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 (CALPERS),
Defendant and Respondent,

and

THE STATE OF CALIFORNIA
Intervener and Respondent.

First Appellate District Division Three, Case No. A142793
Alameda County Superior Court, Case No. RG12661622
The Honorable Evelio Martin Grillo, Presiding Judge

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF CALIFORNIA STATE TEACHERS' RETIREMENT SYSTEM (CALSTRS)

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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

The California State Teachers' Retirement Board (the Board), pursuant to Rule 8.520(f) of the California Rules of Court, hereby respectfully submits this Application for leave to file the attached amicus curiae brief regarding the matter of *Cal Fire Local 2881, et al. v. California Public Employees' Retirement System*, Supreme Court Case No. S239958.

I. THE BOARD'S INTEREST IN REVIEW AND EXPLANATION OF HOW THIS BRIEF WILL ASSIST THE COURT

Cal Fire presents the following two issues for this Court: (1) Was the option to purchase additional service credits pursuant to Government Code section 20909 (known as "airtime service credits") a vested pension benefit of public employees enrolled in the California Public Employees' Retirement System? (2) If so, did the Legislature's withdrawal of this right through the enactment of the Public Employees' Pension Reform Act of 2013 (Gov. Code, §§ 7522.46, 20909, subd. (g)), violate the contracts clauses of the federal and state Constitutions?

The Board does not express an opinion as to the threshold question of whether the option to purchase airtime service credit is a vested pension benefit. Rather, the accompanying brief examines the second issue presented to this Court, and specifically, the significant legal and policy implications concerning the Court of Appeal's revision of this Court's long-standing test for determining whether a modification to a public employee's vested pension right is "reasonable."

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

Allen v. Long Beach provides the framework for determining whether a modification to a vested pension right is reasonable, which is so well settled by this Court that it is incorporated into state statute. For example, the Teachers' Retirement Law, found in Part 13 of the Education Code, explicitly references *Teachers' Retirement Bd. v. Genest* (2007) 154 Cal.App.4th 1012 with regards to the State's contractual obligation to make contributions to the Teachers' Retirement Fund's Supplemental Benefit Maintenance Account. (See Notes to Decisions for Ed. Code, §§ 22954, 24415 ("[. . .] Because SB 20 does not compensate the members for this increased risk or provide a comparable new advantage in place of the $500 million, SB 20 impairs the contractual rights bestowed by Assem. Bill. No. 1102 in violation of the state and federal constitutions."); Notes to Decisions for Ed. Code, § 22954.1 ("[. . .] The replacement of an express obligation to pay a fixed sum of money with a promise to pay the sum if one proves one needs it and, even then, only if one needs it before a specific date, is not a comparable new advantage."); Ed. Code, § 22954.5, subd. (c); see also Ed. Code, §§ 22955, subds. (e) & (g), 22955.1, subds. (d) & (f), citing to *Cal. Teachers Ass'n v. Cory* (1984) 155 Cal.App.3d 494; Assem. Bill No. 1389 (2007-2008 Reg. Sess.) § 81 ("It is the intent of the

Legislature that Sections 4 to 17, inclusive, and Section 80 of this act constitute a comprehensive package of modifications to appropriations for, and benefits of, the State Teachers' Retirement System. It is the intent of the Legislature that this comprehensive package of modifications provides members of the State Teachers' Retirement System with comparable new advantages for members of the system in accordance with the standard articulated in Allen v. Long Beach (1955) 45 Cal.2d 128.").))

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

California's public school educators, relying upon *Allen v. Long Beach* and its progeny, agreed to the "disadvantage" of increasing their monthly contributions in order to ensure the fiscal stability of the retirement fund in return for the "comparable new advantage" of "removing the statutory right

to adjust the improvement factor, and thereby establishing the improvement factor as a contractually enforceable promise." (See Ed. Code, § 22002.5, subd. (d) ("The Legislature hereby increases the contributions of active members by an amount not to exceed the normal cost of the improvement factor, providing a comparable new advantage by removing the statutory right to adjust the improvement factor, and thereby establishing the improvement factor as a contractually enforceable promise."); Ed. Code, § 22901.7, subd. (c) ("The act adding this section [AB 1469] establishes the improvement factor provided pursuant to Sections 22140 and 22141 as a vested benefit pursuant to a contractually enforceable promise and a comparable new advantage in exchange for the contribution increases made pursuant to this section.").)

