ARIZONA COURT OF APPEALS

DIVISION ONE

FRANK PICCIOLI, et al.,

Plaintiffs/Intervenors/Appellees/
Cross-Appellants,

v.

CITY OF PHOENIX, et al.

Defendants/Appellants/
Cross-Appellees.

Court of Appeals
Division One
No. 1 CA-CV-16-0690

Maricopa County
Superior Court
No. CV2012-010330

DEFENDANTS/APPELLANTS/CROSS-APPELLEES' COMBINED REPLY BRIEF AND CROSS-APPEAL ANSWERING BRIEF

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REPLY BRIEF ON APPEAL AND CROSS-APPEAL ISSUE NO. 3*

INTRODUCTION**

For sixteen years, the City incorrectly included as pensionable "compensation" the amount of any payout an employee received at retirement for accrued sick leave. The question for this Court is whether the Pension Clause forever bars the City from correcting that mistake. As a matter of law and common sense, the answer is no.

Although the Pension Clause protects public employee retirement benefits, it does not transform every contract, policy, or practice that touches an employee's pension into a constitutional right. Article XXIX of the Arizona Constitution is implicated only if an employee shows that a vested right exists independent of the Constitution.

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* As explained below (*see* Cross-Appeal Argument Summary), the City includes cross-appeal issue no. 3 as part of its reply brief because the issues are intertwined.

** This brief uses the same defined terms as the City's opening brief, e.g., "the City" refers to all appellants/cross-appellees collectively, "members" refers all named plaintiffs and intervenors (individuals and unions), and the "Charter" refers to the 2012 version of the Charter (excerpted at APP115–159), unless otherwise noted. References to APP___ refer to the City's Appendix attached to its opening brief. References to the "answering brief" refer to the appellees/cross-appellants' combined answering and cross-opening brief.

Here, the source of the members' contractual rights to retirement benefits is the City of Phoenix Charter. The Charter's plain text contradicts the members' claim that they have a permanently vested contractual and constitutional right to spike their pensions with retirement payouts for accrued sick leave. Thus, the terms of the Charter resolve this case, not the Pension Clause or evidence extrinsic to the retirement contract itself. A plain reading of the text shows that the Charter does not permit pension spiking.

No matter what happened in the past, the City and COPERS cannot continue a practice that violates the Charter's plain text. Accordingly, the members have no legal right to continue pension spiking beyond the fair and equitable solution the City implemented. The Court should reverse in part and affirm in part.

ARGUMENT SUMMARY

Both sides agree that the plain text of the Charter controls the main issue in this case. The Charter's text, as confirmed by its structure and purpose, demonstrate that "compensation" means regular, annual pay for personal services rendered. The members' arguments to the contrary and their alternative constructions of the Charter conflict with the Charter's text

and structure and therefore should be rejected. Applying the proper definition of "compensation," sick-leave payouts at retirement are neither regular, annual pay nor for personal services rendered, and therefore may not be included as pensionable "compensation." Past practice cannot amend or alter the Charter's text, so the City's past actions do not and cannot change the character of the payouts under the Charter. (Argument § I.)

Moreover, because the Charter, as the governing retirement plan document, does not give employees the right to spike their pensions with sick-leave payouts, the Pension Clause does not give the members the right to continue the practice. The Pension Clause does not protect a right that does not exist in the retirement plan in the first place. (Argument § II.)

Furthermore, the City's past practice does not give the members a contractual right, independent of the Charter's terms, to spike their pensions in perpetuity. The Charter controls what counts as pensionable compensation, and no Arizona case justifies using past practice to overcome the plan document's terms. Finally, even if the members did have some independent vested right outside the terms of the Charter, the City's actions have not diminished or impaired such a right. The

"snapshot" approach in revised AR 2.441 entitles employees to count *all* sick leave accrued under the old practice, which fully protects any vested rights the members may have had. The City thus implemented a fair and equitable system to address the past practice while correcting the mistake *prospectively only*. (Argument § III.)

ARGUMENT

I. A one-time payout at retirement for accrued sick leave is not pensionable "compensation" under the Charter.

A. Both sides agree that the Charter's plain terms control.

As set forth in the City's opening brief (*e.g.*, at 32–36), the Charter controls the terms and benefits of the City's retirement plan, COPERS. The members agree. They acknowledge (at 5) that "[t]he terms of COPERS are set forth in Ch. XXIV, Art. II of the City Charter." And they insist that the text of the Charter "is clear on its face." (Answering Br. at 34–35; *see also id.* at 44 ("[T]he language of COPERS is clear and unambiguous, so the Court should not look beyond the language, but rather simply apply it without using other means of construction[.]") (citation omitted).)

As a threshold matter, the City disagrees with many of the claims the members make in their Statement of the Case and Statement of Facts (at 5–32), but most of their allegations are irrelevant to the legal question here.

For example, the members discuss evidence (at 16–31) showing that from 1996 to 2012, the City and COPERS permitted employees to spike their pensions with retirement payouts for accrued sick leave. But the City readily admits that it allowed pension spiking for this sixteen-year period. More importantly, this type of extrinsic evidence is irrelevant in light of the members' assertion that the Charter "is clear and unambiguous." (Answering Br. at 44 (quotation marks and citation omitted).)

The central dispute in this case therefore boils down to whether the Charter defines pensionable "compensation" broadly to mean essentially *anything* paid or given to employees (as the members urge), or whether the Charter's plain terms limit the types of payments that can be counted towards the calculation of an employee's pension benefits under COPERS (as the City argues). As explained in the City's opening brief (at 32–56) and below, the Charter's text, structure, and purpose all confirm that pensionable "compensation" is limited to regular, annual pay for personal services rendered.

B. The Charter's text, structure, and purpose confirm that pensionable "compensation" means regular, annual pay for services rendered.

As explained in the opening brief (at 12–13), a Plan member's lifetime pension benefit depends on two factors—credited service (i.e., *time*) and average compensation (i.e., *pay*). Charter ch. XXIV, art. II, § 19.1. This case concerns the "pay" factor. (*See* Opening Br. at 12–13, 48–51.)

Under the Charter, not all amounts paid to employees count towards their pensions. Rather, the Charter fixes retirement benefits based on an employee's "*highest annual compensations*," averaged over a 3-year period. *Id.* §§ 2.14, 19.1(a) (emphasis added). Section 2.13 of the Charter defines "compensation" for pension purposes as "*a member's salary or wages paid him by the City for personal services rendered by him to the City*." *Id.* § 2.13 (emphasis added).

The second sentence of § 2.13 explains what happens if "a member's compensation is not all paid in money." *Id.* As the City's opening brief explained (at 41–44), nonmonetary compensation under § 2.13's second sentence must still fit the first sentence's predicate definition of "compensation." The members do not dispute this point. Despite saying (at 40) that sick leave payouts are compensation "under the second

sentence . . . , under the first sentence, or both," the members offer no reason for concluding that something not paid in money may be counted as pensionable compensation without qualifying as "salary or wages . . . for personal services rendered." Thus, § 2.13 and § 2.14 of the Charter limit the compensation that can be counted for pension purposes to an employee's annual salary or wages for personal services rendered. (*See* Opening Br. at 32–56.)

The Court must construe the Charter's text to fulfill the intent of the electorate who adopted it. Because the Charter does not define "salary or wages," those terms must be given their plain and ordinary meaning, unless the voters "clearly intended" something other than the usual meaning. *Bilke v. State*, 206 Ariz. 462, 464–65 ¶ 11 (2003) (citation omitted); *see also Cross v. Elected Officials' Ret. Plan*, 234 Ariz. 595, 603 ¶ 26 (App. 2014). The members agree with this rule, and also agree that the Court should look to dictionary definitions to infer the plain and ordinary meaning of these terms.

Both before and since the voters adopted the definition of "compensation" in 1953, dictionaries have defined "salary" and 'wages" as fixed, regular payments made periodically. (*See also* Opening Br. at 32–36.)

Dictionary	"Salary"	"Wages"
Webster's New International Dictionary of the English Language (2d. ed. 1946) (APP529–31)	The **recompense or consideration paid**, or stipulated to be paid, **to a person at regular intervals** for services, esp. to holder of official, executive, or clerical positions; fixed compensation regularly paid, as by the year, quarter, month, or week; stipend	**Pay given for labor**, usually manual or mechanical, **at short stated intervals**, as distinguished from salaries or fees.
New Oxford American Dictionary (3d ed. 2010) (APP522–23)	[A] **fixed regular payment**, **typically paid on a monthly basis but often expressed as an annual sum**, made by an employer to an employee, esp. a professional or white-collar worker	[A] **fixed regular payment**, **typically paid on a daily or weekly basis**, made by an employer to an employee, esp. to a manual or unskilled worker . . . .
American Heritage Dictionary (5th ed. 2011) (APP526–27)	**Fixed compensation** for services, **paid to a person on a regular basis**.	A **regular payment**, **usually on an hourly, daily, or weekly basis**, made by an employer to an employee, especially for manual or unskilled work.

The Charter's definition of "final average compensation," meanwhile, sets an annual time frame for pensionable pay. Specifically, § 2.14 calculates final average compensation based on the employee's "highest *annual compensations*." (Emphasis added.) Accordingly, only amounts an employee receives as regular, annual pay for personal services rendered are pensionable "compensation" under the Charter.

Faced with these clear limits on pensionable compensation, the members accuse the City (at 53) of "engrafting onto the statute provisions

that do not exist" because the words "fixed" and "regular" do not appear in §§ 2.13 and 2.14. (Quotation marks and citation omitted.) But that construction comes from the standard tools of statutory interpretation—dictionary definitions and the structure and purpose of the Charter.

As noted above, since Phoenix voters adopted COPERS in 1953, dictionaries have consistently defined "salary" and "wages" to mean regular, periodic pay. Moreover, this plain meaning of "salary or wages" comports with the structure and purpose of COPERS, and the Court must construe the Charter's provisions "in light of their place in the statutory scheme so they may be harmonious and consistent." *State v. Flynt*, 199 Ariz. 92, 94 ¶ 5 (App. 2000) (citations omitted).

The structure of the Charter's retirement plan further confirms that Phoenix voters did not intend to include one-time, lump-sum payouts for unused leave in the calculation of pension benefits under the Charter. (Opening Br. at 48–55.) The City illustrated in its opening brief (at 53–54) how treating a one-off payment like a retirement payout for accrued sick leave as part of the employee's final year salary or wages throws off the entire statutory scheme. The members offered no response to these points in their answering brief.

C. The members' interpretation of "salary or wages" under § 2.13 and "annual compensations paid" under § 2.14 conflicts with the Charter's plain text and structure.

The members offer two primary arguments for why the terms of §§ 2.13 and 2.14 require the City to forever include the retirement-triggered accrued sick leave payouts as pensionable "compensation."

First, they argue (at 46–49) that the definition of "wage" in Black's Law Dictionary provides the plain meaning of the phrase "salary or wages" in § 2.13's definition of compensation. Second, they argue (at 56–60) that "annual compensations paid" in § 2.14's definition of final average compensation refers to salary or wages actually paid in a year. But the Charter's text and structure undercut both of these arguments, as does the relevant caselaw.

1. The members' broad definition of "wages" as remuneration in almost any form is unsupported by relevant legal authority and conflicts with the Charter's text and structure.

The members contend (at 47) the phrase "salary or wages" in § 2.13 plainly means "remuneration for a person's services," and thus clearly includes "all money paid directly to employees for services rendered, regardless of labels." Citing Black's Law Dictionary, they argue that "wages" means "payment in almost any form for an individual's labor or

services," and that this broad definition controls over any narrower construction of "salary." (Answering Br. at 46–47, 49 (citation omitted).) The Court should reject the members' expansive interpretation of "salary or wages," for three reasons.

First, the members do not actually rely on the definition of "wage" from Black's. Under "wage," Black's provides a *definition* in the first sentence with additional, non-definitional information following a bullet:

> **wage** *n.* (14c) *Payment for labor or services, usu. based on time worked or quantity produced; specif., compensation of an employee based on time worked or output of production.* • Wages include every form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, vacation pay, bonuses, and the reasonable value of board, lodging, payments in kind, tips, and any similar advantage received from the employer. An employer usu. must withhold income taxes from wages. Cf. SALARY.

Black's Law Dictionary (10th ed. 2014) (emphasis added). The members rely on the text *following* the bullet to argue (at 46) that the definition of "wages" includes sick pay payouts. But as the guide to Black's explains, this text is not part of the definition; it is a non-definitional usage note: "Bullets are used to separate definitional information (before the bullet) from information that is not purely definitional (after the bullet), such as encyclopedic information or usage notes."

Second, in addition to being non-definitional, the usage note quoted by the members is irrelevant here. That note comes directly from a 1944 Wisconsin statute regarding unemployment benefits.[1] Another state's express statutory definition of wages for unemployment purposes does not illuminate what Phoenix voters meant to include in pensionable "salary or wages" under the Charter.

In fact, this reading of wages would dramatically expand the meaning of pensionable "compensation" beyond its current scope. If "salary or wages" means "payment in almost any form for an individual's labor or services," then ostensibly *any* money paid to an employee relating to employment would be included. But many work-related payments to

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[1] This usage note first appeared in Black's Law Dictionary in 1951 with a citation to *Ernst v. Industrial Commission*, 16 N.W.2d 867 (Wis. 1944). *See Wage*, Black's Law Dictionary (4th ed. 1951), attached as an addendum hereto. *Ernst*, in turn, quoted it directly from Wis. Stat. Ann. § 108.02(6), which provided:

> "'Wages' means every form of remuneration payable for a given period (or paid within such period, if this basis is permitted or prescribed by the commission) to an individual for personal services, including salaries, commissions, vacation pay, dismissal wages, bonuses and the reasonable (actual or estimated average) value of board, rent, housing, lodging, payments in kind, tips, and any other similar advantage received from the individual's employer . . . ."

