No. S239958

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CAL FIRE LOCAL, 2881 (formerly known as CDF Firefighters), et al.

Petitioners and Appellants,
v.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM (CalPERS),

Defendant and Respondent,

And

THE STATE OF CALIFORNIA,

Intervener and Respondent.

On Review from the Court of Appeal, First Appellate District, Division 3, Civil 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

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Brief of *Amici Curiae* by 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 in Support of Petitioners Cal Fire Local 2881, et al.

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I.

INTRODUCTION

Amici, who represent approximately 100,000 dedicated public servants, are extremely concerned about positions advocated by the Court of Appeal and the State of California in this proceeding. This Brief focuses upon two well established legal principles, upon which employees represented by *Amici* relied in commencing and continuing their public service, that threaten to be emasculated if the positions taken by the Court of Appeal and State are upheld.

Amici strongly urge that, even if this Court should reject those assertions, it is incumbent upon this Court to clarify any possible confusion that has resulted during this era of "pension envy" by rendering an Opinion that unequivocally reaffirms that (1) in order to create a vested pension entitlement, it is not necessary that an enactment or contract describing the retirement benefits in existence at the time individuals commence or continue performing services also expressly state that those described benefits are intended to be vested rights and (2) while specified pension benefits of active employees already earned in return for services rendered may be modified, any resulting disadvantages must be offset by comparable advantages. The failure to make these clear pronouncements will cause a huge cloud to continue to hang over the heads of all current public

employees who commenced and continued their public service in reliance upon those well-established legal principles.

II.

AMICI URGE THIS COURT TO RENDER A DECISION THAT UNEQUIVOCALLY REAFFIRMS THAT PENSION ENTITLEMENTS OF PUBLIC EMPLOYEES CLEARLY DESCRIBED IN A GOVERNING ENACTMENT OR CONTRACT CONSTITUTE VESTED CONTRACTUAL RIGHTS EARNED UPON COMMENCEMENT OF EMPLOYMENT EVEN THOUGH THAT DESCRIPTIVE LEGISLATION DOES NOT EXPRESSLY STATE THAT THESE BENEFITS ARE INTENDED TO BE VESTED

The decision of the Court of Appeal and the State's Answer Brief On The Merits completely disregard decades of authority holding that, once public employment commences, those employees have earned, as compensation (either present or deferred) for the services being rendered, those pension entitlements described in applicable governing enactments and/or contracts. In doing so, the Court of Appeal and State rely heavily on out of context language in this Court's decision in *Retired Employees Assn. of Orange County, Inc. v. County of Orange* ("*REAOC*") (2011) 52 Cal.4th 1171. In REAOC, this Court was tasked with answering "[w]hether, as a matter of California law, a California county and its employees can form an **implied** contract that confers vested rights to health benefits on retired county employees [under circumstances where those promised entitlements

were **not** set forth in an applicable enactment]." (*Id.* at 1176, *emphasis added.*). This Court answered that question in the affirmative.

REAOC did **not** deal with an enactment or contract identifying available pension benefits. Yet the Court of Appeal and State seem to rely on *REAOC* for the proposition that parties asserting the existence of a vested right bear a heavy burden to show that a promulgation describing the pension entitlements of affected employees must **also** clearly and unambiguously demonstrate an intent that those articulated benefits constitute vested rights protected by the Contract Clause set forth in Article I, section 9 of the California Constitution. Applying *REAOC*, the Court of Appeal held [at 7 Cal.App.5th 126] that, because there is no language in Government Code section 20909 expressing that the option to purchase "air time" was intended to constitute a vested right that would survive the repeal of the statute, that entitlement was not protected from impairment.

