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September 30, 2016

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

Re: **Letter in Support of Petition for Review or Depublication of *Marin Association of Public Employees, et al., v. Marin County Employees' Association, et al.* by amicus AFSCME District Council 57 *and* AFSCME Retiree Chapter 57**
Supreme Court No. S237460 (Ct. of Appeal No. A139610)

To the Honorable Justices of the California Supreme Court:

District Council 57 of the American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME Council 57") is an intermediate federation of AFSCME-affiliated labor unions representing local government employees in Northern California. The District Council and its local affiliates represent over 25,000 California public-sector employees of cities, counties, schools, community colleges, transit agencies, and public works, service, park, and other special districts, throughout Northern California and the Central Valley. Amicus AFSCME Retiree Chapter No. 57 is a membership organization comprised of retired public employees who were members of local unions affiliated with AFSCME Council 57. The retiree chapter represents and advocates for the interests of California public employee retirees.

Under state law, AFSCME Council 57 is the exclusive collective bargaining representative of its members, which carries the obligation to negotiate and bargain over pension and retirement benefits, a "mandatory subject bargaining" under state labor law. AFSCME Council 57 and the Retiree Chapter's members participate in county, city, district and state

pension plans, including those governed by the County Employees Retirement Law ("CERL"). Accordingly, amici have a substantial and long-standing interest in the issue presented by *Marin Association of Public Employees, et al., v. Marin County Employees' Association, et al.*, (hereafter *MAPE v. MCERA*), which entails the extent to which a public employees' pension benefit is an enforceable contract right under California law.

In *MAPE v. MCERA* the Court of Appeal, First Appellate District, overturned long-standing precedent relating to the scope of changes -- or modifications – that public employers may make to the terms of employees' pensions. The Supreme Court has long-held the right to earn a pension under terms offered upon an employees' acceptance of employment constitutes a term of the employment contract, and is therefore a vested right under the California Constitution's contracts clause. For the better part of a century this Court has held -- and reiterated on many occasions -- that pension systems should remain flexible and therefore modifications are permitted.

For equally as long, however, this Court has also held that in order to ensure a modification to a pension system does not result in an impairment of the pension contract, modifications may not work to the detriment of employees and, therefore, any disadvantage occasioned by a modification must be offset by a "commensurate benefit." *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 864 (citing and discussing *Abbott v. City of San Diego* (1958) 165 Cal.App.2d 511, 518).)

Not only is this doctrine integral to the concept of a pension system, but it is necessary to ensure these vested rights remain unimpaired throughout the public employee's tenure and upon her eventual superannuation.

The Court of Appeal overturned this precedent, holding that pensions may be modified to the detriment of employees without causing an impairment to the pension contract or the vested rights it entails. AFSCME Council 57 joins in Petitioners' request for review and/or depublication of *MAPE v. MCERA,* because the reversal of precedent

accomplished by the Court of Appeal is founded on misunderstandings and misinterpretations of binding precedent, some of which are outlined in this letter, including:

- In applying the contracts clause, the Court of Appeal failed to distinguish between doctrines this Court and the United States Supreme Court apply when presented with an instance of the state impairing its own contractual obligations. The courts distinguish between laws and regulations of general application enacted under a police power that may have the effect of upending private contractual expectations, from laws that impair a state's own contracts with others. Although the Court of Appeal relied on the former doctrine, the latter doctrine applies to public pension laws and therefore requires a much stricter standard on the part of the state to justify the impairment.

- Although conceding employee pensions were impaired, the Court of Appeal invented a justification for such impairment without any record evidence that, ordinarily, would be the state's burden to establish an affirmative defense of necessity.

- The Court of Appeal's decision hinges on an error of grammar, specifically its incorrect belief that the word "should" is equivalent to the word "may." Rather, the word "should" is simply the past tense of "shall," and indicates a mandate or command, not a mere suggestion.
- The Court of Appeal incorrectly formulated the central holdings of many significant cases handed down by this Court in order to justify a departure from this Court's established precedent.

