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5 Respondent
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9 **BOARD OF ADMINISTRATION**
10 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

11 In the matter of the Amount of Proper)
12 Benefits Payable to)

13 PAUL G. MAST, Judge, Ret.)
14)
15)
16)
17)
18)

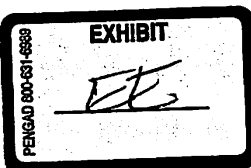
AGENCY CASE NO. 2010-0825

OAH NO. 2015-030996

SUPPLEMENTAL TRIAL BRIEF

Hearing Date: November 30, 2015

Hearing Location: Los Angeles, CA



1 **SUPPLEMENTAL TRIAL BRIEF RE RIGHT TO COLA INCREASES**
2

3 Effective January 1, 1970, (GC §68203, 1969 Amendment) California amended
4 Government Code Section 68203 (GC §69203), which establishes salaries of all judges
5 and justices of courts of record of the State of California. GC §68203, 1969 Amendment
6 included and established Annual Cost-of-Living Adjustments (COLA) for all judicial
7 salaries. The COLA was based upon the Consumer Price Index, Category U, of the
8 Department of Industrial Relations from December-to-December of each year. The
9 benefits were adjusted each September (September adjustment date).
10

11 The COLA also applied to retirement benefits for all judges and justices who
12 served during that time period, including the balance of any term that started within the
13 period while the COLA adjustment was authorized by GC §68203 (protected period).
14

15 The Legislature amended GC §68203, effective January 1, 1977 (GC §68203 1976
16 Amendment), changing the September benefit adjustment date so that the benefits
17 COLA were adjusted each July (July adjustment date) based on the CPI Index, Category
18 U, of December of the prior year, placing a 5% cap on the annual increases of the
19 salaries and retirement benefits.
20

21 State Controller Kenneth Cory took the position that the 1976 amendment
22 applied to all judges including those whose terms began before January 1, 1977. A
23 number of judges took exception to this position and a lawsuit was filed, Lester Olson, et
24 al. vs Kenneth Cory, State Controller *Olson v. Cory, I*, 27 Cal.3d, 636 P. 2d 532 (1980),
25 (*Olson I*).
26
27
28

1 On March 27, 1980, Supreme Court Justice William P. Clark, handed down the
2 decision of the Court in *Olson I*, decreeing:

3 a. That the 1976 Amendment could not be constitutionally applied to a judge or
4 justice during any term of office that began before January 1, 1977 (a protected
5 term).

6 b. That the 1976 Amendment was unconstitutional as applied to Judicial
7 Pensioners.

8 c. That a protected period (wherein COLA adjustments were vested) was any
9 period of service prior to or occurring from January 1, 1970 to December 31, 1970,
10 and any period after December 31, 1970 that a judge or justice served during a
11 term that started before December 31, 1976.

12 d. That these rights of judicial pensioners were vested and could not be changed
13 (unless other comparable consideration was given – which the Court noted was
14 not the case).

15 e. That the vesting of the COLA increases for judicial pensioners retirement
16 benefits meant that the judicial pensioners were entitled to COLA increases to
17 their retirement benefits for their time of service within the protected period.

18 f. For the time of service subsequent to the protected period (the non-protected
19 period), Judges are not vested with COLA increases. Thus, in order to calculate
20 retirement benefits, a ratio must be drawn between service in the protected and
21 non-protected period.

22
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24
25
26 Petitioner claims that a retired judge or justice's pension is based on an
27 active judge or justice's salary. Therefore any judge or justice who left the bench
28

1 on or after January 1, 1977, could not have been due additional amounts under
2 *Olson I*.

3
4 Petitioner is wrong. As discussed *infra* in *Olson I* and *Betts v. Board of*
5 *Administration of the Public Employees Retirement System* 21 Cal.3d 859, 582 P.2d
6 614, 148 Cal.Rptr. 158 (*Betts*), although a judicial pension was based on an active
7 justice's or judge's salary prior to January 1, 1977, after January 1, 1977, the COLA
8 benefits of retired judges and justices were vested for the period prior to and through
9 the end of their service during their protected period. Those vested rights could not be
10 revoked unless replaced by other benefits of a similar value, *infra*. The retirement
11 benefits after January 1, 1977, are based on the COLA retirement benefits.
12

13
14 Petitioner's theory is that the retirement benefits were based on an active justice's
15 or judge's salary. This is incorrect. During the period of time after January 1, 1977 to the
16 end of the final protected term, there were two (and later three) levels of salary being
17 paid to a justice or judge holding the same particular office. The different levels of
18 salaries resulted when some justices and judges first assumed office or began a new
19 term after January 1, 1977. Their salaries (and future vested pension rights for the
20 period after January 1, 1977) were governed by GC §68203, 1976 Amendment.
21

22 Petitioner's theory that "particular judicial office" means the seat the judicial
23 officer held in the courthouse is incorrect. If that were the definition of "particular
24 judicial office," *Olson I* would be meaningless, *infra*.
25

26 The decision in *Staniforth* does not differentiate between times during the
27 protected period before or after January 1, 1977. The decision states that:
28

1
2 a *segment* of each of the claims pleaded by the 10 claimants--alleged
3 underpayments *during* the protected period--were based on
4 underpayments that would have fallen *within* the ambit of *Olson I's*
5 protected periods, and JRS does not contend otherwise. *Staniforth* at
6 992.

