

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

CASE NO. B218660

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COUNTY OF ORANGE,  
Plaintiff/Appellant,

v.

ASSOCIATION OF ORANGE COUNTY  
DEPUTY SHERIFFS ET AL.,  
Defendants/Respondents.

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APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES  
CASE NO. BC389758  
HONORABLE HELEN I. BENDIX, DEPT. 18

**APPELLANT'S REPLY BRIEF**

June 11, 2010

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## INTRODUCTION

As the County's Opening Brief emphasizes, this case is and remains one about fiscal responsibility and adhering to the constitutional rules. It has nothing to do with freezing pensions. It has nothing to do with reaching into retirees' pockets to claw back past payouts, even unconstitutional payouts. The case has to do instead with foreclosing ruinous fiscal irresponsibility by enforcing the rules against an egregious example of profligacy with public funds.

The County's Opening Brief explains that by retroactively applying the "3% at 50" enhancement without voter approval, the County plainly violated the Constitution two times over by "incurring" an unconstitutional "liability" estimated at around \$100 million in the form of "extra" pension "compensation" for past services "rendered" by public safety employees. In response, AOCDS lacks any good responses. AOCDS completely, understandably, disowns the Superior Court's erroneous "yearly payment" debt-limit ruling, which AOCDS induced below. AOCDS declines to respond substantively to our Opening Brief's dissection of *American River Fire Protection District v. Brennan*, 58 Cal. App. 4th 20 (1997), which provided grounds for the extra-compensation ruling below. AOCDS does not seriously dispute that the County properly pleaded that "3% at 50"

liabilities, if lawfully incurred, constitute binding County obligations, created retroactively for the benefit of a narrow class of employees, running into millions upon millions of dollars, to be paid out from future tax receipts. AOCDS does not seriously contest the County's readings of the relevant constitutional text and structure. Nor does it offer a textual or structural analysis of its own.

Instead, AOCDS seeks a broad "pensions" constitutional exemption of uncertain grounding. As proposed by AOCDS, the exemption would apply across constitutional provisions, including both debt-limit and extra-compensation provisions. It would stand unmoored from recognized constitutional purposes, the constitutional language, and any judicial decision to date, other than a one-sentence dictum in the discredited *Brennan* decision. It apparently would apply to all extra pension compensation in any amount no matter how large. It apparently would allow such extra compensation for any County employee or officer, including County Supervisors, no matter how high in the organizational hierarchy.

In the face of AOCDS's bold bid for a new constitutional exemption, OCERS, for its part, pleads neutrality. But having done so, OCERS then incongruously frets less about AOCDS's exemption proposal than about the

untroubling implications of a ruling for the County grounded in settled constitutional understandings.

It is clear against this backdrop that the County properly pleaded violations of the debt-limit and extra-compensation provisions. Consistent with Art XVI, § 18(a)'s debt-limit provision, the County pleaded that it "incurred" in 2001–2002 a large "liability" and "indebtedness" coming due in future years without setting aside any funds to cover it in 2001–2002 and without voter approval. *See* Section I, *infra*. Consistent with Art XI, § 10's extra-compensation prohibition, the County pleaded that the former Board of Supervisors granted extra (deferred) pension "compensation" to public "employees" on the basis of, and in proportion to, work already rendered in the past. *See* Section II, *infra*. Moreover, consistent with the outlier status of retroactive pension benefits and the limited nature of the County's challenge, invalidating the retroactive portion of "3% at 50" via faithful and straightforward constitutional analysis will impose few disruptions or practical difficulties for public pensions financing in California. *See* Section III, *infra*. For all these reasons, the decision below should be reversed.

## ARGUMENT

The County's Opening Brief explains that the large liabilities challenged here were initially estimated to cost \$100 million; were later estimated to cost \$187 million; and have since been estimated to cost still more. Op Br. at 26. In contrast, the cohort benefitting from these large liabilities is small and limited — a class of approximately 2,000 employees in active County service as of June 28, 2002. JA: 6:1597. Even using the most conservative \$100 million estimate of the size of the liability, this works out to an average extra employee compensation package, and added County liability, of about \$50,000 per person. Unless invalidated, this continuing stream of “3% at 50” payments will drain County coffers and burden County taxpayers into the indefinite future. Moreover, apart from this Court's intervention, there is nothing to prevent equally large or even larger sums being given away for nothing by future County Supervisors.

### **I. THE COURT BELOW ERRED IN GRANTING JUDGMENT ON THE COUNTY'S DEBT-LIMIT CLAIM.**

Our Opening Brief emphasizes that the Constitution's debt-limit provision, Art XVI, § 18(a), prohibits local governments from “incurring” future “liabilities” without voter approval. Without the debt-limit provision, elected officials might take on long-term liabilities to be funded by tax collections set to occur long after those officials leave office, thereby binding the future-year budgetary choices of future officials and the

electorate as a whole. With the provision, long-term liabilities are not outlawed, but before incurring such liabilities elected officials must go to the voters and allow the people, those who will have to work for years to pay off the incurred debts, to cast their ballots and have their say. *See* Op. Br. at 22–23.

The Constitution’s debt-limit provision is designed to “put an end to the practice” of local governments “incurring liabilities in excess of income in order to finance extravagance, thereby creating a floating debt to be repaid from the income of future years.” *Pension Obligation Bond Comm. v. All Persons Interested*, 152 Cal. App. 4th 1386, 1398 (2007) (debt-limit provision imposes a “balanced budget requirement”). The provision protects a well functioning democracy by promoting democratic transparency and accountability in County government. *See, e.g.*, Op. Br at 41 (absurd to permit constitutional “evasions” taking the form of “incurring indebtedness in uncertain amounts”). It protects especially against the risk, well known and feared at least since the Founding of the United States, that organized groups might commandeer local government to serve their own interests. *See id.* at 59 (discussing “risk of political dysfunction”).

Here, the County properly pleaded an Art XVI, § 18(a) violation. Consistent with the plain language of Art XVI, § 18(a), the County pleaded that it “incurred” in 2001–2002 a large “liability” and “indebtedness”

coming due in future years without setting aside any funds to cover it in 2001–2002 and without voter approval. *See* JA 3:722–23; *see, also*, Op. Br. at 22–27. In addition, the County’s briefing makes clear that the retroactive portion of “3% at 50” constitutes precisely the type of “rolling snowball” of municipal “indebtedness” and “liability” that the Constitution’s framers sought to prevent:

[T]he framers had in mind the great and ever-growing evil to which the municipalities of the state were subjected by the creation of a debt in one year, which debt was not, and was not expected to be, paid out of the revenues of that year, but was carried on into succeeding years, increasing *like a rolling snowball* as it went, until the burden of it became almost unbearable upon the taxpayers. It was to prevent this abuse that the constitutional provision was enacted.

*McBean v. City of Fresno*, 112 Cal. 159, 164 (1896)(emphasis added).

