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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)

**[SJPOA'S PROPOSED] STATEMENT OF
DECISION**

25 AND RELATED CROSS-COMPLAINT
26 AND CONSOLIDATED ACTIONS

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TABLE OF CONTENTS

	Page
FACTUAL BACKGROUND	1
DISCUSSION	4
I. MEASURE B VIOLATES THE CALIFORNIA CONSTITUTION’S CONTRACTS CLAUSE BECAUSE IT IMPAIRS POLICE OFFICERS’ VESTED PENSION RIGHTS	4
A. There is No Conflict Between Charter Section 1500 and the Creation of Vested Rights In the SJMC	5
B. Sections 1506-A and 1507-A Violate Police Officers’ Right to City Payment of UAAL.....	7
C. Section 1509-A Violates Officers’ Vested Disability Retirement Rights.....	11
D. Section 1510-A Violates Police Officers’ Vested Right to COLAs	13
E. Section 1511-A Violates Police Officers’ Vested Rights to the SRBR	14
F. Section 1512-A Violates Police Officers’ Vested Rights to the “Lowest Cost” Retirement Healthcare Plan Available to Active Officers	17
G. The City Offered No Cognizable Justification for Measure B’s Violation of Vested Rights	24
II. MEASURE B VIOLATES SJPOA’S COLLECTIVE BARGAINING AGREEMENT	25
III. SECTION 1513-A VIOLATES THE P&F RETIREMENT BOARD’S FIDUCIARY DUTIES TO BENEFICIARIES.....	26
IV. SECTION 1514-A VIOLATES OFFICERS’ RIGHT TO PETITION.....	29
V. SECTION 1515-A VIOLATES THE SEPARATION OF POWERS DOCTRINE	31
VI. SJPOA IS ENTITLED TO A PERMANENT INJUNCTION ENJOINING THE CITY FROM APPLYING MEASURE B TO CURRENT POLICE OFFICERS AND RETIREES	32
VII. THE CITY FAILED TO SHOW IT IS ENTITLED TO DECLARATORY RELIEF ON ITS FEDERAL CROSS-CLAIMS	32
VIII. DISPOSITION.....	34

1 Retirement Plan of the City of San Jose (“P&F Retirement Board” or “Board”).³ SJPOA
2 sought declarative and injunctive relief, as well as damages from the City. SJPOA did not
3 contend that Measure B violated the rights of future Police Officers, but rather that it
4 violated the rights of active and retired Police Officers.

5 At trial, SJPOA and the other unions presented sections of the San Jose City
6 Charter (“Charter”), the San Jose Municipal Code (“SJMC”), and their collective
7 bargaining agreements (memoranda of understanding or “MOA”) giving rise to their
8 rights. They also presented witnesses, including SJPOA’s Vice-President, Sergeant John
9 Robb, as well as retired police officers Peter Salvi and Michael Fehr who testified
10 regarding substantial increases in the amount they pay for their retiree healthcare.⁴ The
11 unions also presented the expert testimony of Thomas Lowman, an actuary, who testified
12 regarding the P&F Retirement System and the concept of unfunded accrued actuarial
13 liability (“UAAL”).

14 In opposition, the City presented, *inter alia*, the testimony of Sharon Erickson
15 (the City’s Auditor), Debora Figone (the City Manager), and Alex Gurza (the Deputy City
16 Manager), regarding the City’s fiscal condition that led up to Measure B. The City also
17 presented its own actuarial expert, John Bartel.

18 The City offered no evidence that the P&F Retirement Plan itself was insolvent
19 or that Measure B was directed to address any such insolvency. Instead, the City’s
20 evidence was that it had suffered declining revenues during the Great Recession and faced
21 increasing future pension obligations that required the City to reduce certain municipal
22 services such as library, park, and maintenance services as well as staffing across all city
23 departments. (RT 579:28, 583:17-26, 585:15; Measure B, section 1501-A.) The City’s
24

25 ³ SJPOA sued the P&F Retirement Board solely as a necessary and indispensable party.
26 The Board administers the retirement plan, but has no authority over any changes to its
27 terms. SJPOA seeks no direct relief against the Board.

28 ⁴ SJPOA also presented the testimony of Bob Leininger, who testified he received certain
retirement newsletters from the City. (RT 1009:16-1010:12; e.g., Ex. 13 [April 2005 City
of San Jose Retirement System Newsletter].)

1 witnesses testified that Measure B was driven by a concern with containing the City's
2 employee and pension costs and that the City Mayor proposed Measure B along with a
3 declaration of fiscal emergency.

4 Despite the City's economic condition, City Manager Figone testified that she
5 ultimately recommended to the City Council that it not adopt a declaration of fiscal
6 emergency. A motivating reason for this was that in December 2011, the City received a
7 revised projection of its pension costs for Fiscal Year 2012-13 that was approximately \$55
8 million less than previously projected. The City Council took Figone's advice and did not
9 declare a fiscal emergency.

10 Relatedly, Figone testified that in August 2012 she recommended that the City
11 Council approve a ¼ cent or ½ cent city sales tax increase measure be put on the
12 November 2012 election ballot. (RT 575:9; 631:12-28.) The measure, if passed, would
13 have raised revenues by approximately \$60 million (RT 632:7.)

14 SJPOA also elicited testimony from the City's witnesses that the City's
15 economic condition has improved even without full implementation of Measure B. Sales
16 and property tax revenues rose from 2011 onwards and were projected to further increase.
17 (RT 486:25.) City Manager Figone acknowledged that the City's current 2013-14 budget
18 is restoring city services and paying salary increases to employees.

19 The evidence at trial also demonstrated that the City Mayor had represented on
20 numerous occasions that the City's pension costs would increase to \$650 million in fiscal
21 years . (RT 636:17-18.) The evidence further demonstrated that the \$650 million figure
22 was not accurate, but rather that the pension costs for that fiscal year were dramatically
23 lower \$ 431 million. (RT 637:27.) Toward the end of 2011, pension liabilities were
24 estimated to less than half the unfounded \$650 million figure put forth by the Mayor
25 repeatedly in prior months.

26 The parties do not appear to dispute the City's economic condition, but rather
27 dispute its applicability to issues presently before this Court.

1 1186, emphases added; *Olson v. Cory* (1980) 27 Cal.3d 532, 540 [“a public employee’s
2 pension rights are an integral element of compensation”].)

3 Charters and municipal codes are valid and enforceable sources of vested
4 property rights. (See *International Assn. of Firefighters v. San Diego* (1983) 34 Cal.3d
5 292, 302 (“IAF”) [charter, ordinances, and municipal codes]; *Retired Employees*
6 *Association of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1194
7 (“REAOC”) [ordinances].)

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

16 **A. There is No Conflict Between Charter Section 1500 and the Creation**
17 **of Vested Rights In the SJMC**

18 In its June 21, 2013 Order denying the City’s Motion for Summary
19 Adjudication, this Court rejected the City’s position that the Charter prevents the creation
20 of vested rights. The evidence and parties’ arguments at trial confirmed that prior ruling.

21 First, by its terms, Section 1500 does not apply to Measure B because it is not
22 an ordinance enacted by the City Council.⁵ The plain text of Section 1500 provides the

23 _____
24 ⁵ Charter Section 1500 provides:

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

1 “Council may . . . amend” and thus does not authorize Measure B—a charter amendment
2 enacted by the voters. The City’s placement of Measure B on the ballot cannot satisfy
3 Section 1500’s mandate that “the Council” enact the amendment because a proposed
4 charter amendment is not the law of San Jose until the voters enact it. (See Cal. Const.
5 art. XI § 3(a).) Our Supreme Court has held that “reservation of rights” language must be
6 read in strict conformance with its stated terms. (*Eu, supra*, 54 Cal.3d at pp. 529-530; see
7 also *Southern California Gas Co. v. City of Santa Ana* (9th Cir. 2003) 336 F.3d 885, 893
8 [rejecting as “absurd” analogous “reservation of rights” argument by municipality in
9 contracts clause case].)⁶ Additionally, Section 1500 does not contain any express
10 language preventing the creation of vested rights, let alone evidence such intent.

11 Second, the Court finds there is no “conflict” between the Charter and the
12 SJMC because the Charter itself expressly authorizes the City Council to create pension
13 rights through the SJMC. Charter Section 1500 states that the City Council “shall
14 provide, by ordinance or ordinances, for the creation, establishment and maintenance of a
15 retirement plan.” Charter Section 1504(e) expressly authorizes the City Council to grant
16 “greater or additional” benefits.

17 The legislative history and amendments to Section 1500 also confirm the
18 limited nature of the “reservation of rights” language. In particular, the evidence at trial
19 demonstrated that the 1961 Charter amendments added the “reservation of rights”
20 language solely to allow the City Council to increase pension benefits.