7
8 It is clear that *Olson I* held that those justices and judges serving part of their
9 judicial service during the protected period (the period from the first day in January
10 1970 to the first day of January 1977, and until the completion of any term of office that
11 began therein) received as part of their compensation, the vesting of cost-of-living
12 adjusted (COLA) retirement benefits during their protected period.

13
14 Likewise, any justice or judge first taking office after the first day in January 1977
15 did not receive any vested cost-of-living retirement benefits in accordance with GC
16 §68203, 1969 Amendment, as that amendment was abrogated by GC §68203, 1977
17 Amendment.

18
19 Any justice or judge starting a new term after the first day of January 1977, would
20 not **further accrue** any cost-of-living adjusted retirement benefits for that future
21 service. Beginning the new term of office, however, would not abrogate any retirement
22 benefits already vested (see the authority cited, *infra*). The result is that for any justice
23 or judge beginning such a new term after the protected period ends, that part of that
24 justice's or judge's retirement benefits earned before and during the protected period
25 are subject to cost-of- living adjustments; that part of his/her retirement benefits, for
26 the period after their protected period ended, is based on the current salary of a justice
27 or judge holding that particular judicial office (Superior Court Judge, Appellate Court
28

Justice, etc.).

Petitioner would allege that vested retirement benefits are not vested after the protected period (and thus are not vested at all). This is not the law, as shown below.

**RETIREMENT BENEFITS ARE VESTED ACCORDING TO *OLSON I*
DURING THE PROTECTED PERIOD**

Cost-of-living adjustment increased retirement benefits, earned during the protected period and before, were entirely vested and could not be impaired, unless accompanied by comparable new advantages, *Olson I* and other cases, *infra*.

Olson I held that GC §68203 1976 Amendment **impaired vested rights** to COLA increases for justices and judges, stating:

The 1976 amendment, in addition to impairing the vested rights of judges in office, also impairs those of judicial pensioners. A long line of this court's decisions has reiterated the principle that **a public employee's pension rights are an integral element of compensation and a vested contractual right** accruing upon acceptance of employment. (*Betts v. Board of Administration*, supra, 21 Cal.3d 859, 863; *541 *Kern v. City of Long Beach*, supra, 29 Cal.2d 848, 852853.) In *Betts*, this court held that a former state treasurer who had served in that office from 1959 to 1967 was entitled to a pension on the basis of the law in effect at the time of his termination rather than the modified law in effect at the time of his application for pension benefits in 1976. (*Id.*, at pp. 867, 868.) The statute in effect in 1976 purported to withdraw benefits to which he had earned a vested contractual right while employed. Although an employee does not obtain any 'absolute right to fixed or specific benefits ... **there [are] strict limitation[s] on the conditions which may modify the pension**

1 **system in effect during employment.'** (Betts v. Board of
2 Administration, supra, 21 Cal.3d 859, 863, 864.) **Such modifications**
3 **must be reasonable and any 'changes in a pension plan which**
4 **result in disadvantage to employees should be accompanied by**
5 **comparable new advantages.'** (Id., at p. 864.) Since no new
6 comparable or offsetting benefit appeared in the modified plan, we held the
7 1976 statute unconstitutionally impaired the pensioner's vested rights.

8
9 In the present case the state has purported to modify pension rights with the
10 amendment of section 68203. Between 31 December 1969 and 1 January 1977, a
11 judicial pensioner was entitled to receive benefits based on a specified percentage
12 of the salary of a judge holding the judicial office to which the retired or deceased
13 judge was last elected or appointed. (Gov. Code, § 75000 et seq.) **The salary for**
14 **such a judicial office if the retired or deceased judge served in office**
15 **during the period 1970 to 1977 was covenanted to increase annually**
16 **with the increase in the CPI. The 1976 limitation on increases in judicial**
17 **salaries is, in turn, calculated to diminish benefits otherwise available**
18 **to those judicial pensioners. Such modification of pension benefits**
19 **works to the disadvantage of judicial pensioners by reducing potential**
20 **pension increases, and provides no comparable new benefit.** Again, we
21 conclude that defendants have failed to demonstrate justification for impairing
22 these rights or that comparable new advantages were included and that **section**
23 **68203 as amended is unconstitutional as to certain judicial pensioners.**
24 [emphasis supplied]. *Olson I* at 541 ,542.

