

No. S239958

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

CAL FIRE LOCAL 2881, et al.
Petitioners and Appellants,

v.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
Defendant and Respondent,

and

THE STATE OF CALIFORNIA,
Intervener and Respondent.

On Review from the Court of Appeal for the First Appellate District,
Division Three, Civil Case No. A142793

After an Appeal from the Superior Court for the State of California, County
of Alameda, Case Number RG12661622,
Hon. Evelio Grillo, Presiding Judge

**APPLICATION FOR PERMISSION TO FILE AND AMICUS
CURIAE BRIEF OF AMALGAMATED TRANSIT UNION LOCAL
1225, AMALGAMATED TRANSIT UNION LOCAL 1555,
INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS LOCAL 1245, INTERNATIONAL FEDERATION OF
PROFESSIONAL AND TECHNICAL ENGINEERS LOCAL 21,
MARIN ASSOCIATION OF PUBLIC EMPLOYEES, OPERATING
ENGINEERS LOCAL UNION NO. 3, AND PHYSICIANS' AND
DENTISTS' ORGANIZATION OF CONTRA COSTA**

LEONARD CARDER, LLP
Arthur Liou (State Bar No. 252690)
1330 Broadway, Suite 1450
Oakland, CA 94612
Telephone: (510) 272-0169
Facsimile: (510) 272-0174
aliou@leonardcarder.com
Attorneys for Amici Curiae

TABLE OF CONTENTS

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE
BRIEF IN SUPPORT OF CAL FIRE LOCAL 2881 6

I. INTEREST OF AMICI CURIAE 6

II. AMICUS CURIAE’S BRIEF WILL ASSIST THE COURT
IN DECIDING THE MATTER..... 7

III. CALIFORNIA RULE OF COURT 8.520(F)(4)
DISCLOSURE 8

AMICUS CURIAE BRIEF OF AMALGAMATED TRANSIT
UNION LOCAL 1225, AMALGAMATED TRANSIT UNION
LOCAL 1555, INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL 1245, INTERNATIONAL
FEDERATION OF PROFESSIONAL AND TECHNICAL
ENGINEERS LOCAL 21, MARIN ASSOCIATION OF PUBLIC
EMPLOYEES, OPERATING ENGINEERS LOCAL UNION NO.
3, AND PHYSICIANS’ AND DENTISTS’ ORGANIZATION OF
CONTRA COSTA 9

I. INTRODUCTION 9

II. ARGUMENT 11

A. *Floyd v. Blanding* Has No Applicability Here, and
There Is No “Elevated Burden” on Petitioners 11

B. *REAOC* Concerned the Creation of an Implied Vested
Right to Health Insurance Pooling, Not Pension
Benefits, and It Does Not Require a Showing of an
Explicit Intent to Create Vested Pension Rights..... 14

C. The Court Should Reject *Marin Association of Public
Employees’*s Flawed Reading of Pension Case Law
and Find that Comparable Advantages Must Be
Provided to Offset Pension Disadvantages 18

III. CONCLUSION 22

CERTIFICATE OF WORD COUNT 23

PROOF OF SERVICE 24

TABLE OF AUTHORITIES

CASES

Abbott v. City of Los Angeles
(1958) 50 Cal.2d 438 19

Alameda County Deputy Sheriff's Assn. v. Alameda County Employees' Retirement Assn.
(2018) 19 Cal.App.5th 61 7, 20

Allen v. Board of Administration
(1983) 34 Cal.3d 114 passim

Allen v. City of Long Beach
(1955) 45 Cal.2d 128 19

Assn. of Blue Collar Workers v. Wills
(1986) 187 Cal.App.3d 780 18

Bellus v. City of Eureka
(1968) 69 Cal.2d 336 18

Betts v. Board of Administration
(1978) 21 Cal.3d 859 9, 12, 16, 19

Brooks v. Pension Board
(1938) 30 Cal.App.2d 118 21

CAL FIRE Local 2881 v. California Public Employees' Retirement System
(2016) 7 Cal.App.5th 115 11, 14, 15, 19

