IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

Cal Fire Local 2881, et al.,

Petitioners and Appellants,

vs.

California Public Employees' Retirement System (CalPERS),

Defendant and Respondent,

and

The State of California,

Intervenor and Respondent.

Case No. S239958

First Appellate District Division Three Case No. A142793

Alameda County Superior Court Case No. RG12661622 Hon. Evelio Grillo, Presiding Judge

PROPOSED BRIEF OF *AMICI CURIAE* OF ORANGE COUNTY ATTORNEYS ASSOCIATION AND ORANGE COUNTY MANAGERS ASSOCIATION IN SUPPORT OF PETITIONERS AND APPELLANTS

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I. INTRODUCTION

Petitioners have presented three issues:

1. Was the option to purchase additional service credits a vested pension right or benefit?
2. Was the repeal of section 20909 necessary to preserve and maintain PERL?
3. Did the repeal of section 20909, without providing disadvantaged employees with an offsetting pension advantage, violate the Contracts Clause?

[Opening Brief on the Merits, at p. 10.] We agree with this framing of issues and note that Respondent California Public Employees' Retirement System (CalPERS) and Intervenor/Respondent State of California have not contested it.

This brief is addresses the Contracts Clause questions raised in issue 3, above, by showing that the requirement that there be offsetting with comparable advantages of individually disadvantageous changes in a pension system is simply a fact-specific application of core constitutional principles long recognized by the courts.

II. IDENTITY AND INTEREST OF THE *AMICI*

The Orange County Attorneys Association ("OCAA") and the Orange County Managers Association ("OCMA") (collectively "*Amici*"), are employee organizations, recognized by the County of Orange (the "County") as exclusive bargaining representatives of certain units of County employees pursuant to the Meyers-Milias-Brown Act ("MMBA"),

Gov. Code § 3500 (?YEAR?) OCAA represents employees in the County's "Attorney Unit," consisting of attorneys in the offices of District Attorney, Public Defender, Alternate Defender, Associate Defender, County Counsel, and Child Support Services. OCMA represents managers assigned to the County's various departments and agencies. As set forth in greater detail in the Petition to File *Amici Curiae* Brief, filed concurrently hereto, the interest of *Amici* in this case derives from their representation of public employees whose pension rights may be affected by the Court's ruling on the scope and application of the vested benefits doctrine.

The proposed *amici curiae* brief was authored by Marianne Reinhold, Laurence S. Zakson, and Aaron G. Lawrence, of Reich, Adell & Cvitan, A Professional Law Corporation. No party, person, or entity other than the *Amici* made a monetary contribution to fund the preparation of the proposed brief.

III. ARGUMENT

A. Background on the Vested Rights Doctrine

Any inquiry into the vested benefits doctrine must start with the Contracts Clauses of the U.S. and California constitutions, Contract Clause, U.S. Const. art. I, § 10, cl. 1; Cal. Const., art. I, § 9, each of which protects against any law impairing the obligation of contracts. This is a significant limitation on sovereign authority, but one with deep and abiding roots in

our form of government. Indeed, the *Federalist Papers* described these limits as rooted in "the first principles of the social compact," and as reflecting an important "constitutional bulwark in favor of personal security and private rights." See The Federalist No. 44 (James Madison); see also *Fletcher v. Peck* (1810) 10 U.S. 87, 137-38, 3 L.Ed. 162.[1] This is especially true when what is at issue is not the incidental effects of legislation of general application, but, rather, attempts by states to wipe out their own contractual obligations towards creditors (see *United States Trust Co. v. New Jersey* (1977) 431 U.S. 1, 17 97 S.Ct. 1505, *citing* *Fletcher v. Peck* (1810) 10 U.S. 87, 3 L.Ed. 162 (1810); *Dartmouth College v. Woodward* (1819) 17 U.S. 518, 4 L.Ed. 629)—the type of state action where the state's own self-interest is inevitably at issue. See, e.g. *United States Trust Co. v. New Jersey* (1977) 431 U.S. at 29 ("A governmental

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[1] Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state.

No state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts...

Id., at 137-38 (rejecting argument that exception existed "in favour of the right to impair the obligation of those contracts into which the state may enter").

entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.")

