ROTHNER, SEGALL & GREENSTONE
ATTORNEYS
510 SOUTH MARENGO AVENUE
PASADENA, CALIFORNIA 91101-3115

GLENN ROTHNER
ANTHONY R. SEGALL
ELLEN GREENSTONE
JONATHAN M. COHEN
ELI NADURIS-WEISSMAN
MARIA KEEGAN MYERS

DANIEL B. ROJAS
HANNAH S. WEINSTEIN

MICHELE S. ANCHETA
OF COUNSEL

TELEPHONE:
(626) 796-7555

FACSIMILE:
(626) 577-0124

WEBSITE:
WWW.RSGLABOR.COM

October 24, 2016

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-3600

Re: *Marin Association of Public Employees, et al., v. Marin County Employees' Association, et al.,* California Supreme Court Case No. S-237460

Amici Curiae Letter in Support of Request for Depublication

To the Honorable Hon. Tani Cantil-Sakauye, Chief Justice, and Associate Justices:

Pursuant to California Rule of Court 8.500(g), the following labor unions respectfully submit this letter to request depublication of the Court of Appeal's opinion in the above-referenced matter: the American Federation of State, County and Municipal Employees ("AFSCME"); American Federation of Teachers ("AFT"); National Education Association ("NEA"); Service Employees International Union ("SEIU"); California Faculty Association ("CFA"); California Federation of Teachers ("CFT"); California School Employees Association ("CSEA"); and California Teachers Association ("CTA"). These union *amici* collectively represent over one million public employees in California whose vested pension rights are now gravely threatened by the decision of the Court of Appeal below.[1]

Amici have separately sent this Court a letter in support of the Petition for Review in this case; the instant request for depublication is made in the alternative—assuming the Petition for Review is not granted—on the basis of the same serious flaws in the Court of Appeal's decision. As set forth in the Petition, the Court of Appeal's decision wrongly answers a question of law important not only to California, but to pension rights jurisprudence nationwide: Under the Contracts Clause of the California Constitution, does the undisputedly "vested right" of a public employee to a promised pension entitle that employee to the pension she was promised, or merely to a "reasonable pension" of undefined terms?

[1] No party or counsel for any party, other than counsel for *amici,* has authored this letter in whole or in part. No party, no counsel for a party and no person or entity—other than *amici,* their members, or their counsel—made a monetary contribution intended to fund the preparation or submission of this letter brief.

The longstanding "California Rule" is that a public employee is, in fact, entitled to receive the pension originally promised to her, and if the legislature wishes to modify that formula, it may do so only if it provides a comparable new pension benefit. The fixed meaning of this rule of law has been understood, and followed, by numerous other state courts around the country. By substituting this bedrock rule of public pension law with the amorphous standard that public employees are merely entitled to a "reasonable" pension, the Court of Appeal below invented a new, unworkable rule out of whole cloth. The resulting uncertainly created by that decision could thus disturb the reasonable expectations of millions of California public employees, in turn creating serious attrition problems for public employers charged with providing essential public services. Moreover, if let stand, the Court of Appeal's decision could have similarly ominous repercussions for public employees in other states whose pension jurisprudence rests upon the heretofore solid foundation of the California Rule.

For these reasons, in the event this Court does not grant the Petition for Review, *amici* hereby strongly urge in the alternative that the Court depublish the decision below.

I. INTEREST OF *AMICI CURIAE.*

The American Federation of State, County and Municipal Employees ("AFSCME") is a labor union comprised of a diverse group of people who share a common commitment to public service. AFSCME's 1.6 million members include workers in both the public and private sectors, including about 83,378 California public employees within the jurisdiction of this Court whose vested rights as members of a public pension plan are threatened by the decision below. Of these, at least 18,938 have pensions administered by county retirement plans under Government Code Section 31450 *et seq.,* and thus directly affected by the state statute at issue in this case, Government Code Section 31461. Together, AFSCME and its members advocate for prosperity and opportunity for working families across the nation through the efforts of its approximately 3,400 local unions and 58 councils in 46 states, the District of Columbia and Puerto Rico.

