IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Case No. S184059

RETIRED EMPLOYEES ASSOCIATION OF ORANGE COUNTY, INC.,
Plaintiff and Petitioner

v.

COUNTY OF ORANGE,
Defendant and Respondent.

After Order Of This Court Accepting Certification Of Question From the United States Court of Appeals For The Ninth Circuit
(Case No. 09-56026)

APPLICATION TO FILE AMICUS CURIAE BRIEF AND PROPOSED BRIEF OF AMICUS CURIAE IN SUPPORT OF PLAINTIFF AND PETITIONER RETIRED EMPLOYEES ASSOCIATION OF ORANGE COUNTY, INC.

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INTRODUCTION

Pursuant to Rule 8.520, subdivision (f) of the California Rules of Court, the California Retired County Employees Association ("CRCEA"), Sonoma County Association of Retired Employees ("SCARE"), and the Retiree Support Group of Contra Costa County ("RSG") respectfully request leave to file the attached brief in support of Petitioner Retired Employees Association of Orange County ("REAOC"). The proposed brief is authored in whole by the undersigned counsel for CRCEA, SCARE, and RSG. No other person or entity has made monetary contributions intended to fund the preparation or submission of the brief.

STATEMENT OF INTEREST AND EXPLANATION OF HOW THIS BRIEF WILL ASSIST THE COURT

CRCEA is a coalition of associations of retired county employees from the 20 counties with retirement systems formed under The County Retirement Law of 1937.[1] CRCEA was incorporated as a non-profit mutual benefit organization 20

[1] These are: Alameda County Retired Employees Association; Retired Employees of Alameda County; Contra Costa County Retired Employees Association; Fresno County Retired Employees Association; Imperial County Retired Employees Association; Retired Employees of Kern County; Retired Employees of Los Angeles County; Marin County Retired Employees Association; Association of Mendocino County Retired Employees; Retired Employees of Merced County; Retired Employees Association of Orange County; Sacramento County Retired Employees Association; Retired Employees of San Bernardino County; Retired Employees of San Diego County; San Joaquin County Retired Employees Association; San Mateo Retired Personnel Association; Retired Employees of Santa Barbara County; Sonoma County Association of Retired

years ago, and provides central coordination through which the objectives of the 20 local county associations may be advanced. The CRCEA is vitally interested in protecting the retirement health benefits of retirees from California counties.

SCARE and RSG are California non-profit mutual benefit corporations. These organizations represent retired employees from their respective counties and are dedicated to promoting and protecting the welfare and interests of retired employees, including the protection of retiree benefits. The retiree organizations represent both former union and non-union public employees.

The public employee retiree groups write to impress upon this Court the gravity and importance of the issue before this Court to retired public employees across the state. Retired employees in Sonoma, Contra Costa, and many other counties dedicated significant portions, if not all, of their careers, to public service based on the promise of retiree health care. Should Orange County's attempt to repudiate its decades of promises to its retirees be successful, tens of thousands, if not hundreds of thousands, of retirees across the State may face the prospects of immediate reductions in their medical benefits and/or being handed the burden of meeting the rising cost of health care coverage in the future. Indeed, both Sonoma and Contra Costa counties have recently reduced their retirees' medical benefits.

Employees; Retired Employees of Stanislaus County; Tulare County Retired

Amici also write to highlight three points that they believe are not fully addressed in the parties' briefs. First, Orange County's argument that counties cannot enter into implied contracts or enter into contracts with implied terms would usher in a drastic change in California law, both for retirees who, as employees, worked under memoranda of understanding ("MOUs"), and for those who did not. As Amici explain in the attached brief, the County's view of the law, if accepted, would negate California Civil Code § 1428 and case law establishing that governmental entities may enter into contracts in all of the same ways as private parties. It also would run counter to decades of California law recognizing that governmental entities can and are bound by the implied promises they make to their employees.

Second, Amici address a critical issue of contract interpretation that arises whether the Court finds that a contract may be implied or, alternatively, finds that a contract must be the subject of legislative action such as approval of an MOU or adoption of a salary resolution. That question is whether specific vesting or durational language must be present in order to imply a contract containing vesting rights. Although this issue is not explicitly stated in the question certified to and accepted by this Court, Amici believe that it is inextricably interwoven with the certified question. In the attached brief, Amici argue that if an express or

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Employees Association; Ventura County Retired Employees Association.

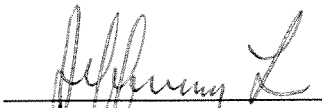
implied contract does not include language explicitly vesting retiree benefits and does not include language explicitly limiting the duration of retiree medical benefits, then courts must review parol evidence to determine whether the parties intended to create vested retiree medical benefits for individuals who retired during the term of the agreement. Third, Amici argue that the discretion granted in California Government Code Section 31691 *et seq.*, which Orange County argues absolves it of any contractual duties to uphold its promises of retiree health benefits, applies only to benefits explicitly granted pursuant to that section.

CONCLUSION

For the foregoing reasons, CRCEA, SCARE, and RSG respectfully request that the Court accept the attached brief for filing in *Retired Employees Association of Orange County v. County of Orange.*

Dated: December 29, 2010

LEWIS, FEINBERG, LEE, RENAKER & JACKSON, P.C.



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I. Introduction

Amici California Retired County Employees Association ("CRCEA"), Sonoma County Association of Retired Employees ("SCARE"), and the Retiree Support Group of Contra Costa County ("RSG") submit this brief in support of the Retired Employees Association of Orange County ("REAOC"). CRCEA, SCARE, and RSG represent both individuals who were union members and those who were not during their careers in public service. While this Court is only faced with the facts of the case before it, the impact of its decision will be great; many California counties may be poised to follow Orange County's lead in cutting retiree medical benefits if this Court gives them the green light to do so.

