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## The Fate of Public Employee Pensions: *Marin*'s Revision of the "California Rule"

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### INTRODUCTION

During the Great Recession, as public outcry grew against unions and public employee pensions, the "California Rule" for public employee pensions came under attack.<sup>1</sup> Under the California Rule, a pension statute forms a contract between the state and its employees on the employee's first day of work, and safeguards past and future pension accruals.<sup>2</sup> The California Legislature can make reasonable modifications to a pension before an employee retires only if (1) the amended pension "bear[s] some material relation to the theory of a pension system and its successful operation;" (2) "comparable new advantages" accompany any disadvantages resulting from the change; and (3) the amendment still leaves employees with a reasonable pension.<sup>3</sup> Now, the California Supreme Court is considering an issue that has sowed uncertainty over the future of the

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1. See, e.g., Darwin BondGraham & Steven Tavares, *Austerity's Champion*, EAST BAY EXPRESS, June 17, 2015, <http://www.eastbayexpress.com/oakland/austeritys-champion/Content?oid=4345237> [https://perma.cc/V8F4-JWTW].

2. *Legislature v. Eu*, 816 P.2d 1309, 1332 (Cal. 1991), <http://law.justia.com/cases/california/supreme-court/3d/54/492.html>; *Allen v. City of Long Beach*, 287 P.2d 765, 767 (Cal. 1955), <http://law.justia.com/cases/california/supreme-court/2d/45/128.html>; *Dryden v. Bd. of Pension Comm'rs of City of Los Angeles*, 59 P.2d 104, 106 (Cal. 1936), <http://law.justia.com/cases/california/supreme-court/2d/6/575.html>.

3. *Allen v. City of Long Beach*, 287 P.2d at 767; *Kern v. City of Long Beach*, 179 P.2d 799, 803 (Cal. 1947), <http://law.justia.com/cases/california/supreme-court/2d/29/848.html>.

California Rule and public employee pension in *Marin Association of Public Employees v. Marin County Employees' Retirement Association*.<sup>4</sup> At issue is whether two pension reform bills, Assembly Bill No. 340 and Assembly Bill No. 197 (collectively, the “Pension Reform Act”), unreasonably modify the vested pension rights of legacy members—those employees hired before the enactment of the Pension Reform Act—in violation of the contract clauses of the state and federal constitutions.<sup>5</sup>

In late 2012, the Marin County Employees' Retirement Association (MCERA) voted in favor to comply with the Pension Reform Act.<sup>6</sup> In implementing the Pension Reform Act, MCERA altered the vested pension rights of legacy members without providing any comparable new advantage. Specifically, the Pension Reform Act amended the definition of “compensation earnable” in Government Code section 31461, a provision of the County Employees Retirement Law (CERL) of 1937.<sup>7</sup> This new definition excludes certain items from the calculation of pension benefits that legacy members could previously include in their benefits calculation.<sup>8</sup>

Several labor unions sued MCERA to stop the implementation of the new policy for legacy members, alleging it was unconstitutional.<sup>9</sup> The trial court held that the Pension Reform Act was constitutional.<sup>10</sup> The First Appellate District Court of Appeal affirmed, concluding that the new definition of “compensation earnable” did not substantially impair the employment contracts of legacy members as they still had a reasonable pension.<sup>11</sup> On November 22, 2016, the California Supreme Court granted a petition for review to hear *Marin*.<sup>12</sup>

This Comment argues that the Court of Appeal reached the wrong conclusion with questionable reasoning. In particular, the Court of Appeal was wrong in (1) rejecting the “comparable new advantages” test and (2) combining aspects of the California Rule with a traditional contract analysis to create a new rule that would threaten public employee pensions. Part I outlines the background context of pension reform in California. Part II provides an overview of *Marin*. Part III illustrates how the Court of Appeal misinterpreted the

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4. *Marin Ass'n of Pub. Emps. v. Marin Cty. Emps.' Ret. Ass'n*, 383 P.3d 1105 (Cal. 2016), <https://casetext.com/case/marin-assn-of-pub-emps-v-marin-cty-employees-ret-assn-1>.

5. *Marin Ass'n of Pub. Emps. v. Marin Cty. Emps.' Ret. Ass'n*, 206 Cal. Rptr. 3d 365, 389 (Cal. Ct. App. 2016), <http://law.justia.com/cases/california/court-of-appeal/2016/a139610.html>; “‘Member’ means any person included in the membership of the retirement association. . . .” Cal. Gov’t Code § 31470 (Deering 2017). “In plain English, and excluding survivor beneficiaries, a ‘member’ is a past or present ‘employee’ (§ 31469) of a ‘public agency’ (§ 31478) who did or is rendering ‘public service’ for compensation to that public agency (§ 31479).” *Marin Ass'n of Pub. Emps.*, 206 Cal. Rptr. at 372, n.4.