The American Federation of Teachers, AFL-CIO ("AFT") represents 1.6 million members who are employed across the nation and overseas in K-12 and higher education, public employment and healthcare. The California Federation of Teachers ("CFT") is the AFT state affiliate in California. CFT is one of the most active public employee organizations in California, which, through its over 140 affiliates, represents more than 100,000 teachers, librarians, nurses, counselors and classified employees working in California's public schools, private schools, community colleges and the University of California system. The large majority of CFT's members participate and possess vested rights in California's State Teachers' Retirement System (CalSTRS) or Public Employees' Retirement System (CalPERS). Pension legislation such as AB 340, passed in 2012, has affected both CalSTRS and CalPERS participants, who, like Petitioners, have long understood that their contributions cannot be increased nor their benefits cut without implementation of offsetting advantages. Additionally, because the California Supreme Court

has been a national leader for other state supreme courts around the country on defining pension rights of public employees, AFT members nationwide have a strong interest in this case.

The National Education Association ("NEA") is a national employee organization representing nearly three million education professionals nationwide. NEA is committed to protecting the retirement security of the overwhelming majority of its active and retired members, who depend on the public employee pensions that they earned over the years. NEA's California affiliate, the California Teachers Association ("CTA"), is one of the largest public employee organizations in California, which, through its over 1,000 chapters, represents 325,000 teachers, counselors, librarians, social workers, nurses and education support personnel working in California's public schools and community colleges. The large majority of CTA's 325,000 members participate and possess vested rights in California's State Teachers' Retirement System (CalSTRS). Thousands of other CTA members participate and possess vested rights in California's Public Employees' Retirement System (CalPERS). Recent pension legislation such as AB 340 has affected both CalSTRS and CalPERS participants, who, like Petitioners, have long understood that their contributions cannot be increased nor their benefits cut without implementation of offsetting advantages.

The Service Employees International Union ("SEIU") is a labor union representing over two million working women and men in the United States, Puerto Rico, and Canada. Over one million of those members are public workers. In California, SEIU represents 263,245 public sector workers employed by the State, counties, cities, hospitals, schools, universities and colleges. This case directly affects SEIU members and retirees in Marin County, and would threaten the stability of pension benefits for hundreds of thousands of SEIU members and retirees across California—and indeed in the many states that rely on the strength and clarity of California law in this area.

The California Faculty Association ("CFA") is a labor union representing over 27,000 faculty members employed by the California State University ("CSU"). Faculty members include both tenure-line and adjunct instructors, coaches, counselors, and librarians who work on twenty-three campuses throughout the state, as well as on satellite campuses, and in online programs. CFA seeks to strengthen the cause of higher education for the public good; to promote and maintain the standards and ideals of the profession; to provide a democratic voice for academic employees; to provide legislative advocacy; and to maintain collective bargaining agreements covering salaries, working conditions, and other items and conditions of employment. CSU faculty who are eligible for pensions are enrolled in the California Public Employees' Retirement System (CalPERS) and have served the CSU and its students with the understanding that their retirement benefits cannot be reduced unless they receive offsetting advantages.

California School Employees Association ("CSEA") is a labor union representing about 230,000 classified school employees throughout the state. CSEA's "bargaining unit" members

are employed in a wide variety of classified (non-certificated) positions in those school districts – including such positions as secretary, custodian, groundskeeper, teaching assistant, maintenance worker and school bus driver. CSEA members and retirees participate in the California Public Employees' Retirement System (CalPERS). According to "Facts at a Glance" (posted on CalPERS' website), as of June 30, 2015, (1) school employees comprised 38 percent of CalPERS' 1,204,621 active and inactive members and (2) 1,423 school districts participated in the system.

II. THE COURT OF APPEAL'S DECISION CONTRADICTS AND UNDERMINES THIS COURT'S PRECEDENT, AS WELL AS THE PRECEDENT OF OTHER STATE HIGH COURTS THAT RELY ON CALIFORNIA'S CLEAR, INFLUENTIAL PENSION JURISPRUDENCE.

This Court held unequivocally in *Allen v. Board of Administration* that "any modification of vested pension rights . . ., when resulting in disadvantage to employees, *must* be accompanied by comparable new advantages." ((1983) 34 Cal. 3d 114, 120 (emphasis added).) Yet, the Court of Appeal below held that this Court's use of the word "must" in *Allen* was "not intended to be given" a "literal" meaning, and that instead these "comparable new advantages" are merely "a recommendation, not a mandate." (Slip Op. at 24-26.) The Petition for Review amply demonstrates why the Court of Appeal was wrong to so conclude as a matter of California law, and those arguments need not be repeated here. (*See* Petition for Review at 19-26.) This alone is a compelling reason for this Court to grant the Petition, or to depublish the decision below.