Indeed, after decades of paying all or substantially all of the cost of medical coverage for retirees and their dependents, Sonoma County recently slashed its contribution to a maximum of $500 per month, regardless of family size and despite the fact that elderly retirees are of limited income and have little or no ability to absorb the additional cost of benefits. Sonoma County's action is the subject of *Sonoma County Association of Retired Employees v. Sonoma County*, Case No. 09-4432 (U.S.D.C., N.D. Cal.). The case was recently dismissed based in part on the court's conclusion that California law does not recognize implied contracts for retiree benefits, the very issue before this Court. A notice of appeal

was filed with the U.S. Court of Appeal for the Ninth Circuit on December 22, 2010.

Similarly, Contra Costa County recently froze the amount of its contribution for retiree medical coverage, thereby reversing its decades-long practice of paying a high percentage of its retirees' medical insurance premiums, and placing the entire cost of rising medical care costs on its retirees.[1]

In addition to drawing attention to the potential impact of the Court's decision on retired public employees across the state, this amicus brief seeks to highlight three points. First, the conclusion argued by Orange County, that counties cannot enter into implied contracts or enter into contracts with implied terms, would usher in a drastic change in California law, both for retirees who, as employees, worked under memoranda of understanding (MOUs), and for those who did not. Second, consistent with California and federal precedent, the question of whether promised retiree medical benefits survive the termination of a public employment contract must be resolved by resort to parol evidence where the contract contains neither express vesting language nor clear duration-limiting language in the contractual provision providing for such benefits. Third, California Government Code Section 31691 *et seq.*, did not expressly or

[1] RSG filed a claim with Contra Costa County under California Government Code Section 901, *et seq.*, which was denied. RSG and the County have entered into an agreement tolling the statute of limitations on the retirees' claims.

impliedly negate the earlier-enacted and broader Government Code Section 53201 *et seq.*, which specifically confers on counties the authority to offer, *inter alia*, retiree medical benefits. The provision in Section 31692 that allows counties to reduce or eliminate benefits is specific to benefits adopted explicitly pursuant to Section 31691. It does not provide carte blanche for counties to reduce or eliminate all retiree benefits.

As noted above, the issue before this Court is timely. The State and its local governments face serious financial issues. Accrued liabilities for post-employment benefits are certainly a legitimate concern. As a result, in 2006, Governor Arnold Schwarzenegger announced the creation of a bipartisan Public Employee Post-Employment Benefits Commission (the "Commission") to study and make recommendations regarding retiree pension and medical benefits. Although he recognized that the financial issues were serious, he also recognized that "[p]romised pensions and health benefits are vitally important to state workers and their families, . . . [a]nd they are obligations that must – and will – be paid by the government." Public Employee Post-Employment Benefits Commission, *Funding Pensions & Retiree Health Care for Public Employees* (2007) ("Commission Report"), *available at* http://www.pebc.ca.gov/images/files/final/080107_PEBCReport2007.pdf, last visited December 20, 2010, at 189. In his proclamation creating the Commission,

he also recognized that retiree health care benefits "serve the public interest by attracting and retaining a workforce that protects the health and safety of the State." *Id.* at 1-2 (Executive Order S-25-06).

Perhaps more important than what the Governor said before the Commission undertook its task is what the Commission reported back to the State. The Commission found that retiree health benefits "are just as important as are pension benefits to the state's workers and retirees . . . [and] are part of deferred compensation packages used to attract and retain qualified individuals for government service." *Id.* at 3. Consistent with this recognition by the Commission, a recent report by the Center for State and Local Government Excellence found that, education and other factors being equal, public employees are not compensated as highly as private employees even after their more generous benefit packages are taken into account. Center for State and Local Government Excellence, *Out of Balance? Comparing Public and Private Sector Compensation Over 20 Years* (2010), *available a*t www.slge.org, last visited Dec. 17, 2010, at 9, 15-16. Because of the discrepancy in pay between private and public sector jobs, the historically richer benefit packages in the public sector have been critical to attracting qualified individuals to public service.

That conclusion is consistent with the pronouncements of this and other courts in this State. *See Carman v. Alvord*, 31 Cal. 3d 318, 325 n.4 (1982)

("Pensions are a government obligation of great importance. They help induce faithful public service and provide agreed subsistence to retired public servants who have fulfilled their employment contracts."); *Thorning v. Hollister Sch. Dist.*, 11 Cal. App. 4th 1598, 1606-07 (1992) (finding that the promise of post-retirement medical benefits was a significant inducement for retention of employees in that case); *see also San Joaquin County Employees' Ass'n v. County of San Joaquin*, 39 Cal. App. 3d 83, 88 (1974) (stating that the payment by governmental agencies of "all or a portion of an employee's medical premiums" is necessary in order for the government to compete with private sector employees in attracting "the most competent employees").

While public entities in the State face significant financial pressures, they cannot and should not be allowed to relieve such pressure on the backs of their retirees. Those retirees were drawn to county employment by the promise of retiree health benefits; those retirees committed their careers to public service and accepted lower pay in the public sector on the promise, *inter alia*, of retiree health benefits; those retirees are now living on fixed incomes and, in many cases, cannot afford to pay increased health care costs; those retirees need health care more than ever as they age. As the Commission recommended, there are many ways to fund retiree health benefit obligations without making the drastic changes that Orange County did. *See* Commission Report, *available at*

http://www.pebc.ca.gov/images/files/final/080107_PEBCReport2007.pdf, last visited December 20, 2010, at 3, 91. These other options, such as prefunding, were not only recommended by the Commission, but they are also more equitable given that, as the Commission found, "[t]he importance of these benefits in the eyes of workers and retirees cannot be overstated." *Id.* at 3. At the end of the day, it is simply "devastating to individuals when health care benefits are changed after they have retired, since the cost of health services can easily deplete a retiree's income." *Id.*

II. Public Entities Can Enter Into Implied Contracts And Contracts With Implied Terms.

The County argues that public entities cannot enter into implied contracts or contracts with implied terms. (Respondent's Answer Brief ("Ans. Brf.") at 14-26.) The County also argues that public entities can only set compensation by legislative act. (*Id.*) Both arguments are incorrect.

