No. A144987

IN THE CALIFORNIA COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION TWO

VALLEJO POLICE OFFICERS ASSOCIATION,

Petitioner/Appellant,

v.

CITY OF VALLEJO,

Respondent/Appellee

APPEAL FROM A JUDGMENT OF
THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SOLANO
THE HONORABLE MICHAEL MATTICE, PRESIDING
LOWER COURT CASE NO.: FCS042492

BRIEF OF AMICUS CURIAE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF THE CITY OF VALLEJO

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I. INTRODUCTION

It is well-settled that legislative acts are not presumed to create private contractual rights. Benefits contained in collective bargaining agreements and memoranda of understanding ("MOUs") are presumed to expire at the expiration of the MOU, unless renegotiated as part of a successor MOU. Further, implied rights will not be inferred without a "clear basis" in the contract or "convincing extrinsic" evidence. Employees and retirees asserting vested rights to continued benefits have a "heavy burden" to overcome the presumption against vested rights and must make a "clear showing" of an "unmistakable" implied right. Vested rights cannot be based on ambiguous or inartful drafting, mistake, subjective intent or expectations of employees or agency staff, non-binding presentations, or even a long-standing past practice. Instead, there must be clear and unequivocal evidence of intent by the governing body to create a vested right that continues in perpetuity without modification.

Despite attempts by employee and retiree associations to assert vested rights based on language in MOUs, policies, resolutions, or through a multitude of extrinsic evidence, no California court since the California Supreme Court's opinion in *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1189 ["*REAOC III*"] has found the retiree health benefits of public employees to be constitutionally vested. Given the high bar set by the California Supreme Court, and the earlier cases the Court relied on, this trend is not surprising and this case is no different.

The Vallejo Police Officers' Association's ("VPOA") theories attempt to upend this trend and would impose perpetual liabilities on cities and other public agencies for innocuous MOU language. It is therefore

important to the League's members that this court reject the flawed and unsupported theories of the VPOA and uphold the well-reasoned and carefully crafted legal framework adopted by the California Supreme Court for analyzing claims of constitutionally vested rights.

In this case, the City of Vallejo ("City") implemented its last, best, and final offer following exhaustion of mandatory impasse procedures, as allowed under the Meyers-Milias-Brown Act (Gov't Code, § 3500 et seq.). The City's last, best, and final offer reduced the City's health care contribution for employees and retirees, but it did not impair any constitutionally vested rights. The parties' MOUs did not provide any express language that would vest employee or retiree health benefits in perpetuity. The VPOA also fails to bring forth any convincing extrinsic evidence establishing an implied vested right. VPOA erroneously relies on language that does not express any clear intent to create vested rights and relies on extrinsic evidence that other courts have found inadequate and unpersuasive.

The League of California Cities ("League") is an association of 474 member cities. Collectively, the League's members provide employee and retiree health benefits to thousands of employees and retirees throughout California. The costs of providing such benefits are not only substantial but, especially in the current economic climate, are also fluctuating and uncertain. Against this backdrop, it is imperative that the League's members maintain the flexibility to adjust their benefit plans, often to preserve them, while simultaneously ensuring the continued provision of other critical services to the public.

The League requests that this Court continue the clear and unbroken trend of courts declining to find a constitutionally vested right to

retiree health benefits absent a *clear* basis in the contract or *convincing* extrinsic evidence. Doing so will provide assurance to cities and other public agencies across the state that their decisions to reduce, modify, or eliminate retiree medical benefits in the absence of a clear promise to provide those benefits in perpetuity will not be subject to legitimate challenge and costly litigation at the expense of the public fisc. It will also eliminate the risk that unsustainable and unexpected liabilities will be imposed based on ambiguous and equivocal language, or a patchwork of extrinsic evidence culled together from years of unreliable and non-binding sources.

Therefore, the League requests that the Court affirm the trial court's decision in its entirety.

II. PROCEDURAL HISTORY

The VPOA filed its First Amended Petition for Writ of Mandate on January 17, 2014, alleging, among other things, that the City impaired VPOA members' vested rights to health benefits by implementing its last, best, and final offer. On February 23, 2015, the trial court denied VPOA's writ in its entirety. VPOA filed a notice of appeal.

