DATE: August 20, 2014

TO: Yves Chery, SACRS President and Robert Palmer, SACRS Executive Director

FROM: Mendocino County Employees Retirement Association

SUBJECT: Ad Hoc Committee on Selling the Merits of Defined Benefit Pension Plans

We have followed the SACRS correspondence on the Ventura initiative and a possible new role in public "education" on the advantages of Defined Benefit Pension Plans. While we appreciate the SACRS role in educating the 20 County retirement systems, as suggested in your correspondence this proposed *public education* role is new territory for SACRS (regardless if it is done directly by SACRS or via information supplied to the 20 systems). In both of the correspondence letters it appears that public relations and communications firms will be hired to help get out a message on protecting the status quo of defined benefit pension plans for public employees.

Our concern is it appears that SACRS will be diverting from the mission spelled out in the by-laws (Article I, Sections 3 and 4), and the mission statement on the bottom of "About Us" on the website, to a new proactive role of educating the public (rather than the systems). As with the SACRS mission statement, this new role is not a clean fit with the mission statement of our retirement system. Shouldn't the funds we hold for the benefit of participants and our focus be kept toward the administration of the employees retirement system as spelled out in CA G. C. Section 31595(a)? Wouldn't the public relations and communications role be best left to labor groups and individuals?

In summary, the following are the reasons we do not believe the public education function is a good idea: 1) As stated above we do not believe it fits the SACRS mission statement. 2) We do not believe it fits within our mission statement. 3) Is this a justified use of participants benefit dollars? Future employees might like it, but how would it benefit those whose funds we are holding? 4) If we lobby or "educate" one way, might we actually be jeopardizing the benefits of one group of beneficiaries at the expense of another group of beneficiaries (current vs retired or vice versa)? As stated above, isn't this lobbying role best left to others? 5) If our new role is to communicate to the public about the benefits of this type of plan, do we also have an obligation to accurately communicate about the costs of this type of system? If so, would we really want to do this?

Thank you.

SACRS
State Association of County Retirement Systems
Staff ★ Trustees ★ Affiliates ★ Success
A California Non Profit Corporation

Date: July 28, 2014
To: SACRS Board of Directors
From: Robert Palmer, SACRS Executive Director
Subject: Update On Ad Hoc Committee's Progress

To Educate Or Not To Educate…That Is The Question….

As Hamlet's contemplates his continued existence in his moving soliloquy, it serves well as an analogy for the future direction that SACRS should consider.

The ad hoc committee appointed by Yves Chery, SACRS President, is very much aware that moving in a direction to provide more educational information on the advantages of defined benefit plans is a new and challenging area for SACRS. SACRS is composed of twenty county pension systems that often see their system's role as quite different from each other.

The initiative filed in Ventura is a line in the sand for us. Some see this as the start of a "domino effect". Others have conveyed that the issue of benefits is really an employer and employee issue. They are the responsible parties and therefore they should be the ones mounting an active defense if they wish to maintain their current benefits.

We in SACRS are supposed to be trustees and fiduciaries, which is true. But we are also the most knowledgeable about our business. We know fact from misrepresentation better than any other entity. Some trustees and administrators want to wait to see the outcome of the initiative, others believe the time is now, and not wait. It is this environment that the ad hoc committee was asked to discuss and make recommendations to the SACRS Board of Directors. The intent is that the SACRS Board of Directors will have a plan and present it to the full membership at the next conference.

To get more actively involved leads to a discussion of public exposure. The topic of SACRS creating more visibility is very difficult. Historically, we have pride ourselves on staying under the radar. So who should lead the discussion on the positive aspects of providing DB plans? There is so much negative information being released that is going unchallenged. We are really the experts on this subject. But it has been the employer and the employees who have negotiated and changed the plans' benefits. They are ultimately responsible for the content of the plans. Many of the systems are signaling that they are uncomfortable with publicly supporting the defined benefit plans as proposed by the SACRS Executive Director.

Is there a role for SACRS in this issue? And what form should it take?

SACRS
State Association of County Retirement Systems
Staff ★ Trustees ★ Affiliates ★ Success
A California Non Profit Corporation

Sometimes, it is necessary to take small steps in matters of great importance. And that is the direction that the ad hoc committee is advising the SACRS Board of Directors to consider.

It has been suggested that we should focus on our own membership and affiliations on the importance of the defined benefit plans. We find that our members have a limited understanding of the benefits to which they are entitled. Also it has been said that the level of interest is primarily because they trust us. They know that we function in the best interests of the members. They know that "the promise" made to them by their employer will be fulfilled by us, the trustees.

At this point in time, the ad hoc committee is suggesting that factual information be gathered and made available for internal use among the SACRS systems and their affiliations. The purpose would be twofold: to educate the members and other interested parties of the SACRS organization on the positive aspects of their defined benefits and also to provide a clear and consistent understanding of our business. So often factual information about our plans is misinterpreted or used in an inappropriate way. Having one source may prove useful to all systems and to their membership.

With this general direction in mind, the ad hoc committee believes it is necessary to establish policies and procedures on how this communication would be undertaken. The ad hoc committee plans to meet with a professional communications firm to explore creating and maintaining a method of providing ongoing and useful information to the SACRS systems. If this appears to be feasible it may become part of the ad hoc committee's recommendation to the SACRS Board of Directors for consideration to the full membership.

As this project progresses, we will provide you, the Board, with further updates and a possible plan of action.

Thank you,

Robert Palmer

Robert Palmer,
SACRS Executive Director

Cc: Members of the ad hoc Committee

1415 L St. Suite 1000 | Sacramento, CA 95814 | **T** (916) 441-1850 | **F** (916) 441-6178 | www.sacrs.org
OPERATING UNDER COUNTY EMPLOYEES RETIREMENT LAW OF 1937, GOVERNMENT CODE 31450 ET SEQ

SACRS
State Association of County Retirement Systems
Staff ★ Trustees ★ Affiliates ★ Success
A California Non Profit Corporation

Date: June 19, 2014

To: SACRS Chief Executive Officers, Retirement Administrators & SACRS Systems Board Chairs

From: Yves Chery, SACRS President

Subject: Status of SACRS' Approach to Sustaining Public DP Plans

Background:

In April, SACRS Executive Director, Robert Palmer, sent a memorandum to all SACRS Affiliates and SACRS Systems regarding the establishment of an educational program on the positive benefits of providing defined benefit retirement plans.

So far, Mr. Palmer has received very little formal feedback from the systems on the proposal to seek out and fund a profession public relations firm to educate the public on the positive aspects of DB plans, such as our CERL systems. He has told me that you folks at the local system level have a better feel for this matter. But at the SACRS staff level, there are a variety of comments surfacing. Some have said that trustees are fiduciaries, not proponents of DB. Some believe that this matter is a plan sponsor and labor organization issue. Others have said that to do anything in the way of a public relations firm creating public support could become very divisive at the local level. Others want to have more discussion before proceeding. In fact, some have suggested either a special session on this topic or put it on the agenda for the November SACRS Conference. Others, pointedly, just want to wait and see what happens with the Ventura County initiative.

New Approach:

As the new SACRS President, I have established an ad hoc committee to look into this educational concept for SACRS and to make recommendations back to the organization. Those selected (and volunteering) are:

Gregg Rademacher, Los Angeles CERA
Richard Stensrud, Sacramento CERS
Jeff Wickman, Marin CERA
Skip Murphy, San Diego CERA
Tracy Towner, Ventura CERA

Continued

We are in the process of setting the first working session for this group. They will start with a pretty open slate. Does SACRS have a role in education of public DB plans? Should it be the "Honest Broker" on these pension topics, as it has done in Sacramento with the Legislature and the Governor's Office? Should SACRS consider retaining a communications firm to assist with the educational program? Does SACRS have an obligation to become involved with initiatives, such as Ventura? If so, to what level?

As the ad hoc committee develops concepts, they will be seeking feedback from the SACRS systems on what is being proposed.

The Ventura Initiative:

Since April memorandum, the focus has moved to what is happening in Ventura County. We all know by now that the proposed initiative received the necessary number of voter signatures to qualify for the November elections. There are three moving parts at this time; I have included summary documents providing their points of view.

1) The Reason Foundation's article on pension reform in Ventura County
2) Ventura County Counsel's legal analysis of the initiative
3) Overview of the lawsuit filed by the opponents of the initiative, Citizens for Retirement Security (CRS).

Your Input:

As we move forward on this educational approach, we welcome comments; suggestions and feedback from all the SACRS systems. Clearly, this is a new role for the SACRS organization…uncharted waters as they say. We have set a session on this topic for the November Conference.

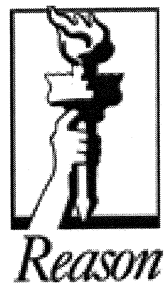
If you have any questions or comments please send to either Bob Palmer at sirbpalmer@aol.com or to Yves Chery at ychery2013@gmail.com.

