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October 21, 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: ***Amici Curiae* Letter in Support of Petition for Review in the Case of *Marin Association of Public Employees v. Marin County Employees' Retirement Association* (Cal. Ct. App. 2016) 206 Cal.Rptr.3d 365 (*Marin*)**
Court of Appeal, First Appellate District, Division Two Case No. A139610
Supreme Court Case No. S237460 (Petition for Review Pending)

Dear Honorable Justices:

This *amici curiae* letter in support of the Petition for Review ("Petition") filed by Petitioners Marin Association of Public Employees, *et al.*, in the captioned matter is submitted to this Honorable Court pursuant to California Rule of Court 8.500(g). This letter is submitted on behalf of the Orange County Attorneys Association ("OCAA") and the Orange County Managers Association ("OCMA") (collectively "*Amici*"). The *Amici* urge this Court to grant review and overturn the Court of Appeal's decision in *Marin* for the reasons set forth herein.

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 the 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 *Amici* have an interest in this case because, as we set forth herein: (1) the *Marin* decision reverses decades of constitutional doctrine, referred to as the "California Rule," which protects California public employees—including members of bargaining units represented by OCAAs and OCMA—from changes in promised retiree benefits that negatively impact them unless such changes are offset with some comparable new advantage; and (2) the Court of Appeal's decision upends a clear test for evaluating changes to pension benefits and replaces that clarity with a vague and poorly-described standard.

Under the rule announced in *Marin*, the constitutional guarantee that any disadvantageous changes in a promised retirement benefit be offset by a comparable advantage is replaced with an ill-defined guarantee that retirement benefits must be "substantial" and cannot be "destroyed." Inasmuch as this radical change casts into doubt the nature and security of their vested pension rights, the *Amici*'s unit members have an acute interest in whether the *Marin* decision is reviewed and upheld by this Court. As the representatives under the MMBA of their respective unit members in regards to their terms and conditions of employment, OCAA and OCMA share this interest.

II. Background

At issue in the Petition is *Marin*'s repudiation of the so-called "California Rule." 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 *Allen* is, in fact, nothing more than a clarification of the meaning of the guarantee (of a "substantial or reasonable" pension subject only to "reasonable" modifications) set forth in a series of earlier cases.[2] In *Allen*, this Court recognized that, under

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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] Among the earlier cases establishing that public employees have the right to a "substantial or reasonable" pension which, while not inflexible, is subject to only "reasonable" modifications are *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 that,

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. In keeping with the case law holding that pension systems, while they must provide guaranteed benefits, also need some flexibility,[3] the Court, in *Allen*, acknowledged that benefits "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" so long as such modifications are "reasonable." *Id.*

> 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."). As we discuss below, subsequent cases—until *Marin*—have consistently and uniformly reaffirmed the California Rule, including the requirement that changes to pension rights that disadvantage employees be offset with comparable new advantages.

In *Marin*, Division Two of the First Appellate District Court of Appeal cast off decades of binding case law holding that, under the California Rule, some comparable new advantage must be provided to offset pension cuts. 2 Cal.App.5th at 697-700 ("There is No Absolute Requirement That Elimination or Reduction of an Anticipated Retirement Benefit 'Must' Be Counterbalanced by a 'Comparable New Benefit'"). Its rationale was as follows:

- 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*).

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in this context, reasonableness means that the public employer must offset any negative modifications with some comparable new advantage.

[3] *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.").

- 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* court stated that the *Allen* decision's choice of wording was a mistake rather than a "doctrinal shift."

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

III. Discussion

a. The *Marin* Decision Incorrectly Reverses Decades of Precedent

For decades, all California courts, including this Court, have recognized that to be reasonable, a change in pension benefits must include comparable advantages as an offset to any disadvantages introduced into the new system. The *Marin* decision is alone in rejecting this longstanding judicial understanding of the constitutionally guaranteed right to a promised retirement benefit. Because this decision undercuts the expectation—created by over sixty years of precedent—upon which literally hundreds of thousands of public employees and their families rely, it is important for this Court to address the split in authority that *Marin* has created in order to secure uniformity of decision and to settle an important question of law. *See* Rule of Court 8.500(b)(1).

Reading the court of appeal's decision in *Marin*, one would think that this Court's 1983 decision in *Allen v. Board of Administration* (1983) 34 Cal.3d 114, 120, 192 Cal.Rptr. 762, was an aberration based on this Court's quoting an overzealous restatement of the applicable rule in an isolated court of appeal decision. In fact, however, the 1983 *Allen* decision was simply one of a then-already longstanding series of cases holding that California public employers could not materially 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 providing an offsetting comparable advantage. The cases applying this rule have been numerous and uniform. *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 impermissible because it 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 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").

In light of this long history of appellate and Supreme Court decisions, it is particularly telling that the *Marin* decision did not point to a single case expressly holding that a comparable new advantage need not be provided.[4] This is because, prior to *Marin*, courts—even when they did not use the precise "***must*** be accompanied" phrasing—uniformly rejected pension changes when they were not accompanied by comparable new advantages. *See, e.g. Abbott*, 50 Cal.2d at 449-54 (rejecting change because "the substitution of a fixed for a fluctuating pension ***is not***

[4] Rather, each of the cases cited by *Marin* in support of its conclusion involved situations where no impairment was found because the asserted change was found to be consistent with the earned vested right. *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).

