SUPREME COURT OF ARIZONA

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<tr><td>FRANK PICCIOLI; et al.,

Plaintiffs/Intervenors/
Appellees/Cross-Appellants,

v.

CITY OF PHOENIX, et al.,

Defendants/Appellants
Cross-Appellees.</td><td>Arizona Supreme Court
No. CV-19-0116-PR

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

Maricopa County
Superior Court
No. CV2012-010330</td></tr>
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DEFENDANTS/APPELLANTS/CROSS-APPELLEES' SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. The Charter's text plainly excludes one-time, lump-sum cashouts for accrued leave from pensionable "compensation." 2

A. The Charter limits pensionable compensation to annual salary or wages. 2

B. A one-time, lump-sum cashout at retirement is not annual salary or wages. 8

II. The Plan's structure confirms that one-time accrued leave cashouts are not pensionable. 10

A. The voters chose to include certain accrued leave as a time factor for pensions, not a pay factor. 10

B. The voters chose to treat hourly and salaried employees equally. 13

C. Treating accrued leave cashouts as pensionable compensation distorts the pay component of the pension formula. 13

III. The members' interpretation conflicts with the Charter's text and structure 16

A. Statutory definitions related to state unemployment and worker's compensation acts cannot overcome COPERS's plain text. 16

B. The members rely on inapposite and out-of-state cases. 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

Amos v. Metro. Gov't of Nashville & Davidson Cty.,
259 S.W.3d 705 (Tenn. 2008) 11

Apache E., Inc. v. Wiegand,
119 Ariz. 308 (App. 1978) 19, 20

Bilke v. State,
206 Ariz. 462 (2003) 5

City of Surprise v. Ariz. Corp. Comm'n,
246 Ariz. 206 (2019) 11, 19

Cross v. Elected Officials' Ret. Plan,
234 Ariz. 595 (App. 2014) 6, 8

Ernst v. Indus. Comm'n,
16 N.W.2d 867 (Wis. 1944) 17

Fields v. Elected Officials' Ret. Plan,
234 Ariz. 214 (2014) 3, 10

Guzman v. Guzman,
175 Ariz. 183 (App. 1993) 18

Holland v. City of Chicago,
682 N.E.2d 323 (Ill. App. Ct. 1997) 8

J.D. v. Hegyi,
236 Ariz. 39 (2014) 15

Lamie v. U.S. Tr.,
540 U.S. 526 (2004) 16

Paddock v. Brisbois,
35 Ariz. 214 (1929) 11

Santa Monica Police Officers' Ass'n v. Bd. of Admin,
137 Cal. Rptr. 771 (Ct. App. 1977) 12

