

H048681

COURT OF APPEAL FOR THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

NORMANDY ROSE AND MARGARET RIOPEL,

Petitioners and Appellants,

v.

COUNTY OF SAN BENITO,

Respondent.

LEAGUE OF CALIFORNIA CITIES AND
CALIFORNIA STATE ASSOCIATION OF
COUNTIES,

Real Parties in Interest.

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

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CERTIFICATE OF
INTERESTED ENTITIES OR PERSONS

There are no entities or persons that must be listed in this certificate under California Rules of Court, rule 8.208.

Dated: September 24, 2021 BURKE, WILLIAMS & SORENSEN, LLP



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APPLICATION FOR LEAVE TO FILE AMICUS BRIEF
TO THE HONORABLE PRESIDING JUDGE:

Pursuant to California Rules of Court, Rule 8.882(d), *amici curiae* the League of California Cities and the California State Association of Counties respectfully request leave to file the accompanying brief of *amici curiae* in support of the County of San Benito. This application is timely made within 14 days after the filing of the reply brief on the merits.

THE AMICI CURIAE

The League of California Cities (“Cal. Cities”) is an association of 478 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee (“Committee”), comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The California State Association of Counties (“CSAC”) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels’ Association of California and is overseen by the Association’s Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

THE INTEREST OF THE AMICI CURIAE

Many members of Cal. Cities and CSAC (collectively, the “*Amici*”) provide or subsidize health benefits for their retired, former employees. The issues in this case are of concern to all California cities and counties whose

City Councils and Boards of Supervisors are elected to weigh the needs and set priorities for the use of limited available resources to provide employee and retiree health benefits while simultaneously ensuring the continued provision of other critical services to the public. *Amici* seek to preserve the ability of local governments to legislate, predict, and budget for, retirement benefits and other future long-term liability. The trial court's decision creates uncertainty and impairs that ability. Accordingly, *Amici's* perspective on this matter is worthy of the Court's consideration and will assist the Court in deciding this matter. *Amici* have a substantial interest in this case.

ABSENCE OF PARTY ASSISTANCE

Pursuant to California Rules of Court, rule 8.882(d)(3), Proposed *Amici* confirm that no party or its counsel authored this brief in whole or in part. Nor did any party, their counsel, person, or entity make a monetary contribution to the preparation or submission of this brief.

CONCLUSION

Cal. Cities and CSAC respectfully request that the Court accept the accompanying brief for filing in this case.

Respectfully submitted,

Dated: September 24, 2021 BURKE, WILLIAMS & SORENSEN,
LLP

By: 

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**BRIEF OF AMICI CURIAE LEAGUE OF CALIFORNIA CITIES
AND CALIFORNIA STATE ASSOCIATION OF COUNTIES**

I. INTRODUCTION

In *Retired Employees Association of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1186 (“*REAOC III*”) the California Supreme Court affirmed that legislative acts are not presumed to create private contractual or vested rights and that a party who asserts the existence of such rights “has the burden of overcoming that presumption.” This burden is “heavy”. (*Id.* at p. 1191.) Implied rights will not be inferred without a “clear basis” in the contract or “convincing extrinsic evidence.” (*Id.* at p. 1191.) There must be a “clear showing” of “unmistakable” intent by the governing body to confer a vested right. (*Id.* at pp. 1186-1189.) Vested rights cannot be based on the subjective intent or expectations of legislators, agency staff or employees, understandings communicated outside the approval process, or long-standing past practice. The governing body’s intent determines the right. (*Vallejo Police Officers’ Assn. v. City of Vallejo* (2017) 15 Cal.App.5th 601, 617.) When considering whether vested rights should be implied in legislation, the court should “proceed cautiously” and identify clear and unequivocal intent of the governing body to be bound in perpetuity to ensure that “neither the governing body nor the public will be blindsided by unexpected obligations.” (*REAOC III, supra*, 52 Cal.4th at pp. 1187-1189.)

The “heavy burden” and need to “proceed cautiously” to identify “unmistakable” evidence of legislative intent to establish an implied right to a vested benefit sets an appropriate and necessary high bar to attacks on benefit programs. Public agencies throughout California have relied on the “unmistakability” standard in their efforts to tackle the mounting costs of providing health benefits to their employees and retirees. To make their benefit structures more efficient and affordable, public agencies have

employed a number of new strategies relating to medical insurance plan and benefit structures, funding strategies, and cost containment measures for active employees, retirees and their dependents. California courts have followed the strict standard of *REAO C III*, and its progeny, and have repeatedly declined to find an implied vested right to retiree health benefits.