A. A Public Entity May Enter Into Implied Contracts Regarding Employee Compensation.

Orange County argues that because a number of California cases regarding public pension rights arise from legislation enacted by the employer's governing body, such rights can *only* be conveyed by legislative act, and not by contract. (Ans. Brf. at 23.) Amici join REAOC's response on this issue (*see* Petitioner's Reply Brief ("Rep. Brf.") at 28-30), and also write to emphasize that the cases

relied upon by Orange County do not preclude the creation of express or implied contractual obligations between represented or unrepresented employees and their public entity employers.

1. Public Entities May Incur Obligations Either By Operation of Law *Or* By Otherwise Contracting For Them In The Same Manner as Private Parties.

California Civil Code § 1428 states that "[a]n obligation arises either from: One--The contract of the parties; or, Two--The operation of law." Cal. Civ. Code § 1428 (emphasis added). The statute on its face makes no exception for governmental entities. As a result, it applies equally to contracts with public parties and to contracts with private parties. *See Cal. Teachers Ass'n. v. Cory*, 155 Cal. App. 3d 494, 504 n.7 (1984) ("*CTA*"). In *CTA*, the Third District Court of Appeal, relying on Civil Code § 1428, explained that legislatures can enter into contracts like ordinary individuals *or* by law through properly enacted statutes. *Id.* Moreover, while ordinary legislation "is subject to revision or repeal in the discretion of the Legislature," a contract entered into by a state with its citizens creates "an obligation which the Legislature cannot impair by subsequent enactment." *Id.*

Given that Civil Code § 1428 does not exempt public entities from contracting in the same ways that private parties may contract, and that private parties may enter into implied contracts, it follows inexorably that public entities

may enter into implied contracts. Consistent with this conclusion, this Court has recognized such contracts. *See Youngman v. Nev. Irrigation Dist.*, 70 Cal. 2d 240, 246-47 (1969) (holding that a California public entity can enter into implied or express contracts for employee compensation and that plaintiff adequately pled an implied contract with a public entity employer); *see also Kashmiri v. Regents of the Univ. of Cal.*, 156 Cal. App. 4th 809, 828-30 (2007) (holding that an implied contract existed between students and their public university).

Moreover, this Court and others have recognized that an individual's performance of his or her job as a public employee may create contractual rights, including rights to post-retirement benefits, despite the absence of a signed bilateral agreement. Thus, in *Betts v. Board of Administration*, 21 Cal. 3d 859, 863 (1978), this Court stated that "[a] public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment." *See also Claypool v. Wilson*, 4 Cal. App. 4th 646, 661 (1992) (quoting *Betts*, 21 Cal.3d at 863-64).

In *CTA*, the Court of Appeal explained that a state statute may be the "'equivalent of an offer upon condition, and upon the performance of the condition by any county the offer [will become] a promise, and binding as such upon the state.'" 155 Cal. App. 3d at 505 (quoting *San Luis Obispo County v. Gage*, 139 Cal. 398, 407-08 (1903)). Therefore, "under ordinary principles of

contract law a bargain may be sealed by performance with knowledge of the offer." *Id.* at 507 (relying on Rest. 2d Contracts, § 50(2) ("Acceptance by performance requires that at least part of what the offer requests be performed or tendered and includes acceptance by a performance which operates as a return promise").[2] Although the contract at issue in *CTA* was one offered by statute, given Civil Code § 1428, there can be no difference if the offer is made in a manner other than by formal legislative action; e.g., if a county makes written and/or oral promises of retiree medical benefits in order to recruit and retain employees, and those employees accept by rendering their services to the county, a contract is formed and is binding on the county. *See, e.g., Kashmiri*, 156 Cal. App. 4th at 829 (holding that "students' conduct when they accepted the University's offer of enrollment" created an implied contract); *see also* Section B-1, *infra*.

Respondent argues that *CTA* and two other similar cases – *Valdes v. Cory*, 139 Cal. App. 3d 773 (1983) and *Claypool*, 4 Cal. App. 4th 646 – stand for the proposition that a public entity may grant retiree health care only through legislative act. (*See* Ans. Brf. at 23.) This argument reads these cases far too

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[2] It is black letter law that "An offer may invite or require acceptance to be made by an affirmative answer in words, or by performing or refraining from performing a specified act . . . . Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances." Rest. 2d Contracts § 30.

broadly; indeed, it reads them so broadly that it would negate Civil Code § 1428. None of these cases stand for the proposition that pension rights or other post-employment benefits must "arise *only* from legislation enacted by the employer's governing body" as Respondent argues. (Ans. Brf. at 23 (emphasis added).) Instead, these cases treat the statutory grant of benefits as a contract *despite* the fact that the promise is contained in a statute. *CTA*, 155 Cal. App. 3d at 505-06 (recognizing that a pension statute created a contractual obligation); *Valdes*, 139 Cal. App. 3d at 787 (same); *Claypool*, 4 Cal. App. at 660 (taking, as its starting point, that the pension statutes at issue created "contractual rights which may not be altered except by replacement with a program establishing comparable benefits").

To read the cases as Respondent suggests would render Civil Code § 1428 meaningless as applied to governmental entities; i.e., it would limit governmental contracts to those created by operation of law. Obviously, such a reading must be incorrect. *See* Cal. Civil Code § 1635 ("All contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided in this Code."). In short, *CTA*, *Valdes*, and *Claypool* do not and cannot establish the rigid rule of law argued by the County that retiree health benefits can only be

granted by legislation passed by the County Board of Supervisors. (*See* Ans. Brf. at 14-26.)[3]

2. The Principle That a Contract Entered Into By a Public Entity May Not Conflict With a Statute Does Not Limit Contracts to Those Created by Statute.