Id. at 867 n.1.

employees do not count as pensionable compensation precisely because they are not "salary or wages" (e.g., bonuses, uniform allowances, and sick leave payouts in the event of an employee's death).

The members' own case citations (at 47–49) reflect this usage note's limited relevance. Most of the cases are not pension cases, and *none* addresses whether retirement payouts for unused sick leave are "wages" under the terms of a public pension plan.[2] For example:

- *Brampton Woolen Co. v. Local Union 112*, 61 A.2d 796, 797 (N.H. 1948) interpreted the *scope of an arbitration clause* in a labor agreement.
- *In re Cardona & Castro*, 316 P.3d 626, 629–30 ¶¶ 10–13 (Colo. 2014) concerned whether accrued sick and vacation leave were "property" for purposes of the *Uniform Dissolution of Marriage Act*.
- *Coates v. Unemployment Comp. Bd. of Review*, 676 A.2d 742, 744–45 (Pa. Commnw. Ct. 1996) involved a claim for *unemployment benefits* under a statute that defined "wages" broadly as "all remuneration . . . paid by an employer to an individual with respect to his employment."

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[2] The only public pension case cited by the members is *Purdie v. Jarrett*, 152 S.E.2d 749 (Ga. 1966), and it does not support their arguments. In *Purdie*, the pension board adopted a formal rule directing that "all compensation, including any bonus paid" be included in pension calculations. *Id.* at 751. Citing this rule, the court held that the board could not retroactively reduce a retired schoolteacher's retirement benefits by excluding the amount of her sick leave payout from her pensionable salary. *Id.* at 751–52. (The pension statute at issue also did not use the term "wages." *See id.*)

- *Long v. Injured Workers' Ins. Fund*, 138 A.3d 1225, 1245–47 (Md. App. 2016) determined whether, for sole proprietors who do not receive "wages," net profits or gross profits should be used as an analog for "gross wages" under a *worker's compensation statute*.

Third, the members' proposed definition of "wage" cannot be reconciled with "salary." Like the non-legal dictionaries cited above (Argument § I.B), Black's defines "salary" as regular, periodic pay: "An agreed compensation for services — esp. professional or semiprofessional services — *usu. paid at regular intervals on a yearly basis*, as distinguished from an hourly basis." Black's Law Dictionary (10th ed. 2014) (emphasis added). Meanwhile, the members assert (at 47) that the plain meaning of "wages" is "*payment in almost any form for an individual's labor or services*." (Citation omitted, emphasis added.) Applying these conflicting definitions would mean that sick leave payouts at retirement qualify as pensionable "compensation" for wage-earners, but not for salary-earners. (*See* Answering Br. at 47 (arguing that "even if the definition of 'salary' were so limited, the payments at issue clearly fall within the definition of wages . . .").) This is an absurd result, unsupported by the Charter's text. *See Arnold Constr. Co. v. Ariz. Bd. of Regents*, 109 Ariz. 495, 498 (1973) (requiring courts to interpret statutory language to avoid absurd results).

Some City employees earn wages; others earn salaries. Nothing in the Charter suggests that voters intended "compensation" to mean something different depending on whether the employee receives salary or wages. To the contrary, a plain reading of the text shows that COPERS treats salary and wages the same way.

On its face, the definition of "compensation" does not differentiate between salary and wages. Section 2.13 uses the phrase "salary or wages" and applies the same qualifying language to both: "paid to him by the City for personal services rendered by him to the City." The Charter's other provisions likewise make no distinction between salary-earners and wage-earners—final average compensation and pension benefits are calculated the same way for both types.

Reading these related provisions in conjunction, as the Court must, shows that "salary" and "wages" have the same meaning here. *See Flynt*, 199 Ariz. at 94 ¶ 5 (courts must construe provisions "in light of their place in the statutory scheme so they may be harmonious and consistent") (citations omitted).

2. The members' reading of "highest annual compensations paid" in § 2.14 ignores the Charter's overall structure and purpose.

Section 2.14 of the Charter defines "final average compensation" in relevant part as "the average of the highest annual compensations paid a member for a period of 3 consecutive, but not necessarily continuous, years of his credited service . . . ." Focusing on the word "paid," the members argue (at 56–60) that "highest annual compensations" in § 2.14 refers to any and all amounts actually paid out to a member in a given year, as opposed to compensation the employee earned and was entitled to receive for personal services rendered in that year. But this proposed construction of "compensations paid" ignores the phrase's context and conflicts with COPERS' structure and purpose.

Other COPERS provisions that refer to compensation conceive of "annual" compensation as a rate of pay, not the total of any and all payments an employee happens to receive in a given year. Section 2.15 of the Charter, for example, defines "final compensation" as an employee's "*annual rate of compensation* at the time his City employment last terminates." (Emphasis added.) "A court should also interpret two sections of the same statute consistently, *especially when they used identical*

language." *Wyatt v. Wehmueller*, 167 Ariz. 281, 284 (1991) (emphasis added). Section 2.15's definition of "final compensation" thus informs the meaning of words like "annual" and "compensation" in the Charter.

Although the members argue (at 61–63) that "final compensation" unrelated to the term "final average compensation," the Charter's text shows the opposite is true. Just like the limits on "final average compensation" in § 2.14, § 2.15 ensures that pension benefits serve their intended purpose—that is, to provide retired employees and their beneficiaries with a consistent revenue stream once they stop working based on the annual salary or wages they earned while employed. Specifically, the Charter sets the maximum annual pension benefit payable to a surviving beneficiary at "the difference between the member's *final compensation* [i.e., the annual rate of compensation] and the workmen's compensation, if any, converted to an *annual basis*." Charter ch. XXIV, art. II, § 25.3 (emphasis added).

In addition, the members' approach would render the three-year average in § 2.14 meaningless. To be eligible for a payout under AR 2.441,

a member must have accrued at least 6.25 years' worth of sick leave.[3] So even if sick leave payouts could be considered part of an employee's salary or wages for personal services rendered, the superior court correctly recognized that including them in the calculation of final average compensation would conflict with the structure and intent of the retirement plan.[4]

The superior court's interpretation, unlike the members', is consistent with the Retirement Plan's overall structure and purpose. (*See* Opening Br. at 48–56.) Under the members' approach, employees with the same pay rate nonetheless would receive unequal pensions for life simply because one took sick leave and the other did not. (*Id.* at 54–55.) There is no rational basis for punishing otherwise equal employees who must take sick leave with a lower lifetime pension benefit, particularly when the employees lucky enough to stay healthy are not disadvantaged. *See*

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[3] APP161 [Tr. Ex. 12 at D000262] (AR 2.441 (2012)) (requiring "a minimum of 750 hours of accrued, unused sick leave in order to qualify for sick leave payout"); APP178 [Tr. Ex. 45 at FP007248] (Personnel Rule 15) (providing that full-time employees accrue sick leave at a rate of ten hours per month).

[4] APP184 [IR-181 at 3] (summary judgment ruling); *see also* Opening Br. at 67–70.

Charter ch. XXIV, art. II, § 14.4 (permitting employees to convert any unused sick leave at retirement to service credit, thereby increasing their "time" under the pension formula).

This Court's decision in *Cross v. Elected Officials' Ret. Plan* also undercuts the members' position. Like § 2.14 of the Charter, the pension statute in *Cross* provided that an employee's average yearly salary must be calculated based on the "salary paid to an employee during the considered [three-year] period." 234 Ariz. at 603 ¶ 27 (citation omitted). The Court reasoned that accrued sick leave payouts at retirement did not qualify as pensionable "salary" because they were not "paid at regular intervals." *Id.* at 604 ¶ 31. The same reasoning defeats the members' overly strict reading of "annual compensations paid."

In sum, the text, structure, and purpose of the Charter's Retirement Plan and Arizona cases confirm that "annual compensation" refers to an employee's regular, periodic pay for personal services rendered in a year.

D. Sick leave payouts at retirement are not regular, annual pay for personal services rendered.

1. Sick leave payouts are not regular, annual pay.

As shown in the City's opening brief (at 32–56), a one-time, lump-sum payout at retirement for accrued sick leave is not part of an employee's annual salary or wages for personal services rendered to the City. An employee receives a sick leave payout under AR 2.441 only one time (if at all). Moreover, the employee's retirement year is the *only* time an employee can cash out accrued sick leave. In ordinary years, an employee cannot receive a full-time salary or wage *and* cash for all unused sick leave accrued that year. The one and only time an employee can do so is at retirement, in accordance with AR 2.441.

Cases in both Arizona and other jurisdictions confirm that one-time, lump-sum payouts are not regular annual pay for pension purposes. *See* Opening Br. at 37–39; *Cross*, 234 Ariz. at 604 ¶¶ 30–31 (observing that "salary" means amounts paid at regular intervals when ruling that accrued sick leave payouts are not includable in "average final salary"); *Stover v. Ret. Bd. of St. Clair Shores Firemen & Police Pension Sys.*, 260 N.W.2d 112, 113–15 (Mich. Ct. App. 1977) ("Annual compensation received does not

include unused sick or vacation payments because those payments are not made regularly during a worker's tenure with the City.").[5]

Although *Cross* involves different facts, it directly relates to the statutory interpretation question here. (*See* Opening Br. at 38.) Moreover, *Cross* also confirms that "[a]lmost all courts" to address the issue have held that lump-sum payments for accrued leave are not pensionable compensation or salary. 234 Ariz. at 604 ¶ 31.

The members do not rebut these authorities. Instead, they suggest in a footnote (at 55 n.45) that those cases are irrelevant because the pension statutes at issue do not use the word "wage," or because they use a temporal limitation other than "annual" compensation. But a public pension statute need not be a carbon copy of COPERS to be relevant.

Indeed, several courts have used the terms "salary" and "wages" interchangeably in the public pension context, even when the statute references only "salary." *See, e.g.*, *Holland v. City of Chicago*, 682 N.E.2d 323,

[5] Although the members discount *Stover* (at 55 n.45) because Michigan's constitution does not include a Pension Clause like Arizona's, that is not relevant to the predicate statutory interpretation question (i.e., whether the plain meaning of "salary or wages" encompasses one-time sick leave payouts at retirement).

327–28 (Ill. App. Ct. 1997) (concluding "salary" means "fixed compensation paid regularly for services" and thus amounts paid "in addition to the regular wage" could not be included); *In re Hohensee v. Regan*, 138 A.D.2d 812, 813–14 (N.Y. App. 1988) (concluding that, for purposes of "final average salary," "fixed regular wages" is consistent with plain meaning of salary); *see also Wade v. Ariz. State Ret. Sys.*, 241 Ariz. 559, 559 ¶¶ 12–14 (2017) (failing to note any distinction between salary and wages when determining whether deferred contributions were "compensation," i.e., "salary or wages" paid to a member).

The members also intimate (at 55 n.45) that cases like *Craig v. City of Huntington*, 371 S.E.2d 596 (W. Va. 1988) are not relevant because the pension statute there calculated benefits based on an employee's "monthly" rather than "annual" pay. But the West Virginia Supreme Court rejected this *exact* monthly-vs.-annual argument:

> [The plaintiffs] undertake to distinguish the persuasiveness of *Craig* on the basis that the statutory term involved in that case was "monthly" while in this case the statutory term is "annual." We do not believe that the two words serve such different purposes within their respective statutory sections as would indicate a legislative intent that payment for unused, accrued vacation days shall enter into the calculation of retirement benefits when "annual" is used, but not when "monthly" is used.

West Va. Consol. Public Ret. Bd. v. Carter, 633 S.E.2d 521, 527 (W. Va. 2006). Thus, *Craig* and other cases like it are relevant here. *See, e.g.*, *Int'l Ass'n of Firefighters, Local No. 64 v. City of Kansas City*, 954 P.2d 1079, 1088 (Kan. 1998) ("monthly salary"); *Santa Monica Police Officers' Ass'n v. Bd. of Admin.*, 137 Cal. Rptr. 771, 772–73 (Ct. App. 1977) ("average monthly compensation").

In short, and contrary to the members' arguments, the cases cited in the opening brief (*e.g.*, at 37–39, 47–48) are directly on point. Each of these cases addresses whether accrued sick leave payouts come within the ordinary meaning of terms like "salary," "wages," and "compensation" in the context of a public pension plan. By contrast, the members fail to cite a single public pension case in support of their interpretation of the Charter's provisions. Thus, although the members try to distinguish *Cross* on the facts, they do not provide any affirmative authority (from Arizona or otherwise) to support their differing interpretation of the Charter.

2. Sick leave payouts at retirement are not paid for personal services rendered.

Sick leave payouts also cannot be compensation under § 2.13 because they are not paid for personal services rendered during the employee's

final year of employment. As explained in the opening brief (at 40–41), whenever an employee works, the employee receives compensation "paid [to] him by the City for personal services rendered by him to the City." Charter ch. XXIV, art. II, § 2.13. This means that any lump-sum payout at retirement for unused sick leave cannot be compensation for the "services rendered" on the days worked because the employee was already compensated for those services. So instead of being the compensation paid "for personal services rendered" (which amounts have already been paid), a lump-sum one-time sick leave payout must be something else—something akin to a retirement bonus or severance pay. Decisively, an employee receives such a payout only when leaving the City's service—that is, when the employee stops rendering personal services. *Cf. Stover*, 260 N.W.2d at 114 ("payments [for unused sick or vacation leave] are properly viewed as a retirement bonus received at retirement and not as annual compensation received during a certain number of years immediately preceding the member's retirement").