Wade v. Ariz. State Ret. Sys.,
241 Ariz. 559 (2017) 6, 15

West Va. Consol. Pub. Ret. Bd. v. Carter,
633 S.E.2d 521 (W. Va. 2006) 6, 7

Constitutional & Charter Provisions

Phoenix City Charter ch. XXIV, art. II 2

Phoenix City Charter ch. XXIV, art. II, § 2.13 .... 3, 6, 7, 13

Phoenix City Charter ch. XXIV, art. II, § 2.14 .... 3, 5

Phoenix City Charter ch. XXIV, art. II, § 2.15 .... 3, 5

Phoenix City Charter ch. XXIV, art. II, § 3 14

Phoenix City Charter ch. XXIV, art. II, § 14.4 11

Phoenix City Charter ch. XXIV, art. II, § 19 2

Statutes & Codes

A.R.S. § 23-355 20

Wis. Stat. § 108.02 17

Other Authorities

Administrative Regulation 2.18 .... 2, 8, 9, 10

Administrative Regulation 2.441 .... 2, 8, 9, 10

American Heritage Dictionary (5th ed. 2011) 4

Black's Law Dictionary (4th ed. 1951) 17

Merriam-Webster.com Dictionary 4

New Oxford American Dictionary (3d ed. 2010) 4

Webster's New International Dictionary of the English
Language (2d ed. 1946) 4

INTRODUCTION

Both this case (*Piccioli*) and *AFSCME Local 8234 v. City of Phoenix* (No. CV-19-0143-PR) concern "pension spiking"—the practice of adding amounts to an employee's pensionable compensation immediately before retirement so that the employee gets a higher lifetime pension. In 2012 and 2014, respectively, the City revised its administrative regulations governing retirement cashouts to prohibit using the one-time cashouts for unused sick leave (AR 2.441) and unused vacation leave (AR 2.18) to spike pensions under the City of Phoenix Employees' Retirement Plan (COPERS).

Piccioli deals with retirement cashouts for unused *sick* leave, and *AFSCME Local 2384* deals with retirement cashouts for unused *vacation* leave, but both cases present the same dispositive legal issues: (1) whether a one-time, lump-sum cashout for accrued leave at retirement is pensionable "compensation" under the Charter; and (2) if not, whether a mistaken past practice creates a prospective and constitutionally protected contractual right under the Pension and Contracts Clauses. For efficiency, this supplemental brief (*Piccioli*) focuses on the Charter's interpretation (issue #1); the *AFSCME Local 8234* supplemental brief will focus on the past practice question (issue #2).

ARGUMENT

I. The Charter's text plainly excludes one-time, lump-sum cashouts for accrued leave from pensionable "compensation."

A. The Charter limits pensionable compensation to annual salary or wages.

Phoenix voters adopted COPERS into the City Charter in 1953.[1] *See* Phoenix City Charter at ch. XXIV, art. II.[2] COPERS provides eligible City employees with lifetime pension benefits equal to a percentage of their monthly pre-retirement pay. Specifically, the pension formula multiplies an employee's final average compensation (pay), credited service (time), and a benefit rate set by the Charter (2% for the first 32.5 years of service):

COPERS Benefit = (Final Average Compensation) × (Credited Service) × 2%

Id. § 19. (*See also* Defendants/Appellants/Cross-Appellees' Opening Brief, *Piccioli v. City of Phoenix*, No. 1 CA-CV 16-0690 (Ariz. Ct. App. Mar. 31, 2017)

[1] COPERS exists because of the Charter; this brief uses "COPERS" and "the Charter" interchangeably.

[2] The City cites to the 2014 version of the Charter in effect during the relevant time period in place when revised AR 2.18 took effect, which is identical in all relevant aspects to the 2012 Charter in place when revised AR 2.441 took effect. Copies of the 2012 and 2014 Charter provisions are available at the *Piccioli* Response to Petition for Review, CAPP028-72, and the *AFSCME* Response to Petition for Review, CAPP030-67.

(hereafter "City's *Piccioli* Opening Br.") at 11-18 (providing overview of the City's personnel and retirement systems).)

Regarding the "pay" factor, the Charter defines the term "final average compensation" and the related terms "final compensation" and "compensation" as follows:

> "**Final average compensation**" means 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 contained within his 10 years of credit service immediately preceding the date his City employment last terminates. If he has less than 3 years of credited service, his final average compensation shall be the average of his compensations for his total period of service. . . .
>
> "**Final compensation**" means a member's annual rate of compensation at the time his City employment last terminates.
>
> "**Compensation**" means a member's salary or wages paid him by the City for personal services rendered by him to the City. . . .

Charter §§ 2.14, 2.15, 2.13 (emphases added).

The Charter does not further define "salary or wages," so these terms are given their ordinary meaning. *Fields v. Elected Officials' Ret. Plan*, 234 Ariz. 214, 219, ¶¶ 19-20 (2014). A survey of common dictionaries, both modern and older, shows that "salary" and "wages" both refer to regular, periodic pay for work:

Dictionary	"Salary"	"Wages"
Webster's New International Dictionary of the English Language (2d ed. 1946)	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)	[A] **fixed regular payment**, **typically paid on a monthly or biweekly 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)	**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 Merriam-Webster.com Dictionary	[F]ixed compensation **paid regularly** for services.	[A] **payment** usually of money for labor or services usually according to contract and **on an hourly, daily, or piecework basis** —often used in plural.

