SUPREME COURT 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,
Intervenor and Respondent.

On Review from the Court of Appeal for the First
Appellate District, Division Three, No. 2 A142793

APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

AND

AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS
AND APPELLANTS CAL FIRE LOCAL 2881, ET AL.

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APPLICATION FOR LEAVE TO FILE

BRIEF OF *AMICI CURIAE*

Pursuant to California Rules of Court, Rule 8.520(f), the American Federation of State, County and Municipal Employees ("AFSCME"), the American Federation of Teachers ("AFT"), the National Education Association ("NEA"), the Service Employees International Union ("SEIU"), the California Faculty Association ("CFA"), the California Federation of Teachers ("CFT"), and the California Teachers Association ("CTA") hereby apply for permission to file the accompanying brief of *amici curiae* in support of Petitioner and Appellant CAL FIRE Local 2881. This application is timely made within no later than thirty (30) days after all briefs that the parties may file, have been filed, or were required to be filed. Cal. R. Ct. 8.520(f)(2).[1]

I. The Interest of *Amici Curiae*.

Together, AFSCME, AFT, NEA, SEIU, CFA, CFT, and CTA represent over 950,000 public employees in California whose vested

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[1] No party or counsel for any party, other than counsel for *Amici*, has authored this brief 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 brief.

pension rights may be threatened by the decision of the court of appeal below.

AFSCME has over 1.6 million members nationally, the vast majority of whom work for public employers. Through its affiliated local unions, AFSCME is the exclusive bargaining representative of approximately 175,000 employees in California, including employees of numerous California cities, counties, school districts, and special districts who participate in public pension systems, including the Public Employees' Retirement System ("CalPERS").

The AFT represents 1.7 million members who are employed across the nation and overseas in K-12 and higher education, public employment and healthcare. The CFT is the AFT state affiliate in California. The CFT 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 vast majority of whom participate in California's State Teachers' Retirement System ("CalSTRS") or CalPERS.

The NEA is a national employee organization representing more than three million education professionals nationwide. NEA's California affiliate, CTA, represents, through its over 1,000 chapters, 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 CalSTRS. Thousands of other CTA members participate and possess vested rights in CalPERS.

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 approximately 350,000 public sector workers employed by the State, counties, cities, hospitals, schools, universities and colleges, the vast majority of whom participate in CalPERS and other public pension systems.

CFA is the exclusive collective bargaining representative of the faculty bargaining unit of the California State University ("CSU"), representing more than 27,000 faculty members, including librarians, counselors, and coaches, at 23 CSU campuses systemwide who participate in CalPERS.

II. *Amici Curiae* Will Assist the Court in Deciding the Instant Matter by Addressing the Development of the Law in California and Nationally Regarding the Right of Public Employees Whose Pension Benefits Are Vested to Have Any Disadvantage Offset by a Commensurate Advantage.

Amici curiae are familiar with the issues before this Court and the scope of their presentation. *Amici's* interest is in correcting the court of appeal's erroneous holding below that the well-established "California Rule" – *i.e.,* any alterations to a pension system that diminish vested rights are permissible only if accompanied by a commensurate advantage – means something other than what this Court has previously declared. Indeed, *Amici's* interest in this case is intertwined with their previously-expressed interest in the *Alameda County* and *Marin* cases, which are pending before the Court and entail similar issues, as set forth in the brief accompanying this application.

To briefly summarize, in *Marin Ass'n of Pub. Employees v. Marin Cty. Employees' Ret. Ass'n* (2016) 2 Cal. App. 5th 674 ("*Marin*"), a case decided without a factual record on defendants' demurrer, the court of appeal misconstrued this Court's precedent developed under *Allen v. City of Long Beach* (1955) 45 Cal. 2d 128 and subsequent cases. In granting review of *Marin*, the Court ordered "further action . . . deferred pending the decision of the Court of Appeal, First Appellate District, Division Four, in *Alameda County Deputy Sheriff's Association et al. v. Alameda County*

Employees' Retirement Association et al., A141913." ("*Alameda County*"). That decision issued on January 8, 2018, and was critical of its sister division's ruling in *Marin*.