Because "[c]ontract rights are a form of property," under the Takings Clause of the Fifth Amendment, they only may "be taken for a public purpose ***provided that just compensation is paid***." United States Trust Co., supra, 431 U.S. at 19 n.16 (*emphasis added*); see also West River Bridge Co. v. Dix (1848) 47 U.S. 507, 538, 12 L.Ed. 535 (exercise of state power to appropriate property, with just compensation, is not unconstitutional impairment of contract); see also Cal. Const., art. I, § 19 ("Private property may be taken or damaged for public use only when just compensation ... has first been paid to, or into the court for, the owner.").

Thus, public employees' contractual right to their promised pension benefits is protected both as a property right[2] and under the Contracts Clause.[3] Viewed in this context, the question whether the State must

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[2] In re Marriage of Brown (1976) 15 Cal.3d 838, 845, 126 Cal.Rptr. 633 ("Since pension benefits represent a form of deferred compensation for services rendered ... the employee's right to such benefits is a contractual right, derived from the terms of the employment contract. Since a contractual right is ... a form of property (see Civ. Code, § 953; Everts v. Will S. Fawcett Co. (1937) 24 Cal.App.2d 213, 215 [74 P.2d 815]), ... an employee acquires a property right to pension benefits when he enters upon the performance of his employment contract.").

[3] See, e.g. Kern v. City of Long Beach (1947) 29 Cal.2d 848 (Kern).

provide a comparable advantage when disadvantageously altering the terms governing public employee pension benefits is not a *sui generis* problem inherent to public employee pension, but, rather, an issue-specific application of core constitutional principles. And the answer—that the State may not "take" constitutionally guaranteed contract/property rights without just compensation in the form of offsetting individual advantage(s)—is relatively straightforward.

Applying these principles, California courts have consistently recognized that the principle that contract rights are a form of property shielded from government taking without just compensation (*see* *United States Trust Co.*, *supra*, 431 U.S. at 19 n.16) requires public employers making any alteration to pension rights that causes employees a constitutionally-cognizable impairment to offset those alterations with a comparable new advantage. *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131, 287 P.2d 765 (*Allen I*) ("To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.")

Thus, *Allen I* articulates a two-part test—where there is a constitutionally-cognizable impairment of reasonably expected pension benefits (1) there must be legitimate public purpose (*United States Trust*

Co., *supra*, 431 U.S. at 19 n.16; *see also* *West River Bridge Co. v. Dix* (1848) 47 U.S. at 5380); and (2) there must be some sort of compensation in the form of comparable advantage (*Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, at 449).

With respect to the public purpose, notwithstanding the unequivocal language in the Contract Clauses, courts have long recognized that merely incidental effects on a party's contractual rights of laws of general application frequently may not run afoul of the Contracts Clause.[4] However, as discussed, the calculus is different where the law is directly aimed at altering public employees' pension benefits and, thus, the state actor has a self-interest in minimizing its obligations to its creditors. Nevertheless, courts have found that because promised pension benefits that are intended to extend over decades, public employers retain some flexibility in altering the terms of the pension benefits available to their employees, and they need not maintain indefinitely the exact rules and

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[4] This sort of "innocent purpose" is directly relevant to whether a modification falls within the State's flexibility to make minimal changes:

> [C]ase law has given rise to the concept of permitted impairments as "minimal impairments." (*See e.g. Valdes*, *supra*, 139 Cal.App.3d at p. 789.) That is to say, the criterion of innocent purpose is that only the minimal impairment needed to attain the tendered legitimate public end has been visited upon the contracting parties. The concept of "minimal impairments" has no proper application as a vague license for the state to impair its obligation so long as it is only "a little bit."

Cal. Teachers Ass'n v. Cory (Ct.App. 3d Dist. 1984) 155 Cal.App.3d 494, 511, 202 Cal.Rptr. 611.

benefits with literal exactitude. *See, e.g. Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 854–55, 179 P.2d 799 ("[P]ension systems must be kept flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system and carry out its beneficent policy... [A]n employee may acquire a vested contractual right to a pension but that this right is not rigidly fixed by the specific terms of the legislation in effect during any particular period in which he serves."); *see also Allen I*, 45 Cal.2d at 131 (rights may be modified "to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system."). As a result, a finding that a particular modification furthered a legitimate government interest and had only a minimal or technical effect on contract rights along these lines may not raise constitutional concerns and, therefore, allow a reviewing court to forego the analysis articulated in *Allen I*. *Valdes v. Cory* (1983) 139 Cal.App.3d 773, 789, 189 Cal.Rptr. 212 ("[A] finding that there has been a technical impairment is merely a preliminary step in resolving the more difficult question whether that impairment is permitted under the Constitution... ." And a "[minimal] alteration of contractual obligations may end the inquiry at its first stage").

