

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION ONE

COUNTY OF ORANGE,

Plaintiff and Appellant,

Case No. B218660

v.

**ASSOCIATION OF ORANGE COUNTY
DEPUTY SHERIFFS et al,**

Defendant and Respondent.

Los Angeles County Superior Court, Case No. BC389758
Hon. Helen I. Bendix, Judge

**APPLICATION TO FILE AMICUS CURIE BRIEF
BY THE CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM AND PROPOSED
AMICUS BRIEF IN SUPPORT OF THE
RESPONDENTS**

EDMUND G. BROWN JR.
Attorney General of California
JONATHAN K. RENNER
Senior Assistant Attorney General
STEPHEN P. ACQUISTO
Supervising Deputy Attorney General
HIREN PATEL
Deputy Attorney General
State Bar No. 179269
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 327-7870
Fax: (916) 324-8835
E-mail: Hiren.Patel@doj.ca.gov
*Attorneys for Amicus Curiae the California
Public Employees' Retirement System*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

Case Name: **COUNTY OF ORANGE v. ASSOCIATION OF ORANGE COUNTY DEPUTY SHERIFFS et al** Court of Appeal No.: B218660

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(Cal. Rules of Court, Rule 8.208)

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Attorney Submitting Form
 HIREN PATEL
 Deputy Attorney General
 State Bar No. 179269
 1300 I Street, Suite 125
 P.O. Box 944255
 Sacramento, CA 94244-2550
 Telephone: (916) 327-7870
 Fax: (916) 324-8835
 E-mail: Hiren.Patel@doj.ca.gov

Party Represented
 Attorneys for the California Public Employees'
 Retirement System



 (Signature of Attorney Submitting Form)

6/1/10

 (Date)

TABLE OF CONTENTS

	Page
Application to file brief as <i>amicus curie</i>	1
I. CalPERS' interest in the case	1
II. CalPERS' participation may assist the court.....	2
CalPERS' Amicus Brief.....	4
I. Introduction.....	4
II. California's history of providing pension benefits based on prior years of public service	5
III. Argument	7
A. Granting enhanced pension benefits based on prior years of service does not violate the constitutional debt limitation.	7
1. The estimated costs of the enhanced benefits are simply actuarial estimations, and thus do not constitute an indebtedness or liability.....	7
2. A government agency's portion of a pension payment is a contingent obligation, and thus exempt from the debt limitation provision.....	10
a. The law governing the contingent obligation exception to the debt limit.....	10
b. The county receives ongoing consideration for future pension payments based on prior years of service.....	12
B. Granting enhanced pension benefits based on prior years of service does not violate the constitutional ban on extra compensation.	15
C. Adopting the county's novel constitutional interpretations could threaten the pension benefits of hundreds of thousands of state and local government employees and their families.	19
IV. CONCLUSION.....	21

TABLE OF AUTHORITIES

	Page
CASES	
<i>Abbott v. City of Los Angeles</i> (1958) 50 Cal.2d 438	17
<i>American River Fire Protection Dist. v. Brennan</i> (1997) 58 Cal.App.4th 20	15, 16, 17, 18
<i>Bellus v. City of Eureka</i> (1968) 69 Cal.2d 336	13
<i>Betts v. Board of Admin. of PERS</i> (1978) 21 Cal.3d 859	16
<i>Brummund v. City of Oakland</i> (1952) 111 Cal.App.2d 114	17
<i>City of Sacramento v. Public Employees Retirement System</i> (1991) 229 Cal.App.3d 1470	13
<i>Columbia County v. Board of Trustee of the Wisconsin Retirement Fund</i> (Wis. 1962) 116 N.W.2d 142	10, 11
<i>Dean v. Kuchel</i> (1950) 35 Cal.2d 444	8
<i>Hannon Engineering, Inc. v. Reim</i> (1981) 126 Cal.App.3d 415	13
<i>Holtendorff v. Housing Auth. of City of Los Angeles</i> (1967) 250 Cal.App.2d 596	16, 17
<i>Hunter v. Sparling</i> (1948) 87 Cal.App.2d 711	13
<i>In re County of Orange</i> (C.D. Cal. 1998) 31 F.Supp.2d 768	8

TABLE OF AUTHORITIES
(continued)

	Page
<i>In re Retirement Cases</i>	
(2003) 110 Cal.App.4th 426	12
<i>Jarvis v. Cory</i>	
(1980) 28 Cal.3d 562	14, 16
<i>Kern v. City of Long Beach</i>	
(1947) 29 Cal.2d 848	11, 13, 16
<i>Miller v. Dunn</i>	
(1887) 72 Cal. 462	15
<i>Nelson v. City of Los Angeles</i>	
(1971) 21 Cal.App.3d 916	17, 18
<i>Rider v. City of San Diego</i>	
(1998) 18 Cal.4th 1035	8, 10, 11
<i>Rider v. City of San Diego</i>	
(1996) 47 Cal.App.4th 1473	8, 11, 12
<i>Rochlin v. State</i>	
(Ariz. 1975) 540 P.2d 643	17
<i>San Joaquin County Employees' Association, Inc. v. County of San Joaquin</i>	
(1974) 39 Cal.App.3d 83	14
<i>Starr v. City and County of San Francisco</i>	
(1977) 72 Cal.App.3d 164	7
<i>State of Cal. ex. rel. State Lands Com. v. Superior Court</i>	
(1995) 11 Cal.4th 50	10
<i>State of California v. Superior Court (Lyon)</i>	
(1981) 29 Cal.3d 210	2
<i>State ex rel. Pension Obligation Bond Comm. v. All Persons Interested etc.</i>	
(2007) 152 Cal.App.4th 1386	8, 12

