Case No. S184059

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

RETIRED EMPLOYEES ASSOCIATION OF ORANGE COUNTY,
Petitioner,

v.

COUNTY OF ORANGE,
Respondent.

After Order of This Court Accepting Certification of the Question from the United States Court of Appeals for the Ninth Circuit

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APPLICATION OF *AMICI CURIAE* LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES FOR LEAVE TO FILE AMICUS BRIEF; BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENT COUNTY OF ORANGE

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APPLICATION FOR LEAVE TO FILE AMICUS BRIEF

To the Honorable Chief Justice of the California Supreme Court:

INTRODUCTION

Pursuant to California Rules of Court, rule 8.520(f), amici curiae League of California Cities and California State Association of Counties hereby respectfully request leave to file the attached brief in support of Respondent County of Orange. This application is timely made within 30 days after the filing of the reply brief on the merits.

THE *AMICI CURIAE*

The League of California Cities ("League") is a non-profit association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the state. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide – or nationwide – significance. The Committee has identified this case as being of great significance due to its potential impact on many California cities and their citizens.

The California State Association of Counties ("CSAC") is a non-profit corporation. Its membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered

by the County Counsels' Association of California, and is overseen by the Associations' Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter with the potential to affect all California counties.

THE INTEREST OF *AMICI CURIAE*

Many members of the League and CSAC (collectively, the "*amici*") provide or subsidize in part health benefits for their retired, former employees. The resolution of this question will have a direct and profound impact on the public agencies that *amici* represent, particularly with respect to their budgeting and employment practices. For this reason, the *amici* have a substantial interest in the present matter.

THE NEED FOR FURTHER BRIEFING

Representing the interests of California public agencies, *amici* are uniquely positioned to explain the legal norms under California law concerning the formation, modification, and alleged "vesting" of health benefits for retirees. They are also able to explain the practical ramifications on public agencies if this Court were to adopt the arguments urged by Petitioner in favor of vesting by implication.

The League and CSAC are deeply familiar with the legal requirements and processes by which their members promulgate and administer legislation, ordinances, and policies. Central to these

organizations' operations is the understanding of the role of elected officials in representative democracy at the local level. Thus, *amici* seek to illuminate the legal and practical implications of the issue presented here: whether retiree health benefits can vest by implication and without formal approval of a legislative body.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully request that the Court accept the accompanying brief for filing in this case.

Dated: December 29, 2010 RENNE SLOAN HOLTZMAN SAKAI LLP

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CERTIFICATE OF INTERESTED PARTIES
[CAL. RULES OF COURT, RULE 8.208]

Amici Curiae League of California Cities and California State Association of Counties knows of no entity or person that must be listed under subsections (I) or (2) of Rule 8.208. (Rule 8.208(d)(3).)

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BRIEF OF *AMICI CURIAE*

QUESTION CERTIFIED BY THE COURT

On August 18, 2010, this Court granted the Ninth Circuit Court of Appeals' request under Rule of Court 8.548 for an answer to the following question:

> 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.

INTRODUCTION

The seemingly straightforward question asked by the Ninth Circuit goes to the heart of an issue that will dramatically affect the long-term viability of many of California's cities and counties. Many cities and counties provide some form of health benefit program for their retirees. These range in scope from permitting retirees to enroll in a group health insurance plan, to payment of 100 percent of the cost of health insurance coverage for retirees and dependents. The manner in which these programs are authorized also range from the case before this Court – where the governing board considered and acted on retiree rates each year – to collective bargaining agreements, and even to charter provisions. But what all of these programs have in common is they must be authorized by a legislative act, under the applicable constitutional and statutory framework.

One thing that many – if not most – of these programs have in common is that they have not been set up in the same manner as pension

benefits. Frequently, there is no "trust" setting out a specific long term promise. Typically, they are not "funded" as an employee works, in the manner of a pension benefit. Moreover, usually, there has been no public debate addressing the long-term cost of the benefit to taxpayers, or consideration that the benefit is intended to be permanent. Until very recently, most of these benefits have been funded on a pay-as-you-go basis by public agencies; as with health care premiums for active employees, the premiums are paid directly by the public agency in the year the premium is due. Some benefits, including the benefit at issue in this matter, are enacted under a statutory framework that even specifies that the benefit is not "vested." (*See* Gov. Code §§ 31691(a), 39692 ["The adoption of an ordinance or resolution pursuant to Section 39691 *shall give no vested right* to any member or retired member [to medical benefits]."], emphasis added.)

In most cities and counties, a crisis is now brewing because (1) the cost of providing medical benefits has mushroomed, and (2) new accounting rules adopted by the Government Accounting Standards Board ("GASB") require public agencies to conduct an actuarial study of the cost of continuing to provide current retiree medical benefits, and to calculate the Annual Required Contribution ("ARC") to fund the benefit over a 20-30 year timeframe. Largely due to the benefit being unfunded and the expected rate of inflation for medical benefit costs, these benefits often have astronomical costs, including unfunded liabilities which sometimes

exceed the ability of public agencies to fund. Consequently, public agencies across the state are attempting to make their benefit structures more efficient and more affordable.

In this case, Orange County's change from the "pooling" arrangement[1] is a model of thoughtful benefits restructuring; other cities and counties have made or are considering this and other changes, small and large, including agreements with employee groups to share the cost of retirement health benefits. The importance of these efforts cannot be overstated – they will determine whether local governments can continue to provide an array of services, including critical public safety and infrastructure services, or become little more than health care providers for their employees and retirees.

The diversity of factual circumstances through which retiree health benefits are provided is an important context for this Court's consideration of the Ninth Circuit's question, which is essentially a pure question of law. The Ninth Circuit asks: "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."

