CALIFORNIA ASSOCIATION OF
PROFESSIONAL SCIENTISTS

October 20, 2016

Via Overnight Delivery

The Hon. Chief Justice Tani Cantil-Sakauye
and Hon. Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: ***Amicus Curiae* Letter in Support of Petition for Review**
Marin Association of Public Employees, et al. v. Marin County Employees' Retirement Association, et al., No. S237460
Court of Appeal, First Appellate District, Division Two,
Case Number A139610

Dear Chief Justice and Associate Justices of the California Supreme Court:

California Association of Professional Scientists ("CAPS") respectfully submits this *amicus curiae* letter, pursuant to rule 8.500(g) of the Rules of Court, in support of plaintiffs and appellants' Petition for Review in this matter.

INTEREST OF CAPS

CAPS represents 3,500 professional scientists who work for the State of California. CAPS is the exclusive bargaining representative of state bargaining unit 10 pursuant to the Dills Act (Gov. Code §3512, et. seq.). CAPS is also a verified supervisory organization representing state employed supervisory scientists under the Excluded Employees Bill of Rights (Gov. Code §3525, et. seq.).

By virtue of their state employment, all CAPS represented employees are members of the California Public Employees' Retirement System ("CalPERS"). CAPS advocates on

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retirement issues before the Legislature and CalPERS and negotiates with the State employer for labor contracts covering retirement benefits and terms on behalf of represented employees under the collective bargaining law. The vast majority of CAPS members are career civil servants who will satisfy the conditions required to vest in the CalPERS administered retirement system for state employees. As such, they count on the pension promises made by the State employer that this deferred compensation will be available to them upon retirement. CAPS members have a significant interest in their vested and earned retirements and an interest in the sound and equitable resolution of retirement issues and disputes in the California courts.

WHY REVIEW SHOULD BE GRANTED

All public employees working today have counted on the pension promises made by their public employers for their entire public service careers. Following a career in public service, they expect that the deferred compensation of their vested pension benefits will be available to them in retirement. Prior to the decision in *Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.* (*Marin*), the rules and decisional law were clear. Pension rights were accepted as vested and protected by the Contracts Clauses of the state and federal Constitutions. Changes to a vested pension right which result in a disadvantage to an employee would need to be accompanied by a comparable new advantage to pass constitutional muster. The *Marin* decision must be reviewed by this Court because it alters the rules established by the Supreme Court for determining what is a vested pension right and changes the test for determining whether changes to a pension benefit are constitutional.

"A public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment." (*Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863.) Pension rights are obligations protected by the contract clause of the federal and state Constitutions. (U.S. Const., art I, §10, cl. 1; Cal. Const., art I, §9). (*United Firefighters of Los Angeles City v. City of Los Angeles* (1989) 210 CalApp.3d 1095.) Such a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing entity. (*Betts*, 21 Cal.3d at 863.) A lawmaker's power to modify pension rights once vested is "'quite limited.'" (*Protect Our Benefits v. City and County of San Francisco* (2015) 235 Cal.App. 4th 619, 628, citing *In re Retirement Cases* (2003) 110 Cal.App.4th 426, 427.)

This Court in *Allen v. Board of Administration* held "that any 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." (*Allen v. Board of Administration* (1983) 34 Ca.3d 114.) The test in *Allen* reflected decades of cases recognizing the nature of vested

pension rights and addressing modifications to those rights. Decisions in the 30 years since *Allen* have kept these standards in place, including this First District's *Protect Our Benefits*. Whether the word "must" or "should" is used in describing the need for a modification in pension rights to be offset by comparable advantages makes no practical difference in the reported cases – all of the decisions still required an analysis of whether the modifications impaired the vested contractual pension rights of employees. This is contrary to the *Marin* Court's assessment that an offsetting is a "recommendation" not a "mandate." (*Slip Opinion* at 26.)

The *Marin* Court of Appeal decision takes these well-established principles and abandons them. Without articulating an exact standard, the *Marin* Court suggests that public employees are entitled only to a "reasonable" and "substantial" pension. The Petition for Review must be granted to restore what until now have been settled important issues of law and to secure uniformity of decision.

While the *Marin* court attempts to "emphasize the limited nature" of the holding, there is nothing limited about the potential reach of this disruption to the well-established vested nature of pension rights. The *Marin* court's reasoning does not limit itself to definitions of "compensation earnable" or simply address "pension spiking." If left intact, the appellate decision is invitation to public agencies to violate their promises to their employees.

The *Marin* Court also ignores this Court's precedent regarding impairment of contracts. While there is precedent for impairing contractual rights, the standards are understandably extremely high before a public employer can do so. It is true that government cannot bargain away the police power of a state (*Stone v.Mississippi* (1880) 101 U.S. 814, 817), but government must honor its agreements. For the contracts clause to mean anything, it must limit the power of government to modify its own agreements. This is especially true when the nature of the governmental power at issue is not within the ambit of traditional police powers, but as is the case here, relates to a revenue or spending power. (*Hermosa Beach Stop Oil Coalition v. City of Hemosa Beach* (2001) 86 Cal.App. 4th 534, 565.)

By finding against all precedent that there is no "vested right," the *Marin* decision bypasses the four prong test for determining whether legislation impairing a contract is constitutionally permissible as set forth by this Court in *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296. This Court in *Sonoma* stated that in order for a public employer to impair a contract:

(1) a declared emergency must be based on adequate factual foundation;

(2) the agency's action must be designed to protect a basic societal interest and not benefit a particular individual;
(3) the law must be appropriate for the emergency and obligation; and
(4) the agency decision must be temporary, limited to the immediate exigency that caused the action.

As noted in *Sonoma*, the "state's police power remains paramount, for a legislative body 'cannot bargain away the public health or public morals' (citations)" but that "if the Contract Clause is to have any effect, it must limit the exercise of the police power to some degree." (*Id.* at 305.) These standards are even higher when government is attempting to impair not the obligations of private parties, but its own obligations. *Sonoma* noted with approval that deference to a legislative assessment of reasonableness and necessity is not required when the government's self-interest is at stake – government can always find a use for extra money for other policy alternatives. Allowing the state to reduce its obligations because it wanted to spend money elsewhere would render the Contract Clause as meaningless. (*Id.* at 308.)

Review of the Appellate Court's *Marin* decision is necessary to resolve the conflicts with this Court's precedents and provide guidance to lower courts and to California's thousands of public sector employers and over a million public sector employees as to the vested nature of retirement benefits in the public sector.

Respectfully submitted,

Gerald James

Attachment: Proof of Service