Thank you,

Yves Chery

Yves Chery, SACRS President

Attachments (3)



Ventura County Pension Reform Would Save $460 Million, Reduce Debt $1.8 billion

By Anthony Randazzo, Director of Economic Research

Summary: If adopted, the Initiative for Pension Fairness and Sustainability would save Ventura County $5.4 million in cash flow over the first two years, $51.6 million in cumulative savings over five years of reform, and $460 million in total savings over 15 years—all while separately eliminating $1.8 billion in pension debt. In the long run, moving to a new defined-contribution system would protect taxpayers from unfunded liabilities and investment return risks in public retirement systems.

The Problem: The Ventura County Employees' Retirement Association (VCERA) is poorly positioned to stay properly funded in the coming years, and local taxpayers may be forced to pick up a hefty tab of unfunded liabilities if substantive changes are not made in the near future.

While the County's payroll has increased just 6.2% from 2008 to 2013, annual taxpayer contributions to the pension system have grown 26.7% during the same time (from $104.4 million to $142.4 million). Despite this large increase in taxpayer payments, during this time period VCERA fell from having 91.3% of the funding needed to pay future pension benefits to having just 79.2%. And during that time, the defined-benefit pension system's unfunded liability has more than tripled to $953.4 million.

This funding disparity is a result of a few different dynamics, including the pension fund's asset investment inability to meet the unrealistic assumed 7.75% rate of return. Investment returns have averaged just 5.82% over the last five years, and 6.93% over the past ten years, indicating that missing the investment target has not been only related to the financial crisis and recession.

Additionally, VCERA has not properly anticipated that retirees are living longer and that more funds are needed to pay those pension benefits over longer retirement spans. Taken together, these are indications of an unsustainable system.

The California Public Employees' Pension Reform Act (PEPRA), which was passed in 2013, attempted to solve problems like these by changing the rules governing local government pension systems statewide. PEPRA does not solve Ventura County's core problems, however. For example, PEPRA has no affect on the County's unfunded liability. Neither does it address shortfalls in investment returns.

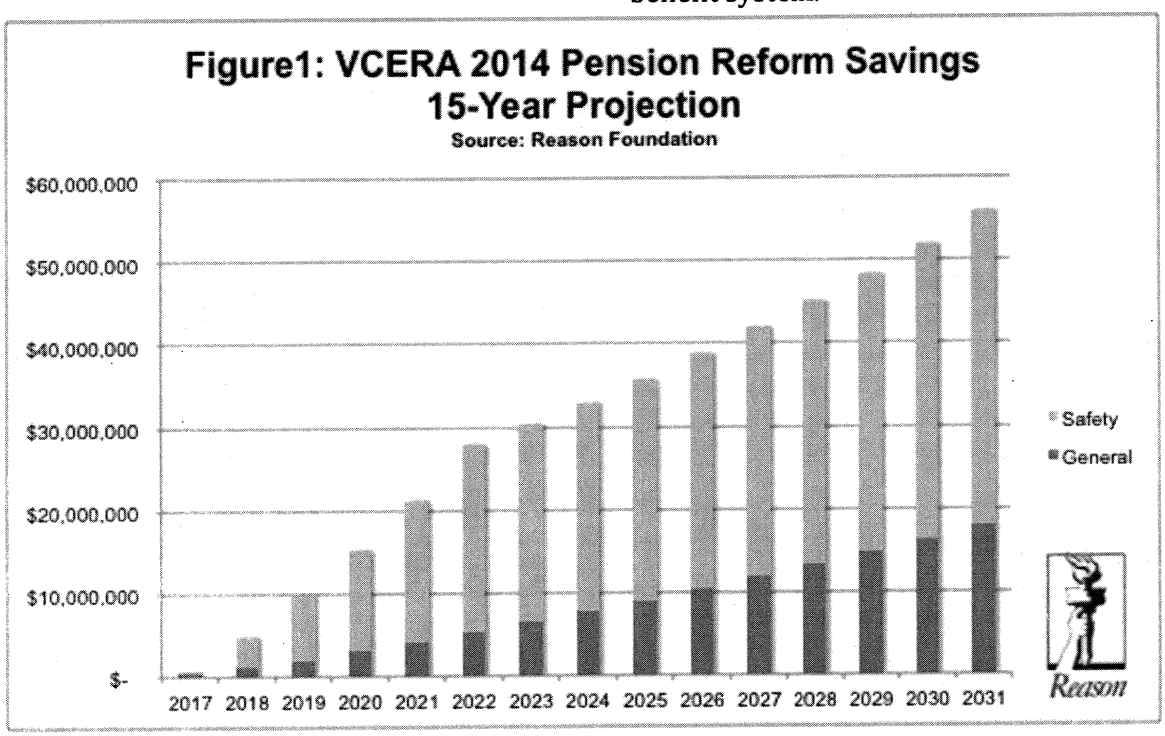
The combination of needing to both pay down the unfunded liability and adopt more realistic investment assumptions will require an increase in County taxpayer contributions into the system unless fundamental reforms beyond PEPRA are implemented.

The Solution: An initiative by county residents would address the risk of long-term liabilities by putting new hires into a 401(k)-style defined-contribution system and phasing out the defined-benefit system over time. Defined-contribution systems have no investment return assumptions, and eliminate taxpayer investment risk.

The defined-contribution system for all new Ventura County employees will have contribution rates from the County of 11% for

public safety employees not enrolled in social security, and 4% for general employees enrolled in social security. The defined contribution system would create no long-term liabilities for the County. All current employees would continue accruing benefits as normal, subject to PEPRA.

The initiative also includes a provision that holds pensionable pay constant for 5 years for all General Tier 1, General Tier 1-PEPRA, and public safety employees. This would create immediate cash flow savings that would enable to the County to pay for increased normal costs in phasing out the defined-benefit system.



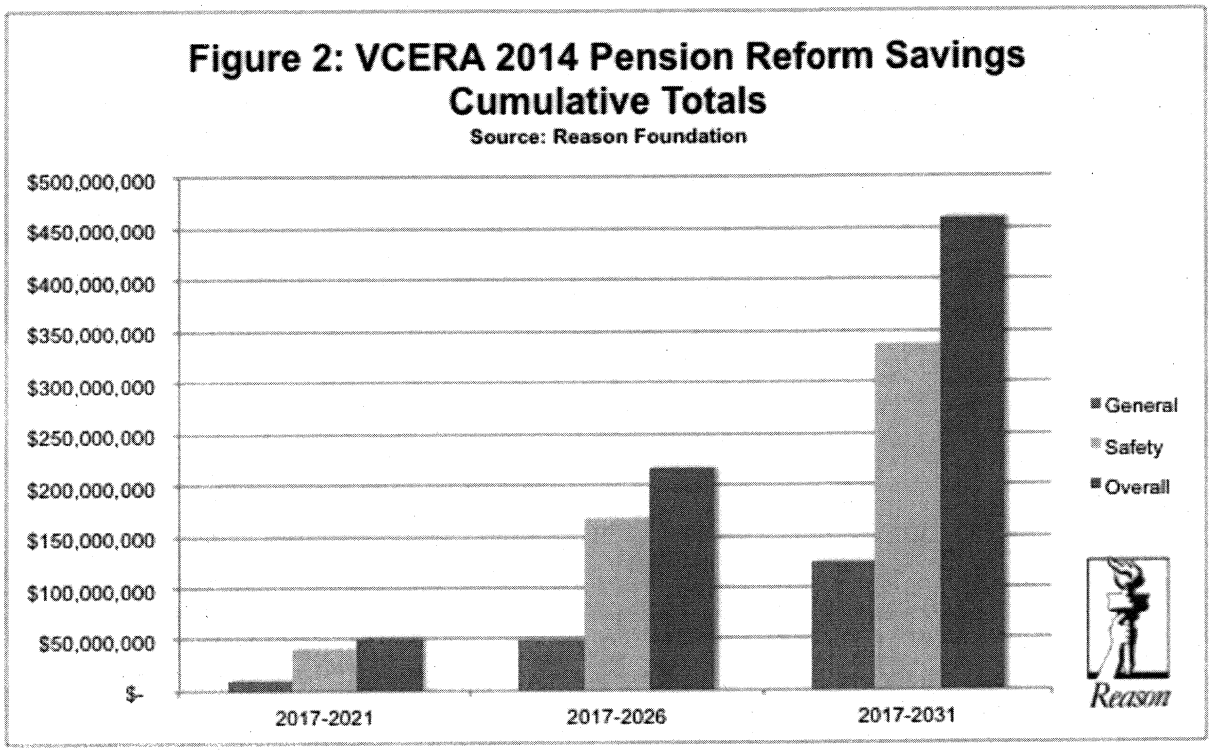
The Savings: Should all elements of this initiative be adopted, Ventura County would see cash flow savings of:

- $508,000 in the first year of implementation, and $4.9 million in the second year of implementation;
- $51.6 million in cumulative savings over the first five years;
- $217.1 million in cumulative savings over ten years;
- $460.4 million in cumulative savings over fifteen years.[1]

VCERA currently amortizes the unfunded liability over fifteen years, which is why the independent actuarial analysis provides projected savings over that time frame. Importantly, these projected savings would be *in addition* to any savings that might occur as a result of implementing PEPRA.

