brief period before all current Police Officers
18 were hired, employees have had a vested right to City payment of all UAAL.

19 The City gives no cognizable reason why the SJMC cannot itself create that
20 vested right. Indeed, the City understood its obligation to pay all UAAL and used it to
21 justify its allocation of all actuarial gains to itself when the P&F Retirement Plan was
22 overfunded in 1993-2004. (See Ex. 22 [Kaldor Memo]; RT 526:27-527:9 [Erickson
23 admitting City reduced its own contributions when plan overfunded].) It did so consistent
24 with a theory that because it was required to pay all UAAL it was accordingly entitled to
25 take all gains. That underfunding directly contributed to the present UAAL that the City
26 is now trying force employees to pay.

1 **a. The City’s Counter Arguments Are Meritless**

2 The City argues that SJPOA cannot prevail because it cannot “prove that the
3 City gave up all legislative control over employee pension contribution rates.” (City Tr.
4 Br. 16:14-15 [capitalization omitted].) But the City has no control over employee pension
5 contribution rates—it delegated that to the P&F Retirement Board. (See Ex. 31, SJMC
6 3.36.1520, 3.36.1550; see also SJMC 3.36.510 [“The retirement board shall have the
7 exclusive control of the administration and investment of the retirement fund”].) More to
8 the point, the City seems to be arguing that it has control over how to apportion UAAL.
9 But, while that may be true as to future employees who have no vested rights, it is not true
10 for active Police Officers who do have vested rights under the Charter and SJMC.

11 **b. Police Officers Have Not “Waived” This Right**

12 The City has no persuasive evidence that Police Officers “waived” their vested
13 rights to City payment of UAAL in their one-time agreement to pay increased pension
14 contributions in Article 5.1 of the 2010-2011 MOA. (Ex. 5470 [Gurza000551].) By way
15 of analogy, the City is essentially arguing that because Police Officers agreed on one
16 occasion to help the City, and because the City also chose to use that help to cover its
17 “mortgage” payments for a year (i.e., UAAL), Officers suddenly became co-signers on the
18 entire UAAL obligation even though Officers *never paid*—even on that one-time basis—
19 any UAAL. The City’s argument makes no practical sense and has no support in the
20 actual agreement between SJPOA and the City.

21 As the party claiming waiver, the City failed to meet its high burden. (See
22 *Choate v. Celite Corp.* (2013) 215 Cal.App.4th 1460, 1466 [employer claiming waiver
23 failed to show a clear and unambiguous waiver has occurred]; *Phillips v. State Personnel*
24 *Bd.* (1986) 184 Cal.App.3d 651, 660 [public employee’s constitutional right to due
25 process could not be waived by the collective bargaining agreement], disapproved on
26 other grounds in *Coleman v. Department of Personnel Admin.* (1991) 52 Cal.3d 1102,
27 1123, fn. 8.) This standard is particularly high in the area of public employment, where
28 *any* ambiguities arising in determination of waiver *must* be construed in the favor of the

1 public employee. (*Choate*, 215 Cal.App.4th at p. 1466, citing *Kirby v. Immoos Fire*
2 *Protection, Inc.* (2012) 53 Cal.4th 1244, 1250.)

3 There was no knowing or actual waiver, and the City fails to cite a *single fact*
4 to meet its burden of showing clear and unmistakable waiver. Indeed, Gurza testified that
5 during the negotiations no party “raise[d] the issue that additional contributions ... would
6 somehow violate a vested right.” (RT 733:8-14.)

7 More fundamentally, the bargaining process could never eviscerate the vested
8 rights at issue because “a collective bargaining unit may not bargain away individual
9 statutory or constitutional rights which flow from sources outside the collective
10 bargaining agreement itself.” (*San Bernardino Public Employees Assn. v. City of Fontana*
11 (1998) 67 Cal.App.4th 1215, 1225 [vested rights may not be bargained away because they
12 are protected by a “statutory source [that] gives the employees additional protection or
13 entitlement to future benefits”].) Officers’ vested rights to City payment of UAAL flow
14 from SJMC 3.36.1520, 3.36.1550, and 3.36.1555 and are thus *not* subject to collective
15 bargaining.

16 The City’s opaque argument that no vested right exists because “the City and
17 its employee unions both considered employee contribution rates to be elements of
18 employee compensation, subject to bargaining” (City Tr. Br. 17:23-24) is flatly incorrect.
19 The City appears to be arguing that *other* unions treated employee pay and pension
20 contribution rates as negotiable, but offered no evidence SJPOA did so.

21 The evidence clearly demonstrated that Police Officers did *not* pay any UAAL
22 through Article 5.1 and that their additional contributions were paid directly to their
23 individual retirement accounts. (Ex. 5470 [Gurza 000551].) The MOA provided that
24 Police Officers’ increased pension contributions were credited to their individual
25 retirement accounts, not to general UAAL. (*Id.*; Ex. 33 Robb Decl. ¶¶16-20 and Exhibit F
26 thereto; Ex. 25 at POA005857.) Had their contributions directly paid for UAAL as the
27 City claims, Police Officers simply would not have the right to make their contributions
28 “on a pre-tax basis” and “subject to withdrawal, return and redeposit.” (*Id.*; RT 825

1 [Gurza testifying Officers departing from service in fact withdrew contributions –
2 including the one-time additional contributions].)

3 The City has never persuasively explained how MOA Article 5.1 means no
4 vested rights exist. Nothing in the parties’ contract stated that Police Officers directly
5 paid UAAL or that Officers waived the vested rights in SJMC sections 3.36.1550 and
6 3.36.1520—which remained in effect during the period in question. Instead, Article 5.1
7 merely provided that Police Officers were paying “One-Time Additional Retirement
8 Contributions” of 5.25% of their pay from June 2010 through June 2011. (Ex. 5470
9 [Gurza 000551]; Ex. 21 [2011-2013 MOA: subsequent MOA deleting the preceding
10 MOA’s provision under Article 5.1 for increased contributions]; RT 783-784, 824 [Gurza
11 acknowledging agreement was “one-time” and subsequent MOA did not include same
12 provision].) Unlike some of the other unions, SJPOA did *not* agree its members would
13 make any on-going contributions.

14 *The parties’ contract expressly reflects that the underlying UAAL obligation*
15 *still belongs to the City.* The MOA expressly stated that “the amounts so contributed will
16 be applied to reduce the contributions that *the City* would otherwise be *required* to make
17 for [UAAL]” and that “the intent of this additional ... contribution ... is to reduce the
18 *City’s required* pension contribution rate.” (*Ibid.* [italics added].) Such contributions
19 undoubtedly allowed the City to reduce its payments toward UAAL, but that does not
20 mean employees themselves directly paid UAAL or waived their vested rights.

21 Alex Gurza’s trial testimony regarding certain pre-MOA bargaining letters that
22 appear to adopt the City’s characterization of these contributions as “an additional
23 member contribution to prior service retirement costs” does not change the result. (RT
24 722-725; Def. Ex. 5411.) Parol evidence cannot contradict the terms of the MOA. (*Casa*
25 *Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 343 [extrinsic evidence may not be relied
26 upon to alter or add to the terms of a contract].) Regardless, those documents reflect that
27 the parties were negotiating the specific contract terms they eventually settled on, i.e.,
28 those outlined above, which left vested rights untouched. More to the point, when directly

1 asked on cross-examination whether SJPOA agreed to assume the City's obligation to pay
2 UAAL, Gurza could only testify that "employees are making payment that the City would
3 otherwise be required to make" (RT 887:5-12), which parroted the language of the MOA.
4 In other words, there was no such agreement.

5 *San Diego Police Officers Assn. v. San Diego City Employees' Retirement*
6 *System* (9th Cir. 2009) 568 F.3d 725 does not help the City. Plaintiffs there claimed a
7 vested right to the city's "pickup" of a portion of police officers' retirement contributions
8 that was purportedly created by the city charter, municipal code, and the parties' MOA.
9 The court held a prior settlement barred plaintiffs' claims based on the charter and
10 municipal code. (*Id.* at pp. 735-736.) It further held the MOA was not a source of vested
11 rights because it had *expired*. (*Id.* at pp. 738-39.) These holdings do not apply here. The
12 City does not "pickup" any employee UAAL contributions because the City bound itself
13 to pay for all UAAL. There is no settlement barring this Court from examining the
14 municipal laws giving rise to that vested right, and Police Officers do not here claim a
15 vested right arising from an expired MOA. More fundamentally, the *San Diego* court's
16 finding that the "**historical** practice of negotiating the amount of pickup . . . in lieu of or
17 in conjunction with salary increases" in prior MOAs confirmed that the pickup was "a
18 compensation term, not a [vested] retirement benefit" (*id.* at p. 739 [emphasis in original])
19 also does not apply. The City presented no evidence of an analogous "historical practice"
20 here and Mr. Gurza testified that the agreement was "one-time" only and that the
21 subsequent MOA did not include the same agreement. (See RT 783-784, 824.) The
22 evidence is clear that by its terms Article 5.1 was a "one-time" agreement. (Ex 5470
23 [GURZA000551].)

24 Finally, the City has relied on other SJMC sections purportedly allowing it to
25 saddle Police Officers with UAAL. First, it relies on SJMC 3.36.1525, of which sub. (B)
26 provides that "members . . . shall make such additional retirement contributions for fiscal
27 years 2010-2011 as may be required by executed agreement with a recognized bargaining
28 unit or binding order of arbitration." But that section was added to validate what the

1 parties mutually agreed to for one year in the MOA outlined above, which was a bilateral
2 agreement.⁵ More fundamentally, neither the MOA nor SJMC 3.36.1525 expressly state
3 that employees directly pay any UAAL.⁶ And SJPOA did not need to object to the
4 enactment of that ordinance. *Board of Administration v. Wilson* (1997) 52 Cal.App.4th
5 1109, 1152 flatly rejected the argument that acquiescence to “past legislation—which had
6 limited scope and duration” means that a party “thereby agreed to any and all future
7 modifications” such as Measure B.

8 During the City’s cross-examination of Thomas Lowman, plaintiffs’ actuarial
9 expert, the City sought to establish that in the past employees have paid “prior service
10 costs” which the City conflated with UAAL. (E.g., RT 282-283, 285:9-15, 312:3-19.)
11 The City believes that this is evidence that no vested right exists. It is not for the reasons
12 outlined above. Payment of prior service credit or UAAL *in exchange* for increased
13 pension benefits (i.e., a “new advantage”) simply does not implicate vested rights or
14 violate the Contracts Clause. That is because the detriment of paying “UAAL” is offset
15 by the new or increased benefit received. Moreover, as Mr. Lowman testified, when a
16 benefit increase is made retroactive, employees’ payment of “prior service credit” is in
17 reality employees’ payment of what their normal costs would have been. (RT 228:12-
18 230:4, 313:3-22; see also RT 952:10-18 [Gurza admitting same]; . see also Ex. 19 at
19 POA005671, Ex. 23 POA002816 [City documents admitting same].)

20 **2. Section 1507-A Is Unlawful Because It Violates Vested**
21 **Rights and/or Contractual Rights**

22 The City argues that SJPOA’s challenge to the VEP repeats “plaintiffs’
23 challenge to Sections 1506-A and 1514-A.” (City Tr. Br. 21:28.) That is incorrect. It is
24

25 _____
26 ⁵ By its terms, SJMC 3.36.1525.A—a parallel section that does not limit such increases to
2010-2011—does not apply to Police Officers. Police Officers are subject to interest
arbitration.

27 ⁶ The City’s argument that the statute of limitations on SJMC 3.36.1525 has run (City Tr.
28 Br. at 17:16-22) has no import here. SJPOA does not challenge that ordinance, nor was
Measure B enacted pursuant to it.

1 true that if Section 1506-A is unlawful because it violates vested rights, Section 1507-A
2 would also be unlawful because it forces employees to give up pension rights. But the
3 VEP may be unlawful even if Section 1506-A is not. For example, if the Court finds that
4 Section 1506-A is lawful, Officers wishing to enroll in VEP so as not to pay UAAL would
5 not be able to because VEP requires prior IRS approval. The City acknowledged at trial
6 that it was unlikely to receive such approval in the near future. (See RT 25:28 – 26:14.)
7 That is problematic because Section 1506-A(c) mandates that Measure B’s salary
8 reductions to pay for UAAL “shall” be effective regardless of IRS approval and regardless
9 of whether the City Council has implemented the VEP. But the City is obligated *by the*
10 *MOA* to maintain contractual salaries. (See Part II.A, *infra.*)

11 * * *

12 The City gave Police Officers no comparable new advantage in exchange for
13 saddling them with UAAL or for forcing them into the VEP. The City asserted at trial
14 that increased retirement contributions are “more beneficial” to employees than a straight
15 wage cut (City’s Tr. Brief at 18, fn. 15) and thus are a comparable new advantage.