In the face of this, the members argue (at 52) that sick leave payouts are regular annual pay for personal services rendered because sick leave is "earned by employees for 'each month of paid service.'" This argument

glosses over the crucial distinction between (a) paid sick leave an employee *accrues* or *uses* during the year, versus (b) a *one-time payout* at retirement for unused leave. Unlike the sick leave employees "earn" on an ongoing basis and can take anytime, a one-time payout for unused leave is "earned" only by retiring, and can be "taken" only once.

For this reason, cases like *Massachusetts v. Morash*, 490 U.S. 107 (1989) do not help the members' argument. In *Morash*, a bank was charged with violating Massachusetts' wage act, which requires employers to pay discharged employees their full wages, including holiday or vacation pay, on the date of discharge. *Id.* at 109. The bank argued that its vacation policy was an "employee welfare benefit plan" governed by ERISA, and thus that the state law was preempted by the federal act. *Id.* at 110–11. The Supreme Court held that ERISA did not preempt the state wage act because vacation policies like the bank's were not the type of employee benefits regulated by ERISA. *Id.* at 115–16.

In the paragraph the members partially quote, *Morash* emphasized that the vacation payments at issue were regular pay covered by the state wage act (rather than benefits regulated by ERISA) because they were payable during employment, not just at termination:

> Moreover, except for the fact that the payment has been deferred, such payments are as much a part of the employees' regular basic compensation as overtime pay or the payment of salary while the employee is absent on vacation. If in the end the employee elects to receive additional compensation instead of a paid vacation, he or she is receiving the same kind of premium pay that is available for holiday or weekend work. The fact that the payments in this case were due at the time of the employee's termination does not affect their character as a part of regular compensation. *Unlike normal severance pay, the employees' right to compensation for accrued vacation time is not contingent upon the termination of their employment.*

Id. at 120 (emphasis added).

The members' quotation (at 51) omits this critical last sentence, which distinguishes the vacation payments in *Morash* from the retirement payouts here. The City, unlike the employer in *Morash*, pays employees for accrued sick leave under AR 2.441 *only* when their employment terminates, if at all.[6]

The one-time and extraordinary nature of the sick leave payout is why it—unlike regular paid sick leave—results in pension spiking. In an ordinary year, an employee cannot receive more than her full-time salary or wage. Sick leave merely helps to ensure that an employee does not earn

[6] The members' arguments (at, *e.g.*, 46–49 and 67–68) based on wage act statutes that define "wages" to include sick leave fail for the same reason. Paid sick leave an employee earns or uses each year (the type formerly encompassed in the Arizona Wage Act, A.R.S. § 23-350 (2011)) is *not* the same thing as a retirement payout for 6.25+ years' worth of unused sick leave.

less due to any illness during the year. Retirement payouts for accrued sick leave, by contrast, cause a "spike" if included in compensation because those payouts give an employee additional money beyond that earned by working full-time during the year. (*See* Opening Br. at 51–55.)

In sum, accrued sick leave payouts at retirement do not qualify as compensation under the text of the Charter for two independent reasons: (1) they are not annual salary or wages, and (2) they are not paid for personal services rendered. Therefore, as "almost every court" to address the issue has held, *see Cross*, 234 Ariz. at 604 ¶ 31, a one-time payout at retirement for unused leave is not pensionable.

E. Past practice cannot amend the Charter's plain text.

Confronted with the textual limitations in the Charter, the members invoke (at 60–70) extrinsic evidence of the City and COPERS' past practice, along with a general principle of liberal construction in favor of pensioners. But the Charter's text unambiguously limits pensionable compensation to annual salary or wages for personal services rendered, which sick leave payouts are not. The Court cannot consider extrinsic evidence to vary the Charter's clear terms. "If the language is clear, the court must 'apply it without resorting to other methods of statutory interpretation.'" *Bilke*, 206

Ariz. at 464 ¶ 11 (citation omitted). Indeed, even the members urge (at 44) that "the language of COPERS is clear and unambiguous, so the Court should not look beyond the language, but rather simply apply it without using other means of construction[.]" (Quotation marks and citation omitted.)

Cases from states with similar constitutional pension clauses have rejected the proposition that a "liberal construction" and extrinsic evidence may overcome the plain terms of the retirement plan. For example, in *Holland v. City of Chicago*, 682 N.E.2d 323, 328 (Ill. App. Ct. 1997), the court agreed with the plaintiffs that Illinois law required it to construe the relevant pension statute liberally in their favor. It cautioned, however, that this general rule "does not permit this court, under the guise of statutory construction, to substitute different provisions or otherwise depart from the plain meaning of the words employed." *Id.* Because nothing in the statute's text indicated an intent to depart "from the generally accepted definition of 'salary,' i.e., fixed compensation paid regularly for services," the court ruled that items of compensation like holiday and vacation pay were not "annual salary" under the statute, "[i]rrespective of how the various components of a police officer's total compensation are treated in

the City's annual appropriation ordinance or in the relevant labor contracts." *Id.* at 327.

The members nevertheless argue (at 63) that the City's past practice proves "that COPERS should be interpreted to include payments of unused sick leave in the benefit formula," citing *Long v. Dick*, 87 Ariz. 25 (1959).[7] They argue that like the parties in *Long*, the City and COPERS "were all repeatedly made aware" that pension spiking was going on, yet the voters never amended the definition of compensation.

Neither the law nor the facts support the members' argument. In *Long*, the parties asked the court to construe a statute that, if applied as written, would create an absurd and conflicting result. 87 Ariz. at 27. Stating that "[i]t should be at once emphasized that *neither party seeks to construe the statute consistent with its literal language*," the court ultimately concluded that the administrative agency's longstanding interpretation of the provisions should control. *Id.* at 28–29 (emphasis added).

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[7] Although the members invoke extrinsic evidence of the City and COPERS' past practice repeatedly (*e.g.*, at 39, 44, 50, 52, 55, 57, 60, 63–66), this evidence is relevant only to their alternative arguments under Argument §§ I.G and II of the answering brief.

This case is like *Holland*, not *Long*. Unlike *Long*, the City and COPERS ask the Court to construe the Charter consistent with its plain text, and no conflicting provision creates ambiguity about the meaning of "compensation" and "final average compensation." Like the pension statute in *Holland*, the Charter's text does not suggest that the voters intended something other than its plain meaning. Thus, the Court cannot resort to extrinsic evidence of past practice to vary the Charter's terms.

But even if the Charter's terms were ambiguous, the members' extrinsic evidence does not establish that sick leave payouts come within the meaning of "compensation" and "final average compensation" under §§ 2.13 and 2.14. For example, the members rely heavily on the City's actuarial and financial reports. But these reports, which are prepared by third-party consultants, merely describe the undisputed practice between 1996 and 2012.[8] They neither state nor suggest that the City or COPERS

[8] *See, e.g.*, APP495–503 [Tr. Exs. 303, 309] (2009 and 2012 Comprehensive Annual Financial Reports) (noting sick leave payout cost as part of overall City budget); Tr. Exs. 52–54, 300–308 (various Comprehensive Annual Financial Reports from 1980 through 2011) (same).

affirmatively determined that the terms of the Charter permitted pension spiking, let alone suggest that the Charter *required* such spiking.[9]

To the contrary, City and COPERS witnesses provided undisputed testimony at trial confirming that until 2012, neither the City nor the Board had ever deliberately considered whether sick leave payouts fell within the meaning of "compensation" and "final average compensation" under §§ 2.13 and 2.14.[10] Because the actuarial and financial reports merely reflected the then-current practices and said nothing about the City's or COPERS's interpretation of the Charter's express terms, the members' argument (at 63–67, 77–79) that the Phoenix voters' acquiescence to pension spiking can be inferred falls flat.

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[9] *See id.*

[10] The members are incorrect in asserting (at 29-31) that the City misrepresents the record by stating that the City and COPERS Board did not make a deliberate and reasoned decision in 1996 to include sick leave payouts in pensionable "compensation" under the Charter. *See, e.g.*, APP509 [IR-475 at 24] (Tr. Transcript Day 3 p.m.) (former City employee and COPERS Board member Cathy Gleason testifying that the City and Board had gone back through all of the records from "before '96 and then in '96 and on and couldn't find no [sic] documents where they had ever actually determined did this payout meet the definition of compensation in the Charter."); APP518–19 [IR-475 at 47] (Tr. Transcript Day 3 p.m.) (Gleason testifying that "we ha[d] never interpreted the compensation language, and allowing people to get – to have those payments be pensionable was an error.").

The members also rely on cases finding an agency's statutory construction consistent with congressional intent because both the public and Congress were "fully aware" of the construction and Congress did not act to change it. *See, e.g.*, *United States v. Rutherford*, 442 U.S. 544, 553–54 (1979) (deferring to FDA's longstanding administrative interpretation of statute where "the interpretation involve[d] issues of considerable public controversy, and Congress ha[d] not acted to correct any misperception of its statutory objectives"); *Chee Lee v. Superior Court In & For Maricopa Cnty.*, 81 Ariz. 142, 147 (1956) ("Presumably, the legislature knew of this interpretation and has made no effort to correct it by amendment. . . . Under such circumstances, while the superintendent's interpretation is not binding on us, yet we should give it serious weight."). None of these cases suggests that a passing reference in a third-party report puts the public on notice of a board's interpretation of a retirement plan provision, much less that the voters' failure to amend their organic law in response indicates approval of the same.

The members also suggest (at 49–50) that this Court can presume Phoenix voters approved of pension spiking because they did not amend the City's organic law to expressly exclude sick leave payouts from § 2.13's

definition of compensation, like the state legislature did in the statute governing the Arizona State Retirement System, A.R.S. § 38-842. But unlike the legislature, which presumably knows of its own laws and intends them to operate compatibly, there is no presumption that the Phoenix voters were aware of and considered a statute governing an entirely different retirement plan when adopting and amending the Charter. Furthermore, Phoenix voters adopted § 2.13's definition of "compensation" in 1953, over forty years *before* the City began offering sick leave payouts.[11]

Finally, the members misrepresent the substance of Proposition 487, the 2014 voter proposition proposing an amendment to the definition of "final average compensation" in COPERS. They claim (at 64–66) that Proposition 487 sought to narrow the current definition of compensation "to more or less mirror what Defendants are advocating in this appeal," and thus argue that it proves "the current text of COPERS does not mean what [the City and COPERS] now claim it means." Not so. Proposition 487 proposed making the definition of "compensation" even narrower than

[11] *See* APP468 [Tr. Ex. 59 at D000283].

it currently stands by excluding items that qualify as "compensation" under the current definition, such as overtime pay.[12] It also would have made revised AR 2.441 retroactively applicable to all employees, instead of prospective for employees who had already accrued the required number of base hours before July 1, 2012.[13]

II. The Pension Clause does not apply because pension spiking is not a term of the retirement contract under the Charter.

As explained in the City's opening brief (at 56–64), because the Charter does not allow sick leave payouts to be included in pensionable "compensation," the Pension Clause does not protect the members' alleged right to continue the practice.

The Pension Clause protects a public employee's contractual right to benefits as a member of a public retirement system. Ariz. Const., art. XXIX, § 1 ("Membership in a public retirement system is a contractual relationship that is subject to article II, § 25," and "[p]ublic retirement system benefits shall not be diminished or impaired."). The members agree that the Charter sets the terms and benefits of membership in the

[12] P-App. 185, 258–62.

[13] *Id.*

COPERS retirement system. (Answering Br. at 5 ("the terms of COPERS are set forth in Ch. XXIV, Art. II of the City Charter").) As this Court recognized in *Cross*, an employer cannot diminish or impair a right in violation of the Pension Clause when the retirement plan does not give the employee that right in the first place. *See Cross*, 234 Ariz. at 600 ¶ 13 (concluding that pensioner did not have a contractual right to include lump-sum payout for accrued vacation leave in calculation of pension benefits because the amounts did not qualify under statutory definition of pensionable pay). Consequently, because the Charter does not permit pension spiking, the members have no constitutionally protected right to that "benefit" under the Pension Clause.

Courts in Illinois, a state with a nearly identical pension clause in its constitution, agree that the pension clause protects only those rights contained in the retirement plan itself. In *Holland v. City of Chicago*, for example, the court explained that because holiday and vacation pay did not qualify as "annual salary" under the pension statute's plain text, "there can be no claim that the City or pension board has somehow redefined a statutory term, thus diminishing an officers' benefits" in violation of the pension clause. 682 N.E.2d at 329; *see also Matthews v. Chicago Transit Auth.*,

51 N.E.3d 753, 772 (Ill. 2016) ("the agreement that controls [public servants'] membership in a retirement system consists of the relevant provisions in the Pension Code that define the rights and obligations that arise from that membership"). The members ignore these Illinois cases entirely.