TABLE OF AUTHORITIES
(continued)

	Page
<i>Stevenson v. Colgan</i> (1891) 91 Cal. 649	15, 16
<i>Sturgeon v. County of Los Angeles</i> (2008) 167 Cal.App.4th 630	14
<i>Sweesy v. Los Angeles County Peace Officers' Retirement Bd.</i> (1941) 17 Cal.2d 356	17
<i>Taxpayers for Improving Public Safety v. Schwarzenegger</i> (2009) 172 Cal.App.4th 749	11
<i>Taylor v. General Tel. Co. of Cal.</i> (1971) 20 Cal.App.3d 70	13
<i>Thorpe v. Long Beach Community College Dist.</i> (2000) 83 Cal.App.4th 655	10
<i>United Firefighters of Los Angeles City v. City of Los Angeles</i> (1989) 210 Cal.App.3d 1095	16, 17
<i>Valdes v. Cory</i> (1983) 139 Cal.App.3d 773	5
 STATUTES	
County Employees Retirement Act of 1937	6
Government Code	
§ 7507	9
§ 31678.2	4
§ 20000 <i>et seq.</i>	1

TABLE OF AUTHORITIES
(continued)

	Page
Stats. 1913, ch. 694	5
Stats. 1931, ch. 700	5
Stats. 1937, ch. 677	6
Stats. 1970, ch. 767	6
Stats. 1971, ch. 170	6
Stats. 1975, ch. 157	6
Stats. 1976, ch. 1436	6
Stats. 1999, ch. 555	6, 19
Stats. 2000, ch. 495	19
Stats. 2001, ch. 782	6, 19
Stats. 2004, ch. 654	6, 19

CONSTITUTIONAL PROVISIONS

California Constitution	
Article XI, § 10	5, 15, 17, 18, 19
Article XVI, § 1	8
Article XVI, § 6	14
Article XVI, § 18	4, 5, 7, 8, 10

COURT RULES

California Rules of Court	
Rule 8.200(c)	1

OTHER AUTHORITIES

65 Ops. Cal. Atty. Gen. 571 (1982)	8, 9
67 Ops. Cal. Atty. Gen. 349 (1984)	8
88 Ops. Cal. Atty. Gen. 165 (2005)	9, 12
89 Ops. Cal. Atty. Gen. 270 (2006)	12
Assembly Bill 616	19
Assembly Bill 1875	19
Senate Bill 400	6, 19
Senate Bill 1696	19
www.calpers.ca.gov	1
www.calpers.ca.gov/eip-docs/about/facts/general.pdf	1

APPLICATION TO FILE BRIEF AS AMICUS CURIE

Pursuant to Rule 8.200(c) of the California Rules of Court, the California Public Employees' Retirement System (CalPERS) applies for leave from the Court to file the attached *amicus curiae* brief in this case. The proposed *amicus* brief is filed in support of respondents the Association of Orange County Deputy Sheriffs' and the Orange County Employees' Retirement System's (OCERS) request that the superior court's judgment be affirmed. The proposed brief is authored in whole by the undersigned counsel for CalPERS. No other person or entity has made monetary contributions intended to fund the preparation or submission of the brief.

I. CALPERS' INTEREST IN THE CASE

This case presents important questions of first impression regarding whether the California Constitution bars public employees from being granted enhanced pension benefits based, in part, on the employees' prior years of public service. CalPERS members have a substantial interest in the resolution of the issues presented in this case.

CalPERS was created by the Legislature to provide pension benefits to hundreds of thousands of state, school, and various local public employees and their beneficiaries. CalPERS was established by the Public Employees' Retirement Law, Government Code section 20000 *et seq.*, and is the largest public pension system in the United States, holding approximately \$200.0 billion in assets. (www.calpers.ca.gov [indicating CalPERS' daily fund market value as of May 27, 2010].) As of June 30, 2009, CalPERS had 1,134,397 members and 492,513 retirees, survivors, and beneficiaries. (www.calpers.ca.gov/eip-docs/about/facts/general.pdf) CalPERS is thus responsible for providing pension benefits to more than

1.6 million active and retired California public employees and their families.

In this appeal, the County of Orange (the County) argues that granting an enhancement in pension benefits based, in part, on prior years of public service violates the California Constitution's municipal debt limitation provision and the ban on extra compensation for public employees.

CalPERS conservatively estimates that, at a minimum, approximately 947,000 of its members have been granted an enhancement in benefits that is calculated based on years of public service rendered prior to the grant of the benefit enhancement. This represents approximately 60% of CalPERS' members. If increases in retirement benefits based on prior years of service were held unconstitutional as the County seeks, the benefit increases previously granted to CalPERS members could be terminated or reduced. Thus, CalPERS members have a direct and substantial interest in the issues presented in the case.

II. CALPERS' PARTICIPATION MAY ASSIST THE COURT

Amicus curiae can often provide a broader prospective on the issues presented than parties advocating their own interests in a particular case. (*State of California v. Superior Court (Lyon)* (1981) 29 Cal.3d 210, 216 [amicus identified broad scope of the court's possible decision]; Simpson & Vasaly, *The Amicus Brief* (2d. ed 2004), American Bar Assn. p. 24 ["Where larger policy or social issues are implicated by a decision, the amicus has a role that the parties often cannot play."].)