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[1] As more fully discussed in the parties' briefing, Orange County previously "pooled" employees and retirees in a single plan. This arrangement spread the cost of the more expensive retiree medical benefits across the entire group, including active employees and retirees, thus artificially inflating employee rates while holding down retiree rates.

(Emphasis added.) The answer, as a matter of currently settled law, is that they cannot – legislative action, conducted in compliance with state opening meeting laws, is required to confer any rights on California public employees. Permitting "implied" commitments in this circumstance would undermine the democratic process by imposing long-term obligations on government that were never aired publicly or debated and approved by the elected governing body.

Petitioner Retired Employees Association of Orange County ("REAOC") predicates its case primarily on the fact that there is a "past practice" of setting rates through a "pooling" arrangement that had the effect of the county and current employees subsidizing the higher cost of retiree benefits. But nothing in the legislative materials even arguably supports a promise not to make changes in the program. Thus, REAOC's position requires that virtually the entire "agreement" must be based on employee conduct, with no legislative approval. In other cases, courts will need to scrutinize legislative pronouncements carefully, asking what *precisely* is the scope of the obligation undertaken by the government agency, and whether there is *clear evidence* that commitment was intended to remain unchanged for a lifetime. This analysis must be viewed through the well-established principle that there is a presumption *against* finding a benefit to be vested, and in favor of finding that it is negotiable under the Meyers Milias Brown Act (Gov. Code § 3500 *et seq.*).

Finally, in addressing the Ninth Circuit's question, this Court must be cognizant of the strong distinction between benefits that are bargained and benefits that are vested. Borrowing from federal labor law, the Public Employment Relations Board ("PERB") and some courts have recognized "past practices" not expressly approved by governing bodies, placing the obligation on the public agency to bargain these practices away. It is unclear whether this attempt to import private sector principles of contract to government is appropriate since public employment is a creature of statute. As the Meyers-Milias-Brown Act states expressly – in recognition of more than a century of established public law – agreements between unions and a public agency "shall not be binding" unless approved by the public agency's governing body. (Gov. Code § 3505.1)

This case provides no occasion to cross that bridge. The impact of finding a benefit to be "vested" goes far beyond – and is almost the opposite of – finding a benefit to be bargainable. Vested benefits cannot be changed unless each individual affected receives a comparable benefit. Hence, they are categorically unbargainable because collective bargaining addresses the bargaining unit as a whole, and not individual members. Moreover, bargained-for benefits are almost always bargained only for the term of a collective bargaining agreement, and therefore, can be renegotiated based on the strength of the parties' positions at the bargaining table.

Finding a key benefit such as retiree health benefits to be vested merely by implication may deprive both the government entity and the employees' representatives from renegotiating the benefit (at least as to those for whom the benefit has vested). Such a ruling could have the effect of making both employees and retirees unwitting captives in public agencies' financial demise.

ARGUMENT

A. THE ANSWER TO THE NINTH CIRCUIT'S QUESTION IS NO: UNDER ESTABLISHED CALIFORNIA LAW, A COUNTY AND ITS EMPLOYEES CANNOT FORM AN IMPLIED CONTRACT THAT CONFERS VESTED RIGHTS TO HEALTH BENEFITS ON EMPLOYEES OR RETIREES

1. Legislative Action, Conducted in Compliance With State Opening Meeting Laws, is Required to Confer Any Rights On California Public Employees

As discussed extensively in the County's brief, in California, the terms and conditions of public employment are governed by statute, not contract. (*Miller v. California* (1977) 18 Cal.3d 808, 813; *Am. Fed. of State, County & Mun. Employees Local 68 v. County of Los Angeles* (1983) 146 Cal.App.3d 879, 889 ["the extent of the protected interest or entitlement (i.e., the terms and conditions of employment) is governed purely by statute"].) Accordingly, courts have recognized that "public employees have no vested right to particular levels of compensation and salaries may be modified or reduced by the proper statutory authority." (*Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1332-22; *Assn. for Los*

Angeles Deputy Sheriffs v. County of Los Angeles (2007) 154 Cal.App.4th 1536, 1548-49 ["the public employee is entitled only to such compensation as is expressly provided by statute or ordinance"].)

A public agency's governing body possesses the exclusive, "plenary" authority to set employee compensation levels. (*See* Cal. Const., art. XI, §1, subd. (b); Gov. Code § 25300; *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 285 [recognizing that a county's governing body "not the state, not someone else," shall provide for the compensation of county employees].) Further, all decisions with respect to employee compensation must be made through formal legislation (i.e., resolution or ordinance), and approved by a majority of the public agency's governing body. (*See* Gov. Code § 3505.1 [memorandum of understanding setting employee compensation not binding until approved by public agency's governing body]; *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 25 [statutory requirement that memoranda of understanding be approved by governing body "reflect[s] the legislative decision that the ultimate determinations [with respect to employee compensation] are to be by the governing body itself"].)

This latter requirement is particularly important given that the setting of employee compensation plays an important part in the governing body's much larger role of adopting a budget, which "entails a complex balancing of public needs in many and varied areas with the finite financial resources

available for distribution among those demands...." (*County of Butte v. Superior Court* (1985) 176 Cal.App.3d 693, 699.) The requirement that employee compensation be set through formal legislation by the public employer's governing body ensures that such important financial decisions rest with the governing body as a whole, as opposed to any single individual. (*See Carmel Valley Fire Protection Dist. v. California* (2001) 25 Cal.4th 287, 302 [enacting a budget "is a legislative decision, involving interdependent political, social and economic judgments which cannot be left to individual officers acting in isolation...."]; *County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 344 [only a majority of a county's governing body may set employee compensation through formal legislative act and allowing compensation levels to be set by any other means "would be inconsistent with both longstanding rules of interpretation and established California case law, as well as deeply offensive to basic principles of representative democracy"].)