Thus, the Legislature, CalSTRS, and its members have relied and acted upon the understanding – first promulgated by this Court and subsequently codified in statute – that a modification to a vested pension right *must* be accompanied by a comparable new advantage. The recent holding in *Cal Fire* undermines this Court's prior decisions and California statutory law; erodes this Court's well-established framework for evaluating potential impairments to vested pension rights; and creates considerable uncertainty for the courts, legislators, those charged with administering pension systems, and California's public educators and their beneficiaries.

II. IDENTIFICATION OF AUTHORS AND MONETARY CONTRIBUTIONS

Pursuant to Rule 8.520(f)(4) of the California Rules of Court, the only persons who played a role in authoring the accompanying brief, in whole or in part, are the attorneys listed in the caption of this application, Brian J.

Bartow and Scott S. Brooks. No parties to this case (or entities who are not parties to this case other than the listed attorneys) authored the brief in whole or in part.

Dated: 2/20/18

Respectfully submitted,

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AMICUS CURIAE BRIEF

I. INTRODUCTION

In California, a public employee's vested pension rights are protected by the Contract Clause of its Constitution. (*Kern v. Long Beach* (1947) 29 Cal.2d 848, 853.) As such, vested pension rights are considered deferred compensation that is earned immediately and "cannot be destroyed, once [ ] vested, without impairing a contractual obligation." (*Ibid.*) Thus, California does not treat pensions as a gratuity, but instead considers "pension provisions [ ] a part of the contemplated compensation for [ ] services and so in a sense a part of the contract of employment itself." (*O'Dea v. Cook* (1917) 176 Cal. 659, 661-662.) Distilled to its most basic, a public pension is a way for the State "to induce competent persons to enter and remain in public employment" while deferring payment obligations. (See *Kern*, *supra*, 29 Cal.2d at p. 856.) Under this theory, the State pays less up front, but contractually agrees to compensate the public servant in the future.

In *Kern*, this Court provided the foundational premise that public employees are entitled "to a substantial or reasonable pension" that "is subject to [. . .] modification." (*Kern*, *supra*, 29 Cal.2d at p. 855.) But the Court left open the critical question of how one determines when a modification to a vested pension right would be deemed reasonable. Eight years later, in the landmark case of *Allen v. Long Beach*, this Court carefully constructed the necessary scaffolding to help answer that question. In what has become known as the "California Rule," this Court held that:

> 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. (*Allen v. Long Beach* (1955) 45 Cal.2d 128, 131, emphasis added.)

Over the next six decades and notwithstanding its use of "should," this Court and the Courts of Appeal always evaluated whether a modification to a vested pension right was accompanied by comparable new advantages when determining whether the modification was reasonable. In no case has a court opted not to apply the test, until *Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.* (2016) 2 Cal.App.5th 674.

The recent holding in *Marin*, which *Cal Fire* embraced in its decision, signals a watershed moment in California's vested rights jurisprudence. In both cases, the Court of Appeal sharply diverged from how this Court has consistently applied the test it outlined in *Allen v. Long Beach*. Fixated upon the grammatical distinction between "should" and "must," the Court of Appeal held that a modification to a vested pension right need not be accompanied by a comparable new advantage. The court's conclusion, however, is founded upon a myopically rigid reading of "should," which is unsupported by this Court's historical treatment of the comparable new advantage test. Similarly, the court ignores case and statutory law that favors reading "should" as mandatory in this context, and not permissive. Finally, and further undermining its radical revision of over sixty years of precedent, the Court of Appeal's "most persuasive evidence" for revising the California Rule is based on an erroneous reading of this Court's decision in *Allen v. Bd. of Admin.* (1983) 34 Cal.3d 114. As a result, this Court should reverse the Court of Appeal's holding and affirm that

modifications to vested pension rights *must* be accompanied by comparable new advantages.

II. THIS COURT SHOULD REJECT THE COURT OF APPEAL'S RADICAL AND CONSEQUENTIAL REVISION OF THE CALIFORNIA RULE

Cal Fire's primary argument for altering the California Rule is drawn directly from *Marin*:

> However, as our colleagues in this district recently explained after an exhaustive review of the case law: " 'Should' [provide some new compensating benefit], not 'must,' remains the court's preferred expression. And 'should' does not convey imperative obligation, no more compulsion than 'ought.' [Citations.] In plain effect, 'should' is 'a recommendation, not ... a mandate.' [Citation.]" (*Cal Fire Local 2881 v. California Public Employees' Retirement System* (2016) 7 Cal.App.5th 115, 130.)