In response, AOCDS rightly declines to defend the Superior Court’s erroneous “yearly payment” debt-limit interpretation, *see* Section I.A, *infra.*, but its multiple alternative arguments fare no better. Section I.B, *infra.* Under any or all of these alternative arguments, the Constitution’s debt-limit is a dead letter that serves no fiscal-responsibility purposes — at least as regards collectively-bargained-for pension obligations, California’s most important category of long-term governmental indebtedness. Section I.C, *infra.*

**A. AOCDS Makes No Attempt to Defend the Superior Court's Error Below.**

In the Superior Court, AOCDS obtained a favorable debt-limit ruling by inducing that court to confuse two distinct concepts: the size of a “liability” or “indebtedness” and the size of the yearly “payments” or yearly “costs” required to pay off that liability or indebtedness. *See, e.g.,* JA 8:1991. As our Opening Brief explains, if you borrow \$50,000, and agree to pay \$5,000 interest every year until you pay back the \$50,000, your liability is \$50,000 and your yearly “payment” or yearly “cost” is \$5,000. Op. Br. at 21. Those amounts are different, and those concepts are different, and no reasonable lender or borrower in any loan transaction of any type (whether involving corporate bonds, government bonds, commercial loans, mortgage loans, or any other vehicle) could ever confuse the face amount of a “liability” or “indebtedness” with the associated yearly debt-service “payment” or yearly debt-service “cost.” *Id.* Nonetheless, at AOCDS’s urging, the Superior Court erroneously ruled in AOCDS’s favor on precisely these grounds.

Having obtained a favorable trial court ruling by conflating the difference between the size of a “liability” and the yearly “payment” or yearly “cost” needed to service the liability, *see* JA 4:879, AOCDS declines to defend the logic and grounds of that ruling in its favor. *See*, AOCDS Br. at 13–23 (omitting any such argument). That AOCDS makes no attempt to

defend the rationale of the Superior Court's ruling confirms that the decision below cannot be upheld on its own terms.

**B. AOCDS's Alternative Arguments Fail.**

In abandoning the grounds of their victory below, AOCDS and OCERS are left with no meaningful responses to the County's argument that pension liabilities are true liabilities and that this fact is confirmed by the Constitution's plain language, decades of California case authorities, and the debt-limit provision's fiscal-responsibility-enhancing purposes. *See generally* Op. Br. Section I.A.

**1. Pension Liabilities Are Liabilities.**

AOCDS's primary argument in the alternative is that pension "liabilities" really are not "liabilities." As stated by AOCDS counsel below, "I don't agree unfunded actuarial liability is a liability of the County of Orange." RT C11:20–21. Confirming this was no slip, AOCDS contends again here that pension liabilities really are not liabilities at all. *See* AOCDS Br. at 13. The only difference on appeal is somewhat more careful phrasing. *See id.* (challenged pension benefits are "not an accounting liability"); *id.* at 15 (County supposedly confuses challenged pension benefits "with an accounting liability"). When is a liability not a liability? According to AOCDS, it is when that liability is a collectively-bargained-for *pension* liability.

The Constitution’s fiscal responsibility provisions are not so limited. The constitutional debt-limit provision states, “No County . . . shall *incur any indebtedness or liability in any manner or for any purpose* exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters . . .” Art XVI, § 18(a) (emphasis added). This language carves out no exception for “pension” liabilities, “accounting” liabilities, or any other kind of liabilities. The language expressly encompasses “any indebtedness or liability” incurred “in any manner” or “for any purpose.” Whatever anyone wants to call the \$100 million plus amount of money involved here, it is an obligation that ultimately must be paid by the citizens — none of whom were allowed to vote on it. That is a “liability,” AOCDS’s arguments notwithstanding.

The distinction AOCDS draws between liabilities generally and “pension” or “accounting” liabilities is illusory. *See Carman v. Alvord*, 31 Cal.3d 318, 327 (Cal. 1921) (“indebtedness . . . covers obligations arising under City’s pension plans”). The Governmental Accounting Standards Board (“GASB”) defines “liabilities,” as “present obligations to sacrifice resources that the government has little or no discretion to avoid.” *Elements of Financial Statements*, Concepts Statement No. 4 (June 2007) ¶ 17. The GASB in turn defines an “obligation” as “a social, legal, or moral requirement, such as a duty, contract, or promise that compels one to

follow or avoid a particular course of action.” *Id.* at ¶ 18. Moreover, for over 100 years, the Supreme Court has looked to such industry and accounting definitions in interpreting relevant state constitutional provisions. *See Sheehy v. Shinn*, 103 Cal. 325, 330–31 (1894); *accord Wolski v. Fremont Inv. & Loan*, 127 Cal. App. 4th 347, 353, (2005) (interpreting statutory limitation on lending practices by reference to “settled principle” of interpreting statutes in light of “customs and usages”) (internal citation omitted). In *Sheehy*, for example, the Court confronted constitutional provisions forbidding sales of stock “on margin,” 103 Cal. 325 at 328, and in construing “margin” it looked to long-standing brokerage and accounting usages.

Here, looking to accounting usages, the pension obligations the County challenges easily meet the ordinary accounting definition of “liability.” In terms of that definition, Orange County’s “duty” to pay the retroactive portion of the “3% at 50” benefit (assuming it was lawfully incurred) became a “present” legal “requirement” or “obligation” of the County as of June 28, 2002. In addition, fulfilling this “duty” undoubtedly will require a sacrifice of “resources” (tax monies) that, absent this Court’s decision, the County “has little or no discretion to avoid.” *See Elements of Financial Statements*, Concepts Statement No. 4 (June 2007) ¶ 17. Contrary to AOCDS’s primary contention in this Court, the retroactive

portion of “3% at 50” easily meets the accounting and constitutional definitions of a “liability.”

2. The County’s Challenge Has Nothing To Do with “UAAL”

Apparently seeking to divert attention from the Constitution’s plain language (“liability” and “indebtedness”), AOCDS first argues that this case is about unfunded accrued actuarial liability (“UAAL”) and then argues that a non-binding 1982 Attorney General opinion, 65 Ops. Cal. Atty. Gen. 571 (1982) exempts UAAL from the Constitution.

Virtually everything about this argument is wrong. *See Carman v. Alvord*, 31 Cal. 3d at 327 (“indebtedness . . . covers obligations arising under City’s pension plans”); *see also* 88 Ops. Cal. Atty. Gen. 165 (2005) (Attorney General opinion stating that “a retroactive improvement in retirement benefits,” like “3% at 50,” “creates a past service *liability*, or *debt* to the retirement fund, that must be paid” (emphasis added, internal quotes omitted)). Most importantly, using the terms “liability” and “debt,” the Attorney General’s 2005 opinion echoes both the Constitution and *Carman* — confirming that pension obligations are indeed liabilities and indebtedness for constitutional purposes.