Further, in California, legislative decisions with respect to employee compensation must be made in compliance with state open meeting laws, including the Ralph M. Brown Act (Gov. Code § 54950 *et seq.*). The Brown Act requires all meetings of a local legislative body to be "open and public" so members of the public may attend and comment. (Gov. Code § 54953.) In addition, the California Constitution states that "[t]he people have the right of access to information concerning the conduct of the

people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." (Cal. Const. art. I, § 3, subd. (b).) These laws ensure that important decisions made by government officials, including decisions with respect to employee compensation, are subject to strict public scrutiny and oversight.[2] (*See Epstein v. Hollywood Entertainment Dist. II* (2001) 87 Cal.App.4th 862, 867 ["It is clearly the public policy of this state that the proceedings of public agencies, and the conduct of the public's business, shall take place at open meetings, and that the deliberative process by which decisions related to the public's business are made shall be conducted in full view of the public"].)

2. In the Absence of Express Legislative Authorization, Public Employees Cannot Have a "Vested" Right to Lifetime Retiree Health Benefits

Where a public agency's authority to enter into a contract is subject to certain, mandatory requirements, failure to comply with those requirements will render a "contract" void and unenforceable. (*See* Witkin,

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[2] To this end, the Brown Act requires that – except in cases of emergency – local public agencies must provide notice to the public of all actions that their government body intends to take in advance of all public meetings. (Gov. Code § 54954.2, subd. (a).) The Brown Act also requires local public agencies to provide members of the public access to all documents to be considered – and all contracts to be approved – by the governing body at each meeting. (Gov. Code § 54954.1.) Failure to comply with these requirements is ground to void the decision made by the governing body, among other sanctions. (Gov. Code § 54960.1.)

Contracts (10th ed. 2005), § 980, p. 1096; *Reams v. Cooley* (1915) 171 Cal. 150, 154; *Miller v. McKinnon* (1942) 20 Cal.2d 83, 87-88; *First Street Plaza Partners v. City of Los Angeles* (1998) 65 Cal.App.4th 650, 657.) As this Court previously explained, "'[w]here the statute prescribes the only mode by which the power to contract shall be exercised the *mode* is the *measure* of the power. A contract made otherwise than as so prescribed is not binding or obligatory as a contract and the doctrine of implied liability has no application in such cases.'" (*Miller*, *supra*, 20 Cal.2d at p. 91-92, quoting *Reams*, *supra*, 171 Cal. at p. 154.)

This rule is absolute. Where prescribed contracting requirements have not been met, a party may not recover from a public entity on the basis of an implied-in-fact contract or any other theory of implied liability, even if the party conferred a benefit on the public agency. (*See Reams*, *supra*, 171 Cal. at p. 154 [contractor could not hold school superintendent liable on contract that did not go through mandatory competitive bidding requirements]; *G.L. Mezzetta v. City of American Canyon* (2000) 78 Cal.App.4th 1087, 1094 [principles of estoppel may not be invoked to contravene statutory contract limitations].) This is because "[o]ne dealing with public officers is charged with the knowledge of, and is bound at his peril to ascertain, the extent of their powers to bind the state for which they seem to act. And, if they exceed their authority, the state is not bound

thereby to any extent."[3] (*Mullan v. State* (1896) 114 Cal. 578, 587; *see Zottman v. City & County of San Francisco* (1862) 20 Cal. 96, 104-05 [denying payment to a contractor hired by the city council because the council lacked the authority to authorize the work]; *Lundeen Coatings Corp. v. Dept. of Water & Power* (1991) 232 Cal.App.3d 816, 835 [subcontractor could not recover against city water department on basis of oral or implied contract where charter required contracts to be in writing]; *First Street Plaza Partners v. City of Los Angeles*, *supra*, at p. 657 [developer could not recover expenditures made pursuant to alleged municipal contract where the purported contract did not comply with city's contract formation requirements].)

Consistent with the above, given the statutory nature of public employment, along with the need for public oversight over a governing body's decision in this respect, courts have refused to find that California public employees have a "vested" right to lifetime retiree health benefits

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[3] This rule also ensures that taxpayers retain some degree of oversight over the manner in which municipal contracts are entered into and, by extension how public funds are spent. Indeed, statutes prescribing a specific means of contracting "ensure that expensive decisions are not hastily made. [These statutes] create[] a broad base of authority by requiring [contract] approval by a number of different individuals. No single individual has absolute authority to bind the municipality...." (*G.L. Mezzetta, Inc.*, *supra*, 78 Cal.App.4th at p. 1094; *see also* 10 McQuillin, *Mun. Corp.* (3d ed. 2009), § 29.2 [the provisions of law circumscribing a government agency's contractual powers "exist to protect the citizens and taxpayers of the municipality from unjust, ill-conceived, or extortionate contracts, or those showing favoritism...."].)

absent express language in a statute, resolution, or some other formal legislative enactment guaranteeing them such a benefit. In other words, the fact that a public employer has provided employees with certain retiree health benefits in the past does not mean it is under a continued obligation to do so forever.

For example, in *Sappington v. Orange County Unified School District* (2004) 119 Cal.App.4th 954, the defendant school district provided a free healthcare benefit to its retirees for more than 20 years, in a time, as the court noted, "before health insurance premiums skyrocketed." (*Id.* at p. 955.) When the district changed its contribution, retirees sued to retain the benefit, claiming that they had a "vested" right to have their health benefits fully funded. The Court of Appeal disagreed. After concluding that "retirees have no vested right under the policy to free PPO coverage,' the court went on to explain that the "fact that retirees 'accepted the benefit ... does not mean they understood they were contractually entitled to such alternatives. Generous benefits that exceed what is promised in a contract are just that: generous. They reflect a magnanimous spirit, not a contractual mandate." (*Id.* at pp. 954-55.)

