Case No. A170424

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

JASON MASS and KAREN GRAF,
individually, and on behalf of others similarly situated,

Plaintiffs-Appellants,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,

Defendants-Appellees.

Appeal from Alameda County Superior Court
Civil Case No. RG17879223
Hon. Robert McGuiness and Hon. Evelio Grillo, Dept. 21

APPLICATION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF APPELLANTS; AMICUS CURIAE BRIEF

Erin M. Riley
(*pro hac vice pending*)
KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3400
Seattle, WA 98101
Tel.: 206.623.1900
eriley@kellerrohrback.com

Jeffrey Lewis
KELLER ROHRBACK L.L.P.
180 Grand Avenue, Suite 3400
Oakland, CA 94612
Tel.: 510.463.3900
jlewis@kellerrohrback.com

Attorneys for Amicus Curiae Pension Rights Center

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS

TO THE PRESIDING JUSTICE OF THE FIRST APPELLATE DISTRICT, DIVISION FOUR:

Pursuant to Rule 8.200, subdivision (c) of the California Rules of Court, the Pension Rights Center respectfully requests leave to submit the within amicus curiae brief in support of Plaintiffs-Appellants.

The Pension Rights Center (the "Center") is a Washington, D.C. nonprofit, nonpartisan consumer organization that has been working for nearly 50 years to protect and promote the retirement security of American workers, retirees, and their families. The Center provides education and legal representation to retirees, workers, and their families concerning retirement plans and is the technical assistance advisor to five regional pension information and counseling centers providing free legal assistance on pension and retirement issues in 31 states. The Center also works to

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improve pension security and adequacy through common ground initiatives with others in the pension community and by working with the Federal agencies and Congress to improve pension outcomes.

A participant in the University of California Retirement Plan acquires a vested interest in both their accrued to date pension benefits and their future accruals following five years of service.

Defendants-Appellees argue that a participant forfeits these accrued vested benefits if they fail to elect to receive them at or before age 60 up to the date they apply for retirement benefits.

The Center submits this brief for the following three reasons: the Ninth Circuit has held that almost identical pension plan provisions do not support Defendants-Appellees' argument; forfeiture of vested benefits is highly unusual in retirement plans; and forfeiture is contrary to a retiree's reasonable expectation that they will receive the benefit that they were promised under their retirement plan.

No counsel for a party authored this brief in whole or in part, and no person (other than amicus curiae or its counsel) made a monetary contribution intended to fund the preparation or submission of this brief.

RESPECTFULLY SUBMITTED this 11th day of August, 2025.

KELLER ROHRBACK L.L.P.

By _____

Jeffrey Lewis
Erin M. Riley
(*pro hac vice* pending)
Attorneys for Amicus Curiae
Pension Rights Center

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

I. INTRODUCTION

A participant in the University of California Retirement Plan (the "Plan") acquires a vested interest in their accrued pension benefits after five years of service. This includes benefits accrued in those five years and all future accruals. Under the Plan, normal retirement age is 60. Defendants-Appellees (hereafter "Defendants") argue that a plan participant forfeits these monthly vested benefits if they fail to fill out the paperwork necessary to commence receiving them at or before age 60 and only receive them prospectively after application.

The Pension Rights Center (the "Center") submits this brief to highlight three points: the Ninth Circuit has held that almost identical pension plan provisions do not support Defendants' argument; forfeiture of vested benefits is highly unusual in retirement plans; and such forfeiture is contrary to a retiree's reasonable expectations that they will receive the pension benefit that they were promised under their retirement plan.

II. ARGUMENT

A. Based on the Express Terms of an Almost Identical Plan Document, The Ninth Circuit Rejected the Same Defense "Forfeiture Policy".

The governing plan document is at the center of plans providing retirement benefits. Following the express terms of the plan document is crucial for proper plan operation and fulfillment of fiduciary obligations to participants and beneficiaries. Moreover, in retirement plan litigation the terms of the plan control. As stated by the U.S. Supreme Court, "if the agreement governs, the agreement governs." *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 99 (2013).