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)*; *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*).

Because Marin case represents a serious departure from this long line of case law, stretching across decades, appellate districts, and retirement systems, it has disrupted the prior "uniformity of decision." Under Rule of Court 8.500(b)(1), this is itself sufficient grounds for review.

Additionally, the issue on which Marin has destroyed that uniformity is an "important question of law," also supporting review. *See id.*[5]

The California Rule has, for decades, set the foundation for the expectations of hundreds of thousands of public employees throughout the state, including OCAA's and OCMA's unit members, about the definiteness of their benefits, something which is now in doubt. The uncertainty introduced by the Marin decision also will disrupt the meet and confer process set forth in the MMBA, Gov. Code §§ 3500, *et seq.*[6] For years, memoranda of understanding have been negotiated between public employers and employee organizations, including OCAA and OCMA, against the backdrop of a legal framework that has included the California Rule, and those negotiations have routinely involved negotiated trade-offs of current pay and benefits for future pension benefits. But Marin has sown confusion as to whether negotiated changes to pension systems are illusory and also in regards to what sorts of changes government employers may lawfully make to their pension systems. These concerns affect tens of thousands of public employees across the state, public employers, and taxpayers generally and certainly constitute an "important public issue."

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[5] Previous cases in which this Court has granted review of disputes concerning the nature and scope of the California Rule include Allen, 45 Cal.2d 128; Abbott, 50 Cal.2d 438; Miller, 18 Cal.3d 808; Betts, 21 Cal.3d 859; and Eu, 54 Cal.3d 492.

[6] 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 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).]

b. The *Marin* Decision Upends a Clear Test for Whether Changes in a Pension System Are Constitutional and Replaces That Clarity With a Vague and Ill-Defined Standard

In addition to inappropriately overturning the heretofore clearly-defined test (forged over decades in an unbroken line of appellate and Supreme Court decisions) for what types of changes to a pension system a California public employer can (and cannot) make, *Marin* provides almost no guidance as to how to evaluate such changes in the absence of the current test.

Under the 1955 *Allen* decision and its progeny, while public employers can make modifications to pension systems to maintain the flexibility and integrity of the system, such changes must be "reasonable"; and, where a change results in "disadvantage to employees," it is permissible only when the change was accompanied "by comparable new advantages." *See* 45 Cal.2d at 131. While there have been disputes over the years over whether a particular change truly constitutes a "disadvantage to employees," *e.g. Miller*, 18 Cal.3d 808 (no disadvantage because change did not effect a vested right), and as to whether specific changes truly included a "comparable new advantage," *e.g. Lyon*, 271 Cal.App.2d 774 (change in indexing method included comparable new advantages), the applicable standard has been clear.

In place of this test, Marin posits as a new standard language that has not formed the basis of any decision. Specifically, it cites language from *Miller*, 18 Cal.3d at 808, *quoting Wallace*, 42 Cal.2d at 183, which provides that "the employee does not have a right to any fixed or definite benefits but only to a substantial or reasonable pension." *Marin*, 2 Cal.App.5th at 695-96. Additionally, *Marin* points to language elsewhere in the case law recognizing that pension rights may not be "destroyed." *Id.*, *citing International Assn. of Firefighters*, 34 Cal.3d at 300-301. Once the sixty years of precedent refining the 1955 *Allen v. City of Long Beach* definition of reasonableness has been rejected, what it means for a pension to be "substantial or reasonable" is unclear. Similarly, when divorced from the requirement that any disadvantage be offset by comparable new advantages, what it takes for a benefit to be "destroyed" is also unclear. Thus, *Marin*'s test has replaced a well-understood test with a new test that has created—and will, for decades to come, create—significant uncertainty about what sorts of reductions to existing employee pension benefits are legal. Because of this, currently working public employees, as well as current retirees, no longer enjoy the security and peace of mind that comes with knowing that their retirement benefits—though not written in stone—are of a determinative value that is relatively fixed. Instead, they face uncertainty about whether their public employer may fundamentally rewrite their pension benefits in a disadvantageous way. Without further guidance from this Court, this uncertainty will persist and manifest itself in countless lawsuits throughout the state, as public employers seek to test the limits of which sorts of changes are legally appropriate.

For the reasons set forth above, the *Amici* respectfully request that this Court grant the Petition and overturn *Marin*, to restore certainty and predictability to vested pension benefits under the California Rule.

Respectfully submitted,

Marianne Reinhold

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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.

On October 21, 2016, I served the document described as **AMICI CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW** on the persons below, as follows:

PLEASE SEE ATTACHED SERVICE LIST

■ **BY MAIL:** I deposited such envelope in the mail at Santa Ana, California. The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

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☐ **BY FAX:** I sent such document by use of facsimile machine telephone number (714) 834-0762. The facsimile cover sheet and confirmation are attached hereto indicating the recipient's facsimile number and time of transmission pursuant to California Rules of Court Rule 2008(e). The facsimile machine I used complied with California Rules of Court Rule 2003(3) and no error was reported by the machine.

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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 21, 2016, at Santa Ana, California.

Rita A. Pollard

RITA A. POLLARD

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