III. LEGAL ARGUMENT

A. THERE IS A PRESUMPTION AGAINST VESTED RIGHTS AND VPOA HAS FAILED TO MEET ITS HEAVY BURDEN TO OVERCOME THAT PRESUMPTION

The contracts clauses of the United States and California constitutions prevent state and local governments from passing laws that impair the obligations of contracts. (U.S. Const. Art. I, §10, cl. 1; Cal. Const. Art. I, §9.) The contracts clauses only protect benefits that are

"vested." (*Id.*) A party asserting a violation of the contracts clauses must show a clear and unambiguous violation. (*Floyd v. Blanding* (1879) 54 Cal. 41, 43.) Whether a benefit is vested "remains a matter of the parties' intent." (*REAOC III*, *supra*, 52 Cal.4th at 1189.)

Courts have consistently erected high barriers to claims of vested rights, especially where the claimed right is to be implied. Courts start with the general presumption that a statutory scheme is not intended to create private vested or contractual rights. (*REAOC III*, *supra*, 52 Cal.4th at 1185.) In analyzing the presumption, the California Supreme Court has directed that courts must bear in mind that the primary function of legislative bodies is to make policy that is, unlike contracts, inherently subject to revision and repeal. (*Id.*) Construing legislative acts "as contracts when the obligation is not clearly and unequivocally expressed would [ ] limit drastically the essential powers of a legislative body." (*Id.*, quoting *National R. Passenger Corp. v. A.T. & S.F.R. Co.* (1985) 470 U.S. 451, 466.) Legislative bodies must retain the flexibility to respond to the changing opinions and desires of their constituents.

Employees asserting a vested right to benefits therefore have a "heavy burden" in overcoming the presumption against vested rights. (*Retired Employees Ass'n of Orange County, Inc. v. County of Orange* (9th Cir. 2014) 742 F.3d 1137, 1141 ["*REAOC V*"].) Moreover, when such rights are contained in a labor agreement, employees have "no legitimate expectation that the longevity based benefits [will] continue unless they [are] renegotiated as part of a new bargaining agreement." (*San Bernardino Public Employees Assn. v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1223 ["*San Bernardino*"].) Absent language to the contrary, these benefits may be modified or reduced once the agreement expires. (*Id.*)

Implied terms generally stand on equal footing with express terms. (*REAOC III, supra*, 52 Cal.4th at 1179.) Implied terms cannot vary or contradict express terms. (*Chisom v. Board of Retirement of County of Fresno Employees' Retirement Association* (2013) 218 Cal.App.4th 400, 415.) However, courts will not infer vested rights lightly. "[I]mplied rights to vested benefits should not be inferred without a clear basis in the contract or convincing extrinsic evidence." (*REAOC III, supra*, 52 Cal.4th at 1191.) The evidence of an implied right must be "'unmistakable' so 'that neither the governing body nor the public will be blindsided by unexpected obligations.'" (*REAOC V, supra*, 742 F.3d at 1141, quoting *REAOC III, supra*, 52 Cal.4th at 1188-89.) Courts deciding if private contractual rights should be implied should proceed cautiously in identifying the contract and defining the contours of the contractual obligation. (*REAOC III, supra*, 52 Cal.4th at 1188.)

Courts have rejected attempts by employees and retirees to assert vested rights to health benefits based on long-standing policies or practices. (*REAOC V, supra*, 742 F.3d at 1142; *Sappington v. Orange Unified School Dist.* (2004) 119 Cal.App.4th 949.) The Ninth Circuit stated that "[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...." (*REAOC V, supra*, 742 F.3d at 1142.) Courts have similarly rejected extrinsic evidence from employees and retirees declaring their understanding that the benefit was vested, that they continued employment in reliance on the benefit, that the benefit was a recruiting tool, and that the benefit was promised in presentations or other employee materials. (See e.g., *Id.*; *Sacramento County Retired Employees Ass'n v. County of Sacramento* (E.D. Cal. 2013) 975 F.Supp.2d 1150 ["*Sacramento County*"].)

Following this consistent line of cases, the trial court determined that VPOA had not met its "'heavy burden' of making a 'clear showing' of the intent to provide medical benefits at the full amount of the 2010 Kaiser North premium" in perpetuity. Accordingly, it denied VPOA's writ of mandate. (Order Regarding Petition for Writ of Mandate, p. 7.)

The trial court's decision is consistent with governing law and should be affirmed, as VPOA has not met its burden and the issues it raises on appeal do not warrant reversal.

