SUPREME COURT OF THE STATE OF CALIFORNIA

NO. S184059

RETIRED EMPLOYEES ASSOCIATION OF ORANGE COUNTY,

Petitioner

vs.

COUNTY OF ORANGE,

Respondent.

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

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RESPONDENT'S ANSWER BRIEF ON THE MERITS

Arthur A. Hartinger (SBN 121521)
ahartinger @meyersnave.com
Jennifer L. Nock (SBN 160663)
jnock@meyersnave.com
J. Scott Smith (SBN 151163)
ssmith@meyersnave.com
MEYERS, NAVE, RIBACK, SILVER & WILSON
555 12th Street, Suite 1500
Oakland, California 94607
Telephone: (510) 808-2000
Facsimile: (510) 444-1108

Nicholas S. Chrisos, County Counsel
and Teri L. Maksoudian, Deputy County Counsel (SBN 167848)
333 West Santa Ana Boulevard, Suite 407
Santa Ana, CA 92701
Telephone: (714) 834-3300
Facsimile: (714) 834-2359

Attorneys for Defendant/Respondent
County of Orange

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ssmith@meyersnave.com
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Facsimile: (714) 834-2359

Attorneys for Defendant/Respondent
County of Orange

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I. INTRODUCTION

This action challenges respondent Orange County's ("County") legislative discretion to set retiree medical insurance rates each year. Asserting an "implied contract" theory as the basis for claiming thousands of retirees possess an irrevocable vested right, petitioner Retired Employees Association of Orange County ("REAOC") contends that the County's Board of Supervisors ("Board") is legally bound to subsidize retiree medical premiums by setting them equal to active employee premiums. A staggering unfunded liability of approximately $400 million is at stake.

The underlying decision by the County to restructure and reform its retiree medical plan came after years of careful study and analysis of all available options. The County's objective was (and remains) to contain the unsustainable costs threatening the continuing viability of the plan. One option "on the table" was simply to phase out the retiree medical plan altogether, and to stop providing group retiree medical insurance. But after extensive negotiations and consultations with all affected parties (including REAOC - who serves as the representative for retirees pursuant to Government Code section 31693), and after achieving a consensus with County labor unions, the Board enacted reasonable and prudent measures that collectively have returned the plan to a course of long-term sustainability.[1]

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1 Government Code section 31693 provides: "In any county, district, or county retirement system providing benefits under this article, the county, district, or county retirement system shall provide any organization that is recognized by the retirement system of the county or district as representing the retired employees of that county or district reasonable advance notice of any proposed changes in employee health care benefits affecting those retired employees and the organization shall have a reasonable opportunity to comment prior to any formal action by the county, district, or county retirement system on the proposed changes. As used in this section, 'proposed changes' means significant changes affecting health care benefits,

Although REAOC attempts to cast the County's actions in a negative light, the reality is that the County devoted an enormous amount of outreach, effort and resources to educate its retirees about responsible health plan design choices and alternatives, and to mitigate against any negative impacts resulting from the plan changes. The Board enacted five new retiree plans with different features, and some with lower monthly premiums than previously available. Thousands of retirees successfully transitioned to different plans, and they remain covered by health insurance to this day. The overall plan remains a success, and the County is proud throughout these challenging economic times to be able to continue to provide quality and affordable group health insurance, with no risk of disqualification based on pre-existing medical conditions, to its retirees.

The theory asserted by REAOC here is dangerous and unprecedented – that a California County can be bound by "implication" to provide lifetime benefits that were never formally approved by the legislative body, and which were never subject to any formal and public review or costing analysis. There are two separate and independent grounds upon which the Court should reject the theory advanced by REAOC, and confirm that 1) under California law a county's legislative body controls compensation, 2) there is a controlling presumption that post-employment medical benefits are *not* vested, and 3) an "implied contract" theory is meritless as a matter of law in this case.

First, public employees are entitled only to such compensation as is expressly provided by statute or ordinance, and a majority of the Board is required to bind the County as it relates to compensation of employees. Here, the underlying record demonstrates – and REAOC does not dispute – that the Orange County Board of Supervisors *never* adopted any legislation

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including, but not limited to, changes in health care carriers, plan design, and premiums."

that specifies the benefit sought here: lifetime retiree medical benefits with rates set by a "pooled" methodology. The Ninth Circuit's question may be resolved on this basis alone: Under California law, there can be no vested right to a benefit that was never approved explicitly by the Board.

Second, Orange County provides retirement benefits pursuant to the County Employees Retirement Law of 1937 ("CERL"or "'37 Act"). (Gov. Code § 31450, *et seq.*[2]) The County began to provide retiree health insurance in 1966, after CERL was amended in 1961 to let counties and districts under CERL provide retiree health care benefits. The 1961 amendments include the caveat that the provision of those benefits "shall give no vested right" to any employee or retiree. (See §§ 31691(a), 31692 ["The adoption of an ordinance or resolution pursuant to Section 31691 *shall give no vested right* to any member or retired member..."], emphasis added.) While precluding a vested right to retiree medical benefits, the statutory scheme did confer a limited protection for retirees by requiring "reasonable advance notice" and the "opportunity to comment" before changing a medical plan. (§ 31693.) In the face of this statutory scheme precluding the benefit from becoming a vested right, there clearly can be no "implied" vested right to retiree health care benefits in Orange County, or any other '37 Act county.

As described below, the various theories advanced by REAOC to overcome these two fundamental points are all misplaced and meritless as a matter of law. REAOC and its amici curiae mistakenly rely on the Meyers-Milias-Brown Act ("MMBA") and related collective bargaining laws that recognize implied obligations arising in public sector employment, such as an implied obligation to permit firefighters to use city facilities to wash personal vehicles. These sorts of implied obligations are subject to

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[2] All further statutory references are to the Government Code unless otherwise indicated.

negotiation, as opposed to vested rights that are immutably vested and therefore not negotiable. Nothing in the MMBA alters local control over the means of adopting compensation packages in California counties, including post-employment benefits. Indeed, the MMBA itself requires all "contracts" to be approved by the legislative body before they can become enforceable.

The traditional pension cases relied upon by REAOC all prove the County's central point in this case. When a county adopts a pension benefit, it does so pursuant to statutory authority that defines the lifetime benefit scheme and permits an actuarial analysis of the cost. The benefit becomes vested because the agency formally adopts a defined benefit program that specifies its lifetime nature, and courts have held that employees may enforce the vested right under the Contract Clauses of the California and United States Constitutions. Here, in contrast, the lifetime benefit sought by REAOC has never been promised or approved by the Board, and there is no record anywhere of a legislative commitment to set health insurance premiums in any particular way beyond a single plan year. Indeed, the only formal plan document containing the County's retiree medical plan specifically confirms that the plan confers no vested rights, and that the County reserves the right to change any plan element, or eliminate the plan altogether.

The County recognizes that health costs are increasing dramatically, and that these costs must compete with other critical social services. The challenge is formidable during these difficult economic times, but the County's actions in this case were reasonable and entirely consistent with California law. A contrary holding – that a county can accidentally commit to providing a lifetime retiree health benefit without its governing body actually voting to provide that benefit – would undermine the fiscal accountability that elected officials owe to their constituents and that is

enshrined in California's Constitution and statutes.

II. STATEMENT OF THE CASE

A. Background Facts

The County is a charter county existing pursuant to the provisions of the California Constitution. (REAOC's Excerpts of Record, filed August 28, 2009, in the Ninth Circuit Court of Appeals ("ER") at ER II: 11, ¶ 7; Codified Ordinances of Orange County, Charter.)

1. The County's Retiree Health Insurance Program and the Legal Challenge in *OCEA v. County of Orange*

In 1961, CERL was amended to permit '37 Act counties to provide group health insurance. (§§ 31691(a), 31692.) In 1966, by Board Resolution No. 66-124, the County began providing "group medical insurance" to its retirees. (County's Supplemental Excerpts of Record, filed September 28, 2009, in the Ninth Circuit Court of Appeals ("SER") at SER 46-47.) While the County initially paid all or a portion of retirees' monthly medical insurance premiums, the Board of Retirement, which had started making the premium payments in 1968, stopped making payments for employees retiring after June 28, 1979, and the County declined annual requests by the Orange County Employees Association ("OCEA") to resume premium payments. (*Id.*; *Orange County Employees Assn. v. County of Orange* (1991) 234 Cal. App. 3d 833, 839, 285 Cal.Rptr. 799 (*OCEA*).)[3]

On April 13, 1987, OCEA and two individuals sought a writ of mandate against the County in Orange County Superior Court. (SER 48-55.) The second cause of action (paragraphs 20-32) asserted a vested rights theory, alleging that the County's "refusal to reinstate a health and benefit plan equivalent to the plan in effect from 1966 through 1979, and to

[3] OCEA is the County's largest labor union, representing approximately 12,000 employees. (ER II: 34, ¶5.)

contribute to the employees' premiums for such plans, is an impairment of Petitioners' vested rights" and that "Petitioners' vested right in a health benefit plan which continues upon retirement at no additional cost to the retiree, is not barred by the provisions of Government Code Section 31692 ..." (SER 48-55, ¶¶ 23, 24.)

On October 9, 1987, the trial court sustained the County's demurrer to OCEA's second cause of action without leave to amend, finding: "*The pension cases relating to vested rights do not apply to health benefits. In addition, Government Code Section 31692 is expressive of legislative policy regarding health benefit plans.*" (SER 56 [Notice of Ruling on Respondents' Demurrer, attaching Minute Orders dated October 9 and 15, 1987, filed Oct. 27, 1987] emphasis added.) While other aspects of the case were appealed, this portion of the ruling was not. (See *OCEA, supra*, 234 Cal.App.3d at 837 fn.2.)