Figure 1 above shows the annual net savings to Ventura County for both general employees and public safety employees. Figure 2 below shows the cumulative savings over fifteen-years for general and public safety employees.

[1] The County will be voting on the proposed initiative after the start of fiscal year 2015; as a result, the changes would be implemented in fiscal year 2016. Therefore, independent actuarial analysis assumes that accrued liability would change starting in fiscal year 2016, and reductions to normal cost would start in fiscal year 2017. The fifteen-year cumulative savings period is from fiscal years 2017 to 2031.



The proposed initiative would also reduce the long-term liabilities of the defined-benefit fund, both by phasing it out it over time and as a result of holding pensionable pay constant. By the end of the 15-year amortization period, VCERA's liabilities would be $1.771 billion lower than without reform (see Table 1 on the next page). This is separate from the annual cash-flow savings.

As also shown in Table 1, the proposed initiative would lead to $230 million in reduced unfunded liabilities over the first five years. By fiscal year 2024, the defined-benefit fund would be fully funded.

The Details: These savings were determined through an independent actuarial analysis performed for Ventura County Taxpayers Association.[2] The actuary modeled the anticipated changes proposed in the reform initiative versus the projected growth in liabilities of the current pension system.

The actuary adopted all of the assumptions used in the most recent valuation for VCERA, except employment growth.[3] Thus, the baseline that the proposed initiative was compared to incorporated changes due to PEPRA. The costs and savings were amortized over 15 years, consistent with current policy. The actuary also assumed that the County would continue to make 100% of its annual contributions.

The official VCERA actuary has been making the unrealistic assumption that the County would not expand the workforce by even one person over the next 15 years.[4] That has not been true over the last 15 years and is not likely to be true in the future.

[2] The independent actuary was William J. Sheffler, FCA, EA, MSPA, ASA of Sheffler Consulting Actuaries, Inc. The actuary reports that their modeling approach was inherently conservative.

[3] The actuary used the most recent Segal Co. valuation for VCERA, Fiscal Year Ended June 30, 2013.

[4] This actuarial valuation was completed by Segal Co.

Table 1: Changes in VCERA Liabilities Due to Pension Reform

Source: Reason Foundation

	Unfunded Liability			Accrued Liability		
FY	Current	After Reform	Net Reduced	Current	After Reform	Net Reduced
2015	$862,000,000	$862,000,000	$0	$5,120,000,000	$5,120,000,000	$0
2016	$767,000,000	$767,000,000	$0	$5,412,000,000	$5,375,000,000	$37,000,000
2017	$741,000,000	$660,000,000	$81,000,000	$5,659,000,000	$5,579,000,000	$81,000,000
2018	$667,000,000	$540,000,000	$127,000,000	$5,963,000,000	$5,810,000,000	$153,000,000
2019	$583,000,000	$407,000,000	$176,000,000	$6,268,000,000	$6,037,000,000	$231,000,000
2020	$488,000,000	$260,000,000	$228,000,000	$6,578,000,000	$6,254,000,000	$324,000,000
2021	$380,000,000	$150,000,000	$230,000,000	$6,893,000,000	$6,512,000,000	$381,000,000
2022	$312,000,000	$86,000,000	$226,000,000	$7,211,000,000	$6,764,000,000	$447,000,000
2023	$242,000,000	$21,000,000	$221,000,000	$7,532,000,000	$7,006,000,000	$526,000,000
2024	$182,000,000	-$33,000,000	$215,000,000	$7,853,000,000	$7,236,000,000	$618,000,000
2025	$97,000,000	-$111,000,000	$208,000,000	$8,174,000,000	$7,450,000,000	$724,000,000
2026	-$11,000,000	-$210,000,000	$199,000,000	$8,494,000,000	$7,646,000,000	$848,000,000
2027	-$83,000,000	-$271,000,000	$188,000,000	$8,809,000,000	$7,820,000,000	$989,000,000
2028	-$129,000,000	-$305,000,000	$176,000,000	$9,119,000,000	$7,970,000,000	$1,149,000,000
2029	-$177,000,000	-$338,000,000	$161,000,000	$9,420,000,000	$8,088,000,000	$1,332,000,000
2030	-$228,000,000	-$373,000,000	$145,000,000	$9,709,000,000	$8,171,000,000	$1,538,000,000
2031	-$281,000,000	-$406,000,000	$125,000,000	$9,982,000,000	$8,211,000,000	$1,771,000,000

The independent actuary assumes there will be modest employment growth in County government, which makes the estimate of savings from the proposed initiative more conservative.[5] If the County actuary turns out to be right and Ventura County does not hire more workers over the next 15 years, savings from the initiative will be even greater than those predicted here.

The independent actuary had to assume no additional changes to the existing VCERA defined-benefit pension plan over the next 15 years, but should any future reforms be implemented, they could result in costs or savings not included in this analysis. Additionally, any future underfunded contributions or missed investment return targets would affect the net position of VCERA's financial condition.

Finally, the savings projection assumes that pensionable pay will increase on a normal basis after the five-year holding period. However, if County leaders decide in the future to retroactively add the five-year of pay increases into pensionable pay (known as "catching up" pensionable pay)—that is, if all pay increases over the next five years are rolled back into pensionable pay—that would be costly to County taxpayers as employee contributions could not be increased to cover the sudden increase in liabilities.

Zero "Transition Costs": The proposed initiative requires *zero additional costs* for Ventura County taxpayers. The County could make separate policy choices that mean costs increase beyond the status quo, such as setting the defined-contribution rate high, or increasing the debt payments for VCERA. But any costs related to these policy choices would be *unrelated* to transitioning from defined-benefit to defined-contribution.

There are two components to pension funding: the annual cost to pre-fund pension liabilities (known as "normal cost"), and the cost to pay off unfunded pension debt. There is no legal reason that VCERA would have to change its defined-benefit debt payment plan due to the transition towards a defined-contribution system. It is important to clarify that employee contributions *never* subsidize debt payments. So there are no transition costs related to debt repayment.

More importantly, the actuary's model shows that the County would save $318,000 from its normal, annual pension cost in the first year, and would spend $332 million less over 15 years because of the change to a defined-contribution plan (see Table 2, next page).

Holding pensionable pay constant saves the County $190,000 in the first year of reform and $128.6 million after 15 years *on top of normal pension cost savings* (see Table 2). These savings could be passed from VCERA to the County. Or it might be necessary to reinvest the money into the defined-benefit fund to offset future losses that the defined-benefit system may still experience due to its unrealistic actuarial assumptions.

Importantly, there may be increased costs in the future for the County due to missing investment targets in the defined-benefit system as it is phased out—the proposed initiative does not change County investment return assumptions for the defined-benefit plan. But any increased costs would be because of faulty assumptions presently in the system, and thus would be incurred even without the transition to defined-contribution system.

[5] The actuary used headcount changes from 2011-2013 to estimate new hires into the future and then applied the salary change assumptions from the Segal valuation.

Table 2: Pension Reform Savings

Source: Reason Foundation

FY	Reduced Normal Cost	Savings from Pensionable Pay Change	Net Savings
2017	$318,000	$190,000	$508,000
2018	$2,548,000	$2,302,000	$4,850,000
2019	$5,323,000	$4,415,000	$9,738,000
2020	$8,662,000	$6,555,000	$15,217,000
2021	$13,179,000	$8,082,000	$21,261,000
2022	$18,841,000	$8,983,000	$27,824,000
2023	$20,914,000	$9,344,000	$30,258,000
2024	$23,192,000	$9,708,000	$32,900,000
2025	$25,576,000	$10,130,000	$35,706,000
2026	$28,323,000	$10,464,000	$38,787,000
2027	$31,088,000	$10,858,000	$41,946,000
2028	$33,724,000	$11,354,000	$45,078,000
2029	$36,682,000	$11,710,000	$48,392,000
2030	$39,841,000	$12,137,000	$51,978,000
2031	$43,563,000	$12,398,000	$55,961,000
2017-2021	$30,030,000	$21,544,000	$51,574,000
2017-2026	$146,876,000	$70,173,000	$217,049,000
2017-2031	$331,774,000	$128,630,000	$460,404,000

For a more detailed breakdown of the savings numbers see Table 3 at the end of this document.