Amici jointly submitted a letter urging review of *Marin*, and the local bodies of some *Amici*, including AFSCME and SEIU, are parties to *Alameda County*. The decision below in the instant case relied heavily on *Marin*, compounding the court of appeal's error and further elevating *Amici's* interest in the resolution of the issues presented here.

The Court's review of *Cal Fire*, therefore, as well as the *Marin* decision and likely review of *Alameda County*, will each include a question of law important to *Amici's* California members, one that has the potential to impact their heretofore settled terms and conditions of employment and expectations regarding their future retirement security (and over which some of *Amici's* local bodies have the duty to bargain as a term and condition of employment).

Through the accompanying brief, *Amici* bring a national perspective to the significance of this case, which implicates an issue on which this Court's jurisprudence has had influence in other jurisdictions. In sum, *Amici's* interest in this matter is significant.

III. Conclusion.

For the foregoing reasons, *Amici Curiae* respectfully request permission to file the accompanying brief in support of Petitioners and Appellants CAL FIRE Local 2881, *et al.*

DATED: February 20, 2018

Respectfully submitted,

GLENN ROTHNER
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By ______________________
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INTRODUCTION AND SUMMARY OF ARGUMENT

In two pending cases springing from implementation of the Public Employees' Pension Reform Act of 2013 ("PEPRA"), including the instant case, the Court must consider the question of the extent to which public employees' retirement security is vested, and whether it may be altered unilaterally during the term of employment. This Court has long held as a matter of constitutional law that any alterations to a pension system that diminish vested rights are permissible only if accompanied by a commensurate advantage. This settled rule has been clearly applied by this Court across several generations of public employees and retirees, and has become influential nationally, adopted by many other states, and relied upon as a settled expectation. *Amici* have a strong interest in presenting their perspective to the Court on that point, whether in this case or the other two we discuss, one pending and the other likely to be reviewed.

On November 22, 2016, the Court granted review of Division Two of the First Appellate District's decision in *Marin Ass'n of Pub. Employees v. Marin Cty. Employees' Ret. Ass'n* (2016) 2 Cal. App. 5th 674 ("*Marin*"), a case decided without a factual record on defendants' demurrer. *Marin* rejected and dramatically reformulated this Court's longstanding and influential "vested rights" pension jurisprudence, developed under *Allen v. City of Long Beach* (1955) 45 Cal. 2d 128 ("*Allen I*") and subsequent cases, which, as explained below, has come to be known nationally as the "California Rule." In granting review of *Marin*, the Court ordered "further action . . . deferred pending the decision of the Court of Appeal, First Appellate District, Division Four, in *Alameda County Deputy Sheriff's Association et al. v. Alameda County Employees' Retirement Association et al.*, A141913." ("*Alameda County*").

In the interim, and prior to a decision being issued in *Alameda County*, on December 30, 2016, the First District, Division Three, decided the instant case, which similarly involves the implementation of PEPRA with respect to particular components of the pension system, namely an option conferred on employees to purchase additional pension service credits at cost. *Cal Fire Local 2881 v. California Pub. Employees' Ret. Sys.* (2016) 7 Cal. App. 5th 115 ("*Cal Fire*").

In *Cal Fire* the court below relied extensively on *Marin* in reaching its conclusion that the rights Petitioners asserted to be vested could nonetheless be eliminated without violating this Court's precedent established under *Allen I* and its progeny. See *Cal Fire*, 7 Cal. App. 5th at 130.

This Court granted review of *Cal Fire* on April 12, 2017. However, prior to full submission, on January 8, 2018, Division Four of the First Appellate District issued its awaited decision in *Alameda County*, thereby clearing the way for this Court to proceed in its review of *Marin. See Alameda County* (Cal. Ct. App. Jan. 8, 2018) No. A141913, 2018 WL 704139. Importantly, Division Four reached a different result than had Division One in *Marin*, and was critical of its sister Division's reasoning with respect to its reformulation of this Court's constitutional vested rights pension jurisprudence under the "California Rule."