In response, AOCDS tries a bold sleight of hand. Sidestepping the constitutional term “liability,” AOCDS pretends that the County is not challenging the retroactive “liabilities” incurred on June 28, 2002, and that

the County instead challenges OCERS's UAAL or OCERS's "UAAL Calculation." See AOCDS Br. at 13 (heading). Wildly and incorrectly, AOCDS goes so far as to state: "This is the mysterious 'UAAL' found throughout the County's opening brief, the Unfunded Actuarial Accrued Liability." *Id.* at 3 (emphasis added). In fact, references to "UAAL" are notably absent from the County's opening brief. There is not one mention of "UAAL" anywhere in the argument section of the County's opening brief. Because that brief is focused on the Constitution, which refers to "liability" and "indebtedness," our lengthy argument did not mention "UAAL" at all.

According to OCERS, as of December 31, 2008, OCERS's total UAAL was \$3,112,335,000. *Actuarial Valuation and Review Report as of December 31, 2008* (The Segal Co., San Francisco, CA), June 12, 2009, at 38, available at <http://www.ocers.org/pdf/finance/actuarial/2008actuarialvaluation.pdf>; Steve Delaney, *Comprehensive Annual Financial Report for the Year Ended December 31, 2008* (OCERS, Santa Ana, CA), June 30, 2009, at 26, available at <http://www.ocers.org/pdf/finance/cafr/2008cafr.pdf>. That enormous \$3 billion figure represents, loosely, the difference as of that date between the value of OCERS's assets and the value of all its accrued pension liabilities. See OCERS Br. at 13.

OCERS's enormous \$3 billion UAAL figure has *nothing* to do with the County's challenge to a comparatively small set of liabilities arising from a single transaction. Although OCERS's UAAL figure continuously fluctuates for a variety of reasons, such as changes in investment returns and mortality tables, this lawsuit is not about those fluctuations. Rather, this suit seeks narrowly to invalidate a single, deliberate decision by former County officials to enter a transaction effective June 28, 2002, and incur a defined set of new "indebtedness" and "liabilities" without voter approval.

Accordingly, this Court should drive beyond a battle of labels to underlying substance. Put aside (for the moment) Art XVI, § 18(a)'s plain language, *Carmen v. Alvord*, the 2005 Attorney General opinion, and the irrelevance of the \$3 billion UAAL of OCERS to this Court's decision. AOCDS's fundamental argument remains that "[b]y nature, the UAAL calculation is a moving target, constantly increasing and decreasing based on a number of factors, including employment decisions." AOCDS Br. at 13; JA 4:898 (same). This "moving target" contention is another way of saying that the "UAAL" label is a smokescreen for AOCDS's attempt to carve a heretofore unrecognized, fourth debt-limit exemption for variable liabilities.

Our Opening Brief emphasizes that, in seeking to carve this fourth, "variable liability" exemption to protect pension liabilities, AOCDS seeks

to overturn the core teachings of *Starr v. City and County of San Francisco*, 72 Cal. App. 3d 164 (1977) — the lead case AOCDS cited in its own motion for judgment on the pleadings. *See* JA 4:896. *Starr* adjudicated debt-limit challenges to two different contracts between San Francisco and a redevelopment agency: a “project lease” that was upheld and a separate “repayment contract” that was invalidated. *Id.* at 172–73. In invalidating the repayment contract, *Starr* found the debt limit violated, even though the offending contract obliged the city to pay a variable, undeterminable sum of money. The ultimate amount to be paid in *Starr* was expressly described as being “of unknown proportions.” *Id.* at 176. *Starr* therefore establishes, contrary to AOCDS’s suggestions, that such a variable indebtedness, a liability of “unknown proportions,” violates the debt-limit provision. *Id.*

3. **AOCDS Out-Of-State Cases Support the County’s Position.**

Lacking California authority, AOCDS relies on inapposite, out-of-state cases. *See* AOCDS Br. at 15–16. Although Judge Bendix rightly rebuked AOCDS for citing these cases, RT E-26:22–28, they nonetheless underscore that pension liabilities truly are liabilities for purposes of California’s debt-limit provision.

In *Rochlin v. State*, cited by AOCDS, the Arizona Supreme Court considered and applied two different Arizona debt-limit provisions — one limitation on *state* “debts” and a second limitation on any “county, city,

town, school district, or other municipal corporation” becoming “indebted in any manner.” 540 P.2d 643, 648 (Ariz. 1975); *see also* AOCDS Br. at 15 (citing *Rochlin*). The Court held that the first provision, narrowly limited solely to “debts,” applies exclusively to “borrowed money” and not pension indebtedness. In contrast, the Court held that the broader provision, encompassing becoming “indebted in any manner,” *does* encompass pension indebtedness. *Id.* at 647. *Rochlin* thus strongly suggests that California’s still broader Art XVI, § 18(a), which prohibits incurring “*any indebtedness or liability in any manner or for any purpose,*” must be read to encompass pension liabilities.

Further supporting the County’s challenge is the application of the Washington Constitution’s Art 8, § 1 to pension obligations in *State v. Yelle*, 399 P.2d 319 (Wash. 1965); *see also* AOCDS Br. at 15. In *Yelle*, as in *Rochlin*, the relevant constitutional language referred narrowly to the state’s ability to “contract debts.” *Id.* at 322. But in *Yelle* the language went even further towards a limited “borrowed money” scope of operation by also referring to “the *loans* creating such debts.” *Id.* (emphasis added). Not surprisingly, given this narrow language, *Yelle* concluded that Washington’s limitation (unlike California’s) applies narrowly to borrowed money.

Along similar lines, the Wisconsin's Supreme Court's multi-facted decision in *Columbia County v. Board of Trustees*, 116 N.W.2d 142 (Wis. 1962), is closely aligned with the County's debt-limit arguments under California's Constitution. *Columbia County* applied Art XI, § 3 of the Wisconsin Constitution, limiting counties from "incurring any indebtedness." *See id.* at 158, n.8. Most significantly, *Columbia County* hinted that the Wisconsin constitution's narrow and exclusive use of "indebtedness," as opposed to the broader term "liability" as in California's Constitution, might carry interpretive significance. *Id.* at 152. ("The word 'debt,' as used in constitutions of other states, does not include a contingent *liability* for purpose of fixing a debt limit.") (emphasis added).

