S285426

No. __________

IN THE SUPREME COURT OF CALIFORNIA

CITY OF SAN JOSÉ,
Plaintiff and Respondent,

v.

HOWARD JARVIS TAXPAYERS ASSOCIATION, CITIZENS FOR FISCAL RESPONSIBILITY, and PAT WAITE, et al.
Defendants and Appellants.

After the Denial of a Petition to Rehear a Published Decision of the Court of Appeal, Sixth District, Case No. H050889
On Appeal from the Santa Clara County Superior Court
Case No. 21CV391517
Honorable Sunil R. Kulkarni

PETITION FOR REVIEW

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THE IMPORTANCE OF THIS CASE

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Appellants Howard Jarvis Taxpayers Association (HJTA), Citizens for Fiscal Responsibility, and Pat Waite petition this court for review of the published decision of the Court of Appeal for the Sixth Appellate District, filed on April 29, 2024. In this decision, the Court of Appeal decided that article XVI, section 18 (section 18) of the California Constitution did not require voter approval when the city council passed a resolution to issue a $3.5 billion pension obligation bond (POB). A true and correct copy of the decision is attached as Exhibit A.

A *state* POB requires voter approval under section 18's counterpart, article XVI, section 1 (section 1). (*State ex rel. Pension Obligation Bond Com. v. All Persons Interested etc*. (2007) 152 Cal.App.4th 1386.) These voter approval guarantees date back to 1879. But this is the first case involving the voters' right to approve or disapprove a *local* POB under section 18.

Review is important because the Court of Appeal here split from the tandem ruling in *State* and reached the opposite conclusion despite the parallel language and otherwise identical value and treatment of the state and local provisions. There is an exception from the voter approval requirement for "obligations imposed by law," but *State* held that the exception does not apply to a POB under section 1. Further distancing itself from *State* despite the tandem treatment of sections 1 and 18, the Court of

Appeal radically concluded that the exception is irrelevant because section 18 does not apply at all!

There is no dispute that the $3.5 billion sought by the San Jose City Council would ordinarily trigger the need for voter approval because it is an amount "exceeding in any year the income and revenue provided for such year." (Cal. Const., art. XVI, § 18(a).) The purpose of the bond is not to pay a demand or a judgment, but to provide "a large infusion of cash" to invest. (1 AA 140; 155.) Appellants assert therefore that a *local* POB requires voter approval just as a *state* POB does.

Constitutional voter rights are at stake and the decision's conflict with on-point precedent is inexplicable and confusing. Two other districts are facing the same legal question. (*City of Escondido v. Jane Fawcett* (D082525, app. pending, argued June 10, 2024); *City of Oxnard v. HJTA* (B328083, app. pending).) This case takes place in a charter city, while the two other cases take place in general law cities. But the common question remains. Local voters and taxpayers across the state need this Court's review for clarity and to uphold their right to approve or disapprove new debt under section 18.

QUESTION PRESENTED

On a $3.5 billion pension obligation bond (POB) exceeding the City of San Jose's annual budget, is voter approval not required under article XVI, section 18 of the California Constitution?

/ / /

GROUNDS FOR REVIEW UNDER RULE 8.500

Review is necessary to settle important questions of law. The result of no voter approval is serious enough reason to review, but in denying the right to vote, the Court of Appeal ruled that a $3.5 billion loan is not even a debt! The Court thus failed to analyze the only relevant debt exception: the "obligation imposed by law" exception. Appellants' argument that a local POB fails this test has not been heard.

Unlike in the parallel state level case, *State ex rel. Pension Obligation Bond Com. v. All Persons Interested etc.*, 152 Cal.App.4th 1386, the Court of Appeal here found that "the city's actions do not trigger the constitutional debt limitation" at all. (Exh. A at 3.) This opens a loophole for local governments to create financial problems or make promises; to then assert that these self-imposed problems or promises are debts that have "already occurred;" (Exh. A at 15), and to then avoid accountability to the voters and the taxpaying public by borrowing money to bail themselves out of trouble.

By finding that the debt limit provision is not even triggered, the Court of Appeal declared it unnecessary to perform the "obligation imposed by law" analysis. This analysis asks if there is a preexisting obligation incurred *involuntarily* by the government entity that is claiming excuse from voter approval. This was asked in *State* and should have been asked here.

Another important question of law is whether article XVI, section 17 vests the relevant power in the city council or in the retirement board. (Exh. A at 10-15.) Since 1992, due to the initiative constitutional amendment known as Proposition 162, Section 17 vests "sole and exclusive responsibility" for numerous functions in the retirement board. But the decision here blurs the board and city council together as one, attempting to articulate "a *municipality*'s constitutional obligation" vis-à-vis its pension system. (Exh. A at 1, emphasis added.) Review is necessary to settle the important question of whether the city council may take it upon itself to determine what payments are due and when, given article XVI, section 17.

A final important question of law is the impact of non-governmental accounting standards boards on California law. By finding that "contemporary professional accounting standards" govern what is a debt for purposes of section 18, (Exh. A at 16), the decision not only shifts authority from California's judiciary to a nongovernmental board in another state, thereby undermining our constitutional law's stability, but it also disagrees with core precedent: *County of Orange v. Association of Orange County Deputy Sheriffs* (2011) 192 Cal.App.4th 21 and *San Diegans for Open Government v. City of San Diego* (2015) 242 Cal.App.4th 416.

DENIAL OF REHEARING BELOW

Appellants petitioned for rehearing on May 14, 2024. The Court of Appeal denied rehearing without modification on May 17, 2024.

The petition for rehearing explained that the decision relied on two material factual errors as well as improper constitutional analysis. The factual errors were used to improperly distinguish core precedent. The improper constitutional analysis was primarily the failure to apply section 18, and thus the complete failure to analyze whether the "obligation imposed by law" exception to voter approval applied. Secondarily, improper analysis included blurring the roles of the retirement board and city council, applying changed accounting practices as if they had the power to overrule California case law, and finding that unfunded actuarial liability qualifies as "other evidence of indebtedness" that the city may convert to a bond.

