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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

ORANGE COUNTY ATTORNEYS ASSOCIATION,

Petitioner,

v.

COUNTY OF ORANGE; BOARD OF SUPERVISORS OF THE COUNTY OF ORANGE,

Respondents.

Case No. 30-2013-00638110-CU-WM-CJC

AMICUS CURIAE BRIEF BY THE STATE OF CALIFORNIA

Date: May 30, 2014
Time: 1:30 p.m.
Dept: C25
Judge: The Honorable Thierry P. Colaw
Action Filed: March 15, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

CONSTITUTIONAL PROVISIONS

INTRODUCTION

In 2012, the Legislature passed and the Governor signed into law the Public Employees' Pension Reform Act of 2013 (PEPRA) to strengthen public pension systems throughout the State of California and ensure their financial solvency. This historic pension reform legislation capped pension benefits, increased the retirement age, stopped abusive pension spiking, and shifted a greater burden onto employees to fund their retirement.

In the course of this litigation between petitioner Orange County Attorneys Association and respondents County of Orange (County) and Board of Supervisors of the County of Orange, a number of questions have arisen regarding the meaning of certain sections of PEPRA, principally Government Code section 31631, which was added by PEPRA to the County Employees' Retirement Law of 1937. (CERL; Gov. Code, § 31450 et seq.) Interested in ensuring that PEPRA is interpreted and implemented as intended, the State of California (State) respectfully submits this amicus curiae brief to assist this Court in construing that statute.

The primary issue petitioner raises is whether, after PEPRA, the County retains its unilateral authority to require county employees to pay their share of pension contributions.[1] Petitioner argues that, absent agreement by the employees in the form of a Memorandum of Understanding (MOU), section 31631 now prevents the County from revoking a prior agreement to pay a portion of the employees' share of pension contributions and hence from requiring the employees to bear their share of the pension funding burden. In other words, petitioner contends that the County must continue to "pick up" its employee's share of pension contributions unless its members agree otherwise in an MOU.

Petitioner's interpretation is incorrect and the State urges the Court to reject it. The purpose animating enactment of PEPRA was precisely to shift *more* of the pension funding burden onto employees. It did not abrogate the County's longstanding authority to unilaterally require

[1] A second issue raised by petitioner is whether the County may continue to require its employees to also pay a portion of the contribution assigned to county *employers*, even though the previous MOU authorizing that practice has expired. While this issue involves the application of PEPRA, it appears to turn mostly on whether the County's interpretation of certain MOU terms and of their effect is valid. The State's amicus curiae brief does not directly address this issue.

employees to pay their share of pension contributions, and does not now condition that authority on the employees' agreement to assume that burden. Petitioner's interpretation is inconsistent with the plain meaning, structure, and purpose of the statute. In addition, by rejecting petitioner's interpretation, the Court can avoid a potential constitutional conflict.

BACKGROUND

I. RETIREMENT BENEFITS ARE FUNDED FROM EMPLOYEE AND EMPLOYER CONTRIBUTIONS

Retirement benefits for CERL members are funded over the employee's working career from employee contributions, employer contributions, and investment returns. (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 197 (2011-2012 Reg. Sess.) as amended Aug. 31, 2012, at p. 10.) Employee and employer contributions are set by counties based on specific benefit levels established by CERL (see, e.g., § 31676.12),[2] the actuarially determined cost of those benefits, and the amounts that accordingly need to be contributed each year to actuarially fund the benefits. (See Declaration of Mitch Tevlin in Support of Respondents' Opposition to the Petition for Writ of Mandate (Tevlin Decl.) at p. 2.)

Because employees and employers split the cost of benefits, each group has a unique rate at which it must contribute. These rates are set by the county board of retirement and then adopted by the county. (Tevlin Decl. at p. 2.) The rate at which an employee must contribute is known as an employee's "normal rate of contribution."

This normal *rate* determines what is known as the member's "normal contributions." (§ 31463 [defining "normal contributions" as "contributions by a member at the normal rates of contributions"].) Should a member leave the retirement system prior to retirement and withdraw his or her contributions, it is the member's (as opposed to employer's) "normal contributions" accumulated and credited over time that must be returned to the member. (See § 31628.)

[2] All statutory references are to the Government Code unless otherwise indicated.

