# Law Offices of James J. Cunningham

ATTORNEYS AT LAW
9455 RIDGEHAVEN COURT # 110
SAN DIEGO, CALIFORNIA 92123
jimcunninghamlaw@gmail.com

TELEPHONE: (619) 871-9116


September 27, 2016

**VIA OVERNIGHT DELIVERY**

The Honorable Tani Cantil-Sakauye, Chief Justice, and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: Amicus Curiae Supporting Review (Cal. Rules of Court, rule 8.500(g))
*Marin Association of Public Employees et al., v. Marin County Employees' Retirement Association et al.*,
(2016) 2 Cal. App. 5th 674
Marin County Super. Ct. No. CIV 1300318
Court of Appeal, First Appellate District, Division Two,
Case Number A139610

Dear Honorable Justices:

The San Diego Public Defenders Association (SDPDA), The Association of San Diego County Employees (ASDCE), Carlsbad City Employees Association (CCEA) and Oceanside Police Officers Association (OPOA), (collectively "the Associations") as *amicus curiae*, respectfully submits the attached amicus curiae letter in support of the Petition for Review filed in the matter of *Marin Association of Public Employees et al., v. Marin County Employees' Retirement Association et al.* ("*Marin*").

## I. THE ASSOCIATIONS' INTEREST

The Associations listed above are public employee organizations representing hundreds of dedicated public servants throughout the State of California. The Associations have a substantial interest in protecting the statutory and common law rights of the public employees they represent. The Associations must advance and protect the rights of their public employee members by participating in the effective resolution of relevant public sector employment cases such as *Marin Association of Public Employees et al., v. Marin County Employees' Retirement Association et al.* To this end, the Associations submit this Supreme Court amicus letter in support of the Petition for Review. The Associations' proposed amicus letter will assist the Court by offering additional perspective on California's public sector labor law requirements as it relates to unilaterally changing pension benefit calculations.

Pursuant to California Rules of Court, rule 8.520(f)(4), the Associations affirms that no party or counsel for a party to this appeal authored any part of this amicus letter.

No person other than this amicus curiae, its members, and its counsel made any monetary contribution to the preparation or submission of this letter.

## II. REASONS FOR REVIEW

1. *Marin* presents an important issue for plenary review that affects public employees and practitioners state-wide regarding the denial of certain contractual pension calculations collectively bargained for and relied upon by employees and how interpretation of this issue will affect existing collective bargaining agreements across the state.

2. *Marin* does not settle whether a state, city or county entity may unilaterally enact certain pension reforms without violating the meet and confer bargaining requirements imposed upon public employers by the Meyers-Milias-Brown Act.

3. *Marin* is distinguishable from *Protect Our Benefits v. City and County of San Francisco*, creating inconsistent decisions within the California Court of Appeals First Appellate District.

## III. FACTS AND PROCEDURAL HISTORY

In September 2012, the Legislature passed Assembly Bill No. 340 (AB 340) which enacted the California Public Employees' Pension Reform Act of 2013. This act made fundamental alterations to the manner in which public pensions are calculated and made other changes to pension benefits allocation. Concurrent with AB 340, the Legislature enacted Assembly Bill No. 197 (AB 197), which, together with AB 340, amended section 31461 of the California Government Code to exclude from the definition of pensionable income certain items of pay that were previously treated as compensation earnable for pension purposes.

On December 18, 2012, the Board of Directors of the Marin Country Employees' Retirement Association (MCERA) adopted a policy implementing new rules regarding compensation earnable and pensionable compensation determinations as a result of the AB 197 Government Code amendments. These new rules of pension calculations contradicted many collective bargaining agreements terms negotiated for by the affected public employees and created significant strain on public employment relations in Marin County. As a result, various public employee organizations initiated suit on January 18, 2013 against Marin County for their failure to adhere to existing pension calculation methods.

