SUPREME COURT OF THE STATE OF CALIFORNIA
No. S184059

RETIRED EMPLOYEES ASSOCIATION OF ORANGE COUNTY,
Petitioner,

vs.

COUNTY OF ORANGE,
Respondent.

After Order Of This Court Accepting Certification Of Question From The United States Court of Appeals For The Ninth Circuit

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PETITIONER'S MOTION FOR CALENDAR PREFERENCE

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I. INTRODUCTION AND PROCEDURAL BACKGROUND

Effective January 1, 2008, Respondent County of Orange ("the County") unilaterally eliminated a critical retirement health benefit from its 6,000 retired employees and their dependents. Specifically, for 23 years (from 1985 through 2007), the County had maintained a retirement health benefits program whereby it permitted employees to continue to participate in County-sponsored health insurance plans after they retired, and it substantially subsidized the premiums those retirees paid to remain enrolled in those plans. (*See Orange County Employee Assoc. v. County of Orange* (1991) 234 Cal.App.3d 833, 837-38 [describing Orange County's retiree premium subsidy as part of its "comprehensive [health insurance] plan available to active employees and retirees"].) By 2007, that retiree premium subsidy represented on average well more than $3,000 per year in cash value to each retiree—a significant amount by any measure, but especially critical to a population of retirees whose average annual pension income in 2007 was less than $28,000.

In 2005 the County decided it wanted to eliminate the retiree premium subsidy. It was required to, and in fact did, negotiate with its employee unions to eliminate active employees' future rights to this premium subsidy. In exchange for that agreement the County provided significant increases in immediate cash

compensation in the form of wage increases. But the County then simply revoked the benefit unilaterally (that is, without negotiation or compensation) from those employees who had already retired, and were therefore neither represented by the employee unions nor otherwise able to bargain to protect their rights to this benefit.

Petitioner Retired Employee Association of Orange County ("REAOC") filed this lawsuit in November 2007 in the United States District Court for the Central District of California, seeking a declaration that the County's confiscation of this retirement benefit violates the contracts clauses of the federal and California Constitutions. In December 2008, REAOC and the County argued cross-motions for summary judgment. Six months later, in June 2009, the District Court granted the County's motion and denied REAOC's, holding that California law prohibited implied contract terms relating to compensation in public employment.

REAOC appealed to the United States Court of Appeal for the Ninth Circuit, and requested an expedited appeal schedule on the grounds that (1) irreparable financial and health injuries to REAOC's members continued to accrue every month; and (2) the age of County retirees meant that approximately 25 County retirees die every month while awaiting judicial relief. The Ninth Circuit found good cause for expediting the appeal and, over the County's objection, granted REAOC's request. It heard argument on June 10, 2010.

At the oral argument, the panel opined that California law was unsettled on the question whether binding implied terms relating to compensation (such as retirement benefits) may arise in public employment. The panel promptly requested that this Court accept certification of that central question. This Court accepted certification by Order dated August 18, 2010.

II. ARGUMENT

Rule 8.240(e) provides that this Court may "grant a motion for [calendar] preference that is supported by a showing that satisfies the court that the interests of justice will be served by granting this preference." That requirement is plainly met here, because the County's elimination of the retiree premium subsidy has caused harm that is (1) severe; (2) growing worse; and (3) irreparable for a large number of the retirees whose interests are at stake in this litigation.