California Teachers Assn. v. Cory
(1984) 155 Cal.App.3d 494 16

CalPERS Bd. of Admin. v. Wilson
(1997) 52 Cal.App.4th 1109 11

Carman v. Alvord
(1982) 31 Cal.3d 318 14

Deputy Sheriffs' Assn. of San Diego County v. County of San Diego
(2015) 223 Cal.App.4th 573 11

| | |
|--|---------------|
| <i>Dryden v. Bd. of Pension Commrs.</i> (1936) 6 Cal.2d 575 | 16 |
| <i>England v. City of Long Beach</i> (1945) 27 Cal.2d 343 | 17 |
| <i>Floyd v. Blanding</i> (1879) 54 Cal. 41 | 8, 11, 12 |
| <i>Hittle v. Santa Barbara County Employees Retirement Assn.</i> (1985) 39 Cal.3d 374 | 13 |
| <i>Kern v. City of Long Beach</i> (1947) 29 Cal.2d 848 | 9, 12, 16, 17 |
| <i>Legislature v. Eu</i> (1991) 54 Cal.3d 492 | 20 |
| <i>Marin Association of Public Employees v. Marin County Employees’ Retirement Assn.</i> (2016) 2 Cal.App.4th 674 | 7, 10, 18, 21 |
| <i>In re Marriage of Brown</i> (1976) 15 Cal.3d 838 | 17 |
| <i>Miller v. State of California</i> (1977) 18 Cal.3d 808 | 9, 16 |
| <i>O’Dea v. Cook</i> (1917) 176 Cal. 659 | 9 |
| <i>Olson v. Cory</i> (1980) 27 Cal.3d 532 | 20 |
| <i>Pasadena Police Officers’ Assn. v. City of Pasadena</i> (1983) 147 Cal.App.3d 695 | 20 |
| <i>Protect Our Benefits v. City and County of San Francisco</i> (2015) 235 Cal.App.4th 619 | 20 |

| | |
|---|---------------|
| <i>Retired Employees Association of Orange County, Inc. v. County of Orange</i> (2011) 52 Cal.4th 1171 | 9, 10, 14, 15 |
| <i>Terry v. City of Berkeley</i> (1953) 41 Cal.3d 698 | 13 |
| <i>United Firefighters of Los Angeles City v. City of Los Angeles</i> (1989) 210 Cal.App.3d 1095 | 20 |
| <i>Ventura County Deputy Sheriffs' Assn. v. Bd. of Retirement</i> (1997) 16 Cal.4th 483 | 13 |
| <i>Wisley v. City of San Diego</i> (1961) 188 Cal.App.2d 482 | 20 |

STATUTES AND CONSTITUTIONS

| | |
|---|--------|
| Cal. Const., art. I, § 10, cl. 1 | 9 |
| Government Code, § 7522.10 | 16 |
| Government Code, § 20000 <i>et seq.</i> ; | 7, 16 |
| Government Code, § 20909 | 14, 15 |
| Government Code, § 31450 <i>et seq.</i> | 7 |
| Stats. 1913, ch. 694 | 9, 12 |
| Stats. 1931, ch. 700 | 12 |
| Stats. 1937, ch. 677 | 12 |

OTHER AUTHORITIES

| | |
|--|----|
| Jennifer Erin Brown, Natl. Inst. on Retirement Security, Pensionomics 2016: Measuring the Economic Impact of DB Pension Expenditures (2016)..... | 15 |
| Robert L. Clark et al., State and Local Retirement Plans in the United States (2011) | 9 |

**APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE
BRIEF IN SUPPORT OF CAL FIRE LOCAL 2881**

Pursuant to California Rule of Court 8.520(f), amici curiae Amalgamated Transit Union Local 1225, Amalgamated Transit Union Local 1555, International Brotherhood of Electrical Workers Local 1245, International Federation of Professional and Technical Engineers Local 21, Marin Association of Public Employees, Operating Engineers Local Union No. 3, and Physicians' and Dentists' Organization of Contra Costa request permission to file the accompanying amicus brief in support of Petitioners CAL FIRE Local 2881 et al.

I. INTEREST OF AMICI CURIAE

Amici curiae are labor unions representing thousands of public sector workers throughout California, across a range of occupations. Amici's members include bus drivers, doctors, dentists, electricians, architects, engineers, maintenance workers, office employees, social workers, and more. They work for a variety of public agencies, such as the City and County of San Francisco, Santa Clara County, Alameda County, Contra Costa County, Marin County, the San Francisco Bay Area Rapid Transit District, the Alameda-Contra Costa Transit District, San Jose, Oakland, Vallejo, and others.

Workers represented by amici receive pension benefits through the California Public Employees' Retirement System (Government Code section 20000 *et seq.*), as well as retirement systems established under the County Employees Retirement Law of 1937 (Government Code section 31450 *et seq.*) and other independent retirement systems. Amici's members are directly affected by the outcome of this case, both because many of them would have been eligible to purchase additional retirement service

credit but also because of the impact the Court of Appeal decision will have on public employee pensions.