In June 2013, after hearing extensive argument, the trial court sustained MCERA's demurrer without leave to amend and entered judgment against the Marin County employee associations. This decision was appealed to the California Court of Appeal and on August 17, 2016 the California Court of Appeal, First Appellate District,

Division 2 published an opinion upholding the trial court's decision to sustain the demurrer reasoning that, "so long as the Legislature's modifications do not deprive the employee of a 'reasonable' pension, there is no constitutional violation." *Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.* (2016) 2 Cal. App. 5th 674, 679-680.

This case involves significant issues of contract interpretation and vested pension rights, which may affect hundreds of thousands of public sector workers employed across the state of California. These public servants depend on their earned, deferred pension benefits collectively bargained for and, as such, should be allowed an opportunity to further review the *Marin* decision.

## IV. ARGUMENT

### a. Review is Warranted to Permit the Associations the Opportunity to Brief the Arguments and Evidence under the *Allen* Standard.

Although the *Marin* Court held that there is no absolute requirement that elimination or reduction of an anticipated retirement benefit must be counterbalanced by a comparable new benefit, the California Supreme Court in *Allen v. Board of Administration* held "that any modification of vested pension rights must be reasonable, must bear a material relation to the theory and successful operation of a pension system, and, when resulting in disadvantage to employees, ***must*** be accompanied by comparable new advantages." *Allen v. Board of Administration* (1983) 34 Cal.3d 114, 120 (emphasis added).

Despite this Supreme Court decision, the Court of Appeal in *Marin* distinguished the *Allen* precedence as "a onetime variation," engaging in significant linguistic maneuvering to replace the word "must" in "***must*** be accompanied by comparable new advantages" to "should" based on older Supreme Court language previously used to assess pension benefit elimination. *Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.* (2016) 2 Cal. App. 5th 674, 697.

Throughout the *Marin* opinion, the Court of Appeal evidenced a willingness to demonize the public employees' position, terming their actions of obtaining better pension benefit increases as "pension spiking," characterizing their bargaining efforts as "various stratagems and ploys to inflate their income and retirement benefits," all while furthering their narrative that the public employees' existing pension benefits and subsequent legal position necessitate, "public ire and legislative chagrin." *Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.* (2016) 2 Cal. App. 5th 674, 674.

The Court of Appeal's holding represents a significant departure from the well-established notion that modifications in vested pension rights must be accompanied by

comparable advantages. The *Marin* Court's primary motivation to depart from this Supreme Court precedence rests on their decision to characterize the specific language of *Allen,* stating that any modification of vested pension rights "must be accompanied by comparable new advantages," as, "a one time departure" decisional hiccup perhaps mistakenly included in the final *Allen* opinion.

The *Marin* Court's holding haphazardly dismisses the specific language used by the *Allen* Supreme Court. In *Marin*, the Court characterized the word "must" as used by the Supreme Court in *Allen* to mean, "should" or "ought." Rather than adopt the literal meaning of the word "must," the Court contented that, "'should' not 'must' remains the court's preferred expression," despite the explicit language used. *Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.* (2016) 2 Cal. App. 5th 674, 699.

To allow any Court of Appeal to replace decisional language explicitly included in a Supreme Court decision with language that better supports their ability to effect certain legal results represents inappropriate judicial precedence-making that should not be allowed by this Court. The logical leap employed by the *Marin* Court to circumvent the plain meaning of "must," a word specifically chosen by the Supreme Court, represents a significant elongation of interpretative judicial lawmaking. All evidence indicates that the *Allen* Court was made fully aware of alternate formulations of the phrase "must be accompanied by comparable new advantages" as it considered many cases employing iterations of this phrase with "should" replacing "must." With this background analysis, the *Allen* Court purposely chose the word "must" in their decision even with their exposure to other phrasing formulations. The *Allen* Court's deliberate use of the word "must" should not be overlooked by the Court of Appeal and represents legitimate court precedence applicable to the case at hand.

In *Betts v. Board of Administration* (1978) 21 Cal.3d 85, the California Supreme Court held that, "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)

Similarly, in *Olson v. Cory* (1980) 27 Cal.3d 532, 541, the California Supreme Court rejected pension 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." (emphasis added)

These holdings support the notion expressed in *Allen* that in order for a pension modification to be reasonable, comparable new advantages must be offered in order to

withstand constitutional scrutiny. In most instances where pension modifications have involved judicial review, an analysis of new comparable advantages also followed. As such, review of this case is warranted under the applicable *Allen* standard rather than the narrower standard applied by the *Marin* Court.