Evidently, as this lengthy and intertwined procedural history indicates, in reviewing the *Marin* decision the Court will already have ample opportunity to consider the contours of the California Rule – an issue that may also be presented in *Cal Fire*, but only if it is determined as a threshold matter that the facts presented here gave rise to a vested pension benefit protected under the California Rule.

Should the Court determine that the opportunity to purchase unearned service credits constitutes a vested right, and further finds that eliminating such right was necessary,[2] it must then consider the issue with

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[2] To be clear, resolution of the instant case may not necessarily resolve *Marin*. Here, Respondent CalPERS eliminated for participants the opportunity to purchase "airtime," *i.e.*, a limited number of years of nonqualifying service credit as a means to enhance one's pension benefit. The Respondents argue *inter alia* that airtime (1) was not a contractually vested right; (2) was not a form of deferred compensation; and, in any event, (3) its curtailment resulted in no substantial material disadvantage that needed to be offset.

which *amici* are concerned here, that is, whether such a right may be impaired by the Legislature without conferring a commensurate advantage. As this Court has held for over seventy years, it may not. Indeed, the rule expounded in *Allen*, and developed in subsequent cases including *Betts v. Board of Administration* (1978) 21 Cal. 3d 859 and *Allen v. Board of Administration* (1983) 34 Cal. 3d 114 ("*Allen II*"), is so entrenched both in California and nationally that is has become known in other states that have adopted it as "the California Rule."

The longstanding "California Rule" holds that a public employee is entitled to receive the pension benefits originally promised to her when she accepted employment. Recognizing the need for flexibility over the decades of an employee's tenure, this Court has permitted "reasonable" modifications to the pension system, with "reasonableness" defined by

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By comparison, in *Marin* and *Alameda*, the respondent county retirement boards revised the formula for calculating the retirement benefit itself by eliminating specified compensation items from the the pension formula, items that had previously been included in the retirement benefit calculation. In those cases, the court of appeal thus squarely addressed the California Rule: that is, whether, in the context of the elimination of specified compensation from calculation of the retirement benefit, such elimination or reduction of an anticipated retirement benefit must be counterbalanced by a comparable new benefit.

In short, should the instant matter be resolved on narrower grounds, then resolution of the broad question addressed by the court of appeal in *Marin and Alameda County* – and their differing approaches to the question of when vested rights may be modified – will still be required of this Court.

whether a modification to a vested right that confers a disadvantage to the employee is offset by a commensurate advantage.

The rule makes both intuitive and logical sense. The state must "turn square corners" with respect to its own employees if it is to expect the same from them. [3] As a creature of the California Constitution's Contracts Clause, the rule recognizes that the acceptance of an offer of employment that contains terms respecting deferred compensation entails not only reliance on the part of the employee, but also opportunity costs associated with committing to long-term employment in the public service, which necessarily entails foregoing other opportunities. This Court has ruled, therefore, that any changes to a vested retirement benefit must be reasonable as measured from the point of view of the affected employee.

It is these sensible and fair attributes of the "California Rule," as well as its clearness of definition and ease of application, that has resulted in its adoption by numerous other state courts around the country.

The court of appeal erred below by accepting and following the First Appellate District, Division One's *Marin* decision. As noted above, that

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3 *Crumpler v. Board of Administration* (1973) 32 Cal. App. 3d 567, 579-80 ("It has been aptly said: '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.")

decision is currently pending review by this Court, and was pended in wait of a decision from the First District, Division Four in *Alameda County.* That decision has now issued. *See Alameda County* (Cal. Ct. App. Jan. 8, 2018) No. A141913, 2018 WL 704139. The Court is therefore now positioned directly to review *Marin*, on which the court below relied, and to consider the differing approach taken by its sister division in *Alameda County*.

Because the *Marin* decision created a new, unworkable rule out of whole cloth, and one that conflicts with this Court's longstanding precedent and the "California Rule," the decision below compounds that error by applying its logic.