It cannot be overemphasized that *REAOC* did **not** cite disapprovingly to, let alone purport to overturn or even water down, bedrock cases such as *Kern v. City of Long Beach* (1947) 29 Cal.2d 848 that established the existence of vested rights to pension entitlements described in promulgations or contracts that **do not** expressly state that those identified benefits are intended to create vested rights that survive their repeal. Nothing about this Court's opinion in *REAOC*, which simply established the capability of creating an implied vested right, proclaimed

the dramatic change in established pension law contained in the Court of Appeal's decision and asserted by the State.

In *Kern v. City of Long Beach, supra*, 29 Cal.2d 848, 852-853, at the commencement of the affected individual's employment, the descriptive legislation (i.e., city charter) provided that "after twenty years' aggregate service a member on application 'shall be retired and paid in equal monthly installments' a limited pension equal to fifty per cent of his annual salary." The charter **did not** contain any language specifying an intent for this described pension entitlement to constitute a vested contractual right.

Approximately thirty-two days before that employee completed the required twenty years of service, a new section was added to the charter purporting to repeal the pension provisions and to eliminate pensions as to all persons not then eligible for retirement. (*Id.* at 850.) This Court held that the charter amendment unconstitutionally impaired the employee's vested contractual right to that retirement benefit, stating "[w]here services are 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." (*Id.* at 851-852.)

Since *Kern*, the decisions of this Court and the Courts of Appeal have repeatedly and consistently held that, as soon as an individual commences rendering services for a public agency, that individual has earned as a part of the consideration in return for performing those services

compensation (usually deferred) in the form of a vested contractual right to the retirement benefits that then exist for similarly situated employees. (See *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863 and *Wallace v. City of Fresno* (1953) 42 Cal.2d 180, 184-185.) That deferred compensation matures into an unconditional entitlement when the individual satisfies the conditions precedent to qualifying for retirement benefits. (*Terry v. City of Berkeley* (1953) 41 Cal.2d 698, 702-03.)

The retirement benefits recognized by the courts as vested contractual rights have been expressed in enactments of all kinds such as city charters (*Kern, supra*, 29 Cal.2d 848), ordinances (*Bellus v. City of Eureka* (1968) 69 Cal.2d 336, 351) and statutes governing pension systems (*Legislature v. Eu* (1991) 54 Cal.3d 492 [Legislators' Retirement System]; *Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109 [Public Employees' Retirement System]; and *Teachers Retirement Bd. v. Genest* (2007) 154 Cal.App.4th 1012 [California Teachers' Retirement System]), as well as contracts (International Brotherhood of Electrical Workers v. City of Redding (2012) 210 Cal.App.4th 1114 (Petition for Review denied).

The courts have **never** required that statutes describing pension benefits available to employees rendering services also contain express or even implied language demonstrating an intent to create a vested right that would survive their repeal. For example, the *Kern* court did not examine the Long Beach City Charter for evidence that the entitlement to a pension

after twenty years of service was specifically intended to create a vested right that would survive repeal of the Charter provision. Instead, the very existence of a described defined benefit pension induces individuals to begin and maintain their employment so as to secure the promised post-employment entitlement identified in the applicable promulgation. As put simply by the *Kern* court, "[t]o hold otherwise would defeat one of the primary objectives in providing pensions for government employees, which is to induce competent persons to enter and remain in public employment." (*Kern, supra,* 29 Cal.2d at 856.)

The *REAOC* decision recognized that the requirement of a "clear showing" that legislation was intended to create contractual obligations is designed to ensure that neither the governing body nor the public will be blindsided by unexpected obligations. (*REAOC, supra*, 52 Cal.4th at 1188-89.) The public is not blindsided by the provision of a pension entitlement set forth in an enactment in existence during the employment of the affected individuals.

Because vested pension benefits are earned as compensation for services performed, there is absolutely no reason to require that the promulgation identifying those entitlements specify that it intends that the benefits it describes be regarded as vested rights. Accordingly, *Amici* urge this Court to make it abundantly clear that *REAOC* is consistent with the long line of reported cases that preceded it.

III.