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Here, the Plan provides for "retroactive payments from" a "date of eligibility." 2-AA-347 (Plan § 12.10). And, as discussed *infra*, eligibility, in contrast to payment, does not depend on an application. Defendants disregard this plain term of the Plan in arguing that Plaintiffs-Appellants (hereafter "Plaintiffs") forfeited their benefits.

In *Canseco v. Construction Laborers Pension Trust for Southern California*, 93 F.3d 600 (1996), the U.S. Court of Appeals for the Ninth Circuit rejected the same defense argument. In that case, the plan trustees refused to pay the retirees retroactive retirement benefits based on their failure to apply for those benefits when they were first eligible to receive them. The retirees brought suit under the Employee Retirement Income Security Act of 1974 ("ERISA"), the federal law governing private employer benefit plans. That suit included a claim under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), to recover the benefits to which they were entitled under the terms of the plan. The retirees sought payment of benefits retroactive to the date they originally became eligible for normal retirement benefits. Defendant trustees argued that an application was a prerequisite for benefit eligibility.

To determine whether the retirees were entitled to retroactive retirement benefits (i.e., benefits for the period from the date when they could have applied to that of their ultimate application), the Ninth Circuit looked to the plan provisions governing benefit eligibility and benefit payments. The court noted that the plan provided three criteria (years of service, age, and covered hours) for eligibility, and notably did not require an application for benefits as a condition for entitlement to benefits. *Canseco*, 93 F.3d at 606–07.

The Ninth Circuit continued:

> We are not persuaded by the Trustees' assertion that the CLPT plan bars the retroactive payment of retirement benefits

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> to an employee who is eligible for those benefits. Nowhere does the CLPT plan provide that an employee's failure to submit an application for benefits will result in the retroactive loss of benefits for which that employee is eligible. Although an application is required to initiate *payment* of benefits, it does not follow from this procedural requirement that the failure to apply for payment of benefits entails the complete loss of those benefits retroactively.

Id. at 607.[1] *See also Cotter v. E. Conf. of Teamsters Ret. Plan*, 898 F.2d 424, 428 (4th Cir. 1990).

Although ERISA does not cover governmental entity plans, the Ninth Circuit did not decide *Canseco* on the basis of any unique aspect of ERISA, but pursuant to a straightforward contract analysis that is equally applicable to Plaintiffs' claim under the terms of the Plan. *See* 93 F.3d at 606 ("To determine whether the Retirees are entitled to retroactive retirement benefits despite their failure to apply for benefits, we look to the [ ] plan provisions governing benefit eligibility and benefit payments.")

Here, as in *Canseco*, nothing in the Plan document states that benefits will be forfeited if not applied for, the sections of the Plan document governing normal and early retirement benefits do not require an application for benefits to determine eligibility for benefits, and the payment section of the Plan document does not require an application as a condition of eligibility.[2] *See id.* at 609 ("By retroactively denying benefits to a class of workers who have indisputably earned them, the Trustees have, in effect, imposed on those workers an additional requirement of eligibility: the submission of an application for benefits.").

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[1] It is noteworthy that the Ninth Circuit reached its conclusion even though an abuse of discretion standard applied to review of the plan's decision denying retroactive benefits. *Canseco*, 93 F.3d at 605. Here, of course, a *de novo* standard applies.

[2] *See* 1-AA-216–17 (Plan § 6.05–06).