The Second District Court of Appeal reached a similar holding in *Ventura County Retired Employees Association v. County of Ventura* (1991) 228 Cal.App.3d 1594, concluding that the applicable statutory scheme "does not require equal health care benefits for active employees

and retirees," emphasizing that "[h]ad the Legislature so intended, it surely would have said so." (*Id.* at pp. 1596, 1598.) The *Ventura* court based its holding on the grounds that the retiree benefit was not mandated by statute and that it would not compel the "County to exercise its budgetary discretion in a particular manner ... or '... to perform legislative acts in a particular manner.'" (*Id.* at p. 1599.)

Also, in *San Diego Police Officers Association v. San Diego City Employees Retirement System* (9th Cir. 2009) 568 F.3d 725, a labor organization claimed that a change in the eligibility requirements for retiree health benefits impaired its members' "vested" contractual rights. The Ninth Circuit Court of Appeals reviewed the California authority on the issue and held that the plaintiff did not fulfill the "heavy burden ... 'to overcome [the] well-founded presumption ... that a legislative body does not intend to bind itself contractually." (*Id.* at p. 740.) The court recognized that these benefits were important to employees, but stated that "were the recognition of constitutional contract rights to be based on the importance of benefits to individuals rather than on legislative intent to create such rights, the scope of rights protected by the Contracts Clause would be expanded well beyond the sphere dictated by traditional constitutional jurisprudence." (*Ibid.*)

Most recently, the federal district court in *Sonoma County Association of Retired Employees v. Sonoma County* (N.D. Cal. May 14,

2010) 2010 WL 1957463 ("*Sonoma*"), rejected a retirement association's ("SCARE") claim that a county's historical practice of providing retirees health benefits at a certain level as well as other extrinsic evidence could give rise to a vested right to such benefits. The district court noted that "[t]his type of evidence could be probative of the scope of the promises allegedly made by county resolution or ordinance," but was not, in and of itself, sufficient to bind the county to provide retirees medical benefits in perpetuity. (*Id.* at p. *6.)

Significantly, in *Sonoma*, SCARE claimed that its members' purported vested right to health benefits also stemmed from a series of resolutions and ordinances adopted by the county's board of supervisors. But because the association did not specifically identify those resolutions and ordinances in its complaint, the court granted the county's motion to dismiss with leave to amend, finding that "[t]his type of specificity is required before the Court will allow Plaintiff to proceed on its claim." *Id.* at pp. *6, 12.)

In its amended complaint, SCARE attached 68 documents consisting of board resolutions and board-ratified memoranda of understanding ("MOUs") which it claimed "establish Sonoma's promises and intent to provide, continuously and consistently, vested retiree health benefits." (*Sonoma County Assn. of Retired Employees v. Sonoma County* (N.D. Cal. Nov. 23, 2010), Case No. 09-04432 CW, 11/23/2010 Order, DOCKET #51,

p. 4.) The district court carefully reviewed each document, but ultimately concluded that "because none of SCARE's exhibits explicitly provides that Sonoma agreed to provide health insurance benefits to retirees in perpetuity, a contract to do so has not been formed." (*Id.* at p. 7.) In particular, the district court found that "[b]ecause the key phrase inferred by SCARE, 'in perpetuity,' is absent, SCARE's argument for vesting is unsupported." (*Id.* at p. 11.)

As these authorities make clear, public employees cannot have a "vested" right to lifetime medical benefits absent express language in a statute, resolution, ordinance or some other form of legislative enactment conferring employees with such a benefit – in particular, language guaranteeing employees that such benefits will continue in perpetuity. As the County extensively discusses in its brief, REAOC has failed to identify any such legislative enactment here.

3. The CERL Lends Further Support to the Conclusion that Retiree Health Benefits Do Not Vest Absent Express Legislative Authorization

The County Employees Retirement Law of 1937 ("CERL," Gov. Code § 31450 *et seq.*) – the state law under which Orange County's retirement system was formed – lends further support to the conclusion that the retiree health benefits at issue here do not vest. The medical benefits provisions of the CERL, adopted in 1961, provide the legal authorization for the County to contribute toward medical premiums of its retirees. (*See*

Gov. Code §§ 31691, 31692, 31693.) If a county provides for retiree medical benefits out of its general fund, the CERL expressly states that the board's decision "shall give no vested right to any member or retired member," and may be amended or repealed at any time, subject only to the specific notice and comment period requirements set forth in the statute. (Gov. Code § 31691, 31692, 31693.)

Government Code section 31692 and 31963 outline the applicable notice and comment periods. Under these provisions, a county may repeal or amend the retiree health benefits at any time provided that the amendment or repeal is not operative until 90 days after the board or governing body notifies the retired members in writing of the board's proposed action. (Gov. Code § 31692.) If the governing body proposes any changes to health care benefits affecting those members who have already retired (i.e., retirees), the board shall provide a recognized organization representing retired employees – in this case, REAOC – reasonable advanced notice of any proposed changes and the opportunity to comment prior to any formal action. (Gov. Code § 31693.) Once a county fulfills these notice and comment requirements, it may unilaterally modify or terminate an ordinance or resolution that provides for health care contributions.

Given that the CERL expressly provides that a county's decision to provide retiree medical benefits through its general fund "shall give no

vested right" and that a county board may modify or terminate the benefit after exhausting the statutory notice and comment requirements, it stands to reason that – absent express legislative authorization to the contrary – employees and retirees cannot have a "reasonable expectation" that such benefits will continue indefinitely in the future in order to give rise to any vested rights. For this additional reason, this Court should answer the Ninth Circuit's question in the negative.

