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July 19, 2010

Honorable Justices
California Supreme Court
350 MacAllister Street
San Francisco, California 94102

Re: *Retired Employees of Orange County v. County of Orange,* U.S. Ninth Circuit Appeal No. 09-56026—Request for Certification

Honorable Justices:

On behalf of Plaintiff/Appellant Retired Employee Association of Orange County ("REAOC"), we are writing with regard to the Ninth Circuit Court of Appeals' June 29th, 2010 Order Certifying Question to the California Supreme Court in the above referenced matter. (*See REAOC v. County of Orange* (9th Cir. 2010) --- F.3d ---, 2010 WL 2593674.) The Ninth Circuit stated the certified question as follows: "Whether, as a matter of California law, a California county and its employees can form an implied contract that confers vested rights to health benefits on retired county employees." (*Id.*)

This question presents two separate issues: (1) whether California law recognizes implied-in-fact contract rights and duties, relating to retirement health benefits, in public sector employment; and (2) whether benefits conferred by such terms can become "vested." With regard to the second issue, it is critical that the term "vested" be understood in the context of this particular dispute. This case presents the limited question whether retirement health benefits may be unilaterally revoked from *current retirees*; it does not pose the separate question whether and how an employer may alter the *future* retirement health benefits of its *active* workforce. As explained below, this distinction—between active and retired employees' rights to retirement benefits—has been central to courts' consideration of whether changes to such benefits are lawful. It has critical implications for this Court's legal analysis of the question(s) presented, and will significantly reduce the potential financial impact this Court's answer (should it agree to accept certification) could have on other municipal employers in California.

Accordingly, REAOC respectfully requests that the certified question be parsed into two questions and re-phrased, as follows:

(1) Can a municipal employer and its employees form an implied-in-fact contract relating to the provision of a retirement health benefit?

(2) If so, under what circumstances—if ever—may a municipal employer unilaterally reduce or eliminate such a benefit from employees who have already retired?

REAOC agrees that this Court has not expressly decided these particular issues. However, as explained below, settled principles of California contract law dictate that (1) public employment contracts may contain implied-in-fact contract terms, including terms relating to retirement benefits; and (2) retired public employees are contractually entitled to receive the retirement health benefits they earned as elements of their compensation.

I. GOVERNMENTAL SUBDIVISIONS MAY BE BOUND BY AN IMPLIED CONTRACT IF THERE IS NO STATUTORY PROHIBITION AGAINST SUCH ARRANGEMENTS.

More than 40 years ago, in *Youngman v. Nevada Irrigation District* (1970) 70 Cal.2d 240, 246-47, this Court held that a municipal employer's two-year practice of providing annual step salary increases to its employees could create an implied-in-fact contract requiring the employer to continue to do so. In *Youngman*, as in this case, the employer insisted that it lacked the statutory authority to enter "implied" contracts with employees. (*Id.*) This Court rejected that argument, observing that the district had authority under the Water Code to "employ agents and employees, prescribe their duties, and fix their salaries," and that this authority included the power to enter implied-in-fact contracts:

> There seems little doubt that the general provisions giving the district the power to enter into contracts of employment without specifying any formal requirements for such contracts were intended to apply to both implied and express contracts since the only significant difference between the two is the evidentiary method by which proof of their existence and terms is established. *Governmental subdivisions may be bound by an implied contract if there is no statutory prohibition against such arrangements.*

(*Id.* at 247 (emphasis added)). *Youngman* has been cited numerous times over the decades for the proposition that implied-in-fact terms arise both in government

and private sector contracts. (*See*, *e.g.*, *Air Quality Products, Inc. v. State of California* (1979) 96 Cal.App.3d 340, 349 ["we have no doubt that a public agency may be found liable in appropriate circumstances on the basis of [] an implied-in-fact contract . . ."]; *Caterpillar, Inc. v. Williams* (1987) 482 U.S. 386, 395 n.9 [under California law implied-in-fact contract arises, in employment relationships, through conduct that takes place both inside and outside the context of collective bargaining agreements ("CBAs")]; *California Emergency Physicians Medical Group v. PacifiCare of California* (2003) 111 Cal.App.4th 1127, 1134; *Bell v. Superior Court* (1989) 215 Cal.App.3d 1103, 1108; *see generally* 4 Witkin, Cal. Proc. 5th (2008) Pleading § 526).