The trial court's ruling in this case departs from this well-established case law and should be reversed. The trial court erroneously found the County of San Benito breached a promise the trial court found implicit in a Board Resolution to provide a "non-modifiable" retiree health benefit. The Board Resolution did not contain any express language that would vest employee or retiree health benefits in perpetuity. Plaintiffs failed to bring forth any extrinsic evidence from the legislative record establishing an implied vested retiree health benefit. Instead, to establish an implied vested benefit, the trial court improperly allowed and considered self-serving testimony of a few former supervisors, staff, and employees regarding past practices, their individual subjective understandings of the Board Resolutions, and communications amongst themselves outside of the public legislative process.

The trial court's establishment of an implied vested right to an "un-modifiable" retiree health benefit risks a devastating financial impact on public agencies. It imposes perpetual, expensive, unbudgeted, liability on public agencies, impairs the transparency of public finance, and impairs the ability of local governments to predict and account for retirement benefits and other future long-term liabilities.

In addition, the trial court based its finding on improper extrinsic evidence of legislative intent in violation of *REOAC III*, as well as improper extra-record evidence in violation of *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 599.

Amici's members collectively provide employee and retiree health

benefits to tens of thousands of employees and retirees throughout California. The costs of providing such benefits are substantial. In response, cities and counties throughout the state have made or are considering making necessary changes to their benefit plans. It is imperative that the *Amici's* members maintain the flexibility to adjust their benefit plans to make them more efficient, affordable and sustainable. Success in controlling retiree health care costs is essential to ensuring the continued provision of other critical services to the public.

Amici request that this Court reverse the trial court's decision to find an implied vested retiree health benefit based on the lack of evidence of a clear and unmistakable intent in the Resolution or convincing extrinsic evidence.

II. BACKGROUND

A. The Escalation Of Retiree Health Costs Is A Significant Burden And Represents A Serious Fiscal Challenge For California's Cities and Counties

The mounting cost of providing health benefits to public sector employees is a growing burden and represents a serious fiscal challenge facing cities and counties throughout California. In the wake of the 2008 recession, public agencies throughout the state determined that, due in part to rising healthcare costs, they were facing budget shortfalls, which were likely to continue to escalate exponentially, negatively impacting bond ratings and, in some cases financial solvency.¹ By 2017, California's state

¹ In May of 2009, the City of Vallejo filed a petition for bankruptcy relief, which included a request to reject its agreements with its labor unions. In June 2012, the City of Stockton filed for Chapter 9 bankruptcy protection. At the time, the City's unfunded pension costs were \$147.5 million. As part of the restructuring, the City phased out its retiree medical plan to achieve a savings of \$11.2 million. Caroline Cournoyer, Governing, June 27, 2012, Stockton, Calif., is Largest City to File for Bankruptcy.

and local agencies had \$187 billion unfunded retiree health care and other post-employment benefit (“OPEB”) liabilities and the upward spiral continues.² As of June 30, 2019, the State of California’s net liability for retiree health and dental benefits was \$93.93 billion.³ A more recent study, based on 2019 and 2020 reporting data of 30,000 local governments throughout the United States, found that state and local governments reported over \$1.2 trillion of net OPEB liabilities, a debt that represents under 6% of the U.S. gross domestic product and is the third largest source of debt for the U.S. subnational governments, behind municipal bonds outstanding and net pension liabilities, estimated at \$3.1 trillion and \$1.2-\$1.5 trillion, respectively.⁴

B. The Escalation Of Retiree Health Benefit Costs Threatens To Crowd Out Delivery Of Critical Public Services

Cities and counties hold responsibility for the welfare of their residents and hardworking public servants who choose a life of service. However, with the cost of pension and retiree health benefits growing faster than revenues, it is generally understood that the programs are not

<https://www.governing.com/archive/gov-stockton-california-bankruptcy.html> (as of Sep. 24, 2012).

² Reason Foundation, California’s Other Fiscal Time Bomb; \$187 in OPEB Liabilities, January 25, 2019 <<https://reason.org/commentary/californias-other-fiscal-time-bomb-187-billion-in-opeb-liabilities>> (as of Sep. 24, 2021)

³ California State Controller, Betty T. Yee, Press Release, August 31, 2020, <https://www.sco.ca.gov/eo_pressrel_21039.html> (as of Sep. 24, 2021); State of California Retiree Health Benefits Program – Actuarial Valuation reports – as of June 30, 2019, p. 6, https://www.sco.ca.gov/Files-ARD/CalSCO_GASB7475_2019_FINAL.pdf (as of Sep. 24, 2021).