6. *Marin Ass'n of Pub. Emps.*, 206 Cal. Rptr. at 373–75.

7. *Id.* at 372.

8. *Id.*

9. *Id.* at 373–74.

10. *Id.* at 378.

11. *Id.* at 389.

12. *Marin Ass'n of Pub. Emps.*, 383 P.3d at 1105.

“comparable new advantages” test and disregarded the California Rule to revise California pension jurisprudence. If the California Supreme Court upholds *Marin*, public employees could face additional cuts to their pensions benefits.

## I.

### BACKGROUND: THE RISE OF PENSION REFORM IN CALIFORNIA

When the stock market collapsed in 2008, many politicians chose pension reform as an avenue to resolve their fiscal crises.<sup>13</sup> Several newspapers, studies, and reports highlighted the dangers of unfunded pension liabilities across the country, with some describing pensions as the “ticking fiscal time bomb for state and local governments.”<sup>14</sup> One 2009 estimate by Professors Novy-Marx and Rauh put the level of underfunding in California’s public pension system at around \$475 billion, the largest in the nation.<sup>15</sup>

Some economists contested this “pension bomb” narrative. Dean Baker argued that pension shortfalls “have been seriously misrepresented in public debates.”<sup>16</sup> According to Baker, most states have pension shortfalls only as a result of the Great Recession and will recover as the stock market improves.<sup>17</sup> He criticized Professors Novy-Marx and Rauh’s \$475 billion calculation of the shortfall and believed pension critics underappreciated the shortfall’s relative size to the state economy.<sup>18</sup> In describing Baker’s research, economist Paul Krugman’s concluded: “The basic moral is that the official story these days—of years and years of huge giveaways to unions, resulting in gigantic, unpayable debts—is just wrong: to a very large extent, the pension shortfall has emerged just since 2007, thanks to the financial crisis, and even then it’s not nearly as big relative to future state incomes as widely imagined.”<sup>19</sup>

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13. See, e.g., *DeMaio: Put Pension Reform on 2012 Ballot*, SAN DIEGO UNION-TRIB., Feb. 22, 2011, <http://www.sandiegouniontribune.com/sdut-demaio-put-pension-reform-2012-ballot-2011feb22-story.html> [https://perma.cc/88Q4-LGZT?type=image].

14. Jack M. Beermann, *The Public Pension Crisis*, 70 WASH. & LEE L. REV. 3, 13 (2013).

15. Robert Novy-Marx & Joshua D. Rauh, *The Liabilities and Risks of State-Sponsored Pension Plans*, 23 J. OF ECON. PERPS. 191, 197–99 (2009).

16. DEAN BAKER, CTR. FOR ECON. AND POLICY RESEARCH, *THE ORIGINS AND SEVERITY OF THE PUBLIC PENSION CRISIS* 10, 15 (2011), <http://cepr.net/documents/publications/pensions-2011-02.pdf> [https://perma.cc/3DNZ-FTQR].

17. *Id.*

18. *Id.* at 10.

19. Paul Krugman, *The Truth About Pensions*, N.Y. TIMES, Feb. 27, 2011, <https://krugman.blogs.nytimes.com/2011/02/27/the-truth-about-pensions/> [https://perma.cc/DE3D-E593]; see Catherine Fisk & Brian Olney, *Public Employee Unions and Pensions*, OnLabor (Jan. 22, 2016), <https://onlabor.org/2016/01/22/public-employee-unions-and-pensions/> [https://perma.cc/25QV-LFNT] (“Unionization doesn’t cause either budget deficits or unfunded pension liabilities. Bad governance does.”); George Skelton, *Cutting Public Pensions Now Won’t Save California*, L.A. TIMES, April 11, 2011, <http://articles.latimes.com/2011/apr/11/local/la-me-cap-pensions-20110411> [https://perma.cc/8BNQ-A5J5] (“Let’s be clear: State employee pensions are not to blame for Sacramento’s budget deficit. Not by any math.”).