A few years later, this Court held that public sector collective bargaining agreements—so-called Memoranda of Understanding, or "MOUs"—are binding, bilateral *contracts*. (*Glendale City Employees Association v. City of Glendale* (1975) 15 Cal.3d 328, 334-38; *see also Sonoma County Organization of Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 304 [same]).[1] As such, they are to be construed, like other contracts, according to rules of interpretation set forth in the Civil Code as well as common law doctrines. (*City of Glendale*,15 Cal.3d at 334-38; *see also City of El Cajon v. El Cajon Police Officers' Assn*. (1996) 49 Cal.App.4th 64, 71 [in construing terms of an MOU, "[w]e are guided by the *well settled rules of interpretation of a contract*, endeavoring to effectuate the mutual intent of the parties . . ."] [emphasis added]). As this Court noted in *Youngman*, the Civil Code provides that a courts' task is to discern and enforce the intent of the parties, whether that intent is set forth in express written words *or* implied from the parties' course of dealing. (Civil Code §§ 1619 ["A contract is either express or implied."], and 1621 ["An implied contract is one, the existence and terms of which are manifested by conduct."]).

In addition to its general instruction that MOUs are to be construed as contracts, the *City of Glendale* Court applied two particular doctrines of interpretation, both of which reinforce the conclusion that implied terms arise in public sector employment.

First, MOUs should be construed in light of special doctrines developed for the interpretation and enforcement of other collective bargaining agreements. (*City of Glendale*, 15 Cal.3d at 339-40 & n.17.)[2] One such doctrine is that the

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[1] It is undisputed that the vast majority of Orange County retirees were covered under MOUs while they were active employees.

[2] "[A]ll modern California decisions treat labor-management agreements *whether in public employment or private* as enforceable contracts . . . which should be

express terms of CBAs are *necessarily* incomplete, and in need of "filling in" by resort to evidence of bargaining history and policies and practices that were deemed acceptable by all parties but were never reduced to express terms. (*Posner v. Grunwald-Marx, Inc.* (1961) 56 Cal.2d 169, 176-77 [cited in *City of Glendale*, 15 Cal.3d at 339-40 & nn. 15-17] [noting "inevitable verbal incompleteness" of CBAs and agreeing with United States Supreme Court's rejection of the argument that "an employee's claim must fail unless he can point to a specific contract provision upon which the claim is founded," because "[t]here are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties."], *quoting United Steelworkers of America v. Warrior & Gulf Co.* (1960) 363 U.S. 574, 578-81 [the source of rights and duties under CBAs "is not confined to the express provisions of the contract," because past practices are "equally a part of the collective bargaining agreement although not expressed in it."]; *see also University of Hawaii Professional Assembly v. Cayetano* (9th Cir. 1999) 183 F.3d 1096, 1099-1104 [longstanding, established practice became an implied term of public sector CBAs], *citing Warrior & Gulf*, *supra*.)

Second, MOUs should be interpreted in light of California's liberal parol evidence rule. (*City of Glendale*, 15 Cal.3d at 340). In reviewing the trial court's interpretation of the MOU there at issue, this Court relied on the formulation of the parol evidence rule set forth in *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co*. (1968) 69 Cal.2d 33, 40. That rule states that, when interpreting a contract, the court must first consider "*all credible evidence* [including extrinsic evidence] offered to prove the intention of the parties."[3] Second, "[i]f the court decides, after considering this evidence, that the language of a contract, in the light of all the circumstances, is *fairly susceptible* of either one of the two interpretations contended for . . . extrinsic evidence relevant to prove either of such meanings is admissible." (*Id*. [emphasis added].) In *City of Glendale*, this

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interpreted to execute the mutual intent and purpose of the parties . . . [t]his principle applies as much to agreements between government employees and their employers as to private collective bargaining agreements. . . *courts have frequently drawn upon precedents involving private labor-management relations to aid in deter-mining the rights of public employees and employee organizations*." (*Id.*, emphasis added).