25
26 The *Olson I* decision uses the words "as to certain judicial pensioners."
27 *Olson I* considered the rights of those pensioners who retired before January 1
28

1 1970, who had no vested COLA retirement rights, yet who did get the benefit of the
2 COLA increases during the protected period, as their pension rights were a
3 percentage of the prevailing salary of judicial officers holding their particular
4 office. These pre-1970 retirees were not included in "certain judicial pensioners" in
5 the quoted portion of the decision in *Olson I*.
6

7 **THE CONTEXT OF *OLSON I* MUST BE CONSIDERED IN INTERPRETING**
8 **THE DECISION**
9

10 Petitioner has or will contend that other portions of *Olson I* state to the contrary,
11 that a justice's or judge's retirement benefits are a portion of the sitting judge's actual
12 salary or that a COLA vested justice or judge is entitled to no more retirement benefits
13 than a COLA unvested justice or judge. These contentions are in error. These arguments
14 are taken out of the context of the case. To properly understand *Olson I*, the context in
15 which it was written must be understood as has been uniformly held.
16

17 *Dyer v. Superior Court (Hasou)* (1997), 56 Cal. App. 4th 61, 65 Cal. Rptr. 2d
18 85, states:

19 However, 'language contained in a judicial opinion is 'to be understood in
20 the light of the facts and issue then before the court, and an opinion is not
21 authority for a proposition not therein considered. [Citations.]' (People v.
22 Banks (1993) 6 Cal. 4th 926, 945 [25 Cal. Rptr. 2d 524, 863 P.2d 769].)
23 When questions about an opinion's import arise, the opinion 'should receive
24 a reasonable interpretation [citation] and an interpretation which reflects
25 the circumstances under which it was rendered [citation]' (Young v.
26 Metropolitan Life Ins. Co. (1971) 20 Cal. App. 3d 777, 782 [98 Cal.Rptr. 77]),
27
28

1 and its statements should be considered in context (see *Pullman Co. v.*
2 *Industrial Acc. Com.* (1946) 28 Cal. 2d 379, 388 [170 P.2d 10]).

3
4 *Kirk v. First American Title Ins. Co.*, 183 Cal. App. 4th 776, 779, 108 Cal. Rptr. 3d
5 620, 634 (2010) states: "When questions about an opinion's import arise, . . . its
6 statements should be considered in context."

7 *Stewart v. Norsigian*, 64 Cal. App. 2d 540 [149 P.2d 46, 150 P.2d 554]; states:
8 "Isolated statements . . . may not be lifted from an opinion and be regarded as abstract
9 and correct statements of law. They must be considered in connection with the factual
10 setting the author of the opinion is discussing."
11

12 *People v. Jeffrey Allen Witmer* Court of Appeal, Second District, Division 4 Case
13 No. B231038 (later reversed by the Supreme Court on other grounds) states:
14

15 [I]t is necessary to read the language of an opinion in the light of its facts
16 and the issues raised, in order to determine which statements of law were
17 necessary to the decision, and therefore binding precedent, and which
18 were general observations unnecessary to the decision. (*Fireman's Fund*
19 *Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1301.)
20 Furthermore, when questions about an opinion's import arise, the opinion
21 'should receive a reasonable interpretation [citation] and an interpretation
22 which reflects the circumstances under which it was rendered [citation]'
23 (*Young v. Metropolitan Life Ins. Co.* (1971) 20 Cal.App.3d 777, 782), and
24 its statements should be considered in context (see *Pullman Co. v.*
25 *Industrial Acc. Com.* (1946) 28 Cal.2d 379, 388).

26
27 The context of the opinion in *Olson I* is that the opinion was written before and
28 issued on March 27, 1980, at a time during the protected period for some justices and

1 judges. The Supreme Court ruled that all pensioners (vested or not) were entitled to
2 receive COLA adjusted pensions based on the COLA salaries of a justice or judge
3 holding the particular judicial office. The Supreme Court did not differentiate between
4 vested and unvested pensioners. This indicates first, that the Court did not consider
5 what particular seat in the courthouse the particular justice or judge occupied, as alleged
6 by Petitioner. Second it indicates that no judicial pensioner (even the non-vested) lost
7 any rights on the first Monday in January 1977.
8

9 During the time after the first Monday in January 1977 until the date of the
10 opinion, March 27, 1980 (and continuing thereafter) there were two levels of pay for
11 each particular judicial office (subsequent to the effective date of the 1981 Amendment
12 to GC §68203, approximately June 1981, there were three levels of pay for each
13 particular judicial office).
14

15 *Olson I, supra*, states GC §68203 1976 Amendment impairs the vested rights of
16 judicial pensioners.

17 *Black's Law Dictionary* defines "vested" as:

18
19 Accrued; fixed; settled; absolute; having the character or giving
20 the rights of absolute ownership; not contingent; not subject to be
21 defeated by a condition precedent. See *Scott v. West*, 03 Wis. 529,
24 N. W. 161; *McGillis v. McGillis*, 11 App. Div. 359, 42 N. Y. Supp.
924; *Smith v. Pros-key*, 39 Misc. Rep. 385, 79 N. Y. Supp. 851.