In 1991, the County prevailed in the portions of *OCEA* that were appealed, with the court ruling that Section 53205.2 did not mandate that the County must "provide retired county personnel with health care benefits equal to those provided to active employees, at no additional out-of-pocket cost to the retirees." (*OCEA, supra*, 234 Cal.App.3d at 836-837, 841.) REAOC asserts that the *OCEA* court's description of the "comprehensive plan available to active employees and retirees" *at the time of the 1990 trial,* is somehow evidence that the pooled rates obligated the County to maintain equal active and retiree rates in perpetuity. (Op. Br. at 13-14, partially quoting *OCEA,* 234 Cal.App.3d at 837-838.) Neither the court's description nor its holding, however, indicate in any way that the retirees had a vested right to pooling.

In 1993, the Board, by Resolution No. 93-369, adopted a comprehensive retiree medical program, titled "the County of Orange Retiree Medical Plan" ("the 1993 Plan"). (SER 57-82.) The 1993 Plan

provides for subsidies – either through a monthly grant or one-time lump sum payment – to help offset retiree premiums, but specifically reserves to the County the right to amend or terminate the plan, and further, provides that it created no vested rights. (ER II: 35:22-37:¶¶11-19; SER 62-63 (Art. 1.3 ["This Plan does not create any vested rights to the benefits provided hereunder on the part of any Employee, Retiree or any other person...."]); SER 79-80 (Arts. 5.4, 5.5).) Like the 1966 plan, the 1993 plan makes no reference to how the Board will set retiree rates, nor does it purport to provide any lifetime pooling benefit.

2. The County Never Adopted Legislation Requiring Pooled Rates Beyond a Single Plan Year

a. The County's Rate-Setting Legislation

Each year, the County's Board of Supervisors exercises its legislative discretion and approves group health plan rates for the following year by formal Board action. The County submitted into evidence in the federal district court the Board's annual legislation setting health plan rates for the plan years 1981 through 2009. (See ER II: 38:10-41:13, ¶¶ 25-33; County's Request for Judicial Notice ("RJN"), filed herewith, Request 1, Exh. 1.) A review of the legislation demonstrates that there was no action by the Board to limit its discretion to set rates in the future. (*Id.*)

For the plan years 1985 through 2007, the Board set retiree rates each year that were equal to active rates for most of its group health plans. With the rates pooled, the cost of a retiree only premium in the Indemnity A Plan from 1985 to 2004 nevertheless increased from $131.48 to $922.91 – representing an over 600% increase. (ER V: 1119, ¶ 4].) To the extent the Board's approval of rates resulted in artificially low – or subsidized – rates for the retirees, that subsidy was made each year through Board action, and lasted only for that year.

REAOC previously identified, as the source of its vested right claim, the Board's rate legislation for the 1985 plan year, Resolution No. 84-1460. (SER 83-92; ER VI: 1185.) That legislation simply adopted the 1985 Health Plan Rate Schedule, with a table establishing the "Retired Employees Monthly Premium Rates Effective January 1, 1985." (SER 83-84 [on the matter of rates, resolution itself says only, "BE IT RESOLVED that this Board hereby: ... 4. Approves the rate tables as contained in Exhibit 5, 5A, 5B. Approves application to employees age 70 or older who are enrolled in medicare, the rates listed in Exhibit 5B, with the normal percentage County share"]; SER 92 [Exhibit 5B to Resolution No. 84-1460, captioned, "Retired Employees Monthly Premium Rates Effective January 1, 1985"].) Neither the resolution nor the attached staff report (referenced as the Agenda Item Transmittal) say anything about how the rates will be set beyond 1985. (SER 83-92.) The accompanying staff report stated, "Retiree rates need to be *increased* to a level that covers expenses and recoups the draw down on reserves," and it recommended a projected 72% increase in retiree rates in 1985 by "equalizing retiree rates with employee rates...." (SER 87.) Contrary to REAOC's assertion, there is nothing in the record, or in REAOC's citations to the record, that the "County determined" that the alternative rate increase was "too drastic" or that "retiree premiums would be subject to excessive inflation over time if they were in fact rated and charged as a separate group of participants." (Op. Brief at 11.) Importantly, the resolution does not contain any language purporting to limit the Board's future discretion when setting health plan rates.

In addition to the staff reports that accompanied the proposed rate legislation, the Board also received reports from the County's outside consultants, including William M. Mercer, Incorporated, Mercer Human Resource Consulting, and Mercer Health and Benefits (collectively

"Mercer") regarding their recommendations for rates for the County's indemnity (i.e., self-funded) health plans and which included an identification of "the cost associated with pooling retiree rates with active rates." (ER V: 1173, ¶¶ 4, 6.) While these reports referred to pooling as a "practice" or "policy" to "reflect the fact that the Board of Supervisors set rates in this fashion over a period of time," the Mercer consultant was "not aware of any enactment by the Orange County Board of Supervisors stating that retirees are entitled throughout their lifetimes to have their health plan rates set equal to active employees..." (ER V: 1173-1174, ¶¶ 5, 7.) And although REAOC attempts to attribute these reports to "the County's employee benefits department," it is clear from the record that they were submitted by Mercer – particularly given that the one report REAOC quotes is on "William M. Mercer" letterhead. (Op. Brief at 14-15, citing ER V: 931.) The words "practice" and "policy" are not contained in any legislative instrument adopted by the Board. (See RJN, Request 1, Exh. 1.)

b. The County's Compensation Legislation: MOUs and PSRs

The County also submitted to the federal district court a complete record of relevant memoranda of understanding ("MOUs") and personnel salary resolutions ("PSRs") adopted by the Board. (RJN, Request 2, Exh. 2.) These MOUs are between the County and its recognized employee associations; there are no MOUs between the County and REAOC. As with the rate-setting legislation, a review of the MOUs and PSRs shows there is nothing in any of the Board's legislative files containing a commitment by the Board to set rates using a pooled method for the lifetime of a retiree. In other words, there is nothing in any of the Board's legislative actions designating the pooling of active and retiree rates as deferred compensation – or any compensation at all.

The one page of the one MOU that REAOC cites in its opening brief (Petitioner's Opening Brief on the Merits, filed September 17, 2010 ("Op. Br.") merely states, "Employees will be given the opportunity to change medical plans at date of retirement." (ER IV: 0874 [MOU between the County and the Orange County Attorneys Association for the Attorney Unit, 1993-1996].) REAOC also included in its excerpt of record the portion of that MOU that incorporates the 1993 Retiree Medical Plan, which precluded vesting. (ER IV: 876-879; ER V: 1151-1152.) By the express terms of the MOU, the MOU's "Retiree Medical Benefit" could not be implemented until and unless the Board approved the 1993 Plan. (ER IV: 876 [Section 5.A.1: "The provisions set forth in this Section shall not be implemented unless the Board of Supervisors adopts a Retiree Medical Program ..." and Section 5.B.1.: "Effective approximately July 1, 1993 or such later date as may be adopted by the Board of Supervisors, the County will implement a Retiree Medical Insurance Grant plan...."].) Finally, the MOU REAOC submitted contains an integration clause on its face sheet confirming that the MOU "sets forth the terms of agreement." (ER IV: 0872.) REAOC cannot identify any language in that or any other MOU regarding a lifetime pooling benefit for retirees. There simply isn't such language.

The first time any County MOU mentioned the methodology for setting rates was in 2006, when the Board restructured the retiree medical program. As discussed below, the MOUs memorialize the County's overall restructuring plan, including the agreement to *split* insurance pools. (ER II: 70-71.)

3. The County Commenced a Review of its Retiree Medical Program in 2004, and Formally Adopted a Reform Plan, Including Splitting the Pool, in 2006

By 2004, the County began a serious review of its retiree medical program, which was critically underfunded and in danger of insolvency because the costs were increasing dramatically and the projected revenues would not cover the costs. (ER II: 41-42, ¶¶ 35, 36; ER II: 75-76, ¶¶ 2, 5-7.) The County's actuaries were estimating an overall $1.4 billion unfunded liability which would be reported in the County's Comprehensive Annual Financial Report starting in fiscal year 2007-2008, with approximately $400 million attributable to pooling alone. (ER IV: 623, 646 [2005 Actuarial Valuation, stating $1,418,692,000 was the total Actuarial Accrued Liability ("AAL") for the County's Retiree Healthcare Plan "using selected actuarial methods and assumptions," including, "The plan is assumed to be ongoing for cost purposes. This does not imply that an obligation to continue the plan exists"]; ER IV: 627 [$373,842,000 of the AAL was for the pooling subsidy, and $1,044,416,000 was for the Grant].)

A Retiree Medical Panel was formed with representatives from the County, its labor unions, the Board of Retirement (or "OCERS"), and REAOC participating. (ER II: 42, ¶ 36; SER 16-24.)[4] In addition, the Board met on various occasions, including a June 2006 public study session, to receive input and consider various options, including elimination of the "subsidy" resulting from pooling, modifying the grant structure, and other alternatives to restructure its retiree medical program. (ER II: 87, ¶¶ 5-6, ER II: 90-94; ER II: 42, ¶¶ 38, 40; ER II: 76-77, ¶¶ 7-9 ["One of the options considered, but not accepted to date, is to eliminate the retiree medical program in its entirety"].)

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4 "OCERS" refers to the Orange County Employees Retirement System.

As part of the restructuring, the County also embarked on negotiations with its labor unions to address the problem. (ER II: 42-43, ¶¶ 39, 41.) On September 12, 2006, the Board approved a key written agreement with OCEA that contained a number of reform measures, including an agreement to rate retirees separately for health plan purposes effective January 1, 2008. (ER II: 44, ¶ 46, ER II: 70-71 [Board approval of OCEA agreement, including the term, "Split the pool (actives/retirees) effective January 2008"].) All other labor unions reached agreements with the County to help resolve the issues. (ER II: 43-44, ¶¶ 42-47.)

The Board also directed County staff to consider new medical plans, and to take reasonable measures to mitigate against any negative impacts on retirees. Eventually, the County adopted five new plans, thus offering plan design alternatives with lower premiums to retirees. (ER II: 45-49, ¶¶ 48-63.) The County also aggressively moved forward with an education and outreach program for retirees. (ER II: 96-103, ¶¶ 5-26; ER II: 109-117.)