16 But California courts define a comparable new advantage as that which *offsets*
17 the withdrawal of a vested benefit by *assigning another, comparable vested benefit the*
18 *employees do not already possess.* (See *Eu, supra*, 54 Cal.3d at pp. 529-530.) During
19 trial the City failed to proffer any authority for its argument that giving employees the less
20 disadvantageous of two unlawful changes meets this standard. (See RT 24:6-25:27.) That
21 makes sense because under the City’s theory employees get *nothing* in exchange for the
22 loss of their right to City payment of pension UAAL; in other words, the fact that
23 increased UAAL contributions are paid by increased contributions, rather than by a wage
24 cut, is not a comparable new advantage because employees did not pay UAAL previously
25 and they received nothing in exchange for being saddled with this new obligation.

26 **B. Section 1509-A Eviscerates the Disability Retirement Benefit**

27 The evidence at trial demonstrated that Charter section 1504 and SJMC
28 3.36.900 create Police Officers’ vested right to disability retirement and specifically

1 define “disabled” or “disability” as an Officer’s inability to perform work within Police
2 Officer classifications. (Exs. 31, 39; see also Ex. 32.) SJMC 3.36.900 authorizes the P&F
3 Retirement Board to determine whether an injured officer is disabled, in consultation with
4 “competent medical opinion.” Measure B imposes a number of detrimental changes: (1)
5 disability is assessed with reference to inability to “perform any other jobs . . . *in the*
6 *employee’s department,*” including non-police officer classifications (Ex. 38 [Measure B
7 § 1509-A(b)(ii)(2)] [emphases added]); (2) officers must also be “incapable of engaging in
8 *any* gainful employment for the City” [emphasis added], presumably meaning an officer
9 is not disabled if he or she can perform any position with the City outside the police
10 department (*id.* [1509-A(a)]); (3) a disability retirement assessment is made even if there
11 are no vacancies into which an injured officer can be placed (*id.*); and (4) Measure B
12 divests the P&F Retirement Board from deciding whether an officer is disabled, giving
13 that authority to a medical panel selected solely by the City. (*Id.* [subd. (c)].)

14 The City argues that Measure B “restricts the parties to their reasonable
15 expectations” because it “changes only the definition for eligibility . . . to restore the
16 original purpose of disability retirements.” (City Tr. Br. at 24:7-12.) But contract
17 expectations are measured from the time of contracting, not in hindsight. (*Kashmiri v.*
18 *Regents of University of California* (2007) 156 Cal.App.4th 809, 832 [“we look to the
19 reasonable expectation of the parties at the time of contract”].) More importantly, the City
20 presented no supporting evidence. Ms. Erickson’s testimony on disability retirement only
21 went to the *City’s* unilateral intent to “reform” the disability retirement system—which is
22 itself irrelevant as to the existence of vested rights. Indeed, she said nothing about
23 *employees’* reasonable expectations.

24 Under the vested rights doctrine, Police Officers’ reasonable expectation was
25 to continue under the disability retirement system in place when they were hired. In
26 *Frank v. Board of Administration*, a correctional employee was excluded from the
27 disability retirement system that existed when he was hired because the Legislature
28 amended various statutes and reclassified his position as a non-law enforcement

1 classification before he retired. (56 Cal.App.3d at pp. 238-240.) The court of appeal held
2 the employee had a vested right to continue in the same retirement system he was hired
3 into because his “reasonable expectations were thwarted” by the subsequent amendment.
4 (*Id.* at pp. 241-243, 245.) Contrary to the City’s argument, the reasoning in *Frank* was
5 motivated not solely by the decrease in Mr. Frank’s pension, but also by the statutory
6 change in eligibility. (See *id.*; see also *Newman v. City of Oakland Retirement Board*
7 (1978) 80 Cal.App.3d 450, 453 [refusing to apply recent amendment because “[i]t was
8 th[e] long established policy . . . that was intended to and did become a part of appellant’s
9 pension contract”].)

10 The City also contends it offered “countervailing advantages”: (1) a decrease
11 in the duration of disability from “permanent” or age 55 to “at least one year,” and (2) the
12 “potential” of long-term disability insurance. (City Tr. Br. at 23:22-26.) But even if true,
13 the City failed to meet its two-prong burden because it failed to show these changes were
14 necessary to keep the pension system solvent. In any event, the law does not accept just
15 any purported “advantage”—it must be a “comparable new advantage.” The meager
16 “advantages” the City proposes are neither comparable to nor do they adequately
17 compensate employees for the substantial impairment Measure B imposes. For example,
18 redefining disability from “permanent” to “one year” does not justify forcing Police
19 Officers to work in non-sworn positions inside or outside the police department,
20 especially when there are no such positions available. Moreover, that “advantage” is
21 meaningless to an Officer who is or is near 55 years old. Finally, the promise of *potential*
22 for “matching funds” to pay for disability insurance for injured officers who do not
23 qualify as disabled is not a comparable new advantage because employees will have to
24 pay out-of-pocket premiums (which disabled officers do not currently do), the level of
25 benefits will not be the same, and finally because City payment is wholly discretionary.
26 (*Teachers Retirement Bd. v. Genest* (2007) 154 Cal.App.4th 1012, 1037 [“[t]he
27 replacement of an express obligation to pay a fixed sum of money with a promise to pay
28 the sum if you prove you need it . . . is not a comparable new advantage”].)

1 Finally, the City also promised to show a “package of policies” at trial
2 justifying Section 1509-A, and warned this Court “not to interfere with the legislative
3 process before it plays out.” (City Tr. Br. at 24:1-5.) But the legislative process was
4 completed when Measure B was enacted, and more importantly the comparable new
5 advantage must be contemporaneous with the disadvantage. As *Genest* demonstrated, the
6 promise of a future benefit will not do.

7 **C. Section 1510-A Violates Police Officers’ Vested Right to COLA**
8 **Benefits By Authorizing Unilateral Forfeiture**

9 The evidence established that SJMC 3.44.150 obligates the City to pay retired
10 Police Officers’ an annual 3% cost of living adjustment (“COLA”) to pension benefits.
11 That section provides, in relevant part: “[e]ach retirement allowance . . . payable under
12 [the P&F Retirement Plan] . . . together with any increases or decreases . . . shall be
13 increased by three percent per annum . . .” (Ex. 40, italics added.) That section
14 contemplates no exception. Countless City recruiting and retirement benefits documents
15 promised that benefit to Police Officers. (E.g., Exs. 11, 13.⁷) And, indeed, Police
16 Officers directly pay distinct amounts into the retirement system solely for purposes of
17 funding the COLA. (Ex. 40; SJMC 3.44.090; RT 353:20-24, 491:15-22.) COLA benefits
18 are recognized vested pension rights. (*Olson v. Cory* (1980) 27 Cal.3d 532, 538-542
19 [invalidating ballot initiative purporting to divest current and retired judges of COLA
20 benefits because their rights were impaired without providing any comparable new
21 advantages]; *Pasadena Police Officers’ Association v. City of Pasadena* (1983) 147
22 Cal.App.3d 695, 702-703 [similar as to police officers].)

23 Section 1510-A, however, gives the City the unfettered right to deny COLAs.
24 (Ex. 38.) First, upon a mere unilateral declaration of “fiscal and service level emergency”
25

26 ⁷ Exhibit 11, the City’s 2002 recruiting flyer to attract Police Officer candidates, states:
27 “Retirement options begin with 20 years of service and age 55 for 50% of salary. Regular
28 retirement is 25 years of service and age 50 for 65% of salary. 30 years of service
provides an 85% retirement with a guaranteed cost of living raise of 3% every year after
retirement for all plans.”

1 by the City Council, the City may “temporarily suspend[.]” COLAs to retirees (defined as
2 “current and future retirees employed as of the effective date of this Act”) for up to five
3 years. (*Id.*) Measure B does not define a “fiscal and service level emergency” or even
4 require that the City Council’s suspension of COLAs be “reasonable” under the
5 circumstances or reasonably related to a declared emergency. (*Id.*) It does not even
6 require that the time period during which COLAs are suspended have any nexus to the
7 declared emergency. (*Id.*) Second, any “temporarily suspended” COLA increases are
8 automatically forfeited because Measure B directs that COLAs “shall” only be restored
9 “prospectively” and even then only “in whole or in part.” (*Id.*) Measure B provides no
10 way for retirees to obtain past COLAs to which they are entitled. (See *id.*) Nor does it
11 provide a comparable advantage for the loss of this protected right. Third, Section 1510-
12 A caps “restore[d]” COLA increases at 3% for current retirees and non-VEP employees,
13 and 1.5% for VEP employees without addressing officers’ entitlement to *past* COLAs.
14 (*Id.*) Thus, Measure B substantially impairs Police Officers’ vested pension rights in
15 COLAs.

16 The City argues this claim is unripe because “the legality of the city’s actions
17 cannot be determined until the City adopts an emergency resolution.” (City Tr. Br. at
18 25:4-5.) That is incorrect because SJPOA’s challenge is facial and, in any event, *as a*
19 *matter of law* the mere declaration of an emergency is insufficient to withhold COLAs
20 under *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23
21 Cal.3d 296. That is because when “government is attempting to modify governmental
22 financial obligations” the City’s actions are subjected to heightened scrutiny in light of the
23 availability of less drastic measures. (*Id.* at p. 310.) Thus, even if the City declares a
24 fiscal crisis, it must *further* demonstrate that suspending and eliminating COLA benefits is
25 “a reasonable [and necessary] measure” directed at resolving that crisis. (*Id.* at p. 312).
26 Measure B has no such requirements and is thus invalid on its face.

1 **D. Section 1511-A Violates Police Officers' Vested Rights By**
2 **Eliminating the SRBR⁸**

3 This Court previously ruled that, as a matter of law, “the plain language of the
4 [SJMC] makes [SRBR] distributions mandatory” for the P&F Retirement Plan and thus
5 they are a vested right. (MSA Order at 6:15-16; Ex. 31 [SJMC 3.36.580, subd. D.2 (“the
6 board *shall* make an annual distribution from the annual SRBR”) (emphases added)].) It
7 further ruled that “[i]f there was an intent that SRBR cease distributions in the face of
8 unfunded liability, it is not apparent from the face of the Charter or the [SJMC]”.) (MSA
9 Order at 6:23-25.) The City presented nothing at trial that requires this Court to revisit its
10 prior ruling.

11 Indeed, SJMC 3.36.580 created Police Officers' vested right to the SRBR,
12 which provides retirees a supplemental check when certain investment goals are exceeded.
13 Section 3.36.580 establishes a funding mechanism (Ex. 31 [SJMC 3.36.580 at subd. B]),
14 sets the only conditions for distribution or transfer of SRBR funds (*id.* at subd. C-D) and
15 mandates that the *Retirement Board* “**shall**” distribute funds to eligible retirees on a
16 yearly basis when those investment goals are exceeded (*id.*, subd. D.2 [“the *board* shall
17 make an annual distribution from the annual SRBR”] [emphases added].) Specifically,
18 SRBR benefits are funded from earnings from the SRBR fund and “excess earnings” from
19 the P&F Retirement Plan. (*Id.* [SJMC 3.36.580.B].) The SRBR applies only to members
20 who were receiving retirement benefits as of June 2001. (*Id.* at subd. D.3.) There is no
21 time limitation or express reservation of rights to modify the SRBR in the SJMC. (*Id.*
22 [SJMC 3.36.580, subd. E.1 and B.2-B.3].) The SRBR is unequivocally a vested right.
23 (*Id.* [SJMC 3.36.580]; see *Genest*, 154 Cal.App.4th at 1029-1030 [statute created vested
24 right to continuous annual transfer from general fund to supplemental fund].)

25 The City does not explain what circumstances or context here makes “shall”
26 not mandatory. (Ex. 31, SJMC 3.36.580 at subd. D.2 & D.5.) The P&F Retirement Plan

27 _____
28 ⁸ SJPOA did not assert Section 1511-A violated the Pension Protection Act, nor does it
seek damages for suspension of the SRBR.

1 does not grant the City Council the same authority over whether to grant SRBR benefits
2 as it has in the Federated Plan. That is, unlike *Ventura County*, there is no “discretionary
3 language” whereby the Council “may authorize payment of all, or such portion as it may
4 elect” of the SRBR. (228 Cal.App.3d (1991) 1594, 1598-1599.) Rather, SJMC 3.36.580,
5 subd. D.2 & D.5 mandate that the administrative body—the Retirement Board—“shall”
6 make the SRBR distributions of available funds. Despite this vested right, Section 1511-
7 A unilaterally abolished the SRBR. (Exs. 38 and 42 [ordinances abolishing SRBR].)