22 *Black's Law Dictionary* further defines "vested right" as, "Right accrued to possessor
23 with no conditions."
24

25 Petitioner previously has made the claim that the effect of the following
26 paragraph from *Olson I* is that justices and judges with vested retirement benefit rights
27 have no more rights to COLA than non-vested justices and judges. Non-vested justices
28

1 and judges in the context of this paragraph are those justices and judges who retired
2 before January 1, 1970. The Petitioner has interpreted the meaning of this paragraph
3 exactly in reverse of its true meaning. **Taken in context**, and with footnote 6 (from
4 *Olson I*) confirming it, what this paragraph states is that for the purpose (the Court
5 states "for our purposes") of determining the benefits due during the time period in
6 which the opinion was written, prior to March 27, 1980, non-vested justices and judges
7 were entitled to the same COLA retirement benefits as vested justices and judges.
8

9 Judicial pensioners whose benefits are based on judicial services
10 terminating **before the effective date** of applicable law providing for
11 unlimited cost of living increases, **have no vested right** to benefits
12 resulting therefrom. Legislation providing for unlimited cost of living
13 increases was first enacted in 1964 to become effective on 1 January
14 1965, although the statute then provided for quadrennial increases
15 based on a different index than the CPI. (Stats. 1964, First Ex. Sess., ch.
16 144, p. 518, § 4.) However, it is not necessary **for our purposes** to
17 determine a judicial pensioner's right as being vested. Vested or not, a
18 pensioner's right entitles him or her to benefits based on the prevailing
19 salary for the judge or justice occupying the particular judicial office,
20 regardless of the date of termination of judicial services giving rise to
21 the pension. Finally, as in the case of judges or justices who enter upon
22 a new or unexpired term of a predecessor judge after 31 December
23 1976, benefits of judicial pensioners based on the salaries of such
24 judges will be governed by the 1976 amendment. *Olson I* at 543.

25 Footnote 6 of *Olson I* states:

26 Even pre 1965 pensioners are entitled to percentage participation
27 in judicial salaries actually paid or to be paid under compulsion
28 of law to judges or justices occupying the judicial office to which
the retired or deceased judge or justice was last elected or
appointed.

1
2 This proves Respondent's position. On the one hand are the various statements in
3 *Olson I*, referencing the prevailing salary for the judge or justice occupying the
4 particular judicial office, and on the other hand is the statement, *supra*, that the "1976
5 amendment, in addition to impairing the vested rights of judges in office, also impairs
6 those of judicial pensioners." (*Olson I* footnote 5 states: "As used herein, the phrase
7 'judicial pensioners' refers to both retired judges and other persons whose benefits are
8 based on services of a deceased judge, e.g., the surviving spouse or minor children of a
9 deceased or retired judge.")

11 If retirement benefits paid after the end of the protected period are only paid in
12 accordance with the salaries of the sitting justice or judge in the particular judicial
13 office, then it would contradict the finding in *Olson I*, *supra*, that "a public
14 employee's pension rights are an integral element of compensation and a
15 vested contractual right;" COLA retirement benefits were vested during the period
16 before the end of the protected period.

18 The statement that retirement benefit payments were paid in accordance with
19 the salary of sitting judges only applies in context, as the phrase in *Olson I* "for our
20 purpose here" means for the time before the *Olson I* decision was handed down,
21 March 27, 1980.

23
24 **BETTS V. BOARD OF ADMINISTRATION RULED THAT RETIREMENT**
25 **BENEFITS ARE TOTALLY AND IRREVOCABLY VESTED**

26
27 *Olson I* was not a case of first impression on this issue. *Betts* stated:
28

1 Petitioner, who served as Treasurer of the State of California
2 from 1959 to 1967, . . .

3 At all times during petitioner's incumbency, the basic retirement
4 benefit available to retired members of the Fund was governed
5 by section 9359.1, subdivision (b), which then provided, in
6 pertinent part: 'The retirement allowance for [a non-legislative
7 member] ... is an annual amount equal to five percent (5%) of the
8 compensation payable at the time payments of the allowance fall
9 due, *to the officer holding the office which the retired member
10 last held prior to his retirement.* . . .

11 Under this 'fluctuating' system, a retired member's monthly
12 allowance would be adjusted periodically throughout the term of
13 the pension to reflect changes in the salary payable to
14 the *current* incumbent of the elective office the member had
15 previously held. . . .

16 In 1974, after petitioner had left office but before his retirement
17 and application for benefits, the Legislature changed the method
18 of benefit computation. Under amended section 9359.1, the basic
19 benefit allowance became 'an annual amount equal to five
20 percent (5%) of the highest compensation received *by the
21 officer while serving in such [nonlegislative elective] office,*
22 *multiplied by years of service credit.* . . .

23 A long line of California decisions has settled the principles
24 applicable to the problems herein presented. (2) A public
25 employee's pension constitutes an element of compensation, and
26 a vested contractual right to pension benefits accrues upon
27 acceptance of employment. Such a pension right may not be
28 destroyed, once vested, without impairing a contractual
obligation of the employing public entity. (*Kern v. City of Long
Beach* (1947) 29 Cal.2d 848, 852-853 [179 P.2d 799].) . . .

However, there is a strict limitation on the conditions which may
modify the pension system in effect during employment. We have
described the applicable principles as follows: 'An employee's
vested contractual pension rights may be modified prior to
retirement for the purpose of keeping a pension system flexible
to permit adjustments in accord with changing conditions and at
the same time maintain the integrity of the system. [Citations.]
Such modifications must be reasonable, and it is for the courts to
determine upon the facts of each case what constitutes a
permissible change. To be sustained as reasonable, alterations of
employees' pension rights must bear some material relation to
the theory of a pension system and its successful operation, *and
changes in a pension plan which result in disadvantage to
employees should be accompanied by comparable new
advantages.* [Citations.] ...' (*Allen v. City of Long Beach* (1955)

1 45 Cal.2d 128, 131 [287 P.2d 765], italics added.) We recently
2 reaffirmed these principles in *Miller v. State of California* (1977)
3 18 Cal.3d 808, 816 [135 Cal.Rptr. 386, 557 P.2d 970].