The County argues that a line of court of appeal cases starting with *Markman v. County of Los Angeles*, 35 Cal. App. 3d 132 (1973), precludes a governmental entity from entering into an implied contract for post-employment benefits. (Ans. Brf. at 45.) However, *Markman* and its progeny simply stand for the proposition that a public entity cannot enter into a contract that *conflicts* with a statute or ordinance that already regulates the exact compensation at issue in the alleged contract. *See, e.g., Markman*, 35 Cal. App. 3d at 133-34 (holding that a Los Angeles deputy sheriff couldn't recover overtime pay because a Los Angeles County ordinance expressly stated that he either had to take commensurate time off or receive prior authorization for paid overtime, neither of which he had done).[4] Many of the cases cited by the County on this point relate to

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[3] Furthermore, as discussed in section B.1. below, all three cases recognize that even a contract for pension benefits that arises from a statute may carry with it implied obligations. *See Valdes*, 139 Cal. App. 3d at 787; *CTA*, 155 Cal. App. 3d at 506; *Claypool*, 4 Cal. App. 4th at 670.

[4] *See also City of S.D. v. Milotz*, 46 Cal. 2d 761, 766-67 (1956) (holding that a court reporter who did not file his transcripts for felony cases within the statutorily-required timeline was subject to the statutory monetary punishment for noncompliance); *Ass'n for L.A. Deputy Sheriffs v. County of L.A.*, 154 Cal. App. 4th 1536, 1549 (2007) (holding that Los Angeles County Deputy Sheriffs were

compensation for civil service positions. In each case, the salary for the civil service position at issue was closely prescribed by statute and could not be "circumvented by purported contracts in conflict therewith." *Martin v. Henderson*, 40 Cal. 2d 583, 586-87, 590-91 (1953) (quoting *Boren v. State Pers. Bd.*, 37 Cal. 2d 634, 641 (1951)) (holding that State highway patrol officers claiming overtime compensation were not entitled to it when the state Civil Service Act and State Personnel Board rules set compensation and hours of work and did not provide for it); *see also Jarvis v. Henderson*, 40 Cal. 2d 600, 606-07 (1953) (holding that a State highway patrol officer claiming overtime compensation was not authorized to receive such payment because his civil

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only able to cash out their unused vacation time as was allowed under express provisions of the County Code and memoranda of understanding, and holding that department policies that conflicted with the express Los Angeles County Code provisions were invalid); *City of L.A. v. L.A. Bldg. & Constr. Trades Council*, 94 Cal. App. 2d 36, 46-47 (1949) (stating "Likewise, to the extent that the conditions of employment commonly arranged by contract are covered by the provisions of the city charter, those provisions are controlling and neither the board of water and power commissioners nor any other city officers, may deviate therefrom by contract."); *McAuliffe v. Kane*, 54 Cal. App. 2d 288, 291-92 (1942) (holding that a Justice of the Peace was entitled to the salary set by statute at the time he accepted office, not the increased salary set by statute after he was already in his position because the State Constitution and County charter prohibit an increase in salary of a "township officer" after he is elected and during his term of office); *Vogel v. White*, 134 Cal. App. 252, 254 (1933) (holding that a chief engineer of the state harbor commission was only entitled to recover the salary that was explicitly set forth in his contract because "[a]n officer who accepts an office at a fixed salary or compensation is deemed to undertake to perform the duties thereof for such stipulated salary, though it be inadequate; and

service salary was fixed by statute and rule of the State Personnel Board and could not be altered, nor could additional rights to salary be created when such rights were not provided for within the statutory scheme).[5]

Markman does state that the "terms and conditions relating to employment by a public agency are strictly controlled by statute or ordinance, rather than by ordinary contractual standards." 35 Cal. App. 3d at 134. However, in the context of the facts and issue in the case, that language has a far more limited meaning than that suggested by Orange County. In that context, the statement means no more than the following: *when* the terms and conditions of employment by a public agency are strictly controlled by statute, ordinary contractual standards do not apply. To the extent that this dictum from *Markman* can be said to have broader meaning, it is in conflict with Civil Code § 1428 and wrong.

B. A Public Entity May Enter Into Implied Contracts For Post-Employment Benefits Unless Statutorily Prohibited From Doing So.

As explained above, a public entity may enter into an *implied* contract so long as no statute expressly prohibits it. (*See* Petitioner's Opening Brief ("Op.

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if the proper authority increases his duties by the addition of others germane to the office the officer must perform them without extra compensation").

[5] Note, however, that the Civil Service law does not limit any powers conferred on any county by charter or the California Constitution, including the power to provide for compensation of employees. *See* Cal. Govt. Code § 31101 ("This part does not limit any powers conferred on any county by charter or any powers

Brf.") at 33-43; Rep. Brf. at 21-29). This principle applies equally to contracts for post-employment benefits.

1. Counties May Enter Into Implied Contracts For Post-Employment Benefits.

Were the Court to recognize an implied contract or implied contract terms in this case, as Amici urge it to do, it would not be the first time that a court in this State found that post-employment benefits were granted impliedly. *See Claypool*, 4 Cal. App. 4th at 670 (recognizing that "[t]his court implied contractual obligations in *Valdes v. Cory* and *California Teachers Assn. v. Cory* which constrained the administration of PERS and the Teachers' Retirement Fund," although finding there was no implied contract on the facts before it).