As in *Holland*, the City and COPERS did not redefine or amend the term "compensation" when they halted pension spiking because sick leave payouts are not "compensation" under the Charter's plain text. For this reason, the authorities the members rely on—where the retirement plan itself expressly granted the pensioners the right they claimed had been impaired or diminished—do not apply here. (*See* Opening Br. at 57–58.) For example, *Fields v. Elected Officials' Ret. Plan*, 234 Ariz. 214, 217 ¶¶ 9–10 (2014) addressed a statutory amendment that raised the investment return threshold from 9% to 10.5% before plan would pay automatic cost-of-living adjustments. Likewise, *Felt v. Bd. of Trs. of Judges Ret. Sys.*, 481 N.E.2d 698, 699–700 (Ill. 1985) found pension clause violation where "the amendment [to the statute] changed the salary base used to compute the annuity from the salary of the judge on the final day of service to the average salary over the last year in service." In short, revised AR 2.441 cannot have diminished

or impaired the members' rights in violation of the Pension Clause because pension spiking is not a term of their retirement contract under the Charter.

In the face of all of this, the members misconstrue the City's argument. They characterize (at 72–73) the argument as requiring that the Charter "expressly address inclusion of sick leave payments" in order to create a constitutional right, and point to other forms of compensation not expressly mentioned in the Charter (e.g., "base pay"). But the constitutional protections turn not on whether the Charter specifically lists a particular type of payment; instead, they turn on whether the payment fits the Charter's definition of pensionable "compensation."

In short, the Charter does not give the members any legal right to spike their pensions with accrued sick leave payouts. As a result, the members' claims that revised AR 2.441 impairs their vested contractual rights in violation of the Pension Clause and Contracts Clauses also fails. The same lack of any contractual right under the Charter dooms the members' arguments (at 81–84) based on the federal and state Contracts Clauses (U.S. Const. art. I, § 10, cl. 1; Ariz. Const. art. II, § 25). *See, e.g.*, *Smith v. City of Phoenix*, 175 Ariz. 509, 515 (App. 1992) (no Contracts Clause violation because claimant "had no vested contractual right").

III. Past practice does not give the members an independent vested contractual right to retirement benefits, but even if it did, revised AR 2.441 does not diminish or impair any vested rights.

As an alternative to their Charter argument, the members claim (at 71–80) that the City's past practice gives them a contractual right, *independent of the Charter*'s *terms*, to continue pension spiking in perpetuity.

This argument also fails. As demonstrated above (Argument § II), the Charter *is* the retirement contract, and it determines what is and is not pensionable compensation. The City cannot amend the Charter's definition of compensation via past practice, nor can it bind itself to terms prohibited by the Charter.

But even if that past practice somehow could give the members additional rights despite the Charters' express limits, revised AR 2.441 does not violate any of the members' vested rights. At most, the members are vested in sick leave already accrued (which AR 2.441 protects); they have no vested rights to payouts for unused sick leave not yet accrued.

A. The Charter controls what is and is not compensation for pension purposes.

The members cannot avoid the Charter's text by invoking a purported independent vested contractual right based on past practice. The Charter *is* the retirement plan, and it is the first and last word on what

counts as compensation for pension purposes. *Cf. Matthews*, 51 N.E.3d at 772 ("the agreement that controls [public servants'] membership in a retirement system consists of the relevant provisions in the Pension Code that define the rights and obligations that arise from that membership").

Moreover, the City and COPERS regularly advised employees of the controlling nature of the Charter's provisions, including in the materials the members now claim show a vested right to pension spike. For example, the COPERS "Guide to Retirement" states, "Every effort has been made to ensure accuracy; however, if any inconsistency exists between this document and the City Charter, the provisions of the City Charter, as interpreted by the COPERS Board, shall prevail. [¶] The City Charter legally governs the operation of the Plan . . . ."[14] Some of the labor contracts even explicitly incorporated this general rule. For example, the 2012-2014 agreement for Unit 7 employees provides, "Retirement benefits are governed by the provision of the Phoenix City Charter as approved by the voters and are not subject to the provisions of this Agreement."[15]

[14] APP440 [Tr. Ex. 38 at D000241].

[15] APP388 [Tr. Ex. 34 at D001236].

Here, the Charter prohibits including sick leave payouts in pensionable compensation. A past practice, no matter how longstanding, cannot overcome the Charter's plain text. *See, e.g.*, *Rose v. City of Hayward*, 179 Cal. Rptr. 287, 297 (Ct. App. 1981) (refusing to give legal significance to longstanding administrative interpretation of pensionability of holiday pay; "where there is no ambiguity in a statute and the administrative interpretation of it is clearly erroneous, even the fact that such administrative interpretation is a longstanding one does not give it legal sanction"); *see also Oden v. Bd. of Admin.*, 28 Cal. Rptr. 2d 388, 392 (Ct. App. 1994) ("Statutory definitions delineating the scope of PERS compensation cannot be qualified by bargaining agreements.").

Bypassing these cases entirely, the members claim (at 71) that the City and COPERS's past practice gives them an independent contractual right outside of the Charter to include sick leave payouts in the calculation of pension benefits: "*Even if COPERS were interpreted to exclude pay for accrued sick leave paid at retirement from the calculation of retirement benefits*, it would not erase Plaintiffs' contractual and constitutional rights to the pension benefit formulas as they were promised, administered and existed from commencement of employment." (Emphasis added.)

The members' evidence of this alleged independent right to continue pension spiking in perpetuity consists of actuarial valuations, affidavits in unrelated lawsuits, and COPERS PowerPoint presentations and handouts. (*See, e.g.*, Answering Br. at 74 n.50.) Even if terms outside of the Charter could be part of the members' "retirement contract" with the City, however, these materials merely describe the undisputed fact that the City and COPERS allowed pension spiking prior to 2012.[16] None of them state or establish that the ability to pension spike is a term of the Charter's Retirement Plan.[17]

Moreover, no Arizona court has ever held that the length of an administrative practice justifies departing from the statutory text and creating additional vested rights to pension benefits beyond those contained in a retirement plan. As the opening brief explained (at 56–59), in cases like *Yeazell v. Copins*, 98 Ariz. 109 (1965), *Norton v. Ariz. Dep't of*

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[16] *See, e.g.*, Tr. Exs. 79, 80, 81, 82, 83 (COPERS PowerPoint presentations) (all stating, "If high 36 months [compensation] is last 36 months we include all retirement applicable payouts at retirement including sick leave . . ."); APP495–503 [Tr. Exs. 303, 309] (2009 and 2012 Comprehensive Annual Financial Reports) (noting sick leave payout cost as part of overall City budget); Tr. Exs. 52–54, 300–308 (various Comprehensive Annual Financial Reports from 1980 through 2011) (same).

[17] *See id.*

Public Safety Local Ret. Bd., 150 Ariz. 303 (1986), and *Hall v. Elected Officials' Ret. Plan*, 241 Ariz. 33 (2016), the plaintiffs claimed a vested right in an express statutory term of the retirement plan, which the legislature later changed by amending the statute. *Yeazell, Norton*, and *Hall* don't speak to the existence of any right outside the terms of the retirement plan, like the one the members argue for here.

The only case the members cite to the contrary (at 75–76) is a nonbinding case from Washington, *Bowles v. Wash. Dep't of Ret. Sys.*, 847 P.2d 440 (Wash. 1993).[18] In *Bowles*, the court had concluded that the pension statute allowed employees to include two years' worth of accrued leave in the calculation of pension benefits. *Id.* at 443. Some participating employers, however, allowed employees to cash out only a percentage of the leave they had accrued in the two-year period. *Id.* at 444. The plan administrator had in the past ignored these employer limitations and included a full two years' worth of leave in the calculation of benefits, but

[18] The members also cite *Kranker v. Levitt*, 327 N.Y.S.2d 259 (Sup. Ct. 1971), *aff'd*, 281 N.E.2d 840 (N.Y. 1972), but the court in *Kranker* was interpreting an ambiguous statute, not determining whether past practice created independent right beyond the pension statute's express terms. *See* 327 N.Y.S.2d at 262.

subsequently changed its policy to take them into account. *Id.* at 444, 446. When employees challenged the change, the court concluded that employees had a vested right in the administrative practice of ignoring employer percentage limitations on leave cashouts when calculating pension benefits. *Id.* at 447.

Bowles should not be followed because it clashes with Arizona law and would thwart the purpose and intent of the COPERS retirement system.

First, *Bowles* ignores the fundamental principles of statutory interpretation followed by Arizona courts. *See, e.g.*, *Paddock v. Brisbois*, 35 Ariz. 214, 220–22 (1929) (when interpreting a constitutional provision, courts must "first examine the plain language" and "follow the text of the provision as written"); *McElhaney Cattle Co. v. Smith*, 132 Ariz. 286, 289–90 (1982) (emphasizing that a court cannot consider extrinsic evidence to vary the apparent meaning of a statute's plain terms). In addition, Washington does not have the robust constitutional protection for pension benefits that Arizona does. As a practical matter, following *Bowles* would make administering Arizona's public retirement systems nearly impossible because employees could argue that every presentation, handbook, and

administrative practice created a new, constitutionally-protected vested right that lasts for life. (*See, e.g.*, Answering Br. at 24–26, 74 n.50 (citing budget and actuarial reports, COPERS PowerPoint presentations, orientation materials, and other handouts as evidence of a vested right to continue pension spiking in perpetuity).)

Bowles's approach also would allow administrative practice to trump the clear intent of Phoenix voters, who chose to incorporate the terms and benefits of the City's retirement plan in the Charter. The voters defined pensionable compensation as annual salary or wages for personal services rendered, which does not include lump-sum payouts for unused leave at retirement. Instead, the voters chose to include unused sick leave as a factor in employee pensions, as a *time* factor, not a *pay* factor—under § 14.4, members receive a *service credit* at retirement for unused sick leave. (*See* Opening Br. at 48–51.) In the end, the voters are on the hook for the cost of COPERS pension benefits; the Court should not rely on out-of-state cases to frustrate the intent of the Phoenix citizens responsible for paying the bill.

In addition, the members are wrong in claiming (at 79–81) that the City and COPERS pay pension benefits "that are above the express limitations on benefits contained in COPERS" using the excess benefit

arrangement. The members conflate the cap on the amount of *compensation* that can be used to calculate pensions under Internal Revenue Code § 401(a)(17) (which is expressly incorporated into § 2.14 of the Charter), with the cap on *benefits payable* under Internal Revenue Code § 415(b) (which is not expressly incorporated into the Charter). The excess benefit arrangement allows COPERS to comply with the benefits limit in § 415(b), while also ensuring that COPERS members receive all benefits owed under the terms of the Charter.[19] It has nothing to do with the § 401(a)(17) *compensation* limit expressly incorporated into Charter § 2.14. The members cite no record evidence—and there is none—that the excess benefit arrangement enables employees to count *compensation* in excess of the § 401(a)(17) limit or in violation of the Charter.

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[19] IR-477 at 99 (Tr. Transcript Day 4 p.m.) (former Plan Administrator Donna Buelow testifying that "we determined there was a need to put this [the excess benefit arrangement] in place to make sure that no one was paid *above the 415 limit*"); *see* Tr. Ex. 41 (Board Policy 174) at D001001 [P-App. 605] ("Because of the statutory limitation on benefits set forth in Section 415(b) of the [Internal Revenue] Code, certain COPERS participants do not receive their full benefits under COPERS. Congress has recognized that government employers who sponsor tax-qualified retirement plans have constitutional and contractual obligations to provide full retirement benefits to their employees, regardless of the limitations of [Internal Revenue] Code Section 415(b).").

Finally, the members argue (at 81–84) that the City violated the federal and state Contracts Clauses, U.S. Const. art. I, § 10 and Ariz. Const. art. II, § 25. But as explained above, neither the Charter nor the City's past practice establish a vested, non-modifiable right to spike pensions, so that cannot be the basis of a Contracts Clause challenge. And even if past practice could be the basis, no vested rights have been impaired, as explained in the next section.

B. Revised AR 2.441 protects whatever vested rights exist.

The members focus much of their answering brief on the City's erroneous past practice with regard to pension spiking. But even assuming that the members have some independent vested right outside the Charter to include sick leave payouts in pensionable compensation, revised AR 2.441 does not diminish or impair it. The City specifically designed the sick leave "snapshot" in revised AR 2.441 to ensure that employees can count *all* sick leave time accrued under the old practice towards their pension calculations. (*See, e.g.*, Opening Br. at 23–25 (illustrating how the snapshot works).) Thus, any vested rights the employees have by virtue of past practice are fully protected under the revised regulation.

Under Arizona law, employees vest in compensation and leave benefits as they earn it. *See, e.g.*, *Bennett v. Beard*, 27 Ariz. App. 534, 536–37 (1976); *Abbott v. City of Tempe*, 129 Ariz. 273, 277–79 (App. 1981) ("In both [*Bennett* and *Yeazell*], the courts recognized that a vested contractual right to benefits existed only when an employee had already performed services and earned benefits, the payment of which was to be made at a future date. This same rationale does not apply where a city has merely adopted an ordinance which provides for the payment of certain benefits, and an employee has yet to perform services entitling him to the benefits.").

Conversely, employees have no vested rights in future pay or leave that they have not yet earned. For example, in *Abbott v. City of Tempe*, 129 Ariz. 273 (App. 1981), a class of firemen sued the City of Tempe after it amended its ordinance to reduce the firemen's rate of holiday pay and accrual of vacation credits. The firemen argued that they had a vested contractual right in the holiday pay and vacation credit ordinance in place at the time they were hired, and thus that Tempe's ordinance impaired their rights as public employees. *Id.* at 277–78. This Court rejected the firemen's theory, observing that nothing in the original ordinance's text indicated that Tempe intended to vest future contract rights in holiday pay

rates and vacation credit accrual and thereby lock itself into those rules in perpetuity. *Id.* at 278–79.