If the decision is left to stand, it will undermine longstanding protections for public pension benefits, contrary to precedent from this Court and other appellate courts. This will lead to uncertainty about what are permissible changes to pension benefits, as well as conflict between amici and employers who seek to impose pension reductions. Amici and their members therefore have an interest in seeing this case resolved consistent with existing precedent, which holds that pension benefits are protected against impairment under the Contract Clause and that for modifications to be made to pension benefits, the change must bear a material relationship to the successful operation and theory of the pension system, and disadvantages to employees must be accompanied by comparable new advantages. (*Allen v. Bd. of Admin.* (1983) 34 Cal.3d 114, 120.)

II. AMICUS CURIAE'S BRIEF WILL ASSIST THE COURT IN DECIDING THE MATTER

Many of the amici participating in this brief filed a brief at the Court of Appeal, and many of them have been participants in recent Court of Appeal cases addressing the impairment of pension benefits, including *Marin Association of Public Employees v. Marin County Employees' Retirement Association* (2016) 2 Cal.App.5th 674 and *Alameda County Deputy Sheriff's Assn. v. Alameda County Employees' Retirement Assn.* (2018) 19 Cal.App.5th 61. Amici believe their views will assist this court given their familiarity with the issues underlying these cases and their familiarity with California pension case law. Amici will draw on their perspective to highlight multiple flaws in the Court of Appeal decision,

including issues not touched on by Petitioners CAL FIRE Local 2881 et al., such as the court's misplaced reliance on statements deriving from *Floyd v. Blanding* (1879) 54 Cal. 41.

III. CALIFORNIA RULE OF COURT 8.520(F)(4) DISCLOSURE

No party or counsel for any party in this appeal authored the proposed amicus brief, in whole or in part, or made any monetary contribution intended to fund the preparation or submission of the proposed brief.

AMICUS CURIAE BRIEF OF AMALGAMATED TRANSIT UNION LOCAL 1225, AMALGAMATED TRANSIT UNION LOCAL 1555, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 1245, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS LOCAL 21, MARIN ASSOCIATION OF PUBLIC EMPLOYEES, OPERATING ENGINEERS LOCAL UNION NO. 3, AND PHYSICIANS' AND DENTISTS' ORGANIZATION OF CONTRA COSTA

I. INTRODUCTION

The first public employee pensions were created in California more than a century ago. (See Stats. 1913, ch. 694, § 1, p. 1423; Robert L. Clark et al., *State and Local Retirement Plans in the United States* (2011) p. 44.) For nearly as long, this Court has been presented with questions about the status of those benefits and what changes are permissible once they have been granted. (See, e.g., *O'Dea v. Cook* (1917) 176 Cal. 659.)

Over the years, the Court has established certain fundamental principles to guide consideration of these issues, and the basic tenets of California pension law have been clear for several decades: (1) pension benefits are protected against impairment by the Contract Clause (Cal. Const., art. I, § 10, cl. 1; *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852-853); (2) public employees gain a vested right to the existing pension benefits upon accepting employment, including any benefit increases granted during the course of their employment¹ (*Miller v. State of California* (1977) 18 Cal.3d 808, 815; *Betts v. Bd. of Admin.* (1978) 21 Cal.3d 859, 866); and (3) any modification to existing pension benefits

¹ In this context, “vested” means that the benefit is protected against impairment under the Contract Clause, although it may not be vested or “matured” in the sense of all conditions being met for future payment. (*Kern, supra*, 29 Cal.2d at p. 855; *Retired Employees Association of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1189, fn. 3.)

must be reasonable, meaning it must “bear a material relation to the theory and successful operation of a pension system, and, when resulting in disadvantages to employees, must be accompanied by comparable new advantages.” (*Allen v. Bd. of Admin.* (1983) 34 Cal.3d 114, 120.) Additionally, while current political winds may be blowing in a different direction, the Court has explicitly recognized that pension benefits are favored by law and are to be liberally construed in favor of providing benefits.

The Court of Appeal decision here suffers from fundamental flaws in its understanding of California pension law. It fails to recognize the distinction between the Contract Clause protections afforded to public employees’ pension benefits and other kinds of benefits where the benefit is not inherently understood as a contractual right. As a result, the Court of Appeal relies on incorrect precedent to wrongly describe the burden on the Petitioners CAL FIRE Local 2881 et al., and it erroneously applies *Retired Employees Association of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171 (*REAOC*), to threshold questions concerning the protected status of pension benefits, when this Court has never applied *REAOC*’s implied vesting analysis to pension benefits. The court’s errors are further compounded by its reliance on *Marin Association of Public Employees v. Marin County Employees’ Retirement Association* (2016) 2 Cal.App.4th 674 (*MAPE*), which misunderstands the circumstances in which modifications can be made.