In *Valdes*, 139 Cal. App. at 785, 787 & n.6, the Court of Appeal determined whether a contractual obligation existed by looking to the longstanding policies and procedures that established the employer's pension contribution rate, the statute's language that evinced an "implicit legislative acknowledgment of the state's continuing obligation," the statutory provisions that "manifest[ed] an intent that periodic employer contributions [would] not be altered," and the state's conduct and conformity therewith, including pamphlets it distributed to state employees on the issue. In short, based on all of these factors,

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conferred on boards of supervisors of counties by subdivision (b) of Section 1 or Section 4 of Article XI of the California Constitution.")

not just an express statutory provision, it held that there was an *implied* contractual obligation to continue to pay the previously established level of contributions to the retirement system absent actuarial input stating that the rate should be different. *Id.* at 787. This *implied* obligation arose because the petitioners had an *implied* vested right in a contribution rate established through sound actuarial principles and the legislature could not, therefore, unilaterally or randomly act to decrease its contributions. *Id.*

In *CTA*, the Court of Appeal held that despite the State's arguments to the contrary, a contractual obligation that was not express could be implied. 155 Cal. App. 3d at 506 ("Given this commitment to permanency of funding and the critical importance which funding bears to the capacity of the state to fulfill the underlying contractual promise to pay the pensions, we *imply* a promise of funding in exchange for the valuable services rendered by the state's teachers.") (emphasis added).

Just as with express contracts between a public entity and an individual, an implied promise conveyed by a public entity may be the "equivalent of an offer upon condition, and upon the performance of the condition by any county the offer [will become] a promise, and binding as such upon the state." *Gage*, 139 Cal. at 407; *id.* at 408 (holding that an offer by a state "made to no person in particular . . . coupled with the subsequent performance of the conditions by the

respondent, furnishes all the elements which are necessary to the formation and existence of an implied contract"); *see also Kashmiri*, 156 Cal. App. 4th at 829 (holding that "students' conduct when they accepted the University's offer of enrollment" created an implied contract); Rest. 2d Contracts § 50(2). "Once an implied contract of the state is demonstrated it is of equal dignity with an express contract for purposes of the prohibitions against impairment." *CTA*, 155 Cal. App. 3d at 505.

2. Counties May Enter Into Implied Contracts Unless Statutorily Prohibited From Doing So.

As discussed above, the only constraint on a public entity's ability to enter into implied contracts is that the entity must not be statutorily prohibited from doing so. *See Youngman*, 70 Cal. 2d at 246 ("Governmental subdivisions may be bound by an implied contract if there is no statutory prohibition against such arrangements.") As REAOC's briefs explain, the only statutes that Respondents argue limit a county's authority to enter into contracts are California Constitution, article XI, section 1, subdivision (b), (The governing body of each county "shall provide for the number, compensation, tenure, and appointment of employees") and California Government Code § 25300 ("The board of supervisors shall prescribe the compensation of all county officers and shall provide for the number, compensation, tenure, appointment and conditions of employment of county employees. Except as otherwise required by Section 1 or 4 of Article XI

of the California Constitution, such action may be taken by resolution of the board of supervisors as well as by ordinance."). (Op. Brf. at 46-49; Rep. Brf. at 25-27.)

However, as REAOC argues, these provisions merely establish that counties, not the state legislature, are responsible for setting wages and compensation. They are not intended to limit the local entities' power. (*See* Op. Brf. at 46-49.) *See also County of Riverside v. Superior Court*, 30 Cal. 4th 278, 285-86 (2003) (stating, "[t]he constitutional language is quite clear and quite specific: *the county*, not the state, not someone else, shall provide for the compensation of its employees," and further finding that the constitutional language is "part of a comprehensive revision of article XI, governing the constitutional prerogatives of and limitations on California cities and counties" which was amended "to give greater local autonomy to the setting of salaries for county officers and employees, *removing that function from the centralized control of the Legislature*") (emphases in original) (internal citations and footnote omitted). Nor do the statute and constitutional provisions require that a county board of supervisors act in any particular form. (*See* Op. Brf. at 49.) *See also Dimon v. County of L.A.*, 166 Cal. App. 4th 1276, 1284-85 (2008) ("Resolutions, as distinguished from ordinances, need not be, in the absence of some express requirement, in any set or particular form.") (quotations and citations omitted).

In short, these provisions delegate to the counties the power to set terms and conditions of employment by any action. *Dimon*, 166 Cal. App. 4th at 1284-85. Thus, as explained in Section III, below, a county may act by passing a resolution ratifying an MOU,[6] or adopting a resolution setting compensation; it may, by resolution, delegate the power to establish and direct issues of compensation to its County Administrator or another figure; *or*, as explained above, it may contract, as private parties may contract, by offering certain terms and conditions of employment, which terms are accepted by performance.[7]

The result urged upon this Court by Respondents would require counties to act uniformly in a way that is not required by the law. Such a result is also unfair to the retired employees who were recruited to public service on the promise of retiree health benefits, performed on this promise by dedicating their careers to public service, and are entitled to the benefit of that bargain. *Gage*, 139 Cal. at

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[6] Despite the fact that a resolution ratifying an MOU does not itself contain the terms of the promise, neither party disputes that a county's act of ratifying a resolution approving an MOU obligates the county to a contract with its employees. *See* Section III, *infra*.

[7] *See, e.g.*, Codified Ordinances of Sonoma County Ch. 2, Art. II, Div. 2, § 2-8 ("the county administrator shall . . . [s]upervise, direct and coordinate all human resource functions not specifically governed by the civil service ordinance, such as risk management, employee benefits, labor relations and countywide training, and may delegate such functions to any county officer, department head or employee"); Codified Ordinances of Contra Costa County Title 2, Div. 24, Ch. 24-4.008 ("the county administrator is the chief administrative officer of the county . . . and shall . . . [e]stablish and enforce personnel policies and practices in county departments and agencies.").

408 (holding that an offer by a state "made to no person in particular . . . coupled with the subsequent performance of the conditions by the respondent, furnishes all the elements which are necessary to the formation and existence of an implied contract"). The financial troubles experienced by counties may be real and difficult, but they do not allow counties simply to declare, after decades of making and complying with promises to employees, to suddenly repudiate those promises because they were not made by resolution or ordinance.

