

No. S239958

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

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Deputy

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

v.

**CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM (CalPERS), et al.,
Defendant and Respondent,**

and

**THE STATE OF CALIFORNIA
Intervenor and Respondent.**

CALIFORNIA COURT OF APPEAL, First Appellate District, Division Three
Case No. A 142793

Alameda County Superior Court (The Honorable Evelio Grillo)
Case No. RG 12661622

**APPLICATION OF CALIFORNIANS FOR RETIREMENT
SECURITY FOR LEAVE TO FILE AMICUS CURIAE BRIEF
IN SUPPORT OF PETITIONERS CAL FIRE LOCAL 2881, et al
and AMICUS BRIEF**

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TO THE HONORABLE CHIEF JUSTICE:

Pursuant to California Rules of Court, Rule 8.520(f), amicus Californians for Retirement Security respectfully requests permission to file the attached brief in support of Petitioner Cal Fire Local 2882. This application is filed within 30 days after the filing of the reply brief on the merits and is therefore timely pursuant to Rule 8.520(f)(2).

THE INTEREST OF AMICUS CURIAE

Californians for Retirement Security (CRS) is a coalition of 32 public employee and retiree organizations that collectively represent more than 1.6 million Californians who are current and former public employees of state and local government. CRS advocates for the retirement security of all Californians, including advocating against the privatization of public retirement programs and the elimination of death and disability retirement benefits, and to protect public employees' rights in their pensions. CRS monitors litigation that potentially implicates the retirement security of the active and retired California public employees including, but not limited to, schoolteachers, firefighters, police officers, bus drivers, trash collectors, librarians and others providing public services to the State's citizenry. CRS has determined that there is a significant risk of harm to the vested pension rights of the public employees and retirees represented by its member organizations if the decision of the Court of Appeal is not overturned.

THE NEED FOR FURTHER BRIEFING

CRS, through its member organizations, represents the interests of current and retired California public employees throughout the state and, as such, is in a unique position to provide a statewide perspective on the legal and policy issues raised by the Court of Appeal's decision. CRS believes that

the Court of Appeal's decision is contrary to decades of this Court's precedent in the area of vested pension rights and that this departure from long-standing precedent creates an unwarranted threat to such rights that is unsupported by either persuasive legal or compelling economic rationale.

CRS submits this amicus curiae brief with the hope that this Court will benefit from our statewide perspective on the issues raised by the decision below.

ABSENCE OF PARTY ASSISTANCE

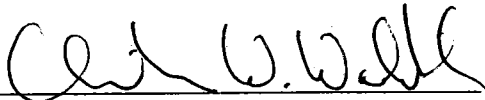
Pursuant to California Rules of Court, rule 8.520(f)(4), amicus confirms that no party or their counsel authored this brief in whole or in part. Nor did any party, their counsel, person, or entity make a monetary contribution intended to fund the preparation or submission of this brief.

CONCLUSION

Amicus CRS respectfully requests that the Court grant this application for leave to file and amicus curiae brief.

Dated: February 21, 2018

OLSON HAGEL & FISHBURN, LLP

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**BRIEF OF AMICUS CURIAE
CALIFORNIANS FOR RETIREMENT SECURITY
IN SUPPORT OF PETITIONER CAL FIRE LOCAL 2881**

I. INTRODUCTION

The California Public Employees' Pension Reform Act of 2013¹ prospectively eliminated the right of current state employees to purchase non-qualified retirement service credit. In upholding this provision, the Court of Appeal erroneously applied this Court's decision in *Retired Employees' Association of Orange County, Inc. v. County of Orange* (2011) 52 Cal. 4th 1171 (*Retired Employees' Association*), finding that Petitioners did not have a vested right to purchase such service because

...there is nothing in either the text of the statute (§20909) or its legislative history, that unambiguously states an intent by the Legislature to create a vested pension benefit. This demonstration of intent, as we explained above, is required by California law. (*Cal Fire Local 2881 v. California Public Employees' Retirement System* (2016) 7 Cal. App. 5th 115, 126, ("*Cal. Fire Local 2881*") citing *Retired Employees' Association*, *supra* at 1190.)