California vested rights law has been settled for many years, and the decision here, along with *MAPE*, represents a significant departure from existing precedent. Accordingly, amici ask the Court to reaffirm that pension benefits are protected contractual rights, even in the absence of

explicit vesting language, and that pension modifications must bear a material relationship to the theory of the pension system, with disadvantages being accompanied by comparable new advantages, as articulated in *Allen v. Board of Administration* and elsewhere.

II. ARGUMENT

A. *Floyd v. Blanding* Has No Applicability Here, and There Is No “Elevated Burden” on Petitioners

One of the first errors the Court of Appeal makes is to put the burden on CAL FIRE Local 2881 to “mak[e] out a clear case, free from all reasonable ambiguity, [that] a constitutional violation occurred.” (*CAL FIRE Local 2881 v. California Public Employees’ Retirement System* (2016) 7 Cal.App.5th 115, 124, quoting *Deputy Sheriffs’ Assn. of San Diego County v. County of San Diego* (2015) 223 Cal.App.4th 573, 578 (*San Diego DSA*)). The court explains that this “elevated burden” is due to the state’s status as a sovereign power and the need to reconcile the Contract Clause with the “essential attributes of sovereign power.” (*CAL FIRE Local 2881, supra*, 7 Cal.App.5th at pp. 124-125, quoting *CalPERS Bd. of Admin. v. Wilson* (1997) 52 Cal.App.4th 1109, 1130-1131.) But where the impairment of pension benefits is concerned, this Court has never required the erection of these “legal hurdles” or created an “elevated burden” as a means of reconciling the Contract Clause with the police power. (*CAL FIRE Local 2881, supra*, 7 Cal.App.5th at p. 124.)

The court borrows the notion that there must be a “clear” case “free from all reasonable ambiguity” from the Fourth District Court of Appeal decision in *San Diego DSA*, which, in turn, drew on *Floyd v. Blanding* (1879) 54 Cal. 41, 43. There are multiple problems, however, with applying *Floyd* to contemporary pension impairment cases.

First, *Floyd* did not concern pension benefits at all—instead, it addressed whether a state agency’s construction of a seawall in front of the plaintiff’s waterfront property impaired plaintiff’s contractual rights, because the state had promised a fixed waterfront boundary line. (*Floyd, supra*, 54 Cal. at pp. 43-44.) Second, despite numerous opportunities to do so, the Court has never cited *Floyd* at all, and lower courts have largely done so only after *San Diego DSA* reintroduced it. In fact, in the nearly 140 years since *Floyd* was decided, and despite the numerous Contract Clause cases before the Court during that time, the Court has never cited *Floyd* in any contract impairment case.

Third, *Floyd* long predates this Court’s pension case law and even the introduction of public sector pensions in California. The state teachers’ pension fund was first created in 1913, and state and county pension systems were not created until the 1930s. (Stats. 1913, ch. 694, § 1, p. 1423 [establishing public school teachers’ retirement salary fund, the predecessor to the California State Teachers’ Retirement System]; Stats. 1931, ch. 700, § 1, p. 1442 [State Employees’ Retirement System, now the California Public Employees Retirement System]; Stats. 1937, ch. 677, § 1, p. 1898 [County Employees Retirement Act of 1937].) The landmark decision of *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, which crystalized the current approach to public pension benefits, was decided nearly 70 years after *Floyd*, and other seminal cases such as *Betts v. Board of Administration* (1978) 21 Cal.3d 859 and *Allen v. Board of Administration* (1983) 34 Cal.3d 114 came even later. So there is no reason to view *Floyd* as precedential or helpful guidance for concepts and principles that arose only after *Floyd* was decided, particularly when this Court has never seen fit to do so.

In fact, rather than requiring that pension cases be free from all ambiguity, the Court has instructed that “[a]ny ambiguity or uncertainty in the meaning of pension legislation must be resolved in favor of the pensioner,” assuming the construction is consistent with the clear language of the statute. (*Ventura County Deputy Sheriffs’ Assn. v. Bd. of Retirement* (1997) 16 Cal.4th 483, 490.) In *Terry v. City of Berkeley* (1953) 41 Cal.3d 698, for example, the Court applied this principle of liberal construction to find that a retired police officer’s benefits had been unconstitutionally impaired, noting that “[i]t is a general and well recognized rule that pension provisions shall be liberally construed in favor of the applicant.” (*Id.* at p. 702, citation omitted.)

