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Civil Litigation
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October 18, 2016

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: Letter in Support of Petition for Review on the Case of *Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.*, Case No. A139610 Supreme Court Case No. S237460

Dear Chief Justice and Associate Justices of the Supreme Court:

Pursuant to California Rule of Court 8.500(g), the San Diego Police Officer's Association ("SDPOA") encourages the Court to grant the petition for review filed by the Marin Association of Public Employees, et al.

The SDPOA is a mutual benefit corporation organized and doing business as a State of California sanctioned employee organization representing police officers holding the rank of captain and below who are employed by the City of San Diego. The SDPOA represents more than 1,800 sworn police officers. The employees the SDPOA represents represent have earned, as part of the consideration for services performed, deferred compensation in the form of a defined benefit pension. Throughout much, if not all, of their careers, they have relied on the ability to receive these promised allowances when they retire (assuming they meet all conditions precedent) in planning their futures and those of their families. These police officers and their families have an overwhelming interest in ensuring that the misguided decision of the Court of Appeal, which provides that the legislature, retirement systems and/or government employers

may undercut those benefits without granting a comparable alternative, is reviewed and overturned by this Court.

It is imperative that this Court grant the Petition for Review to settle an important question of law and to secure uniformity of decision, within the meaning of California Rule of Court 8.500(b)(1), by rendering a Decision that clarifies the well-established principle that, while specified pension entitlements already earned in return for valuable services being rendered may be modified as to form, an alteration of their substance would impair contractual obligations in violation of Article I, Section 9 of the California Constitution. Otherwise, the legitimate expectations of millions of public employees throughout the State derived from the conclusions reached by, and the pronouncements contained in, the numerous reported opinions of this Court and Courts of Appeal for approximately one hundred years will be completely obliterated.

The decision of the Court of Appeal, First Appellate District, conflicts with established Supreme Court precedent. The decision establishes a new standard under which a public employer's modifications to a pension system are to be evaluated under the California Constitution's contracts clause. The decision is an improvident departure from longstanding precedent, and should be reviewed by the Justices. Although the Court of Appeal's decision concedes that a public employees' entitlement to receive the pension offered at the time she accepts employment is a "vested right" protected from impairment by the contracts clause, its reasoning proceeds to unravel that right by permitting modifications to employees' pensions provided the adverse effects sustained by the employees fall short of "abolishing" or "destroying" the pension. (Slip Op. p. 28).

The Court of Appeal's conclusion is contrary to this Court's precedent, which holds that modifications to pension plans are permissible if they are reasonable, and the litmus test to establish whether a modification is reasonable is whether it does not result in an impairment. Thus modifications have been permitted provided the value of the pension being earned by an employee will match the value received at retirement.

For example, in *Allen* v. *Long Beach* (1955) 45 Ca1.2d 128, this Court stated that a certain City Charter amendment "substantially decreases plaintiffs' pension rights without offering any commensurate advantages." (*Id.* at p. 131.) This Court proceeded to hold that a second additional change "raises the cost to [employees] of pension protection without securing any advantage in addition to that which they already enjoyed." (*Id.* at p. 132.) Accordingly, the alterations were held to impair the contractual interests of the employees.

Similarly, in *Abbott* v. *Los Angeles* (1958) 50 Ca1.2d 438, this Court undertook a lengthy analysis of the alleged comparable benefits provided as a result of certain pension changes. (*Id.* at pp. 449-454.) In determining that the changes were not properly offset by comparable advantages, thereby impairing the already-earned contractual entitlements of the employees, this Court concluded (at p. 454): "Regardless of the 'thinking of the time,' however, under the holding of the *Allen* [*v. City of Long Beach*] case the 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." (Italics added.)

Finally, in *Betts v. Board of Administration* (1978) 21 Ca1.3d 859, this Court again restated the test that "changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages." (*Id.* at p. 864.) However, the Court proceeded to hold that the modification in that case was not permitted because no new advantages were provided, stating (at pp. 867-68): "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."* (Italics added.)

Accordingly, even though the prior decisions of this Court did not state that

disadvantages "must" be offset by comparable new advantages, those decisions make clear that such new comparable advantages were required in order for the modification to be reasonable. Left unsaid in the decision of the Court of Appeal is why, if the new advantages were not a requirement, this Court has repeatedly analyzed whether a pension modification provided new advantages and, when the modifications did not provide any comparable new advantages, held that the modifications impaired the contractual interests of the employees.

The Court of Appeal's error is revealed in its approach to the constitutional question, to which it applies a statutory rather than a contract analysis. This Court has often stated that "[p]ension rights, ha[ve] long been characterized as within the domain of contract." (*California Teachers Assn. v. Cory* (1984) 155 Cal.App.3d 494, 50). California jurisprudence has been consistently firm on this point, repeatedly characterizing public pensions in contract language such as inducement, bargain and exchange: "In addition to providing subsistence for the old-age or disability of individual employees and their dependents, public pension plans serve the public purpose of *inducing* qualified persons to enter and continue in public service." (*Phillipson v. Board of Administration* (1970) 3 Cal.3d 32, 49 (emphasis added); *Quintana v. Board of Administration* (1976) 54 Cal.App.3d 1018, 1020 ["The pension system serves as an inducement to enter and continue in the state service."].)

For this reason, public pensions are central to the employment contract between the state and its political subdivisions', employees. As summarized by the Court of Appeal in *Santin v. Cranston* (1967) 250 Cal.App.2d 438, 444: "Pensions for public employees are based upon the theory that such a pension is an *integral* part of the employee's compensation *under his contract of employment*, and that one of the primary purposes of offering a pension, as additional compensation, is to *induce* competent persons to enter and remain in public service." (Italics added; citing *Kern v. City of Long Beach* (1947), 29 Cal.2d 848, 851-853, 855, 856; *French v. French* (1941) 17 Cal.2d 775, 777; *Dryden v. Board of Pension Com'rs of City of Los Angeles* (1936) 6 Cal.2d 575, 579; and *Packer v. Board of Retirement* (1950) 35 Cal.2d 212, 215.)