8 The City also rehashes its argument that SJMC 3.36.580.D.5 (ex. 31) gives it
9 discretion over the SRBR such that it did not suspend legislative control thereby
10 “preventing the creation of a vested property right.” (City Tr. Br. at 27:25-27.) But that
11 discretion—approval of the Retirement Board’s proposed methodology for SRBR
12 distributions—is limited because once approved the SJMC directs that it is *the Board* and
13 not the City that distributes SRBR funds: “Upon approval of the methodology by the city
14 council, the board shall make distributions in accordance with such methodology.” (See
15 subd. D.5.) The City already approved that methodology in 2002 and exercised the
16 limited discretion it had over the SRBR. (Ex. 5705 [Resolution 70822].) The City
17 Council’s limited power merely to approve the Board’s distribution “methodology” does
18 not mean it has the greater power to decide whether to distribute funds.

19 *Doyle v. City of Medford* (9th Cir. 2010) 606 F.3d 667 does not support the
20 City and actually supports SJPOA. *Doyle* involved an “unusual” statute because it did
21 “not contain a particularized standard[] because the nature and extent of the entitlement ...
22 are too indeterminate, and because it allows ... extensive functional discretion regarding
23 *whether* and to what extent” the benefit at issue will be offered. (*Id.* at p. 672.) By
24 contrast, the court noted that whether a statute creates a property interest depends on the
25 existence of “mandatory language that restricts the discretion of the decisionmaker.” (*Id.*
26 at p. 673.) The statute in *Doyle* is wholly unlike SJMC 3.36.580 because once the City
27 exercised its discretion under subsection D.5 it does not grant the City Council any more
28 discretion over SRBR distributions. SJMC 3.36.580 clearly restricts the City’s (and even

1 the P&F Board's) discretion over making SRBR distributions because it has mandatory
2 language specifying when and the circumstances under which a distribution is to be made.

3 Thus, regardless of Gurza's opinion that SRBR distributions "were irregular
4 and undetermined" (RT 776:20), SJMC 3.36.580 clearly sets forth the standard when
5 SRBR distributions are made. (Ex. 31.) SJPOA is not asserting a right to an SRBR
6 benefit of a particular amount, but rather only that its members are entitled upon
7 retirement to an SRBR benefit in accordance with SJMC 3.36.580's standards. (See *id.*)
8 The fact that SRBR distributions are made when certain investment goals are met does not
9 defeat the existence of a vested right. (See *Doyle, supra*, 606 F.3d at p. 673 ["A factual
10 contingency does not ... preclude the creation of a protected property interest.... [A]
11 statute may create a property interest if it mandates a benefit when specific non-
12 discretionary factual criteria are met."].)

13 The City's principal defense at trial for Section 1511-A is that it "remedies the
14 unintended consequences of [making] supplemental payments when the plan is not fully
15 funded." (City Tr. Br. at 28:14-15.) But at most the testimony of the City's witnesses
16 (Erickson, Figone, Gurza, and Bartel) would support *amending* the SRBR plan rather than
17 abolishing it entirely. Nothing at trial proved that Police Officers have no vested rights in
18 the SRBR. Moreover, Mr. Lowman testified that the plan's actuaries were aware that the
19 SRBR had "costs" even though it was funded from excess earnings, and that the SRBR
20 design did not violate any actuarial standards. (See RT 245:23-246:1, 297:15-26.)

21 At trial, Gurza also testified regarding the City's prior suspension of SRBR
22 payments. (See RT 765:28-768:15). But this is irrelevant. The City's amendments to
23 SJMC 3.36.580, subd. D.2, such that there were no SRBR distributions in 2010-2013, has
24 no bearing on whether SRBR created vested rights. Rather, it is merely evidence the City
25 *violated* current retirees' vested rights. (See *California Teachers Assn. v. Cory, supra*,
26 155 Cal.App.3d at p. 506 ["This is a circular argument; it uses evidence of a violation of a
27 contract to show there was no contract"].) That SJPOA and its retirees did not challenge
28

1 the City withholding of SRBR benefits does not mean they acquiesced in the City's
2 outright abolition of the SRBR. (See *Wilson, supra*, 52 Cal.App.4th at p. 1152.)

3 Rather than being an “unintended consequence” (City Tr. Br. at 28:15), the
4 City itself enacted the SRBR in the manner the City now objects to, Police Officers
5 labored under that pension statute, and the courts do not step in to rewrite such statutes.
6 (Cf. *In re Retirement Cases* (2003) 110 Cal.App.4th 426, 475.) If the City wanted to limit
7 SRBR distributions to years when the entire retirement system had no UAAL it could
8 have structured SRBR to do just that. But the City did not, which means the City never
9 required absence of UAAL before retirees’ could receive SRBR distributions. The City
10 itself enacted and approved the SRBR plan in its current form—as opposed to allowing
11 such distributions only when the entire retirement plan had no UAAL. (See Ex. 31
12 [SJMC 3.36.580].)

13 The City’s tortured reading of *Allen v. Board of Administration* (1983) 34
14 Cal.3d 114 (City Tr. Br. at 28:26-27:9) cannot escape that case’s central holding that
15 while the law authorizes “restrict[ing] a party to the gains reasonably to be expected from
16 the contract” it does “not permit[] a construction which permits contract repudiation or
17 destruction.” (*Id.* at p. 120; accord *Walsh, supra*, 4 Cal.App.4th at p. 702 [Legislature
18 “did not eliminate Walsh’s retirement benefits; rather, it confined his benefits to those
19 consistent with” what he would have been eligible for in the first place]; see also *Kern,*
20 *supra*, 29 Cal.2d at p. 853 [“an employee’s pension rights may [not] be entirely
21 destroyed”].) The City offered no evidence that any party had the reasonable expectation
22 the SRBR would be abolished rather than amended.

23 Even the plaintiffs in *Allen* received a comparable new benefit (34 Cal.3d at
24 p. 122 [noting “substitute formula ... tied ... to cost indices rather than current
25 salaries”])—unlike SJPOA members. The City argues that Measure B “does not foreclose
26 the possibility of supplemental payments to retirees” because it only “required that such
27 payments shall not be funded from plan assets.” (City Tr. Br. at 25:18-20, 26:7-8.) But
28 the City identifies no other sources of funds that will be used to pay supplemental

1 payments. The promise of a future benefit from an unidentified source is insufficient.
2 (See *Genest, supra*, 154 Cal.App.4th at p. 1037.)

3 The City may argue also that transfer of SRBR funds to the P&F Retirement
4 Plan is a comparable new advantage. Not so. Although Section 1511-A directs that
5 SRBR funds be returned to the retirement trust fund, it prohibits the use of such funds to
6 pay for any supplemental benefits. Moreover, the transfer to the retirement trust fund is
7 not a comparable new advantage because Police Officers already participate in the
8 retirement fund with their contributions. (See *Eu, supra*, 54 Cal.3d at p. 530 [ballot
9 initiative requiring “transfer or redirection of pension funds to the federal Social Security
10 system” was not a “comparable new advantage” because “every legislator already
11 possessed the right to join the federal Social Security system”].) The only benefit of the
12 transfer of the SRBR funds is to reduce retirement costs for the City by \$13 million at the
13 expenses of plan members. (See RT 693:5-13 [Figone testifying regarding economic
14 benefit to City from abolishing SRBR]; RT 937:16-21 [Gurza admitting that SRBR
15 abolishment did not reduce employee’s pension contributions].)

16 Finally, the City’s exhaustive public policy arguments are misplaced. (City Tr.
17 Br. at 29:16-30:12.) That the City already accounted for the SRBR trust funds which are
18 the subject of this litigation—funds intended for SRBR beneficiaries—to reduce its own
19 pension contributions by \$13 million does not excuse the City’s vested rights violation.
20 (See *International Brotherhood v. City of Redding*(2012) 210 Cal.App.4th 1114, 1122
21 [“financial distress caused to municipality by a statute a matter to address to the
22 Legislature, not the courts”], citing *Orange County Employees Assn. v. County of Orange*
23 (1991) 234 Cal.App.3d 833, 844, fn. 10 [“the law bars such consideration as an excuse for
24 noncompliance”].) In any event, the SRBR is a general City obligation that exists
25 regardless of “the solvency of a particular fund.” (*Bellus, supra*, 69 Cal.2d at p. 352; see
26 also RT 453:4-6 [Erickson testifying “Our concern with [the SRBR] was it needed to be
27 paid out according to the rules that we saw, whether or not the plan was underfunded or
28 overfunded”].)

1 **E. Section 1512-A Violates Police Officers' Vested Rights to the "Lowest**
2 **Cost" Retirement Healthcare Plan Available to Active Officers**⁹

3 Upon retirement, and depending upon their date of hire, Police Officers have
4 vested rights to city payment of healthcare costs under two different ordinances.

- 5 • Officers employed after the City implemented Ordinance 21686 on
6 July 27, 1984 (Ex. 6 [*former* SJMC 3.36.1930]), and before
7 implementation of Ordinance 25615 on July 31, 1998 (Ex. 9 [*amended*
8 SJMC 3.36.1930]), have an *express* vested right to pay a premium "in
9 the same amount as is currently paid by an employee of the City in the
10 classification from which the member retired," i.e., the same premium
11 paid by active Police Officers. (Ex. 6.)
- 12 • Officers employed on or after July 31, 1998, when Ordinance 25615
13 was implemented, have an *express* vested right to the lowest cost plan
14 available to any city employee and an *implied* vested right to the
15 lowest cost plan available to Police Officers. The implied right was
16 created by the parties' course of conduct, and the Bogue interest
17 arbitration award, as implemented by the tripartite MOA and by
18 revised SJMC 3.36.1930. (Exs. 9, 31, 35, 48, 49, 227.)¹⁰

19 **1. Ordinance 21686 sets the floor with respect to City retiree**
20 **healthcare premium coverage for Officers employed in**
21 **1984 to 1998.**

22 The evidence demonstrated that effective July 27, 1984, the City extended the
23 availability of healthcare benefits to retired Police Officers through Ordinance 21686.

24 ⁹ Section 1512-A(b)—which disclaims any vested rights arising from retiree healthcare—
25 cannot lawfully be applied to current Police Officers to divest them of their existing
26 vested rights further described herein.

27 ¹⁰ Police Officers and related classification employed after 2008 have separate claims
28 currently the subject of a grievance, demand for arbitration and petition to compel
29 arbitration in *San Jose Police Officers' Association v. City of San Jose*, Santa Clara
30 County Superior Court Case No. 1-13-CV-244180. (See also RT 858:12-859:14 [City
31 agreeing grievance is separate from this lawsuit and that it will not raise collateral
32 estoppel].)

1 (Ex. 6.) Retired Police Officers thus paid a premium “in the same amount as is currently
2 paid by an employee of the City *in the classification from which the member retired* or
3 which the member held at the time of death.” (*Id.* § 5 [former SJMC 3.36.1930] [italics
4 added].) Retirement Handbooks provided to employees in 1995 and 1997 represented that
5 “You and your survivors will be required to pay a portion of the premiums equal to the
6 amount paid by City employees *in the same position you held* at the time of your
7 retirement.” (Exs. 7 and 8 [1995 and 1997 P&F Retirement Plan Handbooks] [italics
8 added].) Currently the City provides active Police Officers with healthcare benefits
9 equivalent to 85% of the lowest cost plan available to active Police Officers. (Ex. 21
10 Article 8; RT at 137:27-138:4.) This is the same healthcare plan in which retired Police
11 Officer Peter Salvi was enrolled during 2012 and at the time of trial, and in which retired
12 Police Officer Michael Fehr has always been enrolled. (RT 196:1-10; 206:15-19; 70:6-8,
13 73:23-76:25, 78:2-28, 84:3-8, 91:20-93:1.)

14 **2. Ordinance 25615 granted Police Officers employed on or**
15 **after July 31, 1998 the *express* vested right to a subsidy for**
16 **retiree healthcare coverage in the same amount as the**
17 **lowest cost plan available to active city employees; the**
18 **parties’ course of conduct created an *implied* right to have**
19 **that subsidy tied to the lowest cost plan for active Police**
20 **Officers.**

21 In 1997, the Bogue interest arbitration¹¹ award, binding the City, SJPOA and
22 the Firefighters, made significant changes to retiree healthcare premiums. The Bogue
23 award accepted the City’s proposal to “[i]ncrease the employees’ benefit regarding
24 payment of premiums for medical insurance for future retirees to the 100% of the lowest
25 cost plan.” (Ex. 35 at POA007015 [emphasis added].) The grant was specifically
26 premised on “comparability to active employees’ benefits.” (*Id.* at POA007017.)