Under AR 2.441, an employee gets a sick leave payout only when the employee retires. None of the members had retired before the City revised AR 2.441 in July 2012, so none of them vested in a sick leave payout under the earlier version of the AR. *Cf. Norton*, 150 Ariz. at 304 (holding that an employee who no longer met statutory definition of "member" still had vested right to rejoin retirement plan because he had fulfilled all required conditions for rejoining under statute in place when he left).

That is not to say that the members have *no* vested rights in the sick leave they accrued before July 1, 2012. But that is *all* they are vested in—the time they have earned the right to take off. The right to take time off is not the same thing as the right to receive a lump-sum payment for unused time off at retirement. (*See* Argument § I.D.2.)

Revised AR 2.441 does not impact any of the members' vested rights because it concerns only sick leave not yet accrued and sick leave payouts not yet earned. The revised AR uses a sick leave "snapshot" to eliminate future pension spiking. The most important feature of the snapshot relative to vested rights is its prospective-only design. The City's opening

brief illustrates (at 24–25) how the snapshot specifically avoids limiting or eliminating any benefit related to sick leave employees had already accrued when the snapshot took effect. So all employees (these members included) can still count all hours they accrued in reliance on the old, erroneous practice in pensionable compensation when they retire. Said another way, many members will still be able to spike their pensions with sick leave hours they accrued before revised AR 2.441 took effect. This fair and equitable approach protects any vested rights the members may have had, and thus eliminates any argument that the City impaired or diminished any vested rights.

For this reason, cases like *Yeazell* and *Hall* do not apply. Unlike the pensioners in those cases, who were retroactively deprived of benefits (*Yeazell*) or required to pay more money to receive the same benefits originally promised (*Hall*), the members will continue to receive the full benefit of sick leave accrued in reliance on the City's erroneous practice.

Importantly, although the members contend (at 73–75) that revised AR 2.441 constitutes "a change to the formula for calculating retirement benefits," they are not claiming a right to a certain pension benefit formula *under the Charter* here. Rather, they claim (at 73) an independent right to

continue pension spiking as "a term and condition of employment." The same protections applicable to the terms and benefits of the retirement contract itself (i.e., the Charter) do not apply to general terms and benefits of employment. *Yeazell* and *Hall* concern retirement benefits specifically, whereas *Bennett* and *Abbott* address general employment benefits. This case is closer to *Bennett* than it is to *Yeazell*.

The City took pains to design a solution that balances the City's legal obligations to follow the Charter, and the practical consequences of its mistaken past practice. The members try to use the City's equitable solution against it, arguing (at 81) that it shows that they are allowed to pension spike under the Charter. The City and COPERS have the legal authority to recoup benefit overpayments, and thus could have stopped pension spiking altogether, even using already-accrued sick leave hours.[20] They did not do so, however, because they sought to implement a practical and equitable solution to a difficult problem.

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[20] *See Cross*, 234 Ariz. at 601 ¶ 15 (noting general rule that public bodies can recover money paid as a result of legal or factual mistake). In addition, the Charter explicitly authorizes the Board to take legal action to recover overpayments made to members by mistake. Charter ch. XXIV, art. II, § 36.

ANSWERING BRIEF ON CROSS-APPEAL

CROSS-APPEAL STATEMENT OF FACTS AND CASE

I. Revised Administrative Regulation 2.441.

The members' cross-appeal concerns their unsuccessful claims and arguments against the City's 2012 revision to AR 2.441. To briefly recap the relevant background, City employees may accrue sick leave during the year and carry accrued leave over from year to year under the personnel rules and AR 2.441.[21] In 1996, the City revised AR 2.441 to allow employees to "cash out" their accrued but unused sick leave at retirement.[22] The City and COPERS defaulted to including the amounts received under AR 2.441 for sick payouts at retirement in employees' "compensation" for purposes of calculating COPERS pension benefits.[23]

After the City undertook an assessment of pension spiking in 2012, however, it determined that "compensation" under the terms of the

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[21] *See* APP160-75 [Tr. Exs. 8–12] (AR 2.441 (all versions)); APP178–79 [Tr. Ex. 45 at FP007248–49] (Personnel Rule 15).

[22] *See* APP173–75 [Tr. Ex. 8 at D000268–70] (AR 2.441 (1996)).

[23] *E.g.*, APP509 [IR-475 at 24] (Tr. Transcript Day 3 p.m.) (former City employee and COPERS Board member Cathy Gleason testifying that the City and Board had gone back through all of the records from "before '96 and then in '96 and on and couldn't find no [sic] documents where they had ever actually determined did this payout meet the definition of compensation in the Charter.").

Charter's Retirement Plan could not include retirement payouts for accrued vacation.[24] The City thus revised AR 2.441 to eliminate the practice going forward.[25] In light of the past practice of permitting the inclusion of these amounts in pensionable compensation, however, the City decided to make the change prospective only.[26] Since that time, COPERS has administered pension benefits in accordance with the compromise reflected in revised AR 2.441.

II. The superior court action.

In the members' complaint, the named plaintiffs were four current City employees from Units 2, 3, and 7, and three labor organizations (AFSCME Local 2960, AFSCME Local 2384, and ASPTEA) that represent all

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[24] *See, e.g.*, APP493 [Tr. Ex. 150 at 3] (Feb. 14, 2012 Memo to City Council); APP517 [IR-475 at 45] (Tr. Transcript Day 3 p.m.) (Gleason testifying, "And so now that we [the Board] know in 2012 that it doesn't meet the definition of compensation, [the question was] how do we fix it.").

[25] *See id.*; APP161–62 [Tr. Ex. 12 at D000262–63] (AR 2.441 (2012)).

[26] *Id.*; APP518–19 [IR-475 at 47–48] (Tr. Transcript Day 3 p.m.) (former Board member Cathy Gleason testifying that the Board was acting consistent with the Charter when it adopted the snapshot because "we have never interpreted the compensation language, and allowing people to get – to have those payments be pensionable was an error. And so once that is brought to the [B]oard's attention, then it's what is the most practical way to fix it . . . .").

employees across those units.[27] Twelve retired employees from Units 2, 3, and 7 intervened two years into the case.[28]

The members sought a declaratory judgment that revised AR 2.441 violates the Charter; Article XXIX, § 1(C) of the Arizona Constitution; and the contract clauses of the U.S. and Arizona constitutions.[29] They also sought mandamus and injunctive relief.[30]

A. Class certification.

The members moved to certify a class of all active (nonretired) COPERS participants.[31] The superior court denied the motion because the members' proposed class failed to meet the requirements for class certification under Ariz. R. Civ. P. 23.[32] Specifically, the court found that "the claims or defenses of the proposed representatives are not typical of those of a substantial subset of the class" because some COPERS

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[27] IR-1 at 1–3. AFSCME Local 2960 represents Unit 2 employees, AFSCME Local 2384 represents Unit 3 employees, and ASPTEA represents Unit 7 employees.

[28] *See* IR-185 (Motion to Intervene); IR-192 (order granting same).

[29] IR-1 at 12.

[30] *Id.*

[31] IR-67.

[32] IR-91.

participants (namely, City employees in Unit 1) expressly agreed to the revised AR 2.441 in their 2012-2014 labor contract.[33] Noting that "it makes no sense to designate a class in such a way that over 10% of it might feel that it is in their best interests to opt out, to the extent they thought about it at all," the court rejected the members' motion.[34]

B. Summary judgment.

Both sides moved for summary judgment a few weeks later.[35] The members simultaneously filed a renewed motion for class certification, this time excluding Unit 1 employees from the proposed class.[36]

The superior court denied all three motions.[37] First, the court rejected the members' primary claim that revised AR 2.441 "directly violates the Charter because the pay for unused sick leave is compensation under § 2.13, and thus must be included in the computation under § 2.14" as

[33] *Id.* at 2.

[34] *Id.* at n.2.

[35] IR-96; IR-105.

[36] IR-95.

[37] APP182 [IR-181 at 1].

"plainly wrong."[38] The court explained that treating sick leave payouts as pensionable compensation contradicts the three-year limit on final average compensation in § 2.14 because it takes at least 6.25 years for an employee to accrue enough leave to even be eligible for a payout. Thus, a one-time payout for accrued sick leave under AR 2.441 "constitutes a payment for far more than [the employee's] work those final three years."[39]

The superior court nonetheless allowed the case to proceed on the members' alternative contract-based claim that the City had obligated itself to treat sick leave payouts as pensionable in its 2012-2014 labor contracts, finding questions of fact regarding the parties' intent.[40]

Because the only remaining issue in the case was "contract-driven," the superior court concluded that class certification would be inappropriate and denied the members' renewed motion.[41] The court explained that even with the removal of Unit 1 employees, the members' proposed class

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[38] APP184 [IR-181 at 3]. At the same time, the superior court noted that sick leave appeared to be a type of nonmonetary compensation as it accrues, which the City Council could fix the value of under § 2.13's second sentence. *Id.* at n.1.

[39] APP184 [IR-181 at 3].

[40] *Id.*

[41] APP185 [IR-181 at 4].

remained too broad because "unions *and others not represented by unions* could, consistent with the City Charter, enter into contracts which did not require unused sick leave to be included in the pension calculation."[42] The court also questioned why, as a practical matter, class certification was necessary to litigate the remaining contract-specific issues in the case. It noted, "several unions are in fact plaintiffs in this action, and one would think that they could litigate on behalf of their constituents without the burdens imposed by a class action."[43]

Finally, the superior court also questioned whether the lawsuit was ripe because all of the individual members were current employees whose "contracts remain subject to renegotiation as time goes on."[44] Twelve City employees who retired during the 2012-2014 contract term ("intervenors") intervened shortly thereafter to alleviate the jurisdictional issue.[45]

C. Trial.

After a bench trial, the superior court ruled that the members' 2012-2014 labor contracts gave them the right to include sick leave payouts in

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[42] *Id.* (emphasis added).

[43] *Id.*

[44] *Id.*

[45] IR-185 (Motion to Intervene); IR-192 (order granting same).

their final average compensation for COPERS purposes.[46] The court concluded that sick leave is a form of nonmonetary compensation under § 2.13 of the Charter, the value of which the City Council can fix on the City Manager's recommendation.[47] In light of the parties' past practice, the superior court ruled that the parties understood sick leave payouts to be pensionable when they entered their 2012-2014 contracts.[48] Accordingly, the court held that the City's application of revised AR 2.441 to the members during the 2012–2014 contract term violated common law principles and Article XXIX, § 1(C) of the Arizona Constitution.[49] Because the trial related only to the 2012-2014 contracts, however, the court "express[ed] no opinion" as to revised AR 2.441's application to any employees beyond 2014.[50] The court also did not address whether revised AR 2.441 violated the contract clauses of the Arizona or U.S. constitutions.

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[46] APP227–28 [IR-372 at 42–43, ¶¶ 1–7] (Findings of Fact & Conclusions of Law).

[47] APP195 [IR-372 at 10, ¶ 37].

[48] APP227 [IR-372 at 42, ¶ 2].

[49] APP227–28 [IR-372 at 42–43, ¶¶ 3–5].

[50] APP228 [IR-372 at 43, ¶ 7].

D. Post-trial.

The members subsequently filed a motion to amend and supplement the superior court's findings of fact and conclusions of law, seeking to expand the scope of the ruling beyond the two-year contract term.[51] Although the members admitted that "neither Plaintiffs/Intervenors nor Defendants identified the 2014 negotiations or any resulting labor agreement (MOU or MOA) with the City as a relevant or material issue for trial" they nonetheless asked the court to take judicial notice of the parties' 2014-2016 contracts and to "amend the 'Conclusion of Law' section [of the Findings & Conclusions] to find that AR 2.441 revised in 2012 is not currently applicable to Plaintiffs and Intervenors."[52]

The superior court refused, noting that the 2014-2016 contracts and the ongoing validity of AR 2.441 were "plainly beyond the scope of the claims in this lawsuit."[53] It observed that the case had proceeded to trial only on the members' "secondary position, that the City had a contractual obligation given the negotiations and understanding in the 2012 and prior

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[51] IR-374.

[52] *Id.* at 5.

[53] APP231 [IR-383 at 1].

negotiations" and therefore the members' request "that the Court should now take judicial notice of the [2014-2016 MOUs] is clearly contrary to the Court's ruling in this matter—that the [MOUs] are contracts which must be interpreted in light of the parties' understandings and negotiations leading up to them (for which the Court received no evidence regarding the latest negotiations)."[54]

After additional briefing on the proper scope of damages and equitable relief, the superior court ruled that the members were entitled to an injunction prohibiting the City from applying AR 2.441 to them during the 2012-2014 contract term only, rather than in perpetuity as the members had requested.[55] The court further ruled that the twelve named intervenors who retired during the 2012-2014 contract term were entitled to damages for the reduction in their pensions resulting from revised AR 2.441's application to them—in total, about $5,000.[56] It declined to award damages more broadly to all other retirees in Units 2, 3, and 7 impacted by the revised regulation, noting that it had "no doubt" that COPERS would

[54] *Id.*

[55] APP233–35 [IR-415 at 1–3].

[56] APP234 [IR-415 at 2]; APP243–44 [IR-459 at 2–3] (judgment showing total damages).

recalculate pensions as required by the final ruling, and if it did not, the members could then seek supplemental relief.[57]

The parties filed competing fee applications.[58] The members sought approximately $1.2 million in fees and $39,000 in costs.[59] The City contended that neither side should recover fees, but requested approximately $300,000 in fees in the alternative.[60] The superior court denied both sides' fee applications and awarded the members $22,328.37 in costs.[61]

CROSS-APPEAL ISSUES

1. The superior court's narrow substantive ruling applies only to the 2012-2014 contract term and the members offered no evidence at trial about contracts after 2014. In light of that, did the superior court have the discretion to limit relief to the 2012-2014 contract term?

