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October 14, 2016

VIA UPS OVERNIGHT MAIL

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

Re: **Request for Depublication** (Cal. Rules of Court, Rule 8.1125)
Marin Association of Public Employees v. Marin County Employees' Retirement Association (Cal. Ct. App. 2016) 206 Cal.Rptr.3d 365
Court of Appeal, First Appellate District, Division Two Case No. A139610
Supreme Court Case No. S237460 (Petition for Review Pending)

Dear Honorable Justices:

This letter requesting depublication is submitted on behalf of the Orange County Attorneys Association ("OCAA") and the Orange County Managers Association ("OCMA") (collectively "Requestors"). By this letter, Requestors respectfully request depublication of the decision of the First Appellate District in *Marin Association of Public Employees v. Marin County Employees' Retirement Association* (Cal. Ct. App. 2016) 206 Cal.Rptr.3d 365 (*Marin County*), pursuant to Rule 8.1125(a) of the California Rules of Court. The *Marin County* decision was filed on August 17, 2016, and became final on September 16, 2016. *See* CRC 8.264. This request is filed within 30 days after the opinion became final and, therefore, is timely under Rules of Court, Rule 8.1125(a)(4).

A Petition for Review, which remains pending, was filed September 26, 2016.

I. Statement of Interest

OCAA and OCMA are employee associations, recognized by the County of Orange (the "County") as exclusive bargaining representatives of certain units of County employees pursuant to the Meyers-Milias-Brown Act ("MMBA"), Gov. Code §§ 3500, *et seq.*

OCAA represents employees in the County's "Attorney Unit," consisting of attorneys in the offices of District Attorney, Public Defender, Alternate Defender, Associate Defender, County Counsel, and Child Support Services.

OCMA represents managers assigned to the County's various departments and agencies.

The employees that OCAA and OCMA represent have earned, as part of the consideration for services performed, deferred compensation over the course of their careers in the form of a particular defined benefit pension pursuant to he County Employees Retirement Law of 1937 ("CERL").[1] Throughout their careers, these members have relied upon these promised allowances upon their retirement (subject to the vesting rules and other requirements) in planning their and their families' futures.

The *Marin County* decision rejects a longstanding constitutional doctrine, referred to as the "California Rule," which protects California public employees—including OCAA's and OCMA's members—from changes in law that negatively impact their right to promised pension benefits unless such changes are offset with some comparable new advantage. The *Marin County* decision—a clear outlier in the long history of cases applying the California Rule—has the potential to create serious uncertainty, and attendant disruption, in an area of law which previously was clear. Thus, prior to this decision, the law was settled that California public employers could not fundamentally alter contractually promised public employee pension benefits accrued under the rules in place when covered public employees rendered their services in a disadvantageous manner without offsetting comparable advantage. Individual employees made career (and other, potentially long-term, financial) decisions based upon their understanding of the rights they accrued to a retirement benefit. Memoranda of understanding, including trade-offs of current pay and benefits for future pension benefits, were negotiated by public employee unions, including OCAA and OCMA, against the backdrop of this legal framework. Under the rule announced in *Marin County*, there is no requirement that any disadvantageous changes in a pension system or benefit be offset by a comparable advantage. The presence of a decision stating that there is no such requirement alongside a plethora of decisions holding that there is such a requirement calls into question the longstanding expectations of tens of thousands of public employees throughout the state, including OCAA's and OCMA's unit members, about the definiteness of their benefits. The uncertainty introduced by the Marin County decision also will disrupt the meet and confer process set forth in the MMBA, Gov. Code §§ 3500, *et seq.*[2] by sowing confusion as to whether negotiated changes to

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[1] CERL was enacted "to recognize a public obligation to county and district employees who become incapacitated by age or long service in public employment and in accompanying physical disabilities by making provision for retirement compensation and death benefit as additional elements of compensation. . ." Gov. Code § 31451.

[2] Good faith, uniformity, and open communication are essential to this meet and confer process. The MMBA defines its purpose as follows:

> [T]o promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms

pension systems are illusory and also as to what sorts of changes government employers may lawfully make to their pension systems.