AMICI URGE THIS COURT TO RENDER A DECISION THAT CLARIFIES THE WELL-ESTABLISHED PRINCIPLE THAT, WHILE SPECIFIED PENSION ENTITLEMENTS ALREADY EARNED IN RETURN FOR VALUABLE SERVICES RENDERED MAY BE MODIFIED, ANY RESULTING DISADVANTAGES MUST BE OFFSET BY COMPARABLE ADVANTAGES

Both the Court of Appeal (at 7 Cal.App 5th 130-131) and the State (at pp. 38-39) rely upon the decision of the Court of Appeal in *Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.* (2016) 2 Cal.App 4th 674, 679 [review granted by the California Supreme Court]. It held that, notwithstanding clear precedent from this Court and Courts of Appeal, a modification of a promised pension benefit that produces a disadvantage to affected employees should, but need not, be accompanied by offsetting advantages.

What is most astonishing about the Court of Appeal's Opinion in *Marin* is that it is based upon the insulting premise that this Court **carelessly** altered the applicable standard for modifying earned pension benefits by cavalierly replacing the word "should" with the word "must" in *Allen v. Board of Administration* (1983) 34 Cal.3d 114. (*Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.* (2016) 2 Cal.App.5th 674, 697-698.) Implicit in the *Marin* decision is that, before this language change, the law was well-settled that while any disadvantages **should** be replaced with offsetting advantages that "trade" did not need to

occur.

However, the *Marin* Court of Appeal ignored the fact that the actual holdings of this Court before the 1983 *Allen* decision clearly support the conclusion that, in order to survive judicial scrutiny, a disadvantageous modification of pension rights **must** be offset by comparable advantages. For example, in *Allen v. Long Beach* (1955) 45 Cal.2d 128, this Court stated that a certain City Charter amendment "substantially decreases plaintiffs' pension rights without offering any commensurate advantages." (*Id.* at 131.) This Court proceeded to hold that a second additional change "raises the cost to [employees] of pension protection without securing any advantage in addition to that which they already enjoyed." (*Id.* at 132.) Accordingly, the alterations were held to impair the contractual interests of the employees.

Similarly, in *Abbott v. Los Angeles* (1958) 50 Cal.2d 438, this Court undertook a lengthy analysis of the alleged comparable benefits provided as a result of certain pension reductions. (*Id.* at 449-454.) In determining that the changes were not properly offset by comparable advantages, thereby impairing the earned contractual entitlements of the employees, this Court concluded (at 454): "Regardless of the 'thinking of the time,' however, under the holding of the *Allen* [*v. City of Long Beach*] case the 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." (Emphasis added.)

Further, in *Betts v. Board of Administration* (1978) 21 Cal.3d 859, this Court again restated the test that "changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages." (*Id.* at 864.) Most significantly, the Opinion proceeded to hold that the modification in that case was not permitted because no new comparable advantages were provided, stating (at 867-68): "We therefore conclude that the 1974 amendment to section 9359.1 cannot constitutionally be applied to petitioner, because the amendment withdraws benefits to which he earned a vested contractual right while employed. **No 'comparable new advantages'** to petitioner **appear in the plan which can offset the detriment** he has suffered by replacement of a 'fluctuating' system of benefit computation with a 'fixed' system." (Emphasis added.)

Accordingly, even though some of the prior decisions of this Court did not expressly state that disadvantages "**must**" be offset by comparable new advantages, those decisions make it clear that such new comparable advantages **were required** in order for the modification to be reasonable.

Probably the most revealing evidence of the intention of this Court to use the words "should" and "must" interchangeably to mean "must" or "shall" is the fact that approximately one month after the 1983 *Allen* [v. Board of Administration] Decision this Court resumed using the word "should" in its *International Association of Firefighters v. City of San*

Diego Opinion (1983) 34 Cal.3d 192, 301, when quoting from its earlier Decisions. This conclusion is fortified by the fact that both of these rulings, which were rendered only thirty-five days apart, were authored by the same Justice (Richardson).