21
22
23 employees.

24 Strictly speaking, Charter Section 1503 governs the 1961 P&F Retirement Plan, but it
25 uses materially similar “reservation” language, and SJPOA argues that the same analysis
applies to Sections 1500 and 1503.

26 ⁶ The City relies heavily on *Walsh v. Board of Administration* (1992) 4 Cal.App.4th 682,
27 which applied the same “reservation of rights” as *Eu* but on substantially different facts.
28 There it was the Legislature, rather than voters, who exercised its authority to limit
Walsh’s retirement rights, consistent with the “reservation of rights.” (*Id.* at p. 704,
distinguishing *Eu* on this ground.)

1 **B. Sections 1506-A and 1507-A Violate Police Officers' Right to City**
2 **Payment of UAAL**

3 Section 1506-A mandates an employee salary reduction, effective June 23,
4 2013, of 4% per year with a 16% maximum deduction to pay for up to half of "any"
5 UAAL. Section 1507-A implements the "Voluntary Election Program" ("VEP") whereby
6 employees retain the vested right to City payment of UAAL only if they give up other
7 valuable pension rights. The Court finds that Sections 1506-A and 1507-A violate the
8 vested rights of Police Officers.

9 *Vested right.* SJMC sections 3.36.1520, and 3.36.1550 establish that Police
10 Officers have a vested right to City payment of UAAL for the pension system.⁷ SJMC
11 3.36.1520 ("Current service contributions") requires an actuarially sound system (i.e., a
12 fully funded system), but it specifically exempts Police Officers from paying UAAL.
13 SJMC 3.36.1550 ("Contributions for prior service benefits") expressly provides that "the
14 City of San José shall contribute to the retirement fund, monthly, all such amounts as the
15 retirement board shall find must be contributed to the fund, to make this plan actuarially
16 sound to the extent that such amounts are not provided by member and city's current
17 service contributions as provided for in Section 3.36.1520." Municipal ordinances can
18 properly "manifest[] an express intent to cover past [UAAL]" creating a vested right.
19 (*Assoc. of Blue Collar Workers v. Wills* (1986) 187 Cal.App.3d 780, 789.)

20 The legislative history of the pension system and the City's own course of
21 conduct support this result. The City Charter and SJMC have historically required the
22 City to pay UAAL. The 1946 Charter amendments allocated UAAL to the City in Charter
23 Section 78a, sub. (2)(k). Section 78b of the 1961 Charter amendments retained this
24 requirement, but permitted the City to require contributions from members for UAAL
25 generated by increased benefits. Section 1504, subd. (c) of the 1965 Charter also required
26 an actuarially sound system, but was silent on UAAL allocation, authorizing the City

27 ⁷ This analysis does not apply to UAAL for retiree healthcare because by its terms SJMC
28 3.36.1520 excludes retiree healthcare benefits. SJPOA does not argue that its members
 have a vested right not to pay UAAL for retiree healthcare.

1 Council to allocate UAAL by ordinance. The evidence demonstrated that although the
2 Retirement Board used an actuarial method in 1965 to 1971 that defined “current
3 contributions” to include UAAL, in 1971 the City Council enacted a resolution declaring
4 the Council’s intent to amend the P&F Retirement Plan so that only the City paid UAAL.
5 The Council formally amended the plan in 1979, which enacted the immediate precursors
6 to SJMC 3.36.1520 and 3.36.1550. Further, the evidence showed that when the plan was
7 overfunded in 1993-2004, the City reduced its contributions to the plan on the theory that
8 because it was required to pay all UAAL it was accordingly entitled to take all gains.

9 The City’s contrary arguments are not persuasive. It principally argues that
10 Police Officers waived this vested right by negotiating and entering into Article 5.1 of the
11 2010-2011 MOA with the City wherein Officers paid UAAL. The City has not met its
12 burden of showing a clear and unambiguous waiver of vested rights. (*Choate v. Celite*
13 *Corp.* (2013) 215 Cal.App.4th 1460, 1466; *Phillips v. State Personnel Bd.* (1986) 184
14 Cal.App.3d 651, 660, disapproved on other grounds in *Coleman v. Department of*
15 *Personnel Admin.* (1991) 52 Cal.3d 1102, 1123, fn. 8.) Ambiguities arising in
16 determination of waiver must be construed in the favor of public employees. (*Choate,*
17 *supra*, 215 Cal.App.4th at p. 1466, citing *Kirby v. Immoos Fire Protection, Inc.* (2012) 53
18 Cal.4th 1244, 1250.)

19 Putting aside that, and as the City itself concedes, “a collective bargaining unit
20 may not bargain away individual statutory or constitutional rights which flow from
21 sources outside the collective bargaining agreement itself” (*San Bernardino Public*
22 *Employees Assn. v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1225), the evidence at
23 trial did not support the City’s waiver argument.

24 The evidence demonstrated that Police Officers did not pay UAAL through
25 Article 5.1 and that their additional contributions were paid directly to their individual
26 retirement accounts. (Ex. 5470 [Gurza000551].) Article 5.1 provided that Police Officers
27 were paying “One-Time Additional Retirement Contributions” of 5.25% of their pay from
28 June 2010 through June 2011. (*Id.*) Such contributions were made on a pre-tax basis and

1 were subject to withdrawal on separation from city service. (*Id.*) While these
2 contributions allowed the City to reduce its payments toward UAAL, Article 5.1 does not
3 show that employees themselves directly paid UAAL or waived their vested rights under
4 SJMC 3.36.1530 and 3.36.1550. In fact, Article 5.1 reflected that the parties
5 contemplated the UAAL obligation remained with the City. The MOA stated that “the
6 amounts so contributed will be applied to reduce the contributions that *the City would*
7 *otherwise be required to make* for [UAAL]” (italics added) and that “the intent of this
8 additional ... contribution ... is to reduce the City’s required pension contribution rate.”⁸
9 (Ex. 5470 [Gurza000551].) SJMC 3.36.1525 does not change the analysis because it
10 merely implements the parties’ agreement.

11 This case is unlike *San Diego Police Officers Assoc. v. San Diego City*
12 *Employees’ Retirement System* (9th Cir. 2009) 568 F.3d 725, 739 because the City can
13 point to no “historical practice of negotiating” payment of UAAL “in lieu of or in
14 conjunction with salary increases” such that City payment of UAAL was “a compensation
15 term, not a [vested] retirement benefit.” The City presented no evidence of an analogous
16 “historical practice” here. SJPOA did *not* agree its members would make any on-going
17 contributions. By its terms Article 5.1 was a “one-time” agreement, and the subsequent
18 MOA did not require similar contributions. (Ex. 5470 [Gurza000551].)

19 Next, the City argues Officers paid UAAL in the past. The evidence at trial
20 showed that Police Officers have in the past paid prior service contributions in exchange
21 for increased retroactive benefits. The unions’ actuarial expert Thomas Lowman, and
22 City witness Alex Gurza, testified that when benefits were increased retroactively,
23 employees paid the normal costs of those enhancements as prior service costs. That is
24 because a retroactive benefits increase results in accumulated costs arising from the delay
25

26 ⁸ Gurza’s trial testimony regarding certain pre-MOA bargaining letters does not change
27 the result. Parol evidence cannot contradict the terms of the MOA. (*Casa Herrera, Inc. v.*
28 *Beydoun* (2004) 32 Cal.4th 336, 343.) When asked on cross-examination whether SJPOA
agreed to assume the City’s obligation to pay UAAL, Gurza did not testify there was any
such agreement and instead paraphrased the language of the parties’ contract.

1 between the start of the improved benefits and the start of employees' payments the
2 improved benefit.

3 But even if the Court deems such contributions as a form of UAAL—rather
4 than as payment of past normal costs—that does not mean that Officers waived any vested
5 rights. Such payment of UAAL is consistent with the law on vested pension rights
6 because it exchanges a new benefit for the detriment of paying UAAL. For that reason,
7 the City's reliance on other SJMC provisions reflecting such payments in exchange for
8 increased benefits does not change the analysis. Finally, the City contends that SJPOA
9 cannot prevail because it cannot “prove that the City gave up all legislative control over
10 employee pension contribution rates.” But the City has no control over employee pension
11 contribution rates—it delegated that to the P&F Retirement Board. (See Ex. 31 [SJMC
12 3.36.1520, 3.36.1550]; *see also id.* [SJMC 3.36.510].) More to the point, the City seems
13 to be arguing that it has control over how to apportion UAAL. But, while that may be true
14 as to future employees who have no vested rights, it is not true for active Police Officers
15 who do have vested rights under the Charter and SJMC.