[3] Such evidence "includes testimony as to the circumstances surrounding the making of the agreement including the object, nature and subject matter of the writing." *Id.* It also includes "the subsequent conduct of the parties." (*Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1356, *citing Pacific Gas*, *supra*).

Court, relying on *Pacific Gas*, rejected the City's argument regarding the meaning of the MOU because that argument was "based upon an interpretation of the memorandum *on its face without reference to the extrinsic evidence* or the trial court's findings . . ." (*Id.* [emphasis added].)

In addition, this Court has repeatedly held that under California law, even standard (that is, not collectively-bargained) employment contracts contain both express terms and terms that arise by implication from the practices, policies and course of dealing established during the employment relationship. In *Scott v. Pacific Gas & Electric Co*. (1995) 11 Cal.4th 454, 463, this Court explained that

> [t]he recognition of implied-in-fact contract provisions is part of the modern trend in contract law . . . *[e]vidence derived from experience and practice can now trigger additional, implied terms* . . . in the employment context the application of this realistic approach to contractual interpretation means that *courts will not confine themselves to examining the express agreements between the employer and individual employees*, but will also look to the employer's policies, practices, and communications in order to *discover the contents of an employment contract*.

(*Id.* [emphasis added]; *see also Guz v. Bechtel* (2000) 24 Cal.4th 317, 344 [re-affirming "the principle that implied employment contract terms may arise from the employer's official ... policies and practices"].) The fact that we are here dealing with the employment relationship in the public sector does not change this analysis. (*See* Civil Code § 1635 ["All contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided by this Code."]; *Kashmiri v. Regents of U.C.* (2007) 156 Cal.App.4th 809, 828-30 [relying on *Scott* and section 1635 to hold that public university is bound by implied-in-fact promises made to its students, despite its status as a governmental entity); *Southern California Gas Co. v. City of Santa Ana* (9th Cir. 2003) 336 F.3d 885, 890-93 [construing municipal contract to include critical implied financial term that reflected parties' decades-long practice].)

Finally, California's Public Employment Relations Board ("PERB")—the body charged with interpreting and enforcing California's public employment statute, the Meyers Milias Brown Act ("MMBA")—recently reiterated this fundamental rule regarding implied contracts in public employment relationships. In *Sacramento County Attorney's Association v. County of Sacramento* (2009) PERB Decision No. 2043-M, PERB ruled that the county's *unwritten* past practice of providing retiree medical benefits ripened into an implied term in the

employment agreement between the county and its employees. As such, the county was required to resort to the bargaining process if it wanted to reduce or eliminate that benefit prospectively from its active employees; unilateral reduction or elimination was a violation of the MMBA. (*Id.*)[4] A number of Court of Appeals decisions are in accord. (*See*, *e.g.*, *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802 [past practice "was sufficiently widespread and of sufficient duration to constitute an implied condition of employment."]; *International Assn. of Fire Fighters Union v. City of Pleasanton* (1974) 56 Cal.App.3d 959, 972 ["an existing and acknowledged practice" affecting conditions of employment has the same dignity as "an existing agreement or rule."].)

To summarize, the Civil Code and the precedents of this Court, the Court of Appeals, PERB, and federal courts analyzing contracts clause claims arising under California law, are all in accord: implied-in-fact contract rights and obligations arise in the context of public sector employment, just as they do in the private sector. As this Court observed in *Youngman*, the only possible exception to this rule is where a statute *forbids* a public entity to bind itself in this manner. As explained below, there is no such statutory exception in this case.

II. THERE IS NO STATUTE PROHIBITING COUNTIES FROM BINDING THEMSELVES TO IMPLIED TERMS RELATING TO RETIREMENT HEALTH BENEFITS.

