COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PHOENIX LAW ENFORCEMENT ASSOCIATION, an Arizona non-profit corporation; BARRY JACOBS, EARLE AKRE, and ROBERT RAMSEY, and RICK FLUM, THERESA CLARK, NICHOLAS ROSANDER, CHARLES CONSOLIAN, RANDOLPH PALMER, SCOTT MCCAULEY, RODRIGO HERNANDEZ, NATALIE SIMONICK, JANINA AUSTIN, individually and on behalf of themselves and as representatives for similarly situated class members, Plaintiffs/Appellees, v. CITY OF PHOENIX, a body politic, Defendants/Appellees, and MICHAEL DUPUY, and JIM JOCHIM, Intervenors/Appellants.	1 CA-CV 15-0390 Maricopa County Superior Court Case No. CV2014-008711 CV2014-009114 (Consolidated)

APPELLANTS' OPENING BRIEF

Scharf-Norton Center for Constitutional Litigation at the
GOLDWATER INSTITUTE
Clint Bolick (021684)
Jonathan Riches (025712)
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
Litigation@goldwaterinstitute.org
Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

INTRODUCTION

This lawsuit challenges the egregious practice of "pension spiking," whereby public employees with the consent of their employers take unlawful steps to artificially inflate their salary in the last years of employment so as to increase their pension benefits. The unanticipated costs to taxpayers are prohibitive and contribute to the pension crisis in Arizona. While State law expressly prohibits pension spiking and most cities do not engage in it, Phoenix allowed it until recent changes in policy.

The order under review declares as pensionable certain payments to Appellees, who are members of the statewide Public Safety Personnel Retirement System ("PSPRS"), that the plain language and intent of state law prohibits. The governing statute in this case is clear and unequivocal – the interpretation of which requires only giving the law's language its plain and obvious meaning. The intent and purpose of the PSPRS statutory scheme likewise supports the simple conclusion that the payments at issue in this action are not pensionable. The court below erred in holding otherwise.

STATEMENT OF THE CASE

This case presents a question of pure statutory interpretation. At issue is whether the plain language of state law prohibits certain benefits from counting as pensionable pay. The governing statute defines what items do and do not count as

pensionable compensation for members of PSPRS. That law is clear about the payments at issue in this case: "Compensation does not include, for the purpose of computing retirement benefits, payment for unused sick leave, payment in lieu of vacation . . . or payment for any fringe benefits." A.R.S. § 38-842(12). Despite this prohibition, Appellees contend that they are entitled as a matter of law to pensionable payment for these very same benefits – viz., payment for unused sick leave, payment in lieu of vacation leave, and payment for uniform allowances, an undisputed fringe benefit.

This action was filed by Appellee Phoenix Law Enforcement Association, et al. ("PLEA") on June 27, 2014 and by Appellee Theresa Clark, et al. ("Clark") on July 7, 2014. (IR 1; IR 7-10.) The trial court consolidated these actions on July 22, 2014. (IR 36.) Collectively, the Appellees sought declaratory and injunctive relief against the City of Phoenix ("City") for, *inter alia*, alleged breach of contract after the City imposed terms and conditions of employment on the Appellees following an inability of the parties to agree on new employment contracts. (IR 54 at ¶¶ 26, 31.) The City's terms and conditions of employment eliminated the pensionability of the payments at issue in this case. (*Id.* at ¶¶ 27, 32.) In the court below, Appellees sought an order restoring those payments. (IR 1; IR 7-10.)

Michael Dupuy and Jim Jochim, who are Phoenix taxpayers ("Taxpayers"), moved to intervene to prevent the unlawful expenditure of taxpayer funds

threatened by this litigation. (IR 25-26.) *See Smith v. Graham Cnty. Cmty. Coll. Dist.*, 123 Ariz. 431, 432 (App. 1979) ("A taxpayer has sufficient standing in an appropriate action to question illegal expenditures made or *threatened* by a public agency") (emphasis added).

Mr. Jochim was previously the Plaintiff in litigation that challenged the legality of the same pension payments at issue in this case. *See Wright, et al. v. Stanton, et al.*, CV2013-010915. That litigation resolved when the City imposed terms and conditions of employment on Appellees that eliminated the pensionability of the same components of compensation at issue in this appeal. In other words, the *Wright* matter, in which Appellant Jochim was a Plaintiff, precipitated this litigation.

In their motion to intervene, Taxpayers asserted that because the City has previously approved contracts that contain the components of compensation at issue in this litigation, only Taxpayers could reliably assert that those payments were illegal. (IR 25 at 2.) The trial court granted Taxpayers' motion to intervene as of right and permissively. (IR 49.)

On November 18, 2014, Taxpayers filed a motion for summary judgment, asserting that Appellees' action threatened the immediate, unlawful expenditure of taxpayer funds because state law expressly prohibits the relief Appellees seek. (IR 53.) Appellees filed cross-motions for summary judgment. (IR 61; IR 64.) On

March 5, 2015, the lower court denied Taxpayers' motion for summary judgment and granted Appellees' cross-motion for summary judgment. (IR 79.) The court also certified the judgment as final under Rule 54(b), Ariz. R. Civ. P., "conclud[ing] that there is no just reason for delaying the entry of this final order because the legality of the pension payments at issue in this litigation is a threshold issue to the other claims. As a result, the litigants are best served by immediate appellate resolution of this issue." (IR 94.)

Appellants timely filed this appeal. (IR 97.)

This Court has jurisdiction pursuant to A.R.S. § 12-2101(A)(1) and Ariz. R. Civ. P. 54.

STATEMENT OF FACTS

PSPRS is a statewide pension program for eligible public safety personnel. (A.R.S. § 38-841 *et seq.*; IR 54 at ¶ 1.) At the time PSPRS was created, there was a wide variety of heterogeneous retirement programs among different municipalities and departments within municipalities with different pension contribution rates and varying retirement benefits for public safety employees in Arizona. *Id.* at § 38-841(A). In response to the resulting inequitable treatment of public safety officers throughout the state, the Arizona Legislature established PSPRS "to provide a uniform, consistent and equitable statewide [retirement] program for public safety personnel." *Id.* at § 38-841(B).