The Court of Appeal's interpretation is at odds not only with this Court's clear precedents, but also those of high courts in other states, many of which have based their own pension jurisprudence on the "California Rule," so called because "California has been perhaps the most influential in developing this area of the law." (Amy B. Monahan, *Statutes as Contracts? The "California Rule" and Its Impact on Public Pension Reform* (2012) 97 Iowa L. Rev. 1029, 1036.) Under the "California Rule," as understood by learned state judges nationwide—and adopted by at least 12 different states in some form—while "courts permit reasonable modifications of the contract prior to retirement, they do not allow any disadvantageous modifications unless the modifications are offset by comparable new advantages." (*Id.* (citing *Allen*).)

A review of these out-of-state decisions reveals that while judges in other states may disagree with one another as to the wisdom of the California Rule, there is little confusion about what it means. To take an example of a state that follows California, the Supreme Court of Alaska found "California's long experience" with the contractual law of pensions to be "instructive" when it declared in a case of first impression:

> We agree with this analysis and hold that the fact that rights in [Alaska's state employee pension system] vest on employment does

> not preclude modifications of the system; that fact does, however, require that any changes in the system that operate to a given employee's disadvantage *must* be offset by comparable new advantages to that employee.

(*Hammond v. Hoffbeck* (Alaska 1981) 627 P.2d 1052, 1057) (emphasis added).) Alaska has continued to apply that rule—requiring, not recommending, that "changes in the retirement system disadvantaging employees *must* be offset by comparable new advantages"—as recently as 2008. (*Alford v. State, Dep't of Admin., Div. of Ret. & Benefits* (Alaska 2008) 195 P.3d 118, 123 (emphasis added) (internal quotation marks omitted).)

Similarly, the Kansas Supreme Court has held:

> The California rule . . . is logical and fair, and we adopt it. The rule is set out at length above and need not be repeated in full. We hold that the state or a municipality may make reasonable changes or modifications in pension plans in which employees hold vested contract rights, but changes which result in disadvantages to employees *must* be accompanied by offsetting or counterbalancing advantages.

(Singer *v. City of Topeka* (Kan. 1980) 607 P.2d 467, 475-76 (emphasis added); *see also Calabro v. City of Omaha* (Neb. 1995) 531 N.W.2d 541, 551 ("We now adopt the California rule as the rule in Nebraska and hold that a public employee's constitutionally protected right in his or her pension vests upon the acceptance and commencement of employment," such that "the government may unilaterally modify them *so long as* the changes do not adversely alter the benefits or, if the benefits are adversely altered, they are replaced with comparable benefits." (Emphasis added)).)

Even New Jersey's Supreme Court, in choosing to reject the California Rule, understood it to allow a "legislative power of revision," only "with the proviso that a benefit that is taken away is reasonably offset by something added." (*Spina v. Consol. Police & Firemen's Pension Fund Comm'n* (N.J. 1964) 197 A.2d 169, 176.)

Yet, in the face of such clear interpretation of the California Rule by judges in many other states, the Court of Appeal below concluded that this Court's extensive precedent in this area "does not convey imperative obligation" to offset reductions to vested benefits with any comparable new advantages. (Slip Op. at 26.) This holding is not only wrong, it invites havoc. For as the out-of-state cases cited above—and others reaching the same conclusions—demonstrate, the Court of Appeal's decision could undermine the foundation of pension law in many other states if those states' judges were to follow it in the mistaken belief that it is a

correctly-modified construction of this Court's precedents. This result, in turn, could diminish this Court's role as a leader in the law protecting vested pension rights.

For these reasons, the Court should clarify that the Court of Appeal's decision does not represent this Court's longstanding precedent on vested pension rights. Or, if the Court wishes to choose a different case to clarify its law on this issue, it should at the very least depublish the decision below so that other states are not left to wonder if this obvious outlier signals a change or weakening of the bedrock California Rule.

III. THE COURT OF APPEAL'S DECISION INVENTS AN AMORPHOUS "REASONABILITY" STANDARD THAT WILL ONLY EMBOLDEN FURTHER ATTEMPTS TO SLASH VESTED PENSION BENEFITS, WHICH HURT RETIREES AND FAMILIES AND COULD LEAD TO DANGEROUS ATTRITION OF PUBLIC EMPLOYEES.