Marin offered two explanations in support of its radical conclusion that "*There Is No Absolute Requirement That Elimination or Reduction of an Anticipated Retirement Benefit 'Must' Be Counterbalanced by a 'Comparable New Benefit.*' " (*Marin, supra,* 2 Cal.App.5th at p. 697.) First, it "question[ed]" this Court's intent when it used "must," instead of "should," in *Allen v. Bd. of Admin.* (*Id.* at pp. 697-698.) It concluded that "the Supreme Court's use of 'must' in the 1983 *Allen* decision was [not] intended to herald a fundamental doctrinal shift" because Supreme Court decisions before and after *Allen v. Bd. of Admin.* use the word "should"; only court of appeal decisions (and the Supreme Court decision in *Allen v. Bd. of Admin.*) use the word "must"; and *Allen v. Bd. of Admin.* involved retirees, who historically receive a heightened degree of judicial protection. (*Id.* at pp. 698-699.) Second, the court pointed to "the bottom line of who

won" in *Allen v. Bd. of Admin.* as "the most persuasive evidence against the Supreme Court intending to impose a quid pro quo standard." (*Id.* at p. 699.)

The court's reasoning, however, is fatally flawed on both accounts, and also fails to consider that context and circumstances can render the permissive "should" a mandatory "must." As a result, *Marin's* conclusion – which is adopted by *Cal Fire* – that a court is not required to counterbalance a modification to a vested pension right with a comparable new advantage, should be rejected by this Court.

A. This Court Has Always Assessed Whether a Modification to a Vested Pension Right Is Accompanied by a Comparable New Advantage

Marin's fixation on tallying the number of times this Court used the word "should" or "must" misses the forest for the trees. Conspicuously absent from the court's analysis is the salient fact that this Court, in *Allen v. Long Beach* and over the following sixty years, *always evaluates* whether and to what extent comparable new advantages accompany modifications to a vested pension right when it analyzes the facts of a particular case. In other words, *this Court treats the "comparable new advantage" test as mandatory*, not discretionary.[1] And while Supreme Court decisions before

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[1] See *Allen v. Long Beach* (1955) 45 Cal.2d 128, 131-133 (holding several pension changes invalid for failure to offer comparable new advantages); *Abbott v. Los Angeles* (1958) 50 Cal.2d 438, 447-455 (evaluating and concluding that modifications to pension payments were not accompanied by comparable new advantages); *Betts v. Bd. of Admin. of Public Employees' Retirement System* (1978) 21 Cal.3d 859, 863-868 (holding amendment that reduced pension benefits for former state treasurer invalid for failure to provide comparable new advantages); *Olson v. Cory* (1980) 27 Cal.3d 532 [609 P.2d 991, 996] (holding modifications of (continued . . .)

and after *Allen v. Bd. of Admin.* use the word "should," the Court of Appeal disregards two other instances when this Court explicitly characterized the comparable new advantages test as mandatory, including *the most recent case* where this Court evaluated a modification under the California Rule. (See *Abbott v. Los Angeles* (1958) 50 Cal.2d 438, 454, emphasis added ("under the holding of the *Allen* [*v. Long Beach*] case the 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, emphasis added ("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.")

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pension benefits that limited increases in judicial salaries were not accompanied by comparable new advantages); and *Legislature v. Eu* (1991) 54 Cal.3d 492, 529-530 (characterizing comparable new advantages prong as mandatory and rejecting argument that "transfer" or "redirection" of pension funds to federal Social Security system operates as a "comparable new advantage").

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

With its endorsement of a permissive guideline, the Court of Appeal's holding provides only a façade of protection for vested pension rights, as the standard for whether a modification "bears some material relation to the theory of a pension system and its successful operation" is easily met and therefore rarely examined by the courts.[2] As case law has repeatedly demonstrated, the test for determining whether modifications to an employee's vested pension rights are "reasonable" hinges almost exclusively upon the second prong: whether modifications are accompanied by comparable new advantages. Therefore, by removing its teeth, courts are left with little guidance when determining whether a modification is "reasonable," resulting in an unpredictable application of modifications to vested pension rights. Additionally, California's once robust protection of public educators' vested rights will invariably diminish, as a court could uphold nearly any modification to a vested right as long as it was related "to the theory of a pension system and its successful operation."[3]

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[2] See, e.g., *Allen v. Long Beach*, *supra*, 45 Cal.2d at p. 131 (summarily concluding that "there is no evidence or claim that the changes enacted bear any material relation to the integrity or successful operation of the pension system established by section 187 of the charter"); *Olson v. Cory*, *supra*, 27 Cal.3d at p. 541 (court does not evaluate or even cite to first part of *Allen v. Long Beach* test); *Legislature v. Eu*, *supra*, 54 Cal.3d at p. 530 (same); and *Protect Our Benefits v. City and County of San Francisco* (2015) 235 Cal.App.4th 619, 629 (citing test as phrased in *Allen v. Bd. of Admin.*, but does not evaluate first part of test).