Because PSPRS is administered by the state, employers in PSPRS, including the City of Phoenix, are bound by state rules. *Id.* Likewise, the terms of participation, pension contributions, and pension benefits for employees, or PSPRS "members," including Phoenix Police Department officers, are governed by state statute. *Id.*

Under state law, pensions for members of PSPRS hired before January 1, 2012 are calculated based on an average of the highest three years of salary preceding retirement ("final average salary").[1] A.R.S. § 38-842(7). Therefore, the higher a PSPRS member's salary in the years preceding retirement, the higher the member's pension.

Additionally, to direct municipalities and PSPRS members in pension determinations, Arizona law defines what payments count as pensionable "compensation" for PSPRS members:

> "Compensation" means, for the purpose of computing retirement benefits, base salary, overtime pay, shift differential pay, military differential wage pay, compensatory time used by an employee in lieu of overtime not otherwise paid by an employer and holiday pay paid to an employee by the employer for the employee's performance of services in an eligible group on a regular monthly, semimonthly or biweekly payroll basis and longevity pay paid to an employee at least every six months for which contributions are made to the system pursuant to section 38-843, subsection D . . . For

[1] For employees who join the PSPRS after January 1, 2012, an average of the highest five years of salary is used to calculate pension benefits. A.R.S. § 38-842(7).

> the purposes of this paragraph, 'base salary' means the amount of compensation each employee is *regularly paid* for personal services rendered to an employer *before the addition of any extra monies*, including overtime pay, shift differential pay, holiday pay, longevity pay, fringe benefit pay and similar extra payments.

Id. at § 38-842(12) (emphasis added).

Arizona law is likewise clear regarding which payments *do not* count as compensation for purposes of pension calculations: "Compensation does not include, for the purpose of computing retirement benefits, payment for unused sick leave, payment in lieu of vacation, payment for unused compensatory time or payment for any fringe benefits." *Id.*

Despite this statutory prohibition, the City and Appellees have entered into a series of employment agreements that permit PSPRS members represented by Appellees to calculate as pensionable compensation payment in lieu of vacation (IR 7 at ¶ 20), payment for unused sick leave (*id.* at ¶ 22), and payment for uniform allowances (*id.* at ¶ 23). Contract provisions permitting these pensionable payments for Appellee PLEA have been in place since 1988, 2002, and 2008, respectively (*id.* at ¶¶ 20, 22-23).

There are two separate employment contracts that include the provisions at issue in this case – one between the City and Appellee PLEA and one between the City and the Phoenix Police Sergeants and Lieutenants Association ("PPSLA"),

which includes members represented by Appellee Clark. The provisions at issue are substantially similar in both contracts.

The most recent Memorandum of Understanding ("MOU") between Appellee PLEA and the City that permitted these payments was operative from July 1, 2012 until June 30, 2014 ("2012-2014 MOU"). (IR 54 at ¶ 16; IR 55, Ex. 5 at 52) That document allowed Phoenix Police Department officers below the rank of sergeant to include payment in lieu of vacation (IR 54 at ¶ 17; IR 55, Ex. 5 at 44), payment for unused sick leave (IR 54 at ¶ 18; IR 55, Ex. 5 at 33), and payment for a fringe benefit uniform allowance (IR 54 at ¶ 19; IR 55, at 34-35) as pensionable compensation items.

The most recent Memorandum of Agreement ("MOA") between PPSLA, which included members represented by Appellee Clark, and the City that permitted these payments was operative from July 1, 2012 until June 30, 2014 ("2012-2014 MOA"). (IR 54 at ¶ 11; IR 55, 4 at 30.) That document allowed Phoenix Police Department officers in the ranks of sergeant and lieutenant to include payment in lieu of vacation (IR 54 at ¶ 12; IR 55, Ex. 4 at 24), payment for unused sick leave (IR 54 at ¶ 13; IR 55, Ex. 4 at 16), and payment for a fringe benefit uniform allowance (IR 54 at ¶ 14; IR 55, Ex. 4 at 12-13) as pensionable compensation items.

Every type of compensation paid by the City to its employees has earnings codes assigned to it by the City. (IR 54 at ¶ 20.) Certain earning codes are designated as "pensionable," while other earning codes are designated as "not pensionable." (*Id.* at ¶ 21.) The components of compensation for each of the above-described salary exchange payments in the 2012-2014 MOA and 2012-2014 MOU and predecessor agreements paid to Supervisors and PLEA members were coded by the City as pensionable compensation. (*Id.* at ¶ 23.) Additionally, the final average salary for that PSPRS member would also be increased to reflect that payment amount for purposes of computing pension benefits. *See* A.R.S. § 842(7).

For each of these components of compensation, the City made employer contributions based on the payment amount to PSPRS each pay period. (A.R.S. § 38-843(B); IR 54 at ¶ 24.) Set by actuarial evaluation, the employer contribution rate for fiscal year 2013-2014 for the Phoenix Police Department was 34.5% of the member's compensation amount.[2] (IR 54 at ¶ 6.) In other words, for each $100.00 dollars a Phoenix Police Department employee and member of PSPRS earns in pensionable compensation, the City contributes $34.50 to PSPRS.