The interchangeability of "should" and "must" to mean "must" or "shall" is also readily apparent from this Court's subsequent Decision in *Legislature v. Eu* (1991) 54 Cal.3d 492. The Marin Court of Appeal noted (at 2 Cal.App.5th 699) that, in that case, which was decided eight years after *Allen*, this Court restated the "should" test. However, the *Marin* Court of Appeal entirely ignored the beginning portion of the paragraph wherein that test was recited (which began at 54 Cal.3d 529-30) that stated:

> Petitioners acknowledge that the state as employer is permitted to make reasonable modifications to the pension system during the employment relationship, **so long as employees receive "comparable new advantages" in return for any substantial reduction in benefits.** (*Olson v. Cory* [(1980) 27 Cal.3d 532,] 541; *Betts v. Board of Administration*, *supra*, 21 Cal.3d at p. 864; *Allen v. City of Long Beach*, *supra*, 45 Cal.2d at p. 131.) As we stated in Olson, "Although an employee does not obtain any 'absolute right to fixed or specific benefits . . . there [are] strict limitation[s] on the conditions which may modify the pension system in effect during employment.' [Citation.] Such modifications must be reasonable and any '"changes in a pension plan which result in disadvantage to employees ***should be accompanied by comparable new advantages***."' [Citation.] (27 Cal.3d at p. 541.)" (Emphasis added.)

By stating first that reasonable modifications are permitted "**so long** as employees receive comparable new advantages" (emphasis added) and later that "disadvantages **should** be accompanied by comparable new advantages" (emphasis added), this Court made clear that "should" and "must" both mean "must" or "shall", and that comparable advantages are a requirement in order for a modification to be reasonable.

Likewise, in *Olson v. Cory* (1980) 27 Cal.3d 532, 541, which was cited in the above quote, this Court rejected the modifications, stating: "Again, we conclude that defendants have failed to demonstrate justification for impairing these rights ***or that comparable new advantages were included*** and that section 68203 as amended is unconstitutional as to certain judicial pensioners." (Emphasis added)

The pension expectations of employees are measured by "the net benefit available" as gleaned by all "terms of the contract." (*International Association of Firefighters v. City of San Diego*, *supra*, 34 Cal.3d 292, 302; *Allen v. Bd. of Administration, supra,* 34 Cal.3d 114, 120.) "[I]t is by advantage or disadvantage...that the validity of attempted changes in [pension] rights depends." (*Abbott v. City of Los Angeles*, *supra*, 50 Cal.2d 438, 453.)

Interestingly, not one case cited by the *Marin* Court of Appeal, the Court of Appeal in this case or the State (other than *Marin*), involved a situation where an appellate Court held that, while normally disadvantages

resulting from the alteration of a specified benefit **should** be replaced by comparable offsetting advantages, based upon the circumstances presented in that case, that replacement **need not** occur. No Opinion other than *Marin* that referenced the word "should" decided, or even stated, anything to the effect that "while you should replace offsetting advantages, you don't have to".

The cases discussed and emphasized in the *Marin* Opinion in connection with that proposition involved situations where the actual ruling was that there was no contractual impairment because the asserted alteration was consistent with the earned vested right. For example, in the case most frequently cited as support by the Court of Appeal, *Miller v. State of California* (1977) 18 Cal.3d 808, the earned benefit provided a certain allowance upon retiring at age 70. The affected individual asserted that he was deprived of his vested right to receive the pension attendant to that goal because his employer imposed a new mandatory retirement age of 67. This Court correctly concluded (at 817-18) that, because that individual did not possess a vested contractual right to remain in public employment until he reached 70, the loss of the potential benefit available if that age were attained during employment is not an impairment of a **vested pension right** but a lawful condition subsequent that terminated his employment.