⁴ Reason Foundation, Survey of State and Local Government Other Post-Employment Benefits, February 2021, pp. 3-4, <<https://reason.org/wp-content/uploads/state-and-local-government-other-post-employment-benefit-liabilities.pdf>> (as of Sep. 24, 2021).

financially sustainable.⁵ In 2017, Cal. Cities commissioned an actuarial study to address the impact of Cal Cities members' increased contributions to the California Public Employees Retirement System ("CalPERS")⁶ The Study found that the escalation of employer contributions to CalPERS puts a great strain on cities' ability to maintain service delivery levels and will require cities to make very difficult choices to sustain the public sector retirement system while also serving their residents.⁷

Similarly, a case study performed by the Stanford Institute for Economic Policy Research ("SIEPR") found that spending on pension obligations is "crowding out" spending on vital services of cities, counties and other public agencies.⁸ The study found as of 2017, public agencies were already reducing social, welfare, educational, libraries, recreation and community services.⁹ As pension and OPEB costs take an increasingly larger percentage of General Funds, the risk of crowding out public services

⁵ League of California Cities, City Managers Department – OPEB Task Force, *Retiree Health Care. A Cost Containment How-to Guide*, p. 1. September 2016

⁶ "Retirement System Sustainability, A Secure Future for California Cities," League of California Cities Retirement System Sustainability Study and Initial Findings, January 2018 <<https://www.calcities.org/detail-pages/news/2018/02/01/league-of-california-cities%C2%AE-survey-confirms-need-for-more-tools-to-sustain-pension-system-and-local-services-22730>> (as of Sep. 24, 2021) ("League Study")

⁷ "League of California Cities® Survey Confirms Need for More Tools to Sustain Pension System and Local Services", January 31, 2018 <<https://www.calcities.org/detail-pages/news/2018/02/01/league-of-california-cities%C2%AE-survey-confirms-need-for-more-tools-to-sustain-pension-system-and-local-services-22730>> (as of Sep. 24, 2021)

⁸ Joe Nation, "Pension Math: Public Pension Spending and Service Crowd Out in California, 2003-2030," October 2, 2017m, <https://siepr.stanford.edu/sites/default/files/publications/17-023_1.pdf> (as of Sep. 23, 2021).

⁹ *Id.* at p. xi.

such as fire protection, law enforcement, parks services, health and welfare, infrastructure, and other municipal services continues to grow.

C. Cities and Counties Are Taking Serious Action To Address The OPEB Crisis

The past decade has witnessed an increased awareness on the part of the public and public agency officials of the OPEB issue. That awareness has supported impetus for review, analysis, and action. The implementation of Government Accounting Standards Board (GASB) Statement 45, which issued new rules on reporting OPEB liabilities on financial statements, brought to light the staggering escalation in the cost of providing OPEB benefits to public employees in retirement, primarily retiree health care. Starting after 2017, GASB Statements 74 and 75 replaced GASB 45.¹⁰ Those standards require public agencies to take another step and book the full net unfunded liability on their financial statements. Such reporting negatively impacts net positions on financial statements (i.e., “the bottom line”). Looking for ways to control costs and ensure the sustainability of retiree health benefits, public agencies have employed a number of new strategies relating to medical insurance plan and benefit structures, funding strategies, and cost containment strategies for active employees, retirees and their dependents. The importance of efforts such as those undertaken by San Benito County cannot be overstated – they will determine whether local governments can continue to provide for safe, healthy, clean communities for their residents, or have their entire general funds swallowed up by the crushing costs of employee health care and pension costs.

¹⁰ State of California Retiree Health Benefits Program – Actuarial Valuation reports – as of June 30, 2019, *supra*, at pp. 1-2.

D. The County Of San Benito’s Attempt To Address The Escalation Of Costs To Provide Retiree Health Benefits

In this case the County adopted a resolution in 1993 electing to contract with CalPERS to provide health insurance benefits to its employees and retirees under the Public Employees’ Medical Hospital Care Act (“PEMHCA”). Under PEMHCA, CalPERS annually publishes health plans available to employees and retirees of contracting agencies. The County held open enrollment periods each year in which it allowed employees and retirees to select health insurance coverage. Each plan offered included a premium cost (reduced by the County’s agreed upon employer contribution) and terms of coverage. The County’s contributions were fixed regularly – usually annually – via resolutions adopted by the Board that set forth the contributions agreed upon in collective bargaining. Depending on the plan selected, a retiree could receive healthcare at no cost.

