

No. S203561

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JULIE R. GREEN,

Appellant,

v.

TIMOTHY P. GREEN,

Respondent.

) Court of Appeals No. A129436

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(Superior Court No. D08-01292)

**SUPREME COURT  
FILED**

JUL 16 2012

Appeal from a Judgment  
Of the Superior Court, County of Contra Costa  
The Honorable Susan Fenstermacher, Judge  
The Honorable Charles B. Burch, Judge  
And Upon Opinion  
Of the First District Court of Appeals, Division Four

Frank A. McGuire Clerk  
Deputy

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ANSWER TO PETITION FOR REVIEW

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## INTRODUCTION

This case addresses the characterization of California Public Employees' Retirement System ("CalPERS") public service credit for active military service retirement benefits ("military service credit") as community or separate property. In a decision published at *In re Marriage of Green* (2012) 205 Cal. App. 4th 1475, the California Court of Appeals, District One properly held that the military service credit at issue is community property to be apportioned between the parties. Mr. Green has not presented any compelling argument as to why this decision should be reviewed by the Supreme Court of California and so the Petition for Review should be denied.

## ARGUMENT

There is no reason, articulated in Mr. Green's Petition for Review or otherwise, why the Court of Appeals decision need be reviewed by the Supreme Court of California. Mr. Green argues that this Court should grant review "to further its goals of addressing important issues of law and promoting clarity and fairness in the lower courts" (Petition 5) and because "this case presents important questions of first impression" (Petition 11). Although Mr. Green claims that review should be granted pursuant to California Rules of Court, rule 8.500(b)(1), he has not shown that Supreme

Court of California review is “necessary to secure uniformity of decision or to settle an important question of law.” (Cal. Rules of Court, rule 8.500(b)(1).) There are no conflicting decisions at issue and the Court of Appeals settled all raised questions of law.

The Petition for Review has not met the standard for Supreme Court of California review and Mr. Green has not presented a convincing argument that there are unaddressed issues of law; has overstated the potential impact of this case; and has misstated the Court of Appeals holding. Review should, therefore, be denied.

#### I. THE COURT OF APPEALS FULLY ADDRESSED ALL RAISED QUESTIONS OF LAW

Mr. Green’s argument that there are unaddressed issues of law is unconvincing. Mr. Green’s Petition for Review claims that the Court of Appeals opinion “leaves many unanswered questions which will result in a deluge of litigation unless this Court’s guidance is provided.” (Petition 13.) There are no such unanswered questions and the Court of Appeals decision fully settled the very narrow question of law presented by this case – whether a specific and highly unique type of public retirement benefit should be characterized as community or separate property upon the dissolution of a marriage of a benefit recipient.

### **A. Government Code Section 21034 Does Not Have Any Bearing On This Case**

Mr. Green's claim that review should be granted because the Court of Appeals did not address an entirely irrelevant statute does not establish grounds for review. Mr. Green claims that "Also at issue, where as here the employee spouse was single when he started working for the CalPERS employer, is the effect of Government Code section 21034, which provides that purchased service credit are to be credited "as it would be credited if the member had been in state service during his or her public service."" (Petition 12.) Government Code section 21034 is not relevant in this case. Mr. Green's partial quotation of the statute implies that section 21034 somehow impacts the credits at issue. This is not the case. Section 21034 reads, "Public service may be credited as current or prior service, or both, as it would be credited if the member had been in state service during his or her public service."

For a local member like Mr. Green, prior service is defined as service which the member completed "prior to the effective date of the contract under which he or she became a member." (Gov. Code, § 20055.) Mr. Green has never alleged that there is any issue of prior service in this case and even if there was, this does not impact the community property question at issue.

## **B. There Is No Relevant Community Investment Opportunity Issue**

Petitioner claims that the opinion is deficient in that it “fails to provide guidance on whether eligibility for premarital service credits is a community investment opportunity that a spouse has a fiduciary duty to exercise during marriage.” (Petition 14.) Any argument regarding fiduciary duties of spouses in relation to investment opportunities is not relevant to the legal question at issue - the characterization of retirement benefits at dissolution. This argument is particularly unavailing as, in his Answer in the Court of Appeals proceedings, Mr. Green actually argued that “the military retirement credits were not a community ‘investment opportunity.’” (Answer 22.)

Furthermore, this was not raised before the Court of Appeal and, pursuant to California Rules of Court, rule 8.500(c)(1), should not be considered by the Supreme Court of California.

## **C. Review Should Not be Granted On The Basis of Unaddressed Hypothetical Fact Patterns**

Mr. Green states “The decision offers no guidance for how its analysis would apply when premarital service credits are purchased during marriage in a lump sum using separate property.” (Petition 13.) This hypothetical fact pattern is not relevant and the Courts of Appeals’

responsibility is to address the fact pattern presented at the trial court.

There is no question about the fact that Mr. Green made a choice, of his own free will, to purchase military service credit with community funds on an installment plan during marriage. The Court of Appeals and the Supreme Court of California are not charged with addressing any of the endless other hypothetical scenarios that could exist. Having thus fulfilled its responsibility to issue a decision based upon the facts as determined at trial, the Court of Appeals decision need not be reviewed.