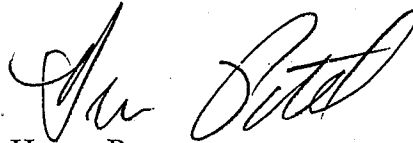
Here, CalPERS may assist the Court by explaining the implications of the Court's decision to public pension beneficiaries well beyond those that are parties to this proceeding. CalPERS also has extensive experience with public pensions applicable both on a local and statewide basis. CalPERS' insights gained from this experience may be beneficial to the Court.

Accordingly, CalPERS respectfully requests that its application to participate as *amicus curiae* be granted.

Dated: June 1, 2010

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
JONATHAN K. RENNER
Senior Assistant Attorney General
STEPHEN P. ACQUISTO
Supervising Deputy Attorney General



HIREN PATEL
Deputy Attorney General
*Attorneys for the California
Public Employees' Retirement System*

CALPERS' AMICUS BRIEF

I. INTRODUCTION

This case presents important questions of first impression that may have a significant impact on state, school, and local public employees and their families throughout California. In this appeal, the County argues that an increase in public pension benefits cannot be calculated based on an employee's prior years of public service. Contrary to the County's position, the California Legislature has repeatedly enacted statutes which authorized increases in pension benefits for hundreds of thousands of state and local public employees who are CalPERS members based, in part, on prior years of government service. If this Court adopts the County's unprecedented claim that permitting enhanced pension benefits based on prior years of public service is unconstitutional, statutory schemes spanning 97 years will be rendered invalid, and the bargained-for pension benefits of at least 947,000 state and local public employees and their families could be adversely affected.

Although the County does not acknowledge it, its lawsuit effectively constitutes a challenge to various statutory schemes that allow state and local governments to retain qualified public employees by granting enhanced pension benefits which take into account an employee's prior years of public service. (See also OCERS' RB pp. 11-15 [the County's lawsuit is in actuality a facial challenge to Gov. Code, § 31678.2].) Often times, an enhancement in pension benefits is offered to public employees in lieu of other possible benefit increases, such as salary increases.

The County first argues that the pension enhancement it granted to members of the Association of Orange County Deputy Sheriffs (hereafter, the Deputy Sheriffs) violates the debt limitation provision of article XVI, section 18, subdivision (a), (section 18(a)) of the Constitution. The County

next argues that that granting enhanced pension benefits to current employees based on prior years of service is a form of extra compensation barred by article XI, section 10, subdivision (a), (section 10(a)) of the California Constitution. Both claims are without merit.

The County's debt limitation claim fails for two reasons. First, the County's obligation to pay the costs owed as a result of the enhanced payment does not qualify as a debt or indebtedness for purposes of article XVI, section 18(a). Second, the payment due for a government agency's future pension obligation is a contingent liability that falls within an exception to the constitutional debt limit.

The County's extra compensation argument fails because pension benefits, even if they are enhanced at a later date, are part of the public employee's original contract of employment. Thus, an enhancement in benefits is not a form of "extra" compensation barred by the California Constitution, but rather a part of the original contract for employment. Accordingly, the judgment should be affirmed.

II. CALIFORNIA'S HISTORY OF PROVIDING PENSION BENEFITS BASED ON PRIOR YEARS OF PUBLIC SERVICE

To appreciate the radical departure in public pension law that the County advocates in this case, it is first helpful to review California's history of providing pension benefits. California has a long history of providing pension benefits to public employees based, in part, on prior years of public service. In 1913, the Legislature created a pension system to benefit California public school teachers. (Stats. 1913, ch. 694.) The 1913 Act allowed the prior years that a teacher had taught in schools outside of California to be used in calculating the teacher's pension benefits. (*Id.*, § 13.) In 1931, the Legislature established the State Employees' Retirement System, the precursor to CalPERS. (*Valdes v. Cory* (1983) 139 Cal.App.3d 773, 780-81; Stats. 1931, ch. 700.) The

original statute creating the state public pension system expressly permitted benefits to be calculated based on prior years of public service. (Stats. 1931, ch. 700, §§ 9 and 81-84.) The Legislature then enacted the County Employees Retirement Act of 1937, which provided for the creation of a retirement system for county employees. (Stats. 1937, ch. 677.) The 1937 Act also permitted county pension benefits to be calculated based, in part, on an employee's prior years of public service. (*Id.*, §§ 28 and 43.5.) Over the subsequent decades, the Legislature continued to authorize providing benefits to various classes of public employees based, in part, on prior years of public service. (See e.g. Stats. 1970, ch. 767, § 2, p. 1451; Stats. 1971, ch. 170, § 42, p. 232; Stats. 1975, ch. 157, § 2, p. 288; Stats. 1976, ch. 1436, §§ 14, 25, and 25.1.)

More recently, the Legislature has again authorized CalPERS to increase pension benefit formulas for existing public employees, and to apply these new formulas to prior years of service. In 1999, the Legislature enacted Senate Bill 400 which created new pension benefit formulas for existing university workers, state industrial workers, school workers, state peace officers, and firefighters, and applied these new formulas for prior years of public service. (Stats. 1999, ch. 555.) In 2001 and 2004, local agencies were also authorized to increase their benefit formulas and apply this increase to the prior service of various existing employees. (Stats. 2004, ch. 654; Stats. 2001, ch. 782.) Thus, including prior years of public service to calculate benefits has been a fundamental part of public employees' pension benefits for at least the past 97 years.

III. ARGUMENT

A. **Granting Enhanced Pension Benefits Based on Prior Years of Service Does Not Violate The Constitutional Debt Limitation.**

The County first argues that its granting of enhanced retirement benefits to the Deputy Sheriffs violated the debt limitation found in article XVI, section 18(a). With certain exceptions not relevant here, section 18(a) states that “[n]o county . . . shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income or revenue provided for such year” unless it is approved by two-thirds of the voters of the county.