27 The City amended SJMC 3.36.1930 (effective July 31, 1998) to implement the
28 Bogue arbitration decision. (Ex. 9 [Ordinance 25615].) The ordinance provided that the

27 ¹¹ As explained at trial, Charter section 1111 sends the parties to binding interest
28 arbitration if they reach impasse while negotiating a collective bargaining agreement. (RT
31:11-15.)

1 P&F Retirement Plan would pay the premium for the “lowest cost medical plan” which
2 was defined as “the lowest monthly premium of all eligible medical plans then in effect,
3 determined as of the time the premium is due and owing.” (*Id.* § 3 [SJMC 3.36.1930.D].)
4 Although the SJMC was ambiguous whether the lowest cost plan was with reference to
5 Police Officers or all City employees, SJMC 3.36.1930 applies *only* to Police Officers and
6 Firefighters and not to any employees in the Federated Plan. (See *id.*) Further, the
7 evidence at trial of the parties’ course of conduct and mutual understandings establishes
8 an *implied* term of that contract is that the reference to “active employees” means “active
9 Police Officers.” *REAOC* recognized that implied contracts give rise to vested pension
10 rights: “The terms of an express contract are stated in words. The existence and terms of
11 an implied contract are manifested by conduct. The distinction reflects no difference in
12 legal effect but merely in the mode of manifesting assent. Accordingly, a contract implied
13 in fact consists of obligations arising from a mutual agreement and intent to promise
14 where the agreement and promise have not been expressed in words.” (52 Cal.4th at
15 p. 1178; *Requa v. Regents of the Univ. of Cal.* (2012) 213 Cal.App.4th 213; *International*
16 *Brotherhood v. City of Redding* (2012) 210 Cal.App.4th 1114).

17 First, the 1996-2000 tripartite MOA on Retirement Benefits between the City,
18 SJPOA and the Firefighters, provided that “[p]ursuant to the arbitration award, the
19 Retirement Plan will pay the premium for the lowest priced medical insurance plan ...
20 available to active employees.”¹² (Ex. 48.) The parties extended that tripartite MOA in
21 2000 for an additional four years, i.e., through 2004. (Ex. 49.) Because Police Officers
22 (and Firefighters) were the only city employees covered by that MOA, SJPOA and the
23 City mutually understood that the reference to “active employees” did not mean all
24 employees citywide, but rather, as relevant here, it meant “active Police Officers.”

25 Next, even after Ordinance 25615 was implemented, the City told Police
26 Officers about to retire and such Officers reasonably understood that they would receive

27
28 ¹² The 1996 effective date of the tripartite MOA reflected the retroactive effect of the
Bogue decision. (See *id.*)

1 the same healthcare benefits as active Officers. Retired Police Officer Peter Salvi testified
2 that when he retired in 1998, he understood his retiree health plan would be “the same as
3 [for] the active officers, including the free lowest price plan” based on representations
4 from city retirement services. (RT 196:1-10; 206:15-19.) Retired Police Officer Michael
5 Fehr, who retired in 2005, testified similarly based on City-sponsored retirement classes
6 and his exit interview with human resources. (RT 70:6-8, 72:22-74:8; 73:23-76:25, 78:2-
7 28, 84:3-8, 91:20-93:1.) And SJPOA Vice-President Police Officer John Robb testified
8 based on his experience and familiarity with retiree benefits that before January 1, 2013,
9 retired Officers received the lowest cost plan available to active Officers. (RT 137:18 –
10 138:01.) Indeed, City Manager Figone’s memorandum to retired employees represented
11 in March 2008 that retiree healthcare benefits were vested rights, i.e., that they could not
12 be changed by the City. (Ex. POA 51; RT 651:16-27, 653:12-19.)

13 *Requa* and *City of Redding* are instructive because they recognized the
14 circumstances under which implied retiree healthcare vested rights arise. In *Requa*, the
15 court found employees stated a claim for violation of vested rights based on the Regents’
16 implied promise to maintain the same level of retiree medical benefits, holding that the
17 *continuous provision of benefits* alone can give rise to an implied promise to provide that
18 level of benefits indefinitely. (213 Cal.App.4th at 227.) *Requa* held that a 1961
19 resolution by the Regents providing for lifetime retiree health benefits supported an
20 implied vested rights claim because such assurances were held out during the course of
21 employment as part of the employment bargain. (*Id.* at pp. 227-228.) Finally, *Requa* also
22 found valid a third category of implied vested claims: *written assurances* from the
23 employer that retiree medical benefits would continue at the same level indefinitely. (*Id.*
24 at pp. 230-231.) In *Redding*, the court found employers’ “job postings as well as internal
25 documents and communications” give rise to implied vested rights because they contained
26 implied promises to pay a certain percentage of future retiree medical expenses and “the
27 City used these promises to recruit employees and induce current employees to remain
28 employed by the City and accept lower wages.” (210 Cal.App.4th at p. 1117.)

1 The evidence at trial sufficiently demonstrated the existence of an implied
2 vested right to retiree healthcare benefit at the same level as active Officers. In addition to
3 the evidence outlined above relating to the parties' course of conduct, since Ordinance
4 25615 was implemented in 1998, the City has continuously paid retirees' healthcare
5 premiums for a low cost plan tied to that of active Officers. (See Exs. 15-18
6 (Comprehensive Annual Financial Reports showing P&F plan covered retiree healthcare
7 at 100% of lowest cost plan available to active Officers.) And the City's statements to
8 active Officers when they applied for retirement (such as Salvi and Fehr) have held out
9 the promise of retirement healthcare benefits at 100 percent coverage of the low cost plan
10 active Officers receive. Additionally, at the close of each fiscal year the City's P&F
11 Retirement Plan issues its fiscal report, and represents it will pay retirees the lowest priced
12 plan available to active police and fire employees:

13 (e) Postemployment Healthcare Benefits

14 The City of San Jose Municipal Code provides that retired
15 employees with 15 years or more of service, their survivors, or
16 those retired employees who are receiving a pension benefit of at
17 least 37.5% of final compensation are entitled to payment of **100%**
of the lowest priced medical insurance plan available to an
active police and fire employee. However, the Plan pays the entire
premium cost for dental insurance coverage.

18 (Ex. 15 at POA005686 [emphases added]; Ex. 17 at POA005691 [same]; Ex. 18 at POA
19 POA007230 [same]; see also Exs. 48-49 [tripartite MOA showing parties' mutual
20 understanding that lowest cost plan determined with reference to active Officers].)
21 Finally, the 2008 Figone memorandum assured retirees that their healthcare benefits were
22 considered vested rights and that there was no plan to change such benefits. (Ex. 51.)

23 **3. The City's Counter Arguments Are Unpersuasive**

24 The City makes a number of opposing arguments. First, it contends SJPOA is
25 "arguing for the resurrection of a Municipal Code provision terminated in 1998." (City Tr.
26 Br. at 32:19 [emphases omitted].) That is incorrect. Officers who worked between 1984
27 and 1998 earned the express vested right to pay a premium equal to that paid by an active
28 Police Officer. (Ex. 6 Ordinance 21686; see *Betts, supra*, 21 Cal.3d at p. 864; *Requa*,

1 *supra*, 213 Cal.App.4th at pp. 227-228.) There was no vested rights violation, however,
2 until the City changed to a citywide lowest cost plan with higher premiums—a plan that
3 was not offered to active Police Officers. For that reason, there is no statute of limitations
4 issue because the evidence shows there was no substantial impairment of the vested right
5 until 2013. (RT at 864:19-22 [“[t]his is the first year we’ve had” the new Kaiser 1500
6 plan].)

7 Second, Gurza denied that “the City [has] ever made any kind of commitment
8 to tie lowest cost plan to any particular category of employee” and testified that since
9 1994 “[the retiree healthcare benefit] has always been the lowest price plan available to
10 active employees” citywide. (RT 801:19-28, 803:22-804:1, 803:19-20, 810:22-23,
11 864:19-22.) But this self-serving testimony is outweighed by former SJMC 3.36.1930,
12 which was in effect from 1984 to 1998, and also by the parties’ course of conduct under
13 amended SJMC 3.36.1930 (including the tripartite MOAs and representations to retirees).
14 Regardless, that the City offered all its employees the same low cost plan is not
15 inconsistent with nor does it defeat retirees’ claim to a vested right vis-à-vis active Police
16 Officers: so long as retirees’ low cost plan subsidy was based on the low cost plan offered
17 to active Officers, the vested right was honored, but just happened to coincide with the
18 same plans available citywide. This coincidence is not evidence that no implied vested
19 right existed, especially because the evidence showed there was no vested rights violation
20 until the City started redefining low cost plan with reference to non-Police Officers, as it
21 did after Measure B was enacted.

22 Next, the City made much at trial regarding benefits fact sheets, which simply
23 state that police and firefighter retirees receive the lowest cost plan for city employees.
24 (RT 86:4-5, 87:6-23; 92:21-93:9.) But, Officer Robb testified that SJPOA’s
25 understanding of those fact sheets is that the lowest cost plan is with respect to police and
26 firefighters, rather than all city employees, because police and fire have their own
27 retirement system. (RT 144:19-148:13; Ex. 5509.) That is a wholly reasonable
28 interpretation, especially given the parties’ course of conduct and the vested nature of the

1 retiree healthcare benefit. In fact, that interpretation makes great practical sense too
2 because police and firefighters have more physically demanding jobs requiring greater
3 medical coverage upon retirement than would a typical city employee. (See RT at
4 195:21-25 [Salvi testimony regarding on-job injury to his foot from a fall and back injury
5 due to a high speed pursuit]; RT at 867:3-865:17 [Gurza admitting that SJPOA rejected
6 Kaiser 1500 plan]; RT at 956:24-27 [Gurza admitting police and firefighters have
7 different healthcare plans than other city employees]; Ex. 56-58.) This also underscores
8 the impact of the parties' conduct, under which the City, for decades, provided benefits in
9 line with these Officers' understanding.

10 Finally, the City contends the changes to the lowest cost plan are unrelated to
11 Measure B. But City Manager Figone originally testified, in response to a direct question
12 from the Court, that the savings the City reaped from the lowest cost plan "are
13 attributable" to Measure B. (RT 604:24-605:3.) Figone changed her testimony the next
14 day insisting the changes were pursuant to the SJMC (RT at 619:9-16), but when asked on
15 cross-examination why the City waited years to implement changes, she could only testify
16 in vague terms that the City had been "progressively implementing" all along. (RT
17 621:24-622:8.) Gurza similarly denied that the change in low-cost plan was related to
18 Measure B (see RT 810:4-16), but the City's self-serving trial testimony cannot overcome
19 the documentary evidence establishing Police Officers' vested rights and that the changes
20 to the lowest cost plan were contemporaneous with Measure B. Additionally, Figone's
21 changed testimony (following an overnight break) undercuts her veracity and gives rise to
22 an inference that Measure B did cause changes to the lowest cost plan.

23 **4. Alternatively, Ordinance 21686 Protects Vested Rights**

24 In the alternative, if the Court does not find an implied vested right for post-
25 1998 Police Officers to receive, upon retirement, premiums equivalent to 100% of the cost
26 of the lowest cost plan of active Police Officers, the following analysis should be applied.

27 Upon its implementation in 1998, Ordinance 25615 initially created a higher
28 level of healthcare benefit for retirees than for active Police Officers, a condition that

1 continued until the end of calendar year 2012. (See RT at 137:27-138:4.) In 2013,
2 however, the implementation by the City of a new lowest cost plan—the so-called “Kaiser
3 \$1500 deductible” Plan—for certain active, non-police, city employees caused retirees’
4 healthcare benefit to fall dramatically. For example, retired Police Officer Peter Salvi
5 testified that whereas in 2012 he was enrolled in the lowest cost plan received by active
6 Police Officers at no cost to him, in 2013 this same plan cost him \$314 per month. (RT
7 202:15-26; see also Ex. 51.) Notably, in 2013, there was no change to the healthcare
8 subsidy received by active Police Officers. (See RT 139:4-16.) The evidence further
9 showed that the City had unsuccessfully attempted to persuade SJPOA to agree to the
10 Kaiser \$1500 deductible plan, but that the Union declined. (RT 864-867.)

11 If Police Officer retirees retired after the effective date of Ordinance 25615
12 (i.e., July 31, 1998) they have a right to 100% of the lowest cost plan available to active
13 police officers, then the application of the lower value \$1500 deductible plan to them, and
14 the commensurate reduction in city payments towards healthcare premiums and increase
15 in retirees’ contributions, violate this vested right. If retired Officers only have a right to
16 100% of the cost of the lowest cost plan available to any city employee, then their rights
17 under Ordinance 21686 apply—since for the first time since 1997 it created a better
18 benefit for retirees than did Ordinance 25615. That is because retirees with vested rights
19 under the 1984 ordinance have a right to pay a premium “in the same amount as is
20 currently paid by an employee of the City in the classification from which the member
21 retired,” i.e., 85% of the lowest cost plan available to active Police Officers.

