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September 27, 2016

Chief Justice and Honorable Members of the Supreme Court
Supreme Court of California
350 McAllister Street
Room 1295
San Francisco, CA 94102-4797

Re: *Amicus Curiae* Letter in Support of Petition for Review in the Case of *Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.* (2016) 2 Cal.App.5th 674;
Court of Appeal, First Appellate District, Case No. A139610
California Supreme Court Case No. S237460

Dear Chief Justice and Associate Justices of the Supreme Court:

Pursuant to California Rule of Court 8.500(g), this *amicus curiae* letter in support of the Petition for Review filed in the above-captioned matter is being submitted on behalf of the Los Angeles Police Protective League, Peace Officers' Research Association of California (PORAC), PORAC Legal Defense Fund, California Association of Highway Patrolmen, Ventura County Deputy Sheriffs' Association, Orange County Employees Association, Orange County Professional Firefighters Association IAFF Local 3631, Cal Fire Local 2881, California Statewide Law Enforcement Association, San Francisco Police Officers Association, California Correctional Peace Officers Association (CCPOA), Deputy Sheriffs' Association of Santa Clara County, Association of Orange County Deputy Sheriffs (AOCDS), Association of California State Supervisors, Sacramento Housing and Redevelopment Agency Employees Association, Law Enforcement Management Unit of Riverside County (LEMU), Orange City Firefighters Association, IAFF Local 2384, Oxnard Firefighters, IAFF Local 1684, Costa Mesa Police Association, Professional Peace Officers' Association of Los Angeles County (PPOA), Association of Los Angeles Deputy Sheriffs (ALADS), El Segundo Police Officers' Association, San Bernardino Sheriffs' Employees' Benefit Association (SEBA), Ventura County Professional Firefighters' Association, IAFF Local 1364, Oxnard Peace Officers' Association, Pasadena Firefighters Association, Criminal Justice Attorneys' Association of Ventura

County, Santa Monica Firefighters, IAFF Local 1109, City of Orange Police Association, Beverly Hills Police Officers Association, Laguna Beach Police Employees' Association, Manhattan Beach Police Officers' Association, Irvine Police Association, Fullerton Firefighters' Association, IAFF Local 3421, Long Beach Lifeguard Association, Vernon Firemen's Association, Hawthorne Police Officers' Association, Santa Barbara County Firefighters Local 2046, Santa Monica Police Officers' Association, Newport Beach Police Association, San Luis Obispo Government Attorneys' Union, Santa Barbara City Fire Management Association, California State University Employees Association, Santa Monica Administrative Team Associates, South Gate Police Officers Association, South Gate Police Management Association, Redlands Police Officers Association, Deputy Sheriffs' Association of Santa Barbara County, Supervisory Team Association of Santa Monica, Costa Mesa Firefighters Association, Riverside County Deputy District Attorney Association, Newport Beach Firefighter's Association, Riverside Police Administrators' Association, Riverside City Firefighters' Association, IAFF Local 1067, Riverside County Attorneys' Association, Deputy Sheriffs' Association of San Diego County, San Diego Deputy District Attorneys' Association, San Diegans Against Crime, San Jose Police Officers' Association, Specialized Peace Officers' Association of Ventura County (SPOAVC), California District Attorneys Association, Fountain Valley Professional Firefighters Association, Upland Professional Firefighters Association, Long Beach Firefighters, Local 372 and the Downey Police Officer's Association.

The entities described above are employee organizations representing tens of thousands of dedicated public servants throughout the State of California. The employees they represent have earned, as part of the consideration for services performed, deferred compensation in the form of a particular defined benefit pension. Throughout much, if not all, of their careers, they have relied on the ability to receive these promised allowances when they retire (assuming they meet all conditions precedent) in planning their futures and those of their families. As we will proceed to explain, these individuals have an overwhelming interest in ensuring that the misguided decision of the Court of Appeal, which provides that the legislature, retirement systems and/or government employers may undercut those benefits without granting a comparable alternative, is reviewed and overturned by this Court.