While it is not ordinarily this Court's burden to correct factual mistakes in a lower court's narrative, public interest demands highlighting the two material errors here to show the gravity of the outcome if this case is left unreviewed. The following two factual errors were summarized in the petition for rehearing.

First, the decision erred by basing its conclusion that voter approval is unnecessary upon the assumption that, "under the terms of the challenged resolution, the city may not issue the bonds unless they result in savings to the city." (Exh. A at 19; see also *id.* at 20 ["… on the condition that they result in a savings to the city. Under these circumstances, we decide…"].) But the City admitted in the record that it *cannot know* if taxpayers will experience savings until the bonds are fully repaid. (See, i.e., 1 AA 122 [City presentation declaring "**Savings not determined until final maturity**" of POBs"] Emphasis added.) In short, the Court of

Appeal assumed that the City's hopeful prediction will come true decades from now. It simultaneously conceded, however, that if savings don't materialize, "additional cost might well trigger the constitutional debt limitation." (Exh. A at 19.) The voters and taxpayers should not be left in this position where a city council can skirt voter approval by merely hoping that new debt invested in the stock market will result in taxpayer savings, especially since the Court of Appeal articulated no event or time certain when the City's unrealized hope would finally ripen into a cause of action.

Second, the Court of Appeal distinguished core precedent on the false assumption that no benefit increases were part of San Jose's unfunded actuarial liability estimate. (Decision at 4 ["The city's unfunded liability has grown **<u>not because of increases in promised benefits</u>**, but because declining interest rates on the expected rate of return on the city's investments, as well as changes to certain assumptions about demographic factors, including mortality and retirement rates, have affected the present value of future pension payments."] Emphasis added.) Again, this is simply untrue. And it will certainly mislead future potential litigants, who will not be able to interpret whether voter approval is necessary when benefit enhancements *clearly were* part of the unfunded liability. Here again, because the City admitted in the record that benefit increases were part of the unfunded actuarial liability (1 RA 0098; 2 RA 0334), the Court of Appeal should have applied existing judicial precedents to the actual facts of this case, rather than fabricating revised facts in order to distinguish existing precedent. As voters have understood since 2011, they may not vote on benefit increases or unfunded actuarial liability, because it is too early under *County of Orange*, 192 Cal.App.4th 21. If they cannot now vote on a POB because it is too late, their constitutional voice will be forever disenfranchised.

Moving on to the legal errors, the petition for rehearing explained that the Court of Appeal's broad error was radically concluding that section 18 does not apply. (Exh. A at 3.) Previously, all governments relied upon the section's application, considering it only potentially excusable through the "obligation imposed by law" exception. (See, i.e., *State ex. rel. Pension Obligation Bond Com.*, 152 Cal.App.4th at 1399 ["The third exception, and the one at issue here, applies to obligations imposed by law."].) The "obligation imposed by law" exception was not analyzed here and, because the petition was denied, remains unanalyzed.

The petition also explained that the Court of Appeal generally erred by imputing the role of the retirement board to the city council. The decision correctly states that "the city's retirement board is charged with 'maintaining the actuarial soundness' of the plans consistent with article XVI, section 17 of the California Constitution." (Exh. A at 10.) Maintaining sufficient assets, performing actuarial calculations, determining the annual contribution required from member agencies, and ensuring the overall soundness of the pension system are the "sole and exclusive" duties of the retirement board. This case does not challenge any decision or action by the retirement board. Rather, it challenges the city council's unilateral decision to issue a $3.5

billion POB to serve as a "large infusion of cash" (1 AA 140; 155) when the retirement board never asked for a large infusion of cash. The retirement board is not involved. Its duties should not have been imputed to the city council because the city council has no authority to act as, or for, the retirement board.

Finally, the petition explained that the Court of Appeal erred by allowing an accounting standards board to direct state law. *County of Orange* determined that unfunded pension liability is not a debt under section 18, and therefore voters may not vote upon its existence or its increases. If the addition of new benefits or a dip in the market that creates an unfunded liability are not yet debts, as *County of Orange* held, then voters would logically expect to exercise their right to vote at the next point in the financial continuum, i.e., when money is borrowed to pay for the new benefits or backfill the unfunded liability. But the Court of Appeal here declared: "Contemporary professional accounting standards support the characterization of the unfunded liability as a *current* debt." (Exh. A at 16, emphasis added.) If unfunded liability is a current existing debt per the City and the Court of Appeal here, then issuing a POB is merely converting an existing debt to a new form. Thus, absent review, the voters have no rights under section 18, and the latest accounting characterization(s) will hereinafter direct the law, de-stabilizing all past and future decisions involving either public accounting or the right of taxpaying voters to control the amount of debt they must shoulder.

SUMMARY OF FACTS AND PROCEDURAL HISTORY

The San Jose City Council established one retirement plan (police and fire) in 1961 and another (federated plan) in 1975. (Exh. A at 3.) As of June 30, 2020, between both plans, there was an estimated $3.5 billion in unfunded actuarial liability for future estimated payments to public employees. This is due to multiple factors, (Exh. A at 4), including non-voter-approved benefit increases. (1 RA 0098; 2 RA 0334.) Unfunded liability can also rise and fall significantly according to stock market performance on the assets invested.

On October 5, 2021, the San Jose City Council passed a resolution to authorize a $3.5 billion pension obligation bond (POB) or tranches of such POBs totaling $3.5 billion. (1 AA 010.) The City acknowledges that any taxpayer savings could not be "determined until final maturity of POBs." (1 AA 122.) A POB would "potentially provide savings." (3 RA 0795.)