4 The Board urges that 1963 amendments to the pension plan
5 provide the necessary offsetting advantage in this case. In that
6 year, the Legislature added section 9360.9, which requires
7 automatic annual adjustment of pension benefits to reflect
8 upward changes in the cost of living.

9 [I]n the instant case, the 1963 enactment of section 9360.9
10 occurred *during* petitioner's term as Treasurer, which ran from
11 1959 to 1967; the 'fluctuating' system of benefit computation was
12 also in effect during this entire period. (4) An employee's
13 contractual pension expectations are measured by benefits which
14 are in effect not only when employment commences, but which
15 are thereafter conferred during the employee's subsequent
16 tenure. . . .

17 From application of the foregoing principles to the case before us
18 we conclude that the prior version of section 9359.1 together with
19 section 9360.9, enacted in 1963, form the basis by which
20 petitioner's reasonable pension expectations must be measured.
21 For four years, petitioner provided his services under a statutory
22 scheme which *simultaneously* included both computation
23 methods. . . .

24 We fully recognize that the effect of our holding is that petitioner
25 thereby receives the benefit of a *double* increment of increase, a
26 troubling result. We can only observe that the Legislature must
27 have intended to provide such benefits to constitutional officers
28 serving between 1963 and 1974 because it left in effect both of the
formulae during that 11-year period.

Petitioner would argue out of context from footnote 7, *infra*, in *Olson I*:

"The net effect of our holding in the instant case is to allow a
judicial pensioner but one increment of increase, that being the
increment of prorate [COLA] increase."

By quoting this one sentence, Petitioner would suggest that applying COLA
increases to retirement benefits of Respondent would somehow constitute a double
increment of increase. This is not true; judicial retirees would get only one increment
of increase. As part of retirement benefits attributable to service during the protected

1 period and before, COLA increases are vested for their entire retirement.

2 The actual current salary of a sitting judge in their office would not be
3 considered.

4 In the same manner, any jurist beginning a new term after their protected
5 period ends would continue to have vested COLA retirement benefits for the period
6 before the new term; there is no divestment provision in GC §68203 1976
7 Amendment. However, retirement benefits attributable to service at the beginning of
8 the new term and thereafter would not receive cost-of-living adjustments. The
9 retirement benefits for said period would be based on the future actual current salary
10 of a sitting judge. This is not present in the instant case, as Respondent retired during
11 his protected period.
12

13
14 The retirement benefits would never have a double increment of increase as
15 mentioned in *Betts*.

16 *Olson I* footnote 7 is complex. The meaning of the footnote is that *Olson I*
17 holds retirement beneficiaries ending their judicial service during their protected
18 period are entitled to vested COLA retirement benefits. It does not address the
19 retirement benefits attributable to service at the beginning of a new term after their
20 protected period ends and thereafter. No COLA benefits **accrue afterwards**. The
21 retirement benefits for that period would be based on the justice or judges salary for
22 that particular judicial office.
23

24 Respondent has separated the sections of footnote 7 and have inserted
25 italicized comments in brackets between the text of footnote 7, following:
26

27 We note that in *Betts* this court held the pensioner was
28 entitled to **both** the benefit of a basic retirement allowance

1 calculated as a proportionate part of the **fluctuating**
2 **salary of the incumbent** in the office occupied by the
3 pensioner **and, additionally, a cost of living**
4 **adjustment** of the basic allowance. We stated then that
5 the effect of the holding 'is that petitioner thereby receives
6 the benefit of a double increment of increase, a troubling
7 result.' (Betts v. Board of Administration, supra, 21 Cal.3d
8 859, 867.) The net effect of our holding in the **instant**
9 **case** is to allow a judicial pensioner but **one increment**
10 **of increase, that being the increment of prorate**
11 **increase**

12 *[“The increment of increase” means the COLA increase for the time of service*
13 *in the protected period and before. The calculation of the yearly COLA increase is*
14 *based on the salary of a judge in the particular office as it was in January 1977. The*
15 *calculations relevant to this case begin on the first day of January 1977 and thereafter*
16 *for the length of the retirement. Prior to January 1977, the sitting judge’s salary*
17 *already included previously calculated COLA increases.]*

18 in the salary of the judge occupying the office formerly
19 occupied by the retired or deceased judge. While that salary
20 **fluctuates** with cost of living increases,

21 *[The Court is referring to cost of living increases or other increases to the*
22 *sitting or justices or judges salary after the protected period for the jurist. The use of*
23 *the word “cost of living increases” is confusing out of context, but in context is*
24 *understandable in that it refers to cost of living increases with a 5 percent cap*
25 *provided for by the 1976 Amendment (in effect until 1981). The increases pursuant to*
26 *the 1976 Amendment are not material and are not in issue in this case.]*

27 the judicial pensioner's proportionate share is his basic
28 retirement allowance and it is not increased by any cost of
29 living
30 factor.