B. THIS CASE IS SIMILAR TO RECENT PUBLISHED CASES DECIDED ON THE MERITS IN WHICH COURTS HAVE DECLINED TO RECOGNIZE A VESTED RIGHT TO RETIREE HEALTH BENEFITS

1. Recent cases have uniformly held that retiree health benefits are not vested

Since the California Supreme Court's decision in *REAOC III* in 2011, all applicable published state and federal cases decided on the merits have found that the plaintiffs in those cases failed to establish a vested right to retiree health benefits.

In *REAOC V*, following the California Supreme Court's answer to the certified question from the Ninth Circuit about whether, as a matter of law, vested rights could theoretically be implied, the Ninth Circuit upheld a district court's ruling that the retirees in that case had not demonstrated an implied right to continued pooling of retiree and current employee health care premiums. (*REAOC V, supra*, 742 F.3d 1137.)

The Ninth Circuit held that there was no implied vested right, even though (1) the practice had continued for 23 years; (2) one memorandum of understanding stated retirees could change their health plan at retirement;

(3) a benefits director provided a declaration stating it was a lifetime benefit; and (4) an auditor-controller presentation stated that the pooled benefit structure was part of the overall compensation package. (*Id.* at 1142.) The Ninth Circuit stated that this evidence did not "credibly, let alone unmistakably" support REAOC's claim that the pooling rate structure was a vested benefit. (*Id.*) A long standing policy does not create a vested right to continued receipt of the benefit in perpetuity. Moreover, cobbling together declarations and fragments of extrinsic evidence is insufficient to carry the "heavy burden" of overcoming the presumption against vested rights. (*Id.* at 1141.)

In *Sacramento County, supra*, 975 F.Supp.2d 1150, which was decided in 2013, the United States District Court for the Eastern District of California granted the County of Sacramento's motion for summary judgment, finding that employees failed to raise a triable issue of fact regarding whether they had a vested right to health insurance subsidies. In that case, the county's retired employees' association filed a class action complaint challenging the county's decision to reduce or terminate medical insurance subsidies. (*Id.* at 1152.) In support of its claim that the subsidy was vested, the association introduced, among other evidence: (1) the declaration of a member of the county board of retirement indicating that the board intentionally underestimated earnings to fund the retiree health subsidy; (2) a declaration by a former county executive declaring that he believed that legislation drafted by a retiree insurance task force guaranteed retirees a lifetime benefit; (3) a declaration from a member of a task force stating he believed that taking the funds from a more stable source would effectively guarantee the subsidy; and (4) declarations from employees stating they accepted employment based on promises that the subsidy

would be renewed year after year and that it was used as a recruitment tool. (*Id.*, 1163-1166.) The court held that all of the evidence presented by the association did not create a disputed issue of material fact regarding whether the county impliedly promised that the subsidy was vested in perpetuity. (*Id.* at 1166.) Accordingly, the court found no vested right to the retiree health benefit subsidy and granted summary judgment in favor of the county. (*Id.* at 1170.)

Shortly after the California Supreme Court's *REAOC III* decision, the Ninth Circuit decided *Harris v. County of Orange* (9th Cir. 2012) 682 F.3d 1126. *Harris* involved a lawsuit challenging the county's decision to restructure retiree health insurance premiums. The benefit was contained in MOUs for represented employees and personnel resolutions for unrepresented employees. (*Id.* at 1129.) The court reviewed the applicable MOUs and determined that no terms in the MOUs or resolutions provided that the benefit would continue in its current form. (*Id.* at 1135.) Moreover, the MOUs contained durational clauses that fixed the term of the MOUs. (*Id.*) The retirees argued that the durational clauses were "generic statements," but the Ninth Circuit disagreed. (*Id.*) The Ninth Circuit held the retirees failed to plead facts suggesting the County promised to maintain benefits for retirees as they existed on the date of their retirement.[1] (*Id.*)

Even before the California Supreme Court's decision in *REAOC III*, there was an established line of cases holding that retiree medical benefits were not vested unless a clear intent for the benefits to vest was evidenced. In *San Diego Police Officers' Ass'n v. San Diego City Employees'*

[1] However, the court gave retirees leave to amend.

