In the Supreme Court of the State of California

MARIN ASSOCIATION OF PUBLIC EMPLOYEES, ET AL., **Petitioners and Appellants,** **v.** **MARIN COUNTY EMPLOYEES' RETIREMENT ASSOCIATION, AND ITS BOARD OF RETIREMENT,** **Respondents,** **THE STATE OF CALIFORNIA,** **Intervenor and Respondent.**	Case No. S237460

First Appellate District, Division Two, Case No. A139610
Marin County Superior Court, Case No. CIV 1300318
The Honorable Roy O. Chernus, Judge Presiding

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

The Public Employees' Pension Reform Act of 2013 (PEPRA) was enacted to address the important statewide issue of spiraling public employee pension costs. This case challenges whether certain aspects of PEPRA impair vested rights in violation of the contract clause. As the State of California argued below, petitioners and appellants Marin Association of Public Employees, et al. (collectively, "petitioners") had no vested right to spike their pension benefits with certain pay items or with compensation paid for services rendered outside normal working hours. Therefore, the court of appeal correctly held that PEPRA's exclusion of these items from the definition of compensation earnable (Gov. Code, § 31461, subds. (b)(1), (b)(3)) was constitutional. This important issue of statewide concern is encompassed within the second question raised in petitioners' Issues Statement. (Petn. for Review, p. 6.)

If the Court grants review and affirms on the second question, it need not reach the first issue—whether pension modifications resulting in a disadvantage to employees must be accompanied by a comparable new advantage. But, if the Court disagrees with the State and respondent Marin County Employees' Retirement Association (MCERA), then it should address the first question because the court of appeal's further holding[1]—that substantial modifications to pensions "should" or "ought to" be accompanied by comparable new benefits, but are not required to do so—presents a conflict with other reported appellate decisions, and clarification

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[1] *Marin Assn. of Public Employees, et al. v. Marin County Employees' Retirement Assn., et al.* (Aug. 17, 2016) 2 Cal.App.5th 674. Citations to the appellate decision will be from the Slip Opinion, attached to the Petition for Review.

from this Court on the continued viability of the "California Rule" would be needed.

ISSUES FOR REVIEW

The petition cited the following issues subject to review:

1. Whether the contract clause of the California Constitution requires that modification of public employees' pension benefits that result in disadvantages to employees be accompanied by comparable new advantages.
2. Whether reductions to pension benefits resulting from the PEPRA impair Marin County employees' vested pension rights in violation of the contract clause.

(Petn. for Review, p. 6.)

FACTUAL AND LEGAL BACKGROUND

In 2012, Governor Brown signed Assembly Bill No. 197 (2011-2012 Reg. Sess.) in tandem with Assembly Bill No. 340 (2011-2012 Reg. Sess.) as part of PEPRA. AB 197 clarified the County Employees' Retirement Law of 1937's (Gov. Code, § 31450 et seq.) longstanding definition of compensation earnable, by delineating what pay items are not included in current employees' pension calculations. Through the addition of subdivision (b) to section 31461, AB 197 now expressly excludes from the definition of compensation earnable:

(1) Compensation previously provided in kind to the member or paid to a third party that was received by the member in the form of cash payment ("in-kind payments") and determined by the board to have been paid to enhance a member's retirement benefit. (Gov. Code, § 31461, subd. (b)(1)(A), (B).)

(2) Payments for additional services rendered outside of normal working hours, whether paid in a lump sum or otherwise. (*Id.*, subd. (b)(3).)

The Legislature noted that these exclusions clarified existing law, as they "are intended to be consistent with and not in conflict with the holdings in *Salus v. San Diego County Employees Retirement Association* (2004) 117 Cal.App.4th 734 and *In re Retirement Cases* (2003) 110 Cal.App.4th 426." (*Id.*, subd. (c).)

Respondent MCERA's Retirement Board decided to no longer include in compensation earnable the following pay items earned on or after AB 197's effective date of January 1, 2013: standby pay, on-call pay, administrative response pay, and in-kind benefits converted to cash. (Appellants' Appendix, Vol. I, pp. 15-16 (1 AA 15-16).)

In response to MCERA's decision, petitioners filed suit, claiming that employees hired before January 1, 2013 have a vested right to the pension benefits provided under policies in place when they commenced employment, and that the passage of AB 197 and MCERA's implementation of the law violated their constitutional rights to these benefits. (1 AA 8-10.) The State intervened in the action to ensure "that its duly enacted laws are vigorously defended and upheld." (State's Supplemental Appendix, Vol. 1, pp. 1-12 (1 SSA 1-12).)

MCERA filed a demurrer to the petition for writ of mandate. (1 AA 31-113.) The State concurred with the legal grounds for MCERA's demurrer. (1 AA 172.) The superior court sustained the demurrer without leave to amend. (1 AA 191-193.) Petitioners timely appealed. (1 AA 328-335.)