III. The Absence of Durational Language in a Contract Requires a Review of Parol Evidence To Determine the Parties' Intent.

Whether the Court holds that a contract providing a vested right to retiree medical benefits may be implied or must instead be the subject of some legislative action, a further question remains: Can such a vested right be implied, or must it be express? For example, if the Court finds that a contract must be the subject of legislative action, nobody could reasonably dispute that a Board of Supervisors' resolution ratifying a written MOU or a Board salary resolution including medical benefits for retirees would be sufficient legislative action to create a contract.[8] However, in many cases, MOUs and salary resolutions

[8] Even without such a resolution, the signed MOU may itself constitute a binding contract. It cannot be disputed that MOUs are contracts that bind a County. *Riverside Sheriffs' Ass'n v. County of Riverside*, 173 Cal. App. 4th 1410 (2009) quoting *Glendale City Employees' Ass'n., Inc. v. City of Glendale,* 15 Cal. 3d 328, 339 (1975) ("[A]ll modern California decisions treat labor-management agreements ... as enforceable contracts which should be interpreted to execute the

providing for retiree medical benefits do not specify the duration of those benefits; i.e., they do not state that the benefits are vested and they do not state the converse – that the benefits only last for the term of the MOU or resolution. Similarly, a County's non-legislative promises to pay retiree medical benefits, which are sufficient to create an implied contract, may not contain durational language. In the case of an implied or express contract, therefore, the issue remains as to whether the court may find an implied promise that retiree medical benefits are vested for the lifetime of any employee who retires during the term of the contract. It is the position of Amici that the lifetime duration of promised retiree medical benefits need not be expressly stated in the contract.

As a threshold matter, Amici agree with REAOC that a court interpreting a contract under California law must (1) consider "all credible evidence [including extrinsic evidence] offered to prove the intention of the parties," and (2) "[i]f the court decides, after considering this [written and extrinsic] evidence, that the contract is fairly susceptible of either one of the two interpretations contended for...extrinsic evidence relevant to prove either of such meanings is admissible." (Op. Brf. at 36-38 (quoting *Pacific Gas and Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 40 (1968).)

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mutual intent and purpose of the parties."). It is likewise undisputed that each of the labor agreements at issue in the case before the Court was ratified by the Orange County Board of Supervisors. (*See* Ans. Brf. at 9.)

However, Amici wish to bring to the Court's attention a body of applicable federal case law that is not addressed in REAOC's briefs, but is fully consistent with California contract law. Under those federal cases, when interpreting whether a collective bargaining agreement ("CBA") promises lifetime retiree medical benefits, neither the absence of express vesting language nor the limited duration of the contract as a whole precludes interpreting the contract so as to vest such benefits. Rather, in the absence of express vesting language and of express duration-limiting language in the provision granting retiree medical benefits, the courts logically find that there are two possibilities: Either the right to retiree health care vests and survives the term of the agreement, or that right is extinguished when the CBA terminates.

It is black letter law that retiree health benefits can vest and survive the expiration of a CBA. *See, e.g., Nolde Bros. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243, 249 (1977) ("[T]here is ... no reason why parties could not if they so chose agree to the accrual of rights during the term of an agreement and their realization after the agreement had expired"); *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n.20 (1971) (recognizing retiree benefits may vest "[u]nder established contract principles"); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1223 (9th Cir. 1984) (citing *Allied Chemical*, 404 U.S. at 181 n.20, and holding that if retiree

medical insurance constitutes a vested benefit under a CBA, that benefit extends beyond the life of the agreement and cannot be ended without the retirees' consent).

Consequently, determining whether a CBA vests health insurance benefits in retired employees is a question of contract interpretation, and the intent of the parties controls the continuation of retiree welfare benefits beyond the agreement's termination. *See, e.g., UAW v. Yard-Man*, 716 F.2d 1476, 1479 (6th Cir. 1983), and other cases cited below.

Many CBAs lack clear language on whether retiree medical benefits vest and, at the same time, lack duration-limiting language in the contract provision conferring such benefits. As a result, in interpreting such contracts, federal courts across the country either (1) consider parol evidence to determine whether an ambiguity exists and to determine the parties' intent, or (2) find an inherent ambiguity and consider parol evidence to determine intent. In *Bower*, the Ninth Circuit held that the absence of unambiguous durational language in a CBA requires a court to consider parol evidence both to identify the ambiguity and to properly interpret the contract. 725 F.2d at 1223-24. The Ninth Circuit found that the expiration of the labor agreement at issue did not determine whether the plaintiffs' retiree health care rights vested, because the collective bargaining agreements did not unambiguously limit medical benefits to the term of the

agreement. *Id.* That CBA, like virtually all collective bargaining agreements, including MOUs covering public employees, had an expiration date for the agreement generally, but not in the separate benefit subsection at issue. *Id.* The court rejected the argument that the CBA's general expiration date terminated the retirees' right to medical benefits.

Instead, the Ninth Circuit turned to contract interpretation principles and examined parol evidence, including statements from management that insurance benefits would continue for life. *Id.* at 1224. In so doing, the court found a number of facts in dispute and held that "those facts create ambiguities in the contract." *Id.* at 1223 (citing *Nat'l Union Fire Insurance of Pittsburgh, Pa. v. Argonaut Insurance Co.*, 701 F.2d 95, 97 (9th Cir. 1983)). As a result of those ambiguities, the Ninth Circuit reversed the trial court's judgment against the retirees because the trial court failed to appropriately consider extrinsic evidence. *Id.* *Bower*'s core holding – that a Court should examine parol evidence to determine whether an ambiguity exists and to interpret the contract – is consistent with California's approach to interpreting collective bargaining agreements (MOUs) and other contracts, as described above.