As amicus will demonstrate, this Court's decision in *Retired Employees' Association* arose under vastly different circumstances from those underlying this Court's longstanding doctrine that the performance of labor by a public employee for consideration that includes pension benefits provided for by statute, *in and of itself* creates a vested right in that employee to the receipt of those benefits. (See, e.g., *Betts v. Board of Administration of Public Employees' Retirement System* (1978) 21 Cal. 3d 859, 863.). This

¹ Assembly Bill No. 340 (2011-12 Reg. Sess.) Cal. Stats. 2012, ch. 296. ("Pension Reform Act").

misapplication of *Retired Employees' Association* by the Court of Appeal yielded an incorrect result in the instant case, and, if left undisturbed, will undermine decades of this Court's precedent.

Further, the Court of Appeal's reliance on *Marin Association of Public Employees v. Marin County Employees' Retirement Association* (2016) 2 Cal. App. 5th 674 ("*Marin*") (currently pending Review by this Court) embraces a deeply flawed opinion. *Marin* both incorrectly interprets and ignores the outcome of several of this Court's leading cases regarding the analysis of vested rights issues, largely based upon the conclusion, unsubstantiated by any evidentiary record, that the entirety of state and local government is facing a pension "crisis." Amicus submits that Intervenor's attempts to demonstrate that such a crisis exists and that it warrants a significant departure by this Court from its established precedent concerning vested pension rights are unfounded.

II. RETIRED EMPLOYEES' ASSOCIATION WAS NOT CONCERNED WITH THE CREATION OF VESTED PENSION RIGHTS THROUGH THE PERFORMANCE OF LABOR UNDER A PENSION STATUTE AND, AS SUCH, IS INAPPOSITE TO THE INSTANT CASE

In *Retired Employees' Association*, this Court answered the following "abstract question" from the United States Court of Appeals for the Ninth Circuit:

Whether, as a matter of California law, a California county and its employees can form an implied contract that confers vested rights on retired county employees. (*Retired Employees' Association, supra* at 1176.)

This question came to this Court from the Ninth Circuit by way of an appeal from a federal district court ruling, which held that the retired employees of Orange County did not have a contractual right to continue to be pooled with active employees for the purpose of setting health insurance rates. (*Retired*

Employees' Association of Orange County v. County of Orange (2009) 632 F. Supp. 2d 983, 984-85.) This pooling, which had been in existence from 1985 until September 2006, resulted in retired County employees paying less for their health insurance than they otherwise would have paid. Upon the termination of this pooling arrangement, retired County employees, who paid for their own insurance, experienced a significant cost increase, while the cost for active employees decreased.

During the period of time that the pooling arrangement was in effect, memoranda of understanding (MOUs) between the active employees' bargaining representatives and the County as well as resolutions of the County Board of Supervisors setting annual health insurance premiums that reflected rates on a plan year by plan year basis. While the retired County employees acknowledged that the MOUs and resolutions "were silent as to the duration of the unified pool," they

...alleged that the County's "longstanding and consistent practice of pooling active and retired County employees, along with the County's representations to employees regarding the unified pool, created an *implied* contractual right for employees who retired before January 1, 2008." (*Retired Employees' Association, supra*, 52 Cal. 4th at 1177-78, emphasis in original).

Significantly, the retired County employees were asserting that they had a right to continued pooling based on an *implied term* of the MOUs between the County and the active employees' bargaining representatives and not based upon an *implied contract* between the retired employees themselves and the County. (*Id.* at 1185.) It is likewise clear that the retired County employees were *not* asserting contractual rights based upon their own exchange of labor in return for compensation that included an implied promise of health benefit premium rate pooling:

In this proceeding, REAOC contends that a retiree's right to the benefits of a single unified pool vested at the time of retirement, and explicitly disavows any claim that the benefits vested when

the employee began his or her service. (*Id.* at 1189, fn. 3.)