Underlying this approach is an appreciation for, rather than an antipathy to, public employee pensions, which the Court has explicitly recognized:

The right to a pension is among those rights clearly ‘favored’ by the law. The rule is firmly established in this state that pension legislation must be liberally construed and applied to the end that the beneficent results of such legislation may be achieved. Pension provisions in our law are founded upon sound public policy and with the objects of protecting, in a proper case, the pensioner and his dependents against economic insecurity.

(*Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374, 390, quotation marks and citations omitted.)

While this does not mean that employees and retirees prevail in every case—and they still have the burden of proving their case—it does mean that pension benefits should not be treated with hostility and the scales weighed against beneficiaries. As the Court noted, not only are pensions an inducement for continued public service, they also serve the

important public purpose of protecting employees from economic insecurity.² (See also *Carman v. Alvord* (1982) 31 Cal.3d 318, 325, fn. 4 [“Pensions are a government obligation of great importance. They help induce faithful public service and provide agreed subsistence to retired public servants who have fulfilled their employment contracts”].)

In sum, notwithstanding *Floyd* and *San Diego DSA*, this Court’s precedent provides clear guidance that the right to pension benefits is favored by the law, contrary to the notion that Petitioners face additional hurdles or an elevated burden.

B. REAOC Concerned the Creation of an Implied Vested Right to Health Insurance Pooling, Not Pension Benefits, and It Does Not Require a Showing of an Explicit Intent to Create Vested Pension Rights

The *Floyd* statement is not the only way in which the Court of Appeal wrongly erects hurdles to Petitioners’ case. The court goes on to assert that Petitioners also have the burden of overcoming the presumption that “a statutory scheme is not intended to create private contractual or vested rights.” (*CAL FIRE Local 2881, supra*, 7 Cal.App.5th at p. 126, quoting *REAOC, supra*, 52 Cal. 4th at p. 1186.) According to the court, CAL FIRE Local 2881 could meet this “heavy burden” only by demonstrating that “the statutory language and circumstances accompanying [passage of Government Code section 20909] clearly evince a legislative intent to create private rights of a contractual nature.” (*CAL*

² It should be noted as well that public pensions serve a vital role in California’s economy because of the economic stimulus effects of retiree spending. (See Jennifer Erin Brown, Natl. Inst. on Retirement Security, Pensionomics 2016: Measuring the Economic Impact of DB Pension Expenditures (2016) p. 1 <<https://goo.gl/zwdsF7>> [as of Feb. 20, 2018, estimating \$2.21 in economic output for every dollar paid of pension benefits and \$9.19 for every dollar contributed to pension funds].)

FIRE Local 2881, supra, 7 Cal.App.5th at p. 126, quoting *REAO*C, *supra*, 52 Cal.4th at p. 1189.) Although the Petitioners contend that, given the explicit statutory authorization (see Government Code, section 20909), they have an express vested right to purchase additional service credit, the Court of Appeal nevertheless holds that Petitioners did not meet their burden, because there is nothing in the text of the statute or its legislative history that “unambiguously states an intent by the Legislature to create a vested pension benefit.” (*CAL FIRE Local 2881, supra*, 7 Cal.App.5th at p. 126.)

As amici noted in their letter in support of review, the principles articulated in *REAO*C have little applicability to cases concerning pension benefit reductions. *REAO*C answered the specific question certified to this Court, whether “a California county and its employees can form an implied contract that confers vested rights to health benefits on retired county employees.” (*REAO*C, *supra*, 52 Cal.4th at p. 1176.) Pension benefits were not at issue in *REAO*C, only the pooling of health insurance rates between retirees and active employees, and instead of dealing with explicitly authorized benefits, as is the case with the pension benefit here, *REAO*C attempted to discern the principles on which implied vested rights could be derived, hence the need for statutory language or legislative history clearly evincing an intent to create contractual rights. (*Id.* at pp. 1186-1187.)

These principles have not been applied to the right to receive pension benefits, because this Court has for many decades recognized that the offer of a pension benefit to public employees is inherently an offer of a vested contractual right, even in the absence of an explicit statement or indication of intent to create a vested right. *Kern*, for example, describes pension provisions in a city charter as “an integral part of the contemplated

compensation set forth in the contract of employment,” which “are an indispensable part of that contract.” (*Kern, supra*, 29 Cal.2d at p. 852, quoting *Dryden v. Bd. of Pension Commrs.* (1936) 6 Cal.2d 575, 579.) The contractual exchange stems from the employee accepting employment in return for the benefit, since the rendering of service under the pension benefit acts as implied acceptance of the offered benefit. (*Kern, supra*, 29 Cal.2d at pp. 851-852 [once service is rendered under a pension statute “the pension provisions become a part of the contemplated compensation for those services and so in a sense a part of the contract of employment itself,” quotation marks omitted]; *Betts, supra*, 21 Cal.3d at p. 863 [“A public employee’s pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment”]; *California Teachers Assn. v. Cory* (1984) 155 Cal.App.3d 494, 506 [“A statute offering pension rights in return for employee services expresses an element of exchange and thereby implies these rights will be private rights in the nature of contract”].)