Baker's arguments did not prevail in the public debate. In 2011, the Little Hoover Commission, an independent state oversight agency, warned Governor Jerry Brown and the California Legislature: "California's pension plans are dangerously underfunded, the result of overly generous benefit promises, wishful thinking and an unwillingness to plan prudently. Unless aggressive reforms are implemented now, the problem will get far worse, forcing counties and cities to severely reduce services and layoff employees to meet pension obligations."<sup>20</sup>

By 2012, pension reform advocates won several policy victories in California. In San Diego, public outcry against the city's unfunded pension liabilities led to a successful pension reform ballot initiative.<sup>21</sup> In San Jose, the city council placed a pension reform measure on the ballot that passed.<sup>22</sup> A few months later, California state legislators passed and Governor Jerry Brown signed two pension reform bills to reduce pension benefits: Assembly Bill 340, enacted as the California Public Employee's Pension Reform Act of 2013, and Assembly Bill 197, a trailer bill passed to clarify Assembly Bill 340.<sup>23</sup>

## II.

### MARIN ASSOCIATION OF PUBLIC EMPLOYEES V. MARIN COUNTRY EMPLOYEES' RETIREMENT ASSOCIATION

Counties are able to create and run a retirement plan for their employees.<sup>24</sup> Twenty out of fifty-eight California counties have their own plan, which a county retirement board administers.<sup>25</sup> Each board determines what "items of remuneration paid to employees qualify as 'compensation' under section 31460 and 'compensation earnable' pursuant to section 31461, and therefore must be included as part of a retiring employee's 'final compensation' for purposes of calculating the amount of a pension."<sup>26</sup> The meaning of "compensation earnable" is critical because the "average annual compensation earnable" during an

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20. Daniel W. Hancock, *Cover Letter to LITTLE HOOVER COMMISSION, PUBLIC PENSIONS FOR RETIREMENT SECURITY* (2011), <http://www.lhc.ca.gov/sites/lhc.ca.gov/files/Reports/204/Report204.pdf> [https://perma.cc/A7GT-5A9H].

21. See, e.g., U-T San Diego Editorial Staff, *Editorial: Carl DeMaio for Mayor of San Diego*, SAN DIEGO UNION-TRIB., May 5, 2012, <http://www.sandiegouniontribune.com/opinion/editorials/sdut-carl-demaio-for-mayor-of-san-diego-2012may05-htmlstory.html> [https://perma.cc/Y8T4-97HP?type=image].

22. See, e.g., Catherine Saillant & Tony Perry, *2 Big Cities OK Cuts to Worker Pension Costs*, L.A. TIMES, June 7, 2012, <http://articles.latimes.com/2012/jun/07/local/la-me-pensions-20120607> [https://perma.cc/K9NM-J52G].

23. Patrick McGreevy, *Gov. Jerry Brown Signs Bill to Trim Public Pension Costs*, L.A. TIMES, Sept. 13, 2012, <http://articles.latimes.com/2012/sep/13/local/la-me-brown-bills-20120913> [https://perma.cc/EY3H-7YY7].

24. *Marin Ass'n of Pub. Emps.*, 206 Cal. Rptr. 3d at 369-70 (citing County Employees Retirement Law of 1937, 1937 Cal. Stat. ch. 677 (codified at § 31450 et seq.)).

25. *Id.* at 370.

26. *Id.* (citation omitted).

employee's last years of employment is the "final compensation" on which an employee's pension is based.<sup>27</sup>

The definition of "compensation earnable" narrowed following the passage of the Pension Reform Act. Before the Pension Reform Act, Government Code section 31461 defined "compensation earnable" as follows:

"Compensation earnable" by a member means the average compensation as determined by the board, for the period under consideration upon the basis of the average number of days ordinarily worked by persons in the same grade or class of positions during the period, and at the same rate of pay. The computation for any absence shall be based on the compensation of the position held by the member at the beginning of the absence. Compensation, as defined in Section 31460, that has been deferred shall be deemed "compensation earnable" when earned, rather than when paid.<sup>28</sup>

The Pension Reform Act amended section 31461 for the purpose of curbing pension spiking.<sup>29</sup> It designated the quoted language above as subdivision (a) and added subdivision (b) to restrict what items count as "compensation earnable" for calculating retirement income. Some of the items subdivision (b) excludes are: any compensation given to augment a member's retirement income, "payments for additional services rendered outside of normal working hours," and payments for unused vacation or sick leave exceeding an amount that "may be earned and payable in each 12-month period during the final average salary period."<sup>30</sup>