Thus, where the government is making a purely technical or otherwise minimal change that bears some material relation to the operation of a pension system, the inquiry is usually at an end. But, as we discuss

more fully below, if the impairment is constitutionally-cognizable, a comparable offsetting advantage is required.

B. Public Employers Must Provide an Offsetting Benefit When Implementing a Constitutionally-Cognizable Impairment of Employees' Contract Rights

In determining whether an offsetting benefit is required, the critical question is whether the modification of pension rules resulted in a sufficiently significant adverse effect on employees' contract rights to constitute a constitutionally-cognizable impairment. For the reasons which follow, this inquiry must: (1) be individually-focused (looking concretely at the impact on those affected), and (2) turn upon whether the alteration was sufficiently significant to disrupt the reasonable expectations of those adversely affected. Upon a showing that individuals' rights were so impaired, the deprivation of constitutional rights demands redress through (3) some form of just compensation—to wit, an offsetting advantage.

1. In determining whether an impairment is constitutionally cognizable, the focus must be on the individualized adverse impacts on those affected

Claims of impairment of constitutional rights, by their nature, must be analyzed with a view towards the concrete concerns of the individuals

whose rights have been implicated. The individualized nature of this inquiry manifests itself in two important respects:

First, the inquiry into the ***impairments*** caused by pension modifications must be individually-focused—that is, it must look to the deprivation suffered by particular employees. *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, at 449 ("[I]t is advantage or disadvantage to the particular employees whose own contractual pension rights, already earned, are involved which are the criteria by which modifications to pension plans must be measured"); *see, e.g. Miller v. State of California* (1977) 18 Cal.3d 808, 811 (no actual modification to plaintiff's pension rights had occurred, so no need for analysis under *Allen I* or *Abbott*); *accord Packer v. Board of Retirement* (1950) 35 Cal.2d 212 (following individualized finding that officer had received offset, the Supreme Court found permissible a pension modification which permitted a "widow's pension" only if the husband agreed to take a lesser pension for himself). While the adverse effect must be analyzed in terms of its effect on individuals, individual public employees do not exist in a vacuum and the modification may affect them as part of a collective bargaining unit in their collective relationship with their public employer rather than in their capacity as individuals.[5]

[5] Thus, public employees often deal with their employer collectively through the meet and confer process under such statutes as the Meyers-Milias-Brown Act, Gov. Code Section 3500 *et seq.* And the disadvantage they experience as a result of the modification of a pension system may be

Second, the inquiry into the ***justification*** proffered for a pension modification—whether it bears a "material relation to the theory of a pension system" as a whole (*see* *Allen I*, *supra*, 45 Cal.2d at 131) must also be evaluated on an individualized basis. That means that the court must look at the ***particular impairments*** suffered by very employees who are adversely affected.[6] While *Amici* disagree with the holding, on this point, the First Appellate District got it right when it said, in its recent *Alameda County Deputy Sheriff's Association* decision, that the impairment analysis:

> . . . must focus on the impacts of the identified disadvantages on the specific legacy members at issue... And, if the justification for the changes is the financial stability of the specific CERL system, the analysis must consider whether the exemption of legacy members from the identified changes would cause that particular CERL system to have "difficulty meeting its pension obligations" with respect to those members... In this regard, mere speculation is insufficient... Moreover, generally speaking "[r]ising costs alone will not excuse the city from meeting its contractual obligations, the consideration for which has already been received by it." ... Under this analysis, and contrary to the holding in *Marin*, the fact that the modifications here at issue may be relatively modest looking at a system's pension costs as a whole may actually argue in favor of finding an impairment, as the continuation of such benefits solely for legacy members may not have a significant impact on the system, especially if such benefits have been already actuarially accounted for and treated as pensionable.

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as a result of tradeoffs made in the compensation package as a result of that process. *See* discussion *infra* at Section B(2).