22 For example, taking Salvi’s premiums, he paid nothing in 2012 for his share of
23 premiums, because he selected the active Officers’ low cost plan, the Kaiser \$25 Copay
24 Plan. But starting in December 2012 he began paying 2013 premiums in the amount of
25 \$314 a month for the same plan. (Ex. 50.) Although his pay stubs reflect an increase of
26 \$130.04 from \$1323.66 (in 2012) to \$1453.70 (in 2013), he actually paid \$314 per month
27 instead, because the City redefined the lowest cost plan to the Kaiser \$1500 Deductible
28 Plan. (Ex. 57 [showing semi-monthly cost of \$569.85, equaling monthly cost of

1 \$1139.70.) That is, the City reduced its lowest cost plan subsidy and only contributes to
2 Salvi's premiums in the amount of the cost of the Kaiser \$1500 plan. The Kaiser \$1500
3 premium (the new "lowest cost" plan), subtracted from the Kaiser \$25 premium (Salvi's
4 plan), is \$314, i.e., the amount Salvi now pays. This is significantly more than what
5 active Officers pay for the lowest cost plan available to them (Kaiser \$25 Copay Plan):
6 they pay 85% of the monthly plan cost of \$1453.70, or \$218.06.

7 * * *

8 Section 1512-A substantially impaired vested rights because starting in January
9 1, 2013, the lowest cost plan the City offered to retirees—which sets the subsidy for the
10 retiree healthcare benefit—was no longer tied to any plan offered to active Police
11 Officers. Instead, the evidence was that the lowest cost plan the City offered retired
12 Police Officers was the Kaiser \$1500 deductible plan, a plan that SJPOA had rejected and
13 which was not offered to active Police Officers.

14 Despite their vested right, retirees' healthcare costs rose substantially when the
15 City changed the design of the lowest cost plan. For that reason, Salvi and Fehr's
16 premiums went up significantly even though they remained in the same healthcare plan
17 from 2012 to 2013, i.e., the Kaiser 1500 plan lowered the subsidy that retirees would
18 receive toward retiree healthcare. Salvi's premiums went from zero to \$314 per month.
19 (RT 202:7-26; Ex. 50.) Fehr's premiums went from \$569 to \$801. (RT 77:26-28; Ex.
20 51.) Indeed, Figone testified that the City reaped millions of dollars in budgetary savings
21 by changing the low cost plan in 2013. (RT 643:18-644:17; RT 956; see also Ex. 5109 at
22 SJ003276-003332 [attributing significant savings to newly implemented lowest cost
23 plan].) Police Officers with vested rights received no comparable new benefit. Instead,
24 they get the lowest benefit available to non-public safety City employees who, e.g., were
25 unlikely to spend their careers in a position as physically-demanding and dangerous as a
26 Police Officer.

1 **F. The City Offered No Cognizable Justification for Measure B's**
2 **Violation of Vested Rights**

3 The City essentially has three overarching “defenses” to SJPOA’s Contracts
4 Clause claim. First, it insists that “reservation of rights” language in the Charter prevents
5 creation of vested rights in the SJMC (City Tr. Brief at 12-13)—an argument this Court
6 previously rejected as a matter of law. Second, it contends that Measure B does not take
7 away any already-earned benefits, but rather that it only changes pension benefits
8 prospectively for current employees. Third, that Measure B is constitutionally-justified.
9 These arguments are meritless.

10 **1. The City Failed To Show the SJMC Is Not a Valid Source**
11 **of Vested Rights**

12 In its June 21, 2013 Order denying the City’s Motion for Summary
13 Adjudication, this Court rejected the City’s arguments that the Charter prevents the
14 creation of vested rights. (MSA Order at 7.) It observed that “the ultimate question is one
15 of law” (*id.* at 4:9-10) and ruled that “the existence of [Charter Sections 1500 and 1503]
16 alone do[] not preclude the creation of vested rights” (*id.* at 4:19-20). There is no reason
17 for this Court to revisit that ruling based on any of the evidence at trial.

18 **First**, Section 1500 cannot justify Measure B because Measure B is not an
19 ordinance and because it was not enacted by the City Council.¹³ First, the plain text of

20 ¹³ Charter Section 1500 provides:

21 Except as hereinafter otherwise provided, **the Council shall**
22 *provide, by ordinance or ordinances, for the creation, establishment*
23 *and maintenance of a retirement plan or plans for all officers and*
24 *employees of the City. Such plan or plans need not be the same for*
25 *all officers and employees. Subject to other provisions of this*
26 *Article, the Council may at any time, or from time to time, amend*
27 *or otherwise change any retirement plan or plans or adopt or*
28 *establish a new or different plan or plans for all or any officers or*
 employees. (Ex. 701 [emphases added].)

26 Strictly speaking, Charter Section 1503 governs the 1961 P&F Retirement Plan because
27 the plan existed before Section 1500 was enacted and because that Section confirmed the
28 plan. However, Section 1503 expressly says it is subject to Section 1500, and the two
sections use materially similar “reservation” language. (*Id.*) Accordingly, the same
analysis applies to both.

1 Section 1500 provides the “Council may . . . amend” and does not authorize Measure B—
2 a charter amendment enacted by the voters.¹⁴ Our Supreme Court has held that analogous
3 “reservation of rights” language must be read in strict conformance with its stated terms.
4 In *Eu*, the court analyzed a much broader “reservation of rights” clause, and yet the high
5 court refused to find that it authorized voter initiatives affecting legislators’ pension rights
6 or that such language meant legislators had no vested rights in the first place. (54 Cal.3d
7 at pp. 529-530 [reservation of rights language “neither states nor implies that these
8 [pension] rights are thus deemed inchoate and unprotected from impairment by the
9 initiative process. Significantly, we have never suggested that the mere existence of [this
10 reservation of rights language] precludes legislators from acquiring pension rights
11 protected by the state or federal contract clauses”]; see also *Southern California Gas Co.*
12 *v. City of Santa Ana* (9th Cir. 2003) 336 F.3d 885, 893 [rejecting as “absurd” analogous
13 “reservation of rights” argument by municipality in contracts clause case].)

14 That reasoning applies equally here. Although this Court factually-
15 distinguished *Eu* because it involved “complete termination of the benefit scheme . . .
16 rather than a modification or adjustment” (MSA Order at 4:23-26), the importance of *Eu*
17 is that it construed reservation of rights language strictly in accordance with its specified
18 terms and found that such language did not prevent the creation of vested rights.
19 Similarly, Section 1500 does not state or imply that Police Officers’ pension rights are
20 “inchoate,” nor does it authorize unilateral modification by the voters. And Measure B is
21 a voter-enacted law, and was not enacted by the City Council. As outlined above, it did
22 not prevent Police Officers from acquiring protected pension rights, i.e., it did not act as
23

24
25
26 ¹⁴ The City’s placement of Measure B on the ballot cannot satisfy Section 1500’s mandate
27 that “the Council” enact the amendment. A proposed charter amendment is not the law of
28 San Jose until the voters enact it and it is then filed with the Secretary of State. (Cal.
Const. art. XI, § 3(a) [“a county or city may adopt a charter by majority vote of its electors
.... The charter is effective when filed with the Secretary of State. A charter may be
amended, revised, or repealed in the same manner”].)

1 an anti-vesting clause. Moreover, Section 1500 is much narrower than the language in
2 *Eu*: Section 1500 does not authorize limiting benefits before retirement.¹⁵

3 **Second**, Section 1500 does not contain any express language preventing the
4 creation of vested rights, let alone evidence such intent. In fact, the City made up for
5 these perceived gaps in its authority through Measure B by adding a reservation of voter
6 rights and express anti-vesting language. (Ex. 38 [Sections 1504-A, 1508-A(h)].) The
7 pre-Measure B Charter contains no such provisions, let alone any statement the rights at
8 issue here are revocable. (See generally, Ex. 701 [Charter].)

9 **Third**, the Council's authority under Section 1500 to "amend or otherwise
10 change any retirement plan . . . or adopt or establish a new or different plan" is expressly
11 subject to the benefits guaranteed elsewhere in the Charter, in particular the minimum
12 benefits for Police Officers contained in Charter Section 1504, including City payment of
13 all UAAL. Arguably, that limitation on Section 1500 further extends to ordinances
14 granting higher benefits enacted pursuant to Section 1504(e).¹⁶

15 ¹⁵ The City relies heavily on *Walsh v. Board of Administration* (1992) 4 Cal.App.4th 682,
16 which applied the same "reservation of rights" as *Eu* but on substantially different facts.
17 Section 1500 simply does not include the same power to limit benefits before retirement at
18 issue there. More fundamentally, it was the Legislature, rather than voters, who exercised
19 its authority to limit Walsh's retirement rights, consistent with the "reservation of rights"
20 language.. (*Id.* at p. 704, distinguishing *Eu* on this ground.)

21 ¹⁶ The legislative history and amendments to Section 1500 confirm the limited nature of
22 the "reservation of rights" language, including that it was never intended to authorize the
23 City to decrease benefits. The 1961 Charter amendments added the "reservation of rights"
24 language solely to allow the City Council to increase pension benefits. The "reservation
25 of rights" language was first added to the Charter in 1961 as Section 78b, which provided
26 in relevant part:

27 *[T]he Council in its discretion may at any time, or from time to*
28 *time, by ordinance, amend or otherwise change the retirement plan*
... for the purpose of providing benefits for members . . . in excess
of those benefits authorized or required by the provisions of said
Section 78a, . . .; provided, however, that [p] (1) The Council shall
not decrease any of said benefits below those which Section 78a
makes mandatory ...

1 **Fourth**, there simply is no “conflict” between the Charter and the SJMC
2 because the Charter expressly authorizes the City Council to create pension rights through
3 the SJMC. Charter Section 1500 itself authorizes and directs that the City Council “*shall*
4 *provide, by ordinance or ordinances, for the creation, establishment and maintenance of a*
5 *retirement plan.*” ((Ex. 701 [Charter, italics added].) And the benefits granted in the
6 Charter are intended to be minimum benefits only. Charter Section 1504(e) expressly
7 authorizes the City Council to grant “greater or additional” benefits: “The benefits
8 hereinabove specified are minimum only; and the Council, in its discretion, may grant
9 greater or additional benefits.” (*Id.*) As noted above, municipal codes are valid and
10 enforceable sources of vested rights. (*IAF, supra*, 34 Cal.3d at p. 302; *REAOC, supra*, 52
11 Cal.4th at p. 1194.) The City does not explain how ordinances enacted pursuant to
12 Charter sections 1500 and 1504(e) conflict with the Charter, nor does it explain the nature
13 of such a conflict. To the extent the City argues that any vested obligation originating in
14 the SJMC abrogates its “reservation of rights”—that argument holds no water.¹⁷

15 **2. Current Police Officers Have a Vested Right to Continue**
16 **Earning Pension Benefits on the Same Terms That Existed**
17 **Before Measure B**

18 The City contends Measure B is lawful because it only changes Police
19 Officers’ pension rights prospectively. (RT 458:16-23, 524:15 – 525:05; Ex. 38 [Section
20 1502-A].)

21 (Ex. 2, 5204 [1961 Charter Amendment, emphases added].) This “reservation of rights”
22 language was needed because, before the amendment, the P&F Retirement Plan was
23 contained exclusively in the Charter and the City Council had no authority to change it.
24 (Ex. 5203 [Proposition A Ballot Pamphlet].) Indeed, that is how it was presented to the
25 voters. (See *id.*) This legislative history confirms the “reservation of rights” language
26 was not intended to give the City authority to take away existing benefits or to decrease
27 them—as it tries to do with Measure B.

28 ¹⁷ *San Diego Firefighters v. Board of Administration* (2012) 206 Cal.App.4th 594
confirms why the SJMC is a valid source of vested rights. There, the court found a
benefit granted by resolution was insufficient to create a vested right because the San
Diego charter required pension benefits be granted through ordinances. (*Id.* at pp. 607-
608.) This was a significant distinction because resolutions are temporary “expression of
the opinion of the legislative body,” but “an ordinance prescribes a permanent rule of
conduct or of government.” (*Id.*) Likewise, Charter Sections 1500 and 1504 authorize
pension benefits granted through ordinances and the SJMC are codified ordinances.