The County’s section 18(a) claim fails for two reasons. First, the County claims that its projected accumulated costs for the enhanced benefits exceeded its revenues for fiscal year 2001-2002 (the fiscal year it granted the enhanced benefits), and this violated section 18(a). However, the anticipated costs for the enhanced benefits are simply actuarial projections, and thus do not constitute an “indebtedness or liability” for purposes of section 18(a). Second, even if the actuarial projections were an indebtedness or liability, the costs are a contingent liability that do not fall within the scope of section 18(a).

1. The estimated costs of the enhanced benefits are simply actuarial estimations, and thus do not constitute an indebtedness or liability.

Article XVI, section 18(a) requires local governments to match their expenditures with their revenues for each particular year. (*Starr v. City and County of San Francisco* (1977) 72 Cal.App.3d 164, 173-74.) Although often characterized as requiring local government to “pay-as-you-go” for public services and not incur future debt, section 18(a) is more accurately described as requiring local governments to enact balanced budgets, where

actual expenditures match actual revenue for the given year. (*Rider v. City of San Diego* (1998) 18 Cal.4th 1035, 1045; *State ex rel. Pension Obligation Bond Comm. v. All Persons Interested etc.* (2007) 152 Cal.App.4th 1386, 1398.) So long as a county's expenditure in a given year matches its revenues for that same year, there is no violation of the debt limit. (*Rider v. City of San Diego* (1996) 47 Cal.App.4th 1473, 1482.) A court examines the economic substance of the transaction at issue to determine whether a governmental entity has incurred an indebtedness or liability that is greater than the entity's revenues for a particular year. (*In re County of Orange* (C.D. Cal. 1998) 31 F.Supp.2d 768, 776.)

As both the Deputy Sheriffs and OCERS have pointed out in their opening briefs, the County's contribution for the enhanced benefits is not an exact, certain amount, but rather an actuarial projection of what the County may ultimately have to contribute to OCERS to meet the projected pension obligations to the Deputy Sheriffs. (Deputy Sheriffs' RB pp. 13-14 and 16-17; OCERS' RB p. 21.) In a formal opinion, the Attorney General has concluded that a government agency's estimated pension obligation based on actuarial estimations is not an indebtedness or liability subject to the constitutional debt limitation. (65 Ops.Cal.Atty.Gen. 571 (1982).) In 1982, the Attorney General examined whether the unfunded liability of the state's contribution to the state Public Employees' Retirement System violated the constitutional debt limitation applicable to state government.¹ The unfunded liability is the portion of pension benefits a governmental

¹ The debt limitation provision applicable at the state level is found in article XVI, section 1 of the California Constitution, and is similar in nature to article XVI, section 18(a). (*Dean v. Kuchel* (1950) 35 Cal.2d 444, 446.) These two provisions are thus construed together. (See *State ex rel. Pension Obligation Bond Comm., supra*, 152 Cal.App.4th at pp. 1397-1401; 67 Ops.Cal.Atty.Gen. 349, 351 (1984).)

entity must pay to retirees and is determined after subtracting the employee contributions and the investment returns for a pension fund. (*Id.* at p. 572.) The amount the governmental entity will pay is simply an estimation, calculated through actuarial estimates. (*Ibid.*; see also Gov. Code, § 7507.)

The Attorney General explained that pension calculations based on actuarial estimates were speculative and “fail[] to qualify as a legally enforceable obligation of any kind.” (65 Ops.Cal.Atty.Gen. at p. 574.) Payments based on actuarial determinations “will depend upon many assumptions made regarding future events such as size of work force, benefits, inflation, earnings on investments, etc.” (*Ibid.*; see also 88 Ops.Cal.Atty.Gen. 165, 167-68 (2005); OCERS’ RB pp. 16-18 and pp. 23-24.) Such an obligation “is simply a projection made by actuaries based upon assumptions regarding future events. No basis for any legally enforceable obligation arises until the events occur and when they do the amount of liability will be based on actual experience rather than [the] projections.” (65 Ops.Cal.Atty.Gen. at p. 754; OCERS’ RB pp. 21 [explaining that the County’s unfunded liability estimated in 2002 was not an “actual, absolute cost to which the County then committed. The future cost could only be *projected* at the time [footnote omitted] and even that projected cost could have been very different depending upon the actuarial methodologies and assumptions selected by the OCERS Board.”].) Thus, “actuarial evaluations do not create legally binding obligations” and “there is nothing in the debt limitation provisions of the state Constitution which suggests that the [governmental obligation] to a pension system is tantamount to an ‘indebtedness or liability.’” (65 Ops.Cal.Atty.Gen. at p. 754.)

The County asserts that the Attorney General’s analysis is not binding on this Court and should be disregarded. (AOB pp. 38-39.) While the opinions of the Attorney General are not binding as a matter of law, they

are entitled to considerable weight. (*State of Cal. ex. rel. State Lands Com. v. Superior Court* (1995) 11 Cal.4th 50, 71.) Indeed, “[r]eliance on Attorney General Opinions is particularly appropriate where [] no clear case authority exists, and the factual context of the Opinions is closely parallel to that under review.” (*Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal.App.4th 655, 662-63.) Here, the factual context of the Attorney General’s 1982 opinion closely parallels the issue raised in this case: whether an actuarial estimation of the County’s future pension obligation constitutes a debt or liability for purposes of the constitutional debt limitation provision. Moreover, cases from other jurisdictions have adopted the Attorney General’s analysis in examining the same question. (See *Columbia County v. Board of Trustee of the Wisconsin Retirement Fund* (Wis. 1962) 116 N.W.2d 142, 152 [pension obligation based on actuarial calculations is “uncertain and indefinite,” and thus not a debt for purposes of a state constitutional debt limitation provision].)