Following the Great Recession of 2007 and the implementation of GASB 45 reporting, the County commenced a thoughtful benefit restructuring process designed to preserve the County’s ability to provide benefits, while simultaneously ensuring the continued provision of other critical services to the public. For example, in 2008, the County took steps to decrease its unfunded liability through increased funding by joining the California Employers’ Retiree Benefit Trust administered by CalPERS and making contributions to pre-fund its OPEB liability (i.e., to establish a restricted investment account to cover these costs when they arise). The County also adopted a vesting schedule for new hire eligibility for retiree medical benefits, and negotiated changes to the employees’ contributions to health insurance premiums.

However, health insurance premiums continued to escalate, including a 20% increase in 2016 alone. Ultimately the County opted out of

PEMHCA and contracted instead with CSAC-EIA for health insurance benefits. As with the CalPERS plans, the CSAC-EIA plans included a premium cost that the County reduced through an agreed upon employer contribution. The County capped contributions for Medicare recipients at 70% of the contribution for others to control costs. Depending on the plan selected, a retiree could still receive healthcare at no cost.

Despite the availability of healthcare at no cost, Plaintiffs Normandy Rose and Margaret Riopel (“Plaintiffs”) sued the County, alleging that the County violated terms of an implied contract, one version of which (they argued four at trial) guaranteed them payment of non-modifiable fully-paid retiree health benefits for life.

At a bench trial, the County argued that no resolution committed the County to confer a lifetime vested interest in any guaranteed contribution to an employee’s or retiree’s health insurance premiums. Additionally, the County objected, *in limine*, to the Plaintiffs introducing extra-record evidence, including testimony from past and present members of the County Board of Supervisors as to their individual intent in adopting certain resolutions related to enrolling in PEMHCA. The court allowed the testimony and ultimately determined that the County breached an implied-in-fact promise to provide lifetime retiree health insurance benefits. The court issued declaratory and writ relief entitling Plaintiffs to the same retirement health insurance contributions given to active employees. The County appealed.

III. LEGAL ARGUMENT

A. The Trial Court Erred In Failing To Apply The Strict Presumption Against Implied Vested Rights

Plaintiffs claim they have an implied, vested, contractual right to a paid, lifetime, retiree, health insurance benefit. They further claim that the County’s actions to modify that benefit violated the contract clauses of the

United States and California Constitutions. (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9.)

To establish a valid contracts claim, the employee must demonstrate an impairment of, or detriment to, a specific vested contractual right as determined by state law. (See *Int'l Assn. of Fire Fighters, Local 145 v. City of San Diego* (1983) 34 Cal.3d 292, 301; *Medina v. Board of Retirement, Los Angeles County Employees Retirement Ass'n* (2003) 112 Cal.App.4th 864, 871.) Further, there must be evidence of the Board of Supervisors' "unmistakable intent" to be contractually bound. (See *Nat'l RR Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.* (1985) 470 U.S. 451, 465-466; *Floyd v. Blanding* (1879) 54 Cal. 41, 43; *Valdes v. Cory* (1983) 139 Cal.App.3d 773, 786 ["the statutory language and circumstances accompanying its passage clearly '... evince a legislative intent to create private rights of a contractual nature enforceable against the State.'].) The standard, referred to as the "unmistakability" doctrine, ensures the highest burden of proof is applied to decisions that necessarily implicate intrusions upon sovereign power. (See *United States v. Winstar* (1996) 518 U.S. 839, 860 ["[N]either the right of taxation, nor any other power of sovereignty, will be held ... to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken."].)

1. The Presumption Against Vested Rights – The Unmistakability - Doctrine

In 2011 in the *REAOC III* decision, the California Supreme Court articulated the "unmistakability doctrine" in the context of resolving a dispute over retiree health benefits and affirmed the longstanding presumption against implied vested contractual rights. (*REAOC III, supra*, 52 Cal.4th 1171.) Drawing upon the separation of powers doctrine, the Court initially recognized that "the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the

[agency].” (*Id.* at p. 1185.) Policies — unlike contracts — are “inherently subject to revision and repeal” and to “construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body.” (*Id.*, quoting *National R.R.*, *supra*, 470 U.S. at p. 466.) A requirement that “the government’s obligation unmistakably appear thus served the dual purpose of limiting contractual incursions on a State’s sovereign powers and of avoiding difficult constitutional questions about the extent of state authority to limit the subsequent exercise of legislative power.” (*Winstar*, *supra*, 518 U.S. at p. 875.)