31 *[The Supreme Court contrasts its holding in Olson I with its holding in Betts.*

32 *In Betts a non-legislative elected pensioner was entitled to both the*
33 *“fluctuating salary of the . . . office” and “a cost of living adjustment” of the basic*

1 retirement allowance. In other words, if Betts' officeholder's salaries were rising,
2 Betts would receive a proportionate share of the increased salary which would then
3 be increased by a cost of living adjustment. The Supreme Court referred to this as "a
4 double increment of increase."

5 In Olson I, the Supreme Court holds that a judicial pensioner is entitled to
6 only one type of increase: that being the cost of living adjustment increase vested
7 during the protected period. Since the judge holding the particular office is getting
8 COLA increases as authorized by the 1969 Amendment, there would be no further
9 increase to that vested portion of his retirement benefits for increases received by
10 sitting jurists after 1977. In the same manner the portion of the retirement benefits of
11 the jurist vested for the period after the protected period would receive the benefit of
12 increases to the actual salaries of sitting jurists.

13 As stated, supra, in this part of footnote 7 "cost of living factor" refers to
14 increases in the basic fluctuations of the sitting judge's salary after January 1977. The
15 definition of "basic retirement allowance," excerpted from footnote 7 below, "In the
16 instant case legislation exists directing increases cost of living or otherwise in the basic
17 retirement allowance" includes the cost of living allowance vested during the protected
18 period.]

19 Betts is distinguishable on the ground that, unlike the instant
20 case, there was express legislative direction mandating the cost of
21 living adjustment be applied to the **fluctuating** basic retirement
22 allowance. (Id., at p. 865.) It was thus necessarily held that since
23 statutes establishing both the **fluctuating** basic retirement
24 allowance and the cost of living adjustment thereto were in effect
25 during the pensioner's term in office, he had acquired vested
26 contractual rights to the dual benefits. In the instant case
27 legislation exists directing increases cost of living or otherwise in
28 the basic retirement allowance, although that allowance itself
may fluctuate depending on adjustments cost of living or
otherwise in salaries of incumbent judges [emphasis supplied.]

[After the protected period, should there be increases to incumbent judges
salaries, the retirement benefits of justices and judges receiving COLA would not be

1 *increased or affected for time periods of their judicial service in which they were*
2 *receiving vested COLA.]*

3
4 The meaning of footnote 7 is that *Olson I* held that judicial retirees who had
5 earned vested cost-of-living adjusted retirement benefits during the protected period
6 and before would receive COLA retirement benefits for that period of their service. For
7 the period after their protected period, when they no longer were earning vested cost-of-
8 living adjusted retirement benefits, their retirement benefits would be the requisite
9 percentage of the sitting justices or judges salary. The jurists retirement benefits would
10 be calculated under two formulas: first, COLA retirement benefits for the time earned
11 during the protected period, but without any benefit derived from fluctuating judicial
12 salaries after the protected period; second, for the requisite percentage of the sitting
13 justice's or judge's salary for the percentage of judicial service which occurred after their
14 protected period. All retirement benefits are vested during the first 20 years of judicial
15 service.
16
17

18 **MARRIAGE OF ALARCON RULES THAT RETIREMENT BENEFITS, ONCE**
19 **VESTED, MAY NOT BE CHANGED BY LATER LAW**
20

21 In *Marriage of Alarcon*, 149 Cal. App. 3d 544, 196 Cal. Rptr. 887 (1983),
22 (*Alarcon*) Arthur Alarcon was serving on the superior court at a time that statutes
23 concerning judicial pensions provided for deferred retirement.
24

25 *Alarcon* stated:

26 In 1973, the statute was amended to provide that a state court
27 judge who accepted a federal judgeship was ineligible for
28 deferred retirement. In 1978 Alarcon began a term on the
California Court of Appeal, and in 1979 he was appointed judge

1 of the U.S. Court of Appeals for the Ninth Circuit. Id. at 550-51,
2 196 Cal. Rptr. at 889-90.

3 When Alarcon sought a deferred California pension as a retired
4 justice from a California appellate court, JRS ruled him
5 ineligible on the ground that when he began a term as an
6 appellate justice in 1978¹ he became subject to the 1973
7 amendment barring deferred retirement for judges who had
8 gone on the federal bench. Before the *Alarcon* court, JRS relied
9 on the holding of *Olson* that a sitting judge who began a term of
10 office after 1976 (when the protected period ended) became
11 subject to the 5 % cap amendment, by which he or she had
12 previously not been constitutionally governed. Id. at 552, 196
13 Cal. Rptr. at 891.

14 The argument of the Judges Retirement System on applicability
15 of *Olson v. Cory I* equates pensions with salaries, a clear case of
16 mistaken identity. . . .

17 There is no promise express or implied the state will continue to
18 pay an existing salary beyond the end of the term. . . . [¶] A
19 pension, however, is different from a salary. A right to pension
20 benefits provided by the state payable upon fulfillment of age,
21 service and other requirements may not be destroyed, once
22 vested, without impairment of the state's contractual
23 obligations. [Id.]