The County contends that the statutes granting it authority to set the terms and conditions of employment for its employees—Article XI, section 1 of the California Constitution and section 25300 of the Government Code—also prohibit implied terms from arising in its employment agreements.[5] If the County is correct in this regard, then both the California Court of Appeal and PERB (the body with the authority and expertise to interpret and enforce public sector employment law) have erred *every time* they have ruled to the contrary. Indeed, if

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[4] PERB's decisions are entitled to considerable deference from the courts of this State. (*See California Teachers Association v. Public Employee Relations Board* (2009) 169 Cal.App.4th 1076, 1086.)

[5] The County attempted to limit the scope of its argument by contending that these statutes forbid implied terms relating to employee "compensation." However, both provisions treat *all* terms and conditions of public employment alike. Accordingly, if these statutes forbid implied compensation terms, they must also forbid implied terms related to *any* aspect of the employment relationship.

the County is correct, then neither the courts of this State nor PERB has *ever* answered the "implied-in-fact term" question correctly.

Moreover, the County's attempt to use these statutory authorizations as shields against implied-in-fact contract obligations is contrary to both the language and legislative purpose of those enactments. Article XI, section 1 of the California Constitution states that "[t]he governing body [of a county] shall provide for the number, compensation, tenure, and appointment of employees." The language of this grant is less restrictive than the Water Code provision that this Court examined in *Youngman*. (*Youngman*, 70 Cal.2d at 246-47 [irrigation district board granted authority to "employ agents and employees, prescribe their duties, and fix their salaries"].) If a grant of authority to "fix" employee compensation permits the formation of implied-in-fact salary terms, then a grant of authority to "provide for" compensation must do likewise.[6] Further, the legislative history behind Article XI, section 1 reveals that it was intended *not* to restrict county boards' power to set employment terms, or to affect the relationship between counties and their employees and employee unions. Rather, its purpose was to clarify the relationship between counties *and the State Legislature*, by establishing that the former had the power to set terms of employment for their workers. (*County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 285-86; *Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 774.)[7]

Government Code section 25300 restates Article XI, section 1's provision allowing county boards to "provide for" compensation and other terms and conditions of county employment. It further states that county boards "may" exercise their authority to provide for compensation and other terms of employment "by resolution of the board of supervisors as well as by ordinance." The County relies on this latter clause to contend that terms and conditions of county employment *must* be set forth in *express written provisions* of formal board legislation. This argument fails for a number of reasons.

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[6] Indeed, the phrase "provide for" suggests relative procedural *in*formality. (*Sturgeon v. County of Los Angeles* (2008) 167 Cal.App.4th 630, 652; *County of Sonoma v. Workers' Comp. Appeals Bd.* (1990) 222 Cal.App.3d 1133, 1141 n. 4.)

[7] "The courts must give statutes a reasonable construction which conforms to the apparent purpose and intention of the lawmakers . . . It is fundamental in statutory construction that courts should ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*Clean Air Constituency v. California State Air Resources Bd.* (1974) 11 Cal.3d 801, 813.)

First, the County's proposed reading of this clause would blow a gaping hole in this Court's holding in *City of Glendale*—that MOUs are contracts that should be interpreted according to the established tenets of contract interpretation. (*City of Glendale*, 15 Cal.3d at 334-38.) It also plainly conflicts with this Court's application of California's liberal parol evidence rule to the interpretation of MOUs, as well as its instruction that MOUs should be construed by reference to doctrines of interpretation of private sector CBAs. (*Id*.)

Second, the legislative history of section 25300 establishes that the Legislature did not intend to establish formal requirements for counties to follow in forming contracts with their employees. In fact, its purpose was precisely the opposite; the Legislature added the clause to clarify that the terms and conditions of county employment need *not* be set through the formal procedures required for a county to pass an ordinance. (*Dimon v. County of Los Angeles* (2008) 166 Cal.App.4th 1276, 1284; *see Clean Air Constituency*, 11 Cal.3d at 813.)