In fact, amici are not aware of any pension law that explicitly states that the benefits provided are protected against contractual impairment as vested rights. For example, there is no provision in the Public Employees Retirement Law, explicitly giving CalPERS members a contractual right to their benefits or promising that the benefits will not be changed. (See Gov. Code, § 20000 *et seq.*; cf. Gov. Code, § 7522.10, subd. (f)(2) [under the California Public Employees’ Pension Reform Act of 2013, no vested right to employer contributions to defined contribution plan].) It is undisputed, however, that CalPERS members are entitled to Contract Clause protection even if they have never contemplated whether their benefits are vested or understood why. (See *Miller, supra*, 18 Cal.3d at p. 817.)

The Court's approach, which fundamentally rests on the notion of pension benefits as deferred compensation exchanged in return for the acceptance of work, is a sensible one. The entire point of the benefit is to induce long and faithful service, making it inherently unjust to change or eliminate the benefit after the worker has already given years of his or her life to the employer. (See *England v. City of Long Beach* (1945) 27 Cal.2d 343, 348 ["We must, of course, reject any theory that the provisions of the charter were designed to create an appearance of granting pensions while at the same time withholding the benefits by providing inadequate funds"].) Additionally, requiring that the benefits be explicitly promised as contractual rights, as *CAL FIRE Local 2881* would have it, would be both impractical and would undermine trust in promised benefits.

When public employees enter employment they do not exhaustively examine the terms of the pension laws under which their benefits are offered. It would be unrealistic to expect that they must review every statutory provision and make a legal judgment as to whether the law explicitly grants a vested benefit, particularly when many public employees would not even know where to look to make this kind of determination. At the same time, the approach to vested pension benefits endorsed by *CAL FIRE Local 2881* would create an incentive for employers and legislators to obfuscate the underlying terms of benefits. The end result would be to render pension benefits illusory or a "mere gratuity" through fine print and qualifiers, contrary to this Court's holdings. (See *Kern, supra*, 29 Cal.2d at p. 850 [unlike other states, California does not treat pensions "as gratuities or bounties which can be withdrawn at any time"]; *In re Marriage of Brown* (1976) 15 Cal.3d 838, 845 ["Although some jurisdictions classify retirement pensions as gratuities, it has long been settled that under

California law such benefits ‘do not derive from the beneficence of the employer, but are properly part of the consideration earned by the employee,’” citation omitted].)

Put slightly differently, although employees are limited to their reasonable expectations, they are also entitled to those expectations. (See *Bellus v. City of Eureka* (1968) 69 Cal.2d 336, 351 [same duty of fair dealing and obligation to protect reasonable expectations as favors insured applies to interpretation of pension rights]; *Assn. of Blue Collar Workers v. Wills* (1986) 187 Cal.App.3d 780, 792 [employees had reasonable expectation that city would meet its obligations to finance benefit].) The Court of Appeal’s invocation of *REAOC* to require a showing of explicit intent would only serve to defeat such expectations, even though no major pension law evidences the kind of intent the court is calling for.

Thus, the Court should take this opportunity to clarify that *REAOC* is limited to its context, and find that the issue of whether Petitioners had a vested right to the optional service credit turns on whether it was part of the operative pension benefit in effect at the time, not whether the Legislature unequivocally expressed an intent to grant an irrevocable benefit.

C. The Court Should Reject *Marin Association of Public Employees’s* Flawed Reading of Pension Case Law and Find that Comparable Advantages Must Be Provided to Offset Pension Disadvantages

As an alternative ground for finding no violation of the Contract Clause, the Court of Appeal relies on *Marin Association of Public Employees v. Marin County Employees’ Retirement Association* (2016) 2 Cal.App.5th 674—which this Court has granted review of—to the effect that there is no requirement that a comparable advantage be provided to

offset the lost service credit benefit. (See *CAL FIRE Local 2881, supra*, 7 Cal.App.5th at pp. 130-131.)

MAPE, however, is built on a deeply flawed parsing of the meaning of “must” and “should” in the Court’s decisions in *Allen v. City of Long Beach* (1955) 45 Cal.2d 128 (*Allen I*), *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, *Allen v. Board of Administration, supra*, 34 Cal.3d 114 (*Allen II*), and others. This reading is incorrect for at least three reasons.