Experts caution that POBs are risky and advise against them even when interest rates are low. (1 AA 072-073; 114; 122-124; 2 AA 437 [guidance affirmed as of February 2021 "regardless of current economic cycles"].) The City recognizes the risk, but criticizes the expert conclusions as "banal." (1 AA 114; 122-124; 141; 149; 193; 2 AA 433-437 ["Invested POB proceeds might fail to earn more than the interest rate on the bonds, leading to an increased UAL." … "Primary risk of POBs … that the market drops soon after the retirement system invests the POB proceeds in the market. This risk should be thoroughly analyzed and understood by issuers."] Emphasis in original.) Contributing to bankruptcy is one such risk, as occurred in Stockton and San Bernardino. (1 AA 073; 2 AA 453 ["City of San Jose Pension Obligation Financing Options" document recognizing these bankruptcies along with that of Detroit].) While the City Council contends it can act wisely against this backdrop, Appellants assert not that the POB is impossible, but that voters have a constitutional right to consider the terms and approve or disapprove it per section 18.

On November 18, 2021, the City filed a Code of Civil Procedure Section 860 validation action against "all persons interested" seeking judicial authorization for the POB (or collective POBs) without voter approval under section 18. (1 AA 008-016.) The City recognized application of section 18 and claimed the "obligation imposed by law" exception. (1 AA at 015.) As "persons interested," Defendants Howard Jarvis Taxpayers, Citizens for Fiscal Responsibility, and Pat Waite, answered. (1 AA 022-031.) Defendants asserted that the "obligation imposed by law" exception does not apply, and that voter approval is indeed necessary.

Following a trial on the papers on August 22, 2022, the trial court filed its "Final Statement of Decision Following Court Trial" on December 9, 2022. (1 AA at 529-539.) The trial decision found that the "obligation imposed by law" exception to voter approval applies and the POBs are valid. Defendants timely filed a Notice of Appeal on March 8, 2023. (1 AA at 557.)

The Court of Appeal affirmed on April 29, 2024, but without reaching the "obligation imposed by law" analysis. It found instead that "the city has not 'incur[red] any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year." (Exh. A at 2-3, citing Cal. Const., art. XVI, § 18(a).) Therefore, it reasoned, section 18 is not applicable, and, for that reason, voter approval is unnecessary. It is from this decision that Appellants seek review.

ARGUMENT

I

Review Is Necessary To Preserve Section 18 Voter Rights.

Article XVI, section 18(a) provides, in relevant part:

> No county, city, town, township, board of education, or school district, 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 of the public entity voting at an election to be held for that purpose…

The decision here circumvents and degrades section 18 with the following logic: "The actions that incurred the city's existing liability – enacting the pension plans and employing the individuals covered by them – have already occurred." (Exh. A at 15.) If this is so, there are two possible results, each destructive to local public finance. The first is that local governments can obligate themselves through financial promises or contracts, declare any time thereafter that they have "already occurred" and avoid section 18 when borrowing money to cover those promises or contracts. In other words, contrary to the entire purpose of section 18, they can impose an obligation on their taxpayers and then finance it without voter approval.

The other result is that the Court of Appeal has effectively established a new "voluntary obligation" exception by reducing the standards from those of the existing "obligation imposed by law" exception. Notably, the decision writes heavily about obligations to public employees, citing many "obligation imposed by law" cases. Either way, review is necessary to uphold section 18's applicability. Local governments should not be permitted to run away with financial over-commitments by simply separating the time of promising from the time of paying.

As for the "obligation" stated in the opening of the decision — to make pension payments and to ensure sufficient assets, (Exh. A at 1), — no one disputes that promises to public employees must be honored. Public employees usually develop vested rights in their pensions. In fact, Appellants' position that *State* requires voter approval of a POB whether at the state level or at the local level is based on the "California Rule" which requires state and local governments alike to honor pension promises. (*Cal Fire Local 2881 v. California Public Employees' Retirement System* (2019) 6 Cal.5th 965, 971 ["California Rule" continues to protect vested pension rights from cancellation].) In other words, state and local government are in exactly the same position as to public employee vested rights. They chose to have retirement plans, after which contractual and statutory obligations stemmed from those choices.

Yet, and despite the opposite outcome in *State*, the decision here emphasizes "vested rights" and uses it as a basis for allowing a POB without voter approval. (Exh. A at 8-10; 12-15.) Accordingly, review is necessary to clarify that voter approval under section 18 is no threat to public employee pensions. Even if voters disapproved borrowing money through a POB to prepay potential future liability, the vested pension rights of employees and retirees would remain untouched, and the City would remain obligated each year to pay the annual contribution demanded by the pension board in order to keep the City's pension account solvent. Just as vested rights continue unharmed at the state level following *State*, local employee vested rights will exist whether or not voters approve any city council's POB proposal.

What has really happened in the decision is that the "obligation imposed by law" exception has been half-applied so as to create a new "voluntary obligation" exception that degrades section 18. For example, the decision states that "Both state and municipal law require that the city's pension plans be actuarially sound." (Exh. A at 9, emphasis added.) But the city's pension plans are actuarially sound. Ensuring actuarial soundness is the job of the pension board, and nothing in the record suggests that the board is not doing its job. The pension board is not demanding or even advocating that the city issue a POB. Issuing a POB is something the city council wants to do voluntarily. That is deficient grounds for asserting an obligation imposed by law.

The "obligation imposed by law" exception to section 18 voter approval requires involuntariness in the first instance, a key element which is ignored in the decision, thus creating a new "voluntary obligation" exception, and inherently defeating the purpose and design of section 18.

Involuntariness for purposes of the exception means that the original action was involuntary. This is what is meant by the original obligation having been "imposed by law." This usually occurs clearly and directly through a statute or a tort judgment. They are involuntary because there is no getting around these impositions. They are imposed and absolute at inception. Here, just as in *State*, the original "obligation" was a voluntary decision to create a pension plan. But as the decision's citation to Government Code 45301 reveals, state law only provides that cities "may" establish pension plans. (Exh. A at 9.) State law never required them, so they were not obligations "imposed by law." And even if a subsequently applicable law could create an "obligation imposed by law," which it cannot, the decision's other citations regarding actuarial soundness, such as Government Code section 45342, pre-date Proposition 162, the 1992 initiative constitutional amendment of article XVI, section 17, placing "sole and exclusive" authority over actuarial services and soundness in the retirement boards, not the city council.

If voluntary local government actions having "already occurred" excuses local governments from section 18, then government promising and contracting becomes far less accountable than intended by our 1879 constitution. Review must be granted to reconsider this important right of voters and taxpayers in public finance.