To be sure, *Columbia County* also held, under a different line of reasoning congruent with the County's arguments, that Art XI, § 3 was not violated on the particular facts under Wisconsin's version of California's "imposed by law" debt-limit exception. *See id.* at 153 ("The constitutional limitation is upon a county incurring an indebtedness. This means an obligation voluntarily incurred by the county and not imposed on the county by law."); *see also* Op. Br. at 37–38 (discussing California's imposed-by-law exception). And it further held, in yet another alternative holding congruent with the County's arguments, that because the relevant rights had not become vested, the Wisconsin Constitution was not violated

under the Wisconsin version of California's "contingent liability" debt-limit exception. *See id.* at 152 ("Farfetched as it may be, if all the employees of a county were discharged or terminated their employment prior to their respective retirement, the liability would cease to exist."); *see also* Op. Br. at 36–37 (discussing California's counterpart liability exception). Here, in contrast to the *Columbia County* situation, all "3% at 50" recipients were able, if they so desired, to quit the day after "3% at 50" became effective on June 28, 2002, and still enjoy the full benefit of the retroactive portion of the "3% to 50%" enhancement. In short, each one of *Columbia County's* alternative holdings supports the County's arguments.

Finally, and perhaps most telling, is AOCDS's continuing citation to the New Jersey Supreme Court's 55-year-old, one-sentence, back-of-the-handing of a debt-limit challenge to the consolidation of New Jersey's police and fireman's pension funds. *See City of Passaic v. Consol. Police and Firemen's Pension Fund*, 113 A.2d 22 (N.J. 1955); *see also* AOCDS Br. at 15 (citing *City of Passaic*). The entirety of the New Jersey court's analysis reasoned as follows: "no debt has been created here, but rather present legislation merely provides that the state shall annually contribute to the fund." *City of Passaic*, 113 A.2d at 26; *see also id.* ("All funds necessary to meet the State's share of said annual payments shall be included in the annual State budget and appropriated by the legislature.")

(emphasis added). Here, by contrast, the relevant California statutes provide for future pension-related appropriations, not by a discretionary decision of the Legislature or Orange County, but by operation of law as necessary. *See* Op. Br. at 6–7 (citing Gov’t Code §§ 31580, 31584, 31586).

Admittedly, these cases’ inferential support for the County’s interpretation only goes so far. The County does not dispute that, as no “two Constitutions have exactly the same language,” *Rochlin*, 540 P.2d at 648, the “specific interpretation” of any state’s debt limit depends on “the particular proviso” at issue. *Id.* Nonetheless, AOCDS’s out-of-state citations, while inapposite, help spotlight the exceptional breadth of California’s debt-limit provision compared to alternative models found in other states.

4. **AOCDS’s “Group Consideration” Argument Is Meritless.**

AOCDS retreats to a further, final alternative contention. AOCDS contends that, assuming the “3% at 50” benefit enhancement were “an indebtedness or liability within the meaning of the debt limitation” (as it is), “3% at 50” nonetheless should “be treated as a contingent obligation and saved by the *Offner-Dean* rule.” AOCDS Br. at 23. AOCDS states the *Offner-Dean* principle as follows:

[W]here a local government assumes an obligation for furnishing property in the future but no liability or indebtedness comes into existence until the consideration is

actually furnished, the obligation does not run afoul of the municipal debt limitation. In other words, such contracts are valid where each year's installment is within the city's income, *and where each year's payment is for consideration actually furnished in that year.*

AOCDS Br. at 23 (quoting *Starr*, 72 Cal. App. 3d at 170–73) (emphasis added) (internal quotes omitted). The retroactive portion of the “3% at 50” benefit plainly violates this rule, even as stated by AOCDS.

As pleaded in the County's complaint, the employees receiving enhanced benefits were permitted under the terms of “3% at 50” to retire immediately and take full advantage of the award. JA 6:1567 (SAC ¶ 90). By allowing recipients to retire immediately and avail themselves of increased pensions, “3% at 50” was not made contingent on the County receiving *any* consideration, or on the deputy sheriffs and other employees providing *any* performance, in any of the future fiscal years in which those benefits have now been paid out. The County pleaded unambiguously that no “3% at 50” pension-benefit recipient has ever been legally required to provide *any* return consideration to the County after that benefit became effective on June 28, 2002. *See* JA 6:1566–1567, *see also* JA 6:1567-1569 at ¶¶ 90–98.

Upon a reversal of the decision below, the County will easily show, as a matter of fact, that many individual employees who benefitted from “3% at 50” retired in fiscal-year 2001–2002 or in subsequent years.

Further, the County also will easily show that these retirees have continued to draw enhanced pensions without providing any corresponding consideration to the County in those subsequent years. These facts were painstakingly well pleaded — and must be accepted as true for purposes of this appeal.

Grasping at straws, AOCDS argues that by “doing their jobs every year, deputies *as a group* continue to provide substantial consideration for the benefit of Orange County and its taxpayers — both present and future.” AOCDS Br. at 25 (emphasis added). But the fallacy in this “group consideration” argument is clear: the fact that *other* employees might *voluntarily choose* to continue to serve, in circumstances where they are not legally bound to serve, does not affect in one way or the other the County’s obligation to fund the pension rights conferred by “3% at 50.”

Pensions are deferred compensation arising from work on behalf of the public. *See* Op. Br. at 44. AOCDS itself emphasizes that pension awards, if lawful, create certain vested rights on behalf of the individual “public employee.” AOCDS Br. at 27 (“A public employee’s pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment.”) (citation and brackets omitted); *see also* *Betts v. Bd. Of Admin. of the Pub. Employees’ Ret. Sys.*, 21 Cal. 3d 859, 863 (1978); *Miller v. State*, 18 Cal. 3d 808, 814

(1977). Under the terms of “3% at 50,” this vesting of pension rights would have occurred regardless of whether that employee, or any other employee or AOCDS member, did or did not continue in County employment. Accordingly, the County unambiguously pleaded that “3% at 50,” if it had been lawful, would have created obligations that are “legally binding” as regards “individual County employees.” JA 6:1566 at ¶ 87. That pleading must be accepted as true for purposes of this appeal.

Simply put, if the retroactive part of the “3% at 50” enhancement had been constitutional, rights to that part of the enhancement would have vested with each individual person employed on June 28, 2002, in Fiscal Year 2001–2002. But no employee or employee group was required to do or refrain from doing anything in order for the “3% at 50” beneficiaries to enjoy those rights. JA 6:1566–70 at ¶¶ 89–99, 103. Given these well-pleaded facts, no future-year legal consideration was promised or provided in return for the retroactive portion of “3% at 50.”

**C. AOCDS’s Call to Carve A Debt-Limit Exemption For Pension Liabilities Would Nullify The Debt Limit.**

Notwithstanding the arguments canvassed above, AOCDS dubiously states that, “[c]ontrary to the County’s assertion, AOCDS has never urged adoption of a new exception to the debt limitation provision.” AOCDS Br. at 25 & n. 14. Surely this is in jest. Having abandoned the Superior Court’s reasoning, AOCDS retreats in this Court to contending that pension

“liabilities” really are not “accounting liabilities.” *See infra.* at 7–10. AOCDS further insists that pensions, because they involve variable liabilities, are not “liabilities” at all in the constitutional sense of the term. *See infra.* at 11–13. Either of these arguments, if accepted, would carve a brand new constitutional pensions exemption of uncertain basis and scope.