One likely explanation for the retired employees' position that vesting of their entitlement to the pooling arrangement did not arise upon commencement of their County service is that the pooling arrangement originated in 1985 and, as of its cessation 21 years later in 2006, there likely were many retired county employees who had ceased work and retired before 1985. These retired employees would not have performed work during the time that the pooling arrangement was in effect and as such would not have been eligible to claim a vested right based upon their exchange of labor in return for an implied promise that the pooling arrangement would remain in effect through their retirement. (*Claypool v. Wilson* (1992) 4 Cal. App. 4th 646, 662-64.) This is consistent with the absence in *Retired Employees' Association* of any reference to the performance of work by the plaintiffs during the period that the pooling arrangement was in effect prior to their retirement.

In short, this Court in *Retired Employees' Association* addressed the question of whether an MOU between *active* county employees and a county can be found to contain an implied term that grants vested rights to retiree health benefits to *retired* county employees without regard to whether labor was performed by the employees prior to their retirement but after such time the implied term came into being. In this context, it is unsurprising that this Court, in answering the question in the affirmative, required "language or circumstances" accompanying the adoption of the MOU "that clearly evince a legislative intent to create private rights of a contractual nature enforceable against the county." (*Retired Employees' Association, supra*, 52 Cal 4th at p. 1176-77.) Simply put, this Court was *not* being asked to revisit its decades of precedent holding that when "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."

(*O’Dea v. Cook* (1917) 176 Cal. 659, 551-62.)²

By layering on a requirement that in order to create vested rights a pension statute must “clearly evince a legislative intent to create private rights of a contractual nature” (*Cal Fire Local 2881, supra*, 7 Cal. App. 5th at p. 126) on top of this Court’s longstanding precedent that the provision of services by a public employee under a pension statute in and of itself creates vested contractual pension rights, the Court of Appeal did not follow the well-settled principle that “... cases are not authority for propositions not considered,” (*Silverbrand v. County of Los Angeles* (2009) 46 Cal. 4th 106, 127),³ creating a dangerous and unworkable standard that cannot be met as a practical matter by most pension statutes. This Court’s own precedent concerning the creation of vested pension rights was in place at the time the Legislature enacted such pension statutes, obviating the need for a “clear statement of legislative intent” that the pension benefits provided for by such statutes constituted vested rights of the eligible public employees. The creation of vested rights by a pension statute has long been presumed unless the Legislature explicitly provided that a provision in a pension statute *was not intended* to create vested pension rights.⁴

² See also, e.g., *Kern v. Long Beach* (1947) 29 Cal. 2d 848, 851-52; *Wallace v. Fresno* (1954) 42 Cal. 2d 180, 183; *Betts v. Board of Administration of Public Employees’ Retirement System, supra*, 21 Cal. 3d at p. 863; *Legislature v. Eu* (1991) 54 Cal. 3d 492, 529-30.

³ See also *Stand up for California! v. State of California* (2016) 6 Cal. App. 5th 686, 769; *Ginns. v. Savage* (1964) 61 Cal. 2d 520, 524, fn. 2.

⁴ For example, see the Court’s discussion in *Teachers’ Retirement Board v. Genest* (2007) 154 Cal. App. 4th 1012 of former Education Code section 24414(d), which provided that the original provisions of a purchasing power supplemental payment program administered by the California State Teachers’ Retirement System contained the following language stating that there was no vested right to General Fund payments to the program: ...”nothing in the sections establishing the Supplemental Benefit Maintenance Program shall be construed as a basis for any implied contractual obligation... or as an intent to grant private rights of contract, or as conferring any vested

Based on this Court's longstanding precedent, we respectfully submit that this Court reject the Court of Appeal's application of *Retired Employees' Association* to the instant matter.

III. DEVIATION FROM THIS COURT'S PRECEDENT REGARDING THE RIGHT TO CONTINUE TO ACCRUE PENSION BENEFITS AT THE SAME LEVEL THROUGHOUT A PUBLIC EMPLOYEES' CAREER, IMPAIRMENT OF VESTED RIGHTS, AND THE REQUIREMENT OF A COMPARABLE NEW ADVANTAGE IN THE EVENT OF IMPAIRMENT IS UNWARRANTED BOTH FROM LEGAL AND PUBLIC POLICY PERSPECTIVES

Although the Court of Appeal concluded, based upon the erroneous analysis discussed above, that the purchase of nonqualified service credit under Government Code section 20909 did not constitute a vested pension right for California state employees, it went on to posit that if section 20909 created a vested pension right, the elimination of that right for current state employees did not constitute an impermissible impairment of vested rights and did not require the provision of a comparable new advantage. (*Cal Fire Local 2881, supra*, 7 Cal. App. 5th at p. 129-131.) In reaching these conclusions, the Appellate Court relied heavily on *Marin Association of Public Employees v. Marin County Employees' Retirement Association, supra*, 2 Cal. App. 5th ("*Marin*"), a case currently pending review by this Court.