- The Court of Appeal's decision is founded on overtly political publications that it substitutes for fact-based evidence, representing a departure from tenets of jurisprudence and neutrality that ordinarily undergird our judicial system.

Each of the above points is amplified below in the hope of illustrating to the Court why the Court of Appeal's decision should be depublished or reviewed for error.

Failure to Properly Apply the "Public Contract" Standard Under the Contracts Clause

In formulating its view of the contracts clause, the Court of Appeal discussed and cited a number of cases involving the state's exercise of its police power to enact statutes that had the effect of unsettling purely private contractual expectations. (Slip Opinion, pp. 31-33). These authorities, cited for the proposition that "the Contract Clause does not foreclose governmental action," are inapposite, because each decision involved a generally-applicable regulation or law that had the consequence of upending the expectations of the contracting parties to private agreements. (*Id.*). It is recognized that individuals who enter into contracts with each other do so at the risk that laws may change.

But an entirely different – and much more stringent -- doctrine applies when a state law impairs the government's *own* contracts. "[I]mpairments of a state's own contracts ... face more stringent examination under the Contract Clause than would laws regulating contractual relationships between private parties." (*Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 245; *University of Hawai'i Professional Assembly v. Cayetano* (1999) 183 F.3d 1096, 1105 ["the Contract Clause is especially vigilant when a state takes liberties with its own obligations."])

Indeed, "[i]n almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.* (1983) 459 U.S. 400, 412 n. 14 ["In the present case, of course, the stricter standard of *United States Trust Co.* does not apply because Kansas has not *altered its own* contractual obligations."]; emphasis added.)

When evaluating the state's impairments of its own contracts,[1] this Court applies *United States Trust Co. v. New Jersey* (1977) 431 U.S. 1, in the context of public employee pensions and reviews such legislation with a skeptical and jaundiced eye. In *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, the Court quoted *U.S. Trust* with approval:

> "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."

(See also *Pasadena Police officers Assn. v. City of Pasadena* (1983) 147 Cal.App.3d 695, 704, n. 3).

The latitude the Court of Appeal conferred to the State under the contracts clause with respect to modifying or reducing pension benefits was incorrect as a matter of law because *MAPE v. MCERA* does not involve laws of general application enacted under the police power, but rather the state's own contractual relationships with individuals, namely its employees. (E.g. *Farrell v. Placer County* (1944) 23 Cal. 2d 624, 628 ["If we say with Mr. Justice Holmes, 'Men must turn square corners when they deal with the Government', It is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens.'"])

Reinvention of Supreme Court Precedent By Turn of Phrase: "Should"

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[1] It matters not that the intervening law here, the Public Employees Pension reform Act of 2013, was enacted by the state but this case involves a county. See *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 314 n. 17 (rejecting argument that state statute affecting contract with county was not subject to stricter contracts clause review because "[a]cceptance of this theory would require us to hold that the state may compel a local entity to impair an obligation which the local entity itself would be precluded from breaching under the contract clause.")

The Court of Appeal has overturned this Court's decision in *Abbott*, *Betts,* and progeny through the reinterpretation of a turn of phrase. It has creatively reinterpreted the word "should" while ignoring binding precedent contrary to its interpretation.

This Court, however, has not been subtle when summarizing the standard to be applied when assessing modifications to public pensions. In *Betts v. Board of Administration*, 21 Cal.3d at 864, this Court stated quite clearly: "*In the absence* of such a showing, and in the light of the authorities hereinabove cited, it follows that the amendments in question imposed a detriment *without a commensurate benefit* and therefore *cannot be sustained as reasonable*... ." (emphasis added). The holding leaves no room for interpretation, and the Court of Appeal erred by departing from it.

With respect to the obligation to ensure detriments are offset by commensurate benefits, although some of this Court's decisions have used the term "should" as opposed to "must" (and some use neither term as indicated in the above-quoted text from *Betts*), that turn of phrase does not provide a basis on which re-write the law. Indeed, the Court of Appeal's re-interpretation of the word "should" is a slim reed because "should" is simply the past-tense of "shall" and is "used to indicate obligation, duty, or correctness, typically when criticizing someone's actions."[2] Therefore, when this Court indicates detriments "should" be offset by commensurate advantages, it is establishing a rule in the context of prescribing a consequence for failing to do so, namely a finding of unconstitutionality. Put very plainly, if I say to my child "if you go out today you should wear a rain coat" that may be a suggestion. But if I say "if you want to stay dry, you should wear a raincoat when you go out today," I have indicated a consequence for failing to abide my admonition. When this Court has stated, time and again, that a detriment "should" be accompanied by a commensurate benefit, it has done so in the context of indicating that a failure to provide an offsetting commensurate benefit results in an unconstitutional impairment of a vested right.

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[2] https://www.google.com/?gws_rd=ssl#q=definition+of+should

In sum, the Court of Appeals interpretation of the word "should" as permissive rather than mandatory is error. Its reasoning is unusual in light of principles of standing and the policy of avoiding advisory opinions; in formulating a standard the Supreme Court does not typically make mere suggestions, rather it lays down rules.

Reliance on Non-Record Evidence

After reformulating decades-old precedent, the Court of Appeal continued its error by "supposing" an affirmative defense on the part of the State. Without evidence to support its conclusion, or the opportunity to provide evidence, the Court of Appeal opined

> "Thus, for all we know, employees who prior to MCERA changing its policy in December 2012 collected any of the items or payments at issue (see fn. 9, ante) continued to have those items or payments included in their monthly compensation. However, due to MCERA's change in policy, each of those employees' paychecks is no longer being reduced by deductions to cover those sums in funding the employee's retirement. Put simply, the new benefit is an increase in the employee's net monthly compensation. Put even more simply, it is more cash in hand every month."

This assertion of fact, where there is no record to support it, does not provide an affirmative defense under *Betts* and *Abbott* for the simple reason that any "cash in hand" is miniscule compared to the disadvantage of the reduced pension. Regardless, the Court of Appeal's disregard for a record, and in light of the generally accepted view that a finder-of-fact must be presented with facts established under the rules of evidence prior to reaching a finding, is indicative of its error.

Reformulation of Supreme Court Precedent Unsupported by their Actual Holdings

In rewriting California law, the Court of Appeal reinterpreted the holdings of this Court in ways that are inconsistent both with the decisions themselves and with how California courts have consistently understood and applied them. Instead the Court of Appeal adopted a novel jurisprudential method it candidly described as "circumstantial," stating: "But the most persuasive evidence against the Supreme Court intending to impose a quid pro quo standard is circumstantial—*the bottom line of who won*." (Slip Opinion, p. 21; emphasis added). That the Court of Appeal described its "most persuasive" jurisprudential evidence supporting a departure from established precedent as "circumstantial" raises eyebrows.

More concerning is the Court of Appeal's tabulation of "who won," a peculiar approach to judicial reasoning. As demonstrated here, that approach is tone-deaf to the circumstances and reasoning on which each case is based. A review of these decisions' holdings – beyond merely "who won" -- reveals the Court of Appeal's error.

Beginning with *Allen*, although the plaintiff's claims were denied, this Court denied the plaintiff's claims because it determined that a comparable new advantage had been provided that sufficiently offset the detriment occasioned by the complained-of pension modification. In other words, despite "who won" the case, the holding directly contradicts the Court of Appeal. As stated in *Allen*:

> "The primary basis for our determination that Betts reasonably was entitled to expect the benefit of both the fluctuating and cost-of-living provisions was the absence in his case of any factors militating against the reasonableness of that expectation *such as were present in Lyon and are present here*."

(*Allen v. Board of Administration* (1983) 34 Cal.3d 114, 123 (emphasis added).) Because the *Allen* court found the state had done what it *should* do, *i.e.* provide a commensurate benefit to offset a detriment, the claim was denied. It defies logic to read *Allen* as endorsing a departure from the very principle on which the Court relied.

Following its discussion of *Allen*, the Court of Appeal proceeded with its "who won" approach by citing to other cases that denied employees' claims of impairment. (Slip Opinion, pp. 29-30). Yet a number of those decisions have been overruled or superseded. For example, *Brooks v. Pension Board*, a 1938 decision that permitted the reduction of the terms of disability pension benefits with respect to an employee who had not yet become disabled, was superseded by this Court's decision in *Dickey v. Retirement Board* (1976) 16 Cal.3d 745, 749, which stated:

> "We can perceive no significant difference in this respect between provisions for pensions on retirement for disability and provisions for full salary payments for disability during active career employment. Each would appear to be a part of the contemplated compensation to police officers that would vest upon the acceptance of employment."

The Court of Appeal's reliance on *Brooks* was therefore in error, as its holding has been long rejected.

Continuing, a number of the authorities the Court of Appeal considered in considering "who won" are simply inapposite. For example, *Miller* involved an amendment to a statutory mandatory retirement age that was not a component of the pension system but was an aspect of civil service statutes. Therefore, the Court did not apply a vested rights or contracts clause analysis, stating: "it is well settled in California that public employment is not held by contract but by statute and that, insofar as the duration of such employment is concerned, no employee has a vested contractual right to continue in employment beyond the time or contrary to the terms and conditions fixed by law." *Miller v. State of California* (1977) 18 Cal.3d 808, 813. In other words, *Miller*'s holding had nothing to do with *Betts, Abbott* or the requirement to provide commensurate benefits to offset any detriments occasioned by a pension modification.

Similarly, the cases recited by the Court of Appeal that discuss increases in employee contributions each involved actuarially-based

pension contribution systems that had been established components of the pension statutes, and therefore did not entail any modifications or changes that would support a legislative impairment of contract. That point is made clearly in the decisions themselves, for example, the Court stated in *International Assn. of Firefighters v. City of San Diego* (1983) 34 Cal.3d 292, 302: "In the present case, *no modification* was made in the retirement system." (emphasis added). Where the Court finds no modification was made, it obviates the need to weigh advantages and disadvantages associated with the modification. Simply, the holding cannot stand for the proposition that the Supreme Court endorsed a modification and it was error for the Court of Appeal to hold otherwise.

Likewise, the Court of Appeal's interpretation of *Claypool v. Wilson* is incorrect, because case did not permit a reduction in a pension formula as to cost of living, as suggested by the Court of Appeal. Rather, the *Claypool* court approved a new COLA formula that replaced the old formula which, the court found, "provided a comparable advantage." (*Claypool v. Wilson* (1992) 4 Cal.App.4th 646, 652 ["The employees who may have earned vested contract rights by rendering service under the repealed statutes *are given comparable* advantages under the new supplemental COLA program and *for that reason* their rights are not unconstitutionally impaired."; emphasis added].) Again, in *Claypool* the court endorsed the requirement that a disadvantage *must* be offset by an advantage in order to save the enactment from a fatal constitutional infirmity, a point central to its holding.

Further errors include the Court of Appeal's formulation of *Amundsen v. Public Employees' Retirement System* (1973) 30 Cal.App.3d 856, 859, which approved changes to years-of-service requirements because "the amendments *also provided* for a decreased percentage of employee contributions in appellant's case, and for *a substantially higher pension* upon retirement after five years of service. Thus the disadvantage was accompanied by comparable new advantages." (emphases added). The Court of Appeal erred in suggesting *Amundsen* endorsed its new approach to contracts clause analysis.

The same is true with respect to *City of Downey v. Board of Administration* (1975) 47 Cal.App.3d 621, 628, which set forth in detail how pension improvements "*adequately offset the detriments imposed*" so as to render the legislation permissible. (*Id.* (emphasis added); explaining, at pp. 632-33, "there was an increase in the rate of contribution of each employee to the system. Offsetting this, however, is the increase in the amount of retirement allowance which each employee...will be entitled to receive, as compared to the amount which would have been payable prior to the 1971 legislation" and listing other changes that advantaged employees to offset the disadvantages).

Each of the foregoing authorities was relied on by the Court of Appeal to justify its re-interpretation of precedent and in tabulating its "who won" analysis. However in each instance the only reason the state entity "won" was because any detrimental modifications were accompanied by commensurate advantages.

A proper reading of the case law reveals that the rule of *Betts* and *Abbott* has been consistently applied by this Court and, until now, the Court of Appeal. In instances where detriments are offset by commensurate advantages the government wins. In instances where they are not, the employees win. It was error for the Court of Appeal to undermine this consistently-applied doctrine.

Reliance on Political Arguments

AFSCME Council 57 is concerned that the Court of Appeal may have ventured into the realm of politics and was inappropriately influenced by partisan publications. Specifically, AFSCME refers to the Court of Appeal's discussion on pages 2-4 of its opinion. The individuals and organizations are of the same political stripe, and their work is funded by a small group of conservatively-oriented, anti-tax, anti-government foundations. Several of those organizations are referred to by the Court of Appeal, others are not although their benefactors are relied upon. Indeed, the Court of Appeal refers to the "State Budget Crisis Task Force," however it is not

evident from the opinion that this "task force" is in fact a private organization comprised of a small group of influential former politicians.

As noted above, any justification for an impairment of a contract requires factual findings as to fiscal necessity and a demonstration that no viable alternatives to the impairment are available. An elevated standard applies to public contracts. The Court of Appeal's citation to a group of one-sided, ideologically driven commentators is insufficient to satisfy the state's evidentiary burden to justify the impairment.

Further, none of the cited-to sources involve or discuss the particular condition of MCERA or Marin County. As this Court has stated "it is advantage or disadvantage to the particular employees whose own contractual pension rights, already earned, are involved which are the criteria by which modifications to pension plans must be measured." (*Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 449; *Betts*, 21 Cal.3d at 864 ["The comparative analysis of disadvantages and compensating advantages must focus on the particular employee whose own vested pension rights are involved"].) It was error for the Court of Appeal to substitute this standard with a formulaic citation to the writings of politically-minded prognosticators.

Conclusion

For the foregoing reasons, AFSCME Council 57 respectfully urges the Court to depublish or grant review of the Court of Appeal's decision in *Marin Association of Public Employees v. Marin County Employees Retirement System*.

Respectfully submitted,

George Popyack
Director, District Council 57

cc: Teague P. Paterson, Beeson, Tayer & Bodine

Enclosure: Certificate of Service

PROOF OF SERVICE

I declare that I am employed in the City of Oakland, County of Alameda, California. I am over the age of eighteen years and not a party to the within cause. My business address is 483 Ninth Street, Suite 200, Oakland, California 94607. On October 3, 2016, I served the enclosed:

Letter in Support of Petition for Review or Depublication of *Marin Association of Public Employees, et al., v. Marin County Employees' Association, et al.* by amicus AFSCME District Council 57 *and* AFSCME Retiree Chapter 57
Supreme Court No. S237460 (Ct. of Appeal No. A139610)

by mail to the parties in said cause (listed below) by placing a true and correct copy thereof enclosed in a sealed envelope in a designated area for outgoing mail. Mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business in a United States mailbox in the City of Oakland, California.

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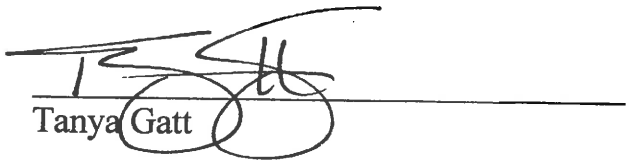
I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on October 3, 2016, at Oakland, California.



Tanya Gatt