1 But the California Supreme Court has consistently held that public employees
2 have the “right to earn *future* pension benefits through continued service, on terms
3 substantially equivalent to those” existing at the time they began working, or enhanced
4 during their service. (*Eu, supra*, 54 Cal.3d at p. 528 [rejecting voter initiative that
5 preserved already-earned vested rights but that impaired right to accrue additional benefits
6 through future service] [emphases added]; *Carman, supra*, 31 Cal.3d at p. 325; *Sweesy v.*
7 *Los Angeles County Peace Officers’ Retirement Board* (1941) 17 Cal.2d 356 [public
8 employees entitled to subsequent benefit increases]; *Kern, supra*, 29 Cal.2d at p. 855
9 [even though pension right vests upon employment, “the amount, terms and conditions of
10 the benefits may be” increased].) These cases control here, especially because the City
11 can cite no contrary case.

12 *Eu*’s holding that future accruals are protected from detrimental changes did
13 *not* turn on the fact that the challenged legislation there completely terminated the pension
14 structure, but rather it turned on the fact that such termination was a type of unreasonable
15 impairment. (54 Cal.3d at p. 530 [“the pension restriction ... [is] an impairment, not a
16 mere ‘modification’ or ‘adjustment’”]; *id.* at p. 532 [similar].) That is, what decides
17 whether Police Officers’ future accruals are protected is whether their underlying pension
18 rights are vested. If they are vested, then they have the right to continue accruing benefits
19 under that existing structure. If they are not vested and Measure B’s modifications are
20 lawful, then their future accruals are earned under the modified structure. In other words,
21 to show that their right to accrue future benefits is protected by the vested rights doctrine,
22 Police Officers do not have to show that Measure B “terminated” the existing pension
23 structure. Rather, they have to show that Measure B was an unlawful impairment.

24 In any event, the City’s argument is internally-contradictory. The core of
25 Measure B seeks to saddle Police Officers with responsibility for paying existing
26 unfunded liabilities that accumulated *before* Measure B was enacted. But if Measure B
27 were truly prospective only (see Section 1502-A), employees would pay only that UAAL
28 accruing *after* it was enacted.

1 3. **The City Did Not Satisfy Its Burden of Justifying Measure**
2 **B as Constitutionally Reasonable and Necessary**

3 Vested pension rights may only be modified when: (1) the modifications are
4 fiscally necessary to keep the pension system solvent (i.e., they have a “material relation
5 to the theory of a pension system and its successful operation”), and (2) any
6 “disadvantage[s] to employees” are “accompanied by comparable new advantages.”
7 (*Betts, supra*, 21 Cal.3d at p. 864.) Although *the City* must satisfy both prongs (see *id.*), it
8 *expressly* waived any fiscal emergency argument. (Ex. 6071; RT 420:12-27, 1013:16-
9 1014:5.)

10 Indeed, Measure B fails the constitutionally-mandated standard for this and
11 numerous other reasons. The evidence—including the trial testimony of Sharon Erickson
12 and Debra Figone—demonstrated that Measure B was wholly a cost-saving measure
13 *unrelated* to keeping the Retirement Plan financially solvent. (Ex. 38 [Measure B, 1502-
14 A “Intent” – stated purpose and intent of Measure B is to preserve funds for essential city
15 services]; see, e.g., RT 531:23-27 [City auditor testifying P&F Retirement Board did not
16 believe Plan was insolvent]; *id.* at 427:25-428:5 [auditor concerned because retirement
17 cost “crowds out other expenditures”]; 455:05-23; 479:28 [city manager discussing
18 services impacted by fiscal crisis].) That is, the City merely wanted to reduce its own
19 contributions to the Retirement Plan.

20 Measure B’s “Findings” emphasize the purported fiscal burdens on the City’s
21 funding of the Retirement Plan, but makes *no finding* that Measure B is necessary to
22 keeping the retirement system sound. (Ex. 701 [Section 1501-A].) For example:

- 23 • “[T]he voters find and declare that [retirement] benefits must be
24 adjusted . . . [to] protect[] *the City’s viability* and public safety”
25 (*Id.*, italics added.)
- 26 • Measure B is intended to address only the City’s ability to provide
27 “Essential City Services” threatened “by budget cuts caused mainly by
28 the climbing cost of employee benefit programs” including “[t]he
employer cost of the City’s retirement plans.” (*Id.*)

- None of the enumerated “Essential City Services” includes providing its employees the retirement benefits they were promised and which they earned. (*Id.* [defining such services only as “police protection; fire protection; street maintenance; libraries; and community centers”].)
- Even though retirement benefits have already been promised to employees and earned by them, Measure B finds that “[t]he City and its residents always intended that [retirement benefits] be fair, reasonable and subject to the City’s ability to pay *without jeopardizing City Services.*” (*Id.*, italics added.)¹⁸

Similarly, Measure B’s legislative history confirms it was about cost-cutting unrelated to keeping the pension system solvent. The City Council resolution placing Measure B on the ballot made no finding that it was necessary to keep the retirement system solvent. (Ex. 38.) Nor did the City Clerk’s analysis that accompanied Measure B on the ballot. (Ex. 34.) Even the ballot measure arguments presented to the voters in favor of Measure B emphasized City costs rather than the need for Measure B to keep the Retirement Plan solvent. (See, e.g., Ex. 34 [“Argument in Favor of Measure B [p] Annual retirement costs skyrocketed from \$73 million to \$245 million over the last decade, *causing service cuts* throughout the city Retirement costs consume more than 20% of the general fund and are projected by independent actuaries to increase for years”], italics added; see also Ex. 34 [“Rebuttal to Argument Against Measure B” asserting that “Measure B follows California law,” but no where stating that Measure B to keep the Retirement Plan solvent.] (See also *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 31 [resolutions, government analyses and ballot arguments are sources of legislative history].)

City Manager Figone and Ms. Erickson testified that Measure B was motivated by the City’s desire to cut its pension costs during a time of fiscal distress to preserve other City services (RT 41:22-42:03; 427:25-428:05; 455:05-23; 602:14-603:28; 607:2-

¹⁸ The City has argued that Measure B’s “Findings” section contains language regarding the City’s ability to fund the retirement system, but nowhere does that language actually state that Measure B is necessary to preserve the solvency of the *retirement system*. (See Ex. 38.)

1 20; 626:5-18.), and not—as required under vested rights law—that Measure B was
2 motivated by a need to keep the pension system from insolvency. (See RT 531:23-27.)
3 Indeed, the evidence is the City viewed raiding the Police Officers’ pension rights was
4 more acceptable than a tax increase. For example, the auditor did not even recommend an
5 increase in revenue to offset the pension costs she identified (RT 529:5-9, 530:10-25), and
6 the City Council rejected the City Manager’s recommendation of a tax increase (RT
7 631:26-632:12). And Figone further testified that despite the City’s fiscal stress, she told
8 the City Council that a declaration of fiscal emergency was not necessary. (RT 601:9-
9 602:8; 639:8-16.)

10 Perhaps most importantly, as outlined in the discussion above regarding
11 individual sections of Measure B, the City adduced *no evidence* that Measure B offered
12 Police Officers any new advantage in exchange for taking away or modifying their vested
13 pension rights. In sum, the evidence is clear that Measure B’s is constitutionally
14 unreasonable.

15 **II. SJPOA DEMONSTRATED THAT NUMEROUS SECTIONS OF MEASURE B VIOLATE**
16 **SJPOA’S COLLECTIVE BARGAINING AGREEMENT**

17 The City is obligated to pay the established salaries of SJPOA’s members—not
18 because they are “vested”—but rather because they are guaranteed by the parties’ MOA.
19 Despite this, the City inexplicably ignored SJPOA’s breach of contract claim and instead
20 asserted it has unbridled authority over employee compensation. That is not so. Our
21 Supreme Court has expressly held that collective bargaining agreements and salary terms
22 are binding and enforceable on a charter city, notwithstanding municipalities’ plenary
23 authority over compensation. (*City of Los Angeles v. Superior Court* (2013) 56 Cal.4th
24 1086, 1093 [“Once a local government approves an MOU, it becomes a binding and
25 enforceable contract that neither side may change unilaterally”]; *Glendale City*
26 *Employees’ Assn. v. City of Glendale* (1975) 15 Cal.3d 328, 338-340; *Olson, supra*, 27
27 Cal.3d at p. 538.) The City offers no contrary authority, and all its cited cases deal with
28 salaries as vested rights—an argument SJPOA does not advance.

1 **A. Sections 1506-A, 1507-A, and 1514-A Unilaterally Reduce the MOA’s**
2 **Contractually-Agreed Salaries**

3 The evidence established that Police Officers’ salaries are set by the parties’
4 contract, according to individual officers’ classification. (See Exs. 21 [Article 5 of current
5 MOA]; 5470 (Article 5)].) Sections 1506-A, 1507-A, and 1514-A all unilaterally reduce
6 those salaries by as much as 16% in order to pay UAAL; the former two sections do so
7 directly, and (as outlined in Part I.A, *supra*), the latter does so indirectly if the VEP is
8 deemed unlawful. That breaches the parties’ contract, resulting in damages to Police
9 Officers in the amount of 4-16% of their salary (based on the rate of the City’s
10 implementation).

11 **B. Section 1512-A Violates Contribution Rate Caps and Meet-and-**
12 **Confer Obligations in the MOA**

13 The evidence also established that the MOA caps Police Officers’
14 contributions for retiree healthcare. The MOA provides that such contributions are made
15 by the City and Police Officers on a 1:1 ratio. (Ex. 21.) More importantly, the MOA
16 expressly caps any increase in contribution rates for Police Officers at 1.25% per year.
17 (Ex. 21 [2011-2013 MOA, Section 50.1].) The MOA further provides that employees
18 shall not pay more than 10% of their pensionable salary to fund retiree healthcare. (*Id.*
19 [Section 50.4].) As of July 1, 2013, SJPOA members already pay 9.51% of their
20 pensionable pay toward retiree healthcare costs. (Ex. 27 [4/5/12 P&F Retirement Plan
21 Resolution No. 3761]; Ex. 29 [3/7/13 P&F Retirement Plan Resolution No. 3800]; RT
22 138:11-16.)

23 Section 1512-A, however, mandates employees “contribute a minimum of 50%
24 of the cost of retiree healthcare, including both normal costs and unfunded liabilities.”
25 (Ex. 38.) If Measure B Section 1512-A is applied to Police Officers, their contributions
26 can exceed the yearly and overall contractual caps in the MOA, and Police Officers would
27 not be able to invoke the meet and confer provisions of the MOA that the parties
28

1 negotiated to determine how to pay for any contributions above 10%. That breach will
2 damage Officers by requiring them to pay more than they agreed to in their MOA.

3 The City argues that a stipulation between the parties nullifies this claim. (City
4 Tr. Br. at 31:12-20.) But by its terms that stipulation expires on January 1, 2014 (*id.*), and
5 SJPOA is entitled to declaratory relief that Section 1512-A does not abrogate its current
6 MOA, which at the time of trial was not yet finalized due to an interest arbitration. (RT
7 135:25-137:9, 856:24-857:5.)

8 Further, statements by City witnesses that the City intends to abide by its MOA
9 obligations (e.g., RT at 815), ring hollow as the City has shown disregard for Police
10 Officers' other rights.

11 **III. SECTION 1513-A UNLAWFULLY DIVIDES THE P&F RETIREMENT BOARD'S**
12 **FIDUCIARY LOYALTY TO BENEFICIARIES**

13 The City presented no evidence defeating SJPOA's claim that Section 1513-A
14 violates the California Pension Protection Act (the "Act"). As SJPOA outlined in its trial
15 brief, the P&F Retirement Board's duties are to retirement plan beneficiaries, i.e., current
16 and retired Police Officers, under trust law principles enshrined in the California
17 Constitution.¹⁹ The Act was specifically enacted to prevent "meddling" with pension

18 _____
19 ¹⁹ Cal. Const. art. XVI, § 17 provides, in relevant part:

20 (a) The retirement board of a public pension or retirement system
21 shall have the sole and exclusive fiduciary responsibility over the
22 assets of the public pension or retirement system. *The retirement*
23 *board shall also have sole and exclusive responsibility to administer*
24 *the system in a manner that will assure prompt delivery of benefits*
25 *and related services to the participants and their beneficiaries....*

26 (b) The members of the retirement board of a public pension or
27 retirement system *shall* discharge their duties with respect to the
28 system *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. A retirement
board's duty to its participants and their beneficiaries shall take
precedence over any other duty. . . .

(e) The retirement board of a public pension or retirement system,
consistent with the exclusive fiduciary responsibilities vested in it,

1 funds in times of perceived fiscal distress. (*State ex rel. Pension Obligation Bond*
2 *Committee v. All Persons Interested in Matter of Validity of Cal. Pension Obligation*
3 *Bonds* (2007) 152 Cal.App.4th 1386, 1392 [“Politicians have undermined the dignity and
4 security of all citizens who depend on pension benefits ... by repeatedly raiding their
5 pension funds.... [¶] ... To protect the financial security of retired Californians, politicians
6 must be prevented from meddling in or looting pension funds”]; see also *Board of*
7 *Retirement v. Sup.Ct.* (2002) 101 Cal.App.4th 1062, 1070 [reversing trial court
8 determination that would “erode the retirement board’s sole and exclusive fiduciary
9 responsibility” to beneficiaries].)