On or about May 30, 2014, after failure to agree on the terms of a 2014-2016 MOU, pursuant to City Ordinance, the Phoenix City Council imposed a "Terms

[2] Based on actuarial valuation for fiscal year 2014-2015, the Phoenix Police Department employer contribution rate rises to 37.62%. (IR 54 at ¶ 7.)

and Conditions of Employment" document ("2014-2016 TCE") on PLEA and Unit 4 police officers below the rank of sergeant. (IR 54 at ¶ 31.) The 2014-2016 TCE eliminated § 3-4B of the 2012-2014 MOU and revised payments made for vacation and sick leave conversions under 3-4(B)(5) and 5-5(J) of the 2012-2014 MOU, pronouncing that such payments are no longer "considered part of Final Average Salary for purposes of pension calculations." (IR 54 at ¶ 32.) The effective date for the 2014-2016 TCE was July 1, 2014. (IR 54 at ¶ 35.)

On or about May 30, 2014, after failure to agree on the terms of a 2014-2016 MOA, pursuant to Phoenix, Ariz. City Code, § 2-233(B)(2)(b), the Phoenix City Manager imposed a "Salaries and Fringe Benefits" document ("2014-2016 SFB") on PPSLA and Unit 6 employees. (IR 54 at ¶ 26.) The 2014-2016 SFB eliminated § 3-1D of the 2012-2014 MOA and revised payments made for vacation and sick leave conversions under 3-4(B)(5) and 5-5(L) of the 2012-2014 MOA, pronouncing that such payments are no longer "considered part of Final Average Salary for purposes of pension calculations." (IR 54 at ¶ 27.) The effective date for the 2014-2016 SFB was July 1, 2014. (IR 54 at ¶ 30.)

As a result, effective July 1, 2014, for all compensation earned from that date forward, the City no longer classified the components of compensation at issue in this case as pensionable, and the City ceased making pension contributions

to PSPRS for those components of compensation pursuant to the terms of the 2014-2016 TCE and the 2014-2016 SFB.[3] (IR 54 ¶¶ 29, 34.)

Appellees challenged those changes to their pensionable compensation in this action (IR 7.)

STATEMENT OF THE ISSUES

Does A.R.S. § 38-842(12) prohibit the payments at issue in this case from counting as pensionable compensation, thus barring Appellees' demand to have those payments restored?

ARGUMENT

The trial court's order in this case is at odds with the plain language of state law, the legislative intent of that law, and the case law. All contravene the court's conclusion that the payments at issue in this case are pensionable.

A. The plain language of A.R.S. § 38-842(12) prohibits the pension payments at issue in this case.

The plain language of A.R.S. § 38-842(12) governs the outcome of this case and tells us directly that the payments at issue are not pensionable. It is axiomatic

[3] The City's prior policy of allowing the conversion of these benefits to pensionable compensation was the subject of a taxpayer challenge that resolved when the City implemented this new policy. *See Wright v. Stanton*, Maricopa County Superior Court Cause No. CV2013-010915 filed Aug. 15, 2013. The City's changed policy regarding conversion of benefits to pensionable compensation conforms to state law. The relief sought by Appellees in the underlying action would create an illegal system, and therefore should be rejected.

that when courts interpret a statute, they "seek to give effect to the plain and obvious meaning of its terms." *State v. Wilson*, 200 Ariz. 390, 397 (App. 2001). "If the language of the statute is plain, the court looks no further." *State v. Jones*, 188 Ariz. 388, 392 (1997). Moreover, "[w]hen a statutory scheme expressly defines certain terms, we are bound by those definitions in construing a statute within that scheme." *Wilson*, 200 Ariz. at 397.

In this case, the governing statute expressly defines "compensation" for purposes of computing pensionable retirement benefits for PSPRS members. That statute is clear that the payments that are the subject of this litigation, viz., payments in lieu of vacation, payments for unused sick leave, and payments for fringe benefits, are *not* pensionable components of compensation: "Compensation does not include, for the purpose of computing retirement benefits, payment for unused sick leave, payment in lieu of vacation . . . or payment for any fringe benefits." A.R.S. § 38-842(12).

Despite this prohibition, Appellees filed this case seeking a court order to restore pension payments for these exact types of pay. *See, e.g.*, (IR 7 at 21, ¶ 2) (Appellee PLEA asked the trial court, *inter alia*, for "an order preliminarily and permanently enjoining the Defendant City of Phoenix from eliminating the conversion rights for sick leave and vacation leave to be part of the base pay and thereby affect the pensionability rates"). Specifically, Appellees seek restoration

of contract provisions that allowed them to include payment in lieu of vacation (IR 54 at ¶¶ 12, 17; IR 55, Ex. 4 at 24 and Ex. 5 at 44); payment for unused sick leave (IR 54 at ¶¶ 13, 18; IR 55, Ex. 4 at 16 and Ex. 5 at 33); and payment for a fringe benefit uniform allowance (IR 54 at ¶¶ 14, 19; IR 55, Ex. 4 at 12-13 and Ex. 5 at 34-35) as pensionable compensation items. The plain language of A.R.S. § 38-842(12) prohibits that result.

Appellees seek pension payments in lieu of vacation pay in violation of A.R.S. § 38-842(12). The relevant provision of the employment agreement between Appellee PLEA and the City allow police officers "who ha[ve] attained a minimum of seventeen (17) years of credited service in PSPRS…[to] elect to have the additional vacation leave that he earns paid to him on a monthly basis during and for the upcoming three (3) consecutive years." (IR 54 at ¶ 17; IR 55, Ex. 5 at 44; *see also* IR 54 at ¶ 12; IR 55, Ex. 4 at 24.) In other words, when PSPRS members, including Appellees, elect this benefit, they are receiving additional payment in lieu of accruing vacation leave. They are doing this at a time when those payments will count as pensionable pay. The plain and obvious meaning of "in lieu of" is "instead of." MERIAM-WEBSTER, Dictionary (Online ed., 2014). *See Jones*, 188 Ariz. at 392 ("A dictionary may define a word's natural and obvious meaning"); *State ex rel. Pennartz v. Olcavage*, 200 Ariz. 582, 588 (App. 2001) ("In determining the plain and ordinary meaning of a word, we may refer to an

established and widely used dictionary."). The language in A.R.S. § 38-842(12) barring "payment in lieu of vacation" from the definition of pensionable compensation is unambiguous. As a result, the court below erred in finding those payments pensionable.[4]

The same is true of sick leave. When Appellee members of PSPRS acquire the threshold number of sick leave hours (IR 54 at ¶¶ 13, 18; IR 55, Ex. 4 at 16 and Ex. 5 at 33) and elect to convert additional leave to pensionable payments, they are receiving "payment for unused sick leave" in violation of A.R.S. § 38-842(12). It is, of course, obvious that "unused" means "not having been used before." MERIAM-WEBSTER, Dictionary (Online ed., 2014). Under the contract provisions at issue, Appellee members of PSPRS are converting future leave that has not been used before to additional pensionable salary. That is unambiguously receiving payment for unused sick leave as pensionable compensation contrary to A.R.S. § 38-842(12).