As our Opening Brief admonishes, AOCDS’s arguments — whether extending to all pensions, limited to collectively-bargained-for pensions, or extending to all variable liabilities — would as a practical matter quickly eviscerate the underlying debt-limit rule. *Cf.* Op. Br. at 60–61 (“We are facing decades . . . of unsustainable pension costs of between 25 percent of pay for a miscellaneous plan and 40 to 50 percent of pay for a safety plan (police and firefighters)”) (quoting Ron Seeling, Chief Actuary, California Public Employees’ Retirement System (“CalPERS”) (alteration in original)). Moreover, if accepted, such an exemption would have no logical stopping point. It would necessarily permit awards of extra (deferred) pension compensation in any amount, not just the challenged awards “limited” to an average of around \$50,000 per employee. It would necessarily permit large, unearned awards of this type to be made on behalf of all categories of public employees and County officers. Furthermore, the suggested exemption would produce the absurd result of permitting evasions of core, fiscal-responsibility, constitutional requirements — so

long as public officials act with gross irresponsibility by incurring pension liabilities in uncertain amounts that come due and owing only after they leave office. *See Woods v. Young*, 53 Cal. 3d 315, 323 (1991) (interpretations “lead[ing] to absurd results” should “be avoided”). On these grounds alone, this Court should reject any call for an unfounded fourth exemption to the debt-limit provision.

In sum, the debt-limit provision mandated that the people be allowed to vote before former officials at the County loosed a new “rolling snowball” of indebtedness by incurring an estimated \$100 million liability to be paid for in future fiscal years. When the County challenged the liability, AOCDS obtained an erroneous ruling from the trial court by conflating fundamental concepts of principal and interest on debt. Unable to defend that court’s reasoning, AOCDS retreats on appeal to alternative, fallback arguments. But none of these fallbacks explains how this \$100 million liability comports with the Constitution, even though the people were deprived of their vote.

## **II. THE COURT BELOW ERRED IN GRANTING JUDGMENT ON THE COUNTY’S EXTRA-COMPENSATION CLAIM.**

Parallel to its debt-limit argument, AOCDS seeks a second *per se* constitutional exemption for pension benefits — this one from the extra-compensation prohibition. Like its debt-limit arguments and unlike the Constitution itself, AOCDS’s extra-compensation arguments impose no

practical limits on granting extra-compensation to counties' current employees. If embraced, AOCDS's extra-compensation arguments will open a wide door to abusive practices.

The Constitution's extra-compensation prohibition, Art XI, § 10, bars local governments from departing from the established law governing employee compensation to grant special after-the-fact payoffs, either to "employees" or to "public officers," in the form of "extra compensation" for "service" "rendered" in the past. Significantly, the Constitution's extra-compensation prohibition makes no distinction between "public officers" and "employees." Accordingly, in AOCDS's view, even the highest ranking officials, like a County Sheriff or even County Supervisors, could procure for themselves millions of dollars in extra-compensation during their terms of office, so long as that compensation was deferred until retirement and labeled a "pension."

As demonstrated below, this extreme view contravenes both the constitutional language and the painstaking care that courts have taken over the decades in weighing contested claims over "mere" thousands of dollars in allegedly unconstitutional salary, overtime pay, vacation pay, and holiday pay. The Constitution's plain terms make clear the violation arising from the retroactive portion of "3% to 50:"

A local government body may not grant extra compensation or extra allowance to a . . . public employee . . . after service

has been rendered or a contract has been entered into or performed in whole or in part . . . .

Cal. Const. Art XI, § 10.

Considering this language, the Supreme Court has long held that this prohibition “forbids” “local enactments” that “retroactively grant compensation for work already performed.” *Longshore v. County of Ventura*, 25 Cal. 3d 14, 22–23 (1979). *Longshore* emphasizes that a “public employee is entitled only to such compensation as is expressly and specifically provided by law . . . applicable at the time compensable services are rendered.” *Id.* In *Longshore*, the court carefully parsed past Ventura County overtime-pay policies, 25 Cal. 3d at 22–27, to determine exactly what pay was and was not authorized for which employees “at the time compensable services” were originally rendered. *Id.*

Courts confronting extra-compensation challenges have therefore applied the clause without favor or exception to *every* form of compensation they have examined. The cases examining these different forms of pay have been various. *See* Op. Br. at 48; *see, also, Longshore*, 25 Cal. 3d at 23 (retroactive payment of overtime prohibited when rules “in effect when overtime hours were logged provided no right to compensation therefore”); *Martin v. Henderson*, 40 Cal. 2d 583, 590–91 (1953) (same); *Seymour v. Christiansen*, 235 Cal. App. 3d 1168, 1178–79 (1991) (payout for unused vacation violates Constitution because not authorized when

work was performed); *Jarvis v. Henderson*, 40 Cal. 2d 600, 607 (1953) (statutes “allowing time off on holidays or compensation therefore . . . were not, and could not be, retroactive”). But no court has ever carved an extra-compensation exception for challenges to *any* type of retroactive public employee compensation. *See* Op. Br. at 47–48.

**A. AOCDS Has No Answer For The County’s Arguments.**

The fact that this case involves egregious new facts — a heretofore unprecedented pension award for the benefit of approximately 2,000 current employees estimated to cost \$100 million at the time it was incurred and much more thereafter — does not make it difficult or doubtful. As our Opening Brief explains, the Supreme Court has held, logically, that pension benefits are a form of “deferred compensation earned immediately upon the performance of services for a public employer.” *Miller v. State*, 18 Cal. 3d at 814.

Here, there can be no doubt that the challenged “3% at 50” pension enhancement represents (deferred) compensation under *Miller* and the plain terms of Art XI §10. In addition, as alleged in the County’s complaint, *all* pension benefits that the County challenges are “retroactive” within the meaning of *Longshore*. Specifically, all challenged benefits were awarded based on, and in proportion to, work already completed by persons who were current County employees as of June 28, 2002 — the date “3% at 50”

took effect. *See* JA 3:724. None of the challenged benefits was owed to County employees under applicable statutory law and labor contracts as they existed “at the time compensable services” were rendered. *Longshore*, 25 Cal. 3d at 22.

AOCDS largely declines to address this straightforward argument or to apply the *Longshore* rule. AOCDS does not attempt to establish that the challenged benefits flowing from “3% at 50” actually were “expressly and specifically provided by law . . . applicable at the time compensable services [were] rendered.” *Longshore*, 25 Cal. 3d at 22.