10 The evidence proved that Section 1513-A compromises these constitutionally-
11 based duties by requiring the Retirement Board (1) to administer retirement plans so they
12 “minimize *any* risk to *the City and its residents*,” and (2) to equally “ensure fair and
13 equitable treatment for current and future plan members *and taxpayers* with respect to the
14 costs of the plans.” (Ex. 38, Section 1513-A(a), (c)(2), italics added[.]) Requiring the
15 Retirement Board to divide its fiduciary duties between beneficiaries and the
16 City/taxpayers violates Article XVI, section 17, because the Board is constitutionally-
17 required to discharge its duties “for the exclusive purposes of providing benefits to,
18 participants and their beneficiaries” and its paramount duty is to beneficiaries. (Cal.
19 Const. art. XVI, § 17(b).) Additionally, consistent with its fiduciary duties to
20 beneficiaries, the Board has “the sole and exclusive responsibility to administer the
21 system” and “the sole and exclusive power to provide for actuarial services” (*id.*, subd.
22 (a), (e)), meaning that as such Section 1513-A(c) cannot, as it directs, dictate “the
23 actuarial assumptions for the plan[.]” or their “objectives.” (See *Westly v. CALPERS*
24 (2003) 105 Cal.App.4th 1095, 1110 [“the ‘plenary authority’ that is granted over the
25

26
27
28 shall have the sole and exclusive power to provide for actuarial
services in order to assure the competency of the assets of the public
pension or retirement system. ([italics added].)

1 ‘administration of the system’ goes to the management of the assets and their delivery to
2 members and beneficiaries of the system”].)

3 The ordinances the City introduced at trial do not cure the illegality. (See Exs.
4 5300, 5301.) Section 1513-A cannot be reconciled with the Pension Protection Act
5 because Measure B purports to place the City and its taxpayers on equal footing with
6 beneficiaries, to whom the P&F Retirement Board owe fiduciary duties above all others.
7 *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470,
8 1493 held that “even assuming [the Act] creates a duty to minimize employer
9 contributions, it cannot be construed to require [a retirement board] to manage the
10 retirement system in a way which would favor an employer over the beneficiaries to
11 whom it owes a fiduciary duty.” That was because:

12 a trustee’s primary duty of loyalty is to the beneficiaries of the trust.
13 . . . The trustee must not be guided by the interest of *any third*
14 *person*. This unwavering duty of complete loyalty to the
15 beneficiary of the trust must be *to the exclusion of the interest of all*
16 *other parties*. Under the rule against divided loyalties, a fiduciary
cannot contend that although he had conflicting interests, he served
his masters equally well or that his primary loyalty was not
weakened by the pull of his secondary one.

17 (*Id.* at p. 1494 [emphasis added; citations and quotations omitted].) It thus concluded that
18 “[a]ny duty [a retirement board] has to minimize employer contributions may not take
19 precedence over its duty to the beneficiaries of the system.” (*Id.*) Thus, because the P&F
20 Retirement Board has no lawful discretion to act in contravention of its constitutional
21 duties under the Act, Measure B cannot be reconciled with the Act.

22 Further, SJPOA’s claim is ripe because it is entitled to declaratory relief as to
23 whether Ordinances 29174 and 29198 cure Measure B’s violations of the Act. That is a
24 sufficiently concrete scenario warranting declaratory relief. (*In re Claudia E.* (2008) 163
25 Cal.App.4th 627, 638 [“An action for declaratory relief lies when the parties dispute
26 whether a public entity has engaged in conduct or established policies in violation of
27 applicable law”]; see also *County of San Diego v. State* (2008) 164 Cal.App.4th 580, 606
28 [“The ‘actual controversy’ language in Code of Civil Procedure section 1060

1 encompasses a probable future controversy relating to the legal rights and duties of the
2 parties”].)

3 Moreover, the ripeness doctrine does not prevent courts from resolving
4 disputes if the consequence of a deferred decision will be lingering uncertainty in the law,
5 especially when there is widespread public interest in the answer to a particular legal
6 question. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 433,
7 fn. 14.) The legality of Measure B’s directive to the Retirement Board to change its
8 actuarial analysis and fiduciary duties is an issue of great public importance and any
9 lingering uncertainty would be detrimental to SJPOA members and taxpayers.

10 Declaratory relief is necessary because after Measure B union members do not know
11 whether their rights under the Pension Protection Act are secured. For example, if this
12 Court does not resolve the legality of Section 1513-A and the Retirement Board
13 implements Measure B’s commands, it would detrimentally and irreparably affect their
14 benefits.

15 **IV. THE POISON PILL IN SECTION 1514-A VIOLATES THE RIGHT TO PETITION**
16 **BECAUSE IT PUNISHES POLICE OFFICERS IF THEIR LAWSUIT IS SUCCESSFUL**

17 The evidence at trial proved SJPOA’s Right to Petition claim because Measure
18 B unlawfully burdened its members’ constitutional right to sue the City. The California
19 Constitution protects the right to “petition government for redress of grievances.” (Cal.
20 Const., art. I, § 3.) “The right to petition encompasses the right to sue.” (*Wolfgram v.*
21 *Wells Fargo Bank* (1997) 53 Cal.App.4th 43, 52 [“the California Supreme Court [has]
22 concluded that a suit ... against the government occupies a preferred status”].) “[A]ny
23 impairment of the right to petition, including any penalty exacted after the fact must be
24 narrowly drawn.” (*Id.* at p. 57.) As the California Supreme Court held in a related
25 context:

26 Few liberties in America have been more zealously guarded than
27 the right to protect one’s property in a court of law. This nation has
28 long realized that none of our freedoms would be secure if any
person could be deprived of his possessions without an opportunity
to defend them In a variety of contexts, the right of access to

1 the courts has been reaffirmed and strengthened throughout our
2 200-year history.

3 (*Payne v. Superior Court* (1976) 17 Cal.3d 908, 911 [imposing cost of administrative law
4 judge on teachers challenging suspension or termination unconstitutionally burdens
5 rights].) Indeed, our Supreme Court has expressly held that “[t]he imposition of a cost or
6 risk upon the exercise of the right to a hearing is impermissible if it has no other purpose
7 or effect than to chill the assertion of constitutional rights by penalizing those who choose
8 to exercise them.” (*California Teachers Assn. v. California* (“CTA”) (1999) 20 Cal.4th
9 327, 338 [italics added].)

10 On its face Section 1514-A’s “poison pill” chills legal challenges to Measure B
11 because it mandates an automatic salary deduction of up to 16% if Section 1506-A(b) “is
12 determined to be illegal, invalid or unenforceable.” (Ex. 38.) Thus, at a practical level, if
13 SJPOA is successful in its lawsuit to protect its members’ pension rights and Section
14 1506-A is declared unlawful, Section 1514-A disregards that illegality and steps in to
15 compel a 16% salary reduction. That is untenable because it threatens an unlawful
16 reduction of contract-based salaries to dissuade successful legal challenges. And while
17 Measure B makes that liability immediate, our Supreme Court has counseled that even
18 *potential* liability that chills the right to petition is unlawful. (*PG&E v. Bear Sterns & Co.*
19 (1990) 50 Cal.3d 1118, 1123 [refusing to recognize tort cause of action for inducing party
20 to seek judicial interpretation of contract because that would be “a pernicious barrier to
21 free access to the courts”].)

22 That Measure B involves Police Officers’ pensions and salaries does not mean
23 this case is of private rather than public concern. SJPOA’s lawsuit involves a public
24 concern regarding the City’s allocation of city funds and the City’s claims of insufficient
25 funds to pay earned pension rights. Lawsuits challenging government’s use of public
26 funds involve public matters, including employee compensation. (See *McKinley v. City of*
27 *Eloy* (9th Cir. 1983) 705 F.2d 1110, 1114-1115 [police officer’s criticism that city council
28 refused to pay salary increase “substantially” met public interest requirement;

1 “compensation levels undoubtedly affect the ability of the city to attract and retain
2 qualified police personnel, and the competency of the police force is surely a matter of
3 great public concern”]; *Connick v. Myers* (1982) 461 U.S. 138 and *Pickering v. Board of*
4 *Education* (1968) 391 U.S. 563, 569-570 [public employee’s criticism of “allocation of
5 school funds” and of government employer’s methods of asking taxpayers for additional
6 funds are matters of public interest deserving constitutional protection].)

7 Such court-filed lawsuits “communicate to the public” and “advance a political
8 or social point of view beyond the employment context.” (*Borough of Duryea v.*
9 *Guarnieri* (2011) 131 S.Ct. 2488, 2501.) *Guarnieri* acknowledged the salutary effects of
10 lawsuits brought by public employees and emphasized these should not be unduly
11 burdened because “these and other benefits may not accrue if one class of knowledgeable
12 and motivated citizens is prevented from engaging in petitioning activity.” (*Id.* at
13 p. 2500.) For this reason, the unpublished case cited by the City does not control. (See
14 *White v. Nevada* (9th Cir. Feb. 20, 2009) 312 Fed.Appx. 896, 897 (no public interest
15 because plaintiffs “motivation was simply to secure more overtime pay through the
16 internal grievance process, rather than to fundamentally change [governmental] policies
17 through public debate”].)

18 Measure B on its face directly and substantially burdens Police Officers’ right
19 to petition and is insufficiently tailored.²⁰ (See Ex. 38.) Section 1514-A’s poison pill
20 directly and impermissibly impacts SJPOA members’ ability to challenge Measure B in
21 court because it punishes them with a 16% salary reduction if they are successful. That is,
22 Measure B is structured so that even if a union sues to invalidate Section 1506-A, a union
23

24 ²⁰ To the extent Section 1514-A has “real and appreciable impact on, or a significant
25 interference with the exercise of the fundamental right,” then “strict scrutiny” applies.
26 (*Fair Political Practices Com. v. Superior Court* (1979) 25 Cal.3d 33, 47; *Browne v.*
27 *Russell* (1994) 27 Cal.App.4th 1116, 1122 [in strict scrutiny ordinance “can survive ...
28 only if the government shows that it advances a compelling state interest and is narrowly
tailored to serve that interest”].) But “[w]hen the regulation merely has an incidental
effect on exercise of protected rights,” rational basis review applies. (*Fair Political*
Practices Com., 25 Cal.3d at p. 47.) Regardless of the level of constitutional scrutiny
applied, Section 1514-A fails.

1 would still lose by operation of Section 1514-A. (*Id.*) Further, the poison pill is entirely
2 “punitive” because there is no requirement the salary reductions be used to pay for
3 unfunded actuarial liability (the stated rationale for the reductions) and thus the reductions
4 appear to be salary reductions for the sake of reductions.

5 Section 1514-A serves no legitimate purpose—let alone a compelling
6 government interest—because it is purely punitive and has no nexus to Measure B’s stated
7 rationales. The California Supreme Court has held in an analogous context that such
8 burdens on the right to a hearing are “impermissible” and that a “[statute] must have a real
9 and substantial relation to a *proper* legislative goal.” (*CTA, supra*, 20 Cal.4th at p. 338;
10 *Wolfgram, supra*, 53 Cal.App.4th at p. 57 [emphases added].) At trial, the City offered
11 the testimony of Sharon Erickson, the city auditor, to support its argument that Measure B
12 had a legitimate purpose of saving the City money and “preserving services.” (RT 412:9-
13 12; 420:12-27.) But regardless of that generalized intent regarding Measure B, Section
14 1514-A *itself* is specifically structured to extract *mandatory* “savings” from employees in
15 the event they succeed at trial. (See Ex. 38.) That alone distinguished Measure B from
16 *Zuckerman v. State Bd. of Chiropractic Examiners* (2002) 29 Cal.4th 32, 44 because
17 *Zuckerman* expressly found the statute before it was lawful because the hearing costs it
18 imposed were “merely *discretionary*.” (*Id.* [noting “the critical importance of ... the
19 discretion not to impose costs”].)