Thus, the Requestors' unit members have an acute interest in whether or not the *Marin County* decision does or does not have precedential value. As the representative under the MMBA of their respective unit members in regards to their terms and conditions of employment, OCAA and OCMA share this interest.

II. Reasons for Depublication

a. Background

The *Marin County* case represents a serious departure from a long line of case law—stretching across decades, appellate districts, and retirement systems—uniformly applying the California Rule to changes in public employee pensions. For years, public employees statewide have reasonably relied upon the uniform application of this rule in understanding the nature of their pension benefits; similarly, public employee organizations representing such employees have entered into memoranda of understanding (and made attendant economic tradeoffs) based upon this longstanding, uniform rule. Yet the *Marin County* decision has suddenly cast doubt upon the California Rule and the reliability of the promise of these pension benefits where there is no reason for any uncertainty to exist.

The California Rule's origin is generally credited to *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 287 P.2d 765 (*Allen*), although the rule has its origins in even earlier cases.[3] In *Allen*, the California Supreme Court held that, under the Contract Clauses of both the federal and California constitutions, public employees have "vested contractual pension rights," which include the method for calculating those pension benefits. *Id.*, at 131. The case law has long

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and conditions of employment between public employers and public employee organizations. It is also the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the various public agencies in the State of California by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by those organizations in their employment relationships with public agencies. [Gov. Code § 3500(a).]

[3] Earlier cases had established that employees have the right to a "substantial or reasonable" pension and that only "reasonable" modifications could be made. *See Wallace v. City of Fresno* (1954) 42 Cal.2d 180, 183, 265 P.2d 884; *Packer v. Board of Retirement of Los Angeles County Peace Officers' Retirement System* (1950) 35 Cal.2d 212, 214, 217 P.2d 660; *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 855, 179 P.2d 799. *Allen* is commonly credited with clarifying the sort of modifications that will be considered reasonable by defining reasonableness to include the public employer's offset of any negative modifications with some comparable new advantage.

recognized that pension systems need some flexibility,[4] and *Allen* recognized this in holding that these vested rights "may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system ..." *Id.* However, *Allen* held that "[s]uch modifications must be reasonable ..." *Id.* In order for a change to be "reasonable," the Court explained that the change must meet the following test:

> To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.

Id., at 131. The *Allen* decision also held that the right to pension benefits was not limited to pension benefits accrued for work that has already been performed, but also to keep accumulating pension benefits in the future under the rules already in place, subject to the limitation above. On this basis, the Court in *Allen* struck down a Long Beach city charter amendment that made only prospective changes to employee retirement contribution amounts. *Id.* (the change "substantively decreases plaintiffs' pension rights without offering any commensurate advantages.").

Cases since *Allen*—across appellate districts and in this Court, not to mention countless trial courts—have repeatedly reaffirmed the general principles underlying the California Rule—that reasonable modifications may be made, so long as there are offsetting comparable new advantages. *See, e.g. Abbott v. Los Angeles* (1958) 50 Cal.2d 438, 326 P.2d 484 ("[T]he 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."); *Miller v. State of California* (1977) 18 Cal.3d 808, 135 Cal.Rptr. 386 (applying California Rule, but finding no violation because there was no vested right to remain in public employment until a particular age); *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 148 Cal.Rptr. 158 (change from fluctuating to fixed indexing lacked comparable new advantage); *Legislature v. Eu* (1991) 54 Cal.3d 492, 529, 286 Cal.Rptr. 283, 816 P.2d 1309 ("[T]he state cannot ... abandon that plan as to incumbent legislators without providing them comparable new

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[4] *See, e.g. Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 854–55 [179 P.2d 799, 803] ("[P]ermitting modification of pensions is a necessary one since pension systems must be kept flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system and carry out its beneficent policy. Thus it appears ... that an employee may acquire a vested contractual right to a pension but that this right is not rigidly fixed by the specific terms of the legislation in effect during any particular period in which he serves. The statutory language is subject to the implied qualification that the governing body may make modifications and changes in the system. The employee does not have a right to any fixed or definite benefits, but only to a substantial or reasonable pension. There is no inconsistency therefore in holding that he has a vested right to a pension but that the amount, terms and conditions of the benefits may be altered.")