In its January 8, 2018 decision, the First Appellate District, Division Two, criticized its sister division's holding in *Marin* noting it "eschewed analysis of the many issues of statutory construction we have wrestled with here." 2018 WL 704139 at *30. Although *Alameda County* takes pains not to directly undercut its sister Justices' decision in *Marin* – with respect to the meaning of the word "should" and its failure to acknowledge that the terms of a pension system are incorporated into the "contract of employment" as held in *Kern* – *Alameda County* concludes with an unmistakable rebuke of *Marin*'s novel formulation and cavalier approach to applying this Court's pension-related jurisprudence. *See id.* (noting *Marin* "too quickly dismissed what could amount to significant financial disadvantages to legacy members "and that "'should' does not mean 'don't have to.' It means "really ought to…" and "[t]hus, when no comparative new advantages are given, the corresponding burden to justify any changes with respect to legacy members will be substantive.")

The *Marin* and *Cal Fire* courts' adoption of an amorphous "reasonableness" standard, while unauthorized as contrary to this Court's binding precedent, is particularly disturbing because it replaces the bright-line test of the California Rule with a vague, subjective, and necessarily difficult-to-apply "reasonableness" evaluation.

Should the Court accept this formulation, the result will be to disturb the settled expectations of millions of California public employees who have dedicated their productive years to the service of the state and its people, and who have understandably come to rely on the California Rule as they enter, continue, and then retire from public service. Where unemployment is historically low, and California public entities are challenged in recruiting dedicated and dependable public servants, a reformulation of these settled expectations could lead to problems of attrition and recruitment for public employers.

THE INTEREST OF *AMICI*

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 more than 175,000 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. 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 1.7 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"). CFT's members have long understood that their pension benefits cannot be cut without implementation of offsetting advantages. 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 more than three million education professionals nationwide. NEA is committed to protecting the retirement security of its active and retired members, the overwhelming majority of whom 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 CalSTRS. Thousands of other CTA members participate and possess vested rights in

CalPERS. CTA's members have long understood that their pension benefits cannot be 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 approximately 350,000 public sector workers employed by the state, counties, cities, hospitals, schools, universities and colleges. The decision below threatens 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. CSU faculty who are eligible for pensions are enrolled in CalPERS and have served the CSU and its students with the understanding that their retirement benefits cannot be reduced unless they receive offsetting advantages.

ARGUMENT

I. 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 Public Pension Jurisprudence.

A. The California Rule Is Clear from this Court's Precedent.

This Court held unequivocally in *Allen II* that "any modification of vested pension rights . . ., when resulting in disadvantage to employees, *must* be accompanied by comparable new advantages." *Allen II* 34 Cal. 3d at 120 (emphasis added).) Yet, the court of appeal below, in accord with *Marin* but since criticized in *Alameda County,* 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." 7 Cal. App. 5th at 130 (quoting *Marin*, 2 Cal. App. 5th at 699).

The court of appeal's interpretation is at odds not only with this Court's clear precedents, but also the function of courts within government and our society, and with the English language itself. Significantly, it also departs from the national consensus that this Court meant what it said when it established the California Rule.

The Court is not in the custom of offering advisory opinions, nor may it. Cal. Const., art. III, § 1; art. VI, §§ 10, 11; *see also* Gov. Code, § 68808; *Hill v. Hill* (1947) 79 Cal. App. 2d 368. Yet by reinterpreting the California Rule as a "recommendation" and not a "mandate," the *Cal Fire* and *Marin* courts have relegated its precedents to exactly that, advisory opinions. *See Cal Fire*, 7 Cal. App. 5th at 130 ("In plain effect, 'should' is 'a recommendation, not . . . a mandate"; quoting *Marin*, 2 Cal. App. 5th at 699).

Contrary to the *Marin* and *Cal Fire* formulations, this Court has not been shy about making clear its holdings on this point. Notably, in *Betts* it stated unequivocally: "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. . . .*" *Betts v. Board of Administration*, 21 Cal. 3d at 864. Indeed, when the Court reviews its jurisprudence closely, it will find that in every case in which it is established that no commensurate advantage was conferred to offset a disadvantage running to the employees following the modification of a pension benefit, it has rendered the pension modification unconstitutional.