The First District Court of Appeal affirmed the trial court's judgment sustaining the demurrer without leave to amend. (Slip Op., at pp. 37, 39.) The appellate court concluded that petitioners "have failed 'to make out a clear case, free from all reasonable ambiguity' and 'reasonable doubt,' that they are the victims of a constitutional violation." (*Id.*, at p. 37, quoting *Floyd v. Blanding* (1879) 54 Cal. 41, 43, *Deputy Sheriffs' Assn. of San*

Diego County v. County of San Diego (2015) 233 Cal.App.4th 573, 578.) But, the court did not rely on the same reasoning as the trial court or respondents. Instead, the court determined that a public employee has a vested right only to a "substantial or reasonable pension," and not to any fixed pay items to be included in the pension. (Slip Op., at p. 22.) The court also ruled that any pension changes resulting in a disadvantage to the employee need not include a comparable new advantage. (*Id.*, at p. 26.) This reasoning represented a departure from the holdings of other Courts of Appeal, which had stated that pension changes resulting in disadvantages *must* be accompanied by comparable new advantages. (*Id.*, at p. 24; see also, e.g., *Lyon v. Fluornoy* (1969) 271 Cal.App.2d 774, 782; *Protect Our Benefits v. City and County of San Francisco* (2015) 235 Cal.App.4th 619, 629.)

DISCUSSION

Both of the questions presented in the Petition for Review present important issues of statewide concern. And the first issue raised by petitioners—if addressed by this Court—presents a split in appellate authority on whether reductions to public employee pensions must also include a comparable new advantage. For these reasons, the State supports review by this Court. (Cal. Rules of Court, rule 8.500(b)(1).)

I. PETITIONERS' SECOND ISSUE PRESENTED—REGARDING IMPAIRMENT OF VESTED RIGHTS—DISPOSES OF THE CLAIMS RAISED IN THE WRIT PETITION.

The second issue raised by petitioners—whether reductions to pension benefits resulting from the PEPRA impair employee' vested pension rights in violation of the contract clause—raises an important issue affecting the pension calculations for employees working within the 20 county

retirement systems governed under CERL.[2] Should this Court decide to grant review, this question—which directly responds to the writ petition and is dispositive in this matter—should be addressed first.

On this issue, the Court of Appeal correctly affirmed the demurrer because PEPRA's exclusion of the pay items at issue did not violate Marin County employees' vested rights to a pension benefit. On appeal, the State argued that the Legislature alone determines what qualifies as compensation earnable. (State's Opp. Brief, at p. 22, citing *Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 201.) Therefore, public employees hold vested rights to only those pension benefits mandated by law; the retirement board's inclusion of such benefits does not create a vested right to them. (State's Opp. Brief, at pp. 22-23, quoting *In re Retirement Cases*, *supra*, 110 Cal.App.4th at p. 453 [stating that counties agreed to only provide "a pension benefit to be calculated as mandated by CERL"].)

In affirming MCERA's demurrer, the court of appeal also held that the Legislature alone determines the contours of public employees' vested rights to their pension benefits. (Slip Op. at pp. 35-36, quoting *Martin v. Henderson* (1953) 40 Cal.2d 583, 590-591 ["[t]he statutory provisions controlling the terms and conditions of [public] employment cannot be circumvented by purported contracts in conflict therewith"].) This decision is consistent other appellate cases limiting the extent of public employees' vested rights to what is permitted under the law. (See *Claypool v. Wilson*

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[2] The counties operating retirement systems governed by CERL include: Alameda, Contra Costa, Fresno, Imperial, Kern, Los Angeles, Marin, Mendocino, Merced, Orange, Sacramento, San Bernardino, San Diego, San Joaquin, San Mateo, Santa Barbara, Sonoma, Stanislaus, Tulare, and Ventura. (State Association of County Retirement Systems <http://www.sacrs.org/index.php?option=com_content&view=article&id=62> [as of Oct. 12, 2016].)

(1992) 4 Cal.App.4th 646, 662 ["The contractual basis of a pension right is the exchange of an employee's services for the pension right offered by the statute"]; see also *Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 22-23 ["A public employee is entitled only to such compensation as is expressly and specifically provided by law"].)

Because CERL never permitted the inclusion of the pay items at issue in this action, their exclusion does not violate the vested rights of MCERA members. (State's Opp. Brief, p. 25.) Therefore, if the Court accepts review of this matter, it should affirm the appellate court's decision on this specific issue. Resolution of this important statewide issue would provide clarity to the 20 county retirement systems implementing PEPRA.

II. PETITIONERS' FIRST ISSUE PRESENTED—REGARDING MODIFICATIONS TO PUBLIC EMPLOYEE PENSIONS—IDENTIFIES A SPLIT IN APPELLATE AUTHORITY CREATED BY THE DECISION BELOW, WHICH WOULD WARRANT THIS COURT'S REVIEW.

The *second* question presented—which responds directly to the allegations raised in the writ petition (1 AA 8-10)—disposes of petitioners' entire action. Therefore, if this Court agrees with the State, MCERA, and the court of appeal that PEPRA does not violate employees' vested rights to a pension benefit, there is no need for this Court to address petitioners' first question on whether reductions in pension benefits need to be offset by comparable new advantages. But, if this Court disagrees on the conclusion reached in the second question, then the first question warrants this Court's review.