In evaluating whether a vested right to lifetime retiree health benefits is implied in a legislative enactment, “it is presumed that a statutory scheme is not intended to create private contractual or vested rights.” (*REAOC III*, *supra*, 52 Cal.4th at p. 1186.) The party who asserts the existence of such rights “has the burden of overcoming that presumption.” (*Id.*) To overcome the presumption, a party must demonstrate that the “language or circumstances accompanying its passage clearly evince a legislative intent to create private rights of a contractual nature enforceable against the [the government entity].” (*Id.* at p. 1177.) This high bar “ensure[s] that neither the governing body nor the public will be blindsided by unexpected obligations.” (*Id.* at p. 1189; see also *Harris v. County of Orange* (9th Cir. 2012) 682 F.3d 1126.)

The California Supreme Court reaffirmed the unmistakability doctrine’s presumption against the creation of a vested contractual rights in *Cal. Fire Local 2881 v. California Public Employees’ Retirement System* (2019) 6 Cal.5th 965, 979, 981-982 (finding no evidence of “the requisite clear manifestation of intent to create contractual rights” relating to the opportunity to purchase ARS credit”).

Courts have consistently erected high barriers to claims of vested

rights, especially where the claimed right is to be implied. Contracts that extinguish or limit the government’s future exercise of regulatory authority are strongly disfavored. (*California Ass’n of Professional Scientists v. Schwarzenegger* (2006) 137 Cal.App.4th 371, 383-384 [“Sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign’s jurisdiction, and will remain intact unless surrendered in unmistakable terms.”].) Indeed, the *REAOC III* Court made clear that “as with any contractual obligation that would bind one party for a period extending far beyond the terms of a contract of employment, implied rights to a vested benefit should not be inferred without a “*clear basis in the contract or convincing extrinsic evidence.*” (*Id.* at p. 1188 emphasis added; see *Claypool v. Wilson* (1992) 4 Cal.App.4th 646, 670 [recognizing in the context of a vested right, that the “[i]mplication of suspension of legislative control must be ‘unmistakable’”]; *Taylor v. Board of Education* (1939) 31 Cal.App.2d 734, 746 [legislative intent to create contractual obligations that will extinguish governmental powers must “clearly and unmistakably appear”].)

2. Strict Adherence To The Presumption Against Vested Rights Is Essential To Preserve Legislative Power

The strict adherence to the high evidentiary burden set out in the “unmistakability doctrine” is critical to protect the power of local governments to take the necessary steps to address and manage the ever-escalating costs associated with the provision of health care benefits to active and retired employees and their dependents. Limiting intervention in the legislative process protects the separation of powers as the imposition of implied irrevocable contractual commitments interferes with the plenary authority of public agencies to set compensation and manage their budgets. Implied vested contractual rights expose public agencies to expensive, unbudgeted, long-term liabilities. They also introduce uncertainty into the

budget process and impair the ability of the legislative body to manage the public fisc and ensure transparency of public finance.

Since the Supreme Court confirmed the unmistakability standard in *REAOC III*, local governments have successfully relied on its high bar to defend and protect the difficult decisions they have had to make to address the unsustainable cost and burden arising from prior decisions to provide fully-funded retiree health benefits. The effectiveness of the standard is evidenced by the fact that the published opinions of state and federal courts have uniformly applied its standard to preserve legislative authority.¹¹ The trial court’s decision here is an outlier.

