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October 12, 2016

The Honorable Chief Justice Tani Cantil-Sakauye
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Amicus Curiae* letter in support of Petition for Review of *Marin Association of Public Employees, et al. v. Marin County Employees' Retirement Association, et al.*
Court of Appeal Case No. 139610
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 this matter is submitted on behalf of the California Professional Firefighters ("CPF"). CPF urges the Court to grant review of the Petition and reverse the decision of the Court of Appeal in *Marin Association of Public Employees, et al. v. Marin County Employees' Retirement Association, et al.* (2016) 2 Cal.App.5th 674 ("*Marin*").

CPF's Interest

CPF is the largest organization in California dedicated exclusively to representing career firefighters. CPF consists of approximately180 affiliated local firefighter organizations representing more than 30,000 federal, state, and local government firefighters. CPF is the state council of the International Association of Firefighters. CPF's mission is to protect and improve the lives and working conditions of the men and women who have made the fire service and the protection of California's citizens their life's work. CPF achieves this mission by advocating for policies that ensure these career firefighters retirement and health care security, a safe and secure work environment, and improved fire service training and education.

The vast majority of CPF's active members are current members of the California Public Employees' Retirement System, county employee retirement associations organized under the County Employees Retirement Law of 1937, or similar defined benefit plans provided by local government agencies pursuant to state law.

CPF and its affiliated local unions have been responsive in addressing challenges facing the state's pension systems. Many of its affiliates have negotiated agreements implementing two-tiered retirement systems and higher

employee contribution rates; many affiliates have also acted to correct perceived pension abuses. CPF members have sacrificed hundreds of millions of dollars in lost wages and benefits to help local agencies address budget deficits and confront pension funding problems. All of these sacrifices have been made in the context of California law as it existed prior to the decision of the Court of Appeal in *Marin*.

CPF members depend on the promise of a secure, predictable retirement in return for their steadfast commitment to a difficult and dangerous profession. They depend on the enforcement and continuity of California law, which for decades has guaranteed that the pension promised at the outset of employment is a vested right to be modified only under strictly limited circumstances. CPF believes that *Marin* employs semantics to retreat from and jeopardize the fundamental underpinning of California public retirement law: that the pension promised to employees upon commencement of their employment is fully protected by the contract clause of the state and federal Constitutions.

Pursuant to California Rule of Court 8.520(f)(4), CPF affirms that no party or counsel for a party to this appeal authored any party of this *amicus curiae* letter. No person other than CPF, its members, and its counsel made any monetary contribution to the preparation or submission of this letter.

Review of *Marin* is necessary to secure uniformity of decision and to settle an important question of law.

In *Allen v. Board of Administration* (1983) 34 Cal.3d 114, 120, this Court 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." This clear pronouncement was hardly unexpected. It followed decades of consistent decisional law which recognized that a comparable new advantage was required when the employer sought to reduce or modify pension benefits promised at the commencement of employment. (See, e.g., *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 132; *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 449, 454; *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 867-68; *Olson v. Cory* (1980) 27 Cal.3d 532, 541.) Equally important, this Court continued to follow *Allen* in *Legislature v. Eu*, where it stated that reasonable modifications are permissible "so long as employees receive 'comparative new advantages' in return for any substantial reduction in benefits." (*Legislature v. Eu* (1991) 54 Cal.3d 492, 529-30 [citing *Olson*, *Betts*, and *Allen v. Board of Administration*].)

Marin cannot be squared with these seminal decisions. The Court of Appeal's vehicle—substituting the word "should" for the word "must" used by this Court in *Allen*—essentially extinguishes these decisions which make clear that comparable advantages were required in order for pension modifications to be reasonable.

The holding in *Marin* is also at odds with another 2015 decision of the First District, which held that 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 a 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, 628-29 [emphasis added].) Again, the court made clear that comparable advantages were required, not that some less stringent standard should be applied.