The Court of Appeal ignored this precedent by blithely describing pensions as creatures of statute and therefore subject to revision at the whim of the legislature through exercise of its police power (Slip Op. at p. 35 ["The Legislature's involvement would obviously take statutory form, which is relevant because the terms and conditions of public employment are fixed by statute and not by contract."]; internal notations omitted).)

To be sure, the terms of pension plans, when offered by the government, are contained in statutes, ordinances or charters but that does not render the rights generated creatures of statute rather than contract. That point was made plain in *Kern v. City of Long Beach*, *supra*, 29 Cal.2d at p. 852: "The pension provisions of a city charter are an *indispensable* part of the *contract of employment between a city and its employees*, creating a right to pension benefits as an integral part of compensation payable *under such contract*, which vests upon acceptance of employment." (emphasis added). Clearer still, is this Court's formulation in *Bellus v. City of Eureka* (1968) 69 Cal.2d 336, 351:

> [A] charter city, possessed of plenary power to adopt a pension system imposing upon it a general obligation, cannot escape liability for those pension payments which it has led its employees reasonably to expect. *In this respect it is no different than any other employer or public service institution which induces reliance upon a contract which may reasonably be interpreted to afford that protection which has been impliedly promised.*

(*Id.* at p. 352, italics added; see also *Carmon v. Alvord* (1982) 31 Cal.3d 318, 325 fn. 4 ["Public pension benefits are created to serve as an inducement to enter and continue in public employment and to provide *agreed* subsistence to retired public servants who have fulfilled their employment contracts."].)

When properly understood as a contractual obligation involving employee compensation, the circumstances under which the terms of a pension system may

be changed as to existing employees is exceedingly narrow.

The cases discussed and emphasized by the Court of Appeal in connection with the proposition that comparable new advantages "should" occur, but are not required, involved situations where the actual ruling was that there was no contractual impairment because the asserted alteration was consistent with the earned vested right. For example, in the case most frequently cited as support by the Court of Appeal, *Miller* v. *State a/California* (1977) 18 Ca1.3d 808, the earned benefit provided a certain allowance upon retiring at age 70. The affected individual asserted that he was deprived of his vested right to receive the pension attendant to that goal because his employer imposed a mandatory retirement age of 67. This Court correctly concluded (at pp. 817-18) that, because that individual did not possess a vested contractual right to remain in public employment until he reached 70, the loss of the potential benefit if that age were attained during employment is not an impairment of a *vested pension right.*

Similarly, the cases involving a fluctuating pension that is a percentage of the income earned by a current employee in the position formerly occupied by the retiree (see *e.g.*, *Casserly v. City of Oakland* (1936) 6 Ca1.2d 64 and *Terry* v *City of Berkeley* (1953) 41 Ca1.2d 698) are readily distinguishable because the reduction in the retirement allowance in those cases was not an impairment of a vested right but, instead, resulted from the application of a condition attached to the earned benefit (I. e., increases or decreases in the salary of a current employee in the same position). Similarly, in *International Association of Firefighters v. City of San Diego* (1983) 34 Ca1.3d 292, 300-303, this Court correctly differentiated the asserted impairment in that case from its earlier decision in *Allen v. City of Long Beach, supra,* 45 Ca1.2d 128, because, unlike *Allen* where an increase in the employee contribution rate was held to be an unconstitutional impairment, the San Diego rate increase was based upon an actuarial change in assumptions that was a condition attached to the vested right that was earned. The Court of Appeal observed (2 Cal.App.5th 697-99) that in *Allen v. Board of Administration, supra,* which was decided in July 1983, this Court replaced the word "should" with the word "must." However, there are two other plausible

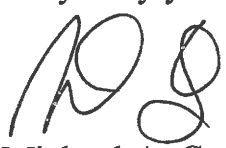
conclusions that could be drawn from this action other than the one reached by the Court of Appeal. One would have been to conclude that this Court intended to change the standard from "should" to "must." The other, and more likely, conclusion is that this Court was consistently using the words "should" and "must" interchangeably.

Likewise, in *Olson* v. *Cory* (1980) 27 Cal.3d 532, 541, this Court rejected the 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."

"'A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.' [Citation.]" (*Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 308.)

The decision of the Court of Appeal conflicts with long-established precedent of this Court. For the foregoing reasons, the SDPOA respectfully urges the Court to grant review of the Court of Appeal's decision.

Very truly yours,



Michael A. Conger

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PROOF OF SERVICE

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

Supreme Court Case No. S237460

(Court of Appeal Case Number: A139610)

I declare as follows:

I, the undersigned declare under penalty of perjury that I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action; my business address is 16236 San Dieguito Road, Suite 4-14, P.O. Box 9374, Rancho Santa Fe, California 92067. My electronic notification address is messerpatti@aol.com.

On October 18, 2016, I served the foregoing document described as:

1. AMICUS LETTER IN SUPPORT OF PETITION FOR REVIEW;

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(X) **BY MAIL -** I am readily familiar with the firm's practice of collection and processing of correspondence for mailing with the United States Postal Service, and that the document(s) shall be deposited with the United States Postal Service this same day in the ordinary course of business pursuant to Code of Civil Procedure § 1013a.

I declare under the penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 18, 2016, at Rancho Santa Fe, California.

Patricia B. Messer

Patricia B. Messer