REAOC attempts to disparage the County's efforts to reform and ultimately save the plan, but the issue before the Court is not whether the decisions were good or wise or ill-conceived. (*Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 962, 81 Cal.Rptr.2d 93 ["Courts have nothing to do with the wisdom of laws or regulations, and the legislative power must be upheld unless manifestly abused so as to infringe on constitutional guaranties"], citing *Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 461-462, 202 P.2d 38.) Rather, the ultimate issue is whether the Board infringed on any "constitutional guaranties" in exercising its legislative discretion to set rates each year. (*Id.*)

B. Procedural Background

On November 5, 2007, REAOC filed a Complaint for Declaratory and Injunctive Relief in the United States District Court for the Central

District of California, contesting the portion of the 2006 retiree medical reform that split the pool for rate-setting purposes. It asserted causes of action for breach of contract, impairment of contract in violation of the United States and California constitutions, violation of the due process clauses of the United States and California constitutions, and promissory estoppel. On June 19, 2009, the court granted the County's Motion for Summary Judgment and denied as moot REAOC's Motion for Summary Adjudication, finding that absent "any explicit legislative or statutory authority requiring the County to continue providing retirees the pooling benefit in setting rates, ... the County is not contractually obligated to provide retirees the pooling benefit throughout their lifetimes." (*Retired Employees Assn of Orange County, Inc. v. County of Orange* (C.D.Cal. 2009) 632 F.Supp.2d 983, 987 (*REAOC*).)

On June 30, 2009, REAOC appealed the district court decision to the United States Court of Appeals for the Ninth Circuit, which heard oral argument on June 10, 2010. On June 29, 2010, the Ninth Circuit requested that this Court answer 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." In July 2010, both parties proposed reformulated questions, with the County proposing on July 19, 2010, the following restatement of the question:

> "Where a county board of supervisors annually sets retiree health plan rates by formal board action, and for a number of plan years chooses to set retiree rates equal to employee rates, but never adopts legislation obligating the county to set future health plan rates in any particular fashion beyond any single plan year, has the county formed an implied contract under state law conferring upon retirees a lifetime, vested right to health rates equal to employee rates?"

On August 18, 2010, the Court agreed to decide the question, designating REAOC as the petitioner.

III. ARGUMENT

As a matter of California law, a California county and its employees cannot form an implied contract that confers vested rights to health benefits on retired county employees absent a clear expression of legislative intent to do so. Here, not only is there is a clear *absence* of legislative intent by the County's governing body to provide the asserted vested right, but the state legislature has expressly precluded finding a vested right to retiree medical benefits in '37 Act counties.

A. The Lack of Board Legislation Conferring the Asserted Vested Right to a Particular Methodology for Setting Group Health Rates Precludes Implying That Right

REAOC contends that its members possess a vested right in pooled medical rates because retirees allegedly earned it as part of their compensation when they were working. (Op. Br. at 56.) But California county employee compensation, including retiree benefits, may be established only by Board legislation, and there is no Board legislation here conferring pooled rates as deferred compensation, let alone as a formal benefit protected as a vested right.

1. County Employee Compensation, Including Retiree Benefits, May Be Established Only by Board Legislation

Only a majority of the Board of Supervisors is authorized to bind the County as it relates to compensation of employees. (*County of Riverside v. Superior Court* (2003) 30 Cal. 4th 278, 285, 132 Cal.Rptr.2d 713, 723 (*Riverside*) ["The constitutional language is quite clear and quite specific: the county, not the state, not someone else, shall provide for the compensation of its employees"], referencing Cal. Const. art. XI, § 1, subd.

(b), § 1(b) [County's "governing body shall provide for the number, compensation, tenure, and appointment of employees"]; § 25300 ["The board of supervisors shall prescribe the compensation of all county officers and shall provide for the ...compensation ... of county employees"]; Codified Ordinances of Orange County Title 1, Div. 3, Art. 1, § 1-3-2 ["The regulation of the ... compensation of officers and employees of the County of Orange... shall, effective July 1, 1965, be fixed by resolution of this Board"]; § 3505.1 [memoranda of understanding not binding until approved by governing body of public agency]; *Assn for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2007) 154 Cal.App.4th 1536, 1548-1549, 65 Cal.Rptr.3d 665, ["'the public employee is entitled only to such compensation as is expressly provided by statute or ordinance'"] quoting *Markman v. County of Los Angeles* (1973) 35 Cal.App.3d 132, 134-135, 110 Cal.Rptr. 611, citations omitted.) Setting "compensation of county employees" in any way other than by a majority of a County's governing body "would be inconsistent with both longstanding statutory rules of interpretation and established California case law, as well as deeply offensive to basic principles of representative democracy." (*County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 344-346, 93 Cal.Rptr.3d 39.)

Here, REAOC has failed to identify any Board resolution, MOU, or other legislative enactment that could possibly serve as the basis for its implied contract theory.

When a statute limits a public agency's power to make certain contracts to a certain prescribed method, 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." (*Reams v. Cooley* (1915) 171 Cal. 150, 153-154, 152 P. 293; § 23006 ["Any contract ...made or attempted to be made in violation of law, is void, and shall not be the

foundation... of a claim against the treasury of any county"]; *First Street Plaza Partners v. City of Los Angeles* (1998) 65 Cal.App.4th 650, 666-668, 76 Cal.Rptr.2d 626 [refusing to imply or enforce contracts where city charter requirements for contracting were not satisfied]; see also *Medina v. Bd. of Retirement, L.A. County Employees Retirement Assn* (2003) 112 Cal.App.4th 864, 869-872, 5 Cal.Rptr.3d 634 [where Board of Supervisors did not adopt provision allowing appellant district attorneys to be classified as safety members, "purported contract to give appellants the pension benefits of safety members" was invalid, and "the vested rights doctrine does not apply"].)

Although REAOC relies on *Youngman v. Nevada Irrigation District*, discussed *infra,* its holding is consistent with the principle that a contract may not be made in conflict with a statutory restriction. (*Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 246, 74 Cal.Rptr. 398 (*Youngman*) ["Governmental subdivisions may be bound by an implied contract *if* there is no statutory prohibition against such arrangements"], emphasis added.) (See Op.Br. at 34, 46.) Moreover, the public sector case REAOC cites as relying on its interpretation of *Youngman* is also consistent with this principle. (See *Air Quality Products, Inc. v. State of California* (1979) 96 Cal.App.3d 340, 349, 157 Cal.Rptr. 791 [after citing *Youngman,* court explained that "no contractual obligation may be enforced against a public agency unless it appears the agency was authorized by the Constitution or statute to incur the obligation; a contract entered into by a governmental entity without the requisite constitutional or statutory authority is void and unenforceable"], citations omitted.)

2. There is No Board Legislation Here Conferring the Asserted Vested Right to a Particular Methodology for Setting Group Health Rates

Throughout this litigation REAOC has equivocated on what

legislative instrument could possibly underlie its implied contract claim. At various times REAOC has identified 1) a 1984 resolution by which the Board adopted the rates for 1985 only; and 2) an MOU that is silent on pooling or equalizing active employee and retiree rates. (See *REAOC, supra,* 632 F.Supp.2d at 986 [noting that REAOC "earlier seemed to embrace Resolution 84-1460 as providing the necessary Board approval" but when that "prove[d] to be an unfruitful embrace," REAOC argued "that the pooling benefit was an implied term of the memoranda of understanding between the parties"].) There was no dispute, however, that neither instrument contained Board approval of the alleged vested right. (See *Ibid.* ["the parties do not dispute that Board resolutions do not explicitly provide that the retirees are entitled to the pooling benefit for their lifetimes"]; Opening Brief of Appellant Retired Employees Association of Orange County, filed August 28, 2009, in the Ninth Circuit, at p. 1 [REAOC concedes that the subsidy from pooling rates "had never been set forth in express terms in the collective bargaining agreements between the County and its employees"].)

Because the 1984 resolution did not express a legislative intent or "continuing obligation" to set retiree rates equal to active rates for any period of time beyond 1985, and because the MOU identified by REAOC, as well as the complete package of Board legislation submitted to the district court and now to this Court, did not express the Board's intent or "continuing obligation" to set retiree rates equal to active rates at all, none can serve as the legislative instrument from which to "imply" a vested right to pooling. (*Cal. Teachers Assn. v. Cory* (1984) 155 Cal.App.3d 494, 505, 202 Cal.Rptr. 611 (*Cory*) [statute manifested a "continuing obligation" before the Court would find a vested right].)

3. Extrinsic Evidence Alone, in the Absence of Applicable Board Legislation, Cannot be Used to Imply the Asserted Vested Right

In light of the absence of any express intent by the Board to create a right to a lifetime benefit of pooling, REAOC turns to a hodgepodge of extrinsic evidence. None of the proffered evidence can create a vested right in the absence of an underlying legislative instrument reflecting the Board's intent to adopt the benefit at issue. (See *Sonoma County Assn. of Retired Employees v. Sonoma County* (N.D. Cal. May 14, 2010, No. 09-04432 CW) ____ F.Supp. ____, 2010 WL 1957463, *3 [while extrinsic evidence "could be probative of the scope of [any] promises allegedly made by county resolution and ordinance," such evidence cannot, "by itself, contractually bind [the County] to provide retirees medical benefits"], citing *Dimon v. County of Los Angeles* (2008) 166 Cal.App.4th 1276, 1284-85, 83 Cal.Rptr.3d 576 *(Dimon)*; *Sappington v. Orange Unified School District* (2004) 119 Cal.App.4th 949, 954-55, 14 Cal.Rptr.3d 764 (*Sappington*); *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 339-40, 124 Cal.Rptr. 513 (*Glendale*); see also *Sterling v. Taylor* (2007) 40 Cal.4th 757, 767, 55 Cal.Rptr.3d 116 ["Because the memorandum itself must include the essential contractual terms, it is clear that extrinsic evidence cannot *supply* those required terms"], emphasis in original.)

