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REPRESENTING UNIONS, WORKERS, AND BENEFIT PLANS

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October 17, 2016

Via Hand Delivery

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

Re: Request for Depublication
Marin Association of Public Employees v. Marin County Employees' Retirement Association
(2016) 2 Cal.App.5th 674
Supreme Court Case No. S237460
First Appellate District Case No. A139610 (Division Two)

Dear Chief Justice Cantil-Sakauye and Associate Justices:

I write on behalf of the International Federation of Professional and Technical Engineers, Local 21; Public Employees Union Local No. 1; Alameda County Management Employees Association; and the Physicians' and Dentists' Organization of Contra Costa to request depublication of *Marin Association of Public Employees v. Marin County Employees' Retirement Association* (2016) 2 Cal.App.5th 674 (First Appellate District case number A139610) ("*MAPE*").[1]

The requesting parties are public sector unions, representing thousands of public employees and have an interest in protecting public employees' pension rights. The Court of Appeal decision significantly undermines public employees' vested rights to their pension benefits under the Contract Clause precedents of this Court and other appellate courts. Given the conflict between established case law and the Court of Appeal opinion, as well as the unwarranted factual findings and indeterminate legal standard contained in the decision, the requesting parties urge the Court to depublish this opinion.

[1] This firm is also counsel to the Marin Association of Public Employees and Catherine Hall, petitioners and appellants in *MAPE*.

I. The Interests of Amicus Curiae

The requesting parties are public sector unions, representing thousands of public employees throughout the San Francisco Bay Area and Northern California. Members of the requesting unions work for the City and County of San Francisco, Alameda County, Contra Costa County, Santa Clara County, the City of Oakland, and the City of San Jose, among others. They participate in defined benefit pension plans administered under local charters or ordinances, the County Employees' Retirement Law of 1937, Government Code section 31450 *et seq.*, and the Public Employees' Retirement Law, Government Code section 20000 *et seq.*

The *MAPE* decision undermines the right of public employees to their vested pension benefits, including members of the requesting unions. Additionally, the requesting unions are parties to similar but separate lawsuits concerning the constitutionality of changes made to pension benefits in Contra Costa and Alameda Counties under the same Assembly Bill 197 (Stats. 2012, ch. 297) as is at issue here (see First Appellate District case number A141913). Accordingly, the requesting unions have a substantial interest in the outcome of the *MAPE* decision and in ensuring that the case law is consistent in its protection of public employee pension rights.

II. Why the Court Should Depublish

The Petition for Review and amicus letters supporting review, as well as other requests for depublication, highlight the significant conflict between the *MAPE* decision and this Court's precedents, as well as the split this decision creates among appellate districts and within the First District Court of Appeal. In particular, the lower court's decision badly misreads *Allen v. Board of Administration* (1983) 34 Cal.3d 114 and other pension cases that have long prohibited changes to public employee pensions except when (1) changes to the pension benefit bears some material relations to the theory of the pension system and its successful operation, and (2) any resulting disadvantages are accompanied by comparable new advantages. (See, e.g., *id.* at p. 120; *Betts v. Bd. of Admin.* (1978) 21 Cal.3d 859, 864-865.)

Because these issues are thoroughly addressed elsewhere, this request for depublication will focus on two additional problems with the decision below: first, notwithstanding that this case was decided at the pleading stage, the court wrongly treats as fact numerous reports and

articles regarding funding of public sector pensions; and second, the Court of Appeal's standard for when pension changes would be permissible is highly indeterminate and provides no guidance for when changes would be permissible.