24 *Alarcon* thus holds that different rules of constitutional law apply when the issue
25 is validity of reduction in the salary of a sitting judge compared to reduction of pension
26 benefits of a retiree, with the rule applicable in the latter situation providing more
27 protection.

28 *Alarcon* holds that whereas the law may change in regard to salaries that are
effective upon beginning a new term or assuming a new office, the law may not be
changed so as to abrogate any vested pension rights. Thus, when Alarcon assumed his
office as Justice of the Appellate Court, his salary and pension rights thereafter became
subject to the 1973 law. When he retired, his pension rights were vested and he was
entitled to a pension based upon his service before he assumed his office as an

1 appellate court justice in 1978 (assuming he did not begin a new term in the trial court
2 between 1973 and 1978, which apparently he did not). The pension rights he earned for
3 his service on the appellate court after 1978 was subject to the law enacted in 1973.

4 His pension rights for a term he began after 1973 were subject to the 1973
5 amendment barring deferred retirement for judges who had gone on the federal bench.
6 He was entitled to pension rights after becoming a federal judge for his service to the
7 end of any term that began before 1973, but not for any term that began after 1973.

8
9 The passage from *Alarcon* above was quoted with approval by the California
10 Supreme Court in *Legislature v. Eu*, 54 Cal.3d 492, 532, 816 P.2d 1309, 1334 (1991).
11 Thus it cannot be contended that the *Alarcon* opinion, written by an intermediate
12 appellate court, misinterpreted what the Supreme Court intended to say in *Olson I*.

13
14 The relationship quote should be interpreted as the *Olson I* court's recognizing
15 that, if a statute affecting remuneration of judges is unconstitutional as applied to a
16 sitting judge, that statute necessarily is also unconstitutional as applied to a judicial
17 pensioner.

18 THE MEANING OF *OLSON I*'S CONCLUSION

19
20 The Conclusion confirms what Respondent has said *supra*. The
21 Conclusion states:

22 **We conclude that Government Code section 68203 as**
23 **amended in 1976, insofar as it would limit cost of living**
24 **salary increases as provided by section 68203 before the**
25 **1976 amendment, cannot be constitutionally applied to (1)**
26 **a judge or justice during any term of office, or unexpired term of**
27 **office of a predecessor, if the judge or justice served some portion**
28 **thereof (a 'protected term') prior to 1 January 1977, and (2) a**
judicial pensioner whose benefits are based on some
proportionate amount of the salary of the judge or justice
occupying that office.

1 The salaries of judges and justices as fixed on 1 September 1976
2 constituted equal compensation for all judges and justices in a
3 particular peer group (the 'base salary'). (See Gov. Code, §§ 68200-
4 68203.) Salaries for judges and justices **never having served in**
5 **a protected term** are fixed by the legislative scheme to be at any
6 time the 1976 base salaries increased annually by the percentage
7 increase in the CPI not to exceed 5 percent, beginning on 1 July
8 1978 (the 'statutory salary'). However, **salaries for judges and**
9 **justices while serving a protected term will be increased**
10 **above the 1976 base on 1 September each year beginning**
11 **1977, by the percentage increase in the CPI for the prior**
12 **calendar year.** There will thus be a disparity in salaries within a
13 peer group of judges or justices while any judge or justice within
14 that group continues to serve a protected term. Such disparity will
15 continue, in the case of trial judges, no later than the first Monday
16 in January 1981 and, in the case of appellate justices, no later than
17 the first Monday in January 1987. (Cal. Const., art. VI, § 5, subd.
18 (a), § 16, subd. (a); Gov. Code, § 71145.) A judge or justice who
19 **completes a protected term and voluntarily embarks**
20 **upon a new term can no longer claim to serve in a**
21 **protected term,** and his or her compensation will thereafter be
22 governed by the provisions of section 68203 as amended in 1976.
23 While that section speaks of annual increases in the salaries of
24 'each justice or judge' by a percentage of the then current salary of
25 'such justice or judge,' we do not deem this to mean that the salary
26 of a judge or justice at the end of a protected term will be the salary
27 at which the judge or justice commences a new, unprotected term
28 should he or she succeed himself or herself. As stated (ante, pp.
544, 545), section 68203 becomes fully applicable upon expiration
of a protected term and it follows that the benefits derived from
constitutional protections during that term cannot be projected
into an unprotected term. Thus the salary at which any
unprotected term is commenced including the salary of a judge or
justice leaving a protected and embarking upon an unprotected
term is the statutory salary then paid to judges or justices of equal
rank who never served during a protected term. Although a salary
of a judge or justice serving a protected term will be decreased
upon entering a new term, such a result is constitutionally
permissible as such a judge or justice has voluntarily embarked or
will voluntarily embark upon a new term for which there was or is
a legislatively designated compensation. **The judgment is**
affirmed as to any judge or justice who served any
portion of his term or the unexpired term of a
predecessor prior to 1 January 1977, and as to judicial
pensioners whose benefits are based on the salary of such
a judge or justice. In all other respects the judgment is reversed.