On December 18, 2012, MCERA became one of the first county boards to implement the Pension Reform Act.<sup>31</sup> It created a "Policy Regarding Compensation Earnable and Pensionable Compensation Determinations," which established a rule conforming with the new definition of "compensation earnable" in section 31461.<sup>32</sup> Starting January 1, 2013, certain items would no longer fall under MCERA's new definition of "compensation earnable," including standby pay, administrative response pay, and call-back pay.<sup>33</sup>

On January 18, 2013, soon after MCERA's new policy came into effect, five recognized employee organizations and four individuals filed an action against MCERA.<sup>34</sup> Plaintiffs alleged that the exclusion of items under the new definition of "compensation earnable" decreased the pensions benefits of legacy members to an amount lower than previously promised, thus "unconstitutionally

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27. *Ventura Cty. Deputy Sheriffs' Ass'n v. Bd. of Ret. of Ventura Cty. Emps.' Ret. Ass'n*, 940 P.2d 891, 901 (Cal. 1997), <http://law.justia.com/cases/california/supreme-court/4th/16/483.html>.

28. Cal. Gov't Code § 31461 (Deering 2012) (amended 2013).

29. *Marin Ass'n of Pub. Emps.*, 206 Cal. Rptr. 3d at 373 (quoting Legislative Counsel's Digest, Assemb. B. 197, 2011–2012 Reg. Sess. (Cal. 2012)).

30. Cal. Gov't Code § 31461 (Deering 2017).

31. *Id.* at 373–74.

32. *Id.*

33. *Id.* at 374–75 n.9.

34. *Id.* at 375.

impair[ing] MCERA members' vested rights."<sup>35</sup> The trial court sustained MCERA's demurrer without leave to amend, finding the Pension Reform Act constitutional.<sup>36</sup>

On appeal, the Court of Appeal affirmed the trial court's judgment, concluding that the Legislature's amendment to section 31461 did not unconstitutionally impair the vested rights of legacy members because the amendment did not deny MCERA members a "reasonable" pension.<sup>37</sup> First, the court determined that the United States and California

Constitutions permit reasonable modifications of vested pension rights, and that any reasonable modification resulting in a disadvantage to employees does not require providing "comparable new advantages."<sup>38</sup> Second, the court examined whether the modifications of MCERA members' vested pension rights amounted to a substantial impairment depriving them from a reasonable pension, and found no such impairment.<sup>39</sup> Thus, MCERA's policy change still maintained members' right to a reasonable pension in compliance with the federal and state constitutions.<sup>40</sup>

### III.

#### CASE ANALYSIS

The Court of Appeal was wrong (1) in rejecting the California Rule's "comparable new advantages" test and (2) in crafting a new test that has alarming consequences for public employee pensions.

#### A. *The Court of Appeal's Rejection of the California Rule's "Comparable New Advantages" Test*

The Court of Appeal incorrectly concluded that the California Rule's "comparable new advantages" test was not mandatory. First, the court improperly relied on *Allen v. Board of Administration of the Public Employees' Retirement System*.<sup>41</sup> Second, the court ignored precedent that treats "should" and "must" interchangeably.

Under the California Rule's "comparable new advantages" test, a comparable new advantage *must* accompany any disadvantage resulting from an amended pension.<sup>42</sup> In 1983 in *Allen v. Board of Administration of the Public Employees' Retirement System*, the California Supreme Court stated the "comparable new advantages" test as the following: "With respect to active

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35. *Marin Ass'n of Pub. Emps.*, 206 Cal. Rptr. 3d at 377.

36. *Id.* at 378 (citing trial court's order).

37. *Id.* at 369.

38. *Id.* at 383–86 (quoting *Allen v. City of Long Beach*, 287 P.2d at 767).

39. *Id.* at 389.

40. *Id.*

41. 665 P.2d 534 (Cal. 1983).

42. *Allen v. Bd. of Admin. of the Pub. Emps.' Ret. Sys.*, 665 P.2d 534, 538 (Cal. 1983), <http://law.justia.com/cases/california/supreme-court/3d/34/114.html>.

employees, we have held that any modification of vested pension rights . . . when resulting in disadvantage to employees, *must* be accompanied by comparable new advantages.”<sup>43</sup> According to the Court of Appeal, *Allen* misstated the “comparable new advantages” test as mandatory, as several courts merely articulated that a comparable new advantage *should* accompany any disadvantage.<sup>44</sup> For example, in 1955, the California Supreme Court said: “[C]hanges in a pension plan which result in disadvantage to employees *should* be accompanied by comparable new advantages.”<sup>45</sup> Thus, the Court of Appeal rejected the “must” formulation of the “comparable new advantages” test, finding that a comparable new advantage need not accompany any disadvantage.<sup>46</sup>