A. The Court of Appeal Makes Unwarranted Factual Findings on Demurrer

Throughout its opinion, the lower court relies on various reports and articles to develop a consistent and highly partisan theme: that the pension reductions at issue here are appropriate because public employee pension obligations are a "ticking fiscal time bomb" of "staggering" proportion. (Slip Op. at p. 3, citations and quotation marks omitted.) The upshot, according to the court, is that "[t]he state must exercise its authority—and establish the legal authority—to reset overly generous and unsustainable pension formulas for both current and future workers." (Slip Op. at p. 4, citations and quotation marks omitted.) In the case of Marin County specifically, the court claimed that the pension system is "projected to plunge into a fiscal and actuarial abyss," and it quotes extensively from civil grand jury reports to conclude that public employee pensions threaten the county's ability to provide "essential services" and that pension reform cannot be delayed. (Slip Op. at pp. 8-9, fn. 7; 36.) Perhaps most significantly, the panel characterizes the case at the outset as being about "pension spiking," implying that the pension benefits at issue were "stratagems and ploys to inflate . . . income." (Slip Op. at p. 1.)

The problem, however, is that there is no evidence in the record to support these findings. As the Court of Appeal acknowledges, but attempts to downplay by asserting there is no factual dispute (see Slip Op. at p. 14), this case was decided solely on the pleadings. The appellants did not plead, nor did any party ever show, that public employee pension funding is as dire as the court describes or that the Marin County Employees' Retirement Association is on the verge of a fiscal abyss. Nor have any facts been established about how the actual pension benefits worked, including whether they somehow artificially inflate employee compensation.

Notwithstanding that these facts have never been proven in court, the Court of Appeal has now established as a matter of law various partisan claims about the funding of public employee pension benefits and the need for "immediate [pension] savings" throughout the state. (Slip Op. at p. 4, emphasis omitted.) Without depublication, these claims will be treated as fact and as legal precedent, even though the trial court did not evaluate any

evidence on these issues, and even though appellants never had an opportunity to put on evidence in rebuttal.

The court then uses these findings to justify its holding, improperly ruling on demurrer that the changes are permissible, because employees have not seen their pensions "destroyed" and still have a "reasonable" pension. (Slip Op. at p. 32.) For instance, the finding that the reductions represent a "reasonable" modification is much more sensible when set against the backdrop of a pension system "projected to plunge into a fiscal and actuarial abyss." (Slip Op. at p. 36.) But there was no evidence nor any factual findings to support such a conclusion, making this a façade.

More crucially, even assuming the court is correct in its "reasonableness" standard of when pensions can be modified, the court cannot circumvent the fact that whether the pension reduction is "reasonable" is itself a question of fact. (See Slip Op. at p. 29 ["[I]t is for the courts to determine upon the facts of each case what constitutes a permissible change," quoting *Miller v. State of California* (1977) 18 Cal.3d 808, 816.].) But without having any established facts here—most notably without any information about the costs of the pension benefits, whether the excluded compensation items are actually used to "spike" pensions, or what pension benefits employees will receive if these payments are excluded—the court determines as a matter of law that the pension reductions are reasonable. (Slip Op. 36.) The court even goes so far as to fault the appellants for failing to demonstrate that the Public Employees' Pension Reform Act of 2013 does not bear a material relation to the theory of a pension system and that the modifications are not "reasonable," as if they had an opportunity to do so at the pleading stage. (Slip Op. at p. 36 ["Plaintiffs make no real effort to demonstrate why the Pension Reform Act's modification . . . does not bear some material relation to the theory of a pension system and its successful operation [citation], or is not a "reasonable modification" of the pension system," quotation marks omitted.].)

This is entirely contrary to the purpose of and standard for a demurrer. Not only has the court treated as fact unproven fiscal and policy assertions, it goes well beyond the complaint to make its ruling on the legal merits. The end product is a partisan decision that fulfills the very imperative the court claims is necessary—the establishment of legal authority to reset pensions for both current and future workers. (Slip Op. at p. 4.) This should not be permitted to stand, and this Court should depublish the opinion.