The phrase "salary or wages" must be given its "usual and commonly understood meaning unless the [voters] *clearly intended* a different meaning." *Bilke v. State*, 206 Ariz. 462, 464-65, ¶ 11 (2003) (citation omitted) (emphasis added). Because the Charter gives no indication that the voters intended the phrase to have an unusual meaning, "compensation" encompasses money paid on a regular, periodic basis.

Section 2.14's definition of "final average compensation" provides the relevant timeframe for pensionable compensation. Specifically, final average compensation relies on *annual* pay:

> "**Final average compensation**" means the average of the *highest annual compensations* paid a member for a period of 3 consecutive, but not necessarily continuous, years . . . .

Id. §§ 2.14 (emphasis added); *see also id.* § 2.15 ("'Final compensation' means a member's *annual rate of compensation* at the time his City employment last terminates." (emphasis added)).

Thus, annual compensation—i.e., annual salary or wages—means an employee's regular, annual pay. (*See* Defendants/Appellants/Cross-Appellees' Combined Reply and Cross-Answering Brief, *Piccioli v. City of*

Phoenix, No. 1 CA-CV 16-0690 (Ariz. Ct. App. Oct. 6, 2017) (hereafter "City's *Piccioli* Reply Br.") at 24-27.)

Arizona caselaw supports this interpretation. In *Cross v. Elected Officials' Retirement Plan*, 234 Ariz. 595 (App. 2014), the court held that retirement cashouts for accrued sick and vacation leave do not count as part of an employee's "final average salary" for pension purposes under the Elected Officials' Retirement Plan (EORP). The court reasoned that the term "salary" in the EORP statute includes amounts paid at regular intervals, which one-time cashouts at retirement for accrued sick and vacation leave are not. *Id.* at 604, ¶¶ 30-31; *see also Wade v. Ariz. State Ret. Sys.*, 241 Ariz. 559, 562, ¶ 14 (2017) (finding salary ordinarily means "fixed compensation paid regularly (as by the year, quarter, month, or week) for services") (quoting Webster's Third New International Dictionary 2003 (2002)).

Cross's reasoning, and the reasoning of the decisions upon which it relied, help to inform the plain meaning of "salary or wages" in § 2.13. (*See* City's *Piccioli* Reply Br. at 28-31.) One of those cases, *West Va. Consol. Pub. Ret. Bd. v. Carter*, 633 S.E.2d 521, 525-28 (W. Va. 2006), is particularly helpful because it addresses statutory text very similar to COPERS.

In *Carter*, members of West Virginia's Public Employee Retirement System (PERS) claimed a right to spike their pensions by counting retirement cashouts for accrued vacation leave toward their final average salary under PERS. *Id.* at 525. Similar to COPERS's definition of "final average compensation," PERS defined "final average salary" as "the average of the highest annual compensation received by a member . . . during any period of three consecutive years of credited services contained in the member's ten years of credited service . . . ." *Id.* at 526. The court relied on the concept of regular, periodic payments:

> If payment for unused, accrued vacation days is in fact "remuneration . . . for personal services rendered," the payment is neither "salary" nor "annual." A "salary" is a fixed amount of income regularly paid to an employee for services rendered. The adjective, "annual," means that the salary is specified or calculable in terms of a *regular* annual or yearly amount, which may be payable in equal monthly, semi-monthly, or other *periodic installments*.

Id. (emphases added).

Much like PERS, the Charter's text limits pensionable pay to an employee's annual salary or wages. *See* Charter, ch. XXIV §§ 2.13-2.15. A one-time, lump-sum cashout at retirement is not part of an employee's regular

annual pay and therefore cannot be used to calculate pension benefits under the Charter.