However, after those on the defined-benefit payroll have completely retired, there would be no further accrued liabilities for VCERA, eliminating all normal annual pension costs. There may still be debt payments required into the defined-benefit system because the actuarial assumptions did not lead the County to completely pre-fund promised benefits. But, again, these debt payments would be required whether or not the County transitioned to a defined-contribution system.

The dynamic effects of the proposed initiative mean that the County would not only reduce liabilities in the long-term, but also save money on a cash flow basis in the short-term, shoring up pension obligations it has for current employees and retirees.

Conclusion: The proposed reform to VCERA saves $460 million over 15 years, eventually eliminates unfunded liabilities by closing the current defined-benefit plan, and puts new hires into a defined-contribution system. Holding pensionable pay constant would pay for the transition from defined-benefit to defined-contribution and provide cash flow savings in the first fiscal year it is adopted for Ventura County, as well as every subsequent year.

Anthony Randazzo is director of economic research at Reason Foundation, a nonprofit think tank advancing free minds and free markets. He can be reached at anthony.randazzo@reason.org.

Media Contact: Chris Mitchell, director of communications at Reason Foundation: (310) 367-6109

Table 3: Pension Reform Savings Detailed Breakdown

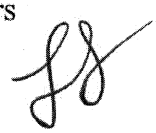
In thousands ($000); Source: Reason Foundation

	Reduced Normal Cost			Pensionable Pay Change Savings			Net Savings		
FY	General	Safety	Overall	General	Safety	Overall	General	Safety	Overall
2017	$277	$41	**$318**	$91	$99	**$190**	$368	$140	**$508**
2018	$748	$1,800	**$2,548**	$383	$1,919	**$2,302**	$1,131	$3,719	**$4,850**
2019	$868	$4,455	**$5,323**	$1,167	$3,248	**$4,415**	$2,035	$7,703	**$9,738**
2020	$1,152	$7,510	**$8,662**	$1,936	$4,619	**$6,555**	$3,088	$12,129	**$15,217**
2021	$2,173	$11,006	**$13,179**	$2,051	$6,031	**$8,082**	$4,224	$17,037	**$21,261**
2022	$3,236	$15,605	**$18,841**	$2,118	$6,865	**$8,983**	$5,354	$22,470	**$27,824**
2023	$4,242	$16,672	**$20,914**	$2,238	$7,106	**$9,344**	$6,480	$23,778	**$30,258**
2024	$5,333	$17,859	**$23,192**	$2,354	$7,354	**$9,708**	$7,687	$25,213	**$32,900**
2025	$6,462	$19,114	**$25,576**	$2,519	$7,611	**$10,130**	$8,981	$26,725	**$35,706**
2026	$7,883	$20,440	**$28,323**	$2,587	$7,877	**$10,464**	$10,470	$28,317	**$38,787**
2027	$9,243	$21,845	**$31,088**	$2,708	$8,150	**$10,858**	$11,951	$29,995	**$41,946**
2028	$10,389	$23,335	**$33,724**	$2,927	$8,427	**$11,354**	$13,316	$31,762	**$45,078**
2029	$11,773	$24,909	**$36,682**	$2,998	$8,712	**$11,710**	$14,771	$33,621	**$48,392**
2030	$13,198	$26,643	**$39,841**	$3,124	$9,013	**$12,137**	$16,322	$35,656	**$51,978**
2031	$15,028	$28,535	**$43,563**	$3,071	$9,327	**$12,398**	$18,099	$37,862	**$55,961**
2017-2021	$5,218	$24,812	**$30,030**	$5,628	$15,916	**$21,544**	$10,846	$40,728	**$51,574**
2017-2026	$32,374	$114,502	**$146,876**	$17,444	$52,729	**$70,173**	$49,818	$167,231	**$217,049**
2017-2031	$92,005	$239,769	**$331,774**	$32,272	$96,358	**$128,630**	$124,277	$336,127	**$460,404**

MEMORANDUM
COUNTY OF VENTURA
COUNTY COUNSEL'S OFFICE

June 13, 2014

TO: Members, Board of Supervisors

FROM: Leroy Smith, County Counsel 

RE: LEGAL ANALYSIS OF INITIATIVE PENSION MEASURE

You have asked for a report back on legal issues raised by the initiative pension measure ("measure"), which would repeal the County of Ventura's ("County") defined benefit pension plan for future employees and replace it with a 401(k)-style plan. This report discusses the major legal issues identified, however, additional research is needed to fully analyze all of the legal issues raised by the proposed measure.

In our opinion, the measure is illegal because it would directly conflict with, and therefore be preempted by, state law that mandates County employees be enrolled in a defined benefit plan as specified in the County Employees Retirement Law of 1937 (the "1937 Act"). Further, the measure is improper because it proposes an administrative act, rather than a legislative act. All or parts of the measure are also invalid for other legal reasons discussed below.

A. THE MEASURE IS INVALID BECAUSE IT PURPORTS TO REPEAL STATE LAW BY LOCAL ORDINANCE

1. County's Defined Benefit Plan is a Creation of State Law

The measure suffers from a basic misconception about the origins of the County's defined benefit plan. The County's defined benefit plan was created by state law, not local law. The County's voters did not enact a defined benefit plan in 1946 when they voted for Ordinance No. 401, which had been submitted to them for ratification by the Board of Supervisors ("Board"). Rather, the voters "accepted" the implementation of a state law, the 1937 Act, in the County. That state law became "operative" in the County when it was "accepted" pursuant to the procedures dictated by the 1937 Act, but it has always been, and remains, a state law.

Once a state law is "accepted" by a local government, whether by its governing body or its voters, it cannot be "unaccepted" or otherwise repealed by the local government unless there are express provisions in the state law allowing it to do so. There are no such provisions in the 1937 Act.

Controlling legal authorities support this conclusion. In enacting state legislation, the California Legislature usually passes laws in a manner that the effective date and operative date are the same – January 1 of the year following its enactment. (Cal. Const., art. IV, § 8c, subd. (c)(1).) However, the Legislature has the power to establish an operative date later than the effective date. (*People v. Camba* (1996) 50 Cal.App.4th 857, 865-856.)[1/] As stated in *Preston v. State Board of Equalization* (2001) 25 Cal.4th 197, 223:

> "The effective date [of a statute] is . . . the date upon which the statute came into being as an existing law.' [Citation.] '[T]he operative date is the date upon which the directives of the statute may be actually implemented.' [Citation.] Although the effective and operative dates of a statute are often the same, the Legislature may 'postpone the operation of certain statutes until a later time.'"

Moreover, the Legislature may provide for a statute to go into effect or become operative contingent upon the happening of a future or uncertain event. (See *Busch v. Turner* (1945) 26 Cal.2d 817, 821 [providing that the Legislature has the power to pass an act to be effective upon the occurring of an uncertain event]; *Ross v. Board of Retirement* (1949) 92 Cal.App.2d 188, 194 [providing that after a law becomes effective, its operation may be postponed if it is made dependent upon a contingency which may occur in the future].) And the decision of a local governing body to accept or reject the new statute may be such a contingent event. (*Firemen's Benevolent Assn. v. City Counsel* (1959) 168 Cal.App.2d 765, 768 [providing a statutory enactment may ordinarily provide that it will take effect on the happening of some future event and the decision of a local governing board may be one such event].)

[1/] An enactment is law on its effective date in the sense that it cannot be changed except by the legislative process; but rights of individuals under the law's provisions are not affected until the provisions become "operative" as law. (*People v. Camba, supra*, 50 Cal.App.4th 857 at p. 866.)

Pursuant to this authority, the California Legislature adopted the 1937 Act, as an uncodified statute. (Stats. 1937, ch. 677, § 2, p. 1898.) The 1937 Act was amended in 1939, 1941, 1943, and 1945. As of 1946, section 40 of the act read as follows:

> "40. There is established in any county of the State a retirement system for its officers and employees, and for the officers and employees of districts therein, *by the acceptance of the provisions of this act* by a majority vote of the electors voting upon such acceptance proposition at any special or general election at which the proposition of accepting the provisions of this act may be submitted or by an ordinance passed by four-fifths vote of its board of supervisors. The provisions of this act become operative in such county on either the first day of January, or the first day of July next, as specified in the ordinance, but not sooner than sixty days after the passage of the ordinance." (Italics added.)[2/]

The required contingency for the 1937 Act to become operative in the County and to establish the retirement system in the County occurred in 1946 when, in accordance with section 40 of the 1937 Act, the County Board of Supervisors voted 5-0 to adopt Ordinance No. 401, entitled "An Ordinance of the County of Ventura, Accepting The Provisions of the County Employees Retirement Act of 1937 (Chapter 677, Statutes of 1937), And Establishing A Retirement System For the Officers and Employees of the County of Ventura And Districts Therein." Section 1 of Ordinance 401 provided in material part that "the Board of Supervisors of the County of Ventura does *hereby accept* the provisions of said County Employees Retirement Act of 1937, . . ." (Italics added.) Although acceptance by a 5-0 vote of the Board was sufficient to make the 1937 Act operative in the County, the Board nonetheless submitted an acceptance proposition to the qualified voters of the County asking them to approve the Board's ordinance accepting the 1937 Act. (Ordinance No. 401, section 2.) On June 4, 1946, a majority of voters approved the proposition accepting the 1937 Act.