B. The Court of Appeal Creates a Vague and Indeterminate Standard

Before the lower court's decision in *MAPE*, this Court had established clear rules for when pension changes would be permissible: to be sustained as "reasonable" under the Contract Clause, alterations must bear a material relation to the theory of the pension system and its successful operation—i.e., the intent must be to continue to provide retirement benefits to employees—and changes that result in disadvantages to employees must be accompanied by comparable new advantages. (E.g., *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131.) The panel below rejects this understanding of what is "reasonable" but does not provide a rule to be applied in its place other than that the pension may not be "destroyed" and employees must continue to have a "reasonable" and "substantial" pension. (Slip Op. at pp. 29-30.) Given the wide range of changes permitted under the court's decision and the lack of any specific guidance as to what is "reasonable," letting this decision remain published will result in extreme confusion and uncertainty.

Under the lower court's interpretation any changes that stop short of "destroying" an employee's anticipated pension are permissible, and "there are acceptable changes aplenty" that are allowed. (Slip Op. at p. 29.) But the court offers no guidance as to how employers, employees, or the courts are supposed to decide what is permitted.

For instance, if a 25% pension reduction is permissible, is a 50% reduction? (See Slip Op. at p. 29.) Does it matter that a custodian making $30,000 a year will be left with much less than an executive or manager making $200,000 a year after such a reduction? How are courts to understand and judge what a "reasonable" pension is? How should the reduction correspond to the exigent circumstances, if at all? (Cf. *Sonoma County Org. of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 306.) Should the government entity be required to raise taxes or cut elsewhere before reducing pensions?

The court also finds that even if comparable new benefits "should" be provided to offset reductions, the Public Employees' Pension Reform Act provided offsetting advantages, because employees no longer have to make pension contributions to fund the eliminated benefit. (Slip Op. at p. 27 ["new benefit" provided by PEPRA in that employee paychecks are "no longer being reduced by deductions to cover those sums in funding the employee's retirement. Put simply, the benefit is an increase in the

employee's net monthly compensation"].) Although the appellants pleaded that no comparable advantage was provided to offset the reductions, even leaving that aside, the court's ruling would seem to permit any reduction in pension benefits so long as employees do not have to contribute as much toward their pensions. But is increased compensation by itself sufficient to provide the "comparable advantage" that "should" accompany disadvantages? Or does the comparable advantage need to be a pension benefit, as the *Allen* formulation indicated? Does there need to be a relationship or some proportionality between the additional compensation and the lost pension benefits? Does it matter that employee salaries are generally not considered vested benefits and therefore can be reduced through an employer's unilateral imposition?

These questions and many more are unanswered by the lower court's decision. Instead, affected parties are left guessing what will ultimately be found "reasonable," in light of the Court of Appeal's opinion and the many conflicting cases interpreting "reasonableness" under the prior standard established by this Court. Without depublication, significant confusion—and more litigation—will abound, and this Court should therefore step in to ensure that the lower court's decision does not continue to be good law.

III. Conclusion

As noted above, these are just some of the reasons this decision should not be allowed to stand, and there are many others not addressed here. The Court of Appeal has attempted to overturn this Court's precedent but has done so in a way that gives unfounded credence to claims not substantiated by the record and which leaves significant confusion in its wake. Accordingly, the requesting parties respectfully ask that this Court depublish this opinion, in addition to granting review to overturn it.

Respectfully Submitted,

LEONARD CARDER, LLP

Arthur Liou

PROOF OF SERVICE

I am employed in Alameda County. I am over the age of eighteen (18) years and not a party to the within action. My business address is 1330 Broadway, Suite 1450, Oakland, California 94612. On October 17, 2016, I caused to be served the following document(s):

- **Request for Depublication**
  Marin Association of Public Employees v. Marin County Employees' Retirement Association
  (2016) 2 Cal.App.5th 674
  Supreme Court Case No. S237460
  First Appellate District Case No. A139610 (Division Two)

by placing a true copy thereof enclosed in a sealed envelope and served in the manner and/or manners described below to each of the parties herein and addressed as below or stated on the attached service list:

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Carol Edgerton