Retirement System (9th Cir. 2009) 568 F.3d 725 ["*San Diego Police Officers' Association*"]), MOUs between the city and the association contained fully-paid retiree health benefits for those retirees with a minimum number of years of service with the city. When negotiations for a successor MOU were unsuccessful, the city imposed an increase to the length of service required to receive retiree health benefits. The union brought suit alleging the city's actions impaired the employees' vested right to retirement benefits protected by the contracts clauses. The court dismissed the case, holding that "the retiree medical benefits here were considered a term of employment that could be negotiated through the collective bargaining process. As such, they were longevity-based benefits that continued only insofar as they were renegotiated as part of a new agreement and were not protectable contract rights." (*San Diego Police Officers' Association, supra,* 568 F.3d at 740; see also *Dailey v. City of San Diego* (2014) 223 Cal.App.4th 237, 253-254 (rejecting a claim that a retiree health care subsidy was a vested right).)

In *Sappington, supra,* 119 Cal.App.4th 949, the district had a policy in place from 1977 to 1997 that stated, "[t]he 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." (*Id.*) During the 20 year period the policy was in place, the district offered retirees free medical insurance through an ever-changing combination of HMOs, indemnity plans, and PPOs. The policy included the full cost of a PPO plan. In 1998, the District offered a premium-free HMO plan, but required retirees selecting the PPO plan to pay the difference between the PPO and the HMO plan. Retirees brought suit, arguing that the district violated a

contractual obligation under the policy by not paying for the full premium cost for enrollment in the PPO plan. The *Sapppington* court held that there was no explicit requirement that the District offer PPO coverage, rather than HMO coverage. The language was so broad that the district was only required to provide some program. The retirees offered extrinsic evidence of the district's course of conduct during the 20 year period in which the District had offered premium-free PPO coverage. (*Id.* at 951-952.) The court rejected the retirees' argument. The court stated, "[g]enerous benefits that exceed what is promised in a contract are just that: generous. They reflect a magnanimous spirit, not a contractual mandate." (*Id.* at 955.)[2]

In *San Bernardino, supra*, 67 Cal.App.4th 1215, the prior MOUs for the city's three bargaining units provided for longevity pay and leave accrual increases based on longevity. During negotiations for a successor MOU, the parties agreed to reduce the longevity-based benefits. The association later filed an action alleging that the longevity-based benefits were constitutionally-protected vested contractual rights that could not be bargained away through the collective bargaining process. The court disagreed, holding the longevity-based benefits were provided in MOUs which were of fixed duration. Once the MOUs expired under their own terms, the employees had no legitimate expectation that the longevity-based benefits would continue unless they were renegotiated as part of a new bargaining agreement. (*Id.* at 1223.)

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[2] The court did not reach the question regarding whether there was a vested right to a fully paid HMO plan.

Here, the trial court's decision is consistent with a long line of cases rejecting claims by employees and retirees that they have a vested right to retiree health benefits.

2. The only recent cases finding in favor of employees or retirees challenging a modification of benefits were decided in the context of a demurrer or motion to dismiss

The only recent cases favorable to employees or retirees challenging a modification of benefits have been decided on demurrer or a motion to dismiss, and are therefore irrelevant to this Court's review of the trial court's ruling on a writ of mandate on the merits.

In *Requa v. The Regents of the University of California* (2012) 213 Cal.App.4th 213, retirees brought a writ of mandate challenging the termination of their university medical benefits and replacement with private benefits, asserting that these actions violated an implied contract that they would receive the same benefits as university personnel. The university demurred, which the trial court sustained without leave to amend. On appeal, the court held that the retirees sufficiently *alleged* an implied contract for continued benefits on the same terms as other university personnel based on the retirees' allegations that the benefits were authorized in 1961 and were provided uninterrupted for more than 50 years, and from university publications assuring employees they would receive the benefits at retirement. However, the case was decided in the procedural context of a demurrer and all allegations had to be accepted as true, even if improbable. (*Id.* at 222.) The *Requa* court explicitly recognized that the case was not being decided on the merits, as it stated, "[t]he only question before us is whether the *allegations of the FAP* are sufficient to state a

cause of action under any legal theory." (*Id.* at 229, emphasis in original; See also *Chisom*, *supra*, 218 Cal.App.4th at 416, fn. 5 [Distinguishing *Requa* on the grounds that *Requa* had to accept the allegations of implied terms that were not clearly erroneous for the purposes of demurrer.].) The court even acknowledged it could not take a definitive view on the meaning of language in source documents. (*Requa*, *supra*, 213 Cal.App.4th at 232.)