16 ***Substantial impairment.*** Sections 1506-A substantially impairs Police
17 Officers' vested rights because it requires them to pay for UAAL with salary reductions of
18 4-16% even though the SJMC makes the City responsible for UAAL. Section 1507-A
19 also violates vested rights because it forces Police Officers to choose between keeping the
20 vested right to City payment of UAAL or keeping their contractual salaries.

21 ***No comparable new advantage.*** The City offered Police Officers no
22 comparable new advantage in exchange for making them pay UAAL. The City asserted
23 at trial that increased retirement contributions are “more beneficial” to employees than a
24 straight wage cut and thus are a comparable new advantage. But California courts define
25 a comparable new advantage as that which offsets the withdrawal of a vested benefit by
26 assigning another, comparable vested benefit the employees do not already possess. (See
27 *Eu, supra*, 54 Cal.3d at pp. 529-530.) That increased UAAL contributions are paid by
28 increased contributions, rather than by a wage cut, is not a comparable new advantage

1 because employees did not pay UAAL previously and because they received nothing in
2 exchange for paying this new obligation.

3 [In the alternative, if the Court does not find that Police Officers have a vested
4 right to City payment of UAAL, the following analysis should be applied:

5 Because the voters intended that Measure B be prospective-only (see Section
6 1502-A), the City cannot apply Section 1506-A to require Police Officers to pay for
7 UAAL that accrued before Measure B was enacted. The City presented no evidence that
8 the voters intended Measure B be applied retroactively. The evidence at trial was that
9 almost all of the UAAL in the P&F Retirement System accrued before Measure B was
10 enacted, and thus remains the responsibility of the City.]

11 **C. Section 1509-A Violates Officers' Vested Disability Retirement**
12 **Rights**

13 *Vested right.* The evidence at trial demonstrated that Charter section 1504 and
14 SJMC 3.36.900 create Police Officers' vested right to disability retirement and
15 specifically define "disabled" or "disability" as an Officer's inability to perform work
16 within Police Officer classifications. SJMC 3.36.900 also authorizes the P&F Retirement
17 Board to determine whether an injured officer is disabled, in consultation with "competent
18 medical opinion." Disability retirement benefits are recognized vested rights. (See *Frank*
19 *v. Board of Administration* (1976) 56 Cal.App.3d 236, 243.)

20 *Substantial impairment.* Measure B substantially impairs those rights as
21 follows: (1) disability is assessed with reference to inability to "perform any other jobs . . .
22 in the employee's department," including non-police officer classifications (Section 1509-
23 A(b)(ii)(2)); (2) officers must also be "incapable of engaging in any gainful employment
24 for the City," meaning an officer is not disabled if he or she can perform any position with
25 the City outside the police department (Section 1509-A(a)); (3) a disability retirement
26 assessment is made even if there are no vacancies into which an injured officer can be
27 placed (*id.*); and (4) Measure B divests the P&F Retirement Board from deciding whether
28

1 an officer is disabled, giving that authority to a medical panel selected solely by the City.
2 (*Id.* subd., (c).)

3 The City argues that Measure B is not an impairment because it “restricts the
4 parties to their reasonable expectations . . . to restore the original purpose of disability
5 retirements.” But contract expectations are measured from the time of contracting, not in
6 hindsight (*Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809,
7 832 [“we look to the reasonable expectation of the parties at the time of contract”]), and
8 the evidence at trial was that the City sought to amend disability retirement to contain its
9 costs. More importantly, the City presented no supporting evidence of the parties’ *mutual*
10 intent. Ms. Erickson’s testimony on disability retirement only went to the *City’s* unilateral
11 desire to “reform” the disability retirement system, but said nothing about *employees’*
12 reasonable expectations. Under the vested rights doctrine, Police Officers’ reasonable
13 expectation was to continue under the disability retirement system in place when they
14 were hired. (See *Frank, supra*, 56 Cal.App.3d at pp. 241-243, 245 [correctional
15 employee’s “reasonable expectations were thwarted” by the subsequent amendments to
16 the disability retirement system that existed when he was hired]; *Newman v. City of*
17 *Oakland Retirement Board* (1978) 80 Cal.App.3d 450, 453 [refusing to apply recent
18 amendment because “[i]t was th[e] long established policy . . . that was intended to and
19 did become a part of appellant’s pension contract”].)

20 ***No comparable new advantage.*** The City’s proffered “countervailing
21 advantages” are neither comparable nor do they compensate employees for these
22 substantial impairments. A decrease in the duration of disability from “permanent” or age
23 55 to “at least one year,” does not justify forcing Police Officers to work in non-sworn
24 positions inside or outside the police department, especially when there are no such
25 positions available. Moreover, that “advantage” is meaningless to an Officer who is or is
26 near 55 years old.

27 As to the “potential” of long-term disability insurance, that is not a comparable
28 new advantage because employees will have to pay out-of-pocket premiums which

1 disabled officers do not currently do, the level of benefits will not be the same, and finally
2 because City payment is wholly discretionary. (See *Teachers' Retirement Bd. v. Genest*,
3 (2007) 154 Cal.App.4th 1012, 1037 [“[t]he replacement of an express obligation to pay a
4 fixed sum of money with a promise to pay the sum if you prove you need it ... is not a
5 comparable new advantage”].) The promise of a future benefit will not do.

6 **D. Section 1510-A Violates Police Officers' Vested Right to COLAs**

7 *Vested right.* The evidence established that Police Officers have a vested right
8 to a cost of living adjustment (“COLA”) to their pension benefits. SJMC 3.44.150
9 obligates the City to pay retired Police Officers' an annual 3% COLA benefit upon
10 retirement. Additionally, numerous City recruiting and retirement benefits documents
11 promised that benefit to Police Officers. The evidence further showed that Police Officers
12 directly pay into the retirement system to fund COLAs. COLA benefits are recognized
13 vested pension rights. (*Olson v. Cory* (1980) 27 Cal.3d 532, 538-542; *Pasadena Police*
14 *Officers Association v. City of Pasadena* (1983) 147 Cal.App.3d 695, 702-703.)

15 *Substantial impairment.* Section 1510-A substantially impairs those vested
16 rights on its face because it gives the City the unfettered right to deny COLAs upon a
17 declaration of “fiscal and service level emergency.” (Ex. 38.) Upon such a declaration,
18 Measure B allows the City to suspend COLAs for up to five years. (*Id.*) Measure B does
19 not define a “fiscal and service level emergency” or even require that the City Council's
20 suspension of COLAs be “reasonable” under the circumstances or reasonably related to a
21 declared emergency. (*Id.*) It does not even require that the time period during which
22 COLAs are suspended have any nexus to the declared emergency. (*Id.*) Any suspended
23 COLA increases are forfeited because Measure B directs that COLAs “shall” only be
24 restored “prospectively” and even then only “in whole or in part.” (*Id.*) Measure B
25 provides no way for retirees to obtain past COLAs to which they are entitled. (*Id.*)

26 Although the City argues SJPOA's claim is unripe because “the legality of the
27 City's actions cannot be determined until the City adopts an emergency resolution,” that is
28 incorrect. SJPOA's challenge to Section 1510-A is facial and as a matter of law the mere

1 declaration of an emergency is insufficient to withhold COLAs under *Sonoma County*
2 *Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296. That case
3 held that even if a local government declares a fiscal crisis, before it may constitutionally
4 withhold COLA benefits, it must demonstrate that suspending COLA benefits is “a
5 reasonable [and necessary] measure” directed at resolving that crisis. (*Id.* at 312).
6 Measure B has no such requirements and is thus invalid on its face.

7 ***No comparable new advantage.*** Measure B does not offer any comparable
8 new advantage that Officers would receive upon suspension of their COLA benefits.

9 **E. Section 1511-A Violates Police Officers’ Vested Rights to the SRBR**

10 This Court previously ruled that as a matter of law “the plain language of the
11 [SJMC] makes [SRBR] distributions mandatory” for the P&F Retirement Plan and thus
12 they are a vested right. (MSA Order at 6:15-16.) It further ruled that “[i]f there was an
13 intent that SRBR cease distributions in the face of unfunded liability, it is not apparent
14 from the face of the Charter or the [SJMC].” (*Id.* at 6:23-25.) The evidence at trial
15 confirmed this ruling.

16 ***Vested right.*** SJMC 3.36.580 created Police Officers’ vested right to the
17 SRBR, which provides retirees a supplemental check when certain investment goals are
18 exceeded. Section 3.36.580 establishes a funding mechanism (Ex. 31 [SJMC 3.36.580 at
19 subd. B]), sets the only conditions for distribution or transfer of SRBR funds (*id.* at subd.
20 C-D) and mandates that the Retirement Board “shall” distribute funds to eligible retirees
21 on a yearly basis when those investment goals are exceeded (*id.*, subd. D.2.) Specifically,
22 SRBR benefits are funded from earnings from the SRBR fund and “excess earnings” from
23 the P&F Retirement Plan. (*Id.* [SJMC 3.36.580.B].) The SRBR applies only to members
24 who were receiving retirement benefits as of June 2001. (*Id.* at subd. D.3.) There is no
25 time limitation or express reservation of rights to modify the SRBR in the SJMC. The
26 SRBR is a vested right. (*Teachers Retirement Board v. Genest* (2007) 154 Cal.App.4th
27 1012, 1029-1030 [statute created vested right to continuous annual transfer from general
28 fund to supplemental fund].)