Indeed, in the parlance of municipal law, the phrase "by resolution" imposes no formal requirement whatsoever. Rather, "[a] resolution in effect encompasses *all actions of the municipal body* other than ordinances," and "resolutions, as distinguished from ordinances, *need not be, in the absence of some express requirement, in any set or particular form*." (*Id*. [emphasis added]; *see also City of Sausalito v. County of Marin* (1970) 12 Cal.App.3d 550, 565 ["The Legislature has been explicit concerning this distinction. It has exacted certain formalities in the enactment of an ordinance by the supervisors of a county . . . but not of their adoption of a resolution."] [citations and quotations omitted].) Here, section 25300 contains no "express requirement" that a board's "resolution" to set a term or condition of employment be in any particular form. Accordingly, to say that a board may set terms and conditions of employment "by resolution" is to say that a board may set terms or conditions of employment by taking "any action" to set terms or conditions of employment. (*Dimon*, 166 Cal.App.4th at 1284-85.) Had the legislature intended to establish formalities for the setting of the terms and conditions of County employment, it could have used the word "shall" instead of "may," it could have used "prescribe" instead of "provide for,"[8] and it could

[8] In the very same statute, the Legislature stated that county boards shall "prescribe" the compensation of all county *officers* but shall "provide for" compensation and terms and conditions of employment for county *employees.* (Govt. Code § 25300.) The use of "prescribe" and "provide for" is deliberate and significant; the former suggests a formal duty that must be exercised directly by the board itself; the latter suggests a less formal and technical process that, for example, permits more delegation. (*Sturgeon,* 167 Cal.App.4th at 652 ["provide

simply have included a requirement that terms of county employment be "expressly" set forth in written resolutions or ordinances. It did none of these things.

Finally, even if the phrase "by resolution" imposed some formal requirement, that requirement was met in this case. The Board established its policy and practice of subsidizing retiree health care *by formal resolution* in 1984, when it considered several alternative insurance rate-setting structures and chose the rate-pooling option, *knowing* it would result in retirees' insurance rates being subsidized by the County and in part by active employees. The Board went on to re-affirm that policy and practice of subsidizing retiree healthcare, *by formal resolution*, every year for the next 23 years. In addition to using its formal resolution process to establish and maintain the retiree medical insurance subsidy, the Board, *by formal resolution*, adopted dozens of MOUs during that period, knowing that the consistent practice under the MOUs was to provide employees with the retiree medical insurance premium subsidy upon retirement. Indeed, as early as 1991 the Board expressly and *by formal resolution* authorized its chief labor negotiator to go to the bargaining table and characterize the existing policy and practice of subsidizing retiree healthcare as a retirement health benefit, that (along with existing pension benefits and a proposed new retirement health benefit) formed a package of benefits that employees would receive during their retirement.

Given the lack of formality suggested by "may," "provide for," and "by resolution," and the Board's many formal resolutions subsidizing retiree health care, any requirements section 25300 imposes on the process by which counties reach agreements with their employees regarding terms of employment such as compensation have been satisfied in this case.

III. RETIREES HAVE A CONTRACTUAL RIGHT TO RECEIVE THE HEALTH BENEFITS THEY EARNED AS AN ELEMENT OF THEIR COMPENSATION.

This case presents the limited question of whether a retirement benefit that accrued to an employee during his or her active employment may be revoked—unilaterally and without compensation—*after* that employee retires. It does not require the Court to decide whether and to what extent an employer may reduce or remove *future* retirement health benefits from active employees (that is, before they retire), through collective bargaining or otherwise. Several courts have highlighted this distinction in the process of deciding the scope and nature of active employees' future rights. (*See San Bernardino Public Employees Assn. v.*

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for" permits governing body more leeway in delegation of power than "prescribe"]; *County of Sonoma*, 222 Cal.App.3d at 1141 n. 4 [same].)