II

<u>Review Is Necessary Because The Court Of Appeal Refused To Perform The "Obligation Imposed by Law" Exception Analysis.</u>

Until this decision circumventing section 18, voters, taxpayers, and governments have operated on the understanding that voter approval is required whenever the government wants to incur debt, especially through issuing bonds, in an amount that exceeds that government's annual budget – unless an exception applies, such as the "obligation imposed by law" exception. (*State ex rel. Pension Obligation Bond Com. v. All Persons Interested etc.,* 152 Cal.App.4th at 1399 ["The third exception, and the one at issue here, applies to obligations imposed by law."]; *County of Orange*, 192 Cal.App.4th at 35-36; 67 Ops.Cal.Atty.Gen. 349, 353 (1984) ["If the debt is not 'voluntarily' incurred, the constitutional requirement will be found inapplicable. (*American Co. v. City of Lakeport*, *supra*, 220 Cal. 548, 557-558; *City of Pasadena v. McAllaster* (1928) 204 Cal. 267, 273; *City of Long Beach v. Lisenby*, *supra*, 180 Cal. 52, 57-58; *Lotts v. Board of Park Commrs*. (1936) 13 Cal.App.2d 625, 635.) The primary application of this theory has been where the Legislature has 'imposed' an obligation upon local governments by statute. (See, e.g., *Lewis v. Widber* (1893) 99 Cal. 412, 413; *Wright v. Compton Unified School District* (1975) 46 Cal.App.3d

177, 181-183; *City of La Habra v. Pellerin* (1963) 216 Cal.App.2d 99, 102; *People ex rel. City of Downey v. Downey County Water Dist*. (1962) 202 Cal.App.2d 786, 805; *Sacramento Municipal Util. Dist. v. Spink* (1956) 145 Cal.App.2d 568, 579-580.)"].) Even the City here did not expect to avoid section 18 without qualifying for the "obligation imposed by law" exception. (3 RA 0805 [City of San Jose presentation recognizing it must satisfy "obligation imposed by law" judicial exception].)

The decision of the Court of Appeal, however, declares this exception analysis unnecessary because it finds section 18 itself inapplicable. (Exh. A at 2-3 ["We affirm the judgment, but our reasoning differs from that of the trial court. We decide that under the terms of the challenged resolution, the city has not 'incur[red] any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year.'"].) Because of this conclusion, it said, "we need not consider the applicability of its exceptions." (Exh. A at 3.) Review must be granted to check this dangerous reasoning. As discussed above, if a local government can issue bonds without voter approval by simply inserting delay between the making of a promise or contract and the financing of that promise or contract, then it can circumvent voter rights under section 18 entirely. The application of the exception analysis must be re-enforced.

The decision's stated avoidance of the exception is disingenuous. For example, among its references to "obligations," the decision cites *Wright v. Compton Unified School District* (1975) 46 Cal.App.3d 177, 181-182 as support for its finding that actuarial soundness (broad concept as it is) is an imposed legal obligation of the city. (Exh. A at 13 ["The use of the term 'shall' in this context describes a legal obligation. See *Wright v. Compton Unified Sch. Dist.* (1975) 46 Cal.App.3d 177, 181-182"].) *Wright v. Compton* performed the "obligation imposed by law" exception analysis. It did so because a statute, Government Code 995, required public entities to provide legal representation to school employees when sued in the scope of their employment. This was a classic example of an "obligation imposed by law" because a statute specifically commanded the undertaking and immediate payment therefor. Notably, it also specified that this was "upon request of an employee." (46 Cal.App.3d at 181.) Here, no request has been made by the retirement board (or an employee or association of employees) that the city council pay $3.5 billion into the system. Nor is there a statute commanding such payment as Government Code section 995 did in *Wright v. Compton*. The Court of Appeal should have completed the "obligation imposed by law" analysis, not merely an "obligation" analysis.

As mentioned, the most vital element missing from the "obligation imposed by law" analysis is involuntariness. In brief, if an obligation is incurred voluntarily, it is not an "obligation imposed by law" and vice versa. In 2007, the Third District Court of Appeal found that the State's then-*current* year's[1] payment to

[1] Arguably, a current year's required payment is far more of an obligation than an additional discretionary payment on future unfunded liability projections. The $960 million POB proposal in

CalPERS was not an "obligation imposed by law" (proposed to be paid by an optional $960 million POB) because the state's obligation to fund pension benefits was "voluntarily undertaken." (*State ex. rel. Pension Obligation Bond Com.*, 152 Cal.App.4th at 1407.) The City's decision to have a pension system here was likewise voluntarily undertaken. (See Gov. Code, §§ 45301; 45306; see also Cal. Civ. Code, §§ 1550; 1565 [consent of parties required for contract, which is "free," "mutual," and "communicated"].)

Voluntariness is determined at inception only, here the initial decision to create a retirement plan. (*State ex. rel. Pension Obligation Bond Com.*, 152 Cal.App.4th at 1399, citing *Arthur v. City of Pasadena* (1917) 173 Cal. 216 [voluntary decision of city to adopt charter did not render involuntary the statutory obligations resulting from that choice].) Put another way, when the "same governing body" that makes a financial commitment then finds itself subject to a resulting legal requirement, its compliance with those resulting legal requirements do not qualify it for the "obligation imposed by law" exception because the voluntary nature of the original commitment cannot be changed in retrospect. (*Pasadena v. McAllaster* (1928) 204 Cal. 267, 276.)

Comparison to *State* is especially important because it reiterated that section 1 and section 18 are construed "in tandem." (*County of Orange*, 192 Cal.App.4th at 35-36, citing

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State thus had a better argument than here for paying an "obligation imposed by law."

Dean v. Kuchel (1950) 35 Cal.2d 444, 446; *State ex. rel. Pension Obligation Bond Com.*, 152 Cal.App.4th at 1397-1401; 67 Ops.Cal.Atty.Gen. 349, 351 (1984); *In re California Toll Bridge Authority* (1931) 212 Cal. 298, 308.) Thus, a POB at the local level should be reviewed under the "obligation imposed by law" exception just as it has been at the state level. Review must be granted to assure this analysis is performed.