As the Petition for Review convincingly argues, "the uncertainty created by the decision below will generate significant new litigation" because it "provides no guidance to courts, retirement boards, policy makers or employees about how to determine what is a constitutionally 'reasonable' pension." (Petition for Review at 27.) This is especially so in light of the Court of Appeal's extreme statement that a "reasonable" impairment of pensions under this Court's precedent means anything "short of actual abolition" or a "radical reduction of benefits," which the Court—citing to a decision from 1938 that is no longer good law—implied could include a reduction of an employee's benefits "from two-thirds to one-half of" the employee's salary. (Slip. Op. at 29-30 (citing to *Brooks v. Pension Board* (1938) 30 Cal.App.2d 118, which was superseded by *Dickey v. Retirement Board* (1976) 16 Cal. 3d 745, 749).)

Indeed, popular efforts to gut public pensions in California have proliferated in recent years, and anti-pension advocates will no doubt seize on the Court of Appeal's decision here—if it is allowed to stand—to attack the vested rights of current public employees. Most notably, in 2012, voters in San Jose adopted by referendum cuts to current city employees' vested public pension rights—cuts which were ultimately struck down in 2014 by Superior Court Judge Lucas, whose opinion cited heavily to the California Rule as formulated by this Court in *Allen*. (*See San Jose Police Officers Ass'n v. City of San Jose* (Sup. Ct. Feb. 20, 2014) Case No. 1-12-CV-225926.) While no other California referendum has yet targeted current employees' vested rights—San Diego Proposition B, which was also approved by voters in 2012, affected only new employees whose pension rights had not yet vested—that is likely to change if this Court allows the decision below to remain on the books.

Adding fuel to these attacks on public pensions could not only harm current employees and their families by destroying their reasonable expectations of retirement savings, but could also cause serious attrition in public employment that will endanger vital public services. As the Nebraska Supreme Court has observed, "current employees considering leaving public

employment may well have been induced to . . . remain working for the [government] because they knew they were guaranteed" a certain pension benefit. (*Calabro,* 521 N.W.2d at 548-49; *see also* Stephen Herzenberg & Ross Eisenbrey, *The Oklahoma State Worker Pension Plan: If It Ain't Broke, Don't Break It* (February 14, 2014) Economic Policy Institute, available at *http://www.epi.org/publication/oklahoma-state-worker-pension-plan-aint/* (concluding that public pension plan was state's "most powerful tool for retaining educated and experienced civil servants despite the significant sacrifices they make by accepting lower salaries").)

It is thus not surprising that none of the three California cities to file for bankruptcy following the 2008 recession—Stockton, Vallejo, and San Bernardino—chose to cut pension benefits for current employees. (*See* Ed Mendel, *Why bankrupt San Bernardino didn't cut pensions* (May 2, 2016) Calpensions.com, available at *https://calpensions.com/2016/05/02/why-bankrupt-san-bernardino-didnt-cut-pensions/*.) These cities made that decision despite having the benefit of a ruling by at least one bankruptcy judge that the supremacy of federal bankruptcy law over state constitutions provides California cities a unique opportunity to skirt the "unusually inflexible 'vested rights' in public employee pension benefits" that have been enshrined as state constitutional law by this Court's California Rule. (*See In re City of Stockton, California* (Bankr. Ct. E.D. Cal. 2015) 526 B.R. 35, 55, aff'd in part, dismissed in part (B.A.P. 9th Cir. 2015) B.A.P. 542, 261.) As San Bernardino explained in its disclosure statement justifying that decision: "The departure of City employees upon rejection of the CalPERS Contract could be massive and sudden," which "would seriously jeopardize the City's ability to provide even the most basic essential services, including public safety services." (Second Amended Disclosure Statement at p. 23, *In re City of San Bernardino* (Bankr. Ct. C.D. Cal. March 30, 2016) Case No. 6:12-bk-28006-MJ, Docket No. 1774.)

Therefore, in light of both ongoing efforts to slash public employees' constitutionally protected pensions, and the threat those efforts pose to the provision of high-quality public services in California, the decision of the Court of Appeal should come off the books before it is exploited for nefarious ends.

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IV. CONCLUSION.