1 The City argues it has retained legislative control over the SRBR, preventing
2 the creation of a vested right. The P&F Retirement Plan, however, does not grant the City
3 Council the same authority over whether to grant SRBR benefits as it has in the Federated
4 Plan. There is no discretionary language whereby the Council “may authorize payment of
5 all, or such portion as it may elect” of the SRBR. (*Ventura County Retired Employees*
6 *Assn. v. County of Ventura* (1991) 228 Cal.App.3d 1594, 1598-1599.) SJMC 3.36.580,
7 subd. D.2 & D.5 make that distribution mandatory. Relatedly, the City’s legislative
8 control over the Retirement Board’s methodology for SRBR distributions does not give
9 the Council authority over whether to distribute SRBR funds. The City exercised the
10 limited discretion it had over the SRBR when it approved that methodology in 2002. (Ex.
11 5705.⁹)

12 This case is unlike *Doyle v. City of Medford* (9th Cir. 2010) 606 F.3d 667
13 because that case involved an “unusual” statute that did “not contain a particularized
14 standard[.]” making “the nature and extent of the entitlement ... too indeterminate” and
15 granting the government employer “extensive functional discretion regarding *whether* and
16 to what extent” the benefit at issue will be offered. (*Id.* at 672.) The statute in *Doyle* is
17 wholly unlike SJMC 3.36.580 because the latter clearly restricts the City’s (and even the
18 Board’s) discretion over making SRBR distributions. (See *id.* at 673 [vested right exists
19 with “mandatory language that restricts the discretion of the decisionmaker”].) Thus,
20 despite Gurza’s characterization of SRBR distributions as “irregular and undetermined,”
21 SJMC 3.36.580 clearly sets forth the standard when SRBR distributions are made.

22 The fact that SRBR distributions are made when certain investment goals are
23 met does not defeat the existence of a vested right. (See *Doyle, supra*, 606 F.3d at 673
24 [“A factual contingency does not ... preclude the creation of a protected property
25
26

27 ⁹ January 29, 2002 “A Resolution of the Council of the City of San Jose Approving the
28 Methodology for the Distribution of Moneys in the Supplemental Retiree Benefit Reserve
of the Police and Fire Department Retirement Fund.” [SJRJN000484 – 000488.]

1 interest.... [A] statute may create a property interest if it mandates a benefit when specific
2 non-discretionary factual criteria are met”].)

3 Finally, that the City Council suspended SRBR distributions in 2010-2013
4 does not demonstrate the SRBR was not a vested right. (See *CTA, supra*, 155 Cal.App.3d
5 at 506 [“This is a circular argument; it uses evidence of a violation of a contract to show
6 there was no contract”].) Although SJPOA and its retirees did not challenge the
7 temporary withholding of SRBR benefits at that time, that does *not* mean they acquiesced
8 to termination of the SRBR. (See *Wilson, supra*, 52 Cal.App.4th at 1152.)

9 ***Substantial impairment.*** Section 1511-A substantially impairs this vested
10 right because it requires termination of the SRBR. (See Ex. 38.) The evidence showed
11 the City terminated the SRBR by ordinance on January 29, 2013 and directed that funds
12 be transferred to the two retirement plans. (Ex. 42 [ordinance terminating SRBR].) The
13 evidence further demonstrated that the City accounted a \$13 million cost savings to itself
14 based on the termination of the SRBR.

15 The City’s principal defense of Section 1511-A is that there is no impairment
16 because Measure B limits the parties to their reasonable expectations, citing *Allen v.*
17 *Board of Administration* (1983) 34 Cal.3d 114. But *Allen* held that while the law
18 authorizes “restrict[ing] a party to the gains reasonably to be expected from the contract”
19 it does “not permit[] a construction which permits contract repudiation or destruction.”
20 (*Id.* at 321; accord *Walsh, supra*, 4 Cal.App.4th at p. 702 [Legislature “did not eliminate
21 Walsh’s retirement benefits; rather, it confined his benefits to those consistent with” what
22 he would have been eligible for in the first place]; see also *Kern, supra*, 29 Cal.2d at p.
23 853 [“an employee’s pension rights may [not] be entirely destroyed”].) The evidence is
24 that Measure B did not amend the SRBR, but rather that it required it be terminated.
25 Thus, even if the testimony of the City’s witnesses (Erickson, Figone, Gurza, and Bartel)
26 regarding the effects of SRBR distributions on UAAL may support *amending* the SRBR,
27 it does not justify terminating SRBR.

1 *No comparable new advantage.* The City gave employees no comparable new
2 advantage for terminating the SRBR. Transfer of SRBR funds to the P&F Retirement
3 Plan is not a comparable new advantage because Police Officers already participate in the
4 retirement fund with their contributions. (*Eu, supra*, 54 Cal.3d at 530 [“transfer or
5 redirection of pension funds to the federal Social Security system” was not a “comparable
6 new advantage” because “every legislator already possessed the right to join the federal
7 Social Security system”].)

8 The City argues that Measure B “does not foreclose the possibility of
9 supplemental payments to retirees” because it only “required that such payments shall not
10 be funded from plan assets.” But the City identifies no other sources of funds that will be
11 used to pay supplemental payments. The promise of a future benefit from an unidentified
12 source is insufficient. (See *Genest, supra*, 154 Cal.App.4th at 1037.)

13 The City’s exhaustive public policy arguments are misplaced. That the City
14 already accounted for the SRBR trust funds which are the subject of this litigation—funds
15 intended for SRBR beneficiaries—to reduce its own pension contributions by \$13 million
16 does not justify the City’s vested rights violation. (See *International Brotherhood v. City
17 of Redding* (2012) 210 Cal.App.4th 1114, 1122 [“financial distress caused to municipality
18 by a statute a matter to address to the Legislature, not the courts”], citing *Orange County
19 Employees Assn. v. County of Orange* (1991) 234 Cal.App.3d 833, 844, fn. 10 [“the law
20 bars such consideration as an excuse for noncompliance”].)

21 **F. Section 1512-A Violates Police Officers’ Vested Rights to the “Lowest
22 Cost” Retirement Healthcare Plan Available to Active Officers¹⁰**

23 *Vested right.* Upon retirement, and depending upon their date of hire, Police
24 Officers have vested rights to city payment of healthcare costs under two different
25 ordinances.

26 _____
27 ¹⁰ SJPOA does not claim its members have a vested right to not pay retiree healthcare
28 UAAL. Further, Section 1512-A(b)—which disclaims any vested rights arising from
retiree healthcare—cannot lawfully be applied to current Police Officers to divest them of
their existing vested rights further described herein.

1 First, Officers employed after the City implemented Ordinance 21686 on July
2 27, 1984 (Ex. 6 [former SJMC 3.36.1930]), and before implementation of Ordinance
3 25615 on July 31, 1998 (Ex. 9 [amended SJMC 3.36.1930]), have an *express* vested right
4 to pay a premium “in the same amount as is currently paid by an employee of the City in
5 the classification from which the member retired,” i.e., the same premium paid by active
6 Police Officers. (Ex. 6.) That right was created by Ordinance 21686 in 1984, which
7 became former SJMC 3.36.1930. Retirement Handbooks provided to employees in 1995
8 and 1997 told retirees that “You and your survivors will be required to pay a portion of
9 the premiums equal to the amount paid by City employees in the same position you held
10 at the time of your retirement.” (Ex. 7-8.) Currently the City provides active Police
11 Officers with healthcare benefits equivalent to 85% of the lowest cost plan available to
12 active Police Officers.

13 Second, Officers employed on or after July 31, 1998, when Ordinance 25615
14 was implemented, have an *express* vested right to the lowest cost plan available to any
15 city employee and an *implied* vested right to the lowest cost plan available to Police
16 Officers. The implied right was created by the parties’ course of conduct, and the Bogue
17 interest arbitration award, as implemented by the tripartite MOA and by revised SJMC
18 3.36.1930. (Exs. 9, 31, 35, 48, 49, 227.)¹¹ Although the revised SJMC is ambiguous
19 whether the premium paid is with reference to Police Officers or all City employees, the
20 parties’ course of conduct and mutual understandings establishes that an implied term of
21 the contract is that the reference to active employees means active police officers.