¹¹ See *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (“*REAOC V*”) (9th Cir. 2014) 742 F.3d 1137, 1144 (No implied vested right to a pooling rate structure in place for 23 years.) [“Missing here is ‘statutory language or circumstances accompanying its passage clearly... evinc[ing] a legislative intent to create [implied] private rights of a contractual nature enforceable against [the County]’”.] (*Ibid.*, abridgements by *REAOC V* court”); *Vallejo Police Officers Assn. v. City of Vallejo* (2017) 15 Cal.App.5th 601, 620 (no implied vested to right to retiree medical benefits at full Kaiser rate.)[“In sum, the trial court did not err in ruling that VPOA did not meet its burden to show ‘a clear basis’ in the 2009 Agreement or ‘convincing extrinsic evidence’ ... of a vested right to retiree medical benefits in the full amount of the Kaiser rate”] (*Ibid.*, citation omitted); *Fry v. City of Los Angeles* (2016) 245 Cal.App.4th 539, 552 (Charter amendments and later ordinances “do not evince a ‘legislative intent’ to create a vested right to a Board-determined subsidy amount. Rather, they evince an intent to reserve to the City Council the final decision authority over the subsidy”); *Sacramento County Sacramento County Retired Employees Ass’n v. County of Sacramento* (E.D. Cal. 2013) 975 F.Supp.2d 1150, 1165-1166 (No disputed fact as to “whether the County created a contract to provide retiree health subsidy with an implied term that the subsidy was vested in perpetuity”; *Harris v. County of Orange* (9th Cir. 2012) 682 F.3d 1126 (retirees failed to plead facts to demonstrate the County promised to maintain benefits for retirees as they existed on the date of their retirement).

B. The Trial Erred In Finding That Plaintiffs Met Their Burden of Making A “Clear Showing” Of An “Unmistakable” Intent to Confer An Implied Vested Right To A Retiree Health Benefit

Respondents assert that the “legislative record alone did not provide substantive guidance as to the Board of Supervisors’ intent to create a vested right in paid retiree health benefits. Because this does not exist, testimony from the former Board of Supervisors is imperative to ascertain the County’s intent to create an implied contract.” (Respondents’ Brief, p. 21.) However, the testimony of the few, individual Board members that the trial court considered did not elucidate the legislative intent of the entire Board. The testimony did not (1) speak to information that was known to the Board, as a legislative body, at the time of enactment, (2) identify or discuss public records of their collective deliberations regarding the benefit, or (3) reference expressions of intent collectively adopted by the Board to express an unmistakable intent to create an un-modifiable vested retiree health benefit. Instead, the testimony focused on past practice, communications outside the legislative process, and the subjective understanding of select individual Board members, County staff, and retirees. In short, the extra-record evidence that Plaintiffs submitted and the trial court considered was irrelevant and inadmissible to ascertain legislative intent. (See *City of King City v. Community Bank of Central California* (2005) 131 Cal.App. 4th 913, 942–948.)

1. Extra-Record Evidence Is Inadmissible To Establish Legislative Intent

As noted above, when evaluating the issue of an implied vested right to a retiree benefit, the court may only imply such a benefit when “the language or *circumstances accompanying its passage* clearly evince a legislative intent to create private rights of a contractual nature enforceable against the [governmental body]” and when there is “*clear basis* in the

contract or *convincing extrinsic evidence.*” (*REAOC, supra*, 52 Cal.4th at pp. 1177, 1191 (*emphasis added.*) The use of the term “circumstances accompanying its passage” demonstrates the *REAOC III* Court’s intent to *include* extrinsic evidence that “flow[s] from a resolution or ordinance” and *exclude* evidence from outside the approval process — i.e., extra-record evidence. (*Retired Employees Assn. of Orange County v. County of Orange* (9th Cir. 2014) 742 F.3d 1137, 1141 (“*REAOC IV*”); *Cal Fire Local 2881 v. California Public Employees’ Retirement System (CalPERS)* (2019) 6 Cal.5th 965, 979 [“the statute or ordinance establishing the benefit and the circumstances of the enactment clearly evince a legislative intent to create contractual rights”]; *Sonoma County Assn. of Retired Employees v. Sonoma County* (9th Cir. 2013) 708 F.3d 1109, 1117 [“resolutions and ordinances may create a contract if the text and the circumstances of their passage ‘clearly evince’ an intent to grant vested benefits”]; *Chisom v. Board of Retirement of Fresno County Employees’ Retirement Assn.* (2013) 218 Cal.App.4th 400, 411-412 & n. 3. [“implied terms, if any, must be implied by the language or circumstances of an express resolution or ordinance.”].)