[6] *See, e.g. Cal. Teachers Ass'n v. Cory* (1984) 155 Cal.App.3d 494, 511, 202 Cal.Rptr. 611 ("An issue of prohibited impairment arises when the scope of the legislative impairment is not narrowly tailored ...").

Alameda County Deputy Sheriff's Ass'n v. Alameda County Emples. Ret. Ass'n & Bd. Emples. Ret. Ass'n (Feb. 5, 2018, No. A141913), at *62, ___Cal.App.5th___, 2018 Cal. App. LEXIS 95; *see also id.*, at 60-61 (criticizing *Marin* decision for "impermissibly focusing on the unfunded pension liability crisis in general" instead of "specifically weigh[ing] the financial implications for Marin CERA if legacy members were exempted from those modifications ...").

2. A constitutionally-cognizable impairment has occurred if the change disrupts individuals' reasonable expectations regarding retirement income

"Laws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the contract clause ... notwithstanding that they technically alter an obligation of a contract." *El Paso v. Simmons* (1965) 379 U.S. 497, 498 n.14, 85 S.Ct. 577; *Allen v. Board of Administration* (1983) 34 Cal.3d 114, 124 (*Allen II*). In the pension context, in light of the need for "pension systems [to] be kept flexible," *Kern*, 29 Cal.2d at 854-55, courts have read into the Contract Clauses the concept that "minimal alterations" of pension benefits need not be subjected to the same scrutiny as substantial impairments when it comes to legislative purpose and offsetting benefits. *See Valdes*, 139 Cal.App.3d at 789; *see also Energy Reserves Group, Inc. v. Kansas Power & Light Co.* (1983) 459 U.S. 400, 411, 103 S. Ct. 697 (impairment of contract must be

"substantial" for it to violate Contract Clause). Thus, the proper measure for whether an impairment is "minimal" or "substantial" is the extent to which it affects the terms upon which the parties have reasonably relied:

> In focusing on '*reasonable* pension expectations' in Betts (italics added), we implicitly affirmed the well established constitutional principle that 'Laws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of a contract." ... 'The Constitution is 'intended to preserve practical and substantial rights, not to maintain theories.' ...'

Allen v. Board of Administration (1983) 34 Cal.3d 114, 124 (Allen II) (no unconstitutional impairment because retirees could not "reasonably" "expect under the terms of their employment contract to obtain retirement allowances computed on the basis of the unique salary increase accomplished by the constitutional revision of 1966 which expressly negated such expectations."); see also Pasadena Police Officers Assn. v. City of Pasadena (Ct.App. 2 Dist. 1983) 147 Cal.App.3d 695, 195 Cal.Rptr. 339 (ability of board to change actuarial assumptions did not impair vested rights because it had been contemplated "at all pertinent times").

When an employee accepts public employment, and renders his or her labor in service thereto, he or she does so reasonably expecting to receive not only the current wages and benefits, but also deferred benefits under the terms promised by the employer. Claypool v. Wilson (Ct.App. 3 Dist. 1992) 4 Cal.App.4th 646, 662, 6 Cal.Rptr.2d 77 ("The contractual

basis of a pension right is the exchange of an employee's services for the pension right offered by the statute."). These "expectations are measured by benefits which are in effect not only when employment commences, but which are thereafter conferred during the employee's subsequent tenure." *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 866.

These expectations extend not only to the explicit text of the applicable Memoranda of Understanding (MOUs) or statutes, but may also include terms that have been implied by practice, usage, and custom. *See Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 134 Cal.Rptr.3d 779 (*REAOC*) ("circumstances accompanying" statutory framework may create vested rights).[7] Included in employees' constitutionally-protected reasonable expectations are the terms of their promised pension benefits. *See Kern*, *supra*, 29 Cal.2d at 853 ("[P]ension laws ... establish contractual rights."). Indeed, "under California law there is a strong preference for construing governmental pension laws as creating contractual rights for the payment of benefits, and

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[7] *See also Board of Administration v. Wilson* (Ct.App. 3d Dist. 1997) 52 Cal.App.4th 1109, 1133, 61 Cal.Rptr.2d 207 ("[T]he PERS statutes set up a retirement system to pay pension rights of state employees. Actuarial soundness of the system is necessarily implied in the total contractual commitment, because a contrary conclusion would lead to express impairment of employees' pension rights."); *Valdes v. Cory* (Ct.App. 3d 1983) 139 Cal.App.3d 773, 786, 189 Cal.Rptr. 212 (looking beyond statutory language to determine that "the Legislature intended to create and maintain the PERS on a sound actuarial basis.").

when feasible to do so[,] such laws should be construed as guaranteeing full payment to those entitled to its benefits 'with the provision of adequate funds for that purpose.'" *Board of Administration v. Wilson* (Ct.App. 3d 1997) 52 Cal.App.4th 1109, 1131, 61 Cal.Rptr.2d 207 (pension laws imply a vested contractual right to an "actuarially sound" retirement system).