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[57] APP234 [IR-415 at 2].

[58] IR-416 (defendants' fee petition); IR-418 (plaintiffs' fee application); *see also* IR-446 (plaintiffs' supplement to fee application).

[59] IR-446 at 1–2.

[60] IR-416 at 2.

[61] APP240–41 [IR-458 at 4–5].

2. Under the narrow substantive ruling the members achieved and the judgment the superior court entered, all affected retirees will receive the relief they are entitled to, with or without a certified class. In addition, the superior court awarded money damages to the only parties who pled for damages (i.e., the named intervenors). Did the superior court have the discretion to deny class certification and money damages to all putative class members?

3. Did the superior court correctly rule that sick leave payouts at retirement are not included in Final Average Compensation in part because not all of it was earned within three years?

4. An attorneys' fee award under A.R.S. § 12-341.01 is not mandatory and is within the discretion of the superior court. Courts may consider a wide range of factors when deciding whether to award fees, and here the superior court considered the appropriate factors. Did the superior court have the discretion to deny fees to both sides in this case?

STANDARDS OF REVIEW

This Court "review[s] the scope of an injunction for abuse of discretion." *State v. Lang*, 234 Ariz. 457, 461 ¶ 14 (App. 2014).

The superior court's denial of class certification likewise will "not be disturbed on appeal unless an abuse of discretion is shown." *Markiewicz v. Salt River Valley Water Users' Ass'n*, 118 Ariz. 329, 341 (App. 1978) (affirming denial of class certification). "If the plaintiff seeks to bring a class action, he bears the burden of showing that his case is appropriate for class action certification." *Id.*

The court's denial of attorneys' fees is also reviewed for abuse of discretion; an appellate court "cannot substitute [its] judgment for that of the trial judge." *Suciu v. AMFAC Distrib. Corp.*, 138 Ariz. 514, 520 (App. 1983).

CROSS-APPEAL ARGUMENT SUMMARY

Cross-appeal issues 1 and 2. The first two cross-appeal issues concern the proper scope of relief under the superior court's ruling on the 2012-2014 labor contracts. Thus, they are relevant *only* if the Court affirms the superior court's ruling that sick leave payouts are nonmonetary compensation, the value of which the City fixed in the 2012-2014 labor contracts. Neither side defends that aspect of the superior court's ruling, so the Court should have no need to address the issue. But if the Court does affirm that aspect of the ruling, then as discussed below (Cross-Appeal

Argument § I), the Court should also affirm the limited scope of the remedy.

Cross-appeal issue 3. For the reasons set forth in the opening brief and in the above reply, the Court should reject the members' cross-appeal issue no. 3. A lump-sum payout for more than six years' worth of unused sick leave cannot be included in the calculation of an employee's "final average compensation" under § 2.14, which, by definition, can include only three years' worth of compensation.

Cross-appeal issue 4. As explained below (Cross-Appeal Argument § II), the superior court had discretion to deny attorneys' fees, and the members merely ask this Court to reweigh a decision that falls squarely within the superior court's discretion.

CROSS-APPEAL ARGUMENT

I. The superior court acted within its discretion to deny relief beyond the 2012-2014 contract term.

As explained above, neither side defends the superior court's ruling that sick leave payouts are nonmonetary compensation, the value of which the City fixed in the 2012-2014 labor contracts. As a result, the Court should not need to reach cross-appeal issues 1 and 2.

If, however, the Court were to affirm the superior court's ruling under the 2012-2014 labor contracts and therefore reach these cross-appeal issues, the Court should affirm. The members give no valid basis to reverse the ruling, and in any event, the relief granted below was correctly tailored to the substantive ruling.

A. The relief awarded conformed to the superior court's narrow substantive ruling and the members did not present evidence of any alleged right under subsequent contracts.

The members argue (at 84–89) that the superior court erred by limiting relief to the 2012-2014 contract term because "vested contractual rights cannot be altered without consent" and the City did not prove that the members consented to change this right after the 2012-2014 contracts expired. But the superior court properly limited relief because the members lost on the claim that would have entitled them to broader relief. The superior court had the discretion to do so. *See City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 187 ¶ 51 (App. 2008) ("An injunction is an equitable remedy, which allows the court to structure the remedy so as to promote equity between the parties. The discretion in injunctive proceedings lies with the trial court, not the reviewing court." (citation

omitted)); *Lang*, 234 Ariz. at 461 ¶ 14 (App. 2014) (scope of injunction reviewed "for abuse of discretion").

The superior court correctly recognized that the members' "most fundamental claim" was that pension spiking is "required by the City of Phoenix Charter. Plaintiffs lost that claim, as set forth in the Minute Entry dated January 6, 2014."[62] Because the members lost that claim, they had no right to the type of expansive relief they later sought from the superior court and now seek on cross-appeal.

The superior court characterized the narrow claim that was not barred by the City's summary judgment victory as one that "boils down to contract interpretation."[63] But—as repeatedly recognized by the superior court—the members introduced no evidence about the 2014-2016 contracts or beyond.[64] Thus, the members have no claim about how to interpret those contracts or the negotiations leading up to them. And to top it off, all

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[62] APP231 [IR-383 at 1] (citing IR-181).

[63] APP185 [IR-181 at 4].

[64] *E.g.*, APP228 [IR-372 at 43, ¶ 7] ("[N]o one put on any evidence regarding what happened during the 2014 negotiations . . . ."); APP231 [IR-383 at 1] ("They were not [introduced]."); APP235 [IR-415 at 3 n.6] ("[T]he parties chose not to litigate the effect of the 2014-2016 memoranda of understanding in the bench trial.").

of the intervenors retired during the 2012-2014 contract period and thus have no interest in future contract periods.[65]

All of the members' arguments about whose burden it is to show consent to altering vested rights completely miss the point. The members lost on the claim that would have entitled them to the relief they seek, and the argument on which they prevailed does not justify that relief. Likewise, the member's arguments (at 87–89) about obtaining permanent declaratory and injunctive relief miss the mark because the superior court *did* award permanent declaratory and injunctive relief concerning the 2012-2014 contract period.[66] At bottom, the superior court had discretion to fashion an appropriate remedy and the court properly exercised that discretion by tailoring the remedy to match the narrow substantive ruling and the limited scope of evidence introduced at trial.

B. The members will receive all relief to which they are entitled, with or without a certified class.

The members challenge the superior court's denial of class certification on cross-appeal only to the extent it impacts the damages

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[65] APP232 [IR-383 at 2] ("[T]hey all retired before the 2014-2016 memoranda of agreement became effective.").

[66] APP242–43 [IR-459 at 1–2, ¶¶ 1, 3].

analysis: "Because the court refused to award relief to all affected employees, *to the degree that class certification was necessary to provide such relief*, the lower court's denial of class certification was an abuse of discretion." (Answering Br. at 93 (emphasis added).) As discussed above (Cross-Appeal Argument §§ I.A–B), the superior court's remedy conformed to the narrow substantive ruling based on the 2012-2014 labor contracts. In other words, "all affected employees" got the relief they were entitled to under the court's ruling.

Of course, if the court had concluded that the members had more robust rights (such as rights extending beyond 2014), then broader relief would have been warranted. But under the substantive ruling they got, the members were not entitled broader relief. And because the members dispute class relief (at 93) only to the extent that it was "necessary to provide such relief," this cross-appeal argument can easily be disposed of.

But even if this Court were to rule in the members' favor and hold that the Charter requires the City to include sick leave payouts in an employee's pensionable "compensation," class certification would serve no practical purpose and the superior court had the discretion to deny certification. *See Markiewicz*, 118 Ariz. at 341 ("[T]he trial court's decision

[denying class certification] will not be disturbed on appeal unless an abuse of discretion is shown.").

Only the named intervenors even came close to seeking money damages, and they have been awarded damages.[67] Moreover, the intervenors' damages request was personal; they never purported to act as class representatives for all similarly-situated retirees.[68] The rest of the members sought only declaratory and injunctive relief and accordingly that is all that they can get, with or without a class.[69] In light of this, the superior court noted that it was "surprised to learn that plaintiffs/intervenors seek what amounts to an award of money damages class-wide for union membership."[70]

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[67] *See* APP234 [IR-415 at 2] ("[T]he [plaintiffs'] prayer for relief contains no request for damages. . . . In fairness, paragraph E of the prayer for relief of Intervenor's Complaint . . . does seek an order that defendants 'recalculate Intervenor's retirement benefits' . . . . *That claim for relief appears to be limited to the named intervenors*." (emphasis added) (citing IR-186 at 12, ¶ E)).

[68] *See* IR-186 (Intervenors' Complaint); *id.* at 5–7 (alleging the specific number of sick leave hours excluded from the calculation of each intervenors' pension benefits by revised AR 2.441).

[69] IR-1 at 12 (requested relief); *see also* APP234 [IR-415 at 2] ("The context of this statement was a *declaratory judgment action* in which: (1) the prayer for relief contains no request for damages . . . .").

[70] APP234 [IR-415 at 2].

As for declaratory and injunctive relief, the superior court correctly noted, "there is no reason to think it's going to apply to one, you know, coworker and not another."[71] Throughout this case, the City has stated that it will honor whatever final judgment the courts reach. And of course it will. If, after all appeals are exhausted, the members achieve a final judgment that requires the City to permit pension spiking, then the City will have to honor that ruling as to all affected employees and retirees, or else, as the superior court recognized, the members will sue again and "it's an easy win right out of the box."[72]

In sum, the Court does not need to reach the class certification issue at all. And if it does, it should affirm the superior court's ruling because class certification serves no practical purpose here; even without a class, the members can achieve all the relief they properly pled. Accordingly, the superior court had discretion to deny class certification.

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[71] IR-482 at 33 (transcript of oral argument re attorneys' fees).

[72] *Id.*

II. The superior court had the discretion to deny attorneys' fees to the members.

A. The superior court applied the correct legal standard and considered the relevant factors.

Finally, the members challenge the trial court's ruling that each side should pay its own attorneys' fees. Because A.R.S. § 12-341.01 is permissive ("may award"), whether to award fees is "a matter in the discretion of the trial court." *Suciu*, 138 Ariz. at 520.[73] This Court "cannot substitute [its] judgment for that of the trial judge." *Id.* "[T]he burden is on plaintiffs to show the trial court abused its discretion" in denying fees. *Ayres v. Red Cloud Mills, Ltd.*, 167 Ariz. 474, 481 (App. 1990).

Here, the superior court had the discretion to deny fees. The Arizona Supreme Court has given a non-exclusive list of factors (the *Warner* factors) when deciding whether to award fees, and the superior court properly considered those factors. *See Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570 (1985).

[73] The superior court correctly articulated that standard: "An award pursuant to A.R.S. § 12-341.01 is highly discretionary." APP238 [IR-458 at 2].

First, the court found that the members "were the successful parties, although their success was modest in light of their original claims."[74] Turning to the *Warner* factors and other considerations, the court noted that:

- Much of the litigation was unnecessary (plaintiffs "prolonged and expanded the litigation").[75]
- The City successfully defended the "substantial issue" of whether the Charter required the inclusion of sick leave payouts in final compensation and therefore "obviously had a meritorious defense."[76]
- It was "doubtful that the claims could have been avoided."[77]
- Neither side would suffer "real hardship" regardless of the fee ruling.[78]
- "The parties' papers were replete with trivial objections," such as the members' frivolous objection to the use of the transition word "finally" in a statement of fact and moving to strike section headings.[79]

In light of those considerations, the superior court properly exercised its "broad discretion" under *Warner*, 143 Ariz. at 570, and concluded that

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[74] APP239 [IR-458 at 3].

[75] APP240 [IR-458 at 4].

[76] *Id*.

[77] *Id.*

[78] APP241 [IR-458 at 5].

[79] APP240 [IR-458 at 4].

"[o]n balance, the court believes each side should bear its own attorneys fees."[80]

B. The members have not carried their burden to show that the superior court got the law or the facts wrong.

Despite the superior court's detailed ruling, the members argue (at 95–103) that the court abused its discretion by denying attorneys' fees.

As a threshold matter, the members do not dispute the superior court's conclusions that the City "had a meritorious defense," the claims likely "could [not] have been avoided," the City's "efforts were far from superfluous," and the legal questions "were novel."[81] The superior court had discretion to deny attorneys' fees based on these undisputed factors alone, and this Court may likewise affirm on that basis. *See Great W. Bank & Tr. Co. v. Pima Sav. & Loan Ass'n*, 149 Ariz. 364, 368 (App. 1986) ("This court is required to uphold the trial court's exercise of discretion if there exists a reasonable basis in the record for denying fees.").

The members first dispute (at 95-97) the superior court's characterization of one claim as "principal" and the members' overall

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[80] APP240–41 [IR-458 at 4–5].

[81] *Id*.

success as "modest." The members do not dispute the superior court's determination that the members were the successful party; they dispute only the superior court's characterization of the degree of success. But the superior court has broad discretion to determine the successful party, and that determination should not be disturbed unless it has no basis:

> The decision as to who is the successful party for purposes of awarding attorneys' fees is within the sole discretion of the trial court, and will not be disturbed on appeal if any reasonable basis exists for it. The superior court, in its discretion, role, and experience, may determine the prevailing party from all the circumstances, the reasonableness of the parties' positions, and their respective financial positions.