## II. THE PETITION FOR REVIEW MISSTATES THE COURT OF APPEALS HOLDING

Petitioner uses a misstatement of the Court of Appeals decision to claim that it represents a departure from prior holdings. There is no such departure and the Court of Appeals decision sufficiently addresses the issue in accordance with the current body of community property case law. The Court of Appeals held that “Timothy held no such unconditional, contractual right to the payment of benefits, or even a nonvested right to such credit, before he actually purchased military service credit during the parties' marriage, using community funds.” (*In re Marriage of Green* (2012) 205 Cal. App. 4th at 1487.) The opinion further explains,

The condition wholly within his control was the right to enter into a contract with CalPERS for the purchase of military service credit in the first place. Before that point, he did not hold a “contractual right [to the military service credit], derived from the terms of the



employment contract.” (*In re Marriage of Brown* (1976) 15 Cal. 3d 838, 845 [126 Cal. Rptr. 633, 544 P.2d 561] italics added.) He instead held no more than an expectancy, because he held “no enforceable right” to the service credit.

(*Ibid.*)

While the Court does identify the uncertainty that the employer would continue to offer the military service credit option as a factor in establishing that the ability to purchase the credit was only an expectancy and not a property right, it is not the determinative factor. Other factors include continued employment with a CalPERS participant, Government Code section 21024 remaining in effect, one’s employer continuing to offer the option to buy military service credit pursuant to the statute, and, most importantly, payment of the requisite amount. (*Id.* at 1489.)

Mr. Green misses the subtlety of the decision, claiming that it holds that “because an employer may change what benefit it offers, public service credit are mere expectancies and not contingent vested rights.” (Petition 12.) Mr. Green uses his faulty interpretation of the holding to allege “a significant modification or departure from prior holdings characterizing retirement benefit rights.” (*Ibid.*) The decision is clear in explaining that, utilizing the reasoning of the seminal case on retirement benefits property rights at dissolution, *In re Marriage of Brown*, Mr. Green’s employment contract did not establish a contractual right to the service credit and, therefore, can only be considered an expectancy dependent upon a number of factors, including the employer’s ability to cancel military service credit

purchase opportunities. The Court of Appeals decision is in line with the current body of community property case law and review should not be granted on any claimed modification or departure from prior law.

### III. THIS CASE DOES NOT HAVE “WIDE RANGING” RAMIFICATIONS

While this case is undoubtedly very important to the parties and does have the potential to effect a small number of others beyond the parties, Mr. Green greatly overstates the potential impact. Mr. Green claims “ramifications of this case are wide ranging, extending far beyond the over 1 million employees covered by the CalPERS system” (Petition 4) and “the valuable public service credits at issue here are a common feature of numerous public retirement plans, and raise substantial questions affecting the property rights of a large number of California families” (Petition 11). He further claims this case effects many other public retirement systems and even private sector ERISA plans.

This case will affect only CalPERS members who have purchased retirement credit under a particular statutory scheme if and when that member dissolves a marriage. While there may be a number of kinds of public service in the CalPERS system with different costing systems, there are only a handful of service credit types with substantially similar schemes to that in question. That is, where the employee pays both the employer

and employee contributions as set out under California Government Code sections 21050 and 21052. In addition to military service credit (Gov. Code, §§ 21024 (for current members), 21027 (already retired local member), 21029 (already retired state or school members) and, 21029.5 (national guard service)), this includes service as a fellow with a branch of the California state government (Gov. Code, § 21020.5), service in the Peace Corps or AmeriCorps (Gov. Code, § 21023.5); employment with a independent data processor (Gov. Code, § 21025.5), and employment in a program sponsored by the Comprehensive Employment and Training Act of 1973 (Gov. Code, § 21030). This case has the potential to impact the property rights of a CalPERS member who has purchased one of these five kinds of service credits and his or her spouse only if and when the member seeks a dissolution of marriage. This is a much more limited pool than Mr. Green would have the Court believe.

Mr. Green does not explain how this case will affect other retirement systems. The other public retirement system that he cites offer credit under an entirely different statutory scheme and so it is overly dramatic to claim all such systems will be impacted by this CalPERS case. The eligibility, costing and purchase procedures are each governed by the systems' regulations, none of which are identical. For example, The Legislators' Retirement Law and State Teachers' Retirement System allow purchase of service credit for military service on the basis of one year of credit for each

five years of credited service in this system (Gov. Code, § 9356.2; Ed. Code, § 22806); the County Employees Retirement Law allows for the purchase of 1 month credit for each 2 months of service (Gov. Code, §§ 31479.3, 31641.1, 31641.2); and CalPERS and the Judicial Retirement Law each offer one year of credit for each one year of service (Gov. Code, § 75031.5). These systems are all unique and analysis of any benefits granted under each system would be analyzed under the applicable statutory scheme. This case addresses only that small universe of CalPERS service credits described above and will not have the wide ranging impact Mr. Green claims.

#### CONCLUSION

Mr. Green has not shown that Supreme Court of California review is appropriate or needed for this case. The Court of Appeals decision settled the raised questions of law and should stand as the decision in this matter. Ms. Green respectfully requests that the Court deny the Petition for Review.

DATED: July 16, 2012

Respectfully Submitted,


By



April Rose Sommer  
Attorney for Appellant  
Julie R. Green

## CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c), I hereby certify that this brief contains 2216 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By   
April Rose Sommer  
Attorney for Appellant  
Julie R. Green

## PROOF OF SERVICE

I am employed in the County of Contra Costa, State of California. I am over the age of 18 years and not a party to the within action; my business address is 460 Center Street #6937, Moraga, CA 94570.

On July 16, 2012, I served the following document, ANSWER TO PETITION FOR REVIEW, by placing a true and correct copy thereof in a sealed envelope with postage affixed hereon fully prepaid in the United States mail at San Francisco, California, addressed as set forth below.

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

By

  
April Rose Sommer