REAOC's first argument is simply that the Board approved retiree medical rates that were equal to active medical rates each year between 1984 and 2006, for the 1985 to 2007 plan years. This argument should be rejected for the simple reason that the Board's exercise of its legislative authority each year does not mean that the Board is legally obligated to exercise its discretion in any particular way in the future, and there are no cases holding otherwise. Case law specifically rejects the same type of

evidence and analysis that REAOC asserts here. (See *Sappington, supra,* 119 Cal.App.4th at 954-55.)

The issue in *Sappington* was whether a policy approved by the school district's governing board in 1976 gave retirees a vested right to free PPO coverage, where the policy read, "The District shall underwrite the cost of the District's Medical and Hospital Insurance Program for all employees who retire from the District provided they have been employed in the District for the equivalent of ten (10) years or longer." (*Sappington, supra,* 119 Cal.App.4th at 951.) To determine the existence of a vested right, the court began "with the language of the policy itself" and noted, "As the basis for a vested right, the policy is curiously brief and unspecific." (*Sappington, supra,* 119 Cal.App.4th at 954.) This language, of course, is more than any language contained in any Board enactment in this case.

As in the instant case, "[t]actily conceding that the language of the policy does not support their position, the retirees turn[ed] to the extrinsic evidence of the parties' course of conduct between 1977 and 1997." (*Id.* at 954.) After an analysis of the policy at issue, as well as the proffered extrinsic evidence, the court reasoned, "[t]he fact the District provided a free PPO benefit for 20 years-before health insurance premiums skyrocketed and the cost of PPO coverage began far outpacing the cost of HMO coverage-does not prove the District promised to provide that option forever." (*Id.* at 955.) Concluding that the "the retirees have no vested right under the policy to free PPO coverage," the court explained, "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 954-955.)[5]

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5 Although it was suggested during oral argument before the Ninth Circuit

REAOC also argues that County representatives and agents described pooling as a "policy" or "practice" or promised "benefit." In this regard, REAOC's representation of the record is grossly inaccurate. The record shows that responsible county officials did *not* characterize pooling as compensation or a promised benefit. With regard to labor negotiators who allegedly promised in 1991-1993 to pool rates (Op. Br. at 15-16), not only did the County continue to pool rates through 2007, but neither the County's negotiators nor the Board promised to provide the benefit for any retiree's lifetime. (See SER 7-15 [REAOC witness Dave Carlaw, former County Chief of Employee Relations through 1992, testified, "I'm not going to say I didn't talk about the combined pool, but there wasn't a promise that it would go on indefinitely"]; SER 28-32 [REAOC witness Ron Kautz, who worked for the County for 27 years, and served as the County's Benefits Manager, testified that he was unaware of the Board ever promising or resolving to continue a pooling methodology for the duration of retirees' lifetimes]; ER V: 1145, ¶ 8 [retired Human Resources Director Jan Walden declared that in the negotiations leading up to the 1993 adoption of the Retiree Medical Plan, "Nor was there any commitment by the County that the 'pooling' methodology would be continued throughout any retirees' lifetime"]); ER V: 1176-1177, ¶ 7 [former Chief Negotiator Judy Cheek declared that in discussing pooling during the 1993 Plan negotiations, "the County never committed itself to set the premiums in a pooled fashion. It was always my understanding that the Board of

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that *Sappington* held that the retirees had a vested right to free HMO coverage, that issue was not before the court: "We note that the trial court implicitly found the policy obligated the District to provide at least one fully paid health plan, and the District's provision of free HMO coverage satisfies that obligation. *We do not reach that issue, because the sole issue on appeal is whether the policy requires the District to provide free PPO coverage*. We have determined the answer is no." (*Sappington, supra,* 119 Cal.App.4th at 955, emphasis added.)

Supervisors retained the discretion to set health plan rates each year, and I believe everyone at the table understood that"].)

With respect to REAOC's reliance on the words "policy" and practice" used in outside reports by the City's actuarial consultants, REAOC omits from the record that those consultants confirmed that they were unaware of *any* enactment by the Board of Supervisors requiring the rates to be set in a pooled fashion. These were reports prepared by outside consultants, and none of the words in the actual legislation adopted by the Board contained any expression of an intent to limit the Board's discretion in the future. (See ER V: 1173-1174, ¶¶5, 7.)

REAOC goes so far as to insert language into a financial report quote to show that the report characterized pooling as part of the County's compensation package (Op. Br. at 22 and 57, citing ER VI: 1233), but the actual report makes no mention of pooling. (See ER VI: 1233 [refers only to pension benefits and the "Retiree Medical Plan," which provides the grant[6] and has a no-vesting provision, as discussed *supra*].) REAOC also mis-cites the County as stating in its Ninth Circuit brief in this case that it offered pooling to induce service to the County, when it said no such thing. (Op. Br. at 57, mischaracterizing County Responding Brief at 47-48.) Regarding actuarial reports (Op. Br. at 20-22), the actuarial report REAOC cites explicitly states that it "*does not imply that an obligation to continue the plan exists,*" where the plan is described as including an "Implied Subsidy," defined as, "Participating retirees pay the active premium rates rather than the actual medical cost." (ER IV: 642, 646, emphasis added.)

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6 Although REAOC labels the subsidy that resulted from pooling or equalizing retiree rates with active employee rates as the "Retiree Premium Subsidy," it is important that REAOC's use of that terminology not be confused with the grant, which is the actual retiree premium subsidy that is referenced in the County's financial report and which is provided by the 1993 Retiree Medical Plan that includes a no-vesting clause. (SER 62-63.)

REAOC also mischaracterizes an individual supervisor's statement about contractual obligations as applying to pooling. (Op. Br. at 19.) Even so, "it is well settled that, in construing legislation, a court does not consider the motives or understanding of individual legislators even when it is the person who actually drafted the legislation." (*No Oil, Inc. v. City of Los Angeles* (1987) 196 Cal.App.3d 223, 248, 242 Cal.Rptr. 37, *citing In Re Marriage of Bouquet* (1976) 16 Cal.3d 583, 589, 128 Cal.Rptr. 427.)

And as a final example, while REAOC claims the County's request for proposal for legal services related to this issue characterized pooling as a post-employment benefit (Op. Br. at 24-25), REAOC again misconstrue the record. The request for proposal stated that "the County's position is that neither the benefits under the Plan, nor the health insurance rate pooling are vested." (ER V: 904.)

Even assuming someone in the County did represent the pooling as a "benefit," this would not create a legally enforceable right, much less a vested right. Absent any Board legislation even mentioning an obligation to continue pooling, or treating it as deferred compensation, REAOC's evidence is irrelevant. *(See Delucchi v. County of Santa Cruz* (1986) 179 Cal.App.3d 814, 824, 225 Cal.Rptr. 43 ["extrinsic evidence...is irrelevant" where "contract is not reasonably susceptible to the meaning advanced by plaintiffs"], citing *Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 16-17, 92 Cal.Rptr. 704; *Garcia v. United States* (1984) 469 U.S. 70, 78, 105 S.Ct. 479 [declining to "adopt some type of reverse parol evidence rule, where oral statements were elevated above enacted language in determining the meaning of the statute"].)

In sum, REAOC's proffer of extrinsic evidence fails because there is no underlying instrument that could possibly be "interpreted" in the manner argued by REAOC.

4. General Pension Cases, As Well As Other California Cases Addressing Retiree Health Benefits, Show That Lack of Board Legislation Conferring the Asserted Vested Right Precludes Implying That Right

The California pension cases that refer to public pension rights as "contractual" make clear that such rights arise only from legislation enacted by the employer's governing body. (See *Claypool v. Wilson* (1992) 4 Cal.App.4th 646, 662, 6 Cal.Rptr.2d 77 (*Claypool*) ["The contractual basis of a pension right is the exchange of an employee's services for the pension right *offered by the statute*"], citations omitted, emphasis added; *Valdes v. Cory*, (1983) 139 Cal.App.3d 773, 189 Cal.Rptr. 212. ["The *explicit language in the retirement law* constitutes a contractual obligation on the part of the state as employer"], emphasis added; *Cory, supra,* 155 Cal.App.3d 494 at 505. ["In California law, a legislative intent to grant contractual rights can be implied from a statute if it contains an unambiguous element of exchange of consideration by a private party for consideration offered by the state"].) Indeed, in *Claypool,* the court explained that where it had "implied contractual obligations" in prior cases related to the administration of other state retirement funds, it "did so on the strength of assurances to be found *in the language of the governing statutes*," noting "that the implication of suspension of legislative control must be 'unmistakable.'" (*Claypool, supra*, 4 Cal.App.4th at 670, quoting *Cory*, 155 Cal.App.3d at 506, emphasis added.) Accordingly, where "[t]here is no such promise expressed in the statutes," the court "will not imply one." (*Ibid.*)

Thus, each pension case cited by REAOC bases its findings on language in an actual statute or other legislative enactment. (See, e,g., *Cory, supra,* 155 Cal.App.3d at 506 [language of Education Code sections 23401 and 23402 "manifests a continuing obligation to fund the Teachers'

Retirement Fund in future years pursuant to statutory formulae"]; *Olson v. Cory* (1980) 27 Cal.3d 532, 541-542,178 Cal.Rptr. 568 [§§ 68203, 75000 *et seq*]; *Kern, supra,* 29 Cal.2d 848, 853, 179 P.2d 799 [source of vested right was City Charter pension provisions, at section 187, subdivision (2)]; *and see Betts v. Bd. of Admin.* (1978) 21 Cal.3d 859, 863, 148 Cal.Rptr. 158, [interpreting section 9359.1].)

Similarly, in addition to *Sappington, supra,* the three other cases that have addressed retiree health benefits also look to legislative language in determining the existence of the claimed right. (*Ventura County Retired Employees' Assn, Inc. v. County of Ventura* (1991) 228 Cal.App.3d 1594, 179 Cal.Rptr. 676 *(Ventura); OCEA, supra,* 234 Cal. App. 3d 833; *Thorning v. Hollister School Dist.* (1992) 11 Cal.App.4th 1598, 15 Cal.Rptr.2d 91 (*Thorning*).)