First, this Court has clearly stated that pension modifications for current employees are reasonable only when disadvantages are offset by comparable new advantages, and regardless of whether the Court has used “must” or “should” in these holdings, its analysis has treated comparable advantage as a necessary condition for modification.

Allen I found an impairment, because the pension changes decreased benefits “without offering any commensurate advantages,” treating comparable advantage as a requirement immediately after stating that disadvantage “should be accompanied by comparable new advantages.” (*Allen I, supra*, 45 Cal.2d at p. 131.) *Abbott* quoted *Allen I* before describing its comparable advantage rule as “the criteria by which modifications to pension plans *must* be measured,” and then proceeded to find that the advantages relied upon by the respondent were not commensurate and did not offset the detriments. (*Abbott, supra*, 50 Cal.2d at pp. 449, 451, 453, emphasis added.) *Betts* likewise quoted *Allen I*’s “should” language while finding that no comparable new advantages offset the detriment the petitioner suffered. (*Betts, supra*, 21 Cal.3d at pp. 864, 867.) *Allen II* explicitly stated that a comparable advantage “must” be provided, although it effectively found that the benefit at issue there was not reduced and that the petitioners were seeking increases that had not

existed during their employment. (*Allen II, supra*, 34 Cal.3d at pp. 120, 125.) If that were not enough, *Olson v. Cory* (1980) 27 Cal.3d 532 and *Legislature v. Eu* (1991) 54 Cal.3d 492 also treat comparable advantages as necessary conditions pension changes to be permissible, and both cases reject changes that did not include such comparable new benefits. (*Olson, supra*, 27 Cal.3d at p. 541; *Eu, supra*, 54 Cal.3d at p. 531.)

Second, numerous appellate decisions have likewise treated the need for a comparable advantage as a mandatory condition that must be met for a modification to be constitutional. (See, e.g., *Wisley v. City of San Diego* (1961) 188 Cal.App.2d 482, 487; *Pasadena Police Officers' Assn. v. City of Pasadena* (1983) 147 Cal.App.3d 695, 702; *United Firefighters of Los Angeles City v. City of Los Angeles* (1989) 210 Cal.App.3d 1095, 1103-1104; *Protect Our Benefits v. City and County of San Francisco* (2015) 235 Cal.App.4th 619, 628-629.) *MAPE* does not present a reason to find these cases—which span decades—incorrectly decided, and it is only with *MAPE* that any Courts of Appeal began finding anything ambiguous about the statement that a comparable advantage “must” be provided. In fact, only *MAPE* and *CAL FIRE Local 2881* give any credence to *MAPE*'s novel interpretation, with other divisions within the First District rejecting this reading, even when presented with the same issues as *MAPE*. (See *Alameda County Deputy Sheriff's Assn. v. Alameda County Employees' Retirement Assn.* (2018) 19 Cal.App.5th 61, 227 Cal.Rptr.3d 787, 831-832 [rejecting *MAPE*'s assessment of whether changes were reasonable and requiring analysis of disadvantages]; *Protect Our Benefits, supra*, 235 Cal.App.4th at pp. 628-629, 630 [finding that change to supplemental cost of living adjustment was not reasonable because no comparable advantage was provided].)

Third, *MAPE* creates an indeterminate standard for when pension reductions are permissible that clearly contradicts decisions from this Court and others. When *MAPE* finds that there are “acceptable changes aplenty” that would be permissible reductions in pension benefits without any offsetting advantage, it endorses detrimental changes that go further than anything this Court has permitted since deciding *Allen I*. (*MAPE, supra*, 2 Cal.App.5th at p. 702.) For instance, *MAPE* cites *Brooks v. Pension Board* (1938) 30 Cal.App.2d 118 for the proposition that pension benefits can be reduced from two-thirds to one-half of an employee’s salary—a reduction of 25%—even though there is no reading of *Allen I* or any of this Court’s precedent since then that would countenance such a drastic reduction in benefits. (*MAPE, supra*, 2 Cal.App.5th at p. 702.) Similarly, *MAPE* finds that even to the extent a comparable benefit “should” be provided, it is sufficient that employees do not need to contribute toward the eliminated pension benefit and get “more cash in hand every month.” (*Id.* at p. 700.) But if that were sufficient to provide a comparable advantage, there would be no limit on the ability to eliminate existing pension benefits, since in virtually all cases employees contribute something toward their pension benefits. This is an absurd result that cannot be reconciled with precedent, and provides ample reason for rejecting *MAPE*.