2. The Subjective Understanding Of Employees Is Inadmissible To Establish Legislative Intent

The trial court’s reliance on the subjective understanding of Plaintiffs and other employees about the nature of the retiree health benefit was in error. Because the focus must be on legislative intent, evidence of how employees and retirees understood the benefit is irrelevant and inadmissible for purposes of establishing an implied vested right. Testimony regarding individual understandings that a retiree health benefit was vested, that a benefit was used as a recruiting tool, that employees remained in employment because of that benefit, or that staff discussed a benefit with employees are not clear and unmistakable evidence of the Board’s intent. (See *Vallejo Police Officers Assn., supra*, 15 Cal.App.5th at

pp. 619-620; *City of San Diego v. Haas* (2012) 207 Cal.App.4th 472, 485; *Sonoma County Assn. of Retired Employees v. Sonoma County* (9th Cir. 2013) 708 F.3d 1109, 1113-1116; *Thorning v. Hollister School Dist.* (1992) 11 Cal.App.4th 1598, 1607–1609); *Sacramento County Retired Employees’ Assn. v. County of Sacramento* (E.D. Cal. 2013) 975 F.Supp.2d 1150, 1165 [county employees’ statements that retirement benefit subsidy would continue could not support finding a vested right where there was no evidence the employees “were authorized to speak for the County or otherwise bind it”].)

3. Past Practice Is Inadmissible To Establish Legislative Intent

Likewise, courts have routinely rejected evidence of long-standing policies or practices as sufficient to establish clear and convincing evidence of legislative intent to create an implied vested benefit. The decision to provide a benefit over a period of time does not equate to a promise to provide the benefit forever. (*REAOC IV, supra*, 742 F.3d at p. 1142 [“a practice or policy extended over a period of time does not translate into an implied contract right without clear legislative intent to create that right ...”]; *Vallejo Police Officers Assn., supra*, 15 Cal.App.5th at pp. 619-620 [“the fact that the City paid the full cost of retiree medical premiums over a period of years does not imply a right that such payments will continue, absent a showing of legislative intent.”]; *Sappington v. Orange Unified School Dist.* (2004) 119 Cal.App.4th 949, 954–955 [school district’s 20-plus year practice of providing free retiree healthcare did not create a vested right: “Generous benefits that exceed what is promised in a contract are just that: generous. They reflect a magnanimous spirit, not a contractual mandate.”].)

Employers should not be penalized for their agreements to provide more generous benefits when financial circumstances and other factors

support such decisions. The trial court's reliance on the County's past practice has negative consequences for all public agencies as it creates perverse incentives for government employees to assert implied contract claims. It also encourages a race to the bottom to prevent current generosity from becoming a permanent mandate.

4. The Subjective Understanding Of Individual Legislators Is Inadmissible As Evidence Of Legislative Intent

It is well-established that the subjective understandings of individuals, as well as communications outside the legislative process, are not admissible to evidence the legislative body's intent. It is axiomatic that statements of individual legislators are not indicative of legislative intent. (*City of Redondo Beach v. Padilla* (2020) 46 Cal.App.5th 902, 918, citing *People v. Farrell* (2002) 28 Cal.4th 381, 394 [“the expressions of individual legislators generally are an improper basis upon which to discern the intent of the entire Legislature”]; *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 845 [“we have repeatedly declined to discern legislative intent from comments by a bill's author because they reflect only the views of a single legislator instead of those of the Legislature as a whole”].) Likewise, non-contemporaneous statements, made years after the fact, are not admissible evidence of legislative intent. (See *Maples v. Kern County Assessment Appeals Bd.* (2002) 103 Cal.App.4th 172, 195, fn. 9 [after-the-fact statements regarding the intent of agency rule were not credited where they conflicted with statements made at the time the rule was adopted].)

This well-established limitation has been applied to exclude evidence of an individual legislator's understanding of a whether a retiree health benefit was vested. (*Vallejo Police Officers Assn., supra*, 15 Cal.App.5th at pp. 619-620 [Vested rights cannot be based on the subjective intent or expectations of legislators or understandings

communicated outside the approval process. The governing body's intent determines the right]; *Sonoma County Assn. of Retired Employees, supra*, 709 F.3d at pp. 1113-1116; *Aguilar v. Superior Court* (2009) 170 Cal.App.4th 313, 326, fn. 7.)

5. The Admission Of Extra-Record Evidence Violates The Separation Of Powers

The trial court's establishment of an implied right to retiree benefits without unmistakable evidence of legislative intent to create vested benefit also implicates the separation of powers as it seriously impairs the ability of public agencies to manage the public fisc. It is well-established that compensation decisions play an important part in the governing body's much larger role of adopting a budget which, "entails a complex balancing of public needs in many and varied areas with the finite financial resources available for distribution among those demands. It involves interdependent political, social and economic judgments which cannot be left in the hands of individual officers acting in isolation." (*County of Butte v. Superior Court* (1985) 176 Cal.App.3d 693, 699.) For this reason, employee compensation must be set through a formal legislative act. (See *Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal.4th 287, 302 [enacting a budget "is a legislative decision, involving interdependent political, social and economic judgments which cannot be left to individual officers acting in isolation"]; *County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 344 [only a majority of a county's governing body may set employee compensation through formal legislative act and allowing compensation levels to be set by any other means "would be inconsistent with both longstanding rules of interpretation and established California case law, as well as deeply offensive to basic principles of representative democracy"].)