In *Ventura*, the retirees "want[ed] health care benefits which are equal in cost to those provided to active employees," but the court held that the applicable statutory scheme "does not require equal health care benefits for active employees and retirees." (*Ventura, supra,* 228 Cal.App.3d at 1596, analyzing § 53205.2.) The statute at issue read, in pertinent part, "...the local agency or governing board shall give preference to such health benefit plans as do not terminate upon retirement of the employees affected, and which provide the same benefits for retired personnel as for active personnel at no increase in costs to the retired person..." (*Id.* fn.1, quoting § 53205.2.) After analyzing the language of the statute, the court concluded, "Section 53205.2, enacted in 1963, does not require equal health care benefits for active employees and retirees. *Had the Legislature so intended, it surely would have said so.*" (*Id.* at 1598, emphasis added.) Although the court was sympathetic to the plight of the retirees in confronting "the spiraling cost of health care in America," it acknowledged "the difficult decisions" confronting legislative bodies in "these fiscally troubled times,"

and held that, under the applicable statutory scheme, the "County is not compelled to offer retirees and active employees a health plan funded by a single and uniform premium to both groups of insureds." (*Id.* at 1598-99.) It therefore declined to compel the "County to exercise its budgetary discretion in a particular manner... or '... to perform legislative acts in a particular manner.'" (*Id.* at 1599, quoting *Sklar v. Franchise Tax Board* (1986) 185 Cal.App.3d 616, 622, 230 Cal.Rptr. 42.)

And in *OCEA*, construing the same statute as *Ventura*, the court also held that "Section 53205.2 does not mandate equal treatment of active and retired employees." (*OCEA, supra,*, 234 Cal.App.3d at 841-842.) Looking at the language of the statute itself, it reasoned, "Use of the word 'preference,' without more, implies the exercise of judgment. Had the Legislature intended the local agencies to 'select' or 'approve' a particular kind of plan, it could easily have said so. It did not." (*Id.* at 842.) Noting the discretion provided throughout the entire statutory scheme, including section 53205, which "*permits* the local agency to pay all or a portion of the premiums, dues or other charges for health and welfare benefits for its employees, both active and retired," the court concluded, "In essence, the statutory scheme permits local agencies to consider the differences between retired and active employees in providing health benefits." (*Id.* at 843, emphasis in original.)

In *Thorning*, the only case to find a right to retiree health benefits, the school district's governing body adopted a policy in 1988 that stated explicitly, "'Any members retiring from the Board after at least one full term shall have the option to continue the health and welfare benefits program if coverage is in effect at time of retirement, except that Board members who have served less than twelve (12) years but at least one term shall pay the full cost of health and welfare benefits coverage.'" (*Thorning, supra*, 11 Cal.App.4th at 1604-1605, quoting "Bylaws of the Board," Policy

No. 9250(a).) In 1990, when two Board members who had over twelve years of service were retiring from the Board, the Board first voted to continue payment for health and welfare benefits for those members for the next ten years but then voted to suspend payment. (*Id.* at 1602.) The retired Board members sought a writ of mandate to require payment, and the court interpreted legislation – without implying anything – to determine who must pay for the health benefits. The *Thorning* court stated:

> "To answer this question, *we look to the language of the 1988 policy declaration and the statutes on which it is based.* ... Reading these sections together, it appears that District intended to allow to long-term retired board members the option of continuing the program at District's expense."

(*Id.* at 1607-1608, emphasis added.) Thus, *Thorning's* application of California law is consistent with that of California's pension cases: where there is no promise of a vested right "expressed in the statutes," the court "will not imply one." (*Claypool, supra,* 4 Cal.App.4th at 670.)

Failing to acknowledge *Sappington, Ventura,* or *OCEA*, REAOC inexplicably says, "no case directly addresses retirement health care benefits." (Op. Br. at 32.) But to the extent REAOC means that no California case has held that public entities can be bound by implied contractual terms to provide a lifetime retirement health care benefit in the absence of explicit legislative authority, REAOC is correct. And that is because such a holding would be inconsistent with California law. As the district court held, "The law is clear: California courts have refused to find public entities contractually obligated to provide specified retirement benefits like those Plaintiff seeks in the absence of explicit legislative or statutory authority." (*REAOC, supra,* 632 F.Supp.2d at 987.)

B. California's County Employees Retirement Law Contains an Express Prohibition Against Vested Retiree Health Benefits

The prohibition on vested retiree health benefits contained in the '37 Act responds directly to the Ninth Circuit's question, i.e., under the '37 Act, a California county and its employees *cannot* form an implied contract that confers vested rights to health benefits on retired county employees.

Specifically, the County provides retirement benefits pursuant to the '37 Act (also referred to as "CERL"). (§31450, et seq.; see also Codified Ordinances of Orange County Title 1, Div. 3, art. 1, §§ 1-3-7, 1-3-8, 1-3-9, 1-3-10 [applying specific sections of CERL to the County's retirement system]; *Stevenson v. Retirement Bd. of the Orange County Employees' Retirement System* (2010) 186 Cal.App.4th 498, 500, 111 Cal.Rptr.3d 716 ["Orange County employees receive retirement benefits under a retirement system established pursuant to the County Employees Retirement Law of 1937 (CERL) (Gov. Code, § 31450 et seq.)"].) In 1961, CERL was amended to let counties and districts under CERL provide retiree health care benefits, with the caveat that the provision of those benefits "shall give no vested right" to any employee or retiree. (*See* §§ 31691(a), 31692 ["The adoption of an ordinance or resolution pursuant to Section 31691 *shall give no vested right* to any member or retired member..."], emphasis added.)

REAOC does not mention CERL in its opening brief, but it has previously asserted two arguments to avoid the vesting prohibition of section 31692. First, REAOC argued in its August 2, 2010, letter brief to this Court that section 31692 did not apply here because County retiree health care premiums are governed by sections 53201 et seq. rather than CERL, and that that statutory scheme does not preclude vesting by implication. REAOC is incorred, as CERL plainly applies to the County's provision of retiree health benefits.

Under CERL, counties that create a retirement system are tasked with creating and funding an "employees retirement fund," which is a trust fund "solely for the benefit of the members and retired members of the

[retirement] system and their survivors and beneficiaries." (§§ 31588, 31588.2.) When CERL was amended in 1961 to let counties provide retiree health benefits, it authorized a county's contribution to those benefits to come "from its funds and *not from* the retirement fund." (§ 31691(a), emphasis added; § 31691(d) [also provides for funding separate from the retirement fund].) At the same time, it explicitly provided that any enactment "pursuant to Section 31691 shall give no vested right to any member or retired member..." (§ 31692.) By requiring funding for such benefits to come from outside the normal funding for retirement benefits, and by explicitly adding no-vesting language, the legislature was quite careful to ensure that these additional benefits not be treated like vested pension benefits. To ensure that county general funds *not* be tied to pension obligations provided through the "employees retirement fund," sections 31691 and 31692 necessarily govern the provision of retiree health benefits to any "retired member" of the County's retirement system, which include REAOC's members.

In contrast, sections 53201, 53202, and 53205 are part of the "group insurance" statutory scheme that simply authorizes local governments to secure and provide health insurance to employees and retirees. (*OCEA, supra*, 234 Cal.App.3d at 843-844 [discussing permissive nature of the statutory scheme.) These statutes do not define the rights of either employees or retirees to receive health insurance; they simply provide the statutory authorization for public agencies to either purchase commercial insurance or to fund their own health care systems. (See § 53201 [authorizing legislative body of local agency to "provide...health and welfare benefits for the benefit of its officers, employees, retired employees"]; § 53205 [legislative body may authorize payment of premiums].) Nor do they create a competing or alternative retiree heath benefit scheme to CERL, as REAOC suggests. To the contrary, they

contemplate that some of the health care premiums authorized by section 53201 would be paid on behalf of county retirement system members, and as such they would be governed by section 31691. Indeed, section 53225 authorizes the creation of an alliance among counties who provide health benefits under section 31691 to pool their resources for providing such benefits. And, of course, *neither* statutory scheme provides a vested right to retiree health benefits or to equal rates for active and retired employees. (*OCEA, supra*, 234 Cal.App.3d at 843-844 ["the statutory scheme permits local agencies to consider the differences between retired and active employees in providing health benefits"].)

Because Section 31691 is the more narrow statute that governs health care benefits provided to members of county retirement systems, any health benefits those members may receive from the County is limited to an enactment made pursuant to section 31691. (Code Civ. Proc. § 1859.)

The *Ventura* court explained as much:

> "Appellant concedes that County's initial decision to furnish health care benefits to retirees is purely discretionary. (See § 31691.) Once a county elects to provide a health benefit plan, section 53205.2 does not compel it to subsidize a retiree health plan that no private insurer could underwrite on a fiscally sound basis. Such a construction would thwart any incentive to offer self-insured health benefit plans to either active employees or retirees."

(*Ventura*, 228 Cal.App.3d at 1598.) Accordingly, because the enactment authorizing health benefits to County retirees can only be undertaken pursuant to section 31691, the corresponding limit on that power in section 31692 necessarily governs this case.

Second, REAOC argued in federal court that when the Board pooled rates in a particular year, it did so by resolution rather than ordinance, and that the non-vesting provisions of CERL apply only to health benefits

conveyed by ordinance. More specifically, the argument is that section 31692's prohibition applies only to the "adoption of an ordinance or resolution pursuant to Section 31691," and that section 31691 lets a county board of supervisors contribute toward payment of retiree medical costs only by "ordinance," while a district's governing board may do so by ordinance or resolution. (See §§ 31691(a), 31692.) The basic flaw in this argument is that even if the County was obligated by section 31691 to authorize pooled rates in a particular year by ordinance, doing so by resolution might invalidate the pooled-rate benefits, but it could not somehow convert the retiree health benefits into vested rights. (*See Medina, supra,* 112 Cal.App.4th at 869, 872 [where "purported contract to give appellants the pension benefits of safety members" was invalid, "the vested rights doctrine does not apply"].) Similarly, if the County "paid" for pooled rates from "its own funds" through artificially high active rates under § 31691(a), rather than from a separate fund under § 31691(d), as referenced in REAOC's August 2, 2010 letter, using what REAOC believes is the wrong payment source would invalidate the "implied subsidy" rather than converting it to a vested right. (*Id.*)

If, however, the Board did have the authority under section 31691 to adopt these retiree health benefits by resolution rather than ordinance then the anti-vesting provision of section 31692 would apply. (§ 31692 ["The adoption of an ordinance or resolution pursuant to Section 31691 shall give no vested right to any member or retired member..."].) Significantly, the trial court in *OCEA* applied the non-vesting provision of section 31692 to retiree health benefits offered through the County's 1966 resolution. (SER 49-56.)