B. REAOC'S ARGUMENTS BEFORE THIS COURT ARE WITHOUT MERIT

1. REAOC's Reliance on *Youngman* and Other Authorities to Support Its Implied-in-Fact Contract Theory Is Misplaced

REAOC cites to a variety of authorities for the proposition that public agencies may be bound by an implied-in-fact contract, including an implied contract conferring public employees with a "vested" right to lifetime health benefits. None of the authorities cited by REAOC support its position.

REAOC initially cites to various authorities that it claims stand for the proposition that because implied contracts are allowed in the private sector, they are also permitted in the public sector. (Reply Brief, pp. 4-8.) Among the authorities cited include Civil Code section 1635, which states: "All contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided in this Code." REAOC also cites to

M.F. Kemper Const. Co. v. City of Los Angeles (1951) 37 Cal.2d 696, in which this Court stated: "The California cases uniformly refuse to apply special rules of law simply because a governmental body is a party to a contract." (*Id.* at pp. 704-05.) But these authorities are inapposite. The issue here is not how a contract should be *interpreted*, but rather whether a contract was formed in the first place.

REAOC next relies on *Youngman v. Nevada Irrigation District* (1970) 70 Cal.2d 240 for the proposition that "this Court long ago applied the implied-in-fact contract doctrine to interpret a public sector employment agreement." (Reply Brief, at p. 6.) REAOC's reliance on *Youngman* is misplaced. Indeed, the *Youngman* court expressly recognized that "[g]overnmental subdivisions may be bound by an implied contract [i]f there is no statutory prohibition against such arrangements." (70 Cal.2d at p. 246, citing *County of Sonoma v. City of Santa Rosa* (1894) 102 Cal. 426, 431.)

Here, there is a statutory – as well as a constitutional – prohibition against the formation of implied contracts governing the terms and conditions of public employment. As discussed above, in the context of public employment, a contract must be created by a resolution or ordinance formally enacted by a majority of a public agency's governing body. (*See* Cal. Const., art. XI, § 1, subd. (b); Gov. Code § 25300; *County of Sonoma v. Superior Court*, *supra*, 173 Cal.App.4th at p. 345.) Indeed, because the

terms and conditions are governed strictly by resolution, ordinance, or other formal legislative enactment, there can be no implied contractual terms. (See, e.g., *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 23-24 [employee could not assert a cause of action for breach of the implied covenant of good faith and fair dealing given the "settled" principle that "public employment is not held by contract but by statute"]; *Kim v. Regents of University of California* (2000) 80 Cal.App.4th 160, 164 [same].)[4]

REAOC also argues that a formal resolution is not required to establish a contract governing the terms and conditions of public employment, citing *Dimon v. County of Los Angeles* (2009) 166 Cal.App.4th 1276 in support. Specifically, REAOC asserts that "in the

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[4] REAOC cites to a number of cases in which courts have found public agencies bound by implied-in-fact contracts or implied contractual terms. (*See* Opening Brief, pp. 37-41, 43, citing, *inter alia*, *Kashmiri v. Regents of Univ. of Cal.* (2007) 156 Cal.App.4th 809 and *Tonkin Construction Co. v. County of Humboldt* (1987) 188 Cal.App.3d 828.) But, as the County correctly points out in its brief, none of the cited cases involved a contract purporting to establish the terms and conditions of public employment. (Respondent's Brief, pp. 41-43.) Nor did any of these cases involve a claim to a "vested" right to retiree health benefits. These distinctions are significant. Courts have recognized that different rules are at play when governments act in their official, sovereign capacities (such as when they set the terms and conditions of public employment), rather than when they are simply just another party to a contract. (*See RUI One Corp. v. City of Berkley* (9th Cir. 2004) 371 F.3d 1137, 1163 ["California courts have distinguished between government's proprietary and sovereign capacities and held that governments acting in their 'proprietary or business capacity' are not entitled to certain rules, defenses or presumptions to which they are entitled when acting in sovereign capacity"], citing *Corp. of Am. v. Durham Mutual Water Co.* (1942) 50 Cal.App.2d 337 and *M.F. Kemper Constr. Co. v. City of Los Angeles*, *supra*, 37 Cal.2d 696.)

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 particular form.'" (Opening Brief, at p. 49, citing *Dimon*, *supra*, 166 Cal.App.4th at p. 1284.)

An identical argument was rejected by the district court in *Sonoma*, *supra*. In that case, the court stated: "the issue is not whether the documents submitted are resolutions; Sonoma does not argue that they are not. Rather, the issue is to what the BOS agreed in those resolutions. As discussed above, in the resolutions the BOS did not agree to pay all or substantially all of retiree health care premiums in perpetuity." (Case No. 09-04432 CW, 11/23/2010 Order, DOCKET #51, pp. 9-10.) The district court then proceeded to quote the following language from *Dimon* that, "'While an ordinance prescribes a permanent rule of conduct or of government, a resolution is, ordinarily, of a temporary character'" and went to state that "because all the exhibits SCARE submits are resolutions rather than ordinances, *Dimon* runs counter to its argument its exhibits create a permanent, vested health insurance premium for the retirees." (*Id.* at p. 10, quoting *Dimon*, *supra*, 166 Cal.App.4th at p. 1285.) This Court should reject REAOC's reading of *Dimon* for the same reason.