AOCDS’s principal rejoinder to the County’s emphasis on the fact that California courts “have consistently interpreted Art XI, § 10 to bar different forms of retroactive pay increases for current employees — including salary increases and increases in vacation, overtime, and sick pay,” Op. Br. at 48 — is the colorful claim that none of these cases has “anything to do with *the price of tomatoes*.” *See* AOCDS Br. at 30 (emphasis added). Translated, this means none of these cases has “anything to do with *pensions*.” *See* AOCDS Br. at 30 (attempting to distinguish all of the County’s precedents on the grounds they do not involve pensions). While true, AOCDS’s tomato-pension statement is correct only because no decided case has yet considered such an egregious situation as this one. This case happens to be the first to present a large,

retroactive, grant of (deferred) pension compensation to current public employees in direct violation of *Longshore*.

Instead of applying the *Longshore* rule, AOCDS heavily relies on cases upholding pension increases, not for current employees but for retirees. See AOCDS Br. at 28 (citing *Sweesy v. Los Angeles County Peace Officers' Ret. Bd.*, 17 Cal. 2d 356 (1941) and *Nelson v. City of Los Angeles*, 21 Cal. App. 3d 916, 918 (1971)). As an initial matter, it is open to question whether *Sweesy* and *Nelson* establish an unqualified green-light for pension-benefit increases for retirees. See Op. Br. at 53. But more fundamentally, the text, structure, and purposes of the extra-compensation prohibition all establish that it must be read to apply with added vigor in the context of unearned compensation awarded to current, politically-active “officials” and “employees.” See, e.g., Op. Br. at 56–64.

AOCDS counters that “every court that has considered this claim has rejected it and held that current employees are entitled to pension benefits granted during their tenure.” AOCDS Br. at 31. But this is like saying “every court to consider claims to enforce a space alien’s written promise has rejected it.” No cases have yet adjudicated ET’s promises. And no cases have yet decided an extra-compensation challenge to extra (deferred) compensation for current employees awarded in clear violation of the *Longshore* rule.

In the court below, AOCDS's trial counsel candidly conceded as much. When asked for his most analogous case, AOCDS counsel cited *Thorning v. Hollister School District*, 11 Cal. App. 4th 1598 (1992), but then noted that relying on *Thorning* was a "reach" with limited relevance:

[*Thorning's*] relevance was solely because they were dealing with continued employees who were current employees. . . . It's another one of those guernseys instead of jersey cows. Insofar as we're required to reach, we reached and we reached to *Thorning* for that and solely that reason.

RT E88:17–23; *see also* AOCDS Br. at 31 (again citing *Thorning*).

The other half of AOCDS's central contention, quoted above, is that "current employees are entitled to pension benefit enhancements granted during their tenure." *See* AOCDS Br. at 31 (making this statement); *Id.* at 27–29 (making the underlying argument). Once again, this statement is at once literally true and utterly misleading.

The County does not dispute that current employees are entitled to "pension benefit enhancements" *lawfully* granted during their tenure. But it is not lawful enhancements but unlawful extra compensation that this case is all about. In *Medina v. Board of Retirement*, the Court of Appeal rejected arguments, like AOCDS's, urging that a flowing stream of unlawful pension payments be left unblocked. *See Medina v. Bd. of Ret.*, 112 Cal. App. 4th 864, 871 (2003). *Medina* rejected the idea that unlawful

benefits should be allowed to continue to flow because of a supposed vesting of these rights. *Id.* at 871–72.

Although AOCDS tries to avoid *Medina* on grounds it did not involve a “carefully considered collective bargaining agreement,” AOCDS Br. at 30, *Medina* did not turn on such distinctions. *Medina* reasoned, “the vested rights doctrine does not apply” where compensation has been unlawfully awarded. *Id.* at 871; *see also Pension Obligation Bond Comm.*, 152 Cal. App. 4th at 1406 (debt incurred in violation of constitution is void). Simply put, unlawful compensation should not be allowed to continue.

Here, this Court has been called to decide this case because these challenged benefits were uniquely, unlawfully, granted in violation of the Constitution. In 2001 and 2002, Orange County pursued a not-yet-litigated way to violate the Constitution; namely, granting extra *pension* compensation for past work to current public employees. Tomorrow, Los Angeles County might find still another new way to violate the Constitution; say, by granting retroactive *in-kind* compensation in the form of free groceries to current public employees for past work. Both forms of retroactive compensation would be equally unconstitutional; neither has previously been struck down. This case involves the price to County taxpayers, now estimated at hundreds of millions of dollars, of unearned

pension compensation and not the price of extra salary, overtime, vacation, or holiday pay, or even free groceries. But this newfangled pension context does nothing to distinguish or diminish the unbroken string of settled authority on which the County relies.

**B. Neither *Brennan* Nor AOCDS's Miscellaneous Contentions Salvage The Challenged Benefits.**

In rejecting these arguments, the Superior Court relied principally on *American Fire River Protection District v. Brennan*. But, as the County's Opening brief explains, *Brennan* cannot support such a decision. Op. Br. at 51–55. *Brennan* did not involve extra pension benefits. It involved a one-time cash payment upon retirement for unused sick leave, coupled with an offsetting *decrease* in pension benefits. *Id.* at 51–52. Because *Brennan* did not involve pension compensation; much less an increase in pension compensation; much less an allegedly unconstitutional increase in pension compensation, *Brennan's* sweeping assertion of a *per se* pensions exemption from extra-compensation scrutiny is pure dictum. *Id.*

In response to our Opening Brief's multi-page analysis, AOCDS throws in a towel. AOCDS fails to try to rehabilitate *Brennan*. AOCDS cites *Brennan* only twice and only very briefly. *See* AOCDS Br. at 28 (asserting without analysis that *Brennan* carves a pensions exemption); *id.* at 30 (asserting without analysis that *Brennan* “is based on pension benefits”) (emphasis in original). Our Opening Brief explains in detail that

*Brennan*'s pension statement, in addition to being dictum, was gratuitous and an incorrect interpretation of law. Op. Br. at 53–55. AOCDS does not substantively respond.

While declining to attempt to rehabilitate *Brennan*, AOCDS offers other arguments. Relying on decisions pre-dating the extra-compensation clause's 1933 amendment to encompass employees, AOCDS tentatively suggests that the prohibition applies only to extra compensation awards tailored for the benefit of individuals, not groups. See AOCDS Br. at 29. But it's nonsense to think governments should be able to avoid a prohibition on individual employee compensation by multiplying that prohibited compensation many times over groups of individuals. See *Longshore* (evaluating, under extra-compensation analysis, *generalized* overtime pay policies as applied to specific law enforcement personnel).

AOCDS obliquely suggests that a public purpose supports the retroactive portion of the “3% at 50” giveaway, and there is relevance to the fact that this purpose is (according to AOCDS) adequate to deflect challenges arising under the constitutional prohibition on gifts of public funds. See Cal. Const. Art XVI, § 6; (prohibiting gifts of public funds); AOCDS Br. at 29 (contending the challenged award is “not a gift”); *id.* (stating that where a “public purpose finding has a reasonable basis in fact, our courts will not disturb it”).