III

Review Is Necessary To Clarify The City Council's Role.

The decision heavily focuses on actuarial duties to the pension plans, but these are duties of the retirement boards, not the city council. (Cal. Const., art. XVI, § 17.) Review is needed to focus on the city council's proposal, not the board's section 17 duties.

The city agrees that the council and the board have separate roles. A September 1, 2021, city memorandum announced "independent, but interrelated roles" of the city council and the retirement boards, in that "only the City Council will have a role in authorizing and paying any POBs that are issued. Conversely, only the respective retirement boards will have authority and responsibility to make decisions about how the proceeds of the bonds are invested once transferred by the City to the respective boards to satisfy a portion of the UAL of each plan." (1 AA at 094.) The city council intends to exercise its discretion in "authorizing and paying" POB debt proceeds to the board. But the board has never said — in *its* role — that actuarial soundness demands additional payment, and so there is no bill for $3.5 billion.

The fact that the city council wants to act within its discretion to pay $3.5 billion (using a new debt instrument) to its retirement boards should put the burden on the city council to prove it qualifies for an exception to section 18 before issuing that new debt. (*Standard Pacific Corp. v. Superior Court* (2009) 176 Cal.App.4th 828, 834 ["As a rule, the party seeking to rely on an exception to a general rule has the burden of proving the exception."]; *City of Lafayette v. East Bay Mun. Utility Dist.* (1993) 16 Cal.App.4th 1005, 1017; *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 24-26 ["The burden of proof as to the applicability of the commercial speech exemption, therefore, falls on the party seeking the benefit of it."].) The city council must be held to that burden on review. There is nothing about the city council's role that takes it outside of section 18.

The blurring of these roles is apparent where the decision states, "In April 2021, the city considered options for paying the unfunded liability to return the retirement plans to actuarially sound footings. The city determined that it would seek approval by resolution of the issuance of pension obligation bonds." (Exh. A at 4.) The decision should be saying "city council" because it was the city council that "considered options for paying the unfunded liability to return the retirement plans to actuarially sound footings." But whether the city's future unfunded liability needed to be paid today to make its plans actuarially sound was a decision left to the sole and exclusive discretion of the retirement boards. Reciting, as if it was proper, that the city council considered options for paying down its unfunded liability reveals the decision's flaw because it assumes the city council could perform this role. But the retirement boards have exclusive authority to perform actuarial services and maintain actuarial soundness. (Cal. Const., art. XVI, § 17.) Therefore, the city council's discretion is limited to what remains: establishing the pension promises according to law and making annual payments as the board calculates and calls them due. Where the city council would like to exceed that discretion and issue a POB in the hopes of bettering its pension system, section 18 dictates that it either ask the voters for approval or prove an exception excusing it from doing so.

This decision has turned section 18 around, however, because it places a new burden on voters to guess when their local governments are "incur[ring] any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year." (Cal. Const., art. XVI, § 18(a).) And if they guess wrong, then their constitutional right is forfeited. They should not have to so guess. Section 18's liberal use of the word "any" combined with "liability," "manner" and "for any purpose" should mean that any action exceeding the annual budget requires voter approval absent an exception. Section 18 requires voter approval before a local government "incur[s] any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year." The phrase "for any purpose" should include the purpose of making a discretionary prepayment on an unfunded actuarial liability estimate. A POB is a new liability with new terms and new consequences. That an optional $3.5 billion bond could be considered exempt from section 18 is extreme and puts the section at risk. This Court should grant review and clarify that section 17 duties are only the board's.

Simply put, review is necessary so that only the city council's powers and actions are considered under section 18[2]. Those actions must be considered against the rights of the voters, not the public employees whose rights are not disturbed nor litigated here despite the decision's contrary representation. No retirement board is a party. No retirement board has presented the City with an invoice for $3.5 billion. No retirement board has been sued for failure to maintain actuarial soundness, wherein a judgment might be sought to force it to demand higher payments from the City. No retiree is a party or has alleged they did not receive their pension check. No current public employee is a party or has alleged any damage to their pension benefits. This case is

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[2] In a pre-1992 case, actuarial soundness was an issue for a city council, but only at the "creation" of the plan. (*City of Costa Mesa v. McKenzie* (1973) 30 Cal.App.3d 763, 766 ["Nine years after its incorporation in 1953 as a general law city, Costa Mesa through its city council created an actuarially sound retirement plan for city employees pursuant to Government Code sections 45341-45345."]; see also Exh. A t 9 [charter language focusing on what the council would "establish"].) No one in this case asserts there was a "creation" of an actuarially unsound plan for which the city council must now course-correct through a POB. The plans were long ago created and presumably on actuarially sound terms at the time(s).

against an admittedly discretionary act of the city council to issue a $3.5 billion bond. This case is simply asserting the constitutional right of voter approval of that bond. Review is necessary because constitutionally exclusive functions of one entity have been grafted on to a city council as a means of avoiding applicable constitutional law guaranteeing voter rights.

IV

Review Is Necessary To Ensure That California Law Is Not Controlled By Advisory Boards.

The decision ignored core precedent, *County of Orange*, 192 Cal.App.4th 21, not based on a change in California law, but on changed accounting practices as set by a board in Connecticut known as GASB[3]. In so doing, it ignored a related key ruling in *San Diegans for Open Government v. City of San Diego* (2015) 242 Cal.App.4th 416 that GASB (and even GAAP) practices do not control California law.

County of Orange mentioned that GASB accounting principles at the time did not treat unfunded pension liability as a debt. The court mentioned GASB only to buttress the conclusion it had already reached, and only to respond to an amicus brief. (192 Cal.App.4th at 39.) Prior to this point in the

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[3] GASB stands for Government Accounting Standards Board. Established in 1984, GASB is an independent, private- sector organization based in Norwalk, Connecticut, that establishes accounting and financial reporting standards for U.S. state and local governments that follow Generally Accepted Accounting Principles (GAAP).