Bobrow v. Bobrow, 241 Ariz. 592, 598 ¶ 25 (App. 2017) (internal quotation marks and citations omitted).[82] This broad discretion applies with particular force when the dispute turns on the *degree* of success.

Arizona courts have repeatedly denied fees when, as here, one side achieved less than what it sought. *See, e.g.*, *Bobrow*, 241 Ariz. at 598 ¶ 26 (affirming denial of fees when "neither party was successful with respect to all of the relief requested"); *Uyleman v. D.S. Rentco*, 194 Ariz. 300, 306 ¶ 28 (App. 1999) (affirming denial of fee award in part because "[n]either party

[82] Although *Bobrow* involved a different basis for fees, it cited *Warner* and the standard for fees under A.R.S. § 12-341.01.

was completely victorious"); *Bank One, Ariz. v. Rouse*, 181 Ariz. 36, 41 (App. 1994) (affirming denial of fees when "verdict was part in favor of [Appellants] and part in favor of Appellees"); *Ayres*, 167 Ariz. at 481 (affirming denial of fees when plaintiffs succeeded on primary claim but "were not successful" on another).

In addition, the members (at 96–97) take the superior court's characterization of one of their claims as "the principal claim" out of context. Read in context, the superior court used that characterization not as an independent basis to deny fees, but rather to demonstrate that the City had a valid defense—one of the *Warner* factors:

> Turning to the *Warner* factors, defendants prevailed on the principal claim (whether inclusion of the sick leave payout in final compensation was required by the City Charter, now and forever), *so it obviously had a meritorious defense to a substantial issue in the litigation*.[83]

The superior court had the discretion to consider the City's success in evaluating whether the City had a valid defense. Thus, the member's discussion of the "central issue test" is irrelevant. The superior court did not apply that test at all, and certainly not in the manner forbidden by *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989).

[83] APP240 [IR-458 at 4] (emphasis added).

Moreover, that case addressed the standard for fees under 42 U.S.C. § 1988, not Arizona law. As demonstrated above, Arizona courts have repeatedly considered the degree of success when evaluating fees under A.R.S. § 12-341.01, even after *Texas State Teachers*.

As for the members' dispute about the degree of success, the members do not dispute the superior court's characterization about what they sought to achieve (that the City "now and forever" had to include sick leave payouts as pensionable compensation, without regard to future bargaining) and what they ultimately achieved (a ruling that treatment of the payouts "is subject to negotiation" and a ruling on a single two-year contract period).[84] In light of that, the superior acted well within its discretion to characterize the members' degree of success. The members cite several cases about the degree of success (at 98–99), but all but one case involve the unique doctrine of awarding nominal damages in civil rights cases brought under 42 U.S.C. § 1983.[85] Those standards do not apply to fee awards under A.R.S. § 12-341.01.

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[84] APP239 [IR-458 at 3].

[85] The City does not discuss the remaining case because it cannot be cited under Ariz. Sup. Ct. R. 111(c)–(d).

The members then dispute (at 99–101) the superior court's comments about the improper management of the litigation.[86] The superior court was in the best position to evaluate how the case progressed. The court had the discretion to conclude that the cumulative litigation tactics over four and a half years were excessive, including (1) unnecessarily seeking class certification, twice,[87] (2) unnecessarily seeking a preliminary injunction,[88] (3) a lengthy trial with repetitive testimony, (4) unnecessarily seeking to amend the court's findings based on evidence never introduced at trial,[89] and (5) unnecessarily seeking damages that went well beyond the members' pleadings,[90] all on top of (6) exceeding the page limitations and making "trivial objections," including to headings "which were obviously included in an effort to assist people in finding things."[91] Although the

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[86] *See* APP240 [IR-458 at 4].

[87] Denied at IR-91.

[88] Denied at IR-62.

[89] Denied at APP231–32 [IR-383 at 1–2].

[90] Denied at APP233–35 [IR-415 at 1–3].

[91] APP240 [IR-458 at 4]. The members defend the objections (at 101 n.61) by suggesting that they would have waived the objections if they had not made them. That misses the point. Objecting to the transition word "finally" or the helpful section headings is completely unnecessary and wasted everyone's resources. Objecting preserved nothing of value.

members quibble with the underlying rulings and who is to blame for all of that, "the trial court is in the best position to observe and assess the conduct of the parties before it." *MacMillan v. Schwartz*, 226 Ariz. 584, 592 ¶ 38 (App. 2011). Moreover, because the superior court denied *both* sides' requests for attorneys' fees, it doesn't matter whether one side or the other was at fault for any particular item. At bottom, the members do not dispute that the underlying facts—i.e., that they engaged in all of the listed conduct. The superior court had the discretion to conclude that the tactics were excessive.

As for the superior court's conclusions concerning "no real hardship to either side" and the effect of a fee award, the superior court acted well within its discretion. The unions in this case have thousands of dues-paying members and their declarations lacked specifics about their supposed limited resources, such as their annual budgets or annual dues receivables.[92]

The members also argue (at 103) that the burden-shifting framework prohibited the superior court from denying all fees. Not so. Because the

[92] IR-420 to -22.

superior court concluded that the members were not entitled to attorneys' fees, the burden-shifting framework was never triggered.

Finally, the members argue that the superior court failed to treat their hybrid contingency fee agreement as a genuine obligation to pay under *Moedt v. Gen. Motors Corp.*, 204 Ariz. 100 (App. 2002), asserting (at 105) that the "lower court's attempt to sidestep *Moedt* was error." That argument is irrelevant, however, because the court did not rule on the *Moedt* issue. Instead, it explained that "the court need not determine whether *Moedt* applies because it cannot in good conscience find reasonable even the amounts actually paid for legal services by plaintiffs."[93] Further, the superior court's denial of fees to both sides makes the discussion of rates even more irrelevant.

In short, the members have failed to carry their burden of showing that the trial court abused its discretion. This Court should affirm the superior court's thorough and careful decision on fees.

[93] *See* APP239 [IR-458 at 3].

CONCLUSION

Retirement payouts for accrued sick leave are not "compensation" under the Charter. This Court should reverse the judgment of the superior court.

RESPECTFULLY SUBMITTED this 6th day of October, 2017.

OSBORN MALEDON, P.A.

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Addendum

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BLACK'S LAW DICTIONARY

Definitions of the Terms and Phrases of
American and English Jurisprudence,
Ancient and Modern
with
Guide to Pronunciation

By

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FOURTH EDITION

By
THE PUBLISHER'S EDITORIAL STAFF

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PREFACE TO THE FIRST EDITION

THE dictionary now offered to the profession is the result of the author's endeavor to prepare a concise and yet comprehensive book of definitions of the terms, phrases, and maxims used in American and English law and necessary to be understood by the working lawyer and judge, as well as those important to the student of legal history or comparative jurisprudence. It does not purport to be an epitome or compilation of the body of the law. It does not invade the province of the text-books, nor attempt to supersede the institutional writings. Nor does it trench upon the field of the English dictionary, although vernacular words and phrases, so far as construed by the courts, are not excluded from its pages. Neither is the book encyclopædic in its character. It is chiefly required in a dictionary that it should be comprehensive. Its value is impaired if any single word that may reasonably be sought between its covers is not found there. But this comprehensiveness is possible (within the compass of a single volume) only on condition that whatever is foreign to the true function of a lexicon be rigidly excluded. The work must therefore contain nothing but the legitimate matter of a dictionary, or else it cannot include all the necessary terms. This purpose has been kept constantly in view in the preparation of the present work. Of the most esteemed law dictionaries now in use, each will be found to contain a very considerable number of words not defined in any other. None is quite comprehensive in itself. The author has made it his aim to include *all* these terms and phrases here, together with some not elsewhere defined.

For the convenience of those who desire to study the law in its historical development, as well as in its relations to political and social philosophy, place has been found for numerous titles of the old English law, and words used in old European and feudal law, and for the principal terminology of the Roman law. And in view of the modern interest in comparative jurisprudence and similar studies, it has seemed necessary to introduce a considerable vocabulary from the civil, canon, French, Spanish, Scotch, and Mexican law and other foreign systems. In order to further adapt the work to the advantage and convenience of all classes of users, many terms of political or public law are here defined, and such as are employed in trade, banking, and commerce, as also the principal phraseology of international and maritime law and forensic medicine. There have also been included numerous words taken from the vernacular, which, in consequence of their interpretation by the courts or in statutes, have acquired a quasi-technical meaning, or which, being frequently used in laws or private documents, have often been referred to the courts for construction. But the main body of the work is given to the definition of the technical terms and phrases used in modern American and English jurisprudence.

PREFACE TO THE FIRST EDITION

In searching for definitions suitable to be incorporated in the work, the author has carefully examined the codes, and the compiled or revised statutes, of the various states, and from these sources much valuable matter has been obtained. The definitions thus enacted by law are for the most part terse, practical, and of course authoritative. Most, if not all, of such statutory interpretations of words and phrases will be found under their appropriate titles. Due prominence has also been given to definitions formulated by the appellate courts and embodied in the reports. Many of these judicial definitions have been literally copied and adopted as the author's definition of the particular term, of course with a proper reference. But as the constant aim has been to present a definition at once concise, comprehensive, accurate, and lucid, he has not felt bound to copy the language of the courts in any instance where, in his judgment, a better definition could be found in treatises of acknowledged authority, or could be framed by adaptation or re-arrangement. But many judicial interpretations have been added in the way of supplementary matter to the various titles.

The more important of the synonyms occurring in legal phraseology have been carefully discriminated. In some cases, it has only been necessary to point out the correct and incorrect uses of these pairs and groups of words. In other cases, the distinctions were found to be delicate or obscure, and a more minute analysis was required.

A complete collection of legal maxims has also been included, comprehending as well those in English and Law French as those expressed in the Latin. These have not been grouped in one body, but distributed in their proper alphabetical order through the book. This is believed to be the more convenient arrangement.

It remains to mention the sources from which the definitions herein contained have been principally derived. For the terms appertaining to old and middle English law and the feudal polity, recourse has been had freely to the older English law dictionaries, (such as those of Cowell, Spelman, Blount, Jacob, Cunningham, Whishaw, Skene, Tomlins, and the "Termes de la Ley,") as also to the writings of Bracton, Littleton, Coke, and the other sages of the early law. The authorities principally relied on for the terms of the Roman and modern civil law are the dictionaries of Calvinus, Scheller, and Vicat, (with many valuable suggestions from Brown and Burrill), and the works of such authors as Mackeldey, Hunter, Browne, Hallifax, Wolff, and Maine, besides constant reference to Gaius and the Corpus Juris Civilis. In preparing the terms and phrases of French, Spanish, and Scotch law, much assistance has been derived from the treatises of Pothier, Merlin, Toullier, Schmidt, Argles, Hall, White, and others, the commentaries of Erskine and Bell, and the dictionaries of Dalloz, Bell, and Escriche. For the great body of terms used in modern English and American law, the author. besides searching the codes and

statutes and the reports, as already mentioned, has consulted the institutional writings of Blackstone, Kent, and Bouvier, and a very great number of text-books on special topics of the law. An examination has also been made of the recent English law dictionaries of Wharton, Sweet, Brown, and Mozley & Whitley, and of the American lexicographers, Abbott, Anderson, Bouvier, Burrill, and Rapalje & Lawrence. In each case where aid is directly levied from these sources, a suitable acknowledgment has been made. This list of authorities is by no means exhaustive, nor does it make mention of the many cases in which the definition had to be written entirely *de novo*; but it will suffice to show the general direction and scope of the author's researches.

H. C. B.

WASHINGTON, D. C., August 1, 1891.

function itself, and the merits of the person who fulfills it. 1 Mill.Pol.Econ. 258.

SAIO. In Gothic law. The ministerial officer of a court or magistrate, who brought parties into court and executed the orders of his superior. Spelman.

SAISIE. Fr. In French law. A judicial seizure or sequestration of property, of which there are several varieties. See *infra.*

SAISIE-ARRÊT. An attachment of property in the possession of a third person.

SAISIE-EXÉCUTION. A writ resembling that of *fieri facias;* defined as that species of execution by which a creditor places under the hand of justice (custody of the law) his debtor's movable property liable to seizure, in order to have it sold, so that he may obtain payment of his debt out of the proceeds. Dalloz, Dict.

SAISIE-FORAINE. A permission given by the proper judicial officer to authorize a creditor to seize the property of his debtor in the district which the former inhabits. Dalloz, Dict. It has the effect of an attachment of property, which is applied to the payment of the debt due.

SAISIE-GAGERIE. A conservatory act of execution, by which the owner or principal lessor of a house or farm causes the furniture of the house or farm leased, and on which he has a lien, to be seized; similar to the *distress* of the common law. Dalloz, Dict.

SAISIE-IMMOBILIÈRE. The proceeding by which a creditor places under the hand of justice (custody of the law) the immovable property of his debtor, in order that the same may be sold, and that he may obtain payment of his debt out of the proceeds. Dalloz, Dict.

SAKE. In old English law. A lord's right of amercing his tenants in his court. Keilw. 145.

Acquittance of suit at county courts and hundred courts. Fleta, l. 1, c. 47, § 7.

SALABLE. "Merchantable," fit for sale in usual course of trade, at usual selling prices. Foote v. Wilson, 104 Kan. 191, 178 P. 430; Stevens Tank & Tower Co. v. Berlin Mills Co., 112 Me. 336, 92 A. 180, 181.

SALABLE VALUE. Usual selling price at place where property is situated when its value is to be ascertained. Fort Worth & D. N. Ry. Co. v. Sugg, Tex.Civ.App., 68 S.W.2d 570, 572.