It is imperative that this Court grant the Petition for Review to settle an important question of law and to secure uniformity of decision, within the meaning of California

Rule of Court 8.500(b)(1), by rendering a Decision that clarifies the well-established principle that, while specified pension entitlements already earned in return for valuable services being rendered may be modified as to form, an alteration of their **substance** would impair contractual obligations in violation of Article I, Section 9 of the California Constitution. Otherwise, the legitimate expectations of millions of public employees throughout the State derived from the conclusions reached by, and the pronouncements contained in, the numerous reported Opinions of this Court and Courts of Appeal for approximately one hundred years will be completely obliterated.[1]

The above reference to a "modification as to form" is based upon the consistent language contained in virtually all of those published Decisions that allows the specified provisions of a particular pension plan or program already earned to be altered so long as any resulting disadvantages would be offset by comparable advantages. The decision of the Court of Appeal decimates that well-established proposition by permitting changes that reduce the **substance** of the earned benefit through its broad holding that modifications resulting in disadvantages do not necessarily have to be replaced by comparable advantages.

What is most astonishing about the Court of Appeal's Opinion is that it is based upon the insulting premise that this Court **carelessly** altered the applicable standard for modifying earned pension benefits by cavalierly replacing the word "should" with the word "must" in *Allen v. Board of Administration* (1983) 34 Cal.3d 114. (*Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.* (2016) 2 Cal.App.5th 674, 697-698.) Implicit in the Court of Appeal's decision is that, before this language change, the law was well-settled that while any disadvantages **should** be replaced with offsetting advantages that "trade" did not need to occur.

However, the Court of Appeal ignores the fact that the actual holdings of this Court before *Allen* clearly support the conclusion that, in order to survive judicial scrutiny, a modification to pension rights **must** be offset by comparable advantages. For

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[1] Furthermore, any actions by the legislature, retirement associations or public employers in response to the invitation of the Court of Appeal is likely to result in expensive and costly litigation throughout the state, thereby tying up critical resources of those public agencies.

example, in *Allen v. Long Beach* (1955) 45 Cal.2d 128, this Court stated that a certain City Charter amendment "substantially decreases plaintiffs' pension rights without offering any commensurate advantages." (*Id.* at 131.) This Court proceeded to hold that a second additional change "raises the cost to [employees] of pension protection without securing any advantage in addition to that which they already enjoyed." (*Id.* at 132.) Accordingly, the alterations were held to impair the contractual interests of the employees.

Similarly, in *Abbott v. Los Angeles* (1958) 50 Cal.2d 438, this Court undertook a lengthy analysis of the alleged comparable benefits provided as a result of certain pension changes. (*Id.* at 449-454.) In determining that the changes were not properly offset by comparable advantages, thereby impairing the earned contractual entitlements of the employees, this Court concluded (at 454): "Regardless of the 'thinking of the time,' however, under the holding of the *Allen* [*v. City of Long Beach*] case the substitution of a fixed for a fluctuating pension ***is not permissible unless accompanied by commensurate benefits*** -- benefits which are not shown to have been granted in the present case." (Emphasis added.)

Finally, in *Betts v. Board of Administration* (1978) 21 Cal.3d 859, this Court again restated the test that "changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages." (*Id.* at 864.) However, the Opinion proceeded to hold that the modification in that case was not permitted because no new advantages were provided, stating (at 867-68): "We therefore conclude that the 1974 amendment to section 9359.1 cannot constitutionally be applied to petitioner, because the amendment withdraws benefits to which he earned a vested contractual right while employed. **No 'comparable new advantages'** to petitioner **appear in the plan which can offset the detriment** he has suffered by replacement of a 'fluctuating' system of benefit computation with a 'fixed' system." (Emphasis added.)

Accordingly, even though the prior decisions of this Court did not state that disadvantages ***"must"*** **be** offset by comparable new advantages, those decisions make clear that such new comparable advantages **were required** in order for the modification to be reasonable. Left unsaid in the decision of the Court of Appeal is why, if the new advantages were not a requirement, this Court has repeatedly analyzed whether a pension modification provided new advantages and, when the modifications did not provide any

comparable new advantages, held that the modifications impaired the contractual interests of the employees.