In *Marin*, Division Two of the First Appellate District rejected a challenge to amendments to the County Employees' Retirement Law, in companion legislation to the Pension Reform Act and a retirement system's implementation. This implementation had the effect of prospectively eliminating the inclusion of certain employee benefits for purposes of

right whatsoever on any present or future member...." (*Id.* at 1029, citing Stats. 1996, ch. 1165, §34, pp. 8505, 8506.)

calculating the future pensions of current county employees. Although both the retirement system and Intervenor State of California defended this action on the grounds that the Pension Reform Act reflected a legislative clarification of pre-existing statutes and as such did not impair vested rights provided by a pension statute, the *Marin* court, *sua sponte*, examined this Court's longstanding vested rights precedent. The Court first determined that the requirement for a comparable new advantage in the event a vested right is impaired is "a recommendation, not... a mandate." (*Id.* at 699.) The Court then reformulated the definition of an "impairment" as follows:

"Thus, short of actual abolition, a radical reduction in benefits, or a fiscally unjustifiable increase in contributions... the governing body may make *reasonable* modifications and changes before the pension becomes payable and that until that time the employee does not have a right to any fixed or definite benefits but only to a substantial or *reasonable* pension." (*Id.* at 702, emphasis original).

The analytical shortcomings of the *Marin* court's decision have been thoroughly demonstrated not only by Petitioner's briefing to this Court but by legal commentary⁵ and, most significantly, the recent decision by Division Four of the First Appellate District in *Alameda County Deputy Sheriff's Association v. Alameda County Employees' Retirement Association* (2018) 19 Cal. App. 5th 61, 122. *Marin* is equally problematic in its disregard of the doctrine of judicial restraint. As this Court has observed, a court should "... not reach constitutional questions unless absolutely required to do so to dispose of the matter before" it.⁶ (*In re Michael G.* (1988) 44 Cal. 3d 283,

⁵ See Comment, *The Fate of Public Employee Pensions: Marin's Revision of the "California Rule"* (September, 2017) 8 Calif. L.Rev. Online 62.

⁶ See also *Powers v. City of Richmond* (1995) 10 Cal. 4th 85, 116: Courts should "... avoid expansive constitutional pronouncements that inevitably prejudice future controversies and may have unforeseen and questionable consequences in other contexts." (George, J., concurring).

295).

As a threshold matter, amicus submits that it would be most appropriate for this Court to withhold consideration of *Marin* until that matter has been fully briefed and argued, which can proceed now that the *Alameda* decision has been issued. However, based largely on *Marin*, Intervenor State (through the Governor's Legal Affairs Office) has tendered a full-throated attack in the instant case on this Court's longstanding rule that, upon acceptance of employment, public employees acquire a vested right to continue to accrue pension benefits based upon the system in effect at that time (*Legislature v. Eu, supra*, 54 Cal. 3d 492, 529-530) (referred to colloquially as the "California Rule"). This attack is based in large part upon the *Marin* court's determination, relying on extrinsic sources that were neither a part of the record before that court nor in the legislative record of the Pension Reform Act, that enactment of the Pension Reform Act was justified by the existence of "staggering" unfunded pension obligations in California. (*Marin, supra*, 2 Cal App. 5th at p. 680-82.)