Similarly, the Sixth Circuit has repeatedly emphasized the importance of discerning the intent of the parties when confronted with retiree health benefit provisions in CBAs. *See, e.g., Yard-Man*, 716 F.2d at 1482; *see also Maurer v.*

Joy Tech., Inc., 212 F.3d 907, 917-18 (6th Cir. 2000) (finding ambiguity where general durational limitation clauses for the entire agreement "are not clearly meant to include retiree benefits"). In *Yard-Man*, the Sixth Circuit rejected the argument that general durational clauses in CBAs demonstrated an intent that all benefits described in the agreement also terminate at that date. 716 F.2d at 1482. Instead, the Sixth Circuit stated that it is likely that the parties intended those benefits to continue based on the fact that the recipients are retired, cannot move to another job to receive similar benefits, and are a special class deserving of protection. *Id.* at 1481-82. After examining extrinsic evidence, the court affirmed the district court's finding that the retiree health benefits were vested. *Id.* at 1481.[9]

Like the Ninth and Sixth Circuits, other federal courts likewise have found that the absence of duration-limiting language in the contract provision providing

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[9] Some courts impose a presumption in favor of vesting if there is ambiguity in the language conferring the benefit. *See, e.g., Yard-man, Inc.*, 716 F.2d at 1482. Other courts impose a presumption that no vesting occurs in the absence of a written, unambiguous intent to do so. *See, e.g., Int'l Union, UAW v. Skinner Engine Co.*, 188 F.3d 130, 139 (3d Cir. 1999). However, neither presumption applies in this case because a "presumption or inference should be used only when traditional contract principles fail." *Anchorage v. Gentile*, 922 P.2d 248, 256 (Alaska 1996). Moreover, the presumption against vesting is based on certain courts' construction of ERISA, a federal statutory scheme inapplicable here. *See Poole v. Waterbury*, 831 A.2d 211, 222 (Conn. 2003) (rejecting presumptions because ERISA's distinct statutory scheme inapplicable to public retiree health case); *Navlet v. Port of Seattle*, 194 P.3d 221, 228-29 (Wash. 2008) (same).

retiree benefits created an actual or potential ambiguity regarding whether medical rights vest. *See, e.g., Local Union No. 150-A, UFCW, et al. v. Dubuque Packing Co.,* 756 F.2d 66, 69-70 (8th Cir. 1985) (finding ambiguity where CBAs did not state retiree benefits expired with CBA); *Int'l Ass'n of Machinists & Aerospace Workers v. Masonite Corp.,* 122 F.3d 228, 233-34 (5th Cir. 1997) (reversing district court's decision that the retired employees' rights to benefits expired with the CBAs in effect at the time they retired because it "pretermitted its analysis of any extrinsic evidence of the parties' intent"); *Deboard v. Sunshine Mining & Ref. Co.,* 208 F.3d 1228, 1240-41 (10th Cir. 2000) (finding language regarding vesting of retiree health benefits ambiguous and finding extrinsic evidence demonstrated intent to create vested rights); *Rosetto v. Pabst Brewing Co.*, 217 F.3d 539, 543 (7th Cir. 2000) (finding a "latent ambiguity" where agreement silent on duration of retiree health benefits that benefits would survive expiration of the agreement).[10]

Each of these courts, consistent with *Bower* and California law, found the agreements' general durational limitations ambiguous as to whether the retiree

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[10] The Seventh Circuit applies a presumption that benefits expire with the agreement creating the entitlement. *See Bidlack v. Wheelabrator Corp.,* 993 F.2d 603, 607 (7th Cir. 1993). However, as discussed in Note 10, no presumption – whether for or against vesting – should apply here. Moreover, the presumption can be eliminated by objective evidence showing ambiguity. *Rossetto*, 217 F.3d at 544.

benefits vested. Each court turned to parol evidence and affirmed the district court's finding that the plaintiff retirees' medical benefits vested, or reversed and remanded the case to the district court because of its failure to properly consider extrinsic evidence.

Moreover, a strong common sense rationale supports the fact that rights do not automatically terminate with the expiration of the MOU. As the Washington Supreme Court recently stated, "[w]ithout vesting, an employee who retires during the course of any one collective bargaining agreement would lose his or her ability to protect any retirement benefit conferred in that agreement less than three years after receiving the benefit." *Navlet,* 194 P.3d at 233; *see also Poole,* 831 A.2d at 228 (limiting the retiree medical benefit to the period in the agreement "often would render the benefit inconsequential, lasting months or weeks, as the plaintiffs no longer would be in a position to negotiate with the city over future benefits.").

These basic contract interpretation principles are not limited to CBAs and MOUs. Given that a resolution can be a contract, as even Respondents concede, that contract is subject to ordinary principles of contract interpretation. (Ans. Brf. at 14.) Indeed, California courts consistently have recognized that a contract for retirement benefits that arises from a statute may carry with it implied obligations. *See Valdes*, 139 Cal. App. 3d at 787; *CTA*, 155 Cal. App. 3d at 506; *Claypool*, 4

Cal. App. 4th at 670. Therefore, just as in the case of an MOU that is devoid of durational language, a court should look to parol evidence to determine whether a salary resolution setting terms and conditions of employment for unrepresented employees is intended to provide vested retiree health benefits.[11]

In short, because the retiree medical provisions of MOUs or similar documents are often ambiguous, a court is required to examine extrinsic evidence of the parties' intent. If the parties intended to create vested retiree medical benefits for individuals who retired under the applicable contract, those rights become vested retiree medical benefits even in the absence of express vesting language.

IV. California Government Code § 31691 Is Not the Sole Statutory Provision Enabling Counties to Provide Retiree Medical Benefits; the Discretion to Revoke Such Benefits Set Forth in § 31692 is Limited to Benefits Conferred Pursuant to § 31691.