But the public purpose question is not the issue because the County brings no gift-of-public-funds challenge. *See* AOCDS Br. at 9 (conceding the County has brought no “gift clause claim”). Moreover, AOCDS’s contention that Counties can sensibly “recruit” new employees by giving money, not to those new employees themselves, but to *incumbent* employees is implausible on its face.

Finally, AOCDS renews its argument that Art XI, § 10’s distinction between an “employee” and someone else (like a retiree) should be disregarded. AOCDS says that the County’s reading of the Constitution’s history in this regard is “wrong.” AOCDS Br. at 31–32. AOCDS says, “the 1933 amendments” which added the term “employee” to a clause that previously encompassed only “officials,” “were adopted to allow County officials — rather than the legislature — to regulate the compensation of County employees other than themselves.” *Id.* at 31. AOCDS concludes, “[i]n short, the amendments were enacted to give counties *more* authority to regulate their employees compensation, not less.” *Id.* at 32 (emphasis in original).

But, of course, giving a County general authority over employee compensation is consistent with — indeed, strongly reinforced by — limiting that authority in the public interest. The California Department of Motor Vehicles does much the same thing when it issues licenses with

corrective eye-wear restrictions. In both cases, a superior authority (the Constitution, the DMV) gives permission to another (counties, potential drivers) to assume responsibility (setting employee compensation, driving on public roads) so long as an important limit is respected (no extra compensation, no driving without glasses). In both instances, a hard-and-fast limitation permits broader general authority to be given with confidence. According to AOCDS, the Legislature has *never* granted counties power to set employees' compensation, except with an accompanying ban on extra compensation. That's good evidence of the central importance of the provision.

**C. A *Per Se* Pensions Exemption Would Swallow The Constitution's Extra-Compensation Rule.**

Despite the County's open challenge, *see* Op. Br. at 56, AOCDS offers no basis for distinguishing *these* unearned pension awards from any conceivable award of retroactive pensions to current employees. A simple example in our Opening Brief showed just how lucrative an award of unearned "3% at 50" compensation can be. Op. Br. at 45–46. Under our particular example, a county employee retiring at age 50 on June 28, 2002, with a final salary of \$100,000 and 30 service years who lives to age 75 would, for example, gain a total of an extra \$750,000 in unearned, retroactive, "3% at 50" — derived pay — in addition to the \$1.5 million in pension pay that he or she would have earned pursuant to the "2% at 50"

rule. OCERS quibbles that this hypothetical might be altered slightly to make the award less lucrative in particular instances. OCERS Br. at 7-8, n.3. But these quibbles apply to any illustrative hypothetical and only confirm the larger point: the “3% at 50” award constitutes a large monetary giveaway — even when measured on the level of individual awards. For all that appears in AOCDS’s briefing, no constitutional principle bars even *individual* lump-sum, pension awards running into millions of dollars. Even more troubling, under AOCDS’s interpretation, no constitutional principle bars making such awards to any County official, including County Supervisors themselves.

**III. THIS COURT SHOULD NOT HESITATE TO FAITHFULLY APPLY THE CONSTITUTION.**

AOCDS and especially OCERS imply without exactly saying so that abiding by the Constitution could in some sense be disruptive or impractical. But as demonstrated below the Constitution is fully workable. The true disruption threatened by this case is the one that would inevitably follow from accepting AOCDS’s novel invitation to exempt pensions from constitutional scrutiny.

OCERS, and to a lesser extent AOCDS, fundamentally misconceives the nature of the County’s argument and thus tends to overstate its potential ramifications. As an initial matter, it is important to understand that the County’s legal theory does not require exactitude in estimates of the cost of

pension enhancements. The debt-limit vulnerability of “3% at 50” would have been significantly addressed if, for example, the County had contributed to OCERS from fiscal year 2001–2002 tax receipts the extra \$100 million or so the “3% at 50” liability was then *estimated* to cost. The fact that this figure eventually turned out to be too low is not the issue. The problem with “3% at 50” is not that the County’s contemporaneous estimates turned out to be wrong. It is that the former Supervisors knew for certain that they were incurring a large new liability; they knew for certain that the best contemporaneous estimate of the liability’s size was around \$100 million, and yet they did literally nothing to offset that liability in the year in which it was incurred.

As a second preliminary matter, it is important to note that the unlikelihood of disruptions arising from enforcing the Constitution is made all the more unlikely by California’s familiar declaratory validation process. This process, frequently used for ensuring compliance with the debt-limit and other constitutional provisions, is a convenient means of sorting out cases or questions on the constitutional borderline. *See* Cal. Gov’t Code § 17700(a) (authorizing state and its departments to bring validation actions to determine the validity of its “bonds, warrants, contracts, obligations, or evidences of indebtedness”); Cal. Civ. Proc. Code § 860 (providing general authority for local agencies to bring validation

actions in similar situations); *City of San Diego v. Rider*, 47 Cal. App. 4th 1473, 1480–81, (1996), *review denied* (Oct. 16, 1996) (adjudicating constitutionality under local debt-limit provision of certain lease-revenue bonds and ground leases in validation action brought by City of San Diego). This validation process could have been invoked by the former County Board at the time the retroactive portion of “3% at 50” was approved. Instead, it went unused.

OCERS and AOCDS list a number of alleged practical difficulties or inconsistencies they suggest are entailed under the County’s constitutional interpretation. Without OCERS or AOCDS saying so exactly, the implication is that abiding by the Constitution is impractical. On examination, however, this laundry list of hints, alleged inconsistencies, suggestions, and concerns builds substantial confidence that the Constitution’s requirements, in addition to being binding law, are practicable, fiscally responsible, and wise.

*First*, and most fundamentally, OCERS labors under a basic misconception that the County’s suit “is, in fairness,” a challenge “to the constitutionality of CERL section 31678.2.” OCERS Br. at 14. In fact, for better or worse, the County challenges only Orange County’s implementation of section 31678.2 in “3% at 50,” not the statute as a whole.

In particular, the County has specifically declined to challenge section 31678.2 as a whole on extra-compensation grounds. Under the extra-compensation provision, local governments may award constitutional pension benefits for past service under that statute so long as public funds are not committed or expended. Conversely, retroactive increases violate the Constitution only when funded, in whole or part, with public money. It is the County's view, for instance, that (putting aside other legal questions) there would be no extra-compensation violation if a county were to establish a program of 401(k)-type retirement accounts funded solely by contributions made by County employees — even if those opportunities were offered based on, and in proportion to, past years of County service. The County's as-applied extra-compensation challenge is directed, not to the statute as a whole, but to the County's fiscally irresponsible use of public money in funding the retroactive benefits authorized by the statute.

Similarly, the County also has specifically declined to challenge section 31678.2 on debt-limit grounds. Indeed, a facial debt-limit challenge to the statute is hardly possible, for Counties and other local governments may *always* comply with the debt-limit provision and still award retroactive benefits under section 31678.2 merely by (1) increasing relevant retirement fund contributions to offset the retroactive compensation award or (2) obtaining voter approval. Here, the County's as-applied debt-limit

challenge arises, not from a challenge to any statute, but from the former Board of Supervisors' unconstitutional failure to take either one of the implementation steps the Constitution requires.