[3] As examples for when a court has rejected a modification based on the first prong, see *Claypool v. Wilson* (1992) 4 Cal.App.4th 646, 666 (noting that "*Wallace* [*v. Fresno* (1954) 42 Cal.2d 180] and *Allen* [*v. Long Beach* (1955) 45 Cal.2d 128] show that considerations external to the functioning of the pension system, such as increased taxpayer hostility to felons or jealousy of employees not covered by the system, will not justify a change. The [material relation] justification must relate to considerations internal to the pension system, e.g., its preservation or protection or the advancement of the ability of the employer to meet its pension obligations. Changes made to effect economies and save the employer money do 'bear

(continued . . .)

Over the past sixty years, the regular application by this Court of the "comparable new advantage" portion of the California Rule highlights its critical function in examining modifications of public employees' vested pension rights. Indeed, the influence of this Court's test is noticeably demonstrated by the fact that it has been adopted by numerous other States.[4]

(. . . continued)
some material relation to the theory of a pension system and its successful operation ... .' [Citation.] That is not to say that a purpose to save the employer money is a sufficient justification for change. The change must be otherwise lawful and must provide comparable advantages to the employees whose contract rights are modified.")

[4] *See Hammond v. Hoffbeck* (Alaska 1981) 627 P.2d 1052, 1057, emphasis added (After citing to *Allen v. Long Beach* and *Betts v. Bd. of Admin.*, the Alaska Supreme Courts states: "We agree with this analysis and hold that the fact that rights in PERS 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."); *Aurora v. Ackman* (Colo.Ct.App. 1987) 738 P.2d 796, 801-802 (noting that "In deciding [*Police Pension & Relief Board v. Bills* (Colo. 1961) 366 P.2d 581], the [Colorado] supreme court relied upon several decisions from California, e.g., *Allen v. City of Long Beach* [ ], *Abbott v. City of Los Angeles* [ ]" and "Because of the supreme court's previous reference to the California rule in the *Bills* case, and because we have reached the independent judgment that this later California jurisprudence is a logical and reasonable exemplification of the conclusion reached in *Bills*, we adopt the rationale applied in these later California cases for application here."); *Nash v. Boise City Fire Dep't* (Idaho 1983) 663 P.2d 1105, 1108-1109 (citing to *Allen v. Long Beach* and progeny and summarizing "the principle which must be considered by the courts in determining whether a modification is reasonable"); *Singer v. Topeka* (Kan. 1980) 607 P.2d 467, 475-476, emphasis added ("The California rule, as set forth in [*Allen v.*] *Long Beach*, 45 Cal.2d 128, is logical and fair, and we adopt it. . . . 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."); *Davis v. Mayor of Annapolis* (Md.Ct.App. 1994) 635 A.2d 36, 39-40 (citing to Nebraska (*Halpin v. Nebraska State Patrolmen's Retirement System* (Neb. 1982) 320 N.W.2d 910) and Kansas (*Singer v. Topeka*) – *Halpin v. Nebraska* cites to *Singer v. Topeka*, which in turn relies upon *Allen v. Long Beach* – and noting that "Maryland has clearly placed itself in the majority
(continued . . .)

In both *Cal Fire* and *Marin*, the Court of Appeal focuses on three foundational vested right cases – *Kern*, *Packer*, and *Wallace*[5] – to reinforce the principle that public employees do not have a right to any fixed or definite benefits "but only to a substantial or reasonable pension." (See *Cal Fire*, *supra*, 7 Cal.App.5th at p. 128; *Marin*, *supra*, 2 Cal.App.5th at p. 707.) While this is true – and also not an issue disputed in either *Cal Fire* or *Marin* – this Court's decision in *Allen v. Long Beach*, which was decided