SALADINE TENTH. A tax imposed in England and France, in 1188, by Pope Innocent III., to raise a fund for the crusade undertaken by Richard I. of England and Philip Augustus of France, against Saladin, sultan of Egypt, then going to besiege Jerusalem. By this tax every person who did not enter himself a crusader was obliged to pay a tenth of his yearly revenue and of the value of all his movables, except his wearing apparel, books, and arms. The Carthusians, Bernardines, and some other religious persons were exempt. Gibbon remarks that when the necessity for this tax no longer existed, the church still clung to it as too lucrative to be abandoned, and thus arose the tithing of ecclesiastical benefices for the pope or other sovereigns. Enc.Lond.

SALARIUM. Lat. In the civil law. An allowance of provisions. A stipend, wages, or compensation for services. An annual allowance or compensation. Calvin.

SALARY. A reward or recompense for services performed.

In a more limited sense a fixed periodical compensation paid for services rendered; a stated compensation, amounting to so much by the year, month, or other fixed period, to be paid to public officers and persons in some private employments, for the performance of official duties or the rendering of services of a particular kind, more or less definitely described, involving professional knowledge or skill, or at least employment above the grade of menial or mechanical labor. State v. Speed, 183 Mo. 186, 81 S.W. 1260. A fixed, annual, periodical amount payable for services and depending upon the time of employment and not the amount of services rendered. In re Information to Discipline Certain Attorneys of Sanitary Dist. of Chicago, 351 Ill. 206, 184 N.E. 332, 359. It is synonymous with "wages," except that "salary" is sometimes understood to relate to compensation for official or other services, as distinguished from "wages," which is the compensation for labor. Walsh v. City of Bridgeport, 88 Conn. 528, 91 A. 969, 972, Ann.Cas.1917B, 318. See, also, Fee.

For "Executive Salaries," see that title.

SALE. A contract between two parties, called, respectively, the "seller" (or vendor) and the "buyer," (or purchaser,) by which the former, in consideration of the payment or promise of payment of a certain price in money, transfers to the latter the title and the possession of property. Pard. Droit Commer. § 6; 2 Kent, Comm. 363; Poth. Cont. Sale, § 1; Butler v. Thomson, 92 U.S. 414, 23 L.Ed. 684. In re Frank's Estate, 277 N.Y. S. 573, 154 Misc. 472.

A contract whereby property is transferred from one person to another for a consideration of value, implying the passing of the general and absolute title, as distinguished from a special interest falling short of complete ownership. Arnold v. North American Chemical Co., 232 Mass. 196, 122 N.E. 283, 284; Faulkner v. Town of South Boston, 141 Va. 517, 127 S.E. 380, 381.

An agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself. Three circumstances concur to the perfection of the contract, to-wit, the thing sold, the price, and the consent. Civ.Code La. art. 2439.

To constitute a "sale," there must be parties standing to each other in the relation of buyer and seller, their minds must assent to the same proposition, and a consideration must pass. Commissioner of Internal Revenue v. Frelhofer, C.C.A.3, 102 F.2d 787, 789, 790, 125 A.L.R. 761.

W

W. As an abbreviation, this letter frequently stands for "William," (king of England,) "Westminster," "west," or "western."

W. D. An abbreviation for "Western District."

WABBLE. To vacillate or sway unsteadily from side to side; to vacillate or show unsteadiness; to move or move along with an irregular rocking or staggering motion or unsteadily from one side to the other. Meadows v. State, 186 Ga. 592, 199 S.E. 133, 135.

WACREOUR. L. Fr. A vagabond, or vagrant. Britt. c. 29.

WADIA. A pledge. See Vadium; Fides Facta.

WADSET. In Scotch law. The old term for a mortgage. A right by which lands or other heritable subjects are impignorated by the proprietor to his creditor in security of his debt. Wadsets are usually drawn in the form of mutual contracts, in which one party sells the land, and the other grants the right of reversion. Ersk. Inst. 2, 8, 3.

WADSETTER. In Scotch law. A creditor to whom a wadset is made, corresponding to a mortgagee.

WAFTORS. Conductors of vessels at sea. Cowell.

WAGA. In old English law. A weight; a measure of cheese, salt, wool, etc., containing two hundred and fifty-six pounds avoirdupois. Cowell; Spelman.

WAGE. In old English practice. To give security for the performance of a thing. Cowell.

WAGE EARNER. Within Bankruptcy Act exempting wage earners from involuntary bankruptcy proceedings must have as his paramount occupation the earning of salary or wages, indicia of wage earning being whether earner depends on his wages for his subsistence and whether wage earning is his paramount occupation. Bankr.Act §§ 1(27), 4b, 11 U.S.C.A. §§ 1(27), 22(b). In re Gainfort, D.C.Cal., 14 F.Supp. 788, 791.

WAGER. A contract by which two or more parties agree that a certain sum of money or other thing shall be paid or delivered to one of them or that they shall gain or lose on the happening of an uncertain event or upon the ascertainment of a fact in dispute, where the parties have no interest in the event except that arising from the possibility of such gain or loss. H. Seay & Co. v. Moore, Tex.Com.App., 261 S.W. 1013, 1014; Young v. Stephenson, 82 Okl. 239, 200 P. 225, 228, 24 A.L.R. 978; Odle v. State, 139 Tex.Cr.R. 288, 139 S.W.2d 595, 597. See, also, Bet.

It was said that contract giving one party or the other an option to carry out the transaction or not at pleasure is not invalid as a "wager." Palmer v. Love, 18 Tenn. App. 579, 80 S.W.2d 100, 105; but if, under guise of contract of sale, real intent of both parties is merely to speculate in rise or fall of prices and property is not to be delivered, but at time fixed for delivery one party is to pay difference between contract price and market price, transaction is invalid as "wager." Baucum & Kimball v. Garrett Mercantile Co., 188 La. 728, 178 So. 256, 259, 260.

WAGER OF BATTEL. The trial by wager of battel was a species of trial introduced into England, among other Norman customs, by William the Conqueror, in which the person accused fought with his accuser, under the apprehension that Heaven would give the victory to him who was in the right. 3 Bl.Comm. 337. It was abolished by St. 59 Geo. III., c. 46.

WAGER OF LAW. In old practice. The giving of *gage* or sureties by a defendant in an action of debt that at a certain day assigned he would *make his law*; that is, would take an oath in open court that he did not owe the debt, and at the same time bring with him eleven neighbors, (called "compurgators,") who should avow upon their oaths that they believed in their consciences that he said the truth. Glanv. lib. 1, c. 9, 12; Bract. fol. 156*b*; Britt. c. 27; 3 Bl.Comm. 343; Cro.Eliz. 818.

WAGER POLICY. See Policy of Insurance.

WAGERING CONTRACT. One in which the parties stipulate that they shall gain or lose, upon the happening of an uncertain event, in which they have no interest except that arising from the possibility of such gain or loss. Fareira v. Gabell, 89 Pa. 89.

WAGERING GAIN. The share of each, where individuals carrying on business in partnership make gains in wagering transactions. Jennings v. Commissioner of Internal Revenue, C.C.A.Tex., 110 F.2d 945, 946.

WAGES. A compensation given to a hired person for his or her services; the compensation agreed upon by a master to be paid to a servant, or any other person hired to do work or business for him. Ciarla v. Solvay Process Co., 172 N.Y.S. 426, 428, 184 App.Div. 629; Cookes v. Lymperis, 178 Mich. 299, 144 N.W. 514, 515; Phœnix Iron Co. v. Roanoke Bridge Co., 169 N.C. 512, 86 S.E. 184, 185. Every form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, vacation pay, dismissal wages, bonuses and reasonable value of board, rent, housing, lodging, payments in kind, tips, and any other similar advantage received from the individual's employer or directly with respect to work for him. Ernst v. Industrial Commission, 246 Wis. 205, 16 N.W.2d 867.

In a limited sense the word "wage" means pay given for labor usually manual or mechanical at short stated inter-

vals as distinguished from salary, but in general the word means that which is pledged or paid for work or other services; hire; pay. In its legal sense, the word "wages" means the price paid for labor, reward of labor, specified sum for a given time of service or a fixed sum for a specified piece of work. In re Hollingsworth's Estate, 37 Cal. App.2d 432, 99 P.2d 599, 600, 602.

Maritime Law

The compensation allowed to seamen for their services on board a vessel during a voyage.

Political Economy

The reward paid, whether in money or goods, to human exertion, considered as a factor in the production of wealth, for its co-operation in the process.

"Three factors contribute to the production of commodities,—nature, labor, and capital. Each must have a share of the product as its reward, and this share, if it is just, must be proportionate to the several contributions. The share of the natural agents is rent; the share of labor, *wages*; the share of capital, interest. The clerk receives a salary; the lawyer and doctor, fees; the manufacturer, profits. Salary, fees, and profits are so many forms of wages for services rendered." De Laveleye, Pol. Econ.

WAGON. A kind of four-wheel vehicle, especially one used for carrying freight or merchandise. McMullen v. Shields, 96 Mont. 191, 29 P.2d 652, 654. A vehicle moving on wheels and usually drawn by horses. The word wagon is a generic term and includes other species of vehicle by whatever name they may be called. An automobile is a vehicle propelled by power generated within itself, used to convey passengers or materials, and in a general sense is a wagon. Strycker v. Richardson, 77 Pa.Super.Ct. 252, 255, but see contra United States v. One Automobile, D.C. Mont., 237 F. 891, 892; Whitney v. Welnitz, 153 Minn. 162, 190 N.W. 57, 28 A.L.R. 68. For "Farm Wagon," see that title.

WAGONAGE. Money paid for carriage in a wagon.

WAGONWAY. That part of a street ordinarily used for the passage of vehicles within the curb lines. Delaware, L. & W. R. Co. v. Chiara, C.C.A. N.J., 95 F.2d 663, 666.

WAIF. Waifs are goods found, but claimed by nobody; that of which every one waives the claim. Also, goods stolen and waived, or thrown away by the thief in his flight, for fear of being apprehended. Wharton.

Waifs are to be distinguished from *bona fugitiva*, which are the goods of the felon himself, which he abandons in his flight from justice. Brown. See People v. Kaatz, 3 Parker, Cr.R. (N.Y.) 138; Hall v. Gildersleeve, 36 N.J.L. 237.

WAINABLE. In old records. That may be plowed or manured; tillable. Cowell; Blount.

WAINAGE. In old English law. The team and instruments of husbandry belonging to a countryman, and especially to a villein who was required to perform agricultural services.

WAINAGIUM. What is necessary to the farmer for the cultivation of his land. Barring. Ob.St. 12; Magna Carta, c. 14. Instruments of husbandry. 1 Poll. & Maitl. 399.

WAIN-BOTE. In feudal and old English law. Timber for wagons or carts.

WAITING CLERKS. Officers whose duty it formerly was to wait in attendance upon the court of chancery. The office was abolished in 1842 by St. 5 & 6 Vict. c. 103. Mozley & Whitley.

WAIVE, *v.* To abandon or throw away; as when a thief, in his flight, throws aside the stolen goods, in order to facilitate his escape, he is technically said to *waive* them.

In modern law, to abandon, throw away, renounce, repudiate, or surrender a claim, a privilege, a right, or the opportunity to take advantage of some defect, irregularity, or wrong. See Brigham Young University v. Industrial Commission of Utah, 74 Utah 349, 279 P. 889, 893, 65 A.L.R. 152.

A person is said to waive a benefit when he renounces or disclaims it, and he is said to waive a tort or injury when he abandons the remedy which the law gives him for it. Sweet.

In order for one to "waive" a right, he must do it knowingly and be possessed of the facts. Barnhill v. Rubin, D.C.Tex., 46 F.Supp. 963, 966.

WAIVE, *n.* In old English law. A woman outlawed. The term is, as it were, the feminine of "outlaw," the latter being always applied to a man; "waive," to a woman. Cowell.

WAIVER. The intentional or voluntary relinquishment of a known right, Lehigh Val. R. Co. v. Ins. Co., 172 F. 364, 97 C.C.A. 62; Vermillion v. Prudential Ins. Co. of America, 230 Mo.App. 993, 93 S.W.2d 45, 51; or such conduct as warrants an inference of the relinquishment of such right, Rand v. Morse, C.C.A.Mo., 289 F. 339, 344; Dexter Yarn Co. v. American Fabrics Co., 102 Conn. 529, 129 A. 527, 537; Gibbs v. Bergh, 51 S.D. 432, 214 N.W. 838, 841; or when one dispenses with the performance of something he is entitled to exact or when one in possession of any right, whether conferred by law or by contract, with full knowledge of the material facts, does or forbears to do something the doing of which or the failure of forbearance to do which is inconsistent with the right, or his intention to rely upon it. Estoup Signs v. Frank Lower, Inc., La.App., 10 So.2d 642, 645. The renunciation, repudiation, abandonment, or surrender of some claim, right, privilege, or of the opportunity to take advantage of some defect, irregularity, or wrong. Christenson v. Carleton, 37 A. 226, 69 Vt. 91; Shaw v. Spencer, 100 Mass. 395, 97 Am.Dec. 107, 1 Am.Rep. 115; Smiley v. Barker, 28 C.C.A. 9, 83 F. 684; Boos v. Ewing, 17 Ohio 523, 49 Am.Dec. 478. A doctrine resting upon an equitable principle, which courts of law will recognize. Atlas Life Ins. Co. v. Schrimsher, 179 Okl. 643, 66 P.2d 944, 948. See, also, Estoppel.