Like the *Marin* court, Intervenor here relies heavily upon a 2011 report by the Little Hoover Commission, citing excerpts declaring that "California's pension plans are dangerously underfunded" and urging "the State 'to exercise its authority—and establish the legal authority—to reset overly generous and unsustainable pension formulas for both current and future workers.'" (Intervenor and Respondent's Answer Brief on the Merits (Ans.Br.) at 16-17). Again citing the Commission report, Intervenor asserts that "... the problem cannot be solved without addressing the pension liabilities of current employees....To provide *immediate savings of the scope needed*, state and local governments must have the flexibility to alter future, unaccrued retirement benefits for current workers ..." (Ans. Br. at 17-18, fn.4.) Intervenor's litigation posture has been accompanied by public pronouncements by the Governor that "There is a lot more flexibility than is

currently assumed by those who discuss the California rule...At the next downturn when things look pretty dire, [pensions] will be on the chopping block.”⁷

Amicus respectfully submits that any reexamination by this Court of its long-standing precedent that protects not only the already-earned pension benefits of all but also those benefits yet to be earned in the future by all public employees in California is unwarranted under any circumstances and certainly not under those presented by the case now before it. *This case* concerns a challenge by employees of the State of California to the elimination of a pension benefit, namely, the right to purchase additional service credit to be applied to the ultimate calculation of benefits at the time of retirement, which had been provided to them pursuant to Government Code section 20909. There is nothing in the record before this Court to support a conclusion that the State’s contribution obligations to CalPERS were so onerous as to warrant elimination of this right.

In fact, as the following chart demonstrates (based upon publicly-available governmental information from the California Department of Finance), the State’s General Fund retirement contribution obligations to CalPERS for its employees as a percentage of General Fund revenue for Fiscal Years 2008-09 through 2018-19 are very low and have not varied significantly, ranging from a low of 1.6 percent to a high of 2.2 percent. These are not the type of numbers that justify judicial consideration of the elimination of a vested right, let alone significant modification or abandonment of the California Rule.

⁷ *Pensions Will be on Chopping Block in Next Recession, Jerry Brown Says*, Sacramento Bee, January 12, 2018, available at <http://www.sacbee.com/news/politics-government/the-state-worker/article194434479.html>

Fiscal Year	General Fund Revenues (Millions)¹	State General Fund Retirement Contribution to CalPERS (Millions)²	Percentage of General Fund Revenues
2008-09	82,772.1	1,685	1.9%
2009-10	87,041.1	1,573	1.8%
2010-11	93,488.9	1,777	1.9%
2011-12	87,070.8	1,746	2.0%
2012-13	99,915.2	1,761	1.8%
2013-14	103,374.7	1,803	1.7%
2014-15	111,789.4	1,842	1.6%
2015-16	115,660.6	2,318	2.0%
2016-17	118,668.8	2,534	2.1%
2017-18	127,251.5	2,783	2.2%
2018-19	129,791.5	2,901	2.2%

¹ California Department of Finance, Historical Chart A-1, General Fund History Revenues and Transfers vs. Expenditures, at http://www.dof.ca.gov/budget/summary_schedules_charts/documents/CHART-A-1.pdf

² For Fiscal Years 2008-09 through 2013-14, see Governor's Budget Summary, 2013-14, page 94, Figure SWE-01 at <http://www.ebudget.ca.gov/2013-14/pdf/BudgetSummary/StatewideExpenditures.pdf>

For Fiscal Year 2014-15, see Governor's Budget Summary 2014-15, page 142, Figure SWE-01, fn. 4 at <http://www.ebudget.ca.gov/2014-15/pdf/BudgetSummary/StatewideIssuesandVariousDepartments.pdf>

For Fiscal Year 2015-16, see Governor's Budget Summary 2015-16, page 133, Figure SWE-01, fn. 6 at <http://www.ebudget.ca.gov/2015-16/pdf/BudgetSummary/StatewideIssuesandVariousDepartments.pdf>

For Fiscal Year 2016-17, see Governor's Budget Summary, 2016-17, page 126, Figure SWE-01, fn. 6 at <http://www.ebudget.ca.gov/2016-17/pdf/BudgetSummary/StatewideIssuesandVariousDepartments.pdf>

For Fiscal year 2017-18, see Governor's Budget Summary 2017-18, page 128, Figure SWE-01, fn. 6 at <http://www.ebudget.ca.gov/2017-18/pdf/BudgetSummary/StatewideIssuesandVariousDepartments.pdf>