Judicial inquiry into the thought process of individual legislators also violates the separation of powers between the judicial and legislative

branches of government. (*Board of Supervisors v. Superior Court* (1995) 32 Cal.App.4th 1616.)

The trial court's reliance on after-the-fact testimony of individual legislator's understandings and extra-record communications to support the imposition of a benefit that carries crushing, perpetual financial obligations undermines transparency in municipal finance and threatens public accountability. (*Retired Employees Ass'n of Orange County, Inc. v. County of Orange* (C.D. Cal. 2009) 632 F.Supp.2d 983, 984 *reversed on other grounds*.) The financial burden accompanying the establishment of an "un-modifiable" implied vested right to retiree health benefits falls upon taxpayers. Ultimately, the introduction of extra-record, after-the-fact evidence of a legislator's intent also seriously undermines transparency in governance and accountability. The identification of which elected officials are responsible for such liability is central to the system of accountability that is at the heart of our representative democracy.

IV. CONCLUSION

For all of the foregoing reasons, *amici curiae* League of California Cities and the California State Association of Counties respectfully request that this Court overrule the trial court because Plaintiffs failed to overcome the presumption that the retiree health benefits at issue were not vested forever by implication. The Court should remand with instructions to enter judgment for the County on all claims.

Dated: September 24, 2021 BURKE, WILLIAMS & SORENSEN, LLP

By: _____


Daphne M. Anneet
Attorneys for Attorneys for *Amici Curiae* League of California Cities and California State Association of Counties

Document received by the CA 6th District Court of Appeal.

CERTIFICATE OF COMPLIANCE WITH
CALIFORNIA RULES OF COURT, RULE 8.204

We hereby certify that, under rules 8.520(b)(1) and 8.204(c)(1) of the California Rules of Court, this *Amicus* Brief is produced using 13-point type and contains 5,205 words including footnotes, but excluding the application for leave to file, tables and this Certificate, fewer than the 25,500 words permitted by the rules. In preparing this Certification, we relied upon the word count generated by Microsoft Word.

Dated: September 24, 2021 BURKE, WILLIAMS & SORENSEN, LLP



By: _____

Daphne M. Anneet
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Curiae League of California Cities and
California State Association of Counties

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PROOF OF SERVICE

(1031A, 2015.5, C.C.P.)

**NORMANDY ROSE AND MARGARET RIOPEL v. COUNTY OF
SAN BENITO**

SAN BENITO COUNTY S.C. CASE NO. CU-17-000151

SIXTH DISTRICT COA CASE NO. H048681

I, Kathleen van Daalen Wetters, declare:

I am employed in the County of Ventura, State of California. I am over the age of eighteen years and not a party to the within entitled actin; my business address 2310 E. Ponderosa Drive, Suite 25, Camarillo, California 93010.

I served the document described as **APPLICATION OF AMICI CURIAE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES FOR LEAVE TO FILE AMICUS BRIEF; BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT SAN BENITO COUNTY** on the interested parties in this action as stated on the attached service as follows:

(1): September 24, 2021, I served a copy of the document on the trial judge by mail by placing a true copy thereof enclosed in sealed envelope address as follows:

Honorable Robert A. O'Farrell
San Benito County Superior Court
450 Fourth Street
Hollister, CA 95023

(2) On September 24, 2021, I electronically served through TRUEFILING a copy of the document to counsel for Petitioners/Plaintiffs Normandy Rose and Margaret Riopel by email: clatten@wmprlaw.com; jmcbride@wmprlaw.com (Christopher E. Platten, John A. McBride)

(3) On September 24, 2021, I electronically served through TRUEFILING a copy of the document to counsel for Respondnet/Defendant City of San Benito by email: ahartinger@publiclawgroup.com; scikes@publiclawgroup.com (Arthur A. Hartinger and Steve Cikes)

Document received by the CA 6th District Court of Appeal.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on September 24, 2021 in Camarillo, California.



KATHLEEN VAN DAALEN WETTERS

Document received by the CA 6th District Court of Appeal.