City of Fontana (1998) 67 Cal.App.4th 1215, 1226 [discussing critical distinction between rights "of employment" and rights "of retirement" and expressly declining to address whether retirement health benefits could be altered by City]; *San Diego Police Officers' Ass'n v. San Diego City Employees' Retirement System* (9th Cir. 2009) 568 F.3d 725 [examining parties' course of dealing to hold that future retirement health benefits of *active* employees were not vested but instead were subject to bargaining; expressly noting that City's changes had been prospective only and did not affect current retirees].)[9]

The Ninth Circuit panel was correct to observe that there is no controlling opinion from this Court on the specific "vesting" question presented here—whether retired employees have a contractual right to receive the retirement *health* benefits they were promised during their active employment. In this case, the County's defense has focused on the first issue presented by this certification order—whether implied contract rights and duties arise in public employment. Accordingly, the issue of "vesting" was discussed only secondarily in the parties' briefs before the Ninth Circuit. REAOC would welcome the opportunity to submit additional briefing on this particular question, should the Court so desire. However, several principles critical to this analysis *are* settled in the case law of this State.

First, this Court has repeatedly held that public employees have a contractual right to receive the compensation they were promised in exchange for work performed. (*Olson v. Cory* (1980) 27 Cal.3d 532, 538 ["[P]ublic employment gives rise to certain obligations which are protected by the contract clause of the Constitution . . . [p]romised compensation is one such protected right."], *citing Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852-853.) Thus,

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[9] This distinction is not only central to the legal analysis; it has significant policy ramifications as well. To hold that retired employees have protected rights to continue to receive the health benefits they were promised during their active employment is *not* to handcuff municipalities to endless fiscal burdens or to leave them helpless to address "unfunded liability" issues. To the contrary, such a holding would leave government employers free at any time to address the *majority* of their future retiree healthcare costs, by striking new bargains with their current and future employees, while fulfilling their commitments to those employees who have already retired. Here, the County did strike new deals with its current (and future) employees regarding retirement benefits, but then went on to revoke the benefit unilaterally from its retirees, who were neither represented in nor protected by the collective bargaining process, and who received nothing in return.

a retiree's retirement health benefits are protected under the contracts clause if those benefits are properly considered an element of his or her deferred compensation.

Second, this Court has observed that retirement health benefits—like pension benefits—*are* a form of deferred compensation, which "do not derive from the beneficence of the employer, but are properly part of the consideration earned by the employee." (*Suastez v. Plastic Dress-Up Co*. (1982) 31 Cal.3d 774, 780.) The United States Supreme Court has reached the same conclusion: "[t]o be sure, the future retirement [health] benefits of active workers are part and parcel of their overall compensation." (*Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburg Plate Glass Co.* (1971) 404 U.S. 157, 180-81.) Accordingly, once an employee retires, "under established contract principles" such benefits "may not be altered without the pensioner's consent." (*Id.* at 181 n. 20.)

PERB has likewise acknowledged that retirement health benefits are an element of deferred compensation,[10] as have a number of federal courts[11] and the supreme courts of several States.[12] Indeed, even the County itself admits on its own website that its retirement health benefits, including the retiree premium subsidy here at issue, "constitute an important component of *the total*

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[10] *California School Employees Association v. Madera Unified School District* (2007) PERB Decision No. 1907 at 2-3 ["PERB decisions have held that future retirement benefits for employees are . . . part of an employee's compensation package. . . [e]mployees can take their compensation as current wages, present health benefits, or future health/pension benefits."], *citing Pittsburg Plate Glass*.

[11] *See*, *e.g.*, *IBEW v. Citizens Telecommunications Co*. (9th Cir. 2008) 549 F.3d 781, 786-87 [citing *Pittsburg Plate Glass* to conclude that "future retirement benefits are part and parcel of an active employee's compensation"]; *Maurer v. Joy Technologies* (6th Cir. 2000) 212 F.3d 907, 915 [retirement health benefits are "typically understood as a form of delayed compensation or reward for past services"].