For Fiscal Year 2018-19, see Governor's Budget Summary 2018-19, page 116, Figure SWE-01, fn. 6 at <http://www.ebudget.ca.gov/2018-19/pdf/BudgetSummary/StatewideIssuesandVariousDepartments.pdf>

More broadly, and more troubling, is Intervenor's assertion that the funding status of California's state and local public retirement systems is so dire and the resulting budget pressures on public entities so great that this Court must abrogate its long-standing precedent and allow such entities to reduce the future retirement benefit accruals of current public employees. Again, this assertion is derived largely from the same one-sided, selectively-chosen materials relied upon by the *Marin* court, which are a product of that court's own research in support of an assertion not even raised by the parties as opposed to that of a fully-developed judicial record where opposing data and viewpoints could have been provided by the litigants in that matter.¹⁰

Contrary to the generalized and conclusory assertions of Intervenor, pension costs for local public entities on both an absolute and percentage of total expenditures basis vary widely between public entities. As the following chart illustrates, looking at two large cities and counties in California that provide retirement benefits through independent retirement systems and two large cities and counties in California that provide retirement benefits through CalPERS, there are significant differences in unfunded liabilities as a percentage of total plan liabilities, employer normal costs and unfunded liability amortization costs as a percentage of payroll, and total required pension contributions as a percentage of entity expenditures. The reasons for these variances are many. There are differences in membership demographics (in particular, the ratio of active employees to those who are retired), benefit structure, actuarial assumptions, and the allocation of funding responsibility between the public entity and its employees.

¹⁰ There is no indication that the Court in *Marin* notified the parties therein that it intended to take judicial notice of the Little Hoover Commission Report and related materials or provide the parties with an opportunity to respond thereto as appears to be required by section 459 (d) of the California Evidence Code. One appellate court identified the purpose of this requirement as "...to assure that the parties have the opportunity to present relevant argument to the court based on a fair understanding of the facts and issues that will serve as the foundation for the court's decision." *Schneider v. Kaiser Foundation Hospitals* (1989) 215 Cal. App. 3d 1311, 1315, fn. 2; *Overruled on other grounds, Moncharsch v. Heily & Blasé* (1992) 3 Cal. 4th 1.

Jurisdiction	Funded Level (Misc./Safety Where Applicable)	Normal Cost Contribution	UAL Contribution or Pension Obligation Bond	Total Contribution	Agency Operating Expenditures	Retirement Costs as % of Operating Expenditures
Los Angeles County	79.4%	\$761 Million	\$839 Million	\$1.6 Billion	\$21.4 Billion	7.5%
San Diego County	76.9%	\$187 Million	\$322 Million	\$509 Million	\$5.8 Billion	8.8%
Riverside County	70.1%/69.2%	\$174 Million	\$109 Million	\$283 Million	\$5.4 Billion	5.2%
Santa Clara County	68.8%/66.5%	\$161 Million	\$197 Million	\$358 Million	\$6.5 Billion	5.5%
Los Angeles City	71.39%/93.9%	\$428 Million	\$545 Million	\$973 Million	\$9.3 Billion	10.5%
Fresno City	111.3%/119.6%	\$33 Million	\$16 Million	\$49 Million	\$1.1 Billion	4.4%
Sacramento City	70.8%/66.5%	\$37 Million	\$43 Million	\$80 Million	\$1 Billion	8%
Long Beach City	73.4%/78.6%	\$48 Million	\$52 Million	\$100 Million	\$2.6 Billion	3.8%

This chart was developed using data from 2017-18 public agency budgets and actuarial valuations dated June 30, 2016 (setting contribution rates for the 2017-18 fiscal year, as follows):

Los Angeles County: Los Angeles County Employees' Retirement Association June 30, 2016 Actuarial Valuation at 32, 41, available at https://www.lacera.com/archives/archivesInvestments/ActuarialReports/lacera_valuation/2016_actuarial_valuation.pdf; Los Angeles County 2017-18 Budget at 2, available at <http://ceo.lacounty.gov/pdf/budget/2017-18/2017-18%20Adopted%20Budget%20Charts.pdf>