[2/] In 1948, the Legislature codified the 1937 Act at section 31450 et seq. of the California Government Code. Section 40 of the act was slightly reworded and codified at sections 31500 and 31501 of the Government Code.

In 1953, the County included the essence of Ordinance No. 401 in its newly created Ventura County Ordinance Code ("VCOC"), without repealing or amending Ordinance No. 401. Since 1953, Division 1, Chapter 2, Article 2, Section 1221 of the County Ordinance Code has provided: "The provisions of the 'County Employees Retirement Law of 1937 (Chapter 677, Statutes of 1937, as amended) are hereby accepted, and in compliance therewith a retirement system is hereby established, of and for the employees of the County and of the districts therein permitted, or entitled to, membership in such system."

All contingencies for making the 1937 Act operative in the County having been met as of June 4, 1946, the 1937 Act (a state law) became fully enacted, effective and operative in Ventura County as of July 1, 1946.

2. The Operation of the 1937 Act in Ventura County Cannot Be Repealed by a Local Ordinance

Because the measure proposes only a local ordinance, which cannot by law disestablish the 1937 Act plan in the County, the measure is illegal and of no effect. Once accepted, the 1937 Act provides no procedure by which a county can disestablish the retirement system or unaccept the retirement law by any subsequent local action, either by the voters or by the board of supervisors. Further, the act provides no authority or process for a county to withdraw from the system.[3/]

The proper method to repeal or amend a state law such as the 1937 Act now operative in the County is for the California Legislature to enact a repealing or amending statute or for the state electorate through a statewide initiative process to enact a repealing or amending law.

[3/] In contrast, the 1937 Act expressly allows for districts to withdraw from the retirement system (otherwise leaving the local retirement system in place). If a district withdraws, the 1937 Act specifies what happens: all accumulated contributions are refunded to the affected employees and the district, or transferred to another public retirement system. (Gov. Code, § 31564.) There is no statutory mechanism for a district to phase out participation in the system, leaving some employees covered and others not.

In fact, this was considered in 1979, but the Legislature declined to grant the County authority to exclude future employees from the 1937 Act plan and provide them with 401(k)-type benefits instead. Senate Bill 1117 was introduced in April 1979, and as initially drafted would have permitted Ventura County (and only Ventura County) to "adopt a resolution excluding from membership all persons who enter county or district service after the effective date of the resolution." (SB 1117, § 1 (1979-1980) (Apr. 5, 1979).) The bill was amended to exclude "classes eligible for safety membership" from the proposal, and to insert the following expression of legislative intent:

> "It is the intent of the Legislature, in authorizing a county of the 13th class [i.e., Ventura County] to exclude employees hired after the effective date of this section from membership in the existing retirement system, to study the effects of removal of mandatory retirement system membership in a county that is currently participating in the County Employees Retirement Law of 1937.
>
> "It is not the intent of the Legislature, at this time, to allow other counties who participate in this retirement system to exclude new employees from membership.
>
> "Any alternative retirement of deferred compensation plans for employees excluded from existing retirement system membership pursuant to this section shall be reviewed by an actuary to verify that all contributions, liabilities, actuarial interest rates, and other valuation factors shall be determined on the basis of actuarial assumptions and methods which, in combination, offer the actuary's best estimate of anticipated experience under the new system.
>
> "The additional contributions required under the new system shall be computed as a level percentage of member compensation. The additional contribution rate required at the time the new system is adopted shall not be less than the sum of (1) the actuarial normal cost, plus accrued liability attributable to benefits over a period of not more than 30 years from the date the new system becomes operative.

> "Any reports or studies prepared as a result of actions taken by the board of supervisors pursuant to this section shall be transmitted to the policy [sic] and Rules Committees of both houses of the Legislature."

Ultimately, this language was deleted from the bill, and a very different version of SB 1117 was enacted, the only effect of which was to make an innocuous reference to a county treasurer's duties. (See Gov. Code, § 31520.)

This Legislative history comports with our interpretation of the relevant law. It is clear that, at least in 1979, the Legislature understood that a county that had accepted the 1937 Act could not disestablish the system without Legislative authorization. In our view, that remains the law today. Interestingly, the Legislature itself considered using Ventura County as a pilot program to study the effects of changing from a defined benefit plan to a defined contribution plan for future employees, but rejected the idea.

The above principles regarding legislative powers and the legislative process are grounded in decisions of the California Supreme Court and the opinions of the California Attorney General. The opinion in *Board, etc. Trustees v. Supervisors* (1893) 99 Cal. 571, is particularly instructive. Orange County had adopted an ordinance electing to come within a state act for law libraries, and later attempted to repeal the ordinance. The California Supreme Court held the attempted repeal was unlawful, finding that:

> "We think the legislature had the power to provide in the act that counties might come within or remain without the provisions of the act, as the boards of supervisors of the respective counties might determine . . . . 'Not only had the legislature the power to provide upon what condition or contingency the provisions of the act might be carried into effect, but also to provide within what time it must be done, if done at all.'
>
> "It is also plain that the attempted repeal of the ordinance declaring Orange County within the provisions of the act was of no avail. When Orange County once came within the provisions of the act, it was there for all purposes; as fully and completely there, as if it had passed directly under its provisions at the date of the original enactment. We do not perceive how it can evade the force and effect

> of the statute of the state (which, after the passage of ordinance No. 14, applied to it) in any different manner or to any greater extent than it can escape the force and effect of any other statute of the state. If it can do so in this instance it has the power to disorganize, for it was created under an act involving the same principle." (*Board, etc. Trustees v. Supervisors*, *supra*, 99 Cal. 571 at p. 573.)

Similarly, the California Attorney General, addressed the question of whether a county was bound by legislative amendments made to the 1937 Act after a county's acceptance of the system. The Attorney General opined that any amendments to the 1937 Act, either before or after a county's approval, are part of the retirement system because the 1937 Act is statewide legislation in force throughout the state and subject to amendment by the Legislature just as any other state legislation, and stated:

> "Undoubtedly the Legislature intended to adopt a system of retirement benefits for county employees which would be uniform in the several counties of the State which have or will in the future accept the system. . . . There is no method provided in the Act by which a county can acquiesce in subsequent amendments by the Legislature and *there is no way in which a county can by ordinance change the system*. . . . The legislation here . . . is State-wide in scope and subject to amendment [and repeal] in the same manner as any other [state] legislation." (10 Ops.Cal.Atty.Gen. (1947) 96, 99, italics added.)

3. The Measure is Preempted by State Law

Article XI, section 7 of the California Constitution confers on each city and county the power to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations *not in conflict with general laws*." (Italics added.) Where a local ordinance conflicts with general law, it is void. (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 290; *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897-898.)

The legislative powers of the electorate of the County are generally coextensive with the powers of the County Board of Supervisors (*DeVita v. County of Napa*, (1995), 9 Cal.4th 763, 775), so the limitation as to conflicts with state law applies to the

enactments of the board of supervisors and the voters. (*Galvin v. Board of Supervisors of Contra Costa County* (1925) 195 Cal. 686, 692.)

Because the measure, by its own terms, contradicts and is inimical to rights established by the 1937 Act, a state law, it is preempted.

B. THE MEASURE PROPOSES AN ADMINISTRATIVE ACT

1. Administrative Acts are not a Proper Subject for an Initiative

"[T]he reserved powers of initiative and referendum do not encompass all possible actions of a legislative body." (*Worthington v. City Council of Rohnert Park* (2005) 130 Cal.App.4th 1132, 1143 ("*Worthington*").) Both state and local initiatives are limited to legislative acts and may not be used to undertake, modify or rescind administrative, adjudicative, or quasi-judicial actions. (*Citizens for Jobs & the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311, 1331-1333 ("*Citizens for Jobs*").) The purpose of this rule is to promote the efficient administration of the business affairs of government. (*Lincoln Property Co. No. 41, Inc. v. Law* (1975) 45 Cal.App.3d 230, 233-234.)

2. The Measure Proposes an Administrative Act

The test for distinguishing legislative from administrative acts is well settled:

> "'The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, *or some power superior to it.*' [Citations.]" (*Valentine v. Town of Ross* (1974) 39 Cal.App.3d 954, 957-958; see also *Citizens for Jobs, supra*, 94 Cal.App.4th 1311 at pp. 1331-1333. (Italics added.)