The OCEA court's reading is consistent with the legislative history of the statutes in question. Although the County's research found no legislative history explaining the use of ordinance and resolution in section

31691, a 1982 amendment to section 31692 does show that the legislature treated those terms interchangeably. Specifically, in 1982, section 31692 was amended to allow Los Angeles County to provide its retirees with certain vested health care rights. (RJN, Request 3, Exh. 3, Assem. Com. on Public Employees and Retirement, Rep. on Assem. Bill No. 3229 (1981-1982 Reg. Sess.) as amended, pp. 4-5 ["Assembly Bill 3229 would amend Section 31692 of '37 Act Law to provide that any *ordinance or resolution* adopted by Los Angeles County in accord with Section 31691 would remain in effect for as long as similar benefits are provided any active member in county service"], emphasis added.) This language made no distinction between a county approving the rights by "resolution" or "ordinance." Additionally, the analysis of the 1982 amendment recognized the general rule that county retirees do not have vested rights to heath care benefits. The Legislative Analyst's report explained,

> "Under current law a county board of supervisors of a county under the County Employees' Retirement Law of 1937 (1937 Act) may choose to pay life or disability insurance premiums, or certain health costs, for retired county employees. The cost of the program must be supported from county funds rather than from the retirement fund. *Current law also provides that the county may rescind this benefit without further obligations to retirees, except that of providing them with 90 days notice.* This bill requires that for counties with a population of 5 million or more, however, the board cannot withdraw this benefit from retirees as long as it provides similar benefits to any active member in current county service. The only county with a population of more than 5 million is Los Angeles County."

(RJN, Request 4, Exh. 4. Legislative Analyst, Analysis of Assem. Bill No. 3229 (1981-1982 Reg. Session), as amended Aug. 9, 1982, emphasis added.) Thus, there is no legislative intent that retirees of any county other

than Los Angeles County have any vested right to any type of health benefit under section 31691. (See *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195, 132 Cal.Rptr. 377["Under the familiar rule of construction, expressio unius est exclusio alterius, where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed"].)

Thus, reading section 31691 as precluding counties from providing retiree medical benefits by resolution instead of by ordinance, or as precluding the non-vesting provision of 31692 from applying to retiree health benefits adopted by resolution, is simply not reasonable; nor is it "consistent with the statute's language and purpose." (*Block v. Orange County Employees' Retirement System* (2008) 161 Cal.App.4th 1297, 1307, 75 Cal.Rptr.3d 137 [resolving ambiguity against pensioner based on statutory interpretation: "Ambiguity or uncertainty in the meaning of pension legislation must be resolved in favor of the pensioner, but such interpretation must be consistent with the statute's language and purpose"].)

CERL's non-vesting provision provides a clear and simple response to the Ninth Circuit's question.

C. REAOC's Various Arguments To Support An Implied Contract Theory Are All Misplaced And Meritless

1. REAOC's MMBA Authorities Do Not Concern The Creation of Obligations Protected by The Vested Rights Doctrine

REAOC asks this Court to go beyond the certified question and "provide guidance regarding the sorts of factual circumstances under which a 'past practice' or 'course of dealing' ripens into a binding contractual obligation on the part of a public employer and/or employee." (Op. Br. at 9.) These terms arise in the context of labor agreements, and there is simply no authority to support the contention that a past practice or course of dealing, in the absence of express legislative intent, can confer *vested*

rights to health benefits on County retirees.

The County's labor relations are governed by the MMBA, which provides that an MOU becomes a "binding agreement" *only after* the negotiating parties' agreement is reduced to writing and "once the governmental body votes to accept the memorandum." (*Glendale, supra*, 15 Cal.3d at 335-336; § 3505.1.) Although the MMBA "encourages binding agreements resulting from the parties' bargaining, the governing body of the agency ... retains the ultimate power to refuse an agreement and to make its own decision." (*People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 601, 205 Cal.Rptr. 794, citing *Glendale*, 15 Cal.3d at 334-336.) The requirement of approval by the Board "reflect[s] the legislative decision that the ultimate determinations are to be made by the governing body itself or its statutory representative and not by others." (*Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 25, 132 Cal.Rptr. 668.) Enforcing unwritten vested rights that are not specified in an MOU would eviscerate the MMBA's important requirement (and protection for public agencies, taxpayers, and voters) that the legislative body must formally approve and adopt the actual written agreement. (*Glendale, supra*, 15 Cal.3d at 336 ["The procedure established by the act would be meaningless if the end-product, a labor-management agreement ratified by the governing body of the agency, were a document that was itself meaningless"].)

Accordingly, REAOC cannot identify any cases decided under the MMBA that have implied a term into an MOU to grant a vested benefit where the MOU is otherwise silent about the benefit. Indeed, none of the MMBA cases REAOC cites to support its contention actually implies a vested benefit into any MOU governed by the MMBA. (See Op. Br. at 36, 42, 50-51, citing *Glendale, supra*, 15 Cal.3d at 339-340; *Sac. County Attys Assn v. County of Sacramento* (2009) PERB Dec. No. 2043-M (*Sac. Attys*);

Vernon Fire Fighters v. City of Vernon (1980) 107 Cal.App.3d 802, 165 Cal.Rptr. 908 (*Vernon*); *Internat. Assn. of Fire Fighters Union v. City of Pleasanton* (1976) 56 Cal.App.3d 959, 979, 129 Cal.Rptr. 68 (*Pleasanton*); *City of El Cajon v. El Cajon Police Officers' Assn* (1996) 49 Cal.App.4th 64, 72 fn. 3, 75 fn. 6, 77, 56 Cal.Rptr.2d 723 [declined to infer or imply terms in MOU, particularly from the City's conduct that supported the unions' position]; *Eureka Teachers Assn v. Eureka City School Dist.* (1987) 11 Pub. Employee Rep. for California (PERC) ¶ 18099 at pages 8, 12 [applying Educational Employment Relations Act ("EERA") rather than MMBA, administrative law judge rejected employer's contention that requiring "receipt of a physician's verification of an employee's absence prior to the start of a semester" was a past practice; no contract term or vested right implied]; *Cal. School Employees Assn v. Madera Unified School Dist.* (2007) PERB Decision No. 1907 (*Madera*) [discussed *infra,* also decided under EERA].)

In *Glendale*, this Court addressed the MMBA for the first time and determined that "an agreement entered into under the Meyers-Milias-Brown Act, once approved by the governing board of the local entities, binds the public employer and the public employee organization." (*Glendale, supra,* 15 Cal.3d at 332.) The Court was not asked to, nor did it decide to, imply lifetime vested benefits into any MOU. Rather, it upheld the trial court's interpretation of the *explicit* salary survey provisions contained in the MOU. (*Id.* at 332-333, 340.) Here, because no County MOU contains any reference to pooling rates, there are no provisions to interpret.

The other MMBA cases and Public Employment Relations Board ("PERB") decisions REAOC cites address past practices that trigger a duty to bargain; not a vested benefit. In *Sac. Attys, supra.,* PERB found that when the County "unilaterally changed the eligibility criteria for current

employees-future retirees' participation" in the retiree health insurance programs, it "unilaterally changed a policy within the scope of bargaining without meeting its obligation to negotiate with four exclusive representatives," thereby violating the MMBA. (*Sac. Attys, supra*, PERB Dec. No. 2043-M at p. 2, and see p. 12 of proposed decision.) Although it noted "a 27-year past practice of awarding retiree health subsidies," it did not say that that past practice created a vested right. (*Id.* at pp. 3-6.) Rather, it was a subject of required bargaining, and the remedy was to require the County to rescind the policy and refrain from implementing it "without fulfilling its obligation to bargain in good faith with the four exclusive representatives." (*Id.* at p.5.) Importantly, the decision clarified, "Nor does this case address the vesting rights of retirees." (*Id.* at p. 9 of adopted proposed decision, fn.4.) It also states, "The Board long ago determined that retirees are not protected by the Act as they are not persons 'employed by' the public employer.... Accordingly, a public employer is not required to bargain over their health insurance benefits." (*Ibid.*) Here, complying with the MMBA, the County negotiated with its employees' representatives about the changes to the retiree medical program (including splitting the pool) reached agreement, and put it in a writing that was approved by the Board. (ER II: 70-71.)

In *Vernon*, the court held that a city's new anti-car-wash rule, "being unilaterally adopted by the city council without prior notice to or meeting and conferring with the Union, was void in its entirety for procedural violation of section 3505 of the Government Code (MMBA)." (*Vernon, supra,* 107 Cal.App.3d at 810-811.) The remedy was to "set aside" the rule "until the 'meet and confer in good faith' duty has been met by the employer." (*Id.* at 824, citing *Huntington Beach Police Officer's Assn. v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 129 Cal.Rptr. 893; *Pleasanton*, supra, 56 Cal.App.3d at 979.) Although firefighters had been

allowed to wash their cars on city property since 1923, the court did not state that that practice had ripened into a vested right. (*Vernon, supra, 107 Cal.App.3d* at 817.)

Similarly, in *Pleasanton,* where the city council amended personnel rules without meeting and conferring with its union, the court found the amendments – including a change to a practice related to the amount of time a new employee had to work before being considered for a merit increase – were also "void" for procedural violations of the MMBA. (*Pleasanton, supra*, 56 Cal.App.3d at 922, 977.) The court did not say new employees had a vested right to be considered for merit increases at a particular time; it just said that the City was required to meet and confer in good faith with the union before changing the practice. (*Id*, at 972-973.)