The Court of Appeal stated that *Allen* probably did not intend to use “must” instead of “should” for four reasons.<sup>47</sup> First, out of the three cases *Allen* cited, only one—a court of appeal decision—used “must.”<sup>48</sup> Because the other two cases cited were California Supreme Court cases, which used “should,” the Court of Appeal considered these two cases more authoritative.<sup>49</sup> Second, a year after *Allen*, the California Supreme Court employed “should” in another case.<sup>50</sup> Third, *Allen* involved retirees, who traditionally received “a heightened degree of judicial protection.”<sup>51</sup> Fourth, the California Supreme Court never restated the “must” formulation again after *Allen*.<sup>52</sup> Therefore, *Allen* did not intend to require a comparable new advantage to offset any detriment: the word “should,” given its plain effect, only suggests “a recommendation, not . . . a mandate.”<sup>53</sup>

The Court of Appeal’s reliance on *Allen* to revise the California Rule’s comparable new advantages test seems imprudent, because the outcome of *Allen* did not depend on this test. *Allen* held that a constitutional revision substantially increasing legislative salaries could not apply to the computation of pension benefits of retired legislators, because the “restriction took the form of withholding unforeseen or windfall advantages which bore no relation to the fundamental theory and objective” of the Legislators’ Retirement System.<sup>54</sup> In other words, the result in *Allen* turned more on the question of the “material relation to the theory and successful operation of a pension system” than the

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43. *Id.*

44. *Marin Ass’n of Pub. Emps.*, 206 Cal. Rptr. 3d at 384.

45. *Allen v. City of Long Beach*, 287 P.2d at 767 (emphasis added).

46. *Marin Ass’n of Pub. Emps.*, 206 Cal. Rptr. 3d at 386.

47. *Id.* at 384–85.

48. *Id.*

49. *Id.*

50. *Id.* at 385.

51. *Marin Ass’n of Pub. Emps.*, 206 Cal. Rptr. 3d at 385.

52. *Id.*

53. *Id.* (quoting *Cuevas v. Superior Court*, 130 Cal. Rptr. 238, 239 (Ct. App. 1976), <http://law.justia.com/cases/california/court-of-appeal/3d/58/406.html>).

54. *Allen v. Bd. of Admin. of the Pub. Emps.’ Ret. Sys.*, 665 P.2d at 542.

comparable new advantages test.<sup>55</sup> In its revisionist analysis, the Court of Appeal considered the absence of a comparable new advantage in *Allen*, which employed the “must” formulation, as convincing evidence that *Allen* did not intend to mandate the comparable new advantages test.<sup>56</sup> But the comparable new advantages test was not implicated in *Allen*. If the test were implicated, *Allen* would have given the “must” effect. Therefore, because *Allen* did not hinge on the comparable new advantages test, it is irrelevant to the Court of Appeal’s analysis.

Even if *Allen* were relevant, the Court of Appeal’s four reasons to justify its revision still contravenes precedent. Although the word “should” implies no compulsion, California courts have used “must” and “should” interchangeably for several decades to require a comparable new advantage whenever an amended pension disadvantages an employee. In 1955, the California Supreme Court in *Allen v. City of Long Beach* used “should.”<sup>57</sup> Nonetheless, it held that a city charter’s modifications to pension rights were invalid, because they substantially disadvantaged employees’ pension rights without providing any comparable advantages, and had no “material relation to the integrity or successful operation of the pension system.”<sup>58</sup> In 1991, the California Supreme Court in *Legislature v. Eu* employed “should” again.<sup>59</sup> It found that an initiative measure banning any pension or retirement benefit from accruing due to service in the

Legislature was an unconstitutional impairment of the vested pension rights of incumbent legislators, because the initiative destroyed the system for additional benefits without providing a comparable new advantage.<sup>60</sup> Therefore, despite decades of precedent mandating a comparable new advantage to accompany any disadvantageous modifications to pensions, the Court of Appeal rejected precedent in favor of a revised, permissive comparable advantages test.

Nevertheless, the Court of Appeal concluded that the Pension Reform Act would withstand the comparable new advantages test even if it were mandatory.<sup>61</sup> It stated that MCERA’s policy change gave a comparable new advantage to members: because the new policy excluded certain items or payments from the pension calculation, deductions involving those sums in financing members’ retirement would no longer lower their paychecks, thereby increasing their net monthly compensation.<sup>62</sup> However, this effect is not a comparable new benefit, but only a residual of the detrimental modification. MCERA provided legacy members no comparable new advantage.