Interestingly, not one case cited by the Court of Appeal (or any other published Decision I was able to locate) involved a situation where an appellate Court held that, while normally disadvantages resulting from the alteration of a specified benefit **should** be replaced by comparable offsetting advantages, based upon the circumstances presented in the case, that replacement **need not** occur. No Opinion that referenced the word "should" decided, or even stated, anything to the effect that "while you should replace offsetting advantages, you don't have to".

The cases discussed and emphasized in the Opinion of the Court of Appeal in connection with that proposition involved situations where the actual ruling was that there was no contractual impairment because the asserted alteration was consistent with the earned vested right. For example, in the case most frequently cited as support by the Court of Appeal, *Miller v. State of California* (1977) 18 Cal.3d 808, the earned benefit provided a certain allowance upon retiring at age 70. The affected individual asserted that he was deprived of his vested right to receive the pension attendant to that goal because his employer imposed a mandatory retirement age of 67. This Court correctly concluded (at 817-18) that, because that individual did not possess a vested contractual right to remain in public employment until he reached 70, the loss of the potential benefit if that age were attained during employment is not an impairment of a **vested pension right**.

Similarly, the cases involving a fluctuating pension that is a percentage of the income earned by a current employee in the position formerly occupied by the retiree (see *e.g.*, *Casserly v. City of Oakland* (1936) 6 Cal.2d 64 and *Terry v City of Berkeley* (1953) 41 Cal.2d 698) are readily distinguishable from the situation presented in this case because the reduction in the retirement allowance in those cases was not an impairment but, instead, resulted from the application of a condition attached to the earned benefit (*i.e.*, increases or decreases in the salary of a current employee in the same position). Similarly, in *International Association of Firefighters v. City of San Diego* (1983) 34 Cal.3d 292, 300-303, this Court correctly differentiated the asserted impairment in that case from its earlier decision in *Allen v. City of Long Beach, supra*, 45 Cal.2d 128 because, unlike *Allen* where an increase in the employee contribution rate was held to be

an unconstitutional impairment, the San Diego rate increase was based upon an actuarial change in assumptions that was a condition attached to the vested right that was earned.

The Court of Appeal observed (at 2 Cal.App.5th 697-99) that in *Allen v. Board of Administration*, *supra,* which was decided in July 1983, this Court replaced the word "should" with the word "must." However, there are two other plausible conclusions that could be drawn from this action other than the one reached by the Court of Appeal. One would have been to conclude that this Court intended to change the standard from "should" to "must." The other, and more likely, conclusion is that this Court was consistently using the words "should" and "must" interchangeably.[2]

Probably the most revealing evidence of the intention of this Court to use the words "should" and "must" interchangeably is the fact that approximately one month after the *Allen* Decision this Court resumed using the word "should" in the *International Association of Firefighters v. City of San Diego* decision (*supra* at 34 Cal.3d 301) when quoting from its earlier Opinions. This conclusion is fortified by the fact that both of these Decisions, which were rendered only thirty-five days apart, were authored by the same Justice (Richardson).

The interchangeability of "should" and "must" is also readily apparent from this Court's subsequent Decision in *Legislature v. Eu* (1991) 54 Cal.3d 492. The Court of Appeal noted (at 2 Cal.App.5th 699) that, in that case, which was decided eight years after *Allen*, this Court restated the "should" test of *Allen*. However, the Court of Appeal entirely ignored the beginning portion of the paragraph wherein that test was recited, which began (at 54 Cal.3d 529-30) and stated:

> Petitioners acknowledge that the state as employer is permitted to make reasonable modifications to the pension system during the employment relationship, ***so long as*** *employees receive*

[2] This explanation would not make as much sense had the initial word been "may" instead of "should." "May" clearly allows the decision maker to exercise complete discretion. The use of the word "should" connotes an approach much closer to that attendant to the word "must" in that it effectively says that it must be done this way absent unique circumstances.