Finally, in *Madera Unified School Dist.*, PERB affirmed the dismissal of an unfair labor charge that alleged the school district violated the EERA by unilaterally changing the district's contribution to health care benefits for current employees and retirees, where there was express language in the collective bargaining agreement regarding the issue. (*Madera, supra,* PERB Decision No. 1907, at pp. 1, 4-7.) As with the other cases, there was no finding of a vested right to any retiree health benefit; rather, the Board held "that the retirement health insurance provisions in the present case are within the scope of bargaining insofar as they affect the future retirement benefits of current employees." (*Id.* at p. 3.) The decision also noted that "retirees are not protected under EERA." (*Id.* at p. 2.)

Accordingly, even if providing the pool in the past is deemed a "past practice" under the MMBA, then the remedy is to require the County to negotiate a change to that past practice with its unions – which it did. (*Riverside Sheriff's Assn v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1291, 131 Cal.Rptr.2d 454 [defining "binding past practice" under the MMBA, "the alteration of which requires compliance with the

MMBA"]; *Sac. Attys*, *supra*, PERB Dec. No. 2043-M.)

2. The County's Negotiations with its Labor Unions to Reform the Retiree Medical Program Neither Created Nor Evidence an Implied Contract for the Asserted Right to Pooling

REAOC argues that labor negotiations in the 1990s over the 1993 Plan, as well as the labor negotiations that resulted in splitting the pool in 2006, may be the basis for implying a vested right to a pooling methodology for setting rates. This argument is facially meritless because the 1993 Plan specifically states that no provision is vested, and that the County reserved its right to make changes to the plan. (SER 62-63, 79-80.)

Further, where every MOU contains an integration clause on its face sheet confirming that the MOU "sets forth the terms of agreement" (e.g., ER IV: 872), no additional terms may be implied. (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 346, 9 Cal.Rptr.3d 97 (*Casa Herrera*) ["The parole evidence rule establishes that an integrated written agreement supersedes any prior or contemporaneous promise at variance with the terms of that agreement"]; Civ. Code § 1625 ["The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument"]; Code Civ. Proc. § 1856; *Andersen v. Workers' Comp. Appeals Bd.* (2007) 149 Cal.App.4th 1369, 1377, 57 Cal.Rptr.3d 839 [applying sections of Civil Code and Civil Procedure Code to interpret MOU].) The rule that a written agreement supercedes negotiations and that "extrinsic evidence may not 'add to, detract from, or vary the terms of'" a written agreement "'applies to any type of contract, and its purpose is to make sure that the parties' final understanding, deliberately expressed in writing, shall not be changed.'" (*Casa Herrera, supra,* 32 Cal.4th at 345., quoting 2 Witkin, Cal. Evidence

(4th ed. 2000) Documentary Evidence, § 63, p. 183.) Assuming "that MOUs are to be construed as contracts" (Op. Br. at 36), a court may not add a vested rate pooling benefit into any MOU, given that all of the MOUs are silent on the issue and every MOU contains an integration clause.

Thus, statements allegedly made during negotiation sessions in the 1990s are immaterial if they were not put in writing and approved by the Board. (*Glendale, supra*, 15 Cal.3d at 335-336; § 3505.1; Civ. Code § 1625; see also *Katsura v. City of San Buenaventura* (2007) 155 Cal.App.4th 104, 109, 65 Cal.Rptr.3d 762 ["'No government, whether state or local, is bound to any extent by an officer's acts in excess of his . . . authority'"], citations omitted.) Although pooling may have been discussed during these negotiations, any requirement to pool was not part of the final agreement, does not appear in any MOU, and thus may not be implied at all, let alone as a vested right.

Similarly, adding a term in 2006 to split the pool does not require, as REAOC suggests, an implication that the prior MOUs required pooled rates. The fact that the MOUs were silent on pooling in the past means simply that there was no MOU term binding the County on this issue.

As for REAOC's contention that the County treated pooling as an implied term in the MOUs during 2005-2006 negotiations when the unions agreed to "surrender" their rights to pooling by increasing the wages of the active employees (Op. Br. at 17-19, 24), the contention does not lead to the finding of a vested right. The County negotiated "splitting the pool" with the labor unions in 2006 because it was part of the overall retiree medical restructuring package, and the County met and conferred concerning the impact of this decision to split the pool on bargaining unit members' wages. (ER V: 1135, ¶ 7.) (§ 3504 [scope of representation extends to all matters relating to wages]; § 3505 [County "shall meet and confer in good faith regarding wages"]; *AFSCME v. City and County of Santa Clara* (1984) 160

Cal.App.3d 1006, 1010, 207 Cal.Rptr. 57, 59 [duty to bargain extends to impacts on wages].) While "splitting the pool" did not change any term of any MOU, other aspects of the restructuring package did include changes to express provisions in the MOUs, such as those related to the 1993 Retiree Medical Plan. (ER IV: 0876-0879.) It is impossible after package bargaining to essentially "un-do" the package and attempt to line up what was traded for what. The final MOU, as approved by the Board, is the instrument that must be evaluated. Whether the Board achieved any concessions by a wage trade-off, or whether the wages were intended to cover increased pension costs or inflation, is irrelevant. (*See San Bernardino Public Employeees Association v. City of Fontana* (1998) 68 Cal.App.4th, 1215,, 1224-25 79 Cal.Rptr. 634.)

Finally, if a public employer could be found to have committed to a vested right merely by talking about a particular benefits during negotiations, the public employer would be stifled in what it said during negotiations, thereby defeating the MMBA's primary purpose of promoting "full communication between public employers and their employees." (§ 3500.)

3. None of the "Implied Contract" Theory Cases Cited By REAOC Support Its Case

REAOC relies primarily on *Youngman,* 70 Cal.2d 240, *supra,* to show that the County can be bound by an implied contract for compensation. (Op.Br.at 33-34.) In that case, the Court "implied" a contract to provide merit-based increases for 1965 where the "'announced practice'" of annual merit increases was allegedly "'contained in Personnel Policies adopted by the District after discussion and negotiation with the [union], and disseminated to its employees.'" (*Youngman, supra,* 70 Cal.2d at 245, quoting plaintiff's complaint.) Thus, this "implied contract" stemmed from a writing approved by the irrigation district after union

negotiations, and it applied only to a single year, *not* a lifetime. (*Id.* at 243-244 fn.1 ["there is no issue involving future years" beyond 1965].) Based on a liberal construction of the allegations in the complaint, and in the absence of statutory prohibitions or formal requirements regarding how the district could fix compensation, the Court held that the implied contract claim was "sufficient to withstand a general demurrer." (*Id.* at 244-245, 247.) The *Youngman* court also stated, "Governmental subdivisions may be bound by an implied contract *if* there is no statutory prohibition against such arrangements." (*Id.* at 246, emphasis added.) Here, where REAOC seeks an implied contract for a vested benefit, obviously extending beyond one year, in the absence of a negotiated union agreement or other Board legislation approving the benefit, *Youngman* simply does not support REAOC's claim.

Nevertheless, REAOC relies on *Youngman* to somehow show that there are no formal requirements precluding the County from being held to an implied contract that confers vested rights to retiree health benefits, despite the distinction that there were no formal requirements restricting the irrigation district in 1965. (Op. Br. at 46.) At the time, the Water Code provided that the district's board may fix employees' salaries, but did not prescribe "formal requirements for the consummation of an employment contract by the board." (*Youngman, supra.* 70 Cal.2d at 246.) It was not until 1968 that the Legislature enacted the MMBA, which provides that an agreement "reached by the representatives of the public agency and a recognized employee organization" cannot become binding until it is reduced to writing and "the governmental body votes to accept the memorandum." (*Glendale, supra,* 15 Cal.3d at 335-336; § 3505.1.) Accordingly, this "formal requirement" of the MMBA could not be applied to an alleged agreement made in 1965 between the irrigation district and its union.

Here, there *is* a statutory prohibition against implying a vested right to County retiree health benefits. (§ 31692.) In addition, as stated *supra*, there *are* "formal requirements" for setting County employee compensation: all employee compensation shall be set only by County Board resolution, in writing, approved by a majority vote of the Board, in a public and open meeting -- thereby prohibiting compensation from being set in any other way. (Cal. Const. art. XI, § 1, subd. (b); Cal. Const. art. I, § 3, subd. (b) [open meetings]; §§ 3505.1, 25005 ["No act of the board shall be valid or binding unless a majority of all the members concur therein"], 25300, 54953 [open meetings], 54960.1 ["an action taken by a legislative body of a local agency in violation of Section 54953" may be "null and void"]; Codified Ordinances of Orange County Title 1, Div. 3, art. 1, § 1-3-2 [compensation "shall" be set by resolution].)

Although REAOC suggests that these provisions are merely permissive (Op. Br. at 46-49), the authority on which it relies for this suggestion held that where "the County's Board of Supervisors unanimously voted to approve" the MOU at issue at "a regular public meeting," "the Board of Supervisors' approval of the MOU was, in effect, done by resolution" in compliance with section 25300. (*Dimon supra,,* 166 Cal.App.4th at 1284-1285.) Thus, while a resolution, as required by the above-listed authorities, is less formal than an ordinance, it still be must be approved by a majority vote in an open and public meeting of the Board in order to be valid and binding.