County of Orange opinion, the court had already reviewed over a half dozen cases, and compared three Attorney General Opinions, to reach its conclusion that unfunded liability is not a debt for purposes of section 18. That is the answer to the question of law here. *San Diegans for Open Government* then made clear that GASB and GAAP revisions do not have the force of law or have the power to alter California judicial precedents. Since *County of Orange* was not based on GASB accounting principles, it is still perfectly good law and, as to this case, it is on-point precedent. The Court of Appeal in this case had no grounds for distinguishing or rejecting it.

County of Orange specifically decided that unfunded pension liability is not "debt" under section 18. It's just an estimate. Voters have relied on this case to the effect that they may not vote when unfunded liability is increased due to benefit increases or market fluctuations. And logically from the voters' perspective, then, if the fluctuating estimate of unfunded liability itself is not a "debt" they can vote upon under section 18, then a POB (not an estimate) to "prepay" it must be.

To counter this logical voter viewpoint, City's attorneys seized on a GASB change in accounting practices in 2012, one year after *County of Orange* was published. This new practice advises governments to "include pension plans' unfunded liability as a deficit on their balance sheet." (Exh. A at 17.) But moving unfunded liability to a different location in accounting reports does not convert its nature. It is still simply an actuary's estimate at a given snapshot in time, based on a host of assumptions that may or may not materialize, of the City's future pension liability. Nevertheless, the decision uses this change in accounting statements to improperly nullify *County of Orange*.

Reliance on evolving accounting practices would be volatile for the law. That is likely why its first mention in *County of Orange* was as an afterthought in response to an amicus brief, which took time to remind the court incidentally that the unfunded liability was then reported in notes rather than on the balance sheet. (192 Cal.App.4th at 39.) Before reaching this afterthought, however, *County of Orange* had already analyzed and applied the relevant case law, and Attorney General Opinions, to reach its conclusion that unfunded liability is not a debt for purposes of section 18. (*Id*. at 33-39.) The conclusion stood on its own well before the court's commentary on the amicus brief.

Regardless of debate over its relevance, this afterthought was mooted four years later by *San Diegans for Open Government v. City of San Diego* (2015) 242 Cal.App.4th 416, which held that "a public agency's adherence to GASB and GAAP guidelines does not override California law or delineate the legal rights and responsibilities of this state's public agencies." (*Id* at 439.) The decision does not discuss this and therefore it necessitates review.

In direct contrast to *County of Orange* and in ignorance of *San Diegans for Open Government*, the decision found: "Contemporary professional accounting practices support the characterization of the unfunded liability as a current debt." (Exh. A at 16, emphasis added.) The decision should have directly stated it disapproves *County of Orange* and *San Diegans for Open Government*. This Court should review so that voters know what to expect of their rights under section 18. Does *County of Orange* still prohibit them from voting on pension increases or any other actions that would balloon unfunded pension liability? If this decision and *County of Orange* each stand, when can voters exercise their rights under section 18, if ever? And what of *San Diegans for Open Government*? Do changes in accounting practices change California law or not?

The trial judge indeed struggled with this important question, keeping in mind *County of Orange*'s binding precedent. He asked the city's counsel: "Has any case ever distinguished *Orange County* on the grounds that you're proposing now?" to which the City's counsel answered "No." (3 AA 594.) The trial court then summarized to the City's counsel that "you've asked me to disregard what normally would be a binding prior Court opinion because, in your view, it is outdated based on the reliance on now inapplicable accounting standards." (*Ibid*.) That hesitation to use changed accounting standards to go against binding precedent stresses the importance of review here. If *State, County of Orange*, *San Diegans for Open Government* and this decision remain as is, the voters' section 18 rights in the context of pension expansion are destroyed.

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V

Review Is Important To Determine If Unfunded Pension Liability Is "Evidence Of Indebtedness."

A separate but related statutory question of law merits review – that is, whether an unfunded actuarial liability qualifies as "evidence of indebtedness."

The City's only cited statutory authority for issuing the POB is Government Code section 53583. (See Exh. A at 20-21.) Section 53583 provides in pertinent part: "(a) Any local agency may issue bonds ... for the purpose of refunding any revenue bonds of the local agency." In this context, "refunding" doesn't mean reimbursing; it means refinancing. So, for example, if an agency has outstanding "revenue bonds" on which it is paying 10% interest, and interest rates drop to 5%, it can issue new 5% bonds in order to retire the old 10% bonds, and thus save money.

On its face, section 53583 does not apply to this case because the City's proposed bond issuance is not "for the purpose of refunding any revenue bonds." The City argues, however, that the term "revenue bonds" is defined so broadly that it includes unfunded pension liability. "Revenue bonds" are defined in Government Code section 53570 as "bonds, warrants, notes, *or other evidence of indebtedness*." The City argues that unfunded actuarial liability is "evidence of indebtedness," therefore it qualifies as existing "revenue bonds" that the City can "refinance" by issuing refunding bonds. The Court of Appeal accepted this argument. (Exh. A at 26.) Appellants believe this stretches the meaning of "revenue bonds" too far.

In common parlance, "revenue bonds" are a type of bond. Unlike "general obligation bonds," which are backed by the full faith and credit of the issuing agency and repaid from tax revenue, "revenue bonds" are repaid from the revenue produced by some revenue-producing facility (*e.g.*, a power plant) constructed with the bond proceeds. The term "revenue bonds" was coined by the California Supreme Court in the case *In re Cal. Toll Bridge Auth.* (1931) 212 Cal. 298, and described as "bonds secured only by the revenues of a particular utility acquired with proceeds of such bonds." (*Id.* at 307; see also McQuillin, The Law of Municipal Corporations, Municipal Bonds (Nov. 2020 Update) §§ 43:10, 43:14.)

The definition of "revenue bond" in section 53570 may broaden the word "bond" to include "warrants, notes or other evidence of indebtedness," but it does not eliminate the word "revenue." All money paid as annual employer contributions by the City to the retirement boards is derived from *taxes*. There is no revenue-generating enterprise that is funding the City's retirement plans. Therefore, despite the broad definition in section 53570, pension liability is not a *revenue* bond, *revenue* warrant, *revenue* note or other evidence of *revenue* indebtedness.