II. SECTIONS 31581.1 AND 31581.2 ALLOW EMPLOYERS TO "PICK UP" THE CONTRIBUTIONS ASSIGNED TO A MEMBER

CERL contemplates that a member's "normal contributions" to the system, though *attributed* to that member, may not be *paid* for by that member. For decades, section 31581.1 has authorized county employers "pay up to one-half of the contributions normally required of members," in addition to the employer's assigned contributions. (§ 31581.1, subd. (a).) Meanwhile, section 31581.2 has authorized county employers "to pay any portion" of the member's assigned contributions. (§ 31581.2, subd. (a).) Thus, if the member's normal rate of contribution is seven percent, the employer can "pick up" up to three-and-one-half percent of the cost under section 31581.1, and up to seven percent under section 31581.2, reducing the amount the member actually pays, but leaving intact the amount of pension contributions attributed to that member. Section 31581.2, but not section 31581.1, further allows a member to be credited with the amount paid on his behalf, so that should he leave the system prior to retirement, he is entitled to withdraw all contributions credited, both the contributions he paid and those his employer paid on his behalf. (See § 31581.2, subd. (a) ["All payments shall be in lieu of wages and shall be reported simply as normal contributions and shall be credited to member accounts"].) Under both statutes, the employer pick-up reduces the pension funding burden for the employee.[3]

The employer, however, may unilaterally revoke the pick-up. Employer pick-ups authorized under section 31581.1 persist only as long as the authorizing resolution allows. (§ 31581.1, subd. (a) [providing that the employer pick-up is for the "period of time designated in the resolution providing for such payment"].) Section 31581.2 provides that a county can amend or repeal the pick-up "at any time," subject to the meet and confer requirements of the Meyers-Milias Brown Act (§§ 3500–3510) that apply to bargaining over terms of compensation. (§ 31581.2, subd. (b).) Section 31581.2 thus permits a county that has previously authorized a pick-

[3] The Public Employees' Retirement Law (PERL; § 20000 et seq.), which governs the California Public Employees' Retirement System (CalPERS), similarly authorizes employer pick-ups and provides that such pick-ups are to be credited to an individual as that individual's "normal contributions." Whereas CERL achieves these objectives through section 31581.2, PERL specifically defines "normal contributions" to "include[] contributions required to be paid by a member that are in fact paid on behalf of a member by an employer." (§ 20053.)

up to unilaterally withdraw it and instead require employees to pay for their own pension contributions. Significantly, the Legislature long ago made it clear that any pick-up agreed to by a County in an MOU also "shall not create vested rights in any member." (*Ibid.*)

ARGUMENT

I. PEPRA PRESERVES THE EMPLOYER'S UNILATERAL RIGHT TO END PICK-UPS

The parties do not dispute that on December 31, 2012, immediately before the effective date of PEPRA, the County had authority to unilaterally end employer pick-ups, whether because authority for the pick-ups had expired or because responsibility for the pick-ups had been originally assumed pursuant to section 31581.2, which expressly allowed revocation. At issue is whether PEPRA preserves or eliminates this authority. Petitioner argues that pursuant to section 31631, subdivision (a), PEPRA now permits an employer to revoke pick-ups only if it obtains agreement of its employees in the form of an MOU. Respondents disagree, primarily on the ground that PEPRA leaves sections 31581.1 and 31581.2 intact, thereby indicating the Legislature's intent to have these two sections continue to govern employer pick-ups in CERL counties.

But the State submits that it is section 31631, subdivision (b), that governs. Subdivision (b) is a carve-out from section 31631, subdivision (a), that preserves a county's unilateral authority to end pick-ups. It reads: "Nothing in [section 31631] shall modify a board of supervisors' or the governing body of a district's authority under law as it existed on December 31, 2012, including any restrictions on that authority, to change the amount of *member contributions*." (§ 31631, subd. (b), italics added.) Because the effect of giving or taking away a pick-up is to change "the amount of member contributions"—that is, the amount members actually pay into the system—PEPRA preserves the employer's right to unilaterally end pick-ups.

Petitioner dismisses the significance of subdivision (b) of section 31631 on the ground that "the amount of member contributions" refers only to "the 'member contribution' *rate*"—that is, the actuarially set rate that determines the contributions assigned to the employee but not necessarily paid by him. (See Memorandum of Points and Authorities in Support of Verified Petition for Writ of Mandate at pp. 10–11, italics added.) Under petitioner's interpretation,

subdivision (b) does not preserve the County's unilateral authority to end pick-ups but instead preserves only a ministerial power to adjust the amount actuarially set as the required employee contribution.