In *City of San Diego v. Dunkl* (2001) 86 Cal.App.4th 384, 400, the court held that:

> "Once a legislative policy has been established, the administrative acts that follow therefrom are not subject to referendum or initiative. They should not obstruct the project, but should carry it out.

> [Citation.] An enactment that interferes with the City's ability to carry out its day-to-day business is not a proper subject of voter power."

Similarly, in *Kleiber v. City etc. of San Francisco* (1941) 18 Cal.2d 718, 723, the court held that: . . . "if the action [is] designed to carry into effect law already enacted it may be said to be administrative rather than legislative action." In *Worthington, supra*, 130 Cal.App.4th 1132 at p. 1142, footnote 9, the court stated that when a local body merely pursues a plan already adopted by a superior power, it acts administratively, not legislatively, citing 5 McQuillin, Municipal Corporations (3d ed. 2004) section 16:54, pages 407-410.

Applying these principles to the 1937 Act and a county's acceptance, it must be concluded that the County's acceptance of the 1937 Act in 1946 was an administrative act.[4/]

The purpose of the 1937 Act was to enact a new policy and plan, and the ways and means of accomplishing the plan, for retirement systems among the State's counties. To accomplish this policy, the Legislature included in the 1937 Act the ways and means for counties to create an entirely new retirement system, replacing pre-existing systems and providing for a retirement board, investments, pensions, death benefits, disabilities and a means of opting into the system. (Gov. Code, § 31520 et seq.) Thus, the new legislative policy and plan was established and completed by the Legislature in 1937, with subsequent changes accomplished through amendments by the Legislature. With every

---

[4/] That acceptance of the 1937 Act was done by ordinance, does not make it a legislative act.

> "Generally, whether what is done by a municipal legislative body is an ordinance or a resolution depends not on what the action is called but on the reality. Thus the mere doing of a particular thing in the form of an ordinance does not necessarily constitute it an ordinance; in other words, acting by ordinance rather than by resolution does not necessarily constitute municipal legislation. Conversely, where a resolution is in substance and effect an ordinance or permanent regulation, the name given to it is immaterial." (5 McQuillin Mun. Corp. (3d ed. 2013) § 15.2.)

legislative aspect of the 1937 Act completed by the Legislature, there was nothing left for the County to decide except whether to participate or not. The County's action in 1946 to carry into effect a law already enacted by a superior power is properly characterized as an administrative act and not a legislative one.

The correctness of this conclusion is demonstrated by the Attorney General opinion referenced above:

> "The action of the electors in adopting the statute [i.e., the 1937 Act] in Tulare County was not a legislative act in the true sense of the word. [¶] . . . [A] county, when accepting the provisions of the Act, does not legislate but merely evinces the event upon the happening of which the statute becomes effective in the particular county." (10 Ops.Cal.Atty.Gen. (1947) 96, 99.)

Because Ordinance No. 401 was an administrative act, any attempted repeal of Ordinance No. 401 must similarly be deemed an administrative act. (*Citizens for Jobs*, *supra*, 94 Cal.App.4th at p. 1322 [initiative and referendum cannot be invoked to annul administrative acts which are not within the reach of the initiative and referendum process].) Because administrative acts are not proper and lawful subjects for an initiative measure, the measure is illegal.

C. THE MEASURE IMPROPERLY ATTEMPTS TO REGULATE THE FIRE DISTRICT AND OTHER NON-COUNTY ENTITIES AND EMPLOYEES

The measure purports to control the retirement benefits, wages, and collective bargaining processes of the Ventura County Fire Protection District ("Fire District") and other non-County entities through the simple device of defining the "County" to include such entities. Section 1222 (Definitions) of the proposed new ordinance defines "County" to "include all special districts, agencies and sub-governments that the Board of Supervisors serve as the governing board and/or any special districts, agencies and sub-governments that are part of any County retirement program." (Proposed ordinance, section 1222, subd. (f).) Similarly, the measure defines "Employee" to "include all employees and officers of the County of Ventura, its subsidiary agencies, governmental entities and sub-governments that are qualified to be members of the Defined Benefit

Plan or beneficiaries of the Defined Contribution Plan." (Proposed Ordinance, section 1222, subd. (l).)[5/]

The initiative petition was submitted and qualified under the county initiative provisions of the Elections Code. (Elec. Code, §§ 9100-9126.) The initiative proposes adoption of a County ordinance. It does not propose adoption of a district ordinance, or a state statute, nor could it.

The non-County entities purportedly regulated by the proposed new ordinance, besides the Fire District, include the Ventura County Superior Court ("Court"), the Ventura County Air Pollution Control District ("VCAPCD") and the Ventura Regional Sanitation District ("VRSD"). The Court is a state agency, and the others are special districts. Each non-County entity participates in the County's 1937 Act plan; each has its own governing body; and each is legally separate and independent from the County.

Each of these non-County entities has the authority to establish the compensation and benefits of its employees, and conduct its own collective bargaining. (See Health & Saf. Code, §§ 4700, 40121, 40122 & 13861 [authorizing governing boards of the VRSD, the VCAPCD, and the VCFPD and not a county board of supervisors to establish compensation for their employees]; Cal. Const., art. VI, § 4; Gov. Code, § 71600 et seq. [courts set compensation of court employees].)

Thus, under principles of sovereign immunity, these state agencies and special districts are not subject to County ordinances. (*Hall v. City of Taft* (1956) 47 Cal.2d 177, 183; *City of Orange v. Valenti* (1974) 37 Cal.App.3d 240 [state and its special districts not subject to local regulation of sovereign activities unless waived by express statute].) The measure cannot avoid this legal prohibition on County power by artful drafting. Thus, the provisions in the proposed new ordinance that purport to regulate the retirement benefits, wages and collective bargaining processes of the non-County entities are unlawful and invalid.[6/]

[5/] The measure also improperly includes non-County entities or employees within the definitions for Date of Hire, Member, and Memorandum of Understanding. (Measure, section 1222, subds. (g), (m) & (n).

[6/] A qualified voter wishing to qualify an ordinance applicable to special districts

(continued...)

In theory, these entities and employees could be indirectly affected by the repeal of County Ordinance No. 401 by the County or its voters, if that could be legally accomplished. A repeal would have the effect of immediately disestablishing the County's 1937 Act retirement plan, and its governing body, the Ventura County Employees Retirement Association ("VCERA"), leaving plan members in limbo. But even if that were legally possible, the measure's other provisions cannot be applied to these entities or their employees. That means under any scenario, the following provisions of the measure, among others, cannot legally be applied to the Fire District, VRSD, VCAPCD or the Court: mandatory creation of a 401(k)-style plan as the vehicle for retirement benefits; mandatory employer contributions to a 401(k)-style plan; limitations on compensation increases for safety or tier I members; prohibitions against the creation of new defined benefit retirement plans; prohibitions against participating in both a defined benefit plan and a defined contribution plan; and mandatory establishment of a death and disability plan.

D. MEASURE IS VAGUE AND UNWORKABLE, AND THEREFORE INVALID

Initiatives are subject to the same state and federal constitutional limitations as are laws adopted by the Legislature and ordinances adopted by counties. Thus, an initiative is invalid if it is arbitrary and capricious or unconstitutionally vague. (*Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 824; *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 674.) An ordinance is unconstitutionally vague if it is not sufficiently clear to allow persons of common intelligence to understand its meaning and comply with its language (*City of Costa Mesa v. Soffer* (1992) 11 Cal.App.4th 378, 387) or to allow agencies to administer its provisions (*McMurtry v. State Board of Medical Examiners* (1960) 180 Cal.App.2d 760, 766). Likewise, an initiative is invalid if it creates internal inconsistency in an existing legislative scheme. (See *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 541.)

The measure is internally inconsistent, vague and unworkable in that it would immediately repeal and disestablish the existing 1937 Act plan, but at the same time require a lengthy phase out or continuation of the plan. (Measure, section one; Proposed

---

[6/](...continued)
or the Court could attempt to do so, but only through the special district initiative law or the statewide initiative law. (Elec. Code, §§ 9000-9096 or 9300-9323.)

Ordinance, section 1221, subd. (d).) Pursuant to Election Code section 9122 and section 1222, subdivision (k) of the proposed ordinance, the repeal of County Ordinance No. 401 would become effective 10 days after the election results are certified. On that date, the measure would rescind the establishment of the 1937 Act system in the County, so that legally the County's 1937 Act retirement system would no longer exist in the County, and its governing board would be eliminated. After that date there simply would be no 1937 Act system in the County, no defined benefit plan, no elected and appointed retirement board, and no 1937 Act plan in which the County can participate. Such an outcome would be inconsistent with the rights of members vested in the 1937 Act plan to have the plan administered by qualified, elected and appointed, trustees and staff. The measure's purported delegation to the Board to phase out the defined benefit plan by any lawful method is not consistent with the remaining rights and interests of plan members under the 1937 Act.