benefits"); *Chapin v. City Commission of Fresno* (Ct.App. 4 Dist. 1957) 149 Cal.App.2d 40, 44, 307 P.2d 657, ("In the instant case it is clear that the change in the method of computing benefits from a fluctuating amount equal to two-thirds of the salary currently attached to the rank held by Chapin to a limited maximum amount results in a substantial disadvantage and detriment to him, as is apparent from a computation of the trial court in its findings. It is also apparent that such disadvantage and detriment are not accompanied by comparable new advantages."); *DeCelle v. City of Alameda* (Ct.App. 1 Dist. 1963) 221 Cal.App.2d 528, 537, 34 Cal.Rptr. 597 (rejecting pension changes because they "operated to [petitioner's] disadvantage [and] were not offset by compensating benefits"); *Lyon v. Flournoy* (Ct.App. 3d Dist. 1969) 271 Cal.App.2d 774, 76 Cal.Rptr. 869 (change where one form of pension indexing was "substituted for another" was lawful because it provided comparable new advantages); *Amundsen v. Public Employees' Retirement System* (Ct.App. 1 Dist. 1973) 30 Cal.App.3d 856, 859, 106 Cal.Rptr. 759 (change was lawful because "the disadvantage was accompanied by comparable new advantages."); *Pasadena Police Officers Assn. v. City of Pasadena* (Ct.App. 2 Dist. 1983) 147 Cal.App.3d 695, 195 Cal.Rptr. 339; *Association of Blue Collar Workers v. Wills* (Ct.App. 5 Dist.1986) 187 Cal.App.3d 780, 794, 232 Cal.Rptr. 174 (requirement that employees pay for past unfunded liability imposed detriment without corresponding advantage and unconstitutionally impaired obligation of contract); *United Firefighters of Los Angeles City v. City of Los Angeles* (Ct.App. 2 Dist. 1989) 210 Cal.App.3d 1095, 259 Cal.Rptr. 65 (cap on COLA without comparable new advantage); *In re Retirement Cases* (Ct.App. 1 Dist. 2003) 110 Cal.App.4th 426, 448, 1 Cal.Rptr.3d 790 (recognizing that disadvantageous changes "must be accompanied by comparable new advantages" but finding that no modification had occurred); *Teachers' Retirement Bd. v. Genest* (Ct.App. 3 Dist. 2007) 154 Cal.App.4th 1012, 1039, 65 Cal.Rptr.3d 326, 346 (vested rights impaired because law "does not compensate the members for this increased risk or provide a comparable new advantage ..."); *Protect Our Benefits v. City and County of San Francisco* (Ct.App. 1 Dist. 2015) 235 Cal.App.4th 619, 185 Cal.Rptr.3d 410 ("This diminution in the supplemental COLA cannot be sustained as reasonable because no comparable advantage was offered to pensioners or employees in return").

b. *Marin County* Decision

The *Marin County* court's rationale for casting off decades of binding case law holding that under the California Rule some comparable new advantage must be provided to offset pension cuts was limited to the following:

- The *Allen* decision stated only that, for a modification to be reasonable, "changes in a pension plan which result in disadvantage to employees ***should*** be accompanied by comparable new advantages." 45 Cal.2d at 131 (*emphasis added*).
- Asserting that it was only in the 1983 decision in *Allen v. Board of Administration* (1983) 34 Cal.3d 114, 120, 192 Cal.Rptr. 762 (*emphasis added*) (not to be confused with the earlier *Allen* case) that this Court held that such modifications "***must*** be accompanied by comparable new advantages," and that the *Allen* decision used that wording because of its

> reliance upon an earlier Court of Appeal decisions using the formulation including the word "***must,*** " the *Marin County* court stated that the *Allen* decision's choice of wording was a mistake rather than a "doctrinal shift."

See Marin County, 206 Cal.Rptr.3d at 383-86.