Neither the plain meaning of section 31631, subdivision (b), nor the structure of PEPRA as a whole supports petitioner's argument. The plain, commonsense meaning of "the amount of member contributions" is the *amount* members actually pay into the system. That language cannot be construed to mean a *rate*, as petitioners urge.[4] Nor can "member contributions" be construed to mean *normal contributions*, which is a term long defined in CERL that specifically denotes those contributions assigned to the employee at the normal rate of contribution, even if they are not necessarily paid for by the employee. (§ 31463.) Petitioner fails to show why this Court should disregard the well-settled "first step" of statutory construction, which is "to scrutinize the actual words of the statute," and give them their "plain and commonsense meaning." (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476; see also *Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 310 ["Absent a compelling reason to do otherwise, we strive to construe each statute in accordance with its plain language"]; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 ["Words used in a statute or constitutional provision should be given the meaning they bear in ordinary use"].) That meaning "is generally the most reliable indicator of legislative intent and purpose." (*People v. Manzo* (2012) 53 Cal.4th 880, 885.)

Petitioner's interpretation of the term "member contributions" also fails because PEPRA itself expressly distinguishes "member contributions" from "normal contributions." Section 20516 explains that "member contributions" may embrace "contributions *over and above* normal

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[4] In addition, had the Legislature intended "the amount of member contributions" in subdivision (b) of section 31631 to mean the "normal rate of contribution of members," it likely would have used that far more specific term, as it did elsewhere in PEPRA. (§ 31631.5, subd. (a)(1) [limiting the maximum member contribution rate to "no more than 14 percent above the applicable normal rate of contribution of members"]; *id.*, subd. (a)(2) ["Applicable normal rate of contribution of members means the statutorily authorized rate applicable to the member group as the statutes read on December 31, 2012"].) That the Legislature did not do so further suggests it meant something different. (See *Orange County Air Pollution Control Dist. v. Public Util. Com.* (1971) 4 Cal.3d 945, 954, fn. 8 ["The courts assume that in enacting a statute the Legislature was aware of existing, related laws and intended to maintain a consistent body of statutes," quotation marks omitted].)

contributions otherwise required" (§ 20516, subd. (b), italics added)), such as contributions covering an *employer* contribution (*id.*, subd. (a)). In other words, the term "member contributions" means the contributions actually paid by the employee, no matter whose share of the funding burden is being paid. That understanding of "member contributions" is also consistent with the use of the term in section 31641.2, a part of CERL. That section permits a member to receive retirement credit for past public service if a member pays *two times* the contributions that he or she would have made had he or she been a member during that length of time. However, rather than denote only the amount of the member's normal contributions as "member contributions," section 31641.2 uses that term to refer to *all* of the contributions the member pays into the system. (§ 31641.2, subd. (b).)[5] The argument that the term in section 31631 instead refers only to a member's "normal contributions" is thus untenable. (See *Lungren*, *supra*, 45 Cal.3d at p. 735 [requiring "provisions relating to the same subject matter" to "be harmonized to the extent possible"]; *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 743 ["[T]he various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole"].)[6] Instead, "effect should be given" to the Legislature's choice of words in section 31631 by interpreting "the amount of member contributions" according to its plain meaning and how that term is used elsewhere in both CERL and PEPRA. (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 18.)

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[5] The title of CERL's Article VI, "Members' Contributions," provides further evidence that the term "member contributions" has a broader meaning than "normal contributions." That article addresses not only a member's "normal contributions" (§ 31463), but also a member's "additional contributions" (§ 31465).

[6] Petitioner's reference to various other sections of CERL to support its argument that "member contributions" refer simply to the member's normal rate of contribution is unavailing. Only one of the four sections petitioner cites (see Memorandum of Points and Authorities in Support of Verified Petition for Writ of Mandate at p. 11) even uses the term "member contributions." That section—section 31453.5—uses the phrase "required member contributions" not to refer to a member's normal rate of contribution, but rather to explain how the normal rate of contribution is to be determined. In addition, nothing about that section's reference to "the required member contributions" indicates that the term "member contributions" is limited only to a member's normal contributions. In contrast, section 20516 expressly indicates that the term "member contributions" *is* distinct from "normal contributions."

Once subsection (b) is properly understood to preserve the County's preexisting authority to change the amounts members actually contribute, it is clear that carve-out embraces the authority to end pick-ups.

II. READING SUBDIVISION (B) OF SECTION 31631 TO PRESERVE COUNTY AUTHORITY TO CHANGE WHAT MEMBERS PAY INTO THE SYSTEM DOES NOT DEPRIVE SUBDIVISION (A) OF MEANING

Petitioner objects to the State's reading of subdivision (b) on the ground that it "would deprive subsection (a) of meaning." (Memorandum of Points and Authorities in Support of Verified Petition for Writ of Mandate at p. 9.) According to petitioner, "subsection (b) cannot be interpreted to allow unilateral imposition of increases absent an approved MOU because this would render meaningless the subsection (a) clause requiring an MOU." (*Id.* at p. 10.)