More fundamentally, unfunded actuarial liability is not evidence of indebtedness at all. Unfunded actuarial liability is an annual estimate, prepared by retirement board actuaries, to show the City a projection of what its future liability for pension payments could be, based on a host of assumptions. Other than its bill for this year's annual contribution, there is no "*evidence* of indebtedness." "Evidence" is a term of art in the law. "'Evidence' means [something] offered to *prove* the *existence* or nonexistence of a *fact*." (Evid. Code, § 140.) A retirement board's annually fluctuating estimate of future liability does not prove, as a fact, the existence of a future indebtedness.

Citing an Attorney General opinion as adopted in *County of Orange*, "No basis for any legally enforceable obligation arises until the events occur and when they do the amount of liability will be based on actual experience rather than the projections." (192 CalApp.4th at 36, citing 65 Ops.Cal.Atty.Gen 571, 574 (1982).) When the Attorney General refers to "events" that have not yet occurred, he means the assumptions upon which the unfunded liability calculation is based. Those assumptions include many unknown future variables such as whether benefits will change or stay the same, the number of active city employees who will be paying into the system, the number of employees who will stay until vested, employee ages at retirement, employee years of service, the number of years retirees collect benefits before dying, and how the pension system's investments perform in future years. Such statements are not conclusive.

Finally, the Court of Appeal's reasoning that unfunded pension liability is a type of revenue bond because it is "evidence of indebtedness" is inconsistent with the general concept of "evidence of indebtedness" being a written negotiable instrument.

As listed in Government Code section 53570, for example, "other evidence of indebtedness" follows "bonds, warrants, notes." None of these are analogous to a fluctuating actuarial estimate.

The decision walks through several other statutes, cases, and legislative history, seeking to decide what is the "support[ed]" or "suggest[ed]" answer to whether unfunded actuarial liability is an "other evidence of indebtedness." (Exh. A at 20-26.) Finding nothing directly applicable, the decision nonetheless concludes that the city has statutory authority to "convert[] the debt represented by the unfunded liability into debt in the form of bonds." (Exh. A at 26.) Similar to its previous analysis avoiding section 18, it did so again by relying on the concept of public employee vested rights, even though they cannot be disturbed by voter approval. (Exh. A at 21; 25, citing *Carman*, 31 Cal.3d at 328, 332.)

The cases the decision then cites as authorizing "converting" the unfunded liability to bonds are unhelpful. In *Los Angeles v. Teed* (1896) 112 Cal. 319, existing *bonds* were simply being replaced by new bonds. If the case at bar were also a case of replacing old bonds with new bonds, it could be done without voter approval. But that's not the case here. *City of Long Beach v. Lisenby* (1919) 180 Cal.52 was a classic "obligation imposed by law" case, wherein a tort judgment for the collapse of a public auditorium required immediate and defined payment. If there were an "obligation imposed by law" here, obviously, the city could finance it without voter approval. But that's not the case here. Thus, while both cases involved conversion, they involved conversion of defined amounts, immediately due and payable, that were already accepted as legally necessary to pay in the present. They did not involve anything analogous to present “conversion” of a fluctuating estimate of future unfunded pension liability. Review is needed to determine if “conversion” of unfunded actuarial liability as “other evidence of indebtedness” is appropriate.

CONCLUSION

For the reasons above, review should be granted.

DATED: June 10, 2024

Respectfully submitted,

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WORD COUNT CERTIFICATION

I certify, pursuant to Rule 8.204 and Rule 8.504(d) of the California Rules of Court, that the attached petition for review, including footnotes but excluding the caption page, tables, and this certification, as measured by the word count of the computer program used to prepare this pleading, contains 7,713 words.

DATED: June 10, 2024

/s/ Laura E. Dougherty
LAURA E. DOUGHERTY
Counsel for Petitioners
HOWARD JARVIS
TAXPAYERS
ASSOCIATION, CITIZENS
FOR FISCAL
RESPONSIBILITY, and PAT
WAITE

Exhibit A

Filed 4/29/24

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CITY OF SAN JOSÉ, Plaintiff and Respondent, v. HOWARD JARVIS TAXPAYERS ASSOCIATION et al., Defendants and Appellants.	H050889 (Santa Clara County Super. Ct. No. 21CV391517)

In this appeal, we consider the application of the constitutional debt limitation to a municipality's constitutional obligation to its employees to make promised pension payments and its duty to ensure pension plans have sufficient assets to be actuarially sound.

Article XVI, section 18, subdivision (a) of the California Constitution sets forth the constitutional debt limitation applicable to cities. It states in relevant part: "No . . . city . . . 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 of the public entity voting at an election to be held for that purpose." (Cal. Const., art. XVI, § 18, subd. (a).)

This provision, which "mandat[es] balanced budgets" (*Rider v. City of San Diego* (1998) 18 Cal.4th 1035, 1045 (*Rider*)), has been part of the California Constitution since 1879. It was enacted in response to "municipal extravagance" (*San Francisco Gas Co. v.

Brickwedel (1882) 62 Cal. 641, 642 (*San Francisco Gas*)) by local governments making large capital investments and thereby "creating huge long term debts." (*Compton Community College etc. Teachers v. Compton Community College Dist.* (1985) 165 Cal.App.3d 82, 88 (*Compton Community College*).)

Courts have identified exceptions to the constitutional debt limitation, including the "special fund doctrine" (*City of Oxnard v. Dale* (1955) 45 Cal.2d 729, 733 [debt limitation not violated by obligations payable solely from a special fund]), obligations imposed by law (*City of Long Beach v. Lisenby* (1919) 180 Cal. 52, 57 (*Lisenby*) [debt limitation has "no application to cases of indebtedness or liability imposed by law or arising out of tort"]), and contingent obligations (*Rider*, *supra*, 18 Cal.4th at p. 1047 [debt limitation inapplicable to "multiyear contracts in which the local government agrees to pay in each successive year for land, goods, or services provided during that year" because each payment is a contemporaneous payment for the property, goods, or services rather than an installment payment on a long-term debt]; see also *Taxpayers for Improving Public Safety v. Schwarzenegger* (2009) 172 Cal.App.4th 749, 763).