2. A Vested Right to Lifetime Retiree Health Benefits May Not Be Implied into a Collectively-Bargained MOU

In an attempt to bypass the established rule that a public agency will not be bound by an implied-in-fact contract where there is a prescribed contracting method, REAOC contends that a vested right to the "pooling" subsidy at issue here may nevertheless be implied as a term in the memoranda of understanding ("MOUs") negotiated between the County and recognized employee organizations under the Meyers-Milias-Brown Act ("MMBA," Gov. Code § 3500 *et seq.*). REAOC posits that this is so because MOUs are bilateral contracts, not statutes. (Reply Brief, pp. 28-30.) REAOC further claims this conclusion is supported by *Glendale City Employees Association v. City of Glendale* (1975)15 Cal.3d 328, in which, according to REAOC, "this Court expressly endorsed both the liberal parol evidence doctrine … and the notion that the express provisions of collective bargaining agreements must be assumed to be incomplete and in need of filling in through extrinsic evidence, such as course of dealing." (Reply Brief, p. 7.) REAOC is wrong on both counts.

First, REAOC overlooks the fact that while MOUs are in fact negotiated agreements, they are statutory contracts, not common law contracts. Critically, MOUs are not effective and/or otherwise "binding" until they are approved by a majority of the public agency's governing body by legislative action in accordance with state open meeting

requirements. (*See* Gov. Code § 3505.1, *City of Glendale, supra*, 15 Cal.3d at p. 335.) Thus, the prohibitions against implied contracts in the public sector – which, as discussed above, are based on established democratic principles and the need for the public to maintain some degree of oversight over the manner in which public funds are spent – apply equally to collective bargaining agreements negotiated under the MMBA This is especially true given that, as discussed, the setting of employee compensation plays an important part in the governing body's much larger role of adopting a budget.

REAOC also misreads this Court's *City of Glendale* decision. That case does not stand for the proposition, as REAOC suggests, that MOUs must be "assumed to be incomplete and in need of filling in through extrinsic evidence." (Reply Brief, p. 7.) Rather, *City of Glendale* merely recognizes that "[a]greements reached under the [MMBA], like their private counterparts, are the product of negotiation and concession; they can serve as effective instruments for the promotion of good labor-management relations only if interpreted and performed in a manner consistent with the objectives and expectations of the parties." (15 Cal.3d at p. 340.) Accordingly, the Court in *City of Glendale* held that the trial court did not abuse its discretion in using extrinsic evidence to interpret the parties' MOU in order to ascertain their intent.

Unlike the situation in *City of Glendale*, here, REAOC is not merely suggesting that extrinsic evidence be used to interpret an existing MOU provision. Rather, it is suggesting that extrinsic evidence, including the parties' course of conduct, can be used to *create* an implied MOU term – even in the absence of any existing MOU provision related to the asserted pooling benefit or, for that matter, any provision governing how retiree rates will be set. Thus, *City of Glendale* is of no help to REAOC.[5]

It is also important to note that REAOC is not just trying to imply a term into an MOU – it is trying to imply a *vested* term into an MOU. This distinction cannot be overstated.

Implying a lifelong commitment of public funds without the approval of – or, for that matter, even the knowledge of – a public agency's governing body would completely undermine the principles of an open and representative government. Not surprisingly, California courts have

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[5] REAOC also cites to *Southern California Gas Co. v. City of Santa Ana* (9th Cir. 2003) 336 F.3d 885 for the proposition that "[a] new term may be implied into [a] public contract, based on [a] historic practice, where it 'relates to' a subject that is included in the express writing." (Reply Brief, p. 12.) But the Ninth Circuit in *City of Santa Ana* did not suggest, let alone hold, that a past practice may, in and of itself, create an implied contractual obligation; rather, it simply looked at the parties' past practice to aid its interpretation of an ordinance, which the court viewed as a "contract" for purposes of its Contract Clause analysis. (336 F.3d at pp. 889, 891-92.) Moreover, even if REAOC's reading of *City of Santa Ana* were correct, it fails to identify any MOU provision or other legislative enactment that sufficiently "relates to" an implicit agreement to provide retiree health benefits in perpetuity.

applied a strong presumption that a legislative body does not intend to bind itself contractually, particularly where vested rights are at issue. (*See Claypool v. Wilson* (1992) 4 Cal.App.4th 646 [noting that where courts found "implied contractual obligations" in prior cases related to the administration of other state retirement funds, they "did so on the strength of assurances to be found in the language of the government statutes," noting that the "the implication of suspension of legislative control must be 'unmistakable'"], quoting *California Teachers' Assn. v. Cory* (1984) 155 Cal.App.3d 494, 509.) Federal courts interpreting California law have similarly recognized this "well-founded presumption." (*See San Diego Police Officers' Assn. v. San Diego City Employees' Retirement Sys., supra*, F.3d at p. 740 ["[a]bsent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise'"], citing *Robertson v. Kulongoski* (9th Cir. 2006) 466 F.3d 1114, 1118.)

This presumption against "vesting" applies with special force in the context of collectively-bargained MOUs, which are usually limited in duration and subject to change based on future negotiations. For example, in *San Bernardino Public Employees Association v. City of Fontana* (1998) 67 Cal.App.4th 1215, the court expressly rejected a claim that a lifelong commitment may be implied from a collectively bargained MOU. In that

case, a union sought to challenge the city's changes to longevity-based benefits provided under previous MOUs, claiming that the benefits were vested and not subject to change. The court rejected this argument, explaining:

> Here, the longevity based benefits were provided for in collective bargaining agreements reached between the City and its bargaining groups. Those collective bargaining agreements, as implemented through previous MOU's, were of fixed duration. Once the MOU's expired under their own terms, the employees had no legitimate expectation that the longevity based benefits would continue unless they were negotiated as part of a new bargaining agreement.

(*Id.* at p. 1223; *see also City of El Cajon v. El Cajon Police Officers' Assn.* (1996) 49 Cal.App.4th 64, 73 [recognizing that collective bargaining agreements "which can only be terminated through mutual consent of the parties are generally considered to be of indeterminate duration, and that such contracts are terminable at will upon reasonable notice to the other party"].)