22 REAOC recognized that implied contracts give rise to vested pension rights:
23 “The terms of an express contract are stated in words. *The existence and terms of an*
24 *implied contract are manifested by conduct.* The distinction reflects no difference in legal

25 ¹¹ Police Officers and related classification employed after 2008 have separate claims
26 currently the subject of a grievance, demand for arbitration and petition to compel
27 arbitration in *San Jose Police Officers' Association v. City of San Jose*, Santa Clara
28 County Superior Court Case No. 1-13-CV-244180. (See also RT 858:12-859:14 [City
agreeing grievance is separate from this lawsuit and that it will not raise collateral
estoppel].)

1 effect but merely in the mode of manifesting assent. Accordingly, a contract implied in
2 fact consists of obligations arising from a mutual agreement and intent to promise where
3 the agreement and promise have not been expressed in words.” (52 Cal.4th at p. 1178
4 [italics added]; see also *Requa v. Regents of the Univ. of Cal.* (2012) 213 Cal.App.4th 213
5 [continuous provision of benefits, representations during course of employment, and
6 written assurances demonstrate vested rights]; *International Brotherhood v. City of*
7 *Redding* (2012) 210 Cal.App.4th 1114 [job postings and communications used to recruit
8 and induce current employees to accept lower wages support vested rights].)

9 The following facts establish an implied vested right under *REAOC*, *Requa*,
10 *and City of Redding*:

11 The 1997 Bogue interest arbitration award, binding the City, SJPOA and the
12 Firefighters “[i]ncrease[d] the employees’ benefit regarding payment of premiums for
13 medical insurance for future retirees to the 100% of the lowest cost plan,” and was
14 specifically premised on “comparability to active employees’ benefits.” (Ex. 35.)

15 Amended SJMC 3.36.1930 implemented the Bogue arbitration decision,
16 providing that the P&F Retirement Plan would pay the premium for the “lowest cost
17 medical plan” which was defined as “the lowest monthly premium of all eligible medical
18 plans then in effect, determined as of the time the premium is due and owing.” (Ex. 9.)
19 SJMC 3.36.1930 applies *only* to Police Officers and Firefighters and not to any employees
20 in the Federated Plan. Similarly, the 1996-2000 and 2000-2004 tripartite MOAs on
21 retirement benefits provided that “[p]ursuant to the arbitration award, the Retirement Plan
22 will pay the premium for the lowest priced medical insurance plan ... available to active
23 employees.”¹² (Ex. 48.) Because Police Officers (and Firefighters) were the only city
24 employees covered by that MOA, SJPOA and the City mutually understood that the
25 reference to “active employees” did not mean all employees citywide, but rather, as
26 relevant here, it meant “active Police Officers.”

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

1 The City represented to Police Officers about to retire that they would receive
2 the same healthcare benefits as active Officers. Retired Police Officer Peter Salvi testified
3 that when he retired in 1998, he understood his retiree health plan would be “the same as
4 [for] the active officers, including the free lowest price plan” based on representations
5 from city retirement services. Retired Police Officer Michael Fehr, who retired in 2005,
6 testified similarly based on City-sponsored retirement classes and his exit interview with
7 human resources. And SJPOA Vice-President Police Officer John Robb testified based
8 on his experience and familiarity with retiree benefits that before January 1, 2013, retired
9 Officers received the lowest cost plan available to active Officers. Indeed, City Manager
10 Figone’s memorandum to retired employees represented in March 2008 that retiree
11 healthcare benefits were vested rights, i.e., that they could not be changed by the City.

12 In addition to the evidence outlined above relating to the parties’ course of
13 conduct, since Ordinance 25615 was implemented in 1998, the City has continuously paid
14 retirees’ healthcare premiums for a low cost plan tied to that of active Officers. (See Exs.
15 15-18 (Comprehensive Annual Financial Reports showing P&F plan covered retiree
16 healthcare at 100% of lowest cost plan available to active Officers.) And the City’s
17 statements to active Officers when they applied for retirement (such as Salvi and Fehr)
18 have held out the promise of retirement healthcare benefits at 100 percent coverage of the
19 low cost plan active Officers receive. Additionally, at the close of each fiscal year the
20 City’s P&F Retirement Plan issues its fiscal report, and represents that it will pay retirees
21 “100% of the lowest priced medical insurance plan available to an active police and fire
22 employee.” (See Ex. 15 at POA005686 [emphases added]; Ex. 17 at POA005691 [same];
23 Ex. 18 at POA POA007230 [same]; see also Exs. 48-49 [tripartite MOA showing parties’
24 mutual understanding that lowest cost plan determined with reference to active Officers].)

25 Although Gurza denied at trial that “the City [has] ever made any kind of
26 commitment to tie lowest cost plan to any particular category of employee” and testified
27 that since 1994 “[the retiree healthcare benefit] has always been the lowest price plan
28 available to active employees” citywide (RT 801:19-28, 803:22-804:1, 803:19-20, 810:22-

1 23, 864:19-22), this testimony is outweighed by the documentary evidence, including
2 former SJMC 3.36.1930 and the parties' course of conduct under amended SJMC
3 3.36.1930.

4 In any event, that the City offered all its employees the same low cost plan is
5 not inconsistent with nor does it defeat retirees' claim to a vested right vis-à-vis active
6 Police Officers: so long as retirees' low cost plan subsidy was based on the low cost plan
7 offered to active Officers, the vested right was honored, but just happened to coincide
8 with the same plans available citywide. This coincidence is not evidence that no implied
9 vested right existed, especially because the evidence showed there was no vested rights
10 violation until the City started redefining low cost plan with reference to non-Police
11 Officers, as it did after Measure B was enacted.

12 The benefits facts sheets the City introduced at trial do not change the result
13 because the vested right was created by the SJMC and the parties' conduct. Moreover,
14 SJPOA presented evidence the fact sheets may reasonably be interpreted to refer to police
15 and firefighters, rather than citywide, because police and firefighters have their own
16 separate retirement plan.

17 ***Substantial impairment.*** Section 1512-A substantially impaired vested rights
18 because starting in January 1, 2013, the lowest cost plan the City offered to retirees—
19 which sets the subsidy for the retiree healthcare benefit—was no longer tied to any plan
20 offered to active Police Officers. Instead, the evidence was that the lowest cost plan the
21 City offered retired Police Officers was the Kaiser \$1500 deductible plan, a plan that
22 SJPOA had rejected and which was not offered to active Police Officers. Thus, despite
23 their vested rights, the retiree healthcare premiums for retirees like Fehr and Salvi rose
24 substantially from 2012 to 2013, even though they remained in the lowest cost plan
25 offered to active Officers. The evidence was that the City reaped millions of dollars in
26 budgetary savings by changing the low cost plan in 2013, by increasing the healthcare
27 contributions of retired Police Officers.

1 The City makes a number of arguments in response. It argues this claim is
2 barred by the statute of limitations because the SJMC was amended in 1997. But there
3 was no vested rights violation until the City changed the plan design such that the lowest
4 cost plan was different than that available to active Police Officers. For that reason, there
5 is no statute of limitations issue because all the evidence shows there was no impairment
6 of the vested right until 2013.

7 Next, the City contends the changes to the lowest cost plan are unrelated to
8 Measure B. But City Manager Figone originally testified, in response to a direct question
9 from the Court, that the savings the City reaped from the lowest cost plan “are
10 attributable” to Measure B. Figone changed her testimony the next day, testifying that the
11 changes were pursuant to the SJMC. Gurza also denied that the change in low-cost plan
12 was related to Measure B. The Court finds, however, that the testimony by the City’s
13 witnesses cannot overcome the documentary evidence and course of conduct establishing
14 Police Officers’ vested rights, and the fact that the changes to the lowest cost plan were
15 contemporaneous with Measure B. Additionally, Figone’s changed testimony undercuts
16 her veracity and gives rise to an inference that Measure B did cause changes to the lowest
17 cost plan.

18 ***No comparable new benefit.*** The City identified no comparable new benefit in
19 exchange for violating the vested right to the lowest cost plan.

20 *[In the alternative, if the Court does not find an implied vested right for post-*
21 *1998 Police Officers to receive, upon retirement, premiums equivalent to 100% of the cost*
22 *of the lowest cost plan of active Police Officers, the following analysis should be applied.*

23 Upon its implementation in 1998, Ordinance 25615 initially created a higher
24 level of healthcare benefit for retirees than for active Police Officers, a condition that
25 continued until the end of calendar year 2012. (See RT at 137:27-138:4.) In 2013,
26 however, the implementation by the City of a new lowest cost plan—the so-called “Kaiser
27 \$1500 deductible” Plan—for certain active, non-police, city employees caused retirees’
28 healthcare benefit to fall dramatically. For example, retired Police Officer Peter Salvi

1 testified that whereas in 2012 he was enrolled in the lowest cost plan received by active
2 Police Officers at no cost to him, in 2013 this same plan cost him \$314 per month. (RT
3 202:15-26; see also Ex. 51.) Notably, in 2013, there was no change to the healthcare
4 subsidy received by active Police Officers. (See RT 139:4-16.) The evidence further
5 showed that the City had unsuccessfully attempted to persuade SJPOA to agree to the
6 Kaiser \$1500 deductible plan, but that the Union declined. (RT 864-867.)