Public employees— who make an explicit tradeoff by choosing the "job security and employment benefits enjoyed by public employees" rather than the "higher wages" available in the private sector (*see generally Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987, 4 Cal.Rptr.2d 837) quite literally build their careers and their economic lives around these sorts of expectations, which is why it is so critical that there be an offsetting benefit when these expectations are disrupted.

Public sector collective bargaining reflects this same dynamic. Thus, during collective bargaining, each economic item serves as a lever against everything else in the context of a broad give-and-take negotiation over the terms and conditions of employment. When the bargaining parties negotiate a Memorandum of Understanding (MOU), if they understand a retirement benefit to be guaranteed, it is accounted for and valued in a certain way during that give-and-take. *Amicus curiae* OCAA explicitly engaged in this sort of tradeoff in negotiating its 2004-2007 MOU with the County of Orange ("County"). There, OCAA made significant sacrifices in exchange for the County's agreement to an enhanced "2.7% at 55" pension

benefit formula.[8] Employee organizations routinely engage in this sort of long-term sacrifice of other priorities to obtain pension concessions. It is extremely disruptive of reasonable expectations for a public employer to extract such concessions and, then, to unilaterally change the terms of a pension benefit.

The concern with reasonable expectations also flows from the nature of the underlying constitutional norms protected by the vested benefit doctrine. Thus, as this Court has previously recognized, changes that adversely affect the public employee's "gains reasonably to be expected from the [employment] contract" are constitutionally significant

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[8] OCAA expressly engaged in the following tradeoffs to obtain this enhancement:

- Elimination of Preferred Provider Medical coverage;
- Reduction in lifetime medical cap from $2,000,000 to $1,000,000;
- Increased co-pays for medicine and office visits;
- Increased medical premium payments, including a 5% premium pick up by single employees who had previously never contributed;
- Elimination of the County's $100/month contribution to employee 401a account;
- Reduction in Attorney Optional Benefit from $2,700 to $1,500;
- Payment of the difference between the employees' normal contribution rate calculated pursuant to Government Code sections 31621.5 and 31621, and section 31621.8;
- An additional employee contribution to the retirement system in an amount equal to 0.54% of compensation earnable;
- Elimination of lump sum payment worth approximately 1% of salary; and
- Foregoing salary increases entirely for two years, with a salary reopener in lieu of a fixed increase in the final period of the agreement.

impairments under the Contract Clauses. *Allen II*, *supra*, 34 Cal.3d at 124, *quoting* *El Paso v. Simmons* (1965) 379 U.S. 497.[9]

3. Where the individualized inquiry reveals a constitutionally-cognizable impairment, the affected employees must receive just compensation

The California Rule—requiring public employers to provide a comparable new advantage when pension modifications impair employees' contract rights—is consistent with constitutional jurisprudence that views contract rights as a form of property that may not be taken without just compensation. *See* *United States Trust Co.*, *supra* section B(1), 431 U.S. at 19 n.16. This is how California courts have consistently dealt with

[9] Amici note that, in applying this "reasonable expectations" analysis to the present case, the "circumstances accompanying" the statutory framework (*REAOC*, *supra*, 52 Cal.4th at 1187) include a CalPERS publication provided to employees entitled "Vested Rights of CalPERS Members: Protecting the Pension Promises Made to Public Employees." While Respondents have questioned the level of deference to which this CalPERS analysis is due under *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, given that it assertedly is not the result of a "formal agency process," [Intervenor and Respondent State of California's Answer Brief on the Merits, at 34-35], this misses its significance. Employees form their expectations based upon (and plan their economic lives around) employer promises of future benefits. These promises help determine the scope of vested rights and whether an impairment is "substantial" and therefore constitutionally cognizable. An official CalPERS communication such as the one at issue here is predictably likely to be relied upon to form the basis for an employee's expectations concerning the nature, value and scope of her/his retirement benefits—an evidentiary value totally separate and apart from whatever weigh is due under *Yamaha* to the legal analysis underlying the document.

significant impairments of contract rights—and how they should continue to do so.