The majority of jurisdictions support this interpretation of annual compensation. *Cross*, 234 Ariz. at 604, ¶ 31 (observing that "almost all courts" agree that payments for accrued sick and vacation leave may not be treated as compensation for pension purposes); *see, e.g.*, *Holland v. City of Chicago*, 682 N.E.2d 323, 327-29 (Ill. App. Ct. 1997) (holding that the city did not unlawfully diminish or impair pension benefits in violation of the Illinois constitution when it excluded vacation pay and other fringe benefits from final average salary for pension purposes because these amounts were not fixed compensation paid regularly). (*See also* City's *Piccioli* Reply Br. at 28-31.)

B. A one-time, lump-sum cashout at retirement is not annual salary or wages.

Accrued leave cashouts under AR 2.441 and AR 2.18 do not count as pensionable compensation under the Charter because they are neither regular nor annual.

AR 2.441 allows certain employees to "cash out" their accrued sick leave at retirement. (City's *Piccioli* Opening Br. at APP160-63 (AR 2.441

(2012).) But an employee can receive this cashout only once (if at all), at retirement. (*See id.*) Stated otherwise, an employee's retirement year is the only time that the employee can receive both his regular salary or wage, *plus* cash for his accrued sick leave.

AR 2.18 similarly limits employees to a one-time cashout for unused vacation leave at retirement. (*See* Defendants/Appellees' Answering Brief, *AFSCME Local 2384 v. City of Phoenix*, No. 1 CA-CV 18-0027 (Ariz. Ct. App. July 5, 2018) (hereafter "City's *AFSCME* Answering Br.") at CAPP183-89 (AR 2.18 (2014).) Unlike sick leave, however, certain employees can "sell back" up to 40 or 80 hours of vacation leave each year. (*Id.*) Critically, however, an employee can never cash out all of his accrued vacation leave under the sell-back program. The one and only time an employee can cash out all accrued vacation is when the employee retires, in accordance with AR 2.18. (*Id.* at 49-51 (explaining how the sell-back works).) Thus, as with sick leave under 2.441, the member's retirement year is the only year in which he can receive his full-time salary or wage, *plus* cash for all accrued vacation under AR 2.18.

Importantly, these cases concern the one-time cashouts at retirement for unused leave, *not* the paid leave benefits themselves. (*Cf. AFSCME* Pet.

at 20 (claiming that "accrued vacation" is payable annually, but ignoring that annual sell-backs differ in both quantity and kind from the retirement cashouts).) The one-off and extraordinary nature of leave cashouts under AR 2.441 and AR 2.18 is precisely why they result in pension spiking, whereas regular paid leave and sell-backs do not. In an ordinary year, the most an employee can receive (in terms of money for unused sick and vacation leave) is his full-time salary or wage plus up to 40 or 80 hours of vacation sellback. Amounts an employee receives annually for using paid leave or selling back unused vacation leave thus do not "spike" the employee's compensation, because the employee receives no more money than he could have earned in an ordinary year. Retirement cashouts for accrued leave, by contrast, cause a "spike" when included in compensation because the employee will receive more money that year than the employee could have by working full-time in any other year.

II. The Plan's structure confirms that one-time accrued leave cashouts are not pensionable.

A. The voters chose to include certain accrued leave as a time factor for pensions, not a pay factor.

The Court's objective in interpreting the Charter is to "effectuate the intent" of the voters who adopted it. *Fields*, 234 Ariz. at 219, ¶ 19. The voters

adopted a pension formula tying benefits to two factors: compensation (pay) and credited service (time). And, critically, the voters chose to account for accrued leave in that formula in one way only—under § 14.4, accrued *sick leave* can be counted towards *credited service*. Charter ch. XXIV, art. II, § 14.4. Their inclusion of unused sick leave as a time factor implies the exclusion of unused leave as a pay factor. *City of Surprise v. Ariz. Corp. Comm'n*, 246 Ariz. 206, 211, ¶ 13 (2019) ("*Expressio unius est exclusio alterius*—the expression of one item implies the exclusion of others . . . .").