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

18 For example, taking Salvi's premiums, he paid nothing in 2012 for his share of
19 premiums, because he selected the active Officers' low cost plan, the Kaiser \$25 Copay
20 Plan. But starting in December 2012 he began paying 2013 premiums in the amount of
21 \$314 a month for the same plan. (Ex. 50.) Although his pay stubs reflect an increase of
22 \$130.04 from \$1323.66 (in 2012) to \$1453.70 (in 2013), he actually paid \$314 per month
23 instead, because the City redefined the lowest cost plan to the Kaiser \$1500 Deductible
24 Plan. (Ex. 57 [showing semi-monthly cost of \$569.85, equaling monthly cost of
25 \$1139.70.] That is, the City reduced its lowest cost plan subsidy and only contributes to
26 Salvi's premiums in the amount of the cost of the Kaiser \$1500 plan. The Kaiser \$1500
27 premium (the new “lowest cost” plan), subtracted from the Kaiser \$25 premium (Salvi's
28 plan), is \$314, i.e., the amount Salvi now pays. This is significantly more than what

1 active Officers pay for the lowest cost plan available to them (Kaiser \$25 Copay Plan):
2 they pay 85% of the monthly plan cost of \$1453.70, or \$218.06.]

3 **G. The City Offered No Cognizable Justification for Measure B's**
4 **Violation of Vested Rights**

5 The City has two overarching “defenses” to SJPOA’s vested rights claim.
6 First, that Measure B does not take away any already-earned benefits, but rather that it
7 only changes pension benefits prospectively for current employees. Next, that Measure B
8 is constitutionally-justified. These arguments are unpersuasive.

9 The City contends Measure B is lawful because it only changes Police
10 Officers’ pension rights prospectively under Section 1502-A. But the California Supreme
11 Court has consistently held that public employees have the “right to earn future pension
12 benefits through continued service, on terms substantially equivalent to those” existing at
13 the time they began working, or enhanced during their service. (*Eu, supra*, 54 Cal.3d at p.
14 528 [rejecting voter initiative that preserved already-earned vested rights but that impaired
15 right to accrue additional benefits through future service]; *Carman, supra*, 31 Cal.3d at p.
16 325; *Sweesy v. Los Angeles County Peace Officers’ Retirement Board* (1941) 17 Cal.2d
17 356 [public employees entitled to subsequent benefit increases]; *Kern, supra*, 29 Cal.2d at
18 p. 855 [even though pension right vests upon employment, “the amount, terms and
19 conditions of the benefits may be” increased].) These cases control here, especially
20 because the City cited no contrary case.

21 The City also did not satisfy its burden of justifying Measure B as
22 constitutionally reasonable and necessary. Vested pension rights may only be modified
23 when: (1) the modifications are fiscally necessary to keep the pension system solvent (i.e.,
24 they have a “material relation to the theory of a pension system and its successful
25 operation”), and (2) any “disadvantage[s] to employees” are “accompanied by comparable
26 new advantages.” (*Betts, supra*, 21 Cal.3d at 864.) The Court has already addressed the
27 lack of comparable new advantages, *supra*.

1 Although the City must satisfy both prongs, it expressly waived any fiscal
2 emergency argument. The evidence at trial demonstrated that despite the City’s fiscal
3 stress, the City never adopted a fiscal emergency declaration and the City Manager
4 believed such a declaration was unnecessary. The trial testimony of Sharon Erickson and
5 Debra Figone demonstrated that Measure B was wholly a cost-saving measure *unrelated*
6 to keeping the Retirement Plan financially solvent. That is, the City merely showed it
7 wanted to reduce its own contributions to the Retirement Plan not that changes to the plan
8 were necessary to keep it viable. “Few reported decisions have . . . found that the balance
9 of economic necessity outweighed the employees’ right to offsetting advantages” and the
10 only such case cited involved a pension system that was “completely insolvent.” (*Wills*,
11 *supra*, 187 Cal.App.3d at 793.)

12 Measure B’s “Findings” emphasized the fiscal burdens of the City’s payments
13 for “the climbing cost of employee benefit programs,” payments requiring cuts to city
14 services. But there is no finding that Measure B was necessary to preserve the solvency
15 of the retirement system itself. Measure B’s legislative history confirms it was about cost-
16 cutting unrelated to keeping the pension system solvent, including the City Council
17 resolution placing Measure B on the ballot, the City Clerk’s analysis that accompanied
18 Measure B on the ballot, and the ballot measure arguments presented to the voters.

19 In sum, the City has not shown that Measure B was constitutionally reasonable
20 or necessary.

21 **II. MEASURE B VIOLATES SJPOA’S COLLECTIVE BARGAINING AGREEMENT**

22 SJPOA has also proved that Measure B violates its collective bargaining
23 agreement with the City. The California Supreme Court has expressly held that collective
24 bargaining agreements and salary terms are binding and enforceable on a charter city,
25 notwithstanding municipalities’ plenary authority over employee compensation. (*City of*
26 *Los Angeles v. Superior Court* (2013) 56 Cal.4th 1086, 1093 [“Once a local government
27 approves an MOU, it becomes a binding and enforceable contract that neither side may
28

1 change unilaterally”]; *Glendale City Employees’ Assn. v. City of Glendale* (1975) 15
2 Cal.3d 328, 338-340; *Olson, supra*, 27 Cal.3d at p. 538.)

3 The evidence established that Police Officers’ salaries are set by the parties’
4 contract, according to individual officers’ classification. Sections 1506-A, 1507-A, and
5 1514-A all reduce those salaries by as much as 16% in order to pay UAAL; the former
6 two sections do so directly, and the latter does so indirectly if the VEP is deemed
7 unlawful. That breaches the parties’ contract, resulting in damages to Police Officers in
8 the amount of 4-16% of their salary, depending on City’s rate of implementation.

9 The evidence established that the MOA caps Police Officers’ contributions for
10 retiree healthcare. Under the MOA, such contributions are made by the City and Police
11 Officers on a 1:1 ratio. The MOA also expressly caps any increase in contribution rates
12 for Police Officers at 1.25% per year, and provides that employees shall not pay more
13 than 10% of their pensionable salary to fund retiree healthcare. As of July 1, 2013,
14 SJPOA members already pay 9.51% of their pensionable pay toward retiree healthcare
15 costs. If Measure B Section 1512-A is applied to Police Officers, their contributions can
16 exceed the yearly and overall contractual caps in the MOA, and Police Officers would not
17 be able to invoke the meet and confer provisions of the MOA that the parties negotiated to
18 determine how to pay for any contributions above 10%. That breach will damage Officers
19 by requiring them to pay more than they agreed to in their MOA.¹³

20 **III. SECTION 1513-A VIOLATES THE P&F RETIREMENT BOARD’S FIDUCIARY DUTIES**
21 **TO BENEFICIARIES**

22 SJPOA also proved its claim that Section 1513-A violates the California
23 Pension Protection Act (the “Act”) located in California Constitution. art. XVI, § 17.¹⁴

24 ¹³ The City argues that a stipulation between the parties nullifies this claim. But by its
25 terms that stipulation expires on January 1, 2014, and SJPOA is entitled to declaratory
26 relief that Section 1512-A does not abrogate its current MOA.

27 ¹⁴ Cal. Const. art. XVI, § 17 provides, in relevant part:

28 (a) The retirement board of a public pension or retirement system
shall have the sole and exclusive fiduciary responsibility over the
assets of the public pension or retirement system. *The retirement*

1 The Act constitutionalizes the fiduciary duties that pension boards owe their beneficiaries.
2 (*State ex rel. Pension Obligation Bond Committee v. All Persons Interested in Matter of*
3 *Validity of Cal. Pension Obligation Bonds* (2007) 152 Cal.App.4th 1386, 1392; *Board of*
4 *Retirement v. Sup.Ct.* (2002) 101 Cal.App.4th 1062, 1070.) Under these laws, the P&F
5 Retirement Board's duties are to retirement plan beneficiaries, i.e., current and retired
6 Police Officers.