[4] Interestingly, the trial court appears to have at one point agreed with the unambiguous language in A.R.S. § 38-842(12). During oral argument on Appellees' applications for a preliminary injunction, in responding to Appellee PLEA's explanation of the vacation leave conversion provisions of the MOU, the court responded, "That, to me, sounds like a payment in lieu of vacation. Instead of taking your vacation, instead of accruing sick leave, we're going to pay you instead and call that compensation." (TRO Hr'g Tr. 152:17-20 July 16, 2014.) The court below had it right the first time.

In the order under appeal, the trial court disregards the governing statute's plain language. Adopting Appellee PLEA's strained reading of A.R.S. § 38-842(12) verbatim, the trial court found that:

> The payments at issue in this case are the result of an eligible officer electing to end one benefit and start another instead . . . Once an eligible officer elected to take advantage of these provisions, the original benefits – the sick leave accrual, vacation leave accrual, and annual uniform allowance – ceased to exist for those officers. Thus, the payments at issue in this case were not "payments for" anything other than the personal services rendered by the officer. (IR 94 at 1-2.)

Under this analysis, the prohibition on pension payments for "unused sick leave" under A.R.S. § 38-842(12) only means prohibiting payments for sick leave days (or vacation leave for that matter) that were saved and then converted to cash, rather than converted for direct payment immediately upon receipt of the leave. (IR 64 at 6.) Under this analysis, the timing of the payment is the essential factor. In other words, if a sick leave day was previously accrued and saved, it cannot be exchanged for a pension payment. If the same sick leave day is earned but immediately converted to cash, then it can be exchanged for a pensionable payment. This is a distinction without a difference. A sick leave day is obviously used when it is taken. Sick leave days that are placed in a bank of hours are "unused" just like sick leave days that are recently accrued. And in both cases, whether they are sold from a bank of hours or converted to cash upon receipt, if the

officer received pensionable payment for these sick leave days, the officer would be receiving payment for "unused sick leave" in violation of A.R.S. § 38-842(12).[5]

If the trial court's analysis is correct, then *any* type of pay, including for vacation leave, sick leave, or any other fringe benefit, could be converted to future payments and suddenly become pensionable despite express statutory prohibitions. This would render the entire statutory scheme for PSPRS, and any other pension plan, "void, inert, trivial, superfluous, or contradictory." *Hourani v. Benson Hosp.*, 211 Ariz. 427, 431 (App. 2005). Such an extraordinary interpretation not only violates very plain principles of statutory construction, but would render the entire statutory scheme regarding the pensionability of payments irrelevant. As a result, this interpretation must be rejected

Finally, the uniform allowance provisions likewise violate the plain language of A.R.S. § 38-842(12). Under the MOU between Appellee PLEA and the City, "[a]fter 17 years of credited service in PSPRS," appellee members of PSPRS may have "their basic annual uniform allowance converted to a bi-monthly payment for a consecutive three year period" (IR 54 ¶ 19; IR 55, Ex. 5 at 34; *see*

[5] Tellingly, the legislature has not only prohibited use of sick leave payments when calculating the pensions for PSPRS members, but for other public employees as well. *See* A.R.S. § 38-711(7) (prohibiting sick leave and vacation leave payments for members of the Arizona State Retirement System); *see also* A.R.S. § 38-615(F) (applicable to public employees whose compensation requires forfeiture of sick leave upon retirement and stating that sick leave cannot be used when calculating "average salary" for retirement purposes).

also IR 54 at ¶ 14; IR 55, Ex. 4 at 12-13.) The uniform conversion payments made pursuant to these provisions permits pensionable compensation for members who elect the conversion. Appellee PLEA concedes that a uniform allowance "is appropriately considered a fringe benefit" (IR 64 at 7.) A.R.S. § 38-842(12) does not permit pensionable payment for "*any* fringe benefits" not enumerated in the statute. *Id.* (emphasis added). As a result, receipt of pensionable payment in lieu of a uniform allowance, violates A.R.S. § 38-842(12) on its face.

Based on the foregoing, the Court need look no further than the plain language of A.R.S. § 38-842(12) to find that the trial court erred in interpreting that statute. The plain language of A.R.S. § 38-842(12) controls the outcome of this case. *Pima Cnty. v. School Dist. No. One of Pima Cnty.*, 78 Ariz. 250, 252 (1954) ("It is well settled that where a statute expressly defines certain words and terms used in the statute the court is bound by the legislative definition in all cases where the rights of the parties litigant are based upon that statute."); *see also Mail Boxes v. Industrial Comm'n of Ariz.*, 181 Ariz. 119, 121 (1995) ("Where language is unambiguous, it is normally conclusive, absent a clearly expressed legislative intent to the contrary."). It is clear from the language used in A.R.S. § 38-842(12) that the legislature both expressly *included* certain items of compensation as pensionable pay and expressly *excluded* other items of compensation as pensionable pay. The payments at issue in this case were expressly excluded as

pensionable. As a result, the trial court's order finding these payments constitute pensionable pay fails as a matter of law; that order must be reversed.