[12] *See Navlet v. Port of Seattle* (S.Ct. Wash. 2008) 194 P.3d 221, 232 ["In the reality of the employment relationship, welfare [health] benefits make up a part of the core compensatory benefits package offered in exchange for continued service."]; *Duncan v. Retired Employees of Alaska, Inc.* (S.Ct. Alaska 2003) 71 P.3d 882, 887; *Roth v. City of Glendale* (S.Ct. Wis. 2000) 614 N.W.2d 467, 472.

compensation package the County offers *to attract and retain the skilled workforce . . .*"[13]

Third, the Court of Appeal and California Attorney General have held that a public employer may not reduce or eliminate retirement health benefits of retired employees, absent "constitutional justification" (*e.g.*, the reduction is made in response to a public emergency and is of limited duration). (*Thorning v. Hollister School District* (1992) 11 Cal.App.4th 1598, 1603-05, *citing* 67 Ops.Cal.Atty.Gen. 510 (1984).) The *Thorning* court agreed with the Attorney General's conclusion that retirement health benefits are an inducement to take and remain in employment and are properly considered an element of employee compensation. (*Id.*)

Finally, PERB has repeatedly held that, because an active employee's *future* retirement health benefits are contractually-protected elements of deferred compensation, they cannot be reduced or eliminated except through the bargaining process. (*See Sacramento County Attorney's Association*, PERB Decision No. 2043-M; *California School Employees Association*, PERB Decision No. 1907 at 2-3.) It would make little sense to conclude that (1) an active public employee has contractually-protected interests in his or her future retirement benefits—rights that may not be abridged by the employer except through negotiation—but (2) the same employee loses all rights to those benefits the moment he or she retires and begins to receive them. (*Cf. Erie County Retirees' Association v. County of Erie* (3d Cir 2000) 220 F.3d 193, 210 [ADEA protections against age discrimination regarding retirement benefits would be meaningless if those protections ended the moment an employee retires: "It is inconceivable that Congress would in the same breath expressly prohibit discrimination in employee benefits, yet allow employers to discriminatorily deny or limit post-employment benefits to former employees at or after their retirement, although they had earned those employee benefits through years of service with the employer."]; *City of Glendale*, 15 Cal.3d at 335 ["Why negotiate an [MOU] if either party can disregard its provisions? What point would there be in reducing it to writing, if the terms of the contract were of no legal consequence? . . .*The procedure established by the act would be meaningless if the end-product, a labor-management agreement ratified by the governing body of the agency, were a document that was itself meaningless*."] [emphasis added].)

For these reasons, REAOC respectfully requests that this Court accept certification, re-state the certified question, and rule that (1) counties and their employees may form implied-in-fact contract rights and duties respecting

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[13] *See* County of Orange Public Annual Financial Report (2007), at pp. 2, 8 [ERVI 1226, 1233].

retirement health benefits; and (2) retirement health benefits may not be reduced or eliminated from retired employees.

Sincerely,

MOSCONE EMBLIDGE & SATER LLP

G. Scott Emblidge

CERTIFICATE OF SERVICE

I, OMAR LATEEF, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed with Moscone Emblidge & Sater LLP, 220 Montgomery Street, Suite 2100, San Francisco, CA 94104.

On July 19, 2010, I served:

Letter dated July 19, 2010, to The Honorable Justices, California Supreme Court, Re: Retired Employees Association of Orange County, Inc. v. County of Orange, No. 09-56026, Letter regarding the Ninth Circuit Court of Appeals' June 29th, 2010 Order Certifying Question to California Supreme Court

on the interested parties in said action, by placing a true copy thereof in sealed envelope(s) addressed as follows and served the named document in the manner(s) indicated below::

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☒ **BY MAIL:** I caused true and correct copy(ies) of the above documents to be placed and sealed in envelope(s) addressed to the addressee(s) named above and, following ordinary business practices, placed said envelope(s) at the Law Offices of Moscone Emblidge & Sater LLP, 220 Montgomery, Ste. 2100, San Francisco, California, 94104, for collection and mailing with the United States Postal Service and there is delivery by the United States Post Office at said address(es). In the ordinary course of business, correspondence placed for collection on a particular day is deposited with the United States Postal Service that same day.

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

Executed July 19, 2010, at San Francisco, California.

_____

OMAR LATEEF