Requa only follows the California Supreme Court's recognition that a vested right to retiree medical benefits *may* be implied in certain circumstances. It did not hold that retirees had in fact proven a vested right to retiree medical benefits.

Similarly, *International Broth. v. City of Redding* (2012) 210 Cal.App.4th 1114, the primary case relied on by VPOA, was also decided in the procedural context of a demurrer. In *International Broth.*, the court stated that a right to retiree medical benefits may be vested where the language of the MOU provided that the "[c]ity will pay fifty percent (50%) of the group medical insurance program premium for each retiree and dependents, if any, presently enrolled and for *each retiree in the future*...." The court held the language could reasonably be interpreted to mean that employees who retired after the expiration of the MOU were also entitled to the benefit. (*Id.* at 1120.) The court noted that an interpretation finding that the benefit did not survive the MOU would render the "in the future" language mere surplusage. (*Id.*). However, the court only held that this was sufficient "for pleading purposes." (*Id.* at 1120.) Therefore, VPOA's statement that the *Redding* court "found the language sufficient to establish an obligation to provide retiree medical benefits after the term of an agreement" is erroneous. It sets no useable precedent at all for the purposes of this appeal or any other case deciding whether a vested right exists on

the merits.

In *Sonoma County Ass'n of Retired Employees v. Sonoma County* (9th Cir. 2013) 708 F.3d 1109, in the context of a motion to dismiss, retirees alleged that the county's MOUs with employee groups contained an implied term that retiree health benefits were vested in perpetuity. The retirees alleged that it would introduce testimony from former employees who drafted the MOUs, resolutions, and other documents establishing the county's intent to vest the benefits in perpetuity. The Ninth Circuit held that the allegations were sufficient to survive a motion to dismiss without leave to amend.[3] However, the final paragraph of the opinion notes that, even if the retirees can make sufficient allegations to survive a motion to dismiss based on the grounds that the county intended to create a contract, the California Supreme Court's *REAOC* decision requires retirees to bear "the equally heavy burden of establishing that implied terms in that contract provide vested healthcare benefits." (*Id.* at 1120.)

Each of these cases was decided on either a motion to dismiss or a demurrer. In that context, the court must accept all of the allegations in the pleading as true, even where they appear unlikely. (*Smith v. County of Kern* (1993) 20 Cal.App.4th 1826, 1830.) None of the decisions were decided on the merits after full briefing and the introduction of evidence, as is the case in this appeal. Accordingly, these cases are of no help to the VPOA, and should not be relied upon by this Court in deciding whether the VPOA has met its "heavy burden" to establish a vested right on the merits.

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[3] While the court upheld the trial court's decision to dismiss the complaint because the retirees did not allege that the county board of supervisors ratified the MOUs, it nonetheless held that the trial court erred in denying leave to amend.

3. Older case law recognizing vested rights to non-pension benefits have been thoroughly criticized and have not been relied on by later courts

Older cases favorable to a finding of vested benefits have been thoroughly criticized by later courts and are of limited precedential value.

In *California League of City Employee Associations v. Palos Verdes Library District* (1978) 87 Cal.App.3d 135 ["*California League*"], the court found that a benefit had vested where the district's personnel policies and procedures provided longevity increases of two percent at the end of the ninth, twelfth, fifteenth, and eighteenth years of service; a fifth week of vacation after 10 years of continuous service; and a four month sabbatical after 10 years of continuous service. The *California League* court held that these benefits were "important" and were a form of inducement to remain employed. The court held these benefits were vested.

California League has not withstood the test of time. It was criticized by the Fourth District Court of Appeal in *San Bernardino*, *supra*, 67 Cal.App.4th 1215. The *San Bernardino* court explicitly stated that the authority the *California League* court relied upon to support its holding was misplaced and could not fairly be read as creating a new substantive right protected under the contracts clause. (*San Bernardino*, *supra*, 67 Cal.App.4th at 1223.) *San Bernardino* therefore declined to follow *California League*. In *San Diego Police Officers' Association*, *supra*, 568 F.3d at 739, the Ninth Circuit Court of Appeal also found *California League* unpersuasive because it failed to acknowledge the presumption that legislative bodies do not intend to bind themselves contractually, and failed to look at the legislative body's intent to create vested rights. It found *San Bernardino* and its analysis more persuasive. (*San Diego Police Officers'*

Association, supra, 568 F.3d at 740.) Finally, the California Supreme Court also agreed that *California League's* analysis was deficient. (*REAOC III, supra*, 52 Cal.4th at 1190.) Other than standing for the broad proposition that implied rights may exist, *California League* is of no precedential value.