B. The payments at issue in this case are not "base salary."

The definition of "base salary" within A.R.S. § 38-842(12), as conventionally understood, and as defined *by the parties* in their memorandum of understanding, establishes that base salary does not include the payments at issue in this case.

The court below found that "the payments herein are permissible *base salary* compensation for professional services actually provided by the officers and for which monetary contributions were regularly made to the pension system." (IR 94 at 1) (emphasis added.)

The definition of "base salary" within A.R.S. § 38-842(12), however, forecloses that argument. A.R.S. § 38-842(12) provides: "'[B]ase salary' means the amount of compensation each employee is *regularly paid* for personal services rendered to an employer *before the addition of any extra monies,* including overtime pay, shift differential pay, holiday pay, longevity pay, fringe benefit pay and similar *extra payments*" (emphasis added).

The payments at issue in this case are "extra payments" specifically excluded from the definition of base salary in A.R.S. § 38-842(12). Extra means "more than is due, usual, or necessary: ADDITIONAL" MERIAM-WEBSTER,

Dictionary (Online ed., 2014) (emphasis in original). However characterized, it is indisputable that the payments at issue in this case are *in addition to* an officer's regular compensation because they are added to that compensation. Thus, these extra, or additional payments, are clearly not base salary.

The structure of A.R.S. § 38-842(12) likewise eliminates the possibility that the payments at issue in this case are "base salary." Within that statute, "base salary" is considered "compensation" in addition to "overtime pay, shift differential pay, military differential wage pay, compensatory time . . . holiday pay . . . and longevity pay…." These same components of compensation are then specifically *excluded* from the definition of "base salary" in the statute. Thus, if "base salary" by definition does not include items that are *included* in the broader definition of "compensation," it certainly does not include items that are specifically *excluded* from the definition of compensation, such as "payment in lieu of vacation" and "payment for unused sick leave." *Id.* "In construing a statute, 'we consider the statutory scheme as a whole and presume that the legislature does not include statutory provisions which are redundant, void, inert, trivial, superfluous, or contradictory.'" *Hourani*, 211 Ariz. at 431. In finding that the legislature really intended to include payments it specifically excluded from the definition of pensionable compensation, the trial court's reading of A.R.S. § 38-842(12) renders that statute contradictory.

Put another way, under A.R.S. § 38-842(12), the legislature defined certain components of pay as pensionable "compensation," and defined other components as not pensionable "compensation." The structure of A.R.S. § 38-842(12) shows that the legislature created two separate categories of compensation – those components of compensation that are pensionable and those that are not. The payments at issue in this case were plainly and intentionally placed in the "not pensionable" category by state lawmakers. Had the legislature intended to include vacation leave, unused sick leave, and uniform allowances as pensionable compensation, the legislature would simply have included those items under its definition of pensionable compensation, rather than expressly excluded them from that definition. It is absurd to argue that the legislature intended the components of compensation at issue in this case to count as compensation when it expressly listed those specific items as *not* pensionable compensation. Statutes must be interpreted "in a way that avoids absurdity and fulfills the legislature's purpose." *See Mail Boxes*, 181 Ariz. at 122.

Moreover, "base salary" is a well-understood term that does not include payments for things like vacation leave, sick leave, or uniform allowances. "Base pay" means "a rate or amount of pay for a standard work period, job, or position *exclusive of additional payments* or allowances." MERIAM-WEBSTER, Dictionary (Online ed., 2014) (emphasis added). Whether paid on an hourly or annual basis,

"base salary" is just that, a *base* rate of pay to which other components of compensation may or may not be added. What it is not is those other forms of compensation, such as payment for vacation leave, sick leave, or uniform allowances.

In fact, the text of the Memorandum of Understanding between Appellee PLEA and the City specifically bears out that Appellee PLEA itself does not consider extra or additional salary payments of any kind as "base" pay. Specifically, the 2012-2014 MOU referenced "base hourly" pay six times as a figure on which to base additional payments, such as time-and-half for overtime pay or "court standby" pay. (IR 67 at ¶ 1; IR 55, Ex. 5 at 29, 32, 34-37.) Those base hourly wages are then specifically set out in Attachment B to the 2012-2014 MOU. (IR 67 at ¶ 2; IR 55, Ex. 5 at 54.) In fact, Appellee PLEA itself referred to the payments at issue in this case as "*additional* salary payments" no less than 13 times in its Response and Cross Motion for Summary Judgment in the court below. (IR 64 at 2, 4-7, 10-11) (emphasis added). Thus, Appellee PLEA itself has defined "base" pay as payment for regular wages that simply does not include additional payments for things like vacation leave, sick leave, or uniform allowances.

This Court's recent decision in *Cross v. Elected Officials Ret. Plan* is also instructive on this issue. 234 Ariz. 595, 598 (App. 2014). In *Cross*, Jack Cross, a former PSPRS administrator and beneficiary of the Elected Officials Retirement

Plan ("EORP"), inflated his *own* pension by tens of thousands of dollars *a year* by cashing in vacation leave and sick leave at the end of his career at PSPRS. *Id.* Cross then sued EORP when that pension plan reviewed his "average annual salary" pension calculation and excluded "bonuses and payments for unused vacation and sick pay in calculating his pension." *Id*. During litigation at trial and in this Court, Mr. Cross argued that the definition of "annual average salary" under the EORP plan as set out in A.R.S. § 38-801(5) includes payments for unused vacation leave and sick time. *Cross*, 234 Ariz. at 604.