As this Court articulated in *Allen II*:

> [A]ny modification of vested pension rights must be reasonable, must bear a material relation to the theory and successful operation of a pension system, and, when resulting in disadvantage to employees, ***must be accompanied*** by comparable new advantages.

34 Cal.3d at 120 (*emphasis added*). This formulation is not a drafting anomaly, but, rather, an accurate reflection of a consistent constitutional standard. While the exact phrasing has varied, courts have repeatedly used mandatory language to describe the need for a comparable offsetting advantage. *See, e.g.* *Abbot v. Los Angeles* (1958) 50 Cal.2d 438, 454, 326 P.2d 484 ("[T]he substitution of a fixed for a fluctuating pension is ***not permissible unless accompanied*** by commensurate benefits..."); *Legislature v. Eu* (1991) 54 Cal.3d 492, 529, 286 Cal.Rptr. 283 ("[T]he state ***cannot*** ... abandon that plan as to incumbent legislators ***without providing them comparable new benefits***."); *Phillis v. City of Santa Barbara* (Ct.App. 2 Dist. 1964) 229 Cal.App.2d 45, 66, 40 Cal.Rptr. 27 ("There is no merit in respondents' claim that the rule of the *Allen* and *Abbott* cases, ***requiring equal advantages*** to offset disadvantageous amendments to a pension plan, is confined in its application to employees who have fully earned their pension."].); *In re Retirement Cases* (Ct.App. 1 Dist. 2003) 110 Cal.App.4th 426, 448, 1 Cal.Rptr.3d 790 (disadvantageous

changes "***must*** be accompanied by comparable new advantages"); *Pasadena Police Officers Assn. v. City of Pasadena* (Ct.App. 2 Dist. 1983) 147 Cal.App.3d 695, 703, 195 Cal.Rptr. 339 ("[C]hanges detrimental to the employee ***must be offset*** by comparable new advantages.") (*all emphasis added*).

Further, courts have consistently treated comparable new benefits as a mandatory part of any "reasonable" modification by finding the failure to provide such an offset as dispositive in rejecting an impairment. *See, e.g. Chapin v. City Commission of Fresno* (Ct.App. 4 Dist. 1957) 149 Cal.App.2d 40, 44, 307 P.2d 657, ("In the instant case it is clear that the change in the method of computing benefits ... results in a substantial disadvantage and detriment to him, as is apparent from a computation of the trial court in its findings. It is also apparent that such disadvantage and detriment are not accompanied by comparable new advantages."); *Abbot v. Los Angeles* (1958) 50 Cal.2d 438, 326 P.2d 484 ("[T]he substitution of a fixed for a fluctuating pension is not permissible unless accompanied by commensurate benefits—benefits which are not shown to have been granted in the present case."); *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 148 Cal.Rptr. 158 (change from fluctuating to fixed indexing lacked comparable new advantage); *Pasadena Police Officers Assn.*, *supra*, 147 Cal.App.3d 695 (COLA changes invalid due to lack of comparable new advantages); *Teachers' Retirement Bd. v. Genest* (Ct.App. 3 Dist.

2007) 154 Cal.App.4th 1012, 1039, 65 Cal.Rptr.3d 326, 346 (vested rights impaired because law "does not compensate the members for this increased risk or provide a comparable new advantage ..."); *Protect Our Benefits v. City and County of San Francisco* (Ct.App. 1 Dist. 2015) 235 Cal.App.4th 619, 185 Cal.Rptr.3d 410 ("This diminution in the supplemental COLA cannot be sustained as reasonable because no comparable advantage was offered to pensioners or employees in return."). Other courts have found the presence of a comparable new advantage dispositive in favor of an impairment. *E.g. Lyon v. Flournoy* (Ct.App. 3d Dist. 1969) 271 Cal.App.2d 774, 76 Cal.Rptr. 869 (change where one form of pension indexing was "substituted for another" was lawful because it provided comparable new advantages); *Claypool v. Wilson* (1992) 4 Cal.App.4th 646, 669, 6 Cal.Rptr.2d 77 ("the new supplemental Cola program provides an obvious new advantage for present employees ...").