7 Section 1513-A substantially impairs these duties by requiring the Retirement
8 Board to administer retirement plans so they "minimize any risk to the City and its
9 residents," and to equally "ensure fair and equitable treatment for current and future plan
10 members and taxpayers with respect to the costs of the plans." (Section 1513-A(a),
11 (c)(2)].) Requiring the Retirement Board to divide its fiduciary duties between
12 beneficiaries and the City/taxpayers violates the Act because the Board is constitutionally-
13 required to discharge its duties "for the exclusive purposes of providing benefits to,
14 participants and their beneficiaries" and its paramount duty is to beneficiaries. (Cal.
15 Const. art. XVI, § 17 (b).) Additionally, consistent with its fiduciary duties to
16 beneficiaries, the Board has "the sole and exclusive responsibility to administer the
17 system" and "the sole and exclusive power to provide for actuarial services" (*id.*, subd.
18 (a), (e)), meaning that as such Section 1513-A(c) cannot, as it directs, dictate "the

19
20 *board shall also have sole and exclusive responsibility to administer*
21 *the system in a manner that will assure prompt delivery of benefits*
and related services to the participants and their beneficiaries....

22 (b) The members of the retirement board of a public pension or
23 retirement system *shall* discharge their duties with respect to the
24 system *solely in the interest of, and for the exclusive purposes of*
25 *providing benefits to, participants and their beneficiaries,*
26 *minimizing employer contributions thereto, and defraying*
27 *reasonable expenses of administering the system. A retirement*
28 *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,
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 actuarial assumptions for the plan[]” or their “objectives.” (See *Westly v. CALPERS*
2 (2003) 105 Cal.App.4th 1095, 1110 [“the ‘plenary authority’ that is granted over the
3 ‘administration of the system’ goes to the management of the assets and their delivery to
4 members and beneficiaries of the system”].)

5 Ordinances 29174 and 29198 direct the P&F Retirement Board to exercise its
6 fiduciary duties in accordance with Measure B and the Act. But, Measure B cannot be
7 reconciled with the Act because Section 1513-A places the City and its taxpayers on equal
8 footing with beneficiaries, even though the P&F Retirement Board owes fiduciary duties
9 to beneficiaries above all others. *City of Sacramento v. Public Employees Retirement*
10 *System* (1991) 229 Cal.App.3d 1470, 1493 held that a retirement board must not “manage
11 the retirement system in a way which would favor an employer over the beneficiaries to
12 whom it owes a fiduciary duty” because “a trustee's primary duty of loyalty is to the
13 beneficiaries of the trust . . . The trustee must not be guided by the interest of any third
14 person.” (*Id.* at 1494.) As the P&F Retirement Board has no lawful discretion to act in
15 contravention of its constitutional duties under the Act, Section 1513-A cannot be
16 reconciled with the Act even with Ordinances 29174 and 29198.

17 Contrary to the City’s argument, SJPOA’s claim is ripe because the ordinances
18 give rise to a concrete dispute between the parties about the legality of Section 1513-A.
19 (*In re Claudia E.* (2008) 163 Cal.App.4th 627, 638 [“declaratory relief lies when the
20 parties dispute whether a public entity has engaged in conduct or established policies in
21 violation of applicable law”]; *County of San Diego v. State* (2008) 164 Cal.App.4th 580,
22 606 [declaratory relief extends to future controversies].) Additionally, granting
23 declaratory relief resolves any lingering uncertainty as to Police Officers’ and taxpayers’
24 rights under the Act (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419,
25 433 fn.14), especially given the public importance and potential detriments on pension
26 rights if Section 1513-A is implemented and is later determined to be unlawful.

1 **IV. SECTION 1514-A VIOLATES OFFICERS' RIGHT TO PETITION**

2 SJPOA also proved its Right to Petition claim that Section 1514-A
3 unconstitutionally burdens its members' right to sue the City. The California Constitution
4 protects the right to "petition government for redress of grievances." (Cal. Const., art. I, §
5 3.) "The right to petition encompasses the right to sue." (*Wolfgram v. Wells Fargo Bank*
6 (1997) 53 Cal.App.4th 43, 52 ["a suit ... against the government occupies a preferred
7 status"].) "[A]ny impairment of the right to petition, including any penalty exacted after
8 the fact must be narrowly drawn." (*Id.* at 57; *California Teachers Assn. v. California*
9 ("*CTA*") (1999) 20 Cal.4th 327, 338 ["[t]he imposition of a cost or risk upon the exercise
10 of the right to a hearing is impermissible if it has no other purpose or effect than to chill
11 the assertion of constitutional rights by penalizing those who choose to exercise them"].)

12 The Court agrees with SJPOA that Section 1514-A's "poison pill" on its face
13 directly and substantially burdens Police Officers' right to petition because it chills legal
14 challenges to Measure B with its mandate of an automatic salary deduction of up to 16%
15 if Section 1506-A(b) "is determined to be illegal, invalid or unenforceable." Section
16 1514-A's poison pill directly and impermissibly impacts SJPOA members' ability to
17 challenge Measure B in court because it punishes them with a 16% salary reduction if
18 they are successful. That is, Measure B is structured so that even if a union sues to
19 invalidate Section 1506-A, a union would still lose by operation of Section 1514-A.
20 Section 1514-A is also not narrowly tailored because it is entirely "punitive" as there is no
21 requirement the salary reductions be used to pay for unfunded actuarial liability (the stated
22 rationale for the reductions).

23 The City has a number of counter arguments. First, it argues this suit involves
24 pension and salary rights and thus is of private rather than public concern. But lawsuits
25 challenging the government's use of public funds involve public matters, including police
26 officers' compensation. (*McKinley v. City of Eloy* (9th Cir. 1983) 705 F.2d 1110, 1114-
27 1115 [police officer's criticism that city council refused to pay salary increase
28 "substantially" met public interest requirement].) The U.S. Supreme Court held in

1 *Borough of Duryea v. Guarnieri* (2011) 131 S. Ct. 2488, 2501 that court-filed lawsuits
2 “communicate to the public” and “advance a political or social point of view beyond the
3 employment context.” For that reason, the City’s case *White v. Nevada* (9th Cir. Feb. 20,
4 2009) 312 Fed.Appx. 896, 897 is distinguishable because it involved “secur[ing] more
5 overtime pay through the internal grievance process” rather than to seeking “to
6 fundamentally change [governmental] policies through public debate.” SJPOA’s lawsuit
7 sufficiently involves a public concern.

8 The City next contends that Section 1514-A was motivated by the City’s desire
9 to reduce costs and preserve municipal services, rather than an intent to chill the right to
10 petition. Statutes burdening the right to a hearing “must have a real and substantial
11 relation to a proper legislative goal.” (*CTA, supra*, 20 Cal.4th at 338; *Wolfgram, supra*,
12 53 Cal.App.4th at 57.)¹⁵ Despite testimony by the City’s witnesses regarding the
13 circumstances generally leading to Measure B, Section 1514-A *itself* is specifically
14 structured to extract *mandatory* “savings” from employees in the event they succeed at
15 trial. That distinguishes it from *Zuckerman v. State Bd. of Chiropractic Examiners* (2002)
16 29 Cal.4th 32, 44 because *Zuckerman* expressly found the statute before it was lawful
17 because the hearing costs it imposed were “merely *discretionary*.” (*Id.* [noting “the
18 critical importance of ... the discretion not to impose costs”].) Additionally, the City’s
19 legislative goal cannot be achieved by breaching its contractual obligations to its
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25 ¹⁵ To the extent Section 1514-A has “real and appreciable impact on, or a significant
26 interference with the exercise of the fundamental right,” then “strict scrutiny” applies.
27 (*Fair Political Practices Com. v. Superior Court* (1979) 25 Cal.3d 33, 47; *Browne v.*
28 *Russell* (1994) 27 Cal.App.4th 1116, 1122 [in strict scrutiny ordinance “can survive ...
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. (*Id.*) Regardless of
the level of constitutional scrutiny applied, Section 1514-A does not meet it.