This Court squarely rejected Cross's argument. In interpreting the EORP statute, A.R.S. § 38-801(5), the Court held that the definition of "'average annual salary'…does not include bonuses or payments made to a member in lieu of sick time or vacation." *Id.* at 605. Tellingly, the definition of "average annual salary" under A.R.S. § 38-801(5) is not nearly as clear as the definition of "compensation" under § 38-842(12). For example, unlike § 38-842(12), § 38-801(5) does not include an express provision that excludes payment in lieu of vacation, payment for unused sick leave, and payment for fringe benefits from the definition of "compensation." Thus if "average annual salary" under A.R.S. § 38-801(5) rightly does not include pensionable payments for sick leave and vacation leave, then "compensation" under A.R.S. § 38-842(12), a statute that specifically excludes those payments, certainly does not include those payments as "base salary" or

pensionable pay.[6]

C. The clear intent of the Arizona Legislature was to exclude the payments at issue in this case from the definition of pensionable compensation for PSPRS members.

Both the legislature's stated purpose in enacting a "uniform, consistent, and equitable statewide [retirement] program" for public safety officers in Arizona and the legislative history of A.R.S. § 38-842(12) make clear that the legislature intended to exclude the payments at issue in this case as pensionable compensation. "The primary rule of statutory construction is to find and give effect to legislative intent." *Mail Boxes*, 181 Ariz. at 121. In doing so, courts may consider "context, subject matter, historical background, effects, consequences, spirit, and purpose." *Id.* at 122. "When construing statutes, we must read the statute as a whole and give meaningful operation to each of its provisions." *Ruiz v. Hull*, 191 Ariz. 441, 450 (1998).

At the time the PSPRS statute was enacted there were "wide and significant differentials in employee contribution rates, benefit eligibility provisions, types of benefit protection and *benefit formulas*." A.R.S. § 38-841(A) (emphasis added).

---

[6] Although the issue did not appear dispositive to the trial court's resolution of the pensionability issue in *Cross*, this Court also squarely rejected the argument that pension contributions on payments for unused vacation and sick leave was a relevant factor in determining whether such payments are pensionable pay. 341 Ariz. at 605 ("we reject any contention that the Plan's collection of contributions from Cross's bonuses and sick leave and vacation payments represent a considered interpretation of the statute to which we should defer.").

Consequently, the legislature's stated purpose in establishing PSPRS was "to provide a uniform, consistent and equitable statewide [retirement] program for public safety personnel." *Id.* at § 38-841(B). To achieve uniformity and consistency of pension formulas for public safety personnel, the PSPRS statute specifically defines its material terms, including the definition of pensionable "compensation." The legislature's stated purpose in enacting the PSPRS statewide retirement system would be directly undermined if the trial court's interpretation of pensionable compensation under A.R.S. § 38-842(12) is accepted.

The trial court's order interpreting "compensation" under A.R.S. § 38-842(12) disturbs the uniformity of and creates inconsistencies and clear inequities within the PSPRS system.

First, the payments at issue in this case create inconsistencies and inequities between the retirement benefits offered by different employers in the PSPRS system. There are approximately 255 participating employers in PSPRS. (IR 54 at ¶ 2; IR 55, Ex. 1, App. IV.) When the City agreed to permit pension payments for vacation leave, sick leave, and uniform allowances under the 2012-2014 MOU, it created a benefit that was prohibited by A.R.S. § 38-842(12) and thus unavailable to employees of the hundreds of other participating employers in PSPRS. This contravenes the legislature's very purpose of creating a *uniform* statewide retirement system.

Second, defining pensionable compensation to include the payments at issue in this litigation also creates inconsistencies and inequities among individual PSPRS members, even those who belong to the same employer. For example, two City employees who are PSPRS members could have served the same number of years and retired in the same rank with the same base salary but receive vastly different pensions if one took advantage of the provisions at issue in this case and the other did not. Assume, for instance, that an Appellee PSPRS member inflated his or her final average salary by $20,000 each year, beginning in year 17, for three years, and retired after 20 years of service. Assume also that this increased the member's final average salary from $100,000 to $120,000. If the member would have retired without spiking pension, his or her annual pension would be $50,000. By cashing in the payments at issue in this case, however, the member increased his or her annual pension to $60,000. Over the lifetimes of these two retirees, the differences in their retirement benefits would be immense even though their ranks and time in service are identical. This rewards gamesmanship over merit, and promotes inconsistency and inequity over uniformity, flouting the legislature's purpose in creating a "uniform, consistent and equitable statewide retirement program" for all public safety officers in Arizona.

What's more, inconsistencies and deviations impact pension fund solvency by defining the payments at issue in this case as pensionable compensation. For

example, if a PSPRS member took advantage of these provisions, the member would pay increased pension contributions for only a three year period, but would increase the City's pension obligations for the entirety of the member's retirement. In the example above, over the course of three years, the PSPRS member who included the payments at issue as part of his pensionable compensation would have contributed approximately $6,630 to PSPRS in member contributions on the additional payments, or 11.05 percent of the member's increased compensation. *See* A.R.S. §38-843(E)(5). Yet, that member would have increased his annual pension by $10,000. Thus, in the first year of retirement alone, the member is able to recoup *all* of his pension contributions to the system plus an additional $3,370. Multiply the inflated retirement figure over the course of the member's retirement and the inequities that exist under the provisions at issue in this case become stark, as do unfunded liabilities within the pension system. *See In re Puglisi*, 897 A.2d 1015, 1017-18 (N.J. 2006) ("The purpose of [the state retirement statute]…is to protect the actuarial soundness of the pension fund by prohibiting the use of '*ad hoc* salary increases intended to increase retirement allowances without adequate compensation to the [pension] fund' in calculating pensions"); *see also* Jun Peng, Ph.D., and Ilana Boivie, *Lessons from Well-Funded Public Pensions: An Analysis of Six Plans that Weathered the Financial Storm*, National Institute on Retirement Security, June 2011, at 11

(http://www.nirsonline.org/storage/nirs/documents/Lessons%20Learned/final_june_29_report_lessonsfromwellfundedpublicpensions1.pdf ("To the extent it occurs, pension spiking can be harmful to the financial health of the pension plan, because the prefunding of pension benefits assumes certain levels of salary growth over the course of employees' working lives. An unusual increase in [final average salary] above these assumptions will immediately create an unfunded liability, which is detrimental to the pension plan and unfair to other plan participants as well as taxpayers.")) This circumstance is exactly why the legislature attempted to create a uniform, consistent, and equitable statewide retirement program that would avoid this outcome.