In some cases – but not all – the Court has noted that the employer or legislature *should* have done so (to avoid a constitutional infirmity).

The Court has laid down a clear rule, not offered mere suggestions. The Court below, in following *Marin*'s grammatical misadventure as to the meaning of "should," has committed significant error by reversing decades of high court precedent.

B. The California Rule Is Clear to Courts in Sister States.

Courts of many other states have understood the Court's holdings on this point as mandatory, and not simply advisory or suggestive, further establishing that *Marin's*, *Cal Fire's,* and to the extent it did not fully reject *Marin*, *Alameda County's* construction of this Court's grammar is simply incorrect. Indeed, the common application of the rule as mandatory – and not advisory – is so well accepted that it has come to be known as 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.*

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 this Court and judges in many other states, the court of appeal below concluded, again in accord with *Marin*, 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. *Cal*

Fire, 7 Cal. App. 5th at 130 (quoting *Marin*, 5 Cal. App. 5th at 699). 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 undermines a foundational premise of pension law accepted in many other states.

For these reasons, if this Court is indeed to consider the question of the "California Rule," *see* note 2, *supra,* as expounded in *Allen I, Betts* and *Allen II*, among other decisions, despite the fact that it has already granted review of *Marin* and which is now ripe for review in light of the First District, Division Four's January 8, 2018 decision in *Alameda County*, the Court should reverse and clarify that the decision below does not represent this Court's longstanding precedent on vested pension rights.

II. The Court of Appeal's New Subjective "Reasonability" Standard Upsets Settled Expectations, and May Lead to Public Employee Attrition and Challenges to Recruitment.

The court of appeal's decision below respecting the California Rule is a prescription for uncertainty and additional litigation. This is so because it holds that, at bottom, the Constitution requires only a "reasonable" pension, 7 Cal. App. 5th at 132, and discards the bright-line rule on which public employees and employers have relied for generations. The Court's established precedent, under *Allen I, Betts*, and *Allen II* and their progeny, has brought certainty by clearly defining how employers may reasonably modify pensions should they require it, while ensuring employees who enter public service, and devote their careers to serving the public, can rely on their original offer and inducement to enter public service. In short, it ensures both parties enter the relationship with their eyes wide open.[4]

Upsetting that balance, and the settled expectations and reliance interest they have engendered, will unnecessarily present challenges to public employment recruitment and retention. The Court has previously recognized this concern, central to the legitimate and mutual interests on which the California Rule is predicated, when it stated:

> It is obvious that this purpose would be thwarted if a public employee could be deprived of pension benefits and the promise of a pension annuity would either become *ineffective as an inducement to*

[4] The Court on multiple occasions has recognized this central purpose of public pension systems, which undergirds the holdings of *Allen I* and *II*. For example, as stated in *Santin v. Cranston* (1967) 250 Cal. App. 2d 438, 444: "Pensions for public employees are based upon the theory that such a pension is an integral part of the employee's compensation under his contract of employment, and that one of the primary purposes of offering a pension, as additional compensation, is to induce competent persons to enter and remain in public service," citing *Kern v. City of Long Beach* (1947) 29 Cal. 2d 848, 851-853, 855, 856; *French v. French* (1941) 17 Cal. 2d 775, 777; *Dryden v. Board of Pension Com'rs of City of Los Angeles* (1936) 6 Cal. 2d 575, 579; *Packer v. Board of Retirement* (1941) 35 Cal. 2d 212, 215.

> *public employees* or it would become merely a snare and a delusion to the unwary.

Kern, 29 Cal. 2d at 856 (emphasis added).

Unfortunately, California public pension plans have become a favored scapegoat and 'punching bag' for political advantage. The studies set forth in the opening paragraphs of *Marin* – studies critical of pensions which are authored by academics funded by conservative-leaning political organizations that themselves advocate for privatizing public employee retirement security – are an evident product of this inclination. Indeed, as the cases of San Diego and San Jose illustrate, mayors have made their political careers by targeting employees' pension benefits rather than taking on the harder work of modernizing public governance in a changing economy. *Amici* and public employers should expect, if the Court adopts the reasoning of the decision below and *Marin*, that anti-pension advocates, privateers and the political class will seize on the holding to roll back the settled expectations public employees have in their retirement security.