In short, *MAPE* breaks with existing precedent even more than *CAL FIRE Local 2881*, and it does not help buttress the Court of Appeal’s decision. *CAL FIRE Local 2881*’s reliance on *MAPE* is yet another reason to find that the decision is deeply flawed and should be reversed.

III. CONCLUSION

This Court long ago established the basic tenets applicable here, and it should be these principles—certainly not the political winds—that guide the way. The Court of Appeal’s decision misunderstands much of this precedent, and amici respectfully ask the Court to correct these fundamental flaws by reaffirming the pension case law that has existed for decades.

Respectfully Submitted,

LEONARD CARDER, LLP



Dated: February 21, 2018

Arthur Liou
Attorneys for Amici Curiae
Amalgamated Transit Union Local 1225,
Amalgamated Transit Union Local 1555,
International Brotherhood of Electrical
Workers Local 1245, International
Federation of Professional and Technical
Engineers Local 21, Marin Association
of Public Employees, Operating
Engineers Local Union No. 3, and
Physicians’ and Dentists’ Organization
of Contra Costa

CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.500(c)(1), I certify that the text of this amicus brief contains 4,601 words, as counted by the Microsoft Word word-processing program used to generate the brief.

Dated: February 21, 2018



Arthur Liou
LEONARD CARDER, LLP

PROOF OF SERVICE

I am employed in Alameda County. I am over the age of eighteen (18) years and not a party to the within action. My business address is 1330 Broadway, Suite 1450, Oakland, California 94612. On February 21, 2018, I served the following document(s):

APPLICATION FOR PERMISSION TO FILE AND AMICUS CURIAE BRIEF OF AMALGAMATED TRANSIT UNION LOCAL 1225, AMALGAMATED TRANSIT UNION LOCAL 1555, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 1245, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS LOCAL 21, MARIN ASSOCIATION OF PUBLIC EMPLOYEES, OPERATING ENGINEERS LOCAL UNION NO. 3, AND PHYSICIANS' AND DENTISTS' ORGANIZATION OF CONTRA COSTA

by placing a true copy thereof enclosed in a sealed envelope and served in the manner and/or manners described below to each of the parties herein and addressed as below or stated on the attached service list.

 X BY REGULAR MAIL: I caused such envelope to be deposited in the mail at my business address, addressed to the addressee(s) designated. I am readily familiar with LEONARD CARDER, LLP's practice for collection and processing of correspondence and pleadings for mailing. It is deposited with the United States Postal Services on that same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Oakland, California on February 21, 2018.


Carol Edgerton

| | |
|---|---|
| <p>Gary Marc Messing Gregg Mclean Adam Messing Adam & Jasmine, LLP 235 Montgomery Street, Suite 828 San Francisco, CA</p> | <p>Counsel for Petitioner and Appellant CAL Fire Local 2881</p> <p>Counsel for Petitioners and Appellants: Shaun Olsen, Monty Phelps, Sam Davis, Paul Van Gerwen</p> |
| <p>Wesley E. Kennedy Gina Michelle Ratto Preet Kaur CALPERS Lincoln Plaza North 400 Q Street Sacramento, CA 95811</p> | <p>Counsel for Defendant and Respondent California Public Employees' Retirement System (CALPERS)</p> |
| <p>Peter A. Krause Legal Affairs Secretary *Rei R. Onishi Deputy Legal Affairs Secretary Office of Governor Edmund G. Brown Jr. State Capitol, Suite 1173 Sacramento, CA 95814</p> | <p>Counsel for Intervener and Respondent State of California</p> |

| | |
|--|---|
| <p>Stephen H. Silver, Esq. Timothy K. Talbot, Esq. Rains Lucia Stern St. Phalle & Silver, P.C. 1428 2nd Street, Suite 200 Santa Monica, CA 90401</p> | <p>Counsel for Amici Curiae Los Angeles Police Protective League Ventura County Deputy Sheriffs' Association California Association of Highway Patrol Garden Grove Police Association California Statewide Law Enforcement Association Orange County Employees' Association Los Angeles County Professional Peace Officers' Association Association for Los Angeles Deputy Sheriffs Deputy Sheriffs' Association of Santa Clara Fresno Deputy Sheriffs' Association Coalition of Santa Monica City Employees Antioch Police Officers' Association</p> |
| <p>Judge Evelio Grillo c/o Clerk of the Court Office of the Court Clerk Alameda County Superior Court 1225 Fallon Street Oakland, CA 94612</p> | <p>Trial Court</p> |
| <p>Clerk California Court of Appeal First Appellate District, Division 3 350 McAllister Street San Francisco, CA 94102</p> | <p>Appellate Court</p> |