This reading of the case law is, however, fundamentally flawed. It is inconsistent with a directly on-point decision of this Court—the 1983 *Allen* decision. It is also inconsistent with numerous other decisions—in this Court and the Courts of Appeals—that have uniformly applied the California Rule to require offsetting comparable advantages. Thus, the decision failed to acknowledge the numerous other cases that while they may not have used the precise "***must*** be accompanied" phrasing, plainly rejected pension changes because they were not accompanied by comparable new advantages, thereby confirming such offset as mandatory. *See, e.g. Abbott*, 50 Cal.2d at 449-54 (rejecting change because "the substitution of a fixed for a fluctuating pension ***is not permissible unless accompanied by commensurate benefits*** ...") (*emphasis added*); *Betts*, 21 Cal.3d at 867-68 (rejecting change because it "withdraws benefits to which [petitioner] earned a vested contractual right while employed. ***No 'comparable new advantages'*** to petitioner ***appear in the plan which can offset the detriment*** ...") (*emphasis added*).[5] Furthermore, the *Marin County* decision did not point to a single case expressly holding that a comparable new advantage need not be provided, and its authorities in support of this conclusion involved situations where no impairment was found because the asserted change was found to be consistent with the earned vested right.[6] Finally, the portions of the *Marin County* decision that upend the California Rule are not necessary to that decision or—at the very least—these portions address issues that the court did not necessarily need to reach;[7] thus, following its rejection of the California Rule, the First Appellate District went on to hold, "In any event, we think there is a 'new benefit' provided by the Pension Reform Act," 206 Cal.Rptr.3d at 386--a finding that, on its own, could have been sufficient to resolve the issue before the court.[8]

For years, courts at all levels have uniformly held that changes to public employee pension systems resulting in a disadvantage to the employees must be accompanied by an offsetting comparable new advantage. This rule has provided flexibility in how pension benefits are structured, while providing stability in terms of the substantive level of pension benefits that

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[5] *See also Legislature v. Eu* (1991) 54 Cal.3d 492, 529, 286 Cal.Rptr. 283, 816 P.2d 1309 (reasonable modifications allowed "***so long as*** employees receive 'comparable new advantages' ...") (*emph. added*).
[6] *See, e.g. Miller v. State of California* (1977) 18 Cal.3d 808, 135 Cal.Rptr. 386 (no vested right to remain in public employment until a particular age, so loss of that ability was not impairment of vested pension right); *International Assn. of Firefighters v. City of San Diego* (1983) 34 Cal.3d 292, 193 Cal.Rptr. 871, 667 P.2d 675 (rate increase based upon actuarial change in assumptions, which was condition attached to vested right, did not result in impairment to that vested right).
[7] *See generally Ayotte v. Planned Parenthood of Northern New England* (2006) 546 U.S. 320, 329, 126 S.Ct. 961 (narrow rulings favored when considering constitutional challenges to statutes).
[8] Whether this conclusion is correct is beyond the scope of this request.

have been provided. Courts, public employers, public employees, and the bargaining representatives of those employees have long relied on this clear-cut rule. Yet, the First Appellate District has now cast doubt on decades of precedent and on the status of pension rights for millions of workers statewide through its rejection of the California Rule and its certification of the *Marin County* decision for publication. And, in support of its dramatic decision, the First Appellate District provides relatively little discussion of the history of the California Rule, its jurisprudence, and its underlying considerations—perhaps because no party included this argument in its briefs to the appellate court. Rather than providing the sort of expansive, reasoned exposition that would be appropriate for such a significant decision—given the tremendous uncertainty about accrued and future pension benefits such a decision would create--the First Appellate District rests its decision almost entirely an assumption that this Court did not mean what it said in its 1983 *Allen* decision. In these circumstances, the decision in *Marin County* creates uncertainty on an issue of great moment to tens of thousands of California public employees without the kind of doctrinal or historical analysis which would warrant the publication of its novel approach to the issue.

Respectfully submitted,

Marianne Reinhold

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309368

PROOF OF SERVICE
(Code Civ. Proc. § 1013a(3))

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party of the within action; my business address is 2670 North Main Street, Suite 300, Santa Ana, CA 92705.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 14, 2016, at Santa Ana, California.

Rita A. Pollard

RITA A. POLLARD

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Trial Court	**Marin County Superior Court** 3501 Civic Center Dr. San Rafael, CA 94903

AMENDED / SUPPLEMENTAL PROOF OF SERVICE
(Code Civ. Proc. § 1013a(3))

STATE OF CALIFORNIA, COUNTY OF ORANGE

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Rita A Pollard

RITA A. POLLARD

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