Notably, in *San Diego Police Officers Association, supra*, the Ninth Circuit relied on *City of Fontana* in finding that the city's provision of retiree health benefits did not give rise to any vested rights. Specifically, the Ninth Circuit, relying of *City of Fontana*, held that the retiree medical benefits at issue were merely "longevity-based benefits that continued only

insofar as they were renegotiated as part of a new agreement and were not protectable contract rights." (568 F.3d at p. 740.)

The federal district court reached a similar conclusion in *Sonoma, supra*. In that case, the retiree association, like REAOC here, argued that a vested right to lifetime retiree benefits may be implied from the county's negotiated MOUs, which contained certain provisions concerning retiree health benefits. Relying on *Litton Financial Printing Division v. NLRB* (1991) 501 U.S. 190, the association argued that "rights that vest in a collective bargaining agreement survive the term of the agreement." (Case No. 09-04432 CW, 11/23/2010 Order, DOCKET #51, p. 12.) The district court rejected this argument, stating:

> *Litton* does not aid SCARE. Although it confirms that a provision may survive the termination of a collective bargaining agreement, it specifies that the provision must say so in explicit terms; it does not state that a provision may survive the agreement.... Here, SCARE does not seek to enforce the specific MOUs it submits; rather it argues that the MOUs established a pattern and practice regarding the tie agreement which can be transferred to the BOS resolutions in regard to health benefits to members of SCARE. Given the presumption that a legislative body does not intend to bind itself contractually and that clear legislative intent is required to find a contract, any inference that can be gleaned from the MOUs cannot be transferred to the BOS resolutions regarding health benefits to members of SCARE.

(*Id.* at pp. 12-13.)

Finally, REAOC points to a number of appellate court and PERB decisions for the proposition that a longstanding past practice can give rise to a bargaining obligation under the MMBA. But as the County points out in its brief, none of those decisions support its contention that a past practice may imply a vested (non-bargainable) benefit into a MOU. (*See* Respondent's Brief, pp. 32-36.) Rather, the decisions merely indicate that a past practice may trigger a duty to bargain. Importantly, while the MMBA's meet-and-confer requirement is mandatory, it does not bind a public agency to a particular result. (*Mendocino County Employees Assn. v. County of Mendocino* (1992) 3 Cal.App.4th 14872, 1478.) Indeed, subject to certain statutory restrictions, the MMBA authorizes an employer to unilaterally implement its last, best, and final offer presented in MOU negotiations after exhausting the meet-and-confer process and any applicable impasse resolution procedures. (Gov. Code § 3505.4; County of Sonoma v. Superior Court, supra, 173 Cal.App.4th at p. 333 ["the MMBA permits unilateral implementation of a public agency's last, best, and final offer"].) Thus, the notion that a longstanding past practice alone may give rise to a vested contractual right must be rejected.

3. REAOC Attempts to Blur the Distinction Between Non-Vested Health Benefits and Vested Pension Benefits

In support of its contention that the "pooling" arrangement at issue here is amenable to vesting principles, REAOC claims that retiree health

benefits, like pension benefits, are a form of deferred compensation, and thus "public employees have a contractual right to receive the compensation promised them in exchange for work performed." (Opening Brief, p. 56.) REAOC is mistaken.

Claiming that retiree health benefits are, by their nature, amenable to vesting, REAOC relies primarily on a series of pension cases, including *Olson v. Cory* (1980) 27 Cal.3d 532 and *Kern v. City of Long Beach* (1947) 29 Cal.2d 848. These cases hold that *pension* benefits offered to public employees constitute a form of deferred compensation and thus a vested contractual right to these benefits accrues on the employee's first day of employment. But, as the County correctly notes in its brief, in referring to pension rights as "contractual," California case law is clear that such rights arise only from express language in a statute or other legislative enactment duly enacted by the public agency's governing body. (*See* Respondent's Brief, at p. 23; *see also Claypool v. Wilson* (1992), *supra*, at p. 62 ["The contractual basis of a pension right is the exchange of an employee's services for the pension right offered by the statute"]; *Valdes v. Cory* (1983) 139 Cal.App.3d 773, 787 ["The explicit language in the retirement law constitutes a contractual obligation on the part of the state as employer"].) REAOC has failed to cite a single case holding that public pension benefits can be created through an implied contract – indeed, no such case exists.

The only *non-pension* case cited by REAOC, *Thorning v. Hollister School District* (1992) 11 Cal.App.4th 1598, involved retiree health benefits that were granted by resolution and under very different circumstances than the benefits at issue. In *Thorning*, the board of a school district passed a specific resolution, which was supported by a formal district policy, granting retiree health benefits to two retiring (and voting) school board members. At the first meeting after the two board members retired, that resolution was rescinded by the new board. The two board members sued and won on those facts, which bear no resemblance to the circumstances presented here. Notably, even the *Thorning* case required express legislation to base the entitlement to the benefits at issue.[6]

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[6] Subsequent court decisions have called the soundness of *Thorning* into doubt. Specifically, the *Thorning* decision rests heavily on the decision in *California League of City Employees Association v. Palos Verde Library Association* (1978) 87 Cal.App.3d 135 ("*California League*"). However, *California League* was heavily criticized by the Court in *San Bernardino Public Employees' Association v. City of Fontana*, *supra*. As the court in *City of Fontana* noted, the central holding in *California League* was set forth in a single sentence. (*See City of Fontana, supra*, 67 Cal.App.4th at pp. 1222-23.) In contrast, the *City of Fontana* court thoroughly analyzed numerous cases, statutes, and constitutional principles to conclude that longevity benefits in a MOU of a set duration do not become "vested" simply because employees consider them "important." (*Id.* at p. 1223.) Cases subsequent to *City of Fontana* have followed it and not *Thorning*. (*See*, e.g., *San Diego Police Officers Assn. v. San Diego City Employees' Retirement Sys., supra*, 568 F.3d at p. 740.)