Miller expressly states (at p. 817):

> Lawful termination for cause, for example, is a condition which may result in a loss of vested rights. In the case at bench, the power of the Legislature, unfettered by contract, reduced the mandatory age of retirement and thereby created the condition subsequent whose occurrence not only terminated Plaintiff's employment but also defeated his expectation of additional salary and a larger retirement allowance.

In other words, *Miller* analogized its situation to one where an individual's employment was properly terminated because the individual engaged in prohibited misconduct. Therefore, *Miller* has no application to our situation which does not involve the occurrence of any lawful condition subsequent that could eliminate or reduce an anticipated entitlement.

Similarly, the cases cited by the Court of Appeal in *Marin* that involve a fluctuating pension that is a percentage of the income earned by a current employee in the position formerly occupied by the retiree (see *e.g.*, *Casserly v. City of Oakland* (1936) 6 Cal.2d 64 and *Terry v City of Berkeley* (1953) 41 Cal.2d 698) are readily distinguishable from the situation presented in this case because the reduction in the retirement allowance in those cases was not an impairment but, instead, resulted from the application of a condition attached to the earned benefit (*i.e.*, increases or decreases in the salary of a current employee in the same position). In *International Association of Firefighters v. City of San Diego, supra,* 34 Cal.3d 292, 300-303, this Court correctly differentiated the asserted impairment in that case from its earlier decision in *Allen v. City of Long*

Beach, supra, 45 Cal.2d 128 because, unlike *Allen* where an increase in the employee contribution rate was held to be an unconstitutional impairment, the San Diego rate increase was based upon an actuarial change in assumptions that was an express condition attached to the vested right that was earned.

Accordingly, *Amici* urge this Court to include in its Opinion a clear affirmation of the established principle that when a vested pension benefit of an active employee is sought to be modified any resulting disadvantages **must** be accompanied by comparable new advantages.[1]

IV.

CONCLUSION

For all of the reasons set forth in this Brief, *Amici* strongly urge this Court to render a Decision that clearly and unequivocally reaffirms the

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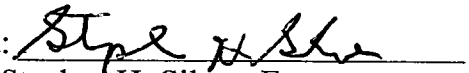
[1] The 1983 *Allen* decision also made it clear (at 34 Cal 3d 114, 120) that for a modification of a vested pension benefit to be upheld it ". . . must bear a material relation to the theory and successful operation of a pension system. . . ." It does not appear that the State is contending that this requirement no longer exists. Instead, the State seems to assert that the repeal of Government Code Section 20909 does in fact bear a material relationship to the theory and successful operation of the pension system.

At pages 27 through 32 of Petitioners' Reply Brief on the Merits, they present a strong opposition to the State's argument. Because the State does not appear to be contending that this requirement no longer exists, *Amici* will not elaborate any further on the merits of its application to this situation other than to express their concurrence with the response presented by Petitioners.

well-established principles addressed in the previous Sections while holding that the repeal of California Government Code Section 20909 was an unconstitutional impairment of vested rights of then existing state employees.

Dated: January 26, 2017

Signed: 

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CERTIFICATE OF COMPLIANCE

Counsel for *Amici Curiae* hereby certifies that pursuant to Rule 8.520(c)(1) of the California Rules of Court, the foregoing brief is produced using 13-point New Times Roman type, including footnotes. This brief contains approximately 3,647 words, which is less than the limitation set by the Rules of Court.

Counsel relies on the word count of the computer program used to prepare this brief.

Dated: January 26, 2017

Signed: _____

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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 and not a party to the within action. My business address is 1428 Second Street, Suite 200, Santa Monica, California 90401.

On January 29, 2018, I served the foregoing document described as **Brief of *Amici Curiae* by 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 in Support of Petitioners Cal Fire Local 2881, et al.** on all interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as set forth on the attached service list.

I deposited such envelopes in the mail at Santa Monica, California. The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Santa Monica, California in the ordinary course of business. I am aware than 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 in affidavit.

Executed this 29th day of January 2018 in Santa Monica, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Leonela Colque _____

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