In *Thorning v. Hollister School Dist.* (1992) 11 Cal.App.4th 1598, a school board passed a resolution granting retiree health benefits to two retiring school board members. After the board members retired, the school board voted to suspend payment. The former board members sought a writ of mandate directing the district to pay for their retiree health benefits after the district decided to suspend payment. The *Thorning* court held that the retirement benefits were vested. The *Thorning* decision relies heavily on the *California League* court's flawed analysis and has not been followed by later courts. (*San Diego Police Officers' Association, supra*, 568 F.3d at 739-40.)

Thus, *California League* and *Thorning* are outdated aberrations and have not been followed by later court cases, including the seminal cases by both the California Supreme Court and Ninth Circuit Court of Appeals. They therefore should not be followed here.

C. VPOA'S CONTENTION THAT ELIGIBILITY REQUIREMENTS VEST A FUTURE BENEFIT IS UNSUPPORTED AND IMPRACTICAL

VPOA's contention that eligibility requirements should be read as creating a vested future benefit would lead to absurd results and should be rejected.

Parties are free to adopt eligibility requirements for the receipt of a particular benefit. Indeed, many of the League's members have adopted

such eligibility requirements in their MOUs. However, the decision to adopt eligibility requirements does not require the benefit to be vested or imply that all employees, even those who do not currently satisfy the eligibility requirements, are vested. VPOA's theory confuses placing eligibility requirements on the receipt of a benefit with guaranteeing the benefit in perpetuity. An eligibility requirement does not preclude the benefit from being eliminated completely in the future or requiring more stringent eligibility requirements, absent express language to the contrary.

The fact that a condition precedent may not be accomplished during a single MOU, cannot, under the case law cited here and in the parties' briefs, be a basis for a benefit being vested in perpetuity. VPOA ignores the realities of labor negotiations. Parties can, and often do, agree to carry language over from one labor agreement to the next when negotiating successor agreements. Parties may agree to a ten year eligibility requirement in a five year labor agreement. The benefit and eligibility requirement remain valid if the language is carried over from agreement to agreement. However, contingencies outside of the labor agreement do not survive where they are not renegotiated. The benefit still remains subject to negotiation, absent clear language or convincing extrinsic evidence to the contrary.

This is not only consistent with the Meyers-Milias-Brown Act (Gov't Code, § 3500 et seq.), but it is also good policy. Public agencies must maintain the flexibility to respond to changing conditions and to effectuate the opinion of the electorate as to how public funds should be spent. The stakes are enormous for the League's members with respect to retiree medical benefits, and whether modifications can be made or whether drastic service cuts or bankruptcy are the only option. In an era of

skyrocketing health costs, public agencies – absent a clear and unmistakable intent to vest health benefits in perpetuity – must be able to modify them, often to preserve them while simultaneously preserving other critical public services.

VPOA's construction would lead to absurd results for the League's members. Under VPOA's construction, any eligibility or vesting requirement that extends beyond the term of the MOU would automatically create a vested right to benefits in perpetuity. It would be absurd to hold that the parties can no longer negotiate to modify these benefits merely because, as previously negotiated, there was a possibility someone could achieve them in the future. Courts have rejected this simplistic vested rights analysis because it is inimical to the process of collective bargaining and would create unexpected liabilities and completely refute the requirement that vesting is established through the intent of the governing body. (See *San Diego Police Officers' Association*, *supra*, 568 F.3d 725; *San Bernardino*, *supra*, 67 Cal.App.4th 1215.) None of VPOA's proffered evidence shows an intent of the City Council that the benefit vest.