This is a gross overstatement. While subdivision (b) excludes attempts to end employer pick-ups from the scope of the MOU requirement, it does not similarly exclude attempts by employers to institute *reverse pick-ups*, whereby employees pay not only their required contributions, but also some of the *employer's* required contributions. Under subdivision (a), the State agrees that attempts to require employees to pay *more than* their normal contributions must have employee agreement in the form of an MOU. Consequently, the MOU requirement of subdivision (a) is anything but meaningless under the State's reading of subdivision (b). Indeed, it operates in precisely the same way as PEPRA's other MOU requirements, which also apply only in the event an employer tries to make its employees pay part of the employer's normal contributions. (See § 7522.30, subd. (e); § 20516.) Petitioner's claim that the State's reading deprives subdivision (a) of meaning lacks merit.

III. READING SUBDIVISION (B) TO PRESERVE COUNTY AUTHORITY TO END PICK-UPS ADVANCES PEPRA'S GOAL OF SHIFTING MORE OF THE PENSION FUNDING BURDEN ONTO EMPLOYEES

As demonstrated, the meaning of section 31631, subdivision (b), is not ambiguous. However, even if it were, under the rules of statutory construction, subdivision (b) must be construed to preserve county authority to end pick-ups. Only that construction harmonizes subdivision (b) with PEPRA's clear intent. (See *Renee J,. supra*, 26 Cal.4th at p. 743 ["When used in a statute [words] must be construed in context, keeping in mind the nature and obvious

purpose of the statute where they appear"]; *Lungren*, *supra*, 45 Cal.3d at p. 735 [explaining that in the case of statutory ambiguity, "[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act"].)

That intent is unambiguously to shift onto employees a greater share of the burden for funding their own pensions, including, at a minimum, their normal retirement contributions. PEPRA makes this intent manifest in several ways. One way is by establishing a "50-50" standard for sharing between employers and employees the "normal cost" of benefits. (§ 7522.30, subd. (a); § 20516.5, subd. (a); § 20683.2; § 31631.5, subd. (a).) Another is by discouraging or limiting employer pick-ups of normal contributions, which are incompatible with PEPRA's "equal sharing" policy. (§ 7522.30, subd. (a) ["The standard shall be . . . that employers not pay any of the required employee contribution"]; § 20516.5, subd. (a) ["It shall be the standard . . . that employers not pay any of the required employee contribution"]; § 20683.2 ["It shall be the standard . . . that employers not pay any of the required employee contribution"].)

A third way PEPRA makes clear its burden-shifting objective is by removing obstacles for reverse pick-ups. Before PEPRA, as a practical matter it was not possible for employers to collectively bargain for reverse pick-ups. This was because an act of the Legislature was required to authorize treating such additional employee contributions as "accumulated contributions" (§ 31467) that a member could withdraw if he or she exited the system before retirement.[7] Section 31631 removes this obstacle by both authorizing reverse pick-up agreements and providing that

[7] One example of such pre-PEPRA legislative authorization is section 31485.10, as amended by Statutes 2011, chapter 390, section 1. The striking similarity between the text of section 31485.10 and that of section 31631 suggests that the purpose of the former may be useful for understanding the purpose of the latter. (Compare § 31485.10, subd. (c) ["A resolution . . . may require members to pay all or part of the contributions by a member or employer, or both, that would have been required . . . . The payment by a member shall become part of the accumulated contributions of the member. For those members who are represented by a bargaining unit, the payment requirement shall be approved in a memorandum of understanding executed by the board of supervisors and the employee representatives"] with § 31631, subd. (a) ["[A] board of supervisors . . . may, by resolution, ordinance, contract, or contract amendment under his chapter, without a change in benefits, require that members pay all or part of the contributions of a member or employer, or both, for any retirement benefits provided under this chapter. All of those payments are hereby designated as employee contributions. For members who are represented in a bargaining unit, the payment requirement shall be approved in a memorandum of understanding executed by the board of supervisors . . . and the employee collective bargaining representative"].)

contributions paid by a member toward *either* the member's or employer's normal contributions are to be designated as "employee contributions" (§ 31631, subd. (a) ["All of those payments are hereby designed as employee contributions"].)[8] In doing so, section 31631—like its counterpart, section 20516, which applies to "classic" employees of agencies contracting with the California Public Employees' Retirement System—underscores that PEPRA, *at a minimum*, aims to shift the pension funding burden onto employees so that employers stop "picking up" employees' normal contributions and employees pay them instead.