In its decision, the court of appeal ruled that a governing body may make reasonable modifications to an employee's pension benefit before retirement. (Slip Op., at p. 30.) And, if such a modification results in a reduction to an employee's pension benefit, such disadvantage *should* be accompanied by a comparable new advantage. (*Id.*, at p. 24, emphasis

added.) This permissive standard differs from the mandatory standard used in a prior case before this Court and in several appellate decisions. In *Allen v. Board of Administration* (1983) 34 Cal.3d 114, this Court stated that any constitutionally-permitted modification "of vested pension benefits must be reasonable, must bear a material relation to the theory of a successful operation of a pension system, and, when resulting in disadvantage to employees, *must* be accompanied by comparable new advantages." (Slip Op., at p. 24, quoting *Allen v. Bd. of Admin.*, *supra*, 34 Cal.3d at p. 120, emphasis in Slip Op.)

The appellate court then noted that it does "not believe that the word 'must' [as used in *Allen, supra*] was intended to be given the literal and inflexible meaning attributed to it by plaintiffs." (Slip Op., at p. 24.) Instead, the appellate court states that "'[s]hould,' not 'must,' remains the court's preferred expression." (Slip Op., at p. 26.) Therefore, the appellate court concluded that pension changes resulting in reductions to public employee's pension benefits are not required to be accompanied by a comparable advantage, but rather "should" or "ought" to include a comparable advantage. (*Ibid.*)

In contrast to the appellate court's use of the term "should"—when describing when governing bodies can make constitutionally-permissible changes to public employees' retirement benefits—several other appellate decisions have followed *Allen* by stating that changes resulting in disadvantages to public employee pensions *must* be accompanied by comparable advantages. (See, e.g., *Lyon v. Fluornoy*, *supra*, 271 Cal.App.2d at p. 782; *Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1137; *In re Retirement Cases*, *supra*, 110 Cal.App.4th at p. 448.) Most recently, Division 5 of the First District Court of Appeal noted that "a lawmaker's power to modify pension rights once vested is 'quite limited,'" and that, changes resulting in a disadvantage

to a current employees' pension benefits "*must be accompanied by comparable new advantages.*" (*Protect Our Benefits v. City and County of San Francisco, supra*, 235 Cal.App.4th at p. 629, internal citations omitted, emphasis in original.)

This Court's review will aid in resolving this split in authority on whether public employees' pension benefits can be reduced prior to retirement without providing a comparable advantage. Moreover, a decision from this Court will alleviate any confusion resulting from the conflicting appellate decisions, and provide public employee retirement boards throughout the state with clarity on implementation of public employee pension laws going forward. While the appellate decision directly affects only a limited number of public employees in Marin County, the First District's reasoning regarding pension modifications affects the administration of pension systems affecting over two million public employee retirement association members throughout the state.[3] Because a ruling by this Court will resolve any splits in authority on what public employee pension modifications are permitted under the contract clause, the State supports Supreme Court review of this action.

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[3] As of June 30, 2015, the California Public Employees' Retirement System (CalPERS) included 1,204,621 active and inactive members. (*CalPERS: Facts at a Glance* <https://www.calpers.ca.gov/docs/forms-publications/facts-at-a-glance.pdf> [as of Oct. 11, 2016].) The California State Teachers' Retirement System (CalSTRS) included 613,856 active and inactive members. (CalSTRS: Fast Facts Fiscal Year Ending June 30, 2015 <http://www.calstrs.com/sites/main/files/file-attachments/fastfacts_2015.pdf> [as of Oct. 11, 2016].) The Los Angeles County Employees Retirement Association (LACERA) included 101,860 active and deferred members. (LACERA 2015 Annual Report <http://www.lacera.com/investments/Annual_Report/cafr/cafr.pdf> [as of Oct. 11, 2016].)

CONCLUSION

For the foregoing reasons, the State supports this Court's review of the above action.

Dated: October 14, 2016

Respectfully submitted,

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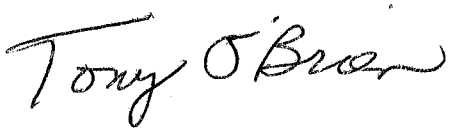

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CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER TO PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 2,089 words.

Dated: October 14, 2016

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DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **Marin Assn. of Public Employees, et al. v. Marin County Employees' Retirement Assn., et al. (Supreme Court)**

No.: **S237460**

I declare:

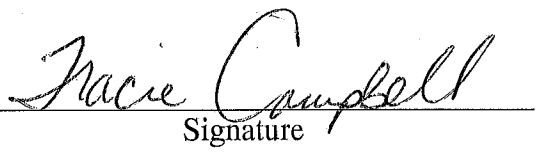
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On October 14, 2016, I served the attached **ANSWER TO PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with the **GOLDEN STATE OVERNIGHT COURIER SERVICE**, addressed as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 14, 2016, at Sacramento, California.

Tracie L. Campbell
Declarant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