> *"comparable new advantages" in return for any substantial reduction in benefits.* (*Olson v. Cory* [(1980) 27 Cal.3d 532,] 541; *Betts v. Board of Administration*, *supra*, 21 Cal.3d at p. 864; *Allen v. City of Long Beach*, *supra*, 45 Cal.2d at p. 131.) As we stated in Olson, "Although an employee does not obtain any 'absolute right to fixed or specific benefits . . . there [are] strict limitation[s] on the conditions which may modify the pension system in effect during employment.' [Citation.] Such modifications must be reasonable and any '"changes in a pension plan which result in disadvantage to employees ***should be accompanied by comparable new advantages***."' [Citation.] (27 Cal.3d at p. 541.)" (Emphasis added.)

By stating first that reasonable modifications are permitted "**so long** as employees receive comparable new advantages" (emphasis added) and later that "disadvantages should be accompanied by comparable new advantages," this Court made clear that "should" and "must" are interchangeable, and that comparable advantages are a requirement in order for a modification to be reasonable.

Likewise, in *Olson v. Cory* (1980) 27 Cal.3d 532, 541, which was cited in the above quote, this Court rejected the modifications, stating: "Again, we conclude that defendants have failed to demonstrate justification for impairing these rights ***or that comparable new advantages were included*** and that section 68203 as amended is unconstitutional as to certain judicial pensioners."

Because of the multitude of reported Decisions of this Court and Courts of Appeal that clearly indicated that there "should/must" be a comparable trade-off when earned pension benefits are altered, the Opinion that is the subject of the Petition for Review places a gigantic cloud over the expectations of millions of individuals whose choices to enter, and more importantly remain in, public service were predicated in significant part upon this established case law that the pensions they earned while employed could not be substantively altered. That reported decision provides no insight as to the circumstances under which, or the extent to which, a reduction in **substance** may occur. These public employees deserve more from the judiciary than the blatant example of judicial legislation presented by the Court of Appeal.

Probably the portion of the Court of Appeal's Opinion that is most disingenuous is the paragraph (at 699-700) that begins with the sentence "In any event, we think there is a 'new benefit' provided by the Pension Reform Act." The decision proceeds to describe the comparable benefit as the future savings to the individual employees resulting from no longer having to pay retirement contributions on the items of compensation removed by the Retirement Association. It does not take a mathematician to ascertain that, for someone close to retirement, the few months or even years of savings realized by paying lower future retirement contributions will not anywhere nearly approximate the reduction in the anticipated retirement allowances resulting from excluding these forms of pay from the final compensation pension base. Even if those future "savings" were utilized to purchase an annuity, there would not be adequate time to realize the necessary earnings on the invested contributions to come remotely close to replacing what was lost[3].

The entities upon whose behalf this letter is being submitted strongly urge this Court to grant the Petition for Review and render its Decision protecting the anticipated retirement benefits of millions of public employees who have rendered long and faithful service based upon the assumption that the substance of the vested rights they earned could not be altered without affording comparable advantages.

Respectfully submitted,

Dated: September 27, 2016 SILVER, HADDEN, SILVER & LEVINE

By: Stephen H. Silver
STEPHEN H. SILVER

[3] It seems that the legislation in question was designed to remove from pensionable income items of pay that retirement associations were not required to include but properly elected to insert in the pension calculations. The appropriate way for the legislature to have addressed the situation was to exclude these items from the pensionable income of future employees (which it did as part of that reform legislation) or even to provide that future recipients of those benefits for the first time could not have that compensation treated as pensionable income.

PROOF OF SERVICE

Marin Association of Public Employees, et al. v. Marin County Employees' Retirement Association; Board of Retirement of the Marin County Employees Association and State of California
California Supreme Court Case No. S237460
[Court of Appeal, First Appellate District, Division 2
Case No. A139610]

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1428 Second Street, P.O. Box 2161, Santa Monica, California 90407-2161.

On September 27, 2016, I served the foregoing document described as **AMICUS LETTER IN SUPPORT OF PETITION FOR REVIEW** on the parties in this action on the parties in said cause (listed below) by enclosing a true copy thereof in a prepaid sealed package, addressed with appropriate Golden State Overnight shipment label, and depositing them with a facility regularly maintained by Golden State Overnight.

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Executed on September 27, 2016, at Santa Monica, California.

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

LISA L. HILL