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Similar to the circumstances in *Canseco,* "[a]lthough an application is required for payments to begin, this administrative requirement does not operate to strip eligible retirees of the benefits they earned upon satisfying the three requirements" of the Plan. *Id.*

B. The Plan's Forfeiture Policy Is Highly Unusual.

Members of the Plan become vested and eligible to receive benefits under the Plan after accumulating five years of vesting service.[3] As the member's years of service for the University of California ("UC") thereafter increase until the Member becomes inactive or reaches retirement age, so does the amount of their vested benefits. The Plan provides for normal retirement at age 60.[4]

As stated *supra*, the Defendants have implemented a policy of denying inactive members' requests for payment of retroactive vested benefits where they are not claimed immediately upon attainment of age 60. Under this policy, inactive members who do not immediately claim benefits forfeit their vested pension benefits for any years or months for which the benefits were not claimed. As explained above, this policy is contrary to the plain and unambiguous terms of the Plan. However, assuming for argument's sake that there is some ambiguity, an important principle of contract interpretation—custom and usage in the industry[5]—warrants rejection of Defendants' "policy."[6]

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[3] *See* 1-AA-134 (Plan § 2.42).

[4] *Id*. The Plan also provides for early retirement between ages 50–60. 1-AA-216 (Plan § 6.05).

[5] *See, e.g., Horsemen's Benevolent & Protective Ass'n v. Valley Racing Ass'n*, 4 Cal. App. 4th 1538, 1560 (1992); Restatement (Second) of Contracts § 222 (Am. Law. Inst. 1981).

[6] *See also* Restatement (Second) of Contracts § 229 ("To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange.").

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Thus, the type of benefit forfeiture policy at issue here is highly unusual in both public and private-sector defined benefit pension plans—including private plans covered by ERISA and non-ERISA-governed plans. A cornerstone of ERISA is that vested benefits are not forfeitable.[7] Defendants' forfeiture policy is expressly prohibited by ERISA, as well as the Internal Revenue Code ("IRC"), the terms of which the Plan is administered. *See* ERISA § 203(a), 29 U.S.C. § 1053(a) ("Each pension plan shall provide that an employee's right to his normal retirement benefits is nonforfeitable upon the attainment of normal retirement age[.]"); I.R.C. § 411(a) (same).[8]

Indeed, the common understanding of the term "vested" is that it means a "non-forfeitable" ownership interest.[9] Thus, in the defined benefit context, "vested benefits" and "non-forfeitable" have been used synonymously prior to ERISA, in the legislative history of ERISA, and in normal usage in the pension field. *Nachman Corp.*, 446 U.S. at 376. In ERISA, the term "vested liabilities" is defined as "the present value of the

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[7] *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374–75 (1980) ("One of Congress' central purposes in enacting [ERISA] was to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid [] if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it.").

[8] While there are exceptions to this prohibition, none include employees who have terminated employment and elected to defer benefits. I.R.C. § 411(a)(3)(A)–(G). The Plan is administered and operates as an "eligible retirement plan" for purposes of the IRC. 1-AA-125–26 (Plan § 2.24).

[9] *See* Suzanne Kvilhaug, *Vesting: What It Is and How It Works*, Investopedia (May 8, 2025), https://www.investopedia.com/terms/v/vesting.asp; *see also* Currency editors, *What is vesting?*, Empower (Mar. 26, 2024), https://www.empower.com/the-currency/work/vesting-period#:~:text=What%20is%20vesting?,employees%20and%20incentivizes%20employee%20retention. ("Vesting is the process through which employees gain ownership of their employer-sponsored retirement funds or equity compensation over time.").

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immediate or deferred benefits available at normal retirement age for participants and their beneficiaries *which are nonforfeitable*." ERISA § 3(25), 29 U.S.C. § 1002(25) (emphasis added).

The Internal Revenue Service equates vesting with non-forfeitable ownership:

> 'Vesting' in a retirement plan means ownership. This means that each employee will vest, or own, a certain percentage of their account in the plan each year. An employee who is 100% vested in his or her account balance owns 100% of it and the employer cannot forfeit, or take it back, for any reason.[10]

The same is true in California, where a long line of cases have held that retirement benefits are deferred compensation which cannot be impaired once earned, and that they are earned when employed. *Kern v. City of Long Beach*, 29 Cal.2d 848 (1947); *Aitken v. Roche*, 48 Cal. App. 753 (1920); *O'Dea v. Cook*, 176 Cal. 659 (1917); *City of San José v. Howard Jarvis Taxpayers Ass'n*, 101 Cal. App. 5th 777 (2024).