2. A government agency’s portion of a pension payment is a contingent obligation, and thus exempt from the debt limitation provision.

a. The law governing the contingent obligation exception to the debt limit.

Even if an actuarial estimation of a future pension obligation constitutes a debt or liability, it still is not subject to the debt limitation because it falls within the contingent liability exception. “Certain exceptions or limitations to the balanced budget requirement of section 18 are almost as old as the requirement itself . . . [and] are firmly rooted in our jurisprudence.” (*Rider, supra*, 18 Cal.4th at p. 1046.) One of these exceptions provides that “the debt limitation in section 18 does not apply when a local government enters into a contingent obligation. A sum payable upon a contingency is not a debt, nor does it become a debt until

the contingency happens.” (*Id.* at p. 1047 [quotes and citation omitted].) The contingent obligation exception is applied to “uphold multiyear contracts in which the local government agrees to pay in each successive year for land, goods, or services provided during that year.” (*Id.*) “Each periodic payment is viewed as a contemporaneous payment for the property, goods, or services received rather than an installment payment for a long-term debt.” (*Taxpayers for Improving Public Safety v. Schwarzenegger* (2009) 172 Cal.App.4th 749, 763.)

Thus, the debt limit is not violated where future payments by the government agency are contingent on property, goods, or services being available to the entity during future periods. (*Id.* at p. 775.) The future services are considered “additional, contemporaneous consideration” for the payments. (*Rider, supra*, 18 Cal.4th at p. 1049.) With respect to multi-year obligations — such as the pension obligation in this case — it is only when a “contractual obligation create[s] [an] immediate debt for an aggregate amount [that] the constitutional restriction applies.” (*Rider, supra*, 47 Cal.App.4th at p. 1482.) Thus, “a public entity may incur a contractual liability without voter approval and not offend the constitutional debt limitation if the contract ‘creates no immediate indebtedness for the aggregate installments . . . [and] confines liability to each installment as it falls due.’” (*Id.* at p. 1478 quoting *City of Los Angeles v. Offner* (1942) 19 Cal.2d 483, 486; see also *Rider, supra*, 18 Cal.4th at pp. 1048-49.) In this case, the County does not allege that it will immediately owe \$100 million or more for the enhanced benefits in any given year.

The forgoing analysis is applied for all installment obligations, and thus is applicable to the pension obligation in this case. (*Columbia County, supra*, 116 N.W.2d at p. 152 [future pension obligations based on past service are a contingent obligation]; see also *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 855 [pension obligations can be considered as a

contingent obligation]; *Rider, supra*, 47 Cal.App.4th at p. 1482 [“an uninterrupted line of decisions [have approved] government commitments of every kind” that are contingent obligations].) Like any other installment obligation, a government entity typically pays its pension obligation in annual installments by providing a portion of the pension payments not covered by the employees’ contributions and the investment returns. (See *State ex rel. Pension Obligation Bond Comm., supra*, 152 Cal.App.4th at pp. 1392-93 [describing the state’s obligation to CalPERS]; 88 Ops.Cal.Atty.Gen. at pp 167-68; 89 Ops.Cal.Atty.Gen. 270, 271 fn. 2 (2006).)

b. The County receives ongoing consideration for future pension payments based on prior years of service.

The County argues the contingency exception does not apply because government agencies do not receive additional consideration when they grant enhanced pension benefits based on prior years of service. (AOB pp. 36-37.) This is simply untrue. Enhanced pension benefits are often the result of the collective bargaining process, and often provided to employees in lieu of other types of benefits. Thus, public employees may forego both current and future wage increases and other future benefits in exchange for future pension benefit increases. Additionally, many government agencies may prefer increasing future pension benefits over providing other more immediate benefits to employees because future pension benefits can, in part, be paid from investment returns instead of taxpayer money. (See *In re Retirement Cases* (2003) 110 Cal.App.4th 426, 461-62 [facts in case indicated that “between 65 and 80 percent of payments made to [beneficiaries] come from investment returns”]; OCERS’ RB p. 17 and p. 24 [“The ultimate cost [for benefits] to the County is . . . heavily dependent upon the retirement system’s investment returns.”].) Providing future

pension benefits in exchange for concessions on other benefits thus has the potential to save taxpayer money over the long term. Accordingly, government agencies receive ongoing consideration for future pension enhancements in the form of prior wage and benefits concessions, and by potentially realizing long term cost savings to taxpayers.

Future benefits are also provided to ensure the long term retention of experienced public employees. Public employees often can only realize the full extent of increased future pension benefits if they stay in their jobs for many years. (See *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1478 and fn. 5 [describing how a pension is calculated based, in part, on length of government service]; OCERS' RB pp. 5-6.) Increased future benefits thus aim to retain an experienced workforce over the long term, thereby providing an ongoing benefit to the public. (See *Bellus v. City of Eureka* (1968) 69 Cal.2d 336, 351 ["One purpose of providing pensions for municipal officers is to induce them to enter *and continue* in the service of the city." (Emphasis added)]; *Kern, supra*, 29 Cal.2d at p. 856 [pensions "induce competent persons to enter *and remain* in public employment" (emphasis added)].) Indeed, our courts have long recognized that continuing in employment for pension benefits is a valid form of consideration provided by the employee for the increased benefits. (*Hannon Engineering, Inc. v. Reim* (1981) 126 Cal.App.3d 415, 425 ["A pension plan offered by the employer and impliedly accepted by the employee by remaining in employment constitutes a contract between them, whether the plan is a public or private one, and whether or not the employee is to contribute funds to the pension. [Citations.] The continued employment constitutes consideration for the promise to pay the pension, which is deemed deferred compensation."]); *Taylor v. General Tel. Co. of Cal.* (1971) 20 Cal.App.3d 70, 74; *Hunter v. Sparling* (1948) 87 Cal.App.2d 711, 722-723.)