The voters could have chosen to treat accrued leave (of either type) as a pay factor instead of a time factor, but they did not. *See Amos v. Metro. Gov't of Nashville & Davidson Cty.*, 259 S.W.3d 705, 715 (Tenn. 2008) (concluding that "if the Metropolitan Council had intended for accrued vacation to be treated in a similar manner as sick leave, it would have expressed that intent explicitly"). And the City cannot unilaterally amend or supplement the pension formula adopted by the voters. *Cf. Paddock v. Brisbois,* 35 Ariz. 214, 221, 225 (1929) (refusing to read charter as giving civil service commission power to discharge officers and employees where the voters vested that power in the city manager; "if it is desirable [to give the commission

discharge authority,] the qualified electors can accomplish that result by amending the charter").

Other courts have relied on the distinction between "pay" and "time" factors in a pension formula to divine legislative intent. In *Santa Monica Police Officers' Ass'n v. Bd. of Admin.*, the court held that retirement cashouts for unused sick and vacation leave did not count toward an employee's "final compensation" for pension purposes, in part because the legislature chose to treat sick leave as a time factor under the pension formula. 137 Cal. Rptr. 771, 774 (Ct. App. 1977). Like COPERS, the *Santa Monica* retirement plan's pension formula relied on two factors, time and pay. *Id.* at 773. And, like COPERS, the retirement plan provided service credit to employees with unused sick leave at retirement, but did not mention unused leave as a pay factor. *Id.* at 773-74. The court thus concluded that the legislature intended to treat unused leave as only a time factor for pensions, not a pay factor. *Id.*

The same reasoning applies to COPERS. The City is free to offer accrued-leave cashouts to employees, but the Charter's provisions control whether those amounts are pensionable. And the Charter approved by Phoenix voters factors accrued leave into the pension formula only as credited service for unused sick leave.

B. The voters chose to treat hourly and salaried employees equally.

In addition to choosing to incorporate only accrued sick leave into the pension formula, and only as a time factor, the voters chose to treat salaried and hourly employees the same way under COPERS.

As discussed below (Argument § III), the members urge the Court to adopt an interpretation of "wages" encompassing *all* money paid to an employee in a given year, without limitation. But doing so would result in hourly and salaried employees being treated differently for pension purposes. Under the members' interpretation, hourly workers (wage-earners) could spike their pensions with accrued leave cashouts, but salaried workers could not. That result conflicts with the text of COPERS, which explicitly treats wage- and salary-earners identically. *See* Charter ch. XXIV, art. II, § 2.13 ("salary or wages"). Because the voters did not differentiate between hourly and salaried workers when they adopted COPERS, the Court should likewise not do so.

C. Treating accrued leave cashouts as pensionable compensation distorts the pay component of the pension formula.

Defined-benefit plans like COPERS are designed to provide retirees with a fixed benefit equal to a percentage of their former salary or wages for

life. *See* Charter ch. XXIV, art. II, §§ 3, 19. (*See also* City's *Piccioli* Opening Br. at 51.) Because one-time retirement cashouts are not part of an employee's regular salary or wages, adding these amounts artificially inflates the "pay" factor of the pension formula. Interpreting COPERS as *requiring* accrued leave cashouts to be counted towards pension benefits flies in the face of the system's design.

Consider the following hypothetical illustration: Employee Smith retired on December 31, 2012 at age 52 after completing 32 years of service with the City. As is typical, Smith's three highest consecutive years of salary were his final years of employment in 2010, 2011, and 2012. At retirement, he received an $8,000 lump-sum cashout for his accrued vacation.[3] Life expectancy according to federal guidelines is 393 months. Under the Charter, Smith's benefit rate is 2% (based on 32 years of service). The chart below shows the calculation of Smith's pension benefit without spiking, and with:

[3] The average sick leave payout for employees retiring in 2009 and 2010 was $9,923. (City's *Piccioli* Opening Br. at n.65.) The average vacation leave cashout for employees retiring between 2011 and 2013 was $8,875. (City's *AFSCME* Answering Br. at CAPP253.)