UC itself recognized that vested benefits are non-forfeitable when it added section 12.10 to the Plan to avoid forfeitures. Plan Section 12.10, titled "Unclaimed Benefits and Accumulations," addresses the situation in which a Plan member is entitled to benefits but has not yet submitted a request for payment. 2-AA-347. Section 12.10 permits the Plan to withhold the vested benefits of eligible members who have not claimed their vested benefits but only until they come forward to claim them. Once the participants come forward, the Plan must pay them their earned vested benefits including "retroactive payments" going back to a "date of

[10] *Retirement topics - Vesting*, Internal Revenue Serv. (May 27, 2025), https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-vesting.

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eligibility", which, for the Plaintiffs, was their normal retirement age of 60.[11] Section 12.10 is entirely consistent with Section 14.01, which provides that all assets of the Plan "shall be held in trust for the exclusive benefit of Members and their Beneficiaries" and, except "to pay taxes and reasonable expenses" of the Plan, shall not be "used for or diverted to purposes other than for the exclusive benefit of Members and their Beneficiaries." 2-AA-350.

That plan forfeitures are highly unusual makes sense from a policy perspective because they interfere with the mobility of labor.[12] As explained by one commentator,

> [The] mobility of the American labor force is an essential factor in the efficient allocation of human and physical resources. ... Some workers stay with one employer from graduation from high school or college until retirement, but most change jobs several times during their careers. This mobility is an essential part of a dynamic society. … Pension forfeitures … have been described as a form of industrial feudalism.[13]

C. The Plan's Forfeiture Policy is Counter to Retirees' Expectations.

Since its founding in 1976, the Center has advocated for the rights of pension plan participants, beneficiaries, and alternate payees in both public and private retirement plan. This has included advocating that they are entitled to a reasonable expectation that once their pension benefits are vested, they are non-forfeitable. For example, in this case, Plaintiff-

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[11] 2-AA-347 (Plan § 12.10) ("If the person or persons entitled thereafter come forward and request payment and establish such entitlement, the amounts then due, *including retroactive payments* from date of eligibility, shall be paid accordingly.") (emphasis added).

[12] John H. Langbein *et al.*, *Pension and Employee Benefit Law* 110–11 (6th ed. 2015).

[13] *Id.* (quoting William C. Greenough & Francis P. King, *Pension Plans and Public Policy* 155–57 (1976)).

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Appellant Graf was "'shocked' and 'alarmed' to discover that, despite UC's representations to the contrary, it intended to claw back benefits she had already earned …, amounting to roughly $154,000 in lost benefits, excluding interest."[14] Similarly, Plaintiff-Appellant Mass was "'surprised and angry to learn that [he] had lost ten years of retirement benefits that [he] had earned,' amounting to over $172,000, excluding interest."[15] Gary Schlimgen, the Executive Director of Retirement Programs and Services for the University of California, stated in his deposition that Defendants often received requests for retroactive benefits from members who did not realize they were foregoing benefits by not claiming them by age 60.[16]

Additionally, as it has been administered, the Plan differs from most retirement plans and Social Security retirement benefits, where monthly benefit payments increase if they are claimed at later ages. Indeed, in this case, Mr. Schlimgen, a UC witness, stated in his deposition that Defendants knew that some Plan members believed the Plan operated like Social Security; *i.e.*, if they claimed their benefits later, their monthly amount would be adjusted upwards.[17] While the terms of the Plan do not appear to provide for actuarial equivalence for participants who choose to wait until after age 60 to claim their benefits, neither does the Plan contain terms that would deprive them of the benefits they have earned merely because they waited until after age 60 to apply for them.

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[14] *See* Pls.'-Appellants' Opening Br. at 21 (citation omitted).

[15] *Id*. at 22 (alterations in original) (citation omitted).