The courts have also recognized the significant benefits the public receives for compensating public employees based on past performance in other contexts. The California Constitution prevents both state and county governments from making or authorizing any gifts of public funds for private purposes. (Cal. Const. art. XVI, § 6; *Sturgeon v. County of Los Angeles* (2008) 167 Cal.App.4th 630, 637.) The question in the gift-of-public-funds analysis is whether appropriated funds were used for a public or private purpose. (*Sturgeon, supra*, 167 Cal.App.4th at p. 637.) If the appropriation is made for a public purpose, there is no violation of the constitutional provision. (*Id.* at pp. 637-38.) The courts have repeatedly rejected claims that payments to public employees based on prior performance constitute gifts of public funds by recognizing the important public purposes that the payments serve.

In *Jarvis v. Cory*, (1980) 28 Cal.3d 562, the plaintiff challenged the Legislature's decision to award lump-sum payments to certain state employees for prior work performed. In rejecting plaintiff's claim that the payments were gifts of public funds, the Court stated:

[T]he Legislature found that the [payments] made by the bill were 'necessary to ensure the continued recruitment and retention of qualified and competent state employees.' We will not disturb the Legislature's finding of a public purpose so long as it has a reasonable basis. [Citation.] In this case, we cannot doubt the substantiality of the purpose stated. Nor can we doubt that [the legislation] serves the purpose by assuring state employees they will not be abandoned in troubled times, and by raising salaries to a level more competitive with those in the private sector. (*Id.* at p. 578 fn. 10.)

In *San Joaquin County Employees' Association, Inc. v. County of San Joaquin*, (1974) 39 Cal.App.3d 83, a retroactive salary increase was challenged as a gift of public funds. In rejecting the claim, the court said:

It is an incontestable fact of governmental employment practices that governmental agencies must compete in the labor market

with non-governmental employers. Such competition includes not only salaries but sick leave time, vacations and numerous other conditions of employment. It has been, for instance, a judicially noticeable practice of governmental agencies to correlate vacation time allowed to the years of service by an employee. . . . We cite these examples only to show that in the area of employment, public agencies must compete, and if to so compete they grant benefits to employees for past services, they are not making a gift of public money but are taking self-serving steps to further the governmental agency's self-interest in recruiting the most competent employees in a highly competitive market. (*Id.* at p. 87-88.)

The gift-of-public-funds cases confirm that enhancements in benefits based on prior years of service do provide ongoing benefits to public agencies. These ongoing benefits thus serve as valid consideration received for purposes of the contingency-exception analysis.

B. Granting Enhanced Pension Benefits Based on Prior Years of Service Does Not Violate the Constitutional Ban on Extra Compensation.

The County's argument that granting enhanced pension benefits based on prior years of service violates article XI, section 10 (a)'s ban on extra compensation is equally meritless.

Article XI, section 10(a) states in relevant part that "[a] local government body may not grant extra compensation or extra allowance to a public officer, public employee, or contractor after service has been rendered or a contract has been entered into and performed in whole or in part" The ban on extra compensation has been part of the California Constitution since the early founding of the state. (*Miller v. Dunn* (1887) 72 Cal. 462, 467-68; *Stevenson v. Colgan* (1891) 91 Cal. 649, 651.) It was enacted for the narrow purpose of "prohibit[ing] government appropriations motivated by charity or gratitude." (*American River Fire Protection Dist. v. Brennan* (1997) 58 Cal.App.4th 20, 24.) "[T]he primary purpose of the prohibition . . . was to prevent [governmental bodies] from enacting

‘private statutes’ in recognition of ‘individual claims.’” (*Jarvis, supra*, 28 Cal.3d at p. 577.) The ban on extra compensation simply denies governmental bodies “the right to make direct appropriations to *individuals* from general considerations of charity or gratitude, or because of some supposed moral obligation” for services already provided. (*Ibid.* [emphasis in original]; see also *Stevenson v. Colgan, supra*, 91 Cal. at p. 651; *American River Fire Protection Dist., supra*, 58 Cal.App.4th at p. 24.)

But, the ban on extra compensation does not bar all benefits based on past service. (*Jarvis, supra*, 28 Cal.3d at p. 570 [“Retroactive payments [] are not necessarily ‘extra compensation . . . after services have been rendered.’”].) Indeed, our Supreme Court has held that a public employee’s “pension expectations are measured by benefits which are in effect not only when employment commences, but which are thereafter conferred during the employee’s subsequent tenure.” (*Betts v. Board of Admin. of PERS* (1978) 21 Cal.3d 859, 866.) The Courts of Appeal have also held that public employees may receive additional pension benefits without violating the constitution. (See e.g. *United Firefighters of Los Angeles City v. City of Los Angeles* (1989) 210 Cal.App.3d 1095, 1107 [public employees “have a vested right not only to benefits substantially similar to those in effect when they accepted public employment [], but also to additional benefits offered later by the public employer”]; *Holtzendorff v. Housing Auth. of City of Los Angeles* (1967) 250 Cal.App.2d 596, 624 [public employees “having a pensionable status are entitled to receive any increase of benefits which may be provided”].)