	Without spiking	**With spiking**
Highest annual compensations over 3 years	• Year 1: $45,000 (2010 salary) • Year 2: $46,000 (2011 salary) • Year 3: $47,000 (2012 salary)	• Year 1: $45,000 (2010 salary) • Year 2: $46,000 (2011 salary) • Year 3: $55,000 (2012 salary + $8,000 vacation cashout)
Final average compensation	($45k + $46k + $47k) / 36 mo. = **$3,833.33/mo.**	($45k + $46k+ $55k) / 36 mo. = **$4,055.56/mo.**
COPERS Benefit	$3,833.33/mo. × 32 × 2% = **$2,453.33/mo.**	$4,055.56 mo. × 32 × 2% = **$2,595.56/mo.**
Lifetime cost	393 mo. × $2,453.33 = **$964,158.69**	393 mo. × $2,595.56 = **$1,020,055.08**

As shown above, a one-time $8,000 retirement bonus balloons into an almost $56,000 lifetime cost to COPERS, and ultimately, the taxpayers. And with over 7,700 COPERS members,[4] the plan-wide cost of pension spiking is orders of magnitude larger.

When the Charter's text "is subject to only one reasonable interpretation," the Court must "apply it without further analysis." *Wade*, 241 Ariz. at 561, ¶ 10 (citation omitted). An interpretation of annual compensation that breaks the pension system cannot be reasonable. *See J.D. v. Hegyi*, 236 Ariz. 39, 41, ¶ 6 (2014) ("The plainness or ambiguity of statutory

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[4] COPERS Actuarial Valuation as of June 30, 2015, at 6, *available at* https://www.phoenix.gov/coperssite/Documents/act1214.pdf.

language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole" (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

The only sensible interpretation is one that allows COPERS to continue operating as designed. *Cf. Lamie v. U.S. Tr.*, 540 U.S. 526, 537 (2004) (finding that the "sound functioning of the bankruptcy system" supported the plain meaning of a bankruptcy statute). Read reasonably, pensionable compensation—i.e., annual salary or wages—does not include a one-time cashout at retirement for accrued leave.

III. The members' interpretation conflicts with the Charter's text and structure.

The members' primary argument is that COPERS, as set forth in the Charter, *requires* the City to count retirement cashouts for accrued leave in the calculation of an employee's pension. But that interpretation conflicts with the Charter's plain text and structure.

A. Statutory definitions related to state unemployment and worker's compensation acts cannot overcome COPERS's plain text.

The members' expansive interpretation of "salary or wages" hinges on defining "wage" as "[a] compensation given to a hired person for his or her services." (*Piccioli* Pet. at 12.) For starters, that definition is circular for

purposes of inferring the meaning of "compensation" under the Charter. Substituting the member's reading of "wage" yields the following definition of compensation: "a member's salary or [compensation given to a hired person for his or her services] paid him by the City for personal services rendered by him to the City." Thus, the members' proposed definition adds nothing to what the Charter already provides.

Moreover, the supposed definition of "wage" relied upon by the members (at *Piccioli* Pet. at App.111 and *AFSCME* Pet. at PR-App.71) is not a definition at all, but a non-definitional *usage note* citing to a 75-year-old Wisconsin unemployment act case. *See* Black's Law Dictionary 1750-51 (4th ed. 1951) (citing *Ernst v. Indus. Comm'n*, 16 N.W.2d 867 (Wis. 1944), which in turn quoted directly from Wis. Stat. § 108.02(6) (1943)). (*See also* City's *Piccioli* Reply Br. at 18-20 & n.1.) In other words, that usage note (which is explicitly non-definitional) is just an example of another state's statutory definition. The 1943 Wisconsin unemployment act does not reflect the intent of Phoenix voters who adopted COPERS a decade later.