Despite these facts, the measure contradictorily provides that VCERA's Board shall retain jurisdiction over the payment and administration of death and disability benefits to employees covered under the defined benefit plan. (Proposed ordinance, section 1227, subd. (b).) VCERA's Board could not possibly perform that function if the measure is adopted because it would cease to exist upon the effective date of the repeal of County Ordinance No. 401. Numerous other inconsistent and unworkable provisions exist in the measure.

The internal inconsistencies and vagueness in the measure make it impossible for the County to lawfully administer the provisions of the measure, rendering the initiative invalid. (*Citizens for Jobs*, *supra*, 94 Cal.App.4th at p.1335 [initiative invalidated for vagueness where so vague as to be unworkable interference with board's duties].)

E. THE MEASURE'S PROVISIONS WHICH PURPORT TO REGULATE COLLECTIVE BARGAINING ARE PREEMPTED

Section 1233 of the ordinance proposed by the measure directs the Board concerning its bargaining position with unions that represent employees entitled to public safety retirement benefits or general tier I benefits. For five years after the measure's operative date, the Board's initial bargaining position in negotiations regarding such employees must not propose terms that would increase pensionable pay. The measure further provides that any tentative agreements reached with unions for changes in

compensation and other benefits require special findings and procedures (findings regarding long term funding and actuarial and accounting justifications) before the Board can approve them.

These provisions directly conflict with the Meyers-Milias-Brown Act ("MMBA") (Gov. Code, § 3500 et seq.), the labor relations statute applicable to the County. The purpose of the MMBA is to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes between public employers and public employee organizations regarding wages, hours and other terms and conditions of employment. (*Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 780 ("*VFRR*").) Labor relations in the public sector are matters of statewide concern. (*Huntington Beach Police Officers Association v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 500 ("*Huntington Beach*").) Thus, the procedures set forth in the MMBA are a matter of statewide concern and are preemptive of contradictory local labor-management procedures. (*VFRR*, *supra*, 8 Cal.4th at 781.)

In *VFRR*, the county entered a memorandum of understanding ("MOU") providing for entry in the California Public Employee Retirement System's ("PERS") "2% at 60" program. A petition called for a referendum on the ordinance approving the contract amendment between the county and PERS. The court held that the ordinance was not subject to referendum because the MMBA embodies a statutory scheme in an area of statewide concern that justifies exemption from the referendum process. (*VFRR, supra*, 8 Cal.4th at pp. 781-782.)

Because, as *VFRR* held, the electorate is prohibited from holding a referendum on a MOU between the county and an employee organization, it stands to reason that the electorate may not preemptively direct the board of supervisors as to the positions it must take in bargaining. Yet, that is precisely what the measure purports to do.

The courts have consistently struck down local regulations, whether adopted by the governing body or by initiative, that interfere with the procedures established by the MMBA. For example, in *Huntington Beach*, the city adopted an employer-employee resolution that purported to exclude work hour schedules from the scope of representation. The court held that the provisions of the employer-employee resolution purporting to exclude the subject of working hours from the meet and confer process was in direct conflict with provisions of the MMBA imposing on governing bodies of public

agencies an obligation to meet and confer in good faith. (*Huntington Beach, supra*, 58 Cal.App.3d at p. 500.)

Therefore, even assuming that a properly drafted initiative could limit the amount of compensation payable to public employees, it is clearly unlawful to attempt to accomplish that result by interfering in the collective bargaining processes mandated by the MMBA. Thus, section 1223 of the ordinance proposed by the measure is preempted and invalid.

F. THE INITIATIVE MAY VIOLATE THE SINGLE SUBJECT RULE

Article II, section 8, subdivision (d) of the California Constitution, provides:

> "An initiative measure embracing more than one subject may not be submitted to the electors or have any effect."

This rule applies to both statewide and local initiatives. (*Shea Homes Limited Partnership v. County of Alameda* (2003) 110 Cal.App.4th 1246, 1255.) To constitute a single subject, each provision of the measure must be: (1) functionally related or reasonably germane to the other provisions; (2) reasonably germane to the purposes of the measure; and (3) not overly broad in connection. (*League of Women Voters v. Eu* (1992) 7 Cal.App.4th 649, 659; *California Gillnetters Assn. v. Department of Fish & Game* (1995) 39 Cal.App.4th 1145, 1161 [rule forbids joining provisions that are germane only to topics of excessive generality such as public welfare].) Here, the subjects of the measure are arguably multiple and not functionally related.

In *Senate of the State of Cal. v. Jones* (1999) 21 Cal.4th 1142, the California Supreme Court found that a State initiative which embraced two matters both generally involving state legislators (the power of reapportionment and compensation) was in actuality two separate and unrelated subjects, which violated the single subject rule. The Supreme Court expressed:

> ". . . [o]ur decisions emphatically have rejected any suggestion 'that initiative proponents are given blank checks to draft measures containing unduly diverse or extensive provisions bearing no reasonable relationship to each other or to the general object which is sought to be promoted. . . . Unrelated proposals always may be

> placed before the voters through separate initiative measures, which may be circulated contemporaneously, affording the electorate the choice of approving all, some, or none of the distinct proposals." (*Id* at pp. 1157-1158.)

The measure's stated purpose is arguably multiple, that of "changing the County employee retirement plan from a Defined Benefit Plan to a Defined Contribution Plan as of July 1, 2015, as well as to place new controls over the establishment to pensionable compensation" (Notice of Intention to Circulate Petition) and to "curb runaway pension costs" and "impose procedural limitations." (Preamble, § C.)

Moreover, the measure purports to regulate not only the County, but "all special districts, agencies and sub-governments that the Board of Supervisors serve as the governing board and/or any special districts, agencies and sub-governments that are part of any County retirement program." (Proposed Ordinance, section 1222, subd. (f).)

A voter wishing to impose the measure's terms on the County, but not on the Court or other entities purportedly covered by the measure, might nevertheless be motivated to vote for the measure to achieve part of his or her goal. This is the sort of undesirable situation the single subject matter rule seeks to avoid.

G. THE MEASURE APPEARS TO CONFLICT WITH STATE LAW AUTHORIZING PARTICIPATION IN DEFERRED COMPENSATION PLANS

Government Code section 53214 provides:

> "Notwithstanding any other provision of law, a participant in a deferred compensation plan may also participate in a public retirement system, and, in ascertaining the amount of compensation of such participant for purposes of computing the amount of his contributions or benefits under a public retirement system, any amount deducted from his wages pursuant to this article shall be included."

We have not fully researched the legislative purpose for this statute, but on its face it appears to be designed to protect public employees who participate in a deferred

compensation plan (which includes 401(k)-type plans) from being excluded from public retirement systems maintained by their employer. The measure appears to directly conflict with this state law, and the presumed legislative purpose. Section 1221, subdivision (b) of the new ordinance proposed by the measure provides that no new employee hired by the County after July 1, 2015 (with the exception of employees permitted to enroll in VCERA by contract) may be enrolled in VCERA or any other defined benefit plan administered by the County. Instead, all employees hired after that date will be permitted to participate only in the new defined contribution plan established by the measure. (Proposed Ordinance, sections 1221(c) and 1221(o).)

H. THE MEASURE APPEARS TO CONFLICT WITH STATE LAW AUTHORIZING COUNTIES TO ESTABLISH PENSION TRUSTS

Government Code section 53216 provides, in relevant part, as follows:

> "The legislative body of a local agency may establish a pension trust funded by individual life insurance contracts, individual annuities, group policies of life insurance, or group annuities, or any one or combination of them, or by any other investment authorized by this article for the benefit of its officers and employees."

The County has relied on this authority in the past, for example when it established a Supplemental Retirement Plan in lieu of social security benefits for extra-help and part-time workers.

Pursuant to Section 1223, subdivision (f), the County would be "prohibited from creating any additional retirement plans beyond that created under this Ordinance." Thus, the measure directly conflicts this state statute. Additional research would be necessary, however, to determine whether this conflict is sufficient to give rise to state preemption.

I. SEVERABILITY

The measure contains a severability clause providing that if any part of the measure is held to be invalid by a court, no other part of the measure shall be affected.

And that it is intent of the people voting for the measure that each part thereof would have been adopted even if one or more of the other parts of the measure are declared invalid or unconstitutional. (Measure, section Two.) Literal compliance with this clause would require the measure to be submitted to the voters even if a single provision was a legally proper subject for an initiative. For example, section 1224 of the proposed new ordinance requires that the County make employer contributions ranging from 4 percent to 11 percent of compensation to a new 401(k)-type plan on behalf of all employees hired on or after July 1, 2015. Assuming that section was lawful, and all other parts of the measure were found to be unconstitutional, the severability clause would still require the Board to submit the measure to an election (or adopt it itself). And if passed, the severability clause would require the County to make the specified employer contributions even though new employees continued to participate in the 1937 Act plan. The law does not require such absurd results.