C. The Court Should Reject the Approach Proposed by Respondents and Recent Court of Appeal Decisions

The approach to vested rights taken in *Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.* (2016) 2 Cal.App.5th 674, 697-700, 206 Cal.Rptr.3d 365 (*Marin*), and *Alameda County Deputy Sheriff's Ass'n v. Alameda County Emples. Ret. Ass'n & Bd. Emples. Ret. Ass'n* (Feb. 5, 2018, No. A141913), ___Cal.App.5th___, 2018

Cal. App. LEXIS 95 (*Alameda County*), and urged here by Respondents is inconsistent with decades of case law described herein and with the underlying constitutional norms, and the Court should decline to adopt it.

1. *Marin* and *Alameda County* take a radical new approach to vested benefits

In *Marin*, a California court—for the first time—held that "There Is No Absolute Requirement That Elimination or Reduction of an Anticipated Retirement Benefit 'Must' Be Counterbalanced by a 'Comparable New Benefit.'" Cal.App.5th at 697-700. According to the radical reimagining of Contract Clause jurisprudence posited by the *Marin* court, providing a comparable new advantage to offset an impairment of employees' constitutional rights is merely a suggestion—no matter how severe the impairment of employees' constitutional rights. The court reaches this conclusion by placing a tremendous amount of significance of the word "***must***" in *Allen II*, compared with the initial formulation of this test in *Allen I*, which stated that "changes in a pension plan which result in disadvantage to employees ***should be accompanied*** by comparable new advantages." 45 Cal.2d at 131 (*emphasis added*). In reaching this conclusion, the First Appellate District posits that the Court in *Allen II* was simply sloppy with language, and its formulation should, therefore, be disregarded.

Further, the *Marin* court suggested, treating an offset as mandatory would be inconsistent with the "essential attributes of sovereign power." *Id.*, at 706.

According to the *Marin* court, the real test should boil down to: (a) whether the modification bears "a material relation to the theory and successful operation of a pension system"—that is, whether there is some policy justification for the change—and (b) whether, after the modification, the employees' remaining pension benefit can still be described as "reasonable." *See id.*, at 700-09. According to *Marin*, the first element is satisfied by a government assertion of a need "to improve the solvency" of a pension system. *Id.*, at 704-05. The latter may apparently be satisfied by some kind of showing[10] that the modification is "modest" in proportion with the remaining benefit. *Id.*, at 704.

The First Appellate District's recent decision in *Alameda County*, *supra* (Feb. 5, 2018, No. A141913), both affirms and somewhat departs from the approach of the court in *Marin*. It accepts as "convincing" the *Marin* court's finding that impairments of vested contractual rights need not be offset through new comparable advantages. *Id.*, at 58. However, in place of a mandate, the *Alameda County* court suggests that if comparable new advantages are not provided, "detrimental changes ... can only be justified

[10] The *Marin* case never cleared the pleading stage, and, thus, the court made its assessment without the benefit of evidence. *See id.*, at 708.

by *compelling* evidence establishing that the required changes 'bear a material relation to the theory ... of a pension system.'" *Id*, at *62 (*emphasis in original*).

Respondents similarly urge the Court to find that there is no constitutional requirement that changes of sufficient magnitude to constitute constitutionally cognizable impairments of the affected employees' reasonable expectations about their pension benefits be offset with comparable new advantages.

2. The Court should decline to adopt this approach

The approach proposed by *Marin* and *Alameda County*, and urged by Respondents, should be rejected for a number of reasons.

First, as we have discussed, *supra* Section B(1), it would be inconsistent with the constitutional norms underlying the vested benefit doctrine. While *Marin* asserts its holding is a necessary corollary of the "essential attributes of sovereign power," 2 Cal.App. at 700, this argument ignores the fact that the underlying rationale for the U.S. and California Constitutions' Contracts Clauses is the conviction that protection of contractual obligations from sovereign impairment is an important "constitutional bulwark in favor of personal security and private rights." *See* The Federalist No. 44 (James Madison); *see similarly Fletcher v. Peck* (1810) 10 U.S. 87, 137-38, 3 L.Ed. 162. This is especially true where, as is

true in the context of public employee pensions, the state has a self-interest in minimizing its own contractual obligations towards its present and future retirees in order to free its revenue for other uses. *See, e.g. United States Trust Co. v. New Jersey* (1977) 431 U.S. at 29 ("a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors").