Finally, the history of the definition of "compensation" under A.R.S. § 38-842(12) and pension contributions for vacation leave, sick leave, and uniform allowances made pursuant to employment contracts between Appellees and the City is also illustrative. The exclusion of "payment for unused sick leave, payment in lieu of vacation . . . [and] payment for fringe benefits" from the definition of compensation under the PSPRS statute was added in 1983. H.B. 2356, 36th Leg., 1st Reg. Sess. (Ariz. 1983). Provisions in the memoranda of understanding that provided for City pension contributions were enacted after that date, beginning in 1988 and continuing up to the 2012-2014 MOU and 2012-2014 MOA. (IR 7 at ¶¶ 20, 22-23.)

Tellingly, the vacation leave conversion provisions (R. 54 at ¶¶ 12, 17; R. 55 at 46, 110) and the uniform allowance conversions (R. 54 at ¶¶ 14, 19; R. 55 at 34-35) are both only available once Appellee PSPRS members attain a minimum of 17 years of service in PSPRS. Similarly, the sick leave exchange provision is only available after Appellee PSPRS members accrue a large bank of sick leave hours (IR 54 at ¶¶ 13, 18; IR 55, Ex. 4 at 16 and Ex. 5 at 33), built over the course of a long career.

Because members of PSPRS, including Appellees, are eligible to retire at 20 years of service (*see* A.R.S. § 38-842(7)), the timing of these eligibility provisions is obviously designed to facilitate spiking. It is difficult to imagine a plausible alternative explanation for why the eligibility threshold for the program is 17 years, and then continues for a three year period. If the purpose is to merely increase salary, irrespective of its pensionability, why not start it at 10 years, 15 years, or 20 years? The answer is obvious. Under these provisions, Appellees' final average three-year salary can be inflated during the time when it counts toward pensionability. That is not a coincidence. It was crafted to ensure the payments at issue in this case are pensionable, irrespective of the statutory prohibition. *See Puglisi*, 897 A.2d at 1018 ("any salary increase made primarily in anticipation of retirement must be disregarded in determining the amount of a retiree's pension, even if the increase was also designed to achieve other objectives, such as

increasing the overall amount of the employee's compensation."). Similarly, the conversion of vacation, sick leave, and uniform payments into monthly or bi-weekly payments is a not-so-subtle attempt to make items that are excluded from the statutory definition of compensation look more like "regular" salary. But only for employees on the verge of retirement whose salaries during that period determine pension amounts.

These contract provisions, therefore, ensure that the salaries, and thus pension amounts, of Appellees will be greatly inflated during their last years of employment. The express purpose and intent of the legislature in enacting the PSPRS statute was to prevent these types of manipulations and create a uniform, consistent, and equitable statewide retirement program for all public safety personnel in Arizona. The court's order below directly undermines that purpose.

D. The purpose of the components of compensation at issue is not to enhance retirement benefits, which is why courts throughout the country have prohibited the inclusion of vacation leave, sick leave, and other fringe benefits from the definition of pensionable compensation.

The components of compensation at issue in this case are not, and were never intended to be, retirement enhancers. Sick leave is "[a] period of paid leave that an employee can use to stay home and recuperate during a period of temporary illness." LEAVE, BLACK'S LAW DICTIONARY (10thEd. 2014). Vacation pay is "[a] worker's paid leave of absence from work, esp. for the purpose of taking an annual

holiday." VACATION, BLACK'S LAW DICTIONARY (10thEd. 2014). The purpose of a uniform allowance is "to cover the cost of uniforms, maintenance, cleaning of such uniforms, and for other duty-related expenses." (IR 55, Ex. 5 at 46.) None of these components of compensation are intended to be retirement enhancers that work to increase pension pay for the entirety of an employee's retirement.

As a result, it should come as no surprise that courts throughout the country that have addressed whether payments for vacation leave, sick leave, and uniform allowances are pensionable have held almost without exception that they are not – even in states where the statutory scheme is not nearly as clear as it is in Arizona. *See, e.g.*, *Chancellor v. Dep't of Ret. Sys.*, 12 P.3d 164, 169 (Wash. App. 2000) (holding that salary payments made in exchange for waiver of vacation leave by senior public safety personnel are not part of "basic salary" for calculating pension benefits); *Davies v. New York State & Local Police & Fireman Ret. Sys*., 259 A.D.2d 912, (App. N.Y. 1999) (holding that unused sick leave converted to salary could not be included in final average salary for pension purposes); *Combs v. Cheek*, 671 S.W.2d 177, 178 (Ark. 1984) (holding that unused sick leave may not be included when calculating a final average salary for pension purposes); *Santa Monica Police Officers Assn. v. Bd. of Admin.*, 69 Cal. App. 3d 96, 101 (1977) (finding that the legislature intended to exclude payments for unused sick leave and vacation time from pension computations); *Lugar v. State ex rel. Lee*, 383

N.E.2d 287, 290 (Ind. 1978) (holding that uniform allowance was properly excluded from definition of salary for pension benefits).

The *Chancellor* case is particularly instructive. In *Chancellor*, the Washington State Court of Appeals invalidated a city's attempt to permit senior public safety personnel to convert vacation leave not yet accrued into additional pensionable salary. 12 P.3d 164. The court found that state law prohibited such payments because they were not "basic salary" as defined under the state retirement statute. *Id*. at 169. In invalidating the city ordinance "authorizing" the vacation leave conversion, the court wrote, "But 'the parties to a contract may not decide for themselves the meaning of terms used by the Legislature.' And the City does not have the authority to adopt its own definition of a statutory term by ordinance." *Id.* (*citing Grabicki v. Dep't of Ret. Sys*., 916 P.2d 452, 456 (1996)).