D. VPOA'S REMAINING CONTENTIONS OF A VESTED RIGHT TO PERPETUAL HEALTH BENEFITS ARE INSUFFICIENT UNDER APPLICABLE LAW

VPOA relies on an unpersuasive textual argument and a smattering of extrinsic evidence that does not support a finding that the City promised that health benefits were vested in perpetuity. VPOA's theories do not reflect applicable law. VPOA's vested rights analysis relies entirely on cases analyzing *pension* benefits, which have traditionally been analyzed under a different framework. (Appellant's Opening Brief, pp. 19-22.) VPOA ignores the long-line of health benefit cases discussed above, and

even the California Supreme Court's analysis in *REAOC III*. (*Id.*) The only case relevant to pension benefits cited by VPOA in its overview of vested rights is *Thorning*, which, as discussed above, has not been followed by later cases and has been thoroughly criticized. (See *San Diego Police Officers' Association*, *supra*, 568 F.3d at 739-40.)

Apart from the eligibility language discussed above, the only express language VPOA cites is the phrase "there after" in the MOU. However, this language does not come close to showing an "unmistakable" intent to vest retiree health benefits. It does not, as VPOA contends, satisfy VPOA's "heavy burden" of overcoming the presumption against vested rights. (*REAOC V*, *supra*, 742 F.3d at 1141.)

With respect to VPOA's extrinsic evidence, courts have consistently rejected the types of evidence introduced by VPOA. The fact that benefits were provided from 1990 through 2012 does not support a right to benefits in perpetuity. (See *REAOC V*, *supra*, 742 F.3d at 1142; *Sappington*, *supra*, 119 Cal.App.4th 949.) Employee declarations concerning their belief that the benefit was vested or that it induced them to accept or remain employed have similarly been held insufficient. (See *REAOC V*, *supra*, 742 F.3d at 1142; *Sacramento County*, *supra*, 975 F.Supp.2d at 1163-1166.) VPOA's citation to statements of a single City Council member, especially when taken out of context, cannot establish an implied vested right to perpetual benefits. The vote of a single member of a governing body is not an act of the governing body and cannot establish legislative intent. (*County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 350.)

VPOA's invocation of the presumption against the drafter in interpretation of agreements is similarly misplaced. The presumption does not apply to negotiated instruments, is considered the last resort of

interpretation, and is inapplicable in the context of constitutionally vested rights because the intent must be "unmistakable." (*Dunne and Gaston v. Keltner* (1975) 50 Cal.App.3d 560; Civ. Code, § 1654; *REAOC III, supra*, 52 Cal.4th at 1188-89.) Finally, VPOA's position that the MOU did not contain a reservation of rights clause in favor of the City is irrelevant. Applicable case law is clear that the "heavy burden" of overcoming the presumption *against* vested rights rests with those asserting vested rights. VPOA's attempts to reverse this presumption must be rejected in order to avoid confusion and unintended liabilities for cities and their residents.

Therefore, VPOA has not shown a clear basis in the contract or convincing extrinsic evidence that would support a finding of a vested right to retiree health benefits.

IV. CONCLUSION

Based on the above, *amicus curiae* requests that the Court affirm the trial court's denial of VPOA's writ of mandate, finding that employees and retirees do not have a vested right to perpetual health benefits.

Dated: April 21, 2016

Respectfully submitted,

LIEBERT CASSIDY WHITMORE

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c)(1)

I, Steven M. Berliner , declare:

I am an attorney at law duly admitted and licensed to practice in the State of California an am one of the attorneys of record for Amicus Curiae League of California Cities.

The text of this brief consists of 5,649 words, including headings and footnotes, as counted by the Microsoft Word 2010 word processing program used to generate this brief.

Executed on April 21, 2016, at Los Angeles, California

Steven M. Berliner

CERTIFICATE OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: **6033 West Century Boulevard, 5th Floor, Los Angeles, California 90045.**

On April 21, 2016, I served the foregoing document described as **BRIEF OF AMICUS CURIAE OF THE LEAGUE OF CALIFORNIA IN SUPPORT OF POSITION OF THE CITY OF VALLEJO** in the manner checked below on all interested parties in this action addressed as follows:

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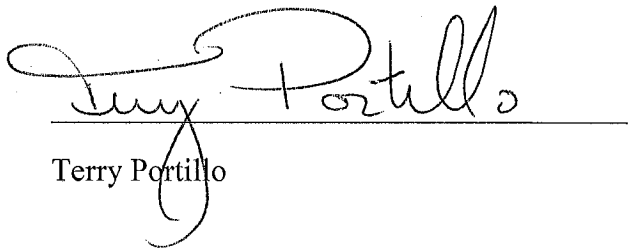

Terry Portillo