A legislative enactment can be severed if, and only if, the valid parts are grammatically, functionally, and volitionally separable from the invalid parts. (See *Jevne v. Superior Court* (2005) 35 Cal.4th 935.) In sum, the remainder of the measure, after separation of the invalid parts, must be complete in and of itself and capable of independent application. (See *Abbott Laboratories v. Franchise Tax Bd.* (2009) 175 Cal.App.4th 1346.)

An ordinance is "functionally separable" if the invalid parts are not necessary to the measure's operation and purpose. An ordinance is "volitionally separable" if the severed parts were not of critical importance to the measure's enactment. (*Jevne v. Superior Court*, *supra,* 35 Cal.4th at p. 960.)

"Volitional separability" depends on whether a court can determine that the remainder of the ordinance would have been adopted without the invalid parts had the adopters known the invalid parts would be removed from the enactment. (See *California Redevelopment Assn. v. Matosantos* (2011) 53 Cal. 4th 231.) The invalid provisions of an ordinance are "volitionally separable," and the remaining provisions can stand on their own, if the invalid parts were not of critical importance to the measure's enactment. (*Jevne v. Superior Court*, *supra,* 35 Cal.4th at p. 961; *Schweitzer v. Westminster Investments*, (2007) 157 Cal.App.4th 1195, 1212-1213.)

This three-part test (grammatical, functional, and volitional severability) applies to voter initiative measures the same as it applies to statutes and ordinances

adopted by legislative bodies. Moreover, in order for a voter initiative to be considered volitionally severable, the provisions to be severed must have been presented to the electorate in a manner that established their independent significance and independent evaluation by the voters in light of the assigned purposes of the initiative measure. (*People v. Salazar-Merino* (2001) 89 Cal.App.4th 590, 600.)

A final determination on whether the valid parts of the measure, if any, can or should be adopted by the Board or referred to the voters cannot be made without knowing how a court has ruled on any legal challenges to the measure. However, as the legal analysis elsewhere in this memorandum shows, the legal flaws in the measure are so fundamental that it is unlikely the valid parts of the measure, if any, can or should be adopted by the Board or referred to the voters.

J. PRE-ELECTION JUDICIAL REVIEW

California trial courts will review an initiative measure for legal validity prior to submission to the voters if the voters lack the power to enact the measure or if the measure would conflict with state law. However, the decision to review an initiative measure prior to its submission to the voters lies wholly within the discretion of the court (*deBottrari v. City Council* (1985) 171 Cal.App.3d 1204, 1209). There is no constitutional right to place an invalid initiative on the ballot (*San Francisco Forty-Niners v. Nishioka* (1999) 75 Cal.App.4th 637, 645-648). And in considering a pre-election challenge, a court balances two competing interests: the court's concern with preventing the waste of public funds in pointless elections against the court's reluctance to delay the exercise of the public's right to vote on a measure while its legality is being determined (See *Gayle v. Hamm* (1972) 25 Cal.App.3d 250, 257-258.)

Under these competing interests, the courts have developed and applied an appropriate standard for pre-election review: while a trial court should give great deference to the electorates' constitutional right to enact laws through the initiative process, a court will remove an initiative from the ballot only if a proper case has been established for interfering, i.e., where the invalidity is clear beyond a doubt (*Save Stanislaus Area Farm Economy v. Board of Supervisors* (1993) 13 Cal.App.4th 141, 150-151).

For example, in *City of San Diego v. Dunkle* (2001) 86 Cal.App.4th 141, involving the pre-election challenge to a baseball stadium initiative, the court stated:

> "It is well established that preelection review of ballot measures is appropriate where the validity of a proposal is in serious question, and where the matter can be resolved as a matter of law before unnecessary expenditures of time and effort have been placed into a futile election campaign"

The appellate court found that the measure was administrative and not legislative in character and beyond the power of the voters, and was therefore invalid.

In *Senate of the State of California v. Jones, supra,* 21 Cal.4th at p. 1154, (involving a pre-election challenge to Proposition 24, which would transfer reapportionment power from the Legislature to the California Supreme Court and provide for the compensation of state legislators and officers), the Supreme Court directed that the measure be kept off the ballot because it violated the single subject requirement of the California Constitution. The court stated that deferring the decision until after the election "may contribute to an increasing cynicism on the part of the electorate with respect to the efficacy of the initiative process." The court further stated that:

> "The presence of an invalid measure on the ballot steals attention, time, and money from the numerous valid propositions on the same ballot. It will confuse some voters and frustrate others, and an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure, tends to denigrate the legitimate use of the initiative procedure. [Citation omitted.]
>
> "In our view, this state's experience with successful postelection challenges to initiative measures . . . amply confirms the accuracy of these observations. [citation omitted]. If an initiative measure is facially defective in its entirety, it is "wholly unjustified to allow voters to give their time, thought, and deliberation to the question of the desirability of the legislation as to which they are to cast their ballots, and thereafter, if their vote be in the affirmative, confront them with a judicial decree that their action was in vain." (*Id* at pp. 1154-1155.)

In *Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1036 (involving a pre-election review of an initiative measure pertaining to

homosexuality and acquired immune deficiency syndrome), the court found the initiative was both substantively invalid and beyond the power of the electorate and did not require that it be placed on the ballot, because it would "constitute a fraud on the electorate if [the court] permitted the initiative to reach the ballot in its present form." The court further stated:

> "[I]f an initiative ordinance is invalid, no purpose is served by submitting it to the voters. The costs of an election-and of preparing the ballot materials necessary for each measure-are far from insignificant. Proponents and opponents of a measure may both expend large sums of money during the election campaign. Frequently, the heated rhetoric of an election campaign may open permanent rifts in a community.That the people's right to directly legislate through the initiative process is to be respected and cherished does not require the useless expenditure of money and creation of emotional community divisions concerning a measure which is for any reason legally invalid." (*Id* at p. 1023.)

Substantial questions have been raised concerning the measure, both as to the county electorate's power to adopt the measure as well as the legal validity of the measure if adopted. Under such circumstances, a trial court may well exercise its discretion to conduct pre-election judicial review of the measure and if it is demonstrated that the invalidity of the measure is clear beyond a doubt, the court may exclude the measure from the ballot.

LS:cn

OVERVIEW OF LAWSUIT AGAINST VENTURA COUNTY PENSION INITIATIVE

Ventura County has established a retirement system under California's County Employees Retirement Law, or "CERL." Under this system, the County provides certain benefits to employees according to terms set forth by State law. The proposed initiative would repeal the County's existing retirement system, create a new defined contribution plan, and limit County contributions to that plan. There are at least five arguments why it is unlawful.

1. Violation of State Law Governing County Employee Retirement Systems. Ventura County decided decades ago to opt into CERL, which provides a specific structure within which counties can establish, maintain, and modify their own retirement systems. The Initiative would repeal the County's participation in CERL without providing a legislatively approved alternative for existing employees and retirees, and would require that all new employees participate in a "Defined Contribution Plan." The Initiative violates State law because CERL does not permit the County to unilaterally repeal its existing retirement system, and the County has not received statutory authorization to impose a new retirement system.

2. Violation of State Law Governing Labor Negotiations. The Meyers-Milias Brown Act ("MMBA") requires the County to negotiate with its employees in good faith and prohibits a board of supervisors from determining policy before negotiations. The Initiative violates the MMBA and prevents the County from negotiating in good faith with its employees because it pre-determines the types and amounts of benefits, the County's contributions to pension benefits, and modifications to those benefits. It also effectively prohibits increases in compensation to some existing employees for five years. The Board cannot legally change these policies.

3. Violation of Exclusive Delegation of Authority to the County Board of Supervisors. State law expressly delegates the authority to establish the compensation of county employees to each county board of supervisors. There is a statewide interest in confining this authority to boards of supervisors, including maintaining stable labor relations and providing certainty that is needed to administer retirement systems and protect retirement system assets. The Initiative would violate this exclusive delegation of power.

4. Impairment of Essential Government Functions. An initiative may not impair essential government functions, including control of the county budget and the adoption of policies necessary to attract and retain qualified personnel, especially safety personnel. Adopting a budget entails a complex balancing of public needs with limited financial resources, and personnel costs are the largest share of county budgets. The Initiative would prevent the County from hiring and retaining qualified personnel, and will likely impose additional general fund costs to cover the absence of new employee contributions to the existing retirement system and a shortened horizon for payment of the unfunded liability.

5. Failure to Enact Legislation. The power to adopt legislation by initiative is limited to the declaration of a purpose and making provisions for the ways and means of accomplishing that purpose. The Initiative purports to "phase out" the existing retirement system and allow the Board to develop new death and disability benefits but does provide any guidance or standards on how to accomplish either goal and is therefore legally deficient.