*Second*, OCERS hints that certain grants of extra pension credits could be deemed supported by insufficient consideration, hence unconstitutional, on the County's theory. OCERS mentions the possibility that certain employee purchases of pension credits might be underfunded by employee contributions. OCERS Br. at 9–10 & n.5. Similarly, OCERS appears to suggest that certain public employee buyouts might lack adequate consideration, where the putative consideration was supplied by the personnel cost savings from the employee's departure from service. *See* OCERS Br. at 10.

But, as noted above, while the debt-limit provision does require consideration to fall within one of its exceptions, it does not require exactitude of the amount of that consideration. Here, once AOCDS members were granted the "3% at 50" benefit on June 28, 2002, they were required to do absolutely nothing in order to take advantage of the retroactive portion of that benefit — not stay in service, not leave service, not anything. The two cases OCERS mentions involve legally-binding consideration (private contributions, personnel cost savings) that some

might call inadequate. But those cases are a far cry from the retroactive application of “3% at 50,” which involves no legal consideration at all.

*Third*, OCERS poses a question whether under the County’s constitutional interpretation a decades-old change to pension computation methodology might potentially be declared infirm. *See* OCERS’s Br. at 8-9. OCERS appreciates that the relevant calculation methodology change appears equivalent for many purposes to instances where County pay raises are higher than expected, and thus an employee’s final compensation (used for purposes of calculating his or her pension benefit) is greater than expected. *See* OCERS Br. at 9 n.4.

At the outset, it is not at all clear that the continuing fiscal impact of the change OCERS spotlights is more than *di minimus*. *See* OCERS Br. at 8-9. But even assuming some continuing impact, the important point, again, is that the County’s theory does not require exactitude in estimation or precision in foresight. It calls, rather, for reasonable yearly contributions to meet the total expected magnitude of the legally-binding liability incurred in the year. Under the County’s theory, unexpected variances occurring due to factors such as unexpectedly-high pay raises are not problematic.

*Fourth*, AOCDS hints that, on the County’s theory, a negotiated *decrease* in the County’s outstanding liabilities might run afoul of the debt-

limit provision. *See* AOCDS Br. at 19–20. But the debt-limit constrains only the “incurring” of additional “liabilities,” not actions that *decrease* old liabilities. Likewise AOCDS hints that under the County’s legal theory, the retention of a new actuary who provides new estimates of the size of pre-existing liabilities might run afoul of the debt-limit provision. *See* AOCDS Br. at 19. But where no new “liabilities” are “incurred,” no constitutional violation arises from investigating the size of old liabilities.

*Finally*, AOCDS softly suggests that, under the County’s theory, an enhanced pension formula funded exclusively by private money as opposed to tax money might fall victim to constitutional infirmity. *See* AOCDS Br. at 19 (describing the exclusively employee-funded “2.7% at 55” pension enhancement). But as spelled out above, the County’s theory holds that no Constitution violation occurs where, unlike with “3% at 50,” no commitments or expenditures of public funds are made.

In breaking no new legal ground, toppling no statutes, and targeting only a single, egregious example of profligacy with public funds, the County’s constitutional challenge should cause no concerns about disruptions to the ordinary operations of public pensions funding and finance. *See* Op. Br. at 5–7. As the County’s Opening Brief emphasizes, Orange County typically funds employee retirement benefits in the year earned through the process of making “normal” contributions to OCERS

pursuant to CERL requirements. *See id.* The future cost of these ordinary retirement benefits is thus handled like regular salary compensation: the money is charged to and paid for in the fiscal year in which employee services are rendered to the County. Op. Br. at 25–26. No constitutional infirmity arises as regards this funding method.

OCERS concedes as a historical matter that OCERS has “long utilized” a “methodology” to “determine required employer contribution rates” that is both permitted by CERL and constitutional under the County’s constitutional interpretation. OCERS Br. at 20. But in OCERS’s view, the CERL should stand on its own and quite apart from the Constitution’s requirements. OCERS oddly insists that OCERS “has no legal obligation” to use this method, *id.*, overlooking the County’s claim that OCERS’s duty stems from the highest possible “legal obligation” — a constitutional obligation.

In any event, OCERS’s statement confirms that a ruling in the County’s favor would not be disruptive. As to Orange County itself, the statement assures that few changes to current practice would be needed. As to counties concerned about precedential effects of such a ruling, a ready compliance model (Orange County) would be at hand. And as noted above, California’s longstanding validation processes are ever-available to sort out any potential cases or questions on the constitutional borderlands.

\* \* \* \*

It is difficult to imagine insuperable practical difficulties arising from a decision in the County's favor. On the other hand, it's impossible not to foresee a "rolling snowball" of fiscal irresponsibility arising from any acceptance of AOCDS's entreaties to carve a pensions exemption from the Constitution's fiscal-responsibility provisions. Unlike the Constitution, AOCDS's arguments for a *per se* pensions exemption impose no practical limits on compensation, either as to amount or as to recipient. Under AOCDS's view, even high-ranking officials like Supervisors could receive self-awarded extra compensation, so long as it is paid after they leave office. On AOCDS's view, these self-awards would be essentially unlimited as to amount — so long as the compensation is deferred until after the end of employment and labeled a "pension." Such an open invitation for high public officials to evade the Constitution, voters, and basic rules of fiscal responsibility in their own financial and political self-interest, once issued, can hardly help being accepted. And wherever, as here, such invitations are accepted, money will flow freely to benefitted individuals or favored groups, but only at a steep price to County finances, County taxpayers, and the public good. AOCDS's bid for a new constitutional exemption should be rejected.

CONCLUSION

The decision below should be reversed.

Dated: June 11, 2010

Respectfully Submitted,

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Robert R. Gasaway

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County of Orange*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, the undersigned counsel of record certifies that the enclosed brief of the County of Orange, was produced using 13-point Roman type and contains approximately 9,388 words, as counted by the word count feature of the Microsoft Word program used to prepare this brief.

Dated: June 11, 2010

By Robert R. Gasaway /cmh  
Robert R. Gasaway  
KIRKLAND & ELLIS LLP

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

**CASE No. B218660**

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COUNTY OF ORANGE,  
Plaintiff/Appellant,

v.

ASSOCIATION OF ORANGE COUNTY  
DEPUTY SHERIFFS ET AL.,  
Defendant/Respondent.

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APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES  
CASE No. BC389758  
HONORABLE HELEN I. BENDIX, DEPT. 18

**PROOF OF SERVICE**

June 11, 2010

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I, LaVetta Washington, 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 333 S. Hope Street, California 90071.

On June 11, 2010, I served a true copy of the following document(s) described as:

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