**b. The *Marin* Court's Holding is Inconsistent with the Court of Appeal's Holding in *Protect Our Benefits v. City and County of San Francisco***

On March 27, 2015 the Court of Appeal of California, First Appellate District, Division Five filed an opinion for *Protect Our Benefits v. City and County of San Francisco*. In this case, San Francisco voters in 2002 passed Proposition B, which made permanent a supplemental COLA adjustment for public employees. In 2011, voters passed Proposition C, which conditioned those supplemental COLA payments on the city's retirement fund being fully funded for the year prior. Retired public employees asserted to the trial court that this "fully funded" requirement instituted by the 2011 amendment should not apply to them, as it would unconstitutionally violate the Contract Clause through retroactive application. The trial court dismissed this argument and upheld the City's position.

However, the Court of Appeal reversed in part stating that, "the reduction of a cost of living allowance, without a comparable new advantage, has been held to impair the pension contract." *Protect Our Benefits v. City and County of San Francisco* (2015) 235 Cal. App. 4th 619, 629. Here the Court reasoned that, "Because there might be some years in which the Fund will earn more than projected, but will not be fully funded under a market value measurement, the full funding requirement results in a detriment to pensioners who would otherwise be entitled to receive the supplemental COLA. This diminution in the supplemental COLA cannot be sustained as reasonable ***because no comparable advantage was offered to pensioners or employees in return***." *Id,* at 630 (emphasis added). The Court was unequivocal in their analysis that a comparable advantage ***must*** be offered in order to be characterized as a reasonable pension modification.

Although the *Marin* Court believes that the *Allen* Court misspoke when stating that a comparable advantage ***must*** be offered in order to render a pension modification reasonable, the *Protect Our Benefits* Court was unwilling to go so far as to contradict the plain words of the Supreme Court in *Allen*. In fact, the *Protect Our Benefits* Court reiterated and applied the *Allen* standard, reasoning that, "while the constitutional proscription against the destruction of vested contractual pension rights does not absolutely prohibit their modification, a lawmaker's power to modify pension rights once vested is quite limited. With respect to active employees…any modification of vested pension rights must be reasonable, must bear a material relation to the theory and successful operation of a pension system, and, when resulting in disadvantage to employees, ***must be accompanied by comparable new advantages***." *Protect Our Benefits v. City and County of San Francisco* (2015) 235 Cal. App. 4th 619, 628-629.

No other Court of Appeal decision apart from *Marin* so blatantly forces outside definitions onto the *Allen* decisional language. The *Marin* Court is more adamant to characterize "must" to mean "should," (mainly to create the linkage that "should" actually means "ought," lowering the standard even further) than simply reading "must" for its plain meaning as they did with every other word of the *Allen* decision. As the *Marin* Court's reasoning for abandoning the explicit language of the *Allen* decision seems irrelevant to other opinions interpreting and applying the *Allen* precedent (most of which make no mention of the language "must" or "should"), inconsistent decisions exist that necessitate further review of the *Marin* decision. In light of the conflicting *Allen* interpretations and the potential repercussions this will cause within the California public sector, a Petition for Review should be granted by this Court.

### c. The Court of Appeal's Decision That the Manner in Which MCERA Implemented AB 197 Was Not Improper Warrants Review

In 1968 Governor Reagan signed the Meyer-Milias Brown Act (MMBA), Government Code 3500, *et seq*., which requires public employers to negotiate over terms of employment with public employees and/or the labor organizations that represent them. Article I, Section 10 of the U.S. Constitution holds that states are prohibited from passing a law impairing the obligation of contracts. Similarly, Article I, Section 9 of the California Constitution states that a law impairing the obligation of contracts may not be passed.