The members similarly miss the mark by relying (at, e.g., *Piccioli* Pet. at 15) on definitions from unemployment and worker's compensation acts. Unemployment and worker's compensation schemes have different

structures and serve different purposes than COPERS. Most importantly, both unemployment and worker's compensation benefits are temporary, while COPERS benefits are paid for life.

More fundamentally, the members' proposed interpretation of "salary or wages" conflicts with COPERS's plain text and structure. First, if "wages" means "[e]very form of remuneration payable for a given period to an individual for personal services, *including salaries*" (*Piccioli* Pet. at App.111), then § 2.13's reference to "salary" is redundant. *See Guzman v. Guzman*, 175 Ariz. 183, 187 (App. 1993) (no words in a statute should be "rendered superfluous, void, contradictory, or insignificant"). The Court should not interpret "wage" in a way that would entirely subsume the term "salary."

Second, as discussed in Argument § II.B, using the members' definition of "wage" would result in different pension benefits for hourly and salaried employees. (*See also* City's *Piccioli* Opening Br. at 56-60.) To support this absurd result, they argue that § 2.13's use of the disjunctive "or" between salary and wages indicates that the terms have different meanings. To the contrary, the canon of *noscitur a sociis*—"a word's meaning cannot be determined in isolation, but must be drawn from the context in which it is used—is appropriate when several terms are associated in a context

suggesting the terms have some quality in common." *City of Surprise*, 246 Ariz. at 211, ¶ 13. COPERS does not distinguish between salary-earners and wage-earners for pension purposes, but includes both terms to cover both wage-earners and salary-earners. The common meaning these terms share is regular, periodic pay, and nothing in the Charter suggests that wage- and salary-earners should receive different pensions for identical pay.

Finally, the members' expansive definition would encompass all kinds of pay not currently included in pension calculations, like uniform allowances, reimbursements for travel expenses, and sick leave cash-outs upon death. (City's *Piccioli* Reply Br. at 20-21.)

B. The members rely on inapposite and out-of-state cases.

Finally, not one of the cases cited by the members addressed whether accrued leave cashouts are "wages" under the terms of a public retirement plan. (*See Piccioli* Pet. at 14 (citing an ERISA case and three distinguishable out-of-state public pension cases); *see also* City's *Piccioli* Reply Br. at 21-22 & n.2.) For example, the members rely on *Apache E., Inc. v. Wiegand*, 119 Ariz. 308, 311 (App. 1978), to argue that "wages means 'earned compensation contracted to be paid by the employer for the employee's personal service regardless of the nature of such compensation.'" (*Piccioli* Pet. at 15 (citation

omitted).) But the question in *Apache* was whether an employer owed commissions to a former employee under the Wage Act, A.R.S. § 23-355, not whether the usual meaning of "salary or wages" includes lump-sum cashouts for unused leave at retirement under the Charter. *Apache E.*, 119 Ariz. at 311. Indeed, the court in *Apache* explicitly rejected the argument that the meaning of "wage" under A.R.S. § 23-355 could be informed by another statutory definition. *Id.* ("Section 23-355 is found in Article 7 of that code and therefore § 23-340 [in Article 6.1] is irrelevant in determining the definition of wages in the present case."). Of course a "Wage Act" would be expansive; it exists to ensure that employees receive every penny they are owed. Pension plans are not so expansive.

At the end of the day, the Charter's plain text controls. The members have not shown any reason to deviate from the usual and ordinary meaning of "salary and wages." Accordingly, COPERS limits pensionable compensation to an employee's regular, annual pay, which lump-sum cashouts at retirement for accrued leave are not.

CONCLUSION

The Court should affirm the court of appeals, reverse the superior court, and remand for entry of judgment in favor of the City.

RESPECTFULLY SUBMITTED this 21st day of February, 2020.

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