For the foregoing reasons, assuming the Petition for Review in this case is not granted, *Amici* respectfully urge the Court to depublish the Court of Appeal's decision in *Marin Association of Public Employees v. Marin County Employees Retirement System*.

Respectfully submitted,

Glenn Rothner
Rothner, Segall & Greenstone
510 South Marengo Avenue
Pasadena, CA 91105
(626) 796-7555

For the California Faculty Association,
California Federation of Teachers,
California School Employees Association,
and California Teachers Association

Judith Rivlin
Matthew Stark Blumin
American Federation of State, County
and Municipal Employees, AFL-CIO
1101 17th Street NW, Suite 900
Washington, DC 20036
(202) 775-5900

David J. Strom
American Federation of Teachers, AFL-CIO
555 New Jersey Ave. NW
Washington, DC 20001
(202) 393-7472

Alice O'Brien
National Education Association
1201 16th Street, NW
Washington, D.C. 20036
(202) 822-7041

Judith A. Scott
Service Employees International Union
1800 Massachusetts Ave. NW
Washington, DC 20036
Tel. (202) 730-7734

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 510 South Marengo Avenue, Pasadena, California 91101.

On October 24, 2016, I served the foregoing document described as ***Amici Curiae*** **Letter in Support of Request for Depublication**on the interested parties in this action in the manner indicated below:

SEE ATTACHED SERVICE LIST

[X] **(By Mail)**
I placed a true copy thereof enclosed in a sealed envelope addressed as listed above or in the attached service list I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice I place all envelopes to be mailed in a location in my office specifically designated for mail. The mail then would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Pasadena, California in the ordinary course of business. I am aware that on motion of the 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 affidavit.

[X] **(State Court)**
I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 24, 2016, at Pasadena, California.

JERRY COHEN

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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Executed on October 24, 2016, at Pasadena, California.

JERRY COHEN

SERVICE LIST

Gregg McLean Adam Messing Adam & Jasmine LLP 235 Montgomery Street, Suite 828 San Francisco, CA 94104	Attorneys for Plaintiffs and Appellants Marin County Management Employees Association; Marin County Fire Department Firefighters' Association; Joel Chandler; and Angelo Sacheli
Jonathan Dennis Yank Amber Lynn Griffiths Carroll Burdick & McDonough 44 Montgomery Street, Suite 400 San Francisco, CA 90071	Attorneys for Plaintiff and Appellant Marin County Fire Department Firefighters' Association
Arthur Wei-Wei Liou Peter Warren Saltzman Leonard Carder 1330 Broadway, Suite 1450 Oakland, CA 94612	Attorneys for Plaintiffs and Appellants Marin Association of Public Employees; and Catherine Hall
Kerianne Ruth Steele Sean Daniel Graham Caren Pamela Spencer Vincent A. Harrington, Jr. Anne Iwa Yen Weinberg Roger & Rosenfeld 1001 Marina Village Parkway, Suite 200 Alameda, CA 90017	Attorneys for Plaintiff and Appellant Service Employees International Union Local 1021, CTW, CLC
Ashley Kathleen Dunning Nossaman LLP 50 California Street, 34th Floor San Francisco, CA 94111	Attorneys for Defendants and Respondents Marin County Employees' Retirement Association; and Retirement Board of the Marin County Employees' Retirement Association
Anthony Paul O'Brien Office of the Attorney General 1300 "I" Street - Suite 125 Sacramento, CA 94501	Attorneys for Intervener and Respondent The State of California

Teague Pryde Paterson Beeson, Tayer & Bodine 483 9th Street, Suite 200 Oakland, CA 94607	Attorneys for Publication/Depublication Requestor Teamsters Joint Council No. 7
Brian J. Bartow California State Teachers' Retirement System Office of the General Counsel 100 Waterfront Place West Sacramento, CA 95605	Attorneys for Publication/Depublication Requestor California State Teachers' Retirement Board
Marianne Reinhold Reich Adell & Cvitan 2670 North Main Street, Suite 300 Santa Ana, CA 92705	Attorneys for Publication/Depublication Requestor Orange County Attorneys Association; and Orange County Managers Association
Arthur Wei-Wei Liou Leonard Carder, LLP 1330 Broadway, Suite1450 Oakland, CA 94612	Attorneys for Publication/Depublication Requestors International Federation of Professional and Technical Engineers, Local 21; Alameda County Management Employees Association; and Physicians' and Dentists' Organization of Contra Costa