"The MMBA has two stated purposes: (1) to promote full communication between employers and employees; and (2) to improve personnel management and employer-employee relations within the various public agencies." *People ex. rel. Seal Beach v. City of Seal Beach* (1984) 36 Cal. 3d 591, 597. "These purposes are to be accomplished by establishing methods for resolving disputes over employment conditions and by recognizing the right of public employees to organize and be represented by employee organizations." *Id.* The Supreme Court has recognized that in enacting a scheme to govern labor relations for public agencies, the Legislature did not intend "to permit local entities to adopt regulations which would frustrate the declared policies and purposes of the [MMBA]." *Seal Beach*, 36 Cal. 3d at 597. This includes the implementation of lawful policies in a manner that would frustrate the purposes of the MMBA.

The *Marin* case centers on a dispute over pension benefit calculations, a term of employment subject to bargaining under the MMBA. The California Court of Appeal, Fourth Appellate District in *City of San Diego v. Haas* held that the level of pension benefits for current employees is a form of wages within the scope of representation under the MMBA. *City of San Diego v. Haas* (2012) 207 Cal.App.4th 472. Additionally, "a public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment. Unlike

other terms of public employment, which are wholly a matter of statute, pension rights are obligations protected by the contract clause of the federal and state Constitutions." *Protect Our Benefits v. City and County of San Francisco* (2015) 235 Cal. App. 4th 619, 628.

In *City of San Diego v. Haas*, the Court of Appeal analyzed whether a Memorandum of Understanding (MOU) between the city of San Diego and relevant public employee organizations could retroactively alter benefit allocations for new public employees without violating the MMBA or the Contract Clause. In this case, after the MOU was executed, a similar city ordinance ratifying the MOU's contents was passed, containing a more lenient calculation cutoff date for new employees. Despite public employee attempts to have the ordinance take precedence over the executed MOU, the Court held that the effect of the MOU would take precedence reasoning that "such MOU's are binding and enforceable contracts that the City may enforce against its employees." *City of San Diego v. Haas* (2012) 207 Cal.App.4th 472, 495.

The *Haas* Court made it a point to emphasize that "where, as is the case here, the parties are authorized to bargain collectively under the MMBA, the MOU's they have agreed to govern their relationship…are binding and constitutionally protected," concluding that, "contract terms implied from default statutory provisions may be excluded from public employees' employment contracts by agreement." *City of San Diego v. Haas* (2012) 207 Cal.App.4th 472, 488, 495. The *Haas* decision lends significant support to the notion that MOU's and other similar public sector labor agreements must be given considerable weight where the parties have demonstrated intent to agree to specified terms of employment.

Indeed, "California has a strong public policy favoring collective bargaining agreements, or MOUs, in the public sector." *Social Services Union Local 535 v. Alameda County Training and Employment Board* (1989) 207 Cal. App. 3d 1458, 1465. A collective bargaining agreement or MOU is not an ordinary contract and must be interpreted "to execute the mutual intent and purpose of the parties." *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal. 3d 328, 339. As such, labor agreements must be given significant weight in order to effectuate that intent of the contracting parties and should be treated as recognized agreements subject to Contract Clause protection.

The MMBA exists to protect such labor agreements and to enable public employers and employees to sustain a dialogue necessary for the creation of these agreements. Contained in the MMBA is the requirement that, "the governing body of a public agency, or such boards, commissions, administrative officers or other representatives…shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations..." Meyers-Milias Brown Act, Section 3505. This "meet and confer"

requirement is essential for motivating productive labor dialogue and has been repeatedly upheld by California courts.

Although "pension spiking" may be a legitimate problem that state and local governments want to address, this should not allow governments to circumvent other statutory requirements mandating certain processes be followed in order to enact institutional reform. In *San Joaquin County Employees' Assn., Inc. v. County of San Joaquin*, the Court of Appeal of California, Third Appellate District reviewed an appeal of a trial court's decision that the San Joaquin County failed to meet and confer with the San Joaquin County Employees' Association. While analyzing the retroactive pay raise at issue in *San Joaquin*, the Court affirmed the trial court's decision reasoning that, "we believe that the entire import of the Meyers-Milias-Brown Act is to permit as much flexibility in employee-governmental agency relations with regard to all aspects in the employer-employee milieu as a voluntary system will permit. To achieve this flexibility, the element of retroactivity is a necessary ingredient not only as to salaries but as to insurance, seniority, and a myriad of other potential points of conflict." *San Joaquin County Employees' Assn., Inc. v. County of San Joaquin* (1974) 39 Cal. App. 3d 83, 88.