[16] *See* 3-AA-766 (Schlimgen Dep. 49:11–18, June 25, 2018). Defendants' argument that the Plaintiffs are seeking greater benefits under Section 12.10 than they would otherwise be entitled to is incorrect. Their earned benefits accrued and they became eligible to receive them at no later than age 60. Under the terms of the Plan, the date of their retirement application does not determine the eligibility date nor the value of their monthly retirement income. *See Canseco*, 93 F.3d at 609.

[17] Rep.'s Tr. of Proceedings vol. 16, 4616–17, Nov. 30, 2023.

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III. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court decisions.

RESPECTFULLY SUBMITTED this 11th day of August, 2025.

KELLER ROHRBACK L.L.P.

By _____

Jeffrey Lewis
Erin M. Riley
(*pro hac vice* pending)
Attorneys for Amicus Curiae
Pension Rights Center

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CERTIFICATION OF WORD COUNT

Pursuant to Rule 8.204(b)(4) and (c)(1) of the California Rules of Court, the undersigned hereby certifies that Amicis Curia Pension Rights Center Brief is produced using 13-point Times New Roman type and contains 2,416 words, according to the word count generated by the computer program used to produce the brief.

August 11, 2025.

By _____
Jeffrey Lewis

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PROOF OF SERVICE

I certify that I am employed in King County, Washington. I am over the age of eighteen years and not a party to the within action. My business address is Keller Rohrback L.L.P., 1201 Third Avenue, Suite 3400, Seattle, WA 98101.

On August 11, 2025, I served the following document: **APPLICATION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF APPELLANTS; AMICUS CURIAE BRIEF** on the parties for service as designated below:

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By email: I caused the document to be served via electronic mail on the parties in this action by transmitting true and correct copies to the following email address(es):

Kirsten Gibney Scott
RENAKER SCOTT LLP
505 Montgomery Street, Suite 1125 San Francisco, CA 94111
kirsten@renakerscott.com

Attorney for Plaintiffs-Appellants, Jason Mass and Karen Graf

Michael Rubin
Max M. Carter-Oberstone
ALTSHULER BERZON LLP
177 Post Street - Suite 300
San Francisco, CA 94108
mrubin@altber.com
mcarteroberstone@altshulerberzon.com

Attorneys for Plaintiffs-Appellants, Jason Mass and Karen Graf

Document received by the CA 1st District Court of Appeal.

Benjamin J Bauer
Brock J Specht
Paul J Lukas
NICHOLS KASTER, PLLP
4600 IDS Center, 80 South 8th St.
Minneapolis, MN 55402
bbauer@nka.com
bspecht@nka.com
lukas@nka.com

Attorneys for Plaintiffs-Appellants, Jason Mass and Karen Graf

Matthew Carl Helland
Daniel Solomon Brome
NICHOLS KASTER, LLP
235 Montgomery Street, Suite 810
San Francisco, CA 94104
helland@nka.com
dbrome@nka.com

Attorneys for Plaintiffs-Appellants, Jason Mass and Karen Graf

Jennifer Salzman Romano
Crowell & Moring LLP
515 South Flower Street - 40th Floor
Los Angeles, CA 90071
jromano@crowell.com

Attorneys for Defendants-Appellees

Kristin Janet Madigan
Joachim Beno Steinberg
Crowell & Morning LLP
3 Embarcadero Ctr, 26th Floor
San Francisco, CA 94111-4069
kmadigan@crowell.com
jsteinberg@crowell.com

Attorneys for Defendants-Appellees

By First-Class Mail: I am familiar with Keller Rohrback L.L.P.'s practice of collection and processing correspondence for mailing with the United States Postal Service, and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business pursuant to Code of Civil Procedure section 1013a.

The Hon. Evelio Grillo
Alameda County Superior Court
Administration Building, Dept. 21
1221 Oak Street
Oakland, CA 94612

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 11, 2025, at Seattle, Washington.

By: _____
Cathy Hopkins, Legal Assistant/Paralegal

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