Although REAOC cites many other cases to support its theory that "implied-in-fact contract rights and obligations arise in the context of public sector employment, just as they do in the private sector," the cases do not support this general contention. (Op.Br.at 37-41, 43, 51, 54 [cases decided under MMBA are discussed, *supra.*]) Not one of these cases

implies a vested right, and several actually explain the distinction between public and private contracts. (See, e.g., *Guz v. Bechtel Nat., Inc.* (2000) 24 Cal.4th 317, 345, 100 Cal.Rptr.2d 352 [rejected contention that private employer could be contractually held to unwritten policies or practices: "there is no triable issue of an implied contract on terms *broader than the specific provisions of those documents*"], emphasis in original; *Scott v. Pacific Gas & Elec. Co.* (1995) 11 Cal.4th 454, 46 Cal.Rptr.2d 427 [private sector employee demotion]; *Gillespie v. City of Los Angeles* (1950) 36 Cal.2d 553, 560-561, 225 P.2d 522 [interpreting express contract between city and state department of public works regarding gas tax funds and highway maintenance, Court declined to find city had duty or authority to maintain road at issue; did not address any vested right issue]; *Wills v. City of Los Angeles* (1930) 209 Cal. 448, 450, 451-452, 287 P. 962 [commenting that the "doctrine" for which REAOC cites it "has no application" to the issue before it, it based its ruling voiding forfeiture provisions in a deed conveying property to a city on "the distinction between contracts which merely involve the proprietary or business functions of the municipality and those which attempt to curtail or prohibit its legislative or administrative authority," and held that the attempts to curtail or prohibit the city's legislative authority "are uniformly invalid"]; *Kashmiri v. Regents of Univ. of Cal.* (2007) 156 Cal.App.4th 809, 827, 829, 833, 67 Cal.Rptr.3d 635 [declining to analogize between student-university relationships and employment contracts, and noting that public employment is governed by statute and is not contractual, court found implied-in-fact contract not to raise university fees for continuing students based on public university's specific *written* promises and the students' acceptance of offers of enrollment]; *Shaw v. Regents of Univ. of Cal.* (1997) 58 Cal.App.4th 44, 53-54 67 Cal.Rptr.2d 850 [incorporated university's patent policy into a written patent agreement, where the agreement's "references to the Patent Policy

are so direct as to indicate the parties' intent to incorporate the policy's then-existing terms into the patent agreement;" court did not imply any terms or vested rights into the patent agreement]; *Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 1432-1434, 246 Cal.Rptr. 609 [holding there could be no "contract of employment which included an implied covenant of good faith and fair dealing" between a *county* and one of its employees because "it is well settled in California that public employment is not held by contract but by statute"]; *Tonkin Construction Co. v. County of Humboldt* (1987) 188 Cal.App.3d 828, 832, 233 Cal.Rptr. 587 [misrepresentation regarding implied warranty in existing construction contract resulted in construction company incurring extra costs to complete contract; neither an employment nor a vested rights claim]; *United Steelworkers of America v. Warrior and Gulf Navigiation Co.* (1960) 363 U.S. 574, 577, 582-585, 80 S.Ct. 1347, 4 L.Ed.2d 1409 [interpreted actual terms of collective bargaining agreement in union's suit to compel arbitration of grievance under federal Labor Management Relations Act; did not imply a vested right]; *So. Cal. Gas Co. v. City of Santa Ana* (9th Cir. 2003) 336 F.3d 885, 887-889 [1938 ordinance was the contract for purposes of Contract Clause analysis; no implied vested right analysis].)

4. The Out-of-State Authority Supports the County's Case

With the exception of New Mexico, all other states that have found vested rights such as those sought here have premised them on the express language of legislative instruments, including state statutes and local MOUs or collective bargaining agreements ("CBAs"). (*Poole v. City of Waterbury* (Conn. 2003) 831 A.2d 21 ["In the context of government sponsored plans for municipal employees, our review of the case law from other states reflects a mixed record of success for retired municipal employees asserting vested rights to medical benefits, principally dependent on whether the

right alleged arises under a collective bargaining agreement"], citing cases.) (See, e.g., *Id.*, 266 Conn. at 73-74 [interpreting language of CBAs regarding retiree health benefits, and concluding "that, although the plaintiffs have a vested right to medical benefits generally, they do not have a vested right to the specific benefits prescribed in the collective bargaining agreement in effect at the time of the retirees' retirement"]; *Germano v. Winnebago County, Ill* (7th Cir. 2005) 403 F.3d 926, 927 [state statute expressly granted retired sheriff deputies property rights to retiree health "at the same premium rate" charged to active deputies]; *Navlet v. Port of Seattle* (Wash. 2008) 194 P.3d 221 [interpreted language actually contained in CBA providing coverage to retirees to resolve ambiguity regarding duration of that benefit]; *Duncan v. Retired Public Employees of Alaska, Inc.* (Alaska 2003) 71 P.3d 882 [state statute provided benefit at issue]; *Roth v. City of Glendale* (Wis. 2000) 614 N.W.2d 467, 468-469 [language in CBA provided retirees were eligible for coverage at 65, "with the City paying the entire premium..."]; *Everson v. State* (Hawaii 2010) 228 P.3d 282 [looked to "plain language and legislative history" of statute to hold that state was not required "to provide health benefits plans to retirees whose benefits 'reasonably approximate' those benefits provided to active employees"]; *Rhode Island Council 94 v. Rhode Island* (D.R.I. April 13, 2010) 705 F.Supp.2d 165, 2010 WL 1499282, *10 ["Plaintiffs cannot point to any explicit language to support their contention that benefits 'vest' upon reaching the age and service thresholds because there is no such language in the [collective bargaining] agreement"]; *Carlucci v. Demings* (Fla. 2010) 31 So.3d 245 [Payment for seven years by board of county commissioners of sheriff's budgets that included a particular health insurance benefit for retirees with at least 20 years of service did not constitute ratification of sheriff's decision to offer the benefit and, thus, did not give employees and retirees with at least 20 years of service a vested entitlement to the

benefit].)

In *Beggs v. City of* Portales (N. M. 2009) 146 N.M. 372, 210 P.3d 798, 802, where the New Mexico Supreme Court held that the existence of an implied contract regarding retiree medical premiums was a question of fact, the court reasoned that, in New Mexico "'most employment agreements in the public sector are implied-in-fact, rooted in the conduct of the parties and in a maze of personnel rules and regulations, as well as employee manuals that apply generically to all employees.'" (*Beggs. supra* 210 P.3d 798, 802, quoting *Campos de Suenos, Ltd. v. County of Bernalillo*, 2001-NMCA-043, ¶ 27, 130 N.M. 563, 28 P.3d 1104.) Of course, as stated at length *supra,* California law is completely different in that California public sector employment is by statute and not by contract. (*See Markman, supra,* 35 Cal.App.3d at 134-135 ["The terms and conditions relating to employment by a public agency are strictly controlled by statute or ordinance, rather than by ordinary contractual standards; and one who accepts such employment, thereby benefiting in ways denied an employee of a private employer, must in turn relinquish certain rights which are enjoyed by private employees, one such disability being that the public employee is entitled only to such compensation as is expressly provided by statute or ordinance regardless of the extent of services actually rendered"], citations omitted.)

IV. CONCLUSION

REAOC's premise in this case - that a California county can be bound by an implied contract conferring a lifetime benefit affecting thousands of retirees and costing hundreds of millions of dollars, when it is undisputed that the board of supervisors never expressly adopted the benefit - is dangerous and unprecedented. Imposing unbudgeted long term liabilities on local agencies (when there was no expressed intent to incur those liabilities, or any plan to pay for them) would undermine the ability of

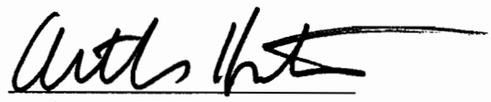
counties to deliver critical public services. In the context of health benefits, REAOC's theory if accepted would create a significant disincentive for counties to provide *any* post employment medical insurance, much less subsidize such insurance when reasonably possible on a year-to-year basis.

The Supreme Court should confirm to the Ninth Circuit that county legislative bodies retain exclusive control over county employee compensation and benefit packages. The County's control is exercised through the legislative process with elected officials voting – expressly - to adopt benefit packages only after the opportunity for a thorough public review and a transparent financial impact analysis. This principle is well-established and should control the outcome in this case. There can be no "implied" vested right to lifetime benefits in the absence of legislation expressly authorizing such benefits.

DATED: November 8, 2010

Respectfully submitted,

MEYERS, NAVE, RIBACK,
SILVER & WILSON

By: 

Arthur A. Hartinger
Attorney for Respondent

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.520, subdivision (c)(1), I certify that the attached brief contains 13,791 words.

Dated: November 8, 2010

Respectfully Submitted,

MEYERS NAVE RIBACK
SILVER & WILSON

By: _____
Arthur A. Hartinger
Attorneys for Respondent
County of Orange

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Alameda, State of California. My business address is 555 12th Street, Suite 1500, Oakland, California 94607.

On November 8, 2010, I served true copies of the following document(s) described as on the interested parties in this action as follows:

Respondent's Answering Brief on the Merits

Scott Emblidge
Michael Patrick Brown
Rachel Sater
Moscone, Emblidge & Sater, LLP
220 Montgomery Street, Suite 2100
San Francisco, CA 94104
Attorneys for Plaintiff-Appellant Retired Employees Association of Orange County, Inc.

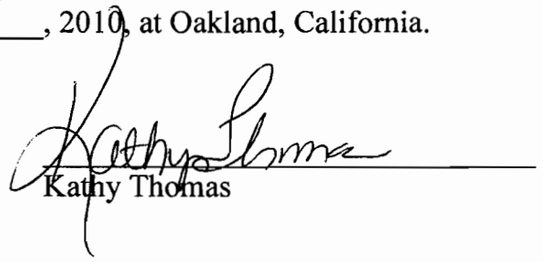
Robert J. Bezemek
Law Offices of Robert J. Bezemek
1611 Telegraph Ave., Suite 936
Oakland, CA 94612
Attorney for Amicus Curiae California Retired County Employees Association, et al.

Jonathan Holtzman
Renne, Sloan, Holtzman & Sakai
350 Sansome St., Suite 300
San Francisco, CA 94104
Attorney for Amicus Curiae League of California Cities, et al

BY PERSONAL SERVICE: I personally delivered the document(s) to the person being at the addresses listed in the Service List. For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with a receptionist or an individual in charge of the office.

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

Executed on November 8, 2010, at Oakland, California.



Kathy Thomas