The *San Joaquin* Court emphasized that the nature of the benefit at issue, retroactive pay raises, should not be used to defeat the meet and confer requirement under the MMBA. Here, the County argued that the retroactive nature of the benefit coupled with an existing expired salary ordinance should preclude the meet and confer requirement from applying to their implementation of the retroactive raises. However, the Court explained that, "if retroactivity of salary adjustments is a proper legislative consideration for state employees and certain educational employees, no discernible reason appears why it would not be a proper subject for negotiations pursuant to the Meyers-Milias-Brown Act." *San Joaquin County Employees' Assn., Inc. v. County of San Joaquin* (1974) 39 Cal. App. 3d 83, 90. This holding establishes the precedence that even retroactive determinations or alterations of public employee benefits specifically contemplated by a city ordinance can also be a proper subject for the MMBA meet and confer requirement.

This holding is unremarkable considering the fact that retroactive alterations of public employee benefits can effectively undermine basic public sector labor relations and employment agreements across the state. The notion that compensation can be retroactively decreased despite proper completion of work remains a significant hurdle for cultivating public sector industry confidence. This false reliance created by public employers promising certain compensation to public employees despite an ability to later alter these benefits represents a legitimate justification for applying the meet and confer requirement to Marin County's actions in *Marin*. Courts have even recognized that, public employees' retirement benefit provisions, such as those at issue in *Marin*, are to be "liberally construed" to "protect the reasonable expectations of those whose reliance is induced." *Bellus v. City of Eureka* (1968) 69 Cal. 2d 336, 340, 348-350. Any alteration of a public employees' retirement benefit should be subject to the MMBA's meet and confer

requirement as pensions are an uncontroverted aspect of "wages, hours, and other terms and conditions of employment." As such, the *Marin* Court's failure to address or even mention the MMBA in their published opinion serves as a proper basis for this Court to grant judicial review as the rights of public sector employees across the state of California are weakened whenever an MMBA requirement is circumvented without judicial or administrative reprimand.

## V. CONCLUSION

It is unreasonable to retroactively reduce the tangible benefits and compensation available to workers when the availability of those benefits enable employee retention only to benefit involved employers. Public employees who have squandered opportunities working for other employers based on promises of certain pension compensation calculations should not be retroactively penalized for believing such empty employer promises. Also of concern is Marin County's failure (and the *Marin* Court's apparent ratification of this failure) to meet and confer over the proposed pension reform, as the MMBA exists to protect the rights of public sector workers across the State of California. As the public sector industry already faces recruitment problems in the face of voter-initiative pension defunding, failure to enforce the MMBA would only increase stress on the public sector industry.

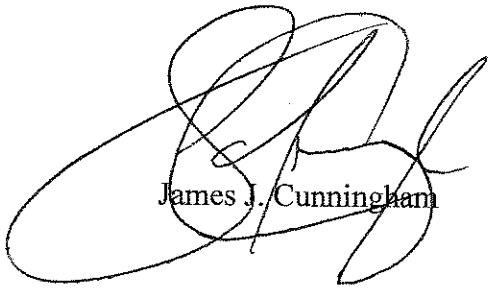
The compensation/benefits obtained through legitimate labor negotiations represents the catalyst that motivates employee action. Any reduction in these benefits once employee labor has been expended should be considered unreasonable based on the bargained for exchange made between the parties and the expectations relevant to working for certain promised benefits/compensation. Any mandated impairment to a bargained for exchange should be considered unreasonable as it unfairly alters the exchange of consideration of the parties in spite of the legitimate economic expectations relied upon based on earlier party representations. To characterize an employer that cuts costs as prudent or business-savvy while characterizing an employee that tries to increase pension benefits upon retirement as unscrupulous or engaging in "pension spiking" seems paradoxical and is a disingenuous argument for the *Marin* Court to champion as a supposed neutral arbiter. It is unreasonable for the Court to sanction a system where employers can offer pensions to attract and retain employees while simultaneously allowing them to reduce what was offered only after that work has been extracted out of the retained employees.