This purpose cannot be squared with petitioners' theory, under which section 31631's MOU requirement applies broadly to *any* changes in member contributions, regardless of whether the employee is covering part of an employer's contributions or his own normal contributions. The effect of reading the MOU requirement so broadly is an implied repeal of section 31581.2, the withdrawal of flexibility long given to CERL counties to unilaterally end employer pick-ups, and the creation of a *new* obstacle to having employees pay their normal contributions.

Section 31631 cannot fairly be interpreted in a manner so at odds with PEPRA. When the meaning of statutory language is not clear, a court must "select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272, quotation marks omitted.) Here, "the construction that comports most closely" with PEPRA's purpose is reading subdivision (b) to narrow the scope of subdivision (a)'s MOU requirement to preserve counties' preexisting authority to change the amounts a member is to contribute. This interpretation ensures PEPRA does not diminish the power of CERL counties to unilaterally make employees pay their own

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[8] Petitioner trumpets the fact that, under the State's interpretation, the term "member contributions"—which has long been used in both PERL and CERL to refer generically to what a member contributes to his or her pension—has a meaning similar to that of "employee contributions," a newly defined term under PEPRA. (Memorandum of Points and Authorities in Support of Verified Petition for Writ of Mandate at pp. 10–11.) But petitioner has failed to show why the plain meaning of "member contributions" should be disregarded. In addition, the Legislature's use of another term with a similar meaning is not a reason to construe the term "member contributions" in a way that contradicts both the meaning of that term as used elsewhere in CERL and PEPRA and PEPRA's purpose.

normal contributions. Moreover, it harmonizes the scope of PEPRA's various MOU requirements so that all apply only to efforts to make employees pay part of an employer's normal contributions. (See § 7522.30, subd. (e); § 20516.)

In contrast, petitioner's interpretation is contrary to this legislative intent and leads to an outcome strikingly at odds with the objectives of PEPRA. Under its interpretation, subdivision (b) has no purpose other than to preserve a CERL county's ministerial authority to establish a member's normal contributions. According to petitioner, this in turn means that section 31631 as a whole was intended to impliedly repeal section 31581.2 and—contrary to the unambiguous goal of the Legislature in enacting PEPRA—make it *harder* for counties to require employees to pay their normal contributions. Such an interpretation fails to "construe the words in question in context, keeping in mind the nature and obvious purpose of the statute." (*People v. Murphy* (2001) 25 Cal.4th 136, 142, quotation marks omitted.)

IV. THE COURT SHOULD AVOID ADOPTING AN INTERPRETATION THAT COULD RENDER THE STATUTE UNCONSTITUTIONAL

The doctrine of construing a statute to avoid constitutional conflicts is "well settled." (*Metromedia, Inc. v. City of San Diego* (1982) 32 Cal.3d 180, 186.) According to the California Supreme Court, "if feasible within bounds set by their words and purposes, statutes should be construed to preserve their constitutionality." (*Ibid.*) Consequently, "[i]f the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution." (*Ibid.*)

Accordingly, this Court should also consider the possible constitutional conflict identified by respondents and amicus curiae California State Association of Counties and California Special Districts Association. They argue that if, as petitioner argues, section 31631 deprives CERL counties of authority to eliminate employer pick-ups absent employee agreement, section 31631 would violate the State's Home Rule Doctrine," as established by sections 1(b) and 11(a) of

article XI of the California Constitution.[9] That doctrine ensures that charter counties have "the sole authority to determine compensation for [their] employees and [that] this authority cannot be delegated to a private body." (Respondents' Memorandum of Points and Authorities in Support of Opposition to Petition for Writ of Mandate at p. 13.) That potential constitutional conflict is avoided by adopting an interpretation of the statute that preserves preexisting county authority to end employer pick-ups.

CONCLUSION

For all of these reasons, the State urges this Court to reject petitioner's interpretation of section 31631 in favor of reading subdivision (b) to preserve existing county authority to modify employer pick-ups.

Dated: March 21, 2014

Respectfully Submitted,

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[9] Significantly, this potential constitutional conflict is triggered only if PEPRA is read not to preserve a CERL county's authority to unilaterally end *employer* pick-ups. Neither respondents nor amicus curiae argue a Home Rule issue is presented in the event the Court rules against the County only on the *reverse* pick-ups question.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Orange County Attorneys Association v. County of Orange, et al.**

No.: **30-2013-00638110-CU-WM-CJC**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On March 21, 2014, I served the attached **AMICUS CURIAE BRIEF BY THE STATE OF CALIFORNIA** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 21, 2014, at San Francisco, California.

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Declarant

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