Entitlement to enhanced pension benefits rests on well-established principles of public pension law. Pension benefits are an element of compensation and an integral part of the individual’s contract for employment with the public agency. (*Betts, supra*, 21 Cal.3d at p. 863; *Kern, supra*, 29 Cal.2d at p. 852.) Without such benefits, public agencies

would not be able to recruit qualified applicants to serve in important public positions. (*Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 455 [“[pension] systems are almost universally essential in order to attract qualified employees to police and fire departments.”].)

Pension rights vest at the moment a person accepts employment with a public agency. (*American River Fire Protection Dist, supra*, 58 Cal.App.4th at p. 28; *United Firefighters, supra*, 210 Cal.App.3d at 1105.) A person entitled to pension benefits is deemed in “pensionable status.” (*Sweesy v. Los Angeles County Peace Officers’ Retirement Bd.* (1941) 17 Cal.2d 356, 361; *Brummund v. City of Oakland* (1952) 111 Cal.App.2d 114, 121.) Any person in pensionable status is entitled to future increases in benefits that are provided. (*Sweesy, supra*, 17 Cal.2d at p. 361; *Brummund, supra*, 111 Cal.App.2d at p. 120-21; *Holtzendorff, supra*, 250 Cal.App.3d at p. 624) An increase in pension benefits is compensation for services the employee is legally required to provide both currently and in the future. (See *Holtzendorff, supra*, 250 Cal.App.2d at p. 623-24; *Rochlin v. State* (Ariz. 1975) 540 P.2d 643, 650 [“A pension even though based on past service is not intended to be compensation for past services. It is an inducement to experienced personnel to remain in service for continued performance. A promise of pension looks to the future and depends upon continued performance of service.”].) Thus, increases in benefits during the course of employment is a part of the employee’s original bargained-for employment benefits, and not a form of “extra” compensation barred by article XI, section 10(a). (*Nelson v. City of Los Angeles* (1971) 21 Cal.App.3d 916, 918-19.)

The court in *Nelson v. City of Los Angeles* rejected an argument nearly identical to the one the County makes in this case. In May 1971, the City of Los Angeles raised pension benefits for police officers and their beneficiaries. (21 Cal.App.3d at p. 917.) A retired police officer and the

widow of a retired officer sought the enhanced benefits. The City denied their claims, arguing that granting enhanced benefits to existing pensioners was extra compensation barred by article XI, section 10. (*Id.* at p. 918.) The court in *Nelson* examined whether “an increase in benefits payable to a city pensioner [is] extra compensation or an extra allowance prohibited by article XI, section 10,” and concluded “that it is not.” (*Ibid.*)

The *Nelson* court held that “an increase in benefits to persons occupying pensionable status [i.e., entitled to pension benefits] is not to be treated as payment of ‘extra compensation or allowance,’ as those terms are used in the proscription of article XI, section 10.” (*Ibid.*) The court noted that it was “well settled that additional pension benefits may constitutionally be provided for members of the retirement system who have acquired a pensionable status.” (*Id.* at pp. 918-19, quoting *Sweesy, supra*, 17 Cal.2d at p. 361.) The *Nelson* court held that an increase in pension benefits to a public employee “on pensionable status is paid as the result of rights incident to that status and not as a matter of increased compensation or allowance.” (*Id.* at p. 919.) Thus, “the right to future increases in pension benefits is inherent in pensionable status, . . . [and] the right to that status is based upon services rendered and is not a gratuity.” (*Id.*) Accordingly, “increases in pension benefits granted to persons in a pensionable status . . . are not proscribed by [] article XI, section 10.” (*Id.* at pp. 919-20; see also *American River Fire Protection Dist, supra*, 58 Cal.App.4th at p. 28 [“An increase in pension benefits even after retirement is not extra compensation as that term is used in article XI, section 10 of the California Constitution.”].)

Here, the County’s adoption of an enhanced formula that would calculate pension benefits based on prior years of service was not motivated from a sense of moral obligation or public benevolence for services already completed or provided. The Deputy Sheriffs bargained for the enhanced

benefits in exchange for their present and future performance of their legal duties. The Deputy Sheriffs likely gave up other benefit increases in exchange for enhanced pension benefits. The Deputy Sheriffs gained a right to pension benefits at the moment they were employed and had a pensionable status at the time the enhanced pension formula was adopted. Thus, the County's adoption of the enhanced benefits based on prior years of service did not violate article XI, section 10(a).

The County admits that the courts permit enhanced pension benefits based on prior service to be paid to retired employees, but argues that providing those same benefits to current public employees is unconstitutional. (AOB pp. 51-54.) But, there is simply no legal or policy basis for distinguishing between retired and current employees in receiving enhanced pension benefits. Indeed, current employees provide a public benefit for the enhanced benefits by continuing to faithfully perform their public duties while retirees obviously do not. Thus, this Court should not accept the County's invitation to draw an arbitrary distinction between current and retired employees for the section 10(a) analysis. The law permits enhanced pension benefits to be provided based on prior years of service to current employees as well.

C. Adopting the County's Novel Constitutional Interpretations Could Threaten the Pension Benefits of Hundreds of Thousands of State and Local Government Employees and Their Families.