The retiree premium subsidy that the County revoked in 2008 was designed to, and for 23 years did, have the effect of reducing insurance premium inflation for the older participants in County-sponsored health plans, especially those retirees who were not eligible for Medicare and therefore depended on County-sponsored plans as their sole or primary medical insurance. For example, during the final four years that the premium subsidy was in effect (2004 through 2007), premiums for non-Medicare retirees increased by just over 4% per year in the County's largest retiree plan, the "Wellwise" PPO plan. The average annual

premium was $11,400 in 2004 and $13,800 in 2007. (Declaration Of Michael Brown In Support Of Motion For Calendar Preference ["Brown Decl."], ¶ 2.) By contrast, during the four years since the County stopped subsidizing retiree premiums in 2008, premium inflation for non-Medicare retirees in that plan has increased fivefold, to 22% per year. The annual premium in 2007 was $13,800; in 2011 it will soar to $24,000. (Declaration Of Gaylan Harris In Support Of Motion For Calendar Preference ["Harris Decl."], ¶ 2.) At this rate, without the retiree premium subsidy, premiums for this group nearly double every four years. Notably, during the same period, premiums for active County employees in the Wellwise plan have been practically unchanged. (*Id.*) In other words, these retirees are bearing a massive and ever-growing financial burden that for 23 years prior to 2008 was spread among *all* insurance plan participants (active and retired employees alike).

Retirees' pension incomes are modest to begin with (less than $30,000 per year on average), and are subject to a maximum annual "COLA" increase of less than 3% per year. (Brown Decl., ¶ 3.) Accordingly, the drastic increase in the rate of medical insurance premium inflation is causing retirees' premiums to devour their pension income at an alarming rate. In 2007, the $13,800 average annual premium for non-Medicare retirees in the Wellwise plan represented approximately 50% of the average annual pension income of a County retiree. But

in 2011, the $24,000 average annual premium for this same plan will represent approximately 80% of that income. If this trend continues, premiums for non-Medicare retires in this plan will *surpass* total retiree pension income by 2013.[1]

Of course, the financial statistics tell only part of the story. To cope with the extra expense of unsubsidized premiums, retirees forego other necessities, deplete their savings, shift into "catastrophic" health plans that offer lower premiums but much higher deductibles and copayments, and/or drop coverage entirely. (*See* Brown Decl., ¶ 4 [attaching declarations filed in the Ninth Circuit Court of Appeals in support of REAOC's motion to expedite].)

The financial and other harms caused by the County's elimination of this long-standing retirement benefit continue to multiply *every day* that this litigation drags on. Much of this harm will be beyond redress should REAOC ultimately prevail in this litigation. (*See LaForest v. Former Clean Air Holding Co.* (2nd Cir 2004) 376 F.3d 48, 55-57 [elimination of health insurance benefits from retired union workers causes "irreparable harm" because (1) most live on modest fixed incomes; (2) a large percentage are or will get sick and require medical care; (3) medical insurance is a necessity because medical care is expensive; and (4) many

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[1] The explosion in premium inflation for non-Medicare retirees has affected all three County-sponsored retiree health plans. Since 2007, premiums shot up in the two other retiree plans by 90% and 105%, respectively. (Harris Decl., ¶ 2.) Premiums for active employees in those plans rose by just 22% and 29% during that period, respectively. (*Id.*)

retired employees will have to forego other necessities to cover lost benefit]; *Leschniok v. Heckler* (9th Cir. 1983) 713 F.2d 520, 524 [retroactive Social Security benefits award cannot make elderly, infirm plaintiffs whole for the harm suffered while benefits were denied].)

Further, nearly 800 members of the group of retirees who were harmed by the County's action have died since this litigation commenced, and 25 more die each month that the case drags on. (Brown Decl., ¶ 5.) "Make-whole" relief is obviously impossible for this ever-growing group of retirees. (*Strobel v.Morgan Stanley Dean Witter* (S.D. Cal. 2007) 2007 WL 1238709 at *3 [delay in reaching final resolution of claims "can be a particularly irreparable harm to an elderly individual"]; Rule of Court 8.240(a) [court should grant calendar preference where party is more than 70 years old and will suffer health effects from failure to grant preference]).

III. CONCLUSION

For these reasons, REAOC respectfully requests that this Court grant its request for calendar preference for the hearing on the certified question.

Dated: August 31, 2010

Respectfully Submitted,

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By: _____s/_____
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