1 employees to maintain their current salaries. The City has not justified Section 1514-A's
2 chill on SJPOA members' right to petition.¹⁶

3 **V. SECTION 1515-A VIOLATES THE SEPARATION OF POWERS DOCTRINE**

4 Section 1515-A also violates the separation of powers doctrine. "[T]he
5 fundamental separation of powers doctrine embodied in article III, section 3 of the
6 California Constitution forbids ... legislative usurpation of traditional judicial authority."
7 (*Mandel v. Myers* (1981) 29 Cal.3d 531, 547.) "Our Constitution assigns the resolution of
8 ... controversies to the judicial branch of government (Cal. Const., art. VI, § 1) and
9 provides the Legislature with no authority to set itself above the judiciary by discarding
10 the outcome or readjudicating the merits of particular judicial proceedings." (*Id.*)

11 Section 1515-A violates this doctrine as a matter of law because it allows the
12 City Council to arrogate the judicial function by authorizing the Council to decide the
13 effect of a judicial court's decree when portions of Measure B are declared unlawful.
14 Subdivision (a) purports to declare the effect of a court ruling finding "any" portion of
15 Measure B is unlawful by declaring that Measure B remains valid, e.g., as to current
16 employees even if unlawful as applied to retirees, and as to future employees even if
17 unlawful as to current employees. Subdivision (b) provides that "[i]f any ordinance
18 adopted pursuant to this Act" is declared unlawful then "the matter shall be referred to the
19 City Council for determination as to whether to amend the ordinance consistent with the
20 judgment, or whether to determine the section severable and ineffective if such ordinance
21 is found to be invalid, unconstitutional or otherwise unenforceable." That is, subdivision
22 (b) gives the City authority to decide severability after the fact, even though that
23 determination is entrusted to the courts. As the Supreme Court stated in *Mandel, supra*,
24 29 Cal.3d at 549, "If the Legislature ... were empowered to reexamine the merits of

25 _____
26 ¹⁶ The fact that this lawsuit has been filed and prosecuted does not mean Section 1514-A
27 is lawful: "An individual's constitutional right of access to the courts cannot be impaired,
28 either directly or indirectly, by threatening or 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 litigation and to ignore a particular judgment whenever it so chose, the myriad safeguards
2 of the judicial process would come to naught and one party to a lawsuit would in effect
3 become both litigant and judge.”

4 Although the City contends this claim is unripe because there is “no ordinance
5 adopted pursuant to Measure B that is the subject of this litigation,” the matter is ripe
6 because SJPOA challenges a number of ordinances implementing Measure B, including
7 those abolishing the SRBR and directing the P&F Retirement Board to comply with the
8 Pension Protection Act.

9 **VI. SJPOA IS ENTITLED TO A PERMANENT INJUNCTION ENJOINING THE CITY FROM**
10 **APPLYING MEASURE B TO CURRENT POLICE OFFICERS AND RETIREES**

11 To qualify for a permanent injunction, a plaintiff must prevail on its causes of
12 action involving the wrongful act sought to be enjoined, and demonstrate the grounds for
13 equitable relief. (*San Diego Unified Port District v. Gallagher* (1998) 62 Cal.App.4th
14 501, 503.) Grounds for equitable relief include “restraining the commission or
15 continuance of the act complained of, either for a limited time or perpetually.” (See Code
16 Civ. Proc. Section 526(a)(1).) Injunctive relief is appropriate when it appears that the
17 defendant will continue its wrongful acts. (*Scripps Health v. Marin* (1999) 72
18 Cal.App.4th 324, 333.)

19 SJPOA has prevailed on its causes of action involving various challenged
20 sections of Measure B. Permanent injunctive relief is appropriate because the City may
21 not lawfully apply Measure B to current or retired Police Officers to deprive them of their
22 vested pension and other rights identified above. The City can show no cognizable harm
23 from being compelled to follow the law. (See *Novar Corp. v. Bureau of Collection &*
24 *Investigative Services* (1984) 160 Cal.App.3d 1, 6 [injunctive relief may be granted
25 against unlawful government action].)

26 **VII. THE CITY FAILED TO SHOW IT IS ENTITLED TO DECLARATORY RELIEF ON ITS**
27 **FEDERAL CROSS-CLAIMS**

28 The City filed a cross-complaint seeking a judicial declaration that Measure B
does not violate the federal constitution’s Contract Clause, Takings Clause, or Due

1 Process clause. SJPOA argues that because the City has not argued that the outcome of
2 the vested rights analysis would be different under federal law, declaratory relief under
3 federal law is unnecessary. The Court agrees.

4 A court has discretion to deny declaratory relief where it is “not necessary or
5 proper ... under all the circumstances.” (*Meyer v. Sprint Spectrum* (2009) 45 Cal.4th 634,
6 647, quoting Code Civ. Proc., § 1061.) Declaratory relief must “serve some practical
7 end” and when it “would have little practical effect in terms of altering parties’ behavior”
8 a court may “deny declaratory relief.” (*Id.* at 647-648.) Like the plaintiffs in *Meyer*, the
9 City here “[has] not with any particularity” argued that resolution of its federal cross-
10 claims would “have any practical consequences” (*id.*), that is, it has not argued that
11 whether Measure B violates Police Officers’ vested rights will be different under federal
12 law. For that reason, the Court will exercise its discretion not to grant the declaratory
13 relief under the federal cross-claims. Such a ruling would make no difference to the
14 underlying judgment because, since Measure B violates the California Constitution, it
15 does not matter whether it additionally violates the federal constitution as the City is
16 barred from applying it to Police Officers. (See *Claremont Improvement Club, Inc. v.*
17 *Buckingham* (1948) 89 Cal.App.2d 32, 33 [“If [the underlying measure] is unenforceable
18 the whole purpose of the [cross-claim] litigation fails”]; *California State Electronics Assn.*
19 *v. Zeos Internat. Ltd.* (1996) 41 Cal.App.4th 1270, 1274 [court should avoid constitutional
20 questions where other grounds are available to dispose of the case].)

21 But even if the Court reached the City’s cross-claim, it would have found for
22 SJPOA. Federal law looks to state law to determine whether a protected property right
23 exists for purposes of the federal Contracts Clause. (*San Diego Police Officers’ Assoc.*,
24 *supra*, 568 F.3d at 737 [Contracts Clause: “federal courts look to state law to determine
25 the existence of a contract”].) Because Measure B deprives Police Officers of state-
26 created property rights without constitutional justification, and because the City has not
27 argued the vested rights analysis is different under federal law, Measure B also violates
28 the federal constitution.

1 **VIII. DISPOSITION**

2 Accordingly, the Court rules as follows. On SJPOA's FIRST AMENDED
3 COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF:

4 1. SJPOA shall have judgment against the City on the First Cause of Action
5 for violation of the California Constitution's Contracts Clause;

6 2. SJPOA's Second Cause of Action for violation of the California
7 Constitutional Takings Clause is dismissed;

8 3. SJPOA's Third Cause of Action for violation of the California
9 Constitutional Due Process Clause is dismissed;

10 4. SJPOA shall have judgment against the City on the Fourth Cause of
11 Action for violation of the California Constitution's Right to Petition;

12 5. SJPOA shall have judgment against the City on the Fifth Cause of Action
13 for violation of the California Constitution's Separation of Powers doctrine;

14 6. SJPOA shall have judgment against the City on the Sixth Cause of Action
15 for breach of the parties' collective bargaining agreement;

16 7. SJPOA shall have judgment against the City on the Eighth Cause of
17 Action for violation of the California Pension Protection Act.

18 It is therefore ordered and adjudged that:

19 1. Measure B cannot be applied to Police Officers working for the City on
20 or before June 5, 2012;

21 2. the City was and is required to provide Police Officers with the
22 retirement benefits and Retirement Plan in place when they began working for the City, as
23 well as any enhancements made during their service with the City;

24 3. the City is required to provide the retirement benefits delineated in the
25 MOA;

26 4. and, by the above-described actions and omissions, the City violated its
27 obligations.
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On the City of San Jose's CROSS-COMPLAINT FOR DECLARATORY
RELIEF:

1. The request for declaratory relief is DENIED and/or the Court finds that SJPOA shall have judgment entered in its favor on the City's cross-complaint for the same reasons outlined above.

Within 10 days after the filing of this Statement of Decision, SJPOA shall file a proposed injunction that prohibits enforcement of Measure B in accordance with this order.

IT IS SO ORDERED.

Hon. Patricia M. Lucas
Superior Court Judge

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 **[SJPOA'S PROPOSED] STATEMENT OF DECISION**

9 by electronic service. Based upon a court order or an agreement of the parties to accept
10 service by electronic transmission, I caused the documents to be sent to the persons at the
11 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.

12 Arthur A. Hartinger, Esq. 13 Linda M. Ross, Esq. 14 Jennifer L. Nock, Esq. 15 Michael C. Hughes, Esq. 16 Meyers, Nave, Riback, Silver & Wilson 17 555 12th Street, Suite 1500 18 Oakland, CA 94607 19 Phone: (510) 808-2000 20 Fax: (510) 444-1108 21 Email: ahartinger@meyersnave.com 22 lross@meyersnave.com 23 jnock@meyersnave.com 24 mhughes@meyersnave.com	25 <i>Counsel for Defendants</i> <i>City of San Jose (No. 1-12-CV-225926)</i> 26 <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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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)

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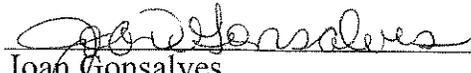
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8 **A copy was also sent via regular U.S. mail**

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.

11
12 
13 Joan Gonsalves