Thus, at a minimum, it is necessary for the Court to grant the Petition to correct *Marin's* departure from well-established precedent and to secure uniformity in existing case law pursuant to California Rules of Court 8.500(b)(1).

In addition to conflicting with precedent, CPF believes that *Marin* is likely to have a destabilizing effect on public sector labor relations. Although *Marin* imposes a new standard of "reasonableness" on the modification of promised pension benefits, the court did little to guide the parties on how that standard may be analyzed, other than describing what is not reasonable: "actual abolition, a radical reduction of benefits, or a fiscally unjustifiable increase in employee contributions." (*Marin, supra*, 2 Cal.App.5th at p. 702.) This amorphous standard makes it impossible for any employee to harbor with precision any reasonable expectation of a pension, and is also an open invitation for continual litigation between unions and employers whenever any pension modification is made without a comparable new advantage.

In this regard, it is noteworthy that the *Marin* petitioners alleged that:

> Because MCERA has included these various pay items in the calculation of retirement benefits, *the cost of these benefits has been actuarially factored into contribution rates and has been paid for by both member and employer contributions*. Additionally, the value and associated costs of these benefits have also been a factor in determining the wage and benefit packages offered to MCERA members through collective bargaining . . . and in some instances has led to employees accepting lower wages or other benefits.

(*Marin, supra*, 2 Cal.App.5th at p. 688 [emphasis added].)

In other words, the parties in *Marin* were aware of the costs of the promised benefits, agreed to them, and funded them in accordance with actuarial standards. If these benefits are not to be paid as promised, employees would certainly have a claim for recovery of the contributions they made for these benefits or a claim for the value of other monetary sacrifices made at the bargaining table in order to maintain these benefits.

But more important, although the *Marin* petitioners alleged that benefits had been prefunded, allegations deemed true for demurrer purposes, the *Marin* court chose to employ the pejorative, politically charged characterization of "pension spiking." In doing so, it adopted the Little Hoover Commission "spiking" definition as "[t]he practice of increasing [an employee's]

retirement allowance by increasing final compensation or including various non-salary items (such as unused vacation pay) in the final compensation figure used in the [employee's] retirement benefit calculations, *and* which has not been considered in prefunding the benefits." (*Marin*, *supra*, 2 Cal.App.5th at p. 682.) Even accepting this definition, *Marin* was never an example of spiking, because the cost of the benefits in question "had been actuarially factored into contribution rates and has been paid for by both member and employer contributions." While CPF views *Marin* as an opportunity to demonstrate that parties can cooperatively address pension challenges by planning for and funding benefits, it views the Court of Appeal opinion as a stunning, result-driven departure from the decisional law of this state, an invitation for ceaseless litigation, and a premature rejection of significant allegations of the underlying action.

CPF respectfully requests this Court to grant the Petition for Review and reverse *Marin*. California's firefighters and all dedicated public employees deserve affirmation that the pension benefits promised them will be honored in accordance with the principles clearly enunciated by this Court.

Dated: October 12, 2016

Respectfully submitted,

DAVIS, COWELL & BOWE, LLP

By:
W. David Holsberry

PROOF OF SERVICE BY REGULAR MAIL

Marin Association of Public Employees, et al. v. Marin County Employee's Retirement Association, et al., California Supreme Court No.: S237460

I declare that I am employed in the County of San Francisco. I am over the age of eighteen years and not a party to the within cause; my business address is 595 Market Street, Suite 800, San Francisco, California on October 12, 2016, I served the enclosed:

Amicus Curiae letter in support of Petition for Review of *Marin Association of Public Employees, et al. v. Marin County Employees' Retirement Association, et al.*

on the parties in said cause (listed below) by placing a true copy of the above, enclosed in a sealed envelope with appropriate postage, for collection and mailing following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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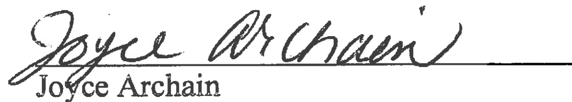
I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 12th day of October, 2016 at San Francisco, California.



Joyce Archain