Furthermore, a comparison to vested pension benefits actually shows why the benefit at issue here should not be considered vested, as it is not governed by the kinds of strict procedural and legislative safeguards applicable to pensions.

Pension plans, unlike the retiree health benefits at issue in this case, are invariably approved by the governing body in explicit detail, including strong safeguards and protections as to how the plans may be modified. For example, in California, the Government Code expressly identifies retirement systems available to non-federal public sector employees. (Gov. Code § 22009.1.) These pension plans are administered by pension boards whose members, as fiduciaries, are held to strict standards of accountability and conflict of interest rules. (See, e.g., Cal. Const. art. XVI, § 17.) Moreover, pension benefits administered under these plans must be established by statute, ordinance or decision of the local electorate. (*See* Gov. Code §§ 20000 *et seq.*, 20380, 20382 [setting forth the terms of the Public Employees' Retirement Fund, covering qualifying California state employees). Importantly, such plans include express terms which specify their duration and how the plan is to be funded.

The very nature of a "defined benefit" pension plan is that the employer promises to provide a particular benefit, at a particular age and years of service. For example, when an employer adopts a "2% at 50 plan," the employer is promising 2% of "final compensation," as defined by the

plan, at age 50, subject to service requirements also spelled out by the plan. Thus, courts have long held that pension benefits are vested benefits afforded specific and special protection in the law. (*See Kern, supra*, 29 Cal.2d at p. 855; *Miller v. California, supra*, 18 Cal.3d at p. 815.) However, neither this Court nor any federal court has extended such blanket protection to other post-employment benefits – like retiree health benefits – in the absence of legislative vesting language similar to that found in defined-benefit pension statutes. There are sound reasons for this judicial restraint.

As this case demonstrates, health benefit plans can be quite different from defined benefit pension plans. Notably, unlike a defined benefit pension plan, the purported "lifetime" pooling arrangement at issue here was never legislatively enacted or approved. There are practical differences as well.

Health plans are always evolving because of the changing nature of health care itself. As the Second Circuit Court of Appeals recognized, Congress rejected the automatic vesting of health care benefits under ERISA because of the hardship such a requirement would impose:

> Automatic vesting was rejected because the costs of such plans are subject to fluctuating and unpredictable variables. Actuarial decisions concerning fixed annuities are based on fairly stable data, and vesting is appropriate. In contrast, medical insurance must take account of inflation, changes in medical practice and

> technology, and increases in the costs of treatment independent of inflation. These unstable variables prevent accurate prediction of future needs and costs.

(*Moore v. Metro. Life Ins. Co.* (2d Cir. 1988) 856 F.2d 488, 492.) As a result, employers change health plans, co-pays, deductibles, coverage of procedures, and so on, nearly every year.

Another apparent reason that Congress rejected automatic vesting of welfare benefit plans under ERISA was a "fear that placing such a burden on employers would inhibit the establishment of such plans." (*Adams v. Avondale Indus., Inc.* (6th Cir. 1990) 905 F.2d 943, 947.) This case makes the point nicely.

In the collective bargaining arena, if a benefit is implied by an arbitrator, the employer can always bargain it away. But, if vesting applies to any post-employment benefit set forth in a collectively-bargained MOU, it stands to reason that employers will not provide such benefits in the future for fear of unintentionally binding the agency to an enormous future commitment. Put another way, public agencies should be free to provide reasonable subsidies based on their current financial situation without being concerned that they will create an implied commitment to provide that subsidy over decades.

Public agencies' concerns with respect to the administration of health care benefits were heightened by the Government Accounting

Standards Board's ("GASB") enactment in 2004 of two new accounting standards, GASB 43 and 45. Those standards required, for the first time, that public agencies conduct an actuarial study of their retiree health benefit plans and then (in the 2007-08 fiscal year) report the accrued liabilities on their books. Throughout California, the actuarial studies conducted under GASB led to shocking results. For example, in Orange County's case, the County's costs – in the absence of some reform – were estimated to be $1.4 billion. The high cost of this estimate was largely due to the extraordinary (and volatile) rate at which health care costs have climbed and will continue to climb. With the adoption of the GASB rules, the County was forced to confront and address a retiree medical plan that was critically underfunded and in danger of insolvency.

The point here is not that various aspects of retiree health benefits can never become vested. That question is simply not raised by this case. Rather, the issue presented is whether retiree health benefits may become vested by implication. As demonstrated above, California law – including established government law principles – is dispositive of this issue. Under that authority, courts must carefully examine a public agency's provision of health care benefits on a case-by-case basis and look for explicit legislative enactments expressing the intent to vest, before finding they are immune to change for an entire lifetime. Such an express legislative commitment is completely lacking in this case.

CONCLUSION

For all of the foregoing reasons, *amici curiae* League of California Cities and the California State Association of Counties respectfully request that this Court conclude that retiree health benefits cannot be vested forever by implication.

Dated: December 29, 2010

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.504(d)(1), counsel certifies that the foregoing brief contains 8,102 words, as counted by the Microsoft Word 2007 word processing program used to generate the brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I, the undersigned, am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 350 Sansome Street, Suite 300, San Francisco, California, 94104. On December 29, 2010, I served the **APPLICATION OF *AMICI CURIAE* LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES FOR LEAVE TO FILE AMICUS BRIEF; BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENT COUNTY OF ORANGE** by placing the document in an envelope, sealing it and consigning it to an express mail service for guaranteed delivery on the next business day following the date of consignment to the addresses set forth below:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on December 29, 2010, at San Francisco, California.

Sherry K. Sly