The Court of Appeal determined that the Legislature may impair labor agreements made between public employers and public employees without requiring any MMBA meet and confer requirement and without offering any comparable advantage to make up for benefits taken away retroactively. This conclusion not only departs from established precedent but is wholly impractical under existing collective bargaining and labor laws. As such, the Associations respectfully requests the Court to review the Court of Appeal's

decision in *Marin* in order to fully explore this important issue and the potential economic fallout created by it.

Thank you for your consideration of this request.

Very truly yours,
The Law Offices of
James J. Cunningham



James J. Cunningham

cc: Service List on All Counsel
The Law Offices of James J. Cunningham
Court of Appeal, First Appellate District, Division Two

## PROOF OF SERVICE

I am a resident of the State of California, over the age of 18 and am not a party to the within action. I am employed by the Law Offices of James J. Cunningham in the County of San Diego, located at 9455 Ridgehaven Ct #110, San Diego, California 92123.

On September 27, 2016, I served the following document(s) on the interested parties in this action:

**1) AMICUS CURIAE SUPPORTING REVIEW**

The document(s) were served upon:

**SEE ATTACHED SERVICE LIST**

The documents were served by the following means:

(XX) **BY MAIL** – I placed each for deposit in the United States Postal Service this same day, with postage thereupon fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth in the attached Service List.

Executed on September 27, 2016, in Los Angeles, California.

CHRISTOPHER MORSE

**SERVICE LIST**

*Marin Association of Public Employees et al., v. Marin County Employees' Retirement Association et al.*

Court of Appeal Case No. A139610

| | |
|---|---|
| Counsel for Defendants and Respondents | Manatt, Phelps & Phillips, LLP<br>Ashley Kathleen Dunning, Kelly L. Knudson, Benjamin G. Shatz, Michael V. Toumanoff<br>11355 West Olympic Blvd<br>Los Angeles, CA 90064 |
| Counsel for Plaintiffs and Appellants: Marin County Fire Department Firefighters' Association; Marin County Management Employees Association; Joel Chandler; and Angelo Sacheli | Carroll, Burdick & McDonough<br>Gregg McLean Adam, Amber Lynn Griffith, Messing Adam, Johnathan Dennis Yank<br>980 9th Street<br>Sacramento, CA 95814 |
| Counsel for Plaintiffs and Appellants: Marin Association of Public Employees; Catherine Hall | Leonard Carder<br>Leonard Carder, Peter Warren Saltzman, Arthur Liou<br>1330 Broadway<br>Oakland, CA 94612 |
| Counsel for Plaintiff and Appellant: Service Employees International Union Local 1021 | Weinberg, Roger & Rosenfeld<br>Vincent A. Harrington Jr., Kerianne Ruth Steele, Anne I. Yen, Sean Daniel Graham, Caren Pamela Spencer<br>1001 Marina Village Parkway Suite 200<br>Alameda, CA 94501 |
| Counsel for Intervenor and Respondent | Kamala D. Harris, Attorney General<br>Douglas J. Woods, Assistant Attorney General, Constance L. LeLouis, Rei R. Onishi, Anthony P. O' Brien, Deputy Attorneys General<br>455 Golden Gate Ave<br>San Francisco, CA 94102 |
| California Court of Appeal | California Court of Appeal<br>First Appellate District, Division 2<br>350 McAllister Street<br>San Francisco, CA 94102 |
| Trial Court | Marin County Superior Court<br>P.O. Box 4988<br>San Rafael, CA 94913 |
| Amicus Curiae: Law Offices of James J. Cunningham | 9455 Ridgehaven Ct #110<br>San Diego, CA 92123 |