Similarly, the court below redefined state law in a manner that is contrary to the plain language of that law. Whether vacation leave, sick leave, and uniform allowances are already accrued, or yet-to-be accrued, state law prohibits pensionable payments for those components of compensation. This case takes the *Chancellor* situation a step further: here the parties are no longer attempting to contract away provisions of state law, but instead Appellees are asking the Court to *force* the City to violate state law.

Davies is also helpful. In that case, pursuant to the terms of a collective bargaining agreement between a municipality and a police union, senior officers converted sick leave into salary for pension purposes. Upholding the determination of the state comptroller that these payments could not be included in final average salary for pension purposes, the court wrote that the senior officer sick leave conversion program "was nothing more than an attempt to circumvent the prohibition contained in [state pension law] against using accumulated sick leave credits in calculating an applicant's final average salary." 259 A.D.2d 912, 913.

Similarly, the action brought by Appellees is "nothing more than an attempt to circumvent" the prohibition under A.R.S. § 38-842(12) against using the components of compensation at issue as pensionable pay. This Court should not permit such an outcome. The purpose of the PSPRS statute was to prevent exactly what the court below did here – allow for an inconsistent and inequitable application of a statewide retirement program.

The order under review, therefore, is not only at odds with the very plain language of state law, but patently defies the central purpose of that law.

NOTICE UNDER RULE 21(a)

Appellants respectfully request an award of costs pursuant to A.R.S. § 12-341 and attorneys' fees pursuant to the private attorney general doctrine. *See Arizona Ctr. For Law In Pub. Interest v. Hassell*, 172 Ariz. 356, 371 (App. 1991).

CONCLUSION

Both the language and intent of A.R.S. § 38-842(12) are clear. The plain language of that statute prohibits the payments at issue from being classified as pensionable. Likewise, the legislative intent in enacting the PSPRS statute was to create a uniform and consistent statewide pension program that would prohibit exactly the types of pension payments the court below found permissible. Based on the foregoing, we respectfully request that this Court reverse the decision of the trial court, declare that the pension payments at issue are not pensionable, and order that Appellees' case below be dismissed with prejudice.

Respectfully submitted August 21, 2015 by:

/s/ Jonathan Riches
Clint Bolick (021684)
Jonathan Riches (025712)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE

COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PHOENIX LAW ENFORCEMENT ASSOCIATION, an Arizona non-profit corporation; BARRY JACOBS, EARLE AKRE, and ROBERT RAMSEY, and RICK FLUM, THERESA CLARK, NICHOLAS ROSANDER, CHARLES CONSOLIAN, RANDOLPH PALMER, SCOTT MCCAULEY, RODRIGO HERNANDEZ, NATALIE SIMONICK, JANINA AUSTIN, individually and on behalf of themselves and as representatives for similarly situated class members, Plaintiffs/Appellees, v. CITY OF PHOENIX, a body politic, Defendants/Appellees, and MICHAEL DUPUY, and JIM JOCHIM, Intervenors/Appellants.	1 CA-CV 15-0390 Maricopa County Superior Court Case No. CV2014-008711 CV2014-009114 (Consolidated)

CERTIFICATE OF SERVICE

Pursuant to Rule 15, Arizona Rules of Civil Appellate Procedure, the undersigned hereby certifies that on the 21st day of August, 2015, she electronically filed Appellants' Opening Brief with the Arizona Court of Appeals, Division One, and electronically served on:

Respectfully submitted August 21, 2015 by:

Michael Napier Eric R. Wilson Cassidy L. Crossen NAPIER, COURY & BAILLIE, P.C. 2525 E. Arizona Biltmore Circle, Suite 135 Phoenix, AZ 85016-0001 Mike@napierlawfirm.com Ewilson@napierlawfirm.com *Attorneys for Plaintiffs PLEA, et al.*	Caroline A. Pilch Robert E. Yen Michael Pang YEN PILCH & LANDEEN, P.C. 6017 N. 15th St. Phoenix, AZ 85014 pilch@ypllaw.com yen@ypllaw.com pang@ypllaw.com *Attorneys for Plaintiffs Clark, et al.*
John Alan Doran Matthew Hesketh SHERMAN & HOWARD LLC 201 E. Washington St., Suite 800 Phoenix, AZ 85004 jdoran@shermanhoward.com mhesketh@shermanhoward.com lhinkel@shermanhoward.com *Attorneys for Defendant City of Phoenix,*	

/s/ Kris Schlott
Kris Schlott

COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PHOENIX LAW ENFORCEMENT ASSOCIATION, an Arizona non-profit corporation; BARRY JACOBS, EARLE AKRE, and ROBERT RAMSEY, and RICK FLUM, THERESA CLARK, NICHOLAS ROSANDER, CHARLES CONSOLIAN, RANDOLPH PALMER, SCOTT MCCAULEY, RODRIGO HERNANDEZ, NATALIE SIMONICK, JANINA AUSTIN, individually and on behalf of themselves and as representatives for similarly situated class members, Plaintiffs/Appellees, v. CITY OF PHOENIX, a body politic, Defendants/Appellees, and MICHAEL DUPUY, and JIM JOCHIM, Intervenors/Appellants.	1 CA-CV 15-0390 Maricopa County Superior Court Case No. CV2014-008711 CV2014-009114 (Consolidated)

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14 of the Arizona Rules of Civil Appellate Procedure, I certify that the body of the attached Appellants' Opening Brief appears in proportionately spaced type of 14 points, is double-spaced using a Roman font, and contains 7,577 words, excluding the table of contents and table of citations.

Respectfully submitted August 21, 2015 by:

/s/ Jonathan Riches
Clint Bolick (021684)
Jonathan Riches (025712)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE