CALSTRS
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Via Overnight Mail

November 10, 2016

Honorable Chief Justice Tani G. Cantil-Sakauye
Honorable Associate Justices
Supreme Court of the State of California
350 McAllister Street
San Francisco, California 94102-4797

RE: Amicus Curiae Letter in Support of Review
Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.
Court of Appeal, First Appellate District, Division Two Case No. A139610
Supreme Court Case No. S237460

To the Honorable Chief Justice and Associate Justices of the California Supreme Court:

Pursuant to California Rules of Court, rule 8.500(g), the California State Teachers' Retirement Board (the Board) respectfully requests that the California Supreme Court grant review of *Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.* (2016) 2 Cal.App.5th 674 (*Marin*). This Court's review of *Marin* is necessary to secure uniformity of decision among the Districts of the Court of Appeal, preserve the precedent established by this Court, and settle the important question of law of whether a detrimental modification to a vested pension right must be accompanied by a "comparable new advantage." (Cal. Rules of Court, rule 8.500(b)(1).)

I. The Board's Interest in Review

The California Constitution requires the Board to administer the California State Teachers' Retirement System (CalSTRS) solely in the interest of its participants and their beneficiaries, explicitly providing that this obligation "shall take precedence over any other duty." (Cal. Const., art. XVI, § 17.) In administering CalSTRS and providing benefits to its members, it is critical for the Board to understand the legal nature and extent of vested pension rights, including the applicability and framework of the "comparable new advantages" test first established by this Court in *Allen v. Long Beach* (1955) 45 Cal.2d 128.

The comparable new advantages test of *Allen* is so well settled by this Court that it is incorporated into state statute. In 2014, the California Legislature enacted Assembly Bill No. 1469 to address the unfunded liability of the State Teachers' Retirement Fund. In response to Senate Concurrent Resolution No. 105 of 2012, the Board had submitted a number of possible legislative scenarios to address funding. A crucial portion of the proposals and ultimately the legislation was the increase in contributions to be paid by teachers, a rate that was already set and vested in statute. The Legislative Counsel's Digest for AB 1469 acknowledges that (emphasis added): "Existing case law holds that the right to a pension is a contractually protected vested right and that the specific provisions of a pension system that a member earns through employment may be modified to the detriment of the member **only if a comparable new advantage is provided**. . . ." The Legislature explicitly recognized and incorporated that right in the language of Education Code section 22002.5, subdivision (b) (emphasis added): "Various legal rulings have determined that vested contractual rights of existing members generally **cannot be changed without providing a comparable new advantage**."

California's public school educators, relying upon this Court's explication of their rights to a comparable new advantage in *Allen* and its progeny, agreed to the "disadvantage" of increasing their monthly contributions in order to ensure the fiscal stability of the retirement fund in return for the "comparable new advantage" of "removing the statutory right to adjust the improvement factor, and thereby establishing the improvement factor as a contractually enforceable promise." (Ed. Code, § 22002.5, subd. (d).)

Thus, the Legislature, CalSTRS, and its members have relied and acted upon the understanding – first promulgated by this Court and subsequently codified in statute – that a detrimental modification to a vested pension right must be accompanied by a "comparable new advantage." The recent holding in *Marin* undermines this Court's prior decisions and California statutory law, and creates considerable uncertainty for the Board, CalSTRS, and its members and their beneficiaries. Unless this Court grants review of the decision, the Board will likely grapple with vested pension rights issues that were previously considered settled.

II. Respondent State of California Supports Review of the Decision

The State of California supports Appellants' Petition for Review. The State acknowledges that the Court of Appeal's creation of a permissive standard where modifications to a public employee's pension benefits that result in disadvantages to the employee *should* be accompanied by comparable new advantages "differs from the mandatory standard used in a prior case before this Court and in several appellate decisions." (State of California Answer, p. 7.) The State therefore correctly concludes that this Court's review of the *Marin* decision will resolve a split in authority, which will "alleviate any confusion resulting from the conflicting appellate decisions, and provide public employee retirement boards throughout the state with clarity on implementation of public employee pension laws going forward." (State of California Answer, p. 8.)

While Marin County Employees' Retirement Association's (MCERA) Answer does not support review, it is noteworthy that it does concede that the Court of Appeal's decision "Was Broader Than Necessary to Decide the Case." In addition, MCERA's thirty-two page Answer almost entirely ignores the highly problematic conclusion reached by the *Marin* court, which is the heart of Appellants' Petition and explicit concern of the numerous entities throughout California, including CalSTRS, that have submitted amicus curiae letters and requests for depublication. Certainly, the disparity in Respondents' Answers is emblematic of the confusion the *Marin* decision will create within vested rights jurisprudence.

III. Respondent MCERA Mistakenly Contends that the Court of Appeal Held Appellants Had No Vested Right to Certain Pay Items in Their Calculation of Pension Benefits

In *Allen v. Long Beach* (1955) 45 Cal.2d 128, 131, this Court applied a two part test for determining whether a modification to a public employee's vested pension right that resulted in disadvantages to the employee would be "sustained as reasonable": (1) "alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation"; (2) "and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages."

In *Marin*, the Court of Appeal all but eliminates the "comparable new advantages" requirement by highlighting that over the past sixty years this Court has generally, but not exclusively, used the word "should" instead of "must." In so doing, the Court of Appeal boldly revises this Court's well-established test in *Allen* based upon what it believes is this Court's "preferred expression," asserting that: "It thus appears unlikely that the Supreme Court's use of 'must' in the 1983 *Allen* decision was intended to herald a fundamental doctrinal shift." (*Marin, supra,* 2 Cal.App.5th at p. 699.) Critically, the Court of Appeal also ignores the salient fact that this Court, in *Allen v. Long Beach* and over the following sixty years, *always evaluates* whether comparable new advantages did accompany detrimental modifications when it analyzes the facts of a particular case. In other words, *this Court treats the second prong as mandatory*, not discretionary. This makes abundant sense, especially because the bar for the test's first prong is extremely low, and rarely examined by the court. Thus, the test for determining whether modifications to an employee's vested contractual pension rights are "reasonable" hinges almost exclusively upon the second prong: whether any modifications that result in disadvantages to an employee's vested pension rights are accompanied by comparable new advantages. The decisions of this Court over the past sixty years confirm this point.[1]

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[1] See *Allen v. Long Beach* (1955) 45 Cal.2d 128, 131-133 (holding several pension changes invalid for failure to offer comparable new advantages); *Abbott v. Los Angeles* (1958) 50 Cal.2d 438, 447-455 (evaluating and concluding that modifications to pension payments were not accompanied by comparable new advantages); *Betts v. Board of Administration of Public Employees' Retirement System* (1978) 21 Cal.3d 859, 863-868 (holding amendment that reduced pension benefits for former state treasurer invalid for failure to provide comparable new advantages); *Olson v. Cory* (1980) 27 Cal.3d 532 [609 P.2d 991, 996] (holding modifications of pension benefits that limited increases in judicial salaries were not accompanied by comparable new advantages); and *Legislature v. Eu* (1991) 54 Cal.3d 492, 529-530 (characterizing comparable new advantages prong as mandatory and rejecting

Notably, if a party does not have a vested pension right, there is no need to apply the *Allen* test, as its purpose is to determine whether an impairment of a vested right is "reasonable." Indeed, on multiple occasions this Court has found that the party at issue had no vested right, forgoing application of the *Allen* test as a result.[2]

In its Answer to Appellants' Petition for Review, MCERA incorrectly asserts that the *Marin* court held that the employees had no vested right to various affected payments in their pension calculations. (MCERA Answer, p. 1.) Under this faulty premise, Respondent claims that the Court need not address Appellants' first issue for review – "Whether the contract clause of the California Constitution requires that modification of public employees' pension benefits that result in disadvantages to employees be accompanied by comparable new advantages." (MCERA Answer, p. 1.)

But at no point in its decision did the Court of Appeal state that Appellants do not have a vested right. Rather, the court held that Appellants' vested rights had not been "substantially" impaired:

> The issue here is whether the amendment of section 31461—the only part of Assembly Bill 197 challenged by plaintiffs and addressed here—**qualifies as an "unreasonable" change, a "substantial" impairment**, and thus a violation of the state and federal Constitutions. . . . We conclude the dual answer is no: MCERA's implementation of the amended version of section 31461 does not qualify **as a substantial impairment** of plaintiffs' contracts of employment with its right to a "reasonable" and "substantial" pension. Thus there is no violation of the state and federal Constitutions. (*Marin, supra*, 2 Cal.App.5th at p. 704, emphasis added.)

In other words, the court found that the impairment to Appellants' vested right was "reasonable": "Plaintiffs Do Not Establish That Their Vested Right to a Reasonable Pension Has Been Substantially Impaired." (*Marin, supra*, 2 Cal.App.5th at p. 700.)

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argument that "transfer" or "redirection" of pension funds to federal Social Security system operates as a "comparable new advantage").

[2] See *Miller v. State of California* (1977) 18 Cal.3d 808, 816 ("[P]laintiff's loss of pension benefits resulted not from an impairment of his vested rights, but from the occurrence of a condition subsequent to the accrual of those rights, namely plaintiff's lawful termination from employment prior to the time when his right to full benefits would have matured."); *Allen v. Board of Administration* (1983) 34 Cal.3d 114, 122 (agreeing with and analogizing the Court of Appeal's analysis in *Lyon v. Flournoy* (1969) 271 Cal.App.2d 774, which "reject[ed] the claim that Mrs. Lyon's vested contractual rights has been impaired unconstitutionally."); *Int'l Ass'n of Firefighters v. City of San Diego* (1983) 34 Cal.3d 292, 303 ("Change in contribution is implicit in the operation of [the City of San Diego's] system and is expressly authorized by that system and no vested right is impaired by effecting such change. In this essential regard, City's retirement system differs from those described in the authorities relied upon by plaintiff, and its reliance thereon is misplaced."); *City of Huntington Beach v. Board of Administration* (1992) 4 Cal.4th 462, 472 ("[A]ny claim under the federal and state contract clauses is without foundation. Clearly, the jailers in this case have no vested right in previous erroneous classifications by the PERS Board.")

This distinction is crucial. If the Court of Appeal held there was no vested right, then the *Allen* test is inapplicable. But if the *Marin* court held, instead, that the vested right was not "substantially" impaired (i.e. the impairment was "reasonable") then such a holding would require application of the *Allen* test. The latter occurred here.[3] Indeed, the Court of Appeal dedicates the entire second half of its opinion to an analysis of the substantial impairment of a vested right and whether impairments that cause disadvantages to vested pension rights "must" or "should" be compensated with comparable new advantages. If the court had found that no vested right existed, this analysis would be superfluous. Furthermore, the court would have no reason to declare that it was not "bound" by other court of appeal decisions that used "must" instead of "should" if it had no intention of applying the *Allen* test and resolving the issue in the case through its application. (*Marin*, *supra*, 2 Cal.App.5th at p. 699.)

Even if the Court of Appeal had concluded that Appellants had no vested right (instead of having a vested right, which was not substantially impaired), this Court should nonetheless grant review, or, alternatively, depublish the decision to ensure the precedent established by this Court is uniformly applied and to prevent the uncertainty the decision will create for the courts, legislators, those charged with administering pension systems, and California's public employees and their beneficiaries. As explained in the Board's request for depublication, Appellants' Petition for Review and Reply, the numerous other requests for depublication and amicus curiae letters in support of review, and even in the State of California's Answer, the *Marin* decision erodes this Court's well-established framework for evaluating potential impairments to vested rights.

In light of the above, the Board respectfully requests that this Court grant Appellants' Petition for Review, or, alternatively, depublish the *Marin* decision.

Respectfully submitted,

Brian J. Bartow
General Counsel

cc: Attached Proof of Service List

[3] MCERA confirms as much in its Answer, stating that "the Court of Appeal also properly concluded that Marin CERA's implementation of PEPRA as to the two types of pay at issue in this case **was not an impairment of the Petitioners' vested rights**. (Slip Op. at pp. 1-2.)" (MCERA Answer, p. 30, emphasis added.) That is, the Petitioners had a vested right, it just was not – as held by the Court of Appeal – "substantially" impaired (as opposed to the Petitioners never having a vested right in the first place).

Case Name: Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn. Court of Appeal of California, First Appellate District, Division Two
Case No.: S237460

PROOF OF SERVICE

I declare that I am, and was at the time of service of the documents and/or items identified herein, over the age of eighteen (18) years, and am not a party to this action. I am employed in the County of Yolo, State of California, and my business address is 100 Waterfront Place, West Sacramento, California 95605. On October 14, 2016, I caused the following document(s) and/or item(s) to be served:

1. DOCUMENT(S) SERVED:

Amicus Curiae Letter in Support of Review

2. METHOD OF SERVICE:

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- ☒ **First-Class Mail** (Code of Civ. Proc. §§ 1013 and 1013a)
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☐ **Via Electronic Transmission/Notification:** Pursuant to consent of the parties, I caused true copies of the document(s) identified above to be served from my electronic service address EMAIL@calstrs.com to the person(s) at the electronic service address(es) listed below. I did not receive, within a reasonable time after transmission, any electronic message or other indication that the transmission was unsuccessful. (Code of Civ. Proc. § 1010.6 and Cal. Rules of Court, Rule 2.251)

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3. PERSON(S) SERVED:

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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 November 10, 2016 at West Sacramento, California.

Brandy McDowell