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55. *Id.* at 538.

56. *Marin Ass’n of Pub. Emps.*, 206 Cal. Rptr. 3d at 385–86.

57. 287 P.2d 765, 767 (Cal. 1955).

58. *Id.*

59. 816 P.2d 1309, 1332 (Cal. 1991).

60. *Id.*

61. *Marin Ass’n of Pub. Emps.*, 206 Cal. Rptr. 3d at 386.

62. *Id.*

*B. The Court of Appeal's Revised California Rule and Its Implications*

After abandoning the comparable new advantages test, the Court of Appeal introduced a new standard for analyzing modified pensions by mixing a traditional contract claim analysis of the modification with aspects of the old California Rule.<sup>63</sup> Under the U.S. and California Constitutions, California may not pass a law that impairs the obligation of contracts. Under a contract claim analysis, a court examines (1) whether a valid contract exists, (2) whether an amendment to the law impairs the contract, and (3) whether the impairment is substantial.<sup>64</sup> Even if a court finds a substantial impairment, the court can find the amendment constitutional if the amendment is justified by a significant public purpose and if it advances the public interest in a “reasonable and necessary” fashion.<sup>65</sup> After applying this framework, the Court of Appeal briefly acknowledged other aspects of the old California Rule—whether the modification was reasonable and whether it maintained “some material relation to the theory of a pension system and its successful operation.”<sup>66</sup>

Following this revised California Rule, the Court of Appeal found that while the amendment impaired the contract, the impairment was not substantial because plaintiffs still had maintained a right to a “reasonable” and “substantial” pension.<sup>67</sup> The court characterized the amendment as “quite modest.”<sup>68</sup> Thus, “in light of the unquestioned need for change” in the midst of “dire financial predictions,” the Legislature’s exercise of power to amend section 31461 still left employees a reasonable pension.<sup>69</sup> The court also stated it had no reason to address whether the modification kept “some material relation to the theory of a pension system and its successful operation,” as plaintiffs did not raise it as an issue.<sup>70</sup>

If the California Supreme Court adopts the Court of Appeal’s revised California Rule, the implications could be dire for public employee pensions. First, this revision is an existential threat for pensions. Governments could amend pensions to an employee’s detriment without providing any comparable new advantage. Even if the Legislature substantially impairs a pension, a reviewing court could still justify the impairment and call the modification reasonable by invoking the public interest. Once the next recession hits—or more likely before—governments would likely seek pension cuts to resolve fiscal

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63. *See id.* at 388–92.

64. *General Motors Corp. v. Romein*, 503 U.S. 181 (1992), <https://supreme.justia.com/cases/federal/us/503/181/case.html>.

65. *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1976), <https://supreme.justia.com/cases/federal/us/431/1/case.html>.

66. *Marin Ass’n of Pub. Emps.*, 206 Cal. Rptr. 3d at 392 (quoting *Allen v. City of Long Beach*, 287 P.2d at 767).

67. *Id.* at 389.

68. *Id.* at 390–91.

69. *Id.*

70. *Id.* at 392.

crises. A reviewing court could then uphold these modifications by citing one side of the policy debate to justify its decision, just as the Court of Appeal did here.<sup>71</sup>

Second, if this revision eviscerates public employee pensions, governments could become even more dysfunctional. One of the main purposes of public employee pensions “is to induce competent persons to enter and remain in public employment.”<sup>72</sup> If the California Supreme Court upholds the Court of Appeal’s decision, governments will likely have to devise other methods to recruit talented employees, as *Marin* threatens the stability of pensions in the future.

#### CONCLUSION

In *Marin*, the Court of Appeal should have held that the Pension Reform Act violated the California Rule, as the legislative amendment to section 31461 failed the comparable new advantages test. Instead, to address the serious abuses of “pension spiking,” it engaged in questionable reasoning to reject the comparable new advantages test in favor of a revised California Rule. If the California Supreme Court upholds this revised California Rule, which incorporates aspects of an ordinary contract analysis and the former California Rule, public employees should brace themselves for further pension cuts, and states courts should ready themselves for a flood of lawsuits.

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71. See *Marin Ass’n of Pub. Emps.*, 206 Cal. Rptr. 3d at 370–71.

72. *Kern v. City of Long Beach*, 179 P.2d 799, 803 (Cal. 1947), <http://law.justia.com/cases/california/supreme-court/2d/29/848.html>.