1 All parties shall bear their own costs on appeal. [emphasis
2 supplied]

3 *Olson I*, in its conclusion, thereby states, as it does in the body of the opinion
4 that, "Government Code section 68203 as amended in 1976, insofar as it would limit
5 cost of living salary increases as provided by section 68203 before the 1976
6 amendment, cannot be constitutionally applied" to judicial pensioners. The Court is
7 saying that since the 1976 law is unconstitutional as to judicial pensioners, the pension
8 rights for judicial pensioners [who served in a judicial office during the protected
9 period] remained the same as they were before the enactment of GC §68203, 1976
10 Amendment. Those pension rights were that they would receive cost-of-living adjusted
11 retirement benefits for the length of time of their judicial service during the protected
12 period, prior to the 1976 Amendment and until the conclusion of any term that started
13 before January 1, 1977.
14

15
16 It is not stated explicitly in the Conclusion, but it is clear that the meaning of the
17 Court is that for any judicial service earned in a new term that began after the first day
18 in January 1977, that retirement benefits would not earn vested cost-of-living enhanced
19 retirement benefits. *Alarcon, supra* confirms this in the passage from, that states:
20

21 The argument of the Judges Retirement System on
22 applicability of *Olson v. Cory I* equates pensions with salaries,
a clear case of mistaken identity.

23 . . . There is no promise express or implied the state will
24 continue to pay an existing salary beyond the end of the term. .
25 . . [¶] A pension, however, is different from a salary. A right to
26 pension benefits provided by the state payable upon
fulfillment of age, service and other requirements may not be
27 destroyed, once vested, without impairment of the state's
28 contractual obligations. *Alarcon 891*.

1 In the *Olson I* "Conclusion" the "judgment affirmed as to judicial pensioners" is
2 the judgment of the Superior Court. In conformity with the Court Rules at the time of
3 that appeal, the decision of the Appellate Court was vacated, and the appeal was
4 designated as being an appeal from the trial court. The trial court had entered a
5 judgment declaring that the GC §28603, 1976 Amendment was unconstitutional as to all
6 retirees (not only those who had service during the protected period). This judgment
7 affirmed the judgment of the trial court that the GC §28603, 1976 Amendment was
8 unconstitutional as to any retiree who had some judicial service during the protected
9 period, and that those judicial retirees had vested constitutionally protected COLA
10 benefits for their service during the protected period and before. *Olson I* reversed the
11 trial court judgment insofar as it held the application of the law unconstitutional as it
12 applied to those retirees who had no service during the protected period (those who
13 retired before the January 1, 1970). *Olson I* does not directly address the question of
14 whether judicial retirees who started a new term after the protected period would also
15 have COLA retirement benefits for the additional period, but to so suggest, and
16 Respondent does not suggest, would be contrary to the ruling in regard to active judges
17 embarking on a new term subsequent to the protected period having taken the new term
18 voluntarily and agreeing to the salary terms (and presumably the future retirement
19 terms) from that date on.

20
21
22
23 If there is any question as to the continuous right to the already vested retirement
24 benefits continuing to be vested despite taking a new term after the GC §28603, 1976
25 Amendment, *Betts* makes it clear when it stated, *supra*:

26
27 'An employee's vested contractual pension rights may be
28 modified prior to retirement for the purpose of keeping a

1 pension system flexible to permit adjustments in accord with
2 changing conditions and at the same time maintain the
3 integrity of the system. [Citations.] Such modifications must
4 be reasonable, and it is for the courts to determine upon the
5 facts of each case what constitutes a permissible change. To
6 be sustained as reasonable, alterations of employees' pension
7 rights must bear some material relation to the theory of a
8 pension system and its successful operation, *and changes in a
9 pension plan which result in disadvantage to employees
10 should be accompanied by comparable new advantages.*
11 [Citations.] ...' (*Allen v. City of Long Beach* (1955) 45 Cal.2d
12 128, 131 [287 P.2d 765], italics added.) We recently
13 reaffirmed these principles in *Miller v. State of
14 California* (1977) 18 Cal.3d 808, 816 [135 Cal.Rptr. 386, 557
15 P.2d 970]. *Betts, supra.* at 29.

16 *Alarcon* agrees: "A right to pension benefits provided by the state payable upon
17 fulfillment of age, service and other requirements may not be destroyed, once vested,
18 without impairment of the state's contractual obligations." *Alarcon, supra.*

19 SUMMARY OF VESTED RETIREMENT RIGHTS

20 The conclusion and result was clearly stated in *Olson I* and other cases. Judicial
21 officers who served some part of their service during the protected period are entitled to
22 COLA retirement benefits for the time of their protected period and before, during the
23 first twenty years of their service. Any service which occurred after their protected
24 period does not earn COLA protected retirement benefits. For that service, retirement
25 benefits are a proportionate amount of the salary of a sitting judge. By way of example:
26 if a judicial officer served 15 years during a protected period and 5 years after the
27 protected period, he/she would receive retirement benefits of 56.25 percent of the salary
28 of the last particular judicial office he or she held, as it was on January 1, 1977, enhanced
by COLA each year on September 1, based on the December-to-December change in the

1 Consumer Price Index, All Urban Consumers, for the prior year. In addition, the judicial
2 officer would receive 18.75 percent of the current salary of a judicial officer holding the
3 particular judicial office last held by the pensioner.

4 Respectfully submitted,

5
6 November 20, 2015

Paul G Mast

Paul G. Mast