This is not to say that the Contracts Clause is an unqualified restriction of sovereign power. As we have discussed, courts have acknowledged that public employers maintain some degree of "flexibility" notwithstanding these principles (*see Kern*, 29 Cal.2d at 854–55), but this flexibility is manifested by the ability to enact general purpose legislation, notwithstanding that such legislation results in "minimal" changes not rising to the level of constitutional concern, not an ability to enact laws specifically directed at abrogating the state's obligations of contract. Moreover, where the State determines that particular contract rights must be abrogated because it is the only or the most appropriate way to vindicate an important public purpose, it can always do so while providing "just compensation" as it would with respect to the taking of other property. *See United States Trust Co., supra*, 431 U.S. at 19 n.16.

Further, as discussed *supra* Section B(3), notwithstanding *Marin*'s attempt to characterize *Allen II* as the outlier, the fact is that California

courts have been consistently describing—and treating—an offsetting benefit as mandatory for decades. *See, e.g. Abbot, supra*, 50 Cal.2d at 454 ("[T]he substitution of a fixed for a fluctuating pension is not permissible unless accompanied by commensurate benefits..."); *Legislature v. Eu, supra*, 54 Cal.3d at 529 ("[T]he state cannot ... abandon that plan as to incumbent legislators without providing them comparable new benefits."); *see also Chapin v. City Commission of Fresno, supra*, 149 Cal.App.2d 40; Betts, supra, 21 Cal.3d 859. Far from mere incautious phrasing, *Allen II*'s formulation (modification resulting in disadvantage to employees "must be accompanied by comparable new advantages") is consistent with this long history. *Marin* is the true outlier.

The court in *Alameda County* would impose some limits upon a public employer's ability to impair employees' constitutional rights—requiring any impairment *not* accompanied by an offsetting new benefit "be justified by *compelling* evidence establishing that the required changes 'bear a material relation to the theory ... of a pension system.'" *Id*, at *62 (*emphasis in original*). However, in addition to being vague and unmoored to any previous analytical approach to this question, this test suffers from the same defects as *Marin*, in that its treatment of offsetting benefits as optional is out of step with precedent requiring a constitutionally cognizable impairment be justified by ***both*** a legally sufficient public purpose and by some kind of just compensation.

IV. CONCLUSION

For the foregoing reasons, *Amici* the Orange County Attorneys Association and the Orange County Managers Association respectfully urge this Court to reverse the lower court's ruling and to set forth in clear and unequivocal terms that wherever modifications of employee pension rights result in a constitutionally-cognizable impairment of individual employees' reasonable expectations, these modifications must be offset by comparable new advantages inuring to the benefit of the adversely affected employees.

Respectfully submitted,

Dated: February 21, 2018

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c)(1) of the California Rules of Court, I hereby certify that this brief contains 5,921 words, including footnotes, produced using 13-point Times New Roman font, which is less than the total words permitted by the Rules of Court. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Respectfully submitted,

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PROOF OF SERVICE
C.C.P. 1013a

COURT NAME:	In the Supreme Court for the State of California
CASE NUMBER:	Supreme Court: S239958 Appellate Court: A142793
CASE NAME:	Cal Fire Local 2881, et al., v. CalPERS (State of California)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I declare that I am a resident of or employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within entitled cause. My business address is 3550 Wilshire Boulevard, Suite 2000, Los Angeles, CA 90010.

On February 21, 2018, I served the document described as **PROPOSED BRIEF OF AMICI CURIAE ORANGE COUNTY ATTORNEYS ASSOCIATION AND ORANGE COUNTY MANAGERS ASSOCIATION IN SUPPORT OF PETITIONERS AND APPELLANTS** regarding the above-referenced case on the parties listed below:

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[X] **(BY UNITED STATES MAIL)** I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. The envelope or package was placed in the mail at Los Angeles, California.

I declare under penalty of perjury of the State of California that the foregoing is true and correct and that this declaration was executed on February 21, 2018, at Los Angeles, California.

Cheryl Winborne

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