This case represents a broad constitutional challenge to the authority to calculate pension benefits based on prior years of public service. On repeated occasions, the Legislature has authorized state and local retirement systems to provide increased pension benefits based on prior years of service. (Stats. 2004, ch. 654 [AB 1875]; Stats. 2001, ch. 782 [AB 616]; Stats. 2000, ch. 495 [SB 1696]; Stats. 1999, ch. 555 [SB 400].) Because of these legislative changes, hundreds of thousands of current employees

retires and their beneficiaries throughout California receive pension benefits based, at least in part, upon prior years of public service. At least 947,000 CalPERS members' retirement benefits are based, in part, on prior years of service. Many local government employees covered by the County Employees' Retirement Law also receive benefits based on prior years of service. In order to receive these benefits, many public employees may have relinquished other wage and benefits demands during the collective bargaining process. If this Court adopts the County's unprecedented claims, the pension benefits of all of these employees and their dependants could be threatened.² (See also OCERS' RB p. 27 [A ruling "that labels all of these statutorily authorized grants [of benefits based on prior years of service as] 'unconstitutional' could undermine the very foundation on which the Legislature has construed California[s] public employee retirement systems."].) The Court should reject the County's radical attempt to disrupt the established benefits of hundreds of thousands of California families.

² Remarkably, the County asserts that even if it made unconstitutional payments, it will not seek to recover the enhanced pension benefits already paid to the Deputy Sheriffs. (AOB pp. 14 and 20.) However, nothing would preclude other individuals from filing a lawsuit that sought to disgorge the enhanced benefits received by the Deputy Sheriffs or other public employees if this Court concludes that payments based on prior years of service were unlawful.

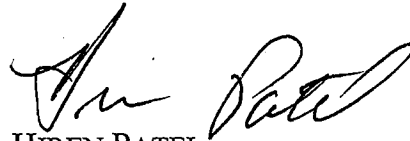
IV. CONCLUSION

For these reasons, the judgment should be affirmed.

Dated: June 1, 2010

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
JONATHAN K. RENNER
Senior Assistant Attorney General
STEPHEN P. ACQUISTO
Supervising Deputy Attorney General



HIREN PATEL
Deputy Attorney General
*Attorneys for the California
Public Employees' Retirement System*

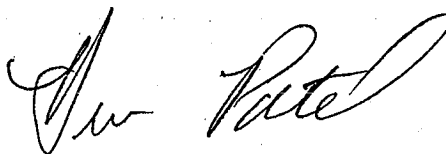
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CERTIFICATE OF COMPLIANCE

I certify that the attached CalPERS' Amicus Brief uses a 13 point Times New Roman font and contains 5,187 words.

Dated: June 1, 2010

EDMUND G. BROWN JR.
Attorney General of California

A handwritten signature in black ink, appearing to read "Hiren Patel", written in a cursive style.

HIREN PATEL
Deputy Attorney General
*Attorneys for the California
Public Employees' Retirement System*

DECLARATION OF SERVICE BY U.S. MAIL AND ELECTRONIC SERVICE

Case Name: **County of Orange v. Association of Orange County Deputy Sheriffs et al.**
Court of Appeal, Second Appellate District No.: **B218660**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On June 2, 2010, I served the attached **APPLICATION TO FILE AMICUS CURIE BRIEF BY THE CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM AND PROPOSED AMICUS BRIEF IN SUPPORT OF THE RESPONDENTS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Miriam A. Vogel
Joseph L. Wyatt, Jr.
Tritia M. Murata
Morrison & Foerster LLP
555 West Fifth Street, Suite 3500
Los Angeles, CA 90013-1024
E-mail Address: mvogel@mofa.com
E-mail Address: jwyatt@mofa.com
E-mail Address: tmurata@mofa.com
*Attorneys for Assoc of Orange Co
Deputy Sheriffs
Defendant and Respondent*
**VIA U.S. MAIL AND
ELECTRONIC MAIL**

James P. Bennett
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105-2482
E-mail Address: jbennett@mofa.com
*Attorneys for Assoc of Orange Co
Deputy Sheriffs
Defendant and Respondent*
**VIA U.S. MAIL AND
ELECTRONIC MAIL**

Thomas J. Umberg
Manatt, Phelps & Phillips, LLP
695 Town Center Drive, 14th Floor
Costa Mesa, CA 92626
E-mail Address: TUmberg@mofa.com
*Attorneys for Assoc of Orange Co
Deputy Sheriffs
Defendant and Respondent*
**VIA U.S. MAIL AND
ELECTRONIC MAIL**

Clerk of the Court
Los Angeles County Superior Court
111 North Hill Street
Los Angeles, CA 90012
VIA U.S. MAIL

C. Robert Boldt
Elizabeth M. Kim
Kirkland & Ellis LLP
333 S. Hope Street
Los Angeles, CA 90071
E-mail Address: rboldt@kirkland.com
E-mail Address: ekim@kirkland.com
*Attorneys for County of Orange
Plaintiff and Appellant*
**VIA U.S. MAIL AND
ELECTRONIC MAIL**

Robert R. Gasaway
Jeffrey Bossert Clark
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
E-mail Address: rgasaway@kirkland.com
E-mail Address: jeffreyclark@kirkland.com
*Attorneys for County of Orange
Plaintiff and Appellant*
**VIA U.S. MAIL AND
ELECTRONIC MAIL**

Harvey L. Leiderman
Jeffrey R. Rieger
Reed Smith LLP
101 Second Street, Suite 1800
San Francisco, CA 94105
E-mail Address: hleiderman@reedsmith.com
E-mail Address: jrieger@reedsmith.com
*Attorneys for Board of Retirement of the
Orange County Employees Retirement
Defendant and Respondent*
**VIA U.S. MAIL AND
ELECTRONIC MAIL**

Office of the Clerk
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797
VIA U.S. MAIL (4 Copies)

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 2, 2010, at Sacramento, California.

Brenda Sanders
Declarant

Brenda Sanders
Signature