20 Further, Measure B’s extracted savings are in the form of a straight wage cut,
21 even though Police Officers’ salaries are set by contract. Once ratified by the City
22 Council, that contract is binding and enforceable even against a charter amendment. (*City*
23 *of Los Angeles, supra*, 56 Cal.4th at p. 1093; *Glendale, supra*, 15 Cal.3d at pp. 334-337
24 [collective bargaining agreements and salary terms are binding and enforceable over
25 charter city]; *Olson, supra*, 26 Cal.3d at p. 538.) In sum, the poison pill does not serve a
26
27
28

1 “proper legislative goal” because the pay reductions they extract are legally prohibited by
2 the parties’ binding contract.²¹

3 **V. SECTION 1515-A ARROGATES JUDICIAL POWERS TO THE CITY AND VIOLATES**
4 **THE SEPARATION OF POWERS DOCTRINE**

5 “[T]he fundamental separation of powers doctrine embodied in article III,
6 section 3 of the California Constitution forbids ... legislative usurpation of traditional
7 judicial authority.” (*Mandel v. Myers* (1981) 29 Cal.3d 531, 547.) “Our Constitution
8 assigns the resolution of ... controversies to the judicial branch of government (Cal.
9 Const., art. VI, § 1) and provides the Legislature with no authority to set itself above the
10 judiciary by discarding the outcome or readjudicating the merits of particular judicial
11 proceedings.” (*Id.*)

12 Section 1515-A violates the Separation of Powers doctrine because it allows
13 the City Council to arrogate to itself the judicial function by authorizing that legislative
14 body to decide the effect of a judicial court’s decree when portions of Measure B are
15 declared unlawful. (See Ex. 38.) First, subd. (a) provides that “[i]f any portion of this Act
16 is held invalid as to any person or circumstance, such invalidity shall not affect any
17 application of this Act which can be given effect.” (*Id.*) Subdivision (a) thus purports to
18 declare the effect of a court ruling finding “any” portion of Measure B is unlawful; that is,
19 it declares that Measure B remains valid, e.g., as to current employees even if unlawful as
20 applied to retirees, and as to future employees even if unlawful as to current employees—
21 regardless of whether the challenge is facial or as-applied. (*Id.*) Second, subd. (b)
22 provides that “[i]f any ordinance adopted pursuant to this Act” is declared unlawful then
23 “the matter shall be referred to the City Council for determination as to *whether to amend*
24

25 ²¹ The fact that this lawsuit has been filed and prosecuted notwithstanding Measure B’s
26 attempt to chill it does not cure the illegality: “An individual’s constitutional right of
27 access to the courts cannot be impaired, either directly or indirectly, by threatening or
28 harassing an individual in retaliation for filing lawsuits. It is not necessary that the
individual succumb entirely or even partially to the threat as long as the threat or
retaliatory act was intended to limit the individual’s right of access.” (*CTA, supra*, 20
Cal.4th at p. 339.)

1 the ordinance consistent with the judgment, or *whether to determine the section severable*
2 *and ineffective* if such ordinance is found to be invalid, unconstitutional or otherwise
3 unenforceable.” (*Id.* [italics added].) That is, subdivision (b) gives the City authority to
4 decide severability after the fact, even though that determination is entrusted to the courts.

5 These results are untenable under our system of laws:

6 If the Legislature in such a case were empowered to reexamine the
7 merits of litigation and to ignore a particular judgment whenever it
8 so chose, the myriad safeguards of the judicial process would come
9 to naught and *one party to a lawsuit would in effect become both*
litigant and judge. In our view it is difficult to imagine a clearer
example of legislative usurpation of judicial authority.

10 (*Mandel, supra*, 29 Cal.3d at p. 549 [italics added]; *ibid.* [any other conclusion would
11 “completely deprive court judgments of the respect and deference which the Constitution
12 contemplates each branch of government would accord to final actions within the
13 jurisdiction of a coequal branch, and would repose in the Legislature a combination of
14 powers that the constitutional draftsmen specifically intended to forestall”].) Accordingly,
15 Section 1515-A violates the Separation of Powers.

16 Although the City contends this claim is unripe because there is “no ordinance
17 adopted pursuant to Measure B that is the subject of this litigation”—that is plainly
18 incorrect as SJPOA challenges Ordinance No. 29198 which implemented Measure B’s
19 abolishment of the SRBR, and Ordinances 29174 and 29198, which direct the P&F Board
20 to exercise its duties in accordance with Measure B and the Pension Protection Act. (Exs.
21 42, 5300, 5301.) Accordingly, this matter is ripe for adjudication.

22 **VI. THE CITY IS NOT ENTITLED TO JUDGMENT ON ITS FEDERAL CROSS-CLAIMS;**
23 **ALTERNATIVELY, SJPOA IS ENTITLED TO JUDGMENT ON THESE CLAIMS**
24 **BECAUSE FEDERAL LAW LOOKS TO STATE LAW TO DETERMINE PROPERTY**
RIGHTS

25 The City has not argued that the outcome of the vested rights analysis is
26 different under federal law, making its request for declaratory relief under federal law
27 wholly unnecessary.

1 This Court has discretion to deny declaratory relief where it is “not necessary
2 or proper ... under all the circumstances.” (*Meyer v. Sprint Spectrum* (2009) 45 Cal.4th
3 634, 647, quoting Code Civ. Proc., § 1061.) Indeed, declaratory relief must “serve some
4 practical end” and when it “would have little practical effect in terms of altering parties’
5 behavior” a court is entitled to “deny declaratory relief.” (*Id.* at pp. 647-648.) Like the
6 plaintiffs in *Meyer*, the City here “[has] not with any particularity” argued that resolution
7 of its federal cross-claims would “have any practical consequences” (*id.*), that is, it has not
8 argued that whether Measure B violates Police Officers’ vested rights will be different
9 under federal law.

10 The City’s federal cross-claims essentially parrots SJPOA’s state law vested
11 rights claims. (City’s Cross-Complaint, filed November 16, 2012 ¶ 2 [“This action seeks
12 declaratory relief under the federal constitutional counterparts of the state law
13 constitutional claims brought by [plaintiffs]”; *id.* ¶ 9 [“This is solely an action ... to
14 confirm the legality of Measure B”].) For that reason, this Court need not rule on the
15 City’s federal claims, particularly because it would make no difference to the underlying
16 judgment, i.e., if Measure B violates the California Constitution, it does not matter
17 whether or not it additionally violates the federal constitution because the City would be
18 barred from applying it to Police Officers. (*Claremont Improvement Club, Inc. v.*
19 *Buckingham* (1948) 89 Cal.App.2d 32, 33 [“If [the underlying measure] is unenforceable
20 the whole purpose of the [cross-claim] litigation fails”]; see also *California State*
21 *Electronics Assn. v. Zeos Internat. Ltd.* (1996) 41 Cal.App.4th 1270, 1274 [court should
22 avoid constitutional questions where other grounds are available to dispose of the case].)

23 To the extent the Court rules on the City’s federal claims, it should find in
24 favor of SJPOA for the same reasons outlined above. The City has not argued that federal
25 law is substantively different or more favorable than state law. Moreover, federal law
26 looks to state law to determine whether a protected property right exists for purposes of
27 the federal Contracts Clause. (*San Diego Police Officers’ Ass’n, supra*, 568 F.3d at p. 737
28 [Contracts Clause: “federal courts look to state law to determine the existence of a

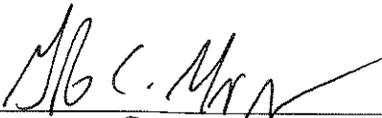
1 contract”]; cf. *Portman v. County of Santa Clara* (9th Cir. 1993) 995 F.2d 898, 904 [“[t]he
2 Due Process Clause does not create substantive rights in property; the property rights are
3 defined by reference to state law”].) Because Measure B deprives Police Officers of state-
4 created property rights, and the City has not argued the vested rights analysis is different
5 under federal law, Measure B also violates the federal constitution.

6 **VII. CONCLUSION**

7 For all these reasons, this Court should enter judgment in favor of SJPOA on
8 its claims and deny the declaratory relief the City requests or, alternatively, enter
9 judgment for SJPOA on all the City’s federal cross-claims.

10 Dated: September 10, 2013

11 CARROLL, BURDICK & McDONOUGH LLP

12
13 By 

14 Gregg McLean Adam
15 Gonzalo C. Martinez
16 Amber L. West

17 Attorneys for Plaintiff and Cross-Defendant
18 San Jose Police Officers’ Association
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1 *San Jose POA v. City of San Jose, et al.*,
2 Santa Clara County Superior Court, No. 1-12-CV-225926
(and Consolidated Actions 1-12-CV-225928, 1-12-CV-226570, 1-12-CV-226574,
3 1-12-CV-227864, and No. 1-12-CV-233660)

4 **PROOF OF ELECTRONIC SERVICE**

5 I declare that I am employed in the County of San Francisco, California. I am
6 over the age of eighteen years and not a party to the within cause; my business address is
44 Montgomery Street, Suite 400, San Francisco, CA 94104. On September 10, 2013, I
7 served the enclosed:

8 **PLAINTIFF AND CROSS-DEFENDANT SAN JOSE POLICE OFFICERS' ASSOCIATION'S**
9 **POST-TRIAL BRIEF**

10 by electronic service. Based upon a court order or an agreement of the parties to accept
11 service by electronic transmission, I caused the documents to be sent to the persons at the
12 electronic notification addresses listed below. I did not receive, within a reasonable time
after the transmission, any electronic message or other indication that the transmission
was unsuccessful.

13 Arthur A. Hartinger, Esq. 14 Linda M. Ross, Esq. 15 Jennifer L. Nock, Esq. 16 Michael C. Hughes, Esq. 17 Meyers, Nave, Riback, Silver & Wilson 18 555 12th Street, Suite 1500 19 Oakland, CA 94607 20 Phone: (510) 808-2000 21 Fax: (510) 444-1108 22 Email: ahartinger@meyersnave.com 23 lross@meyersnave.com 24 jnock@meyersnave.com 25 mhughes@meyersnave.com	26 <i>Counsel for Defendants</i> <i>City of San Jose (No. 1-12-CV-225926)</i> 27 <i>City of San Jose and Debra Figone</i> <i>(Nos. 1-12-CV-225928;</i> <i>1-12-CV-226570; 1-12-CV-226574;</i> <i>1-12-CV-227864)</i>
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Harvey L. Leiderman, Esq.
Reed Smith LLP
101 Second Street, Suite 1800
San Francisco, CA 94105
Phone: (415) 659-5914
Fax: (415) 391-8269
Email: hleiderman@reedsmith.com

John McBride, Esq.
Christopher E. Platten, Esq.
Mark S. Renner, Esq.
Wylie, McBride, Platten & Renner
2125 Canoas Garden Ave., Suite 120
San Jose, CA 95125
Phone: (408) 979-2920
Fax: (408) 979-2934
Email: jmcbride@wmprlaw.com
cplatten@wmprlaw.com
mrenner@wmprlaw.com

Teague P. Paterson, Esq.
Vishtasp M. Soroushian, Esq.
Beeson, Taylor & Bodine APC
Ross House, 2nd Floor
483 Ninth Street
Oakland, CA 94607-4051
Phone: (510) 625-9700
Fax: (510) 625-8275
Email: TPaterson@beesontayer.com
VSoroushian@beesontayer.com

Counsel for Defendant Board of Administration for Police and Fire Department Retirement Plan of City of San Jose (No. 1-12-CV-225926)

Necessary Party in Interest The Board of Administration for the 1961 San Jose Police and Fire Department Retirement Plan (No. 1-12-CV-225928)

Necessary Party in Interest The Board of Administration for the 1975 Federated City Employees' Retirement Plan (Nos. 1-12-CV-226570; 1-12-CV-226574)

Necessary Party in Interest The Board of Administration for the Federated City Employees Retirement Plan (No. 1-12-CV-227864)

Counsel for Plaintiffs Robert Sapien, Mary McCarthy, Thanh Ho, Randy Sekany and Ken Heredia (No. 1-12-CV-225928)

Teresa Harris, Jon Reger, and Moses Serrano (No. 1-12-CV-226570)

John Mukhar, Dale Dapp, James Atkins, William Buffington and Kirk Pennington (No. 1-12-CV-226574)

Counsel for Plaintiff AFSCME Local 101 (No. 1-12-CV-227864)

1 Stephen H. Silver, Esq.
Richard A. Levine, Esq.
2 Jacob A. Kalinski, Esq.
Silver, Hadden, Silver, Wexler & Levine
3 1428 Second Street, Suite 200
Santa Monica, CA 90401
4 Phone: (310) 393-1486
Fax: (310) 395-5801
5 Email: shsilver@shslaborlaw.com
rlevine@shslaborlaw.com
6 jkalinski@shslaborlaw.com

*Attorneys for Plaintiff San Jose Retired
Employees Association, Howard E.
Fleming, Donald S. Macrae, Frances J.
Olson, Gary J. Richert and Rosalinda
Navarro (No. 1-12-CV-233660)*

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8 **A copy was also sent via regular U.S. mail**

9 I declare under penalty of perjury that the foregoing is true and correct, and
10 that this declaration was executed on September 10, 2013, at San Francisco, California.

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Joan Gonsalves