It is for this concern that the Court adopted the California Rule in the first place, which explicitly recognized that the purpose of a pension system is to "induce competent persons to enter and remain in public service." *Allen II*, 45 Cal. 2d at 131; *Kern*, 29 Cal. 2d at 851-53, 855, 856. With this purpose in mind, the Court has considered pension statutes as part of the "employment contract," *Bellus v. City of Eureka* (1968) 69 Cal. 2d 336, 350; *Kern*, 29 Cal. 2d at 852, and construed pension systems "liberally" with any modification's reasonableness construed from the point of view of the employee. *Bellus,* 69 Cal. 2d at 740 ("substantive provisions as incorporated into the pension ordinance must be construed in light of the well-established rule of liberal construction of pension plans to protect the *reasonable expectations of the employees*"; emphasis added). In that way the pension benefits offered to and accepted by employees are removed from the political (and ideological) tug-of-war respecting the provision of essential public services and the appropriate costs of such services. The California Rule is a matter of fairness and eminently reasonable, and the Court's reasoning in this regard has been clearly expressed:

> The rationale underlying the rule of construction in *England* [*v. City of Long Beach* (1945) 27 Cal. 2d 343] ... and the general rule that pension plans be liberally construed to promote their beneficent purpose [] rests on the same duty of fair dealing and obligation to protect the reasonable expectations of those whose reliance is induced that underlie the rules of construction in favor of the insured in insurance cases and in favor of the party of reduced bargaining power in cases involving other standardized contracts.

Bellus, 69 Cal. 2d at 350–51 (internal citations omitted).

This recognition pervades pension jurisprudence not only in California, but elsewhere. 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 unsurprising 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. Indeed, following pension modification Measure B in San Jose (which was found to violate the California Rule by reducing the settled expectation of incumbent employees, *see San Jose Police Officers Ass'n v. City of San Jose* (Sup. Ct. Feb. 20, 2014) Case No. 1-12-CV-225926)), the City faced an attrition and recruiting crises that had serious public safety consequences.[5] And a decision that negatively impacts public employee retirement security would surely have an adverse impact on the ability of public school districts to attract new teachers to address the already existing teacher shortage in this state.

The Court should be mindful, therefore, that a departure from the clearly-stated and well-defined California Rule will have significant

[5] *See, e.g.,* Wall Street Journal, July 4, 2017 "Ill-Funded Police Pensions Put Cities in a Bind" (https://www.wsj.com/articles/ill-funded-police-pensions-put-cities-in-a-bind-1499180342).

overflow effects. Altering the standard to allow the employer to be the arbiter of the "reasonableness" of pension modification would constitute a dramatic departure from the foundational precepts of a pension system, move California away from the laws of many states, and likely lead to unexpected and unintended consequences for public administration.

Should the Court determine that this case is the appropriate vehicle for considering the California Rule – notwithstanding the other issues presented here and the fact that the pending *Marin* case squarely presents that very issue – the Court should reaffirm its longstanding, doctrinally and logically sound approach and reverse the court of appeal.

CONCLUSION

For these reasons, *Amici Curiae* AFSCME, AFT, NEA, SEIU, CFA, CFT, and CTA respectfully request that the Court reverse the court of appeal's decision.

DATED: February 2s, 2018 Respectfully submitted,

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By ____________________
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COUNSEL'S CERTIFICATE OF COMPLIANCE

WITH CALIFORNIA RULE OF COURT 8.520(c)

Counsel of Record hereby certifies that pursuant to Rule 8.520(c) of the California Rules of Court, the enclosed brief of *Amici Curiae* is produced using 13-point roman type font including footnotes and contains approximately 4,899 words, which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Date: February 20, 2018

GLENN ROTHNER, Declarant

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 February 20, 2018, I served the foregoing document described as **APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONERS AND APPELLANTS CAL FIRE LOCAL 2881, ET AL.** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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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 February 20, 2018.

Jerry Cohen

JERRY COHEN

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