Orange County argues that California Government Code Sections 31691 and 31692 enable California counties to provide retiree health benefits and preclude such benefits from being vested. (Ans. Brf. at 26-32.) Amici join in REAOC's response to this argument. (Rep. Brf. at 34-40.) Amici write

[11] In other words, a county could pass an annual salary resolution stating, in relevant part, that it will provide retiree medical benefits. Depending on parol evidence, that resolution could mean either that the County will provide the benefits only for that year, or that the County will provide them for life to anybody who retires during that year.

separately to emphasize that Government Code § 31691 is not the exclusive means of providing retiree health care benefits.

Section 31691 is not the only California Government Code provision that authorizes counties to grant retiree health benefits. Rather, Sections 53200 *et seq.*, which are contained in the "Group Insurance" article of the "Officers and Employees" chapter of Title 5 of the Government Code, confer broad authority on counties to grant health and welfare benefits to both employees and retirees. Section 53201 states that "[t]he legislative body of a local agency . . . may provide for any health and welfare benefits for the benefit of its officers, employees, retired employees, and retired members of the legislative body." Cal. Gov't Code § 53201.

Courts have recognized that Orange County and other California counties grant their health insurance benefits under California Government Code Sections 53200 *et seq.* (*See* Rep. Brf. at 38); *see also OCEA v. County of Orange*, 234 Cal. App. 3d 833, 836-37 (1991) (discussing retiree health benefits granted under Section 53200 *et seq.*); *Thorning*, 11 Cal. App. 4th at 1608-09 (1992) (explaining that the retiree health benefits in Hollister School District are granted pursuant to Section 53200 *et seq.*).

Section 31691, on which Respondent relies, is a section of the "Group Insurance" article of the "County Employees Retirement Law of 1937" contained

in Title 3 of the Government Code. It is unrelated to Section 53200 *et seq.* Section 31691 authorizes counties to pay "premiums on a policy or certificate of life insurance or disability insurance . . . or . . . consideration for any hospital service or medical service corporation." Cal. Gov't Code § 31691. This language does not authorize counties to provide retiree medical insurance (*see* Rep. Brf. at 35), much less state that Section 31691 is the *only* way to grant these benefits.[12] If the Legislature had intended that Section 31691 be the *exclusive* vehicle by which counties could grant retiree health insurance, it would have said so. Even assuming for argument's sake that such an intent could be implied absent explicit language, it should not be implied from the confusing language of Section 31691, which refers, in relevant part, only to payments for "hospital service" or to a "medical service corporation." Tellingly, despite the wide array of cases on vested retirement benefits, many of which were decided after the

[12] The canons of statutory interpretation dictate that "[t]he use of a term in a statute addressing a subject, and omitting that term and using a different term in a similar statute addressing a related subject, shows a different meaning was intended in the two statutes. *Songstad v. Superior Court*, 93 Cal. App. 4th 1202, 1208-09 (2001) (citation omitted). Pursuant to that principle, the authorization in Section 31691 to pay "consideration for any hospital service or medical service corporation" must mean something different than "provid[ing] for any health and welfare benefits for the benefit of . . . retired employees" in Section 53201.

passage of Section 31691 in 1961,[13] no case states that such benefits are conferred solely pursuant to Section 31691.

It cannot be reasonably disputed that Section 31692, on which Orange County relies, confers discretion to reduce or eliminate only benefits granted pursuant to Section 31691. Therefore, if counties' authority to provide retiree medical benefits arises under Section 53201, rather than Section 31691, then Section 31692 does not allow counties to reduce or eliminate those benefits.

IV. Conclusion

For the foregoing reasons, Amici urge the Court to uphold the longstanding principle that a County may enter into implied contracts with its employees that create vested rights to retiree health benefits or, if a contract must be created by formal legislative action, to look to parol evidence to determine whether MOUs ratified by such action or salary resolutions give rise to vested retiree health care rights under traditional rules of contractual interpretation. In addition, Amici urge

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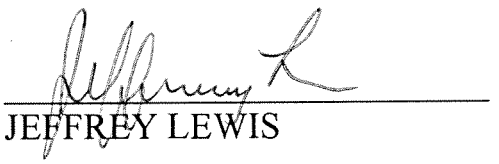
[13] *See, e.g., Cal. Ass'n of Prof'l Scientists v. Schwarzenegger*, 137 Cal. App. 4th 371, 383 (2006) ("'While some jurisdictions view public employees' retirement rights as a gratuity, California is firmly committed to the proposition that these rights are contractual; that they are 'vested' in the sense that the lawmakers' power to alter them after they have been earned is quite limited.'") (quoting *Lyon v. Flournoy*, 271 Cal. App. 2d 774, 779 (1969)); *Claypool*, 4 Cal. App. 4th at 661 ("'a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity.'") (quoting *Betts*, 21 Cal. 3d at 863).

the Court to read the discretion granted in California Government Code Section 31692 as applying only to benefits explicitly granted pursuant to Section 31691.

Respectfully submitted,

Dated: December 29, 2010

LEWIS, FEINBERG, LEE, RENAKER & JACKSON, P.C.



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CERTIFICATE OF WORD COUNT

(Pursuant to California Rules of Court, Rule 8.520(c)(1))

The text of this Amicus Curiae Brief consists of 7, 582 words as counted by the word count feature of the word processing program used to generate the brief, exclusive of materials not required to be counted.

Dated: December 29, 2010

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PROOF OF SERVICE

I, Candice Elder, declare:

My business address is 476 9th Street, Oakland, California 94607. I am over the age of 18 years and not a party to the above-entitled action.

On December 29, 2010, I served:

APPLICATION TO FILE AMICUS CURIAE BRIEF AND PROPOSED BRIEF OF AMICUS CURIAE IN SUPPORT OF PLAINTIFF AND PETITIONER RETIRED EMPLOYEES ASSOCIATION OF ORANGE COUNTY, INC.

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

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Candice Elder

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