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view – pension benefits are contractual, but under certain circumstances 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."); *Dullea v. Massachusetts Bay Transp. Authority* (Mass.Ct.App. 1981) 421 N.E.2d 1228, 1235, citing to *Allen v. Long Beach* and progeny, emphasis added ("[T]he public employer retains some authority to make 'reasonable' modifications in its pension program in order to meet 'changing conditions' and to "maintain the integrity of the system," **provided that** "changes in a pension plan which result in disadvantage to employees **[are]** accompanied by comparable new advantages."); *Calabro v. City of Omaha* (Neb. 1995) 531 N.W.2d 541, 551 ("[I]n *Halpin*, we cited the California rule stated in *Miller v. State of California* [ ], with approval."); *Public Employees' Retirement Bd. v. Washoe County* (Nev. 1980) 615 P.2d 972, 974-975, citing to *Singer v. Topeka*, which in turn cites to *Allen v. Long Beach*, emphasis added ("To be sustained as reasonable, the modification must bear some material relationship to the purpose of the pension system and its successful operation; and any disadvantage to employees **must be** accompanied by comparable new advantages."); *Taylor v. State & Educ. Emps. Grp. Ins. Program* (Okla. 1995) 897 P.2d 275, 279, emphasis added ("the legislature may modify them if modification is necessary and reasonable, and any disadvantages employees suffer through the changes **are offset** by new advantages."); *Burlington Fire Fighters' Ass'n v. Burlington* (Vt. 1988) 543 A.2d 686, 690, citing to *Allen v. Long Beach* ("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 . . . ."); *Wash. Educ. Ass'n v. Dep't of Ret. Sys.* (Wash. 2014) 332 P.3d 439, 443, citing to *Allen v. Long Beach*, emphasis added ("Modifications that have an adverse effect on employees **must be** accompanied by 'comparable new advantages.' "); see also *Nevada Employees Assoc., Inc. v. Keating* (9th Cir. 1990) 903 F.2d 1223, 1227, citing to *Public Employees' Retirement Bd. v. Washoe County* (see *supra*).

[5] *Kern v. Long Beach* (1947) 29 Cal.2d 848; *Packer v. Board of Retirement* (1950) 35 Cal.2d 212; *Wallace v. Fresno* (1954) 42 Cal.2d 180.

after the above three cases, takes the important and indispensable next step in outlining the specific process for determining whether a modification is "reasonable."

Like *Marin* and *Cal Fire*, the recent opinion in *Alameda County Deputy Sheriff's Assn. v. Alameda County Employees' Retirement Assn.* (2018) 19 Cal.App.5th 61 similarly fails to consider this Court's *mandatory application* of the comparable new advantages requirement, and the fact that "should" can mean "must" under certain circumstances (see Section II.B, *infra*). With its conclusory remark that – "Much of *Marin's* vested rights analysis—including its rejection of the absolute need for comparable new advantages when pension rights are eliminated or reduced—is not controversial, and we do not disagree with it" – *Alameda* also implicitly adopts *Marin's* mistaken analysis of *Allen v. Bd. of Admin.*, which fatally undercuts its rationale for modifying this Court's well-established test (see Section II.C, *infra*).

The California Rule, as articulated by this Court, provides courts with the necessary tools to evaluate modifications to vested pension rights, while also ensuring that the State fulfills its contractual obligations and public employees' rights remain protected. By eviscerating the "comparable new advantage" portion of the California Rule, the Court of Appeal plunges back into the murky waters that this Court sensibly departed in *Allen v. Long Beach*. This Court should refuse the lower court's endeavors to do so.

B. "Should" Can Mean "Must"

Coupled with the Court of Appeal's parochial focus on how often this Court has used "should" or "must," is its grammatical argument that

"should" is permissive, and therefore a court is not *required* to counterbalance a modification to a vested pension right with a comparable new advantage. (*Marin*, *supra*, 2 Cal.App.5th at p. 699; *Cal Fire*, *supra*, 7 Cal.App.5th at pp. 130-131.) While it is true that "should" is generally advisory and "must" is mandatory, case and statutory law both confirm that context can transform a "should" to a "must."[6] The public's interest in the California Rule and its established legal precedent offer a perfect example.

Hess Collection Winery v. Agricultural Labor Relations Bd. (2006) 140 Cal.App.4th 1584 helps illustrates this principle. At issue in *Hess* was a constitutional challenge to the mandatory arbitration statutes for agricultural employers in Labor Code section 1164 et seq. Pursuant to Section 1164, a private mediator determined the terms of a contract between Hess Collection Winery and the United Food and Commercial Workers Union, after both parties had failed to agree on the terms of an initial collective bargaining agreement. (*Id.* at p. 1591.)

Hess Collection Winery argued that the word "may" in Code of Regulations, title 8, section 20407, and Labor Code section 1164, subdivision (e), provided the mediator with discretion to disregard the criteria listed in those sections. (*Hess, supra,* 140 Cal.App.4th at p. 1606.) Hess reasoned: "Both the ALRB regulations and newly enacted section 1164(e) simply state that the arbitrator [sic] 'may' consider criteria applied in 'similar proceedings,' such as a comparison of similarly situated employees, but even these vague factors can be disregarded by the

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[6] See, for example, Education Code sections 10 and 75, Government Code sections 5 and 14, and Labor Code sections 5 and 15, which provide that "shall" is mandatory and "may" is permissive, "unless the context otherwise requires."