Howard Jarvis Taxpayers Association, Citizens for Fiscal Responsibility, and Pat Waite (collectively, HJTA) argue that the City of San José (city) violated the constitutional debt limitation when its city council adopted a resolution authorizing the issuance and sale of bonds, on the condition they result in a savings to the city, to address a shortfall in the city's pension plans. In validation proceedings, the trial court upheld the city's actions against a challenge by HJTA, deciding that the bond issuance falls under the obligation imposed by law exception to the debt limitation. HJTA appeals the judgment, contending the city's actions violate the constitutional debt limitation and lack statutory authority.

We affirm the judgment, but our reasoning differs from that of the trial court. We decide that under the terms of the challenged resolution, the city has not "incur[red] any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year." (Cal. Const., art. XVI, § 18, subd. (a).) Because the city's actions do not trigger the constitutional debt limitation, we need not consider the applicability of its exceptions. We furthermore conclude the city has the authority under state law to issue the bonds.

I. FACTS AND PROCEDURAL BACKGROUND[1]

San José is a charter city, whose current charter took effect on May 4, 1965. (City of San José City Charter, adopted 1965.)[2] The City Council established the city's current Federated City Employees Retirement System (federated plan) in 1975 (San José Mun. Code, ch. 3.28, § 3.28.010) and its current Police and Fire Department Retirement Plan (police and fire plan) in 1961 (San José Mun. Code, ch. 3.36, § 3.36.010) (collectively, the retirement plans or pension plans), pursuant to the city's authority under the charter. (Charter, art. XV, § 1500.)

Under the retirement plans, pension benefits for individual city employees vary based on factors such as age, final salary, years of service, type of retirement, and any cost of living adjustments (COLAs). According to the city's actuarial expert, "[t]he exact amount of the pension benefit an active employee will receive upon retirement cannot be known until their retirement date, since it depends on their years of service and pensionable earnings. The current pension benefits of retirees are known, but their future benefits will depend on cost of living and on how long they and their beneficiaries live."

The city makes annual contributions (described in the record as the "normal cost" or "[c]urrent [o]bligation") to fund the retirement plans. If the normal cost does not cover the present value of providing vested retirement benefits, an unfunded liability arises. An unfunded liability is the difference between the present value of future retirement benefits that have been earned as of the valuation date and the assets the city has currently set

[1] We take these undisputed facts from the evidence admitted at the court trial and the matters of which the trial court took judicial notice.

[2] All subsequent charter references are to City of San José City Charter.

aside to pay for them. (San José Mun. Code, ch. 3.28, § 3.28.960.) According to the city's actuarial expert, an unfunded liability is "often large enough that it is not practical for the employer . . . to pay the entire amount all at once. Instead, it is paid over time" or amortized. While the city pays the "normal cost" on an annual basis, the "unfunded liability" can refer to either the liability for any particular year or the amount of liability accumulated over the years as of the valuation date. The "current plan assets" are those assets the city has set aside to pay for the retirement benefits as of a particular valuation date. The amount of the city's unfunded liability is based in part on the discount rate, the current expected annual rate of return on the city's investments—estimated in 2020 and 2021 to be 6.625 percent.

The city's actuary calculates annually the amount of the unfunded liability for each retirement plan, taking into account a combination of factors, including the performance of the city's investments, city employees' actual retirement and mortality patterns, and changes in actuarial assumptions and methods. The city's unfunded liability has grown not because of increases in promised benefits, but because declining interest rates on the expected rate of return on the city's investments, as well as changes to certain assumptions about demographic factors, including mortality and retirement rates, have affected the present value of future pension payments. As of June 30, 2020, the total unfunded liability was approximately $1,383,387,000 for the police and fire plan and $2,099,614,000 for the federated plan.

In April 2021,[3] the city considered options for paying the unfunded liability to return the retirement plans to actuarially sound footings. The city determined that it would seek approval by resolution of the issuance of pension obligation bonds. Under the plan selected by the city, the city council would not be obligated to issue the pension

[3] Unless otherwise specified, all dates were in 2021.

obligation bonds and the timing of any bond issuance would depend on prevailing market conditions.

On October 5, the city passed a resolution which authorized the issuance of pension obligation bonds pursuant to Government Code section 53570 et seq.[4] "in a maximum principal amount not to exceed that required to refund [(i.e., repay)] the [u]nfunded [l]iability, to prepay all or a portion of the city's annual required retirement contribution . . . (the '[c]urrent [o]bligation'), and to pay the costs of issuance of such [b]onds," subject to certain conditions. The resolution gave the city discretion to determine the final principal amount of the bonds, provided that the aggregate amount of the bonds "shall not be greater than the lesser of (a) $3.5 billion or (b) the sum of the [c]ity's [u]nfunded [l]iability and [c]urrent [o]bligation . . . together with the costs of issuing the [b]onds" and the issuance of the bonds results in savings to the city. The bonds would be issued at a lower interest rate than the current expected 6.625 percent rate of return on the city's investments. The resolution also authorized the issuance of additional bonds on similar terms and conditions, as long as they would result in savings to the city.

The resolution authorized the preparation and prosecution of validation proceedings[5] pursuant to Code of Civil Procedure section 860 et seq. to determine the validity of the bonds and related agreements. On November 18, in accordance with the terms of the resolution, the city filed a complaint for validation with the trial court "to determine the validity of the proceedings and obligations relating to the [c]ity's issuance of one or more series of pension obligation refunding bonds, execution of a trust

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[4] Unspecified statutory references are to the Government Code.

[5] "Validation proceedings are a procedural 'vehicle' for obtaining an expedited but definitive ruling regarding the validity or invalidity of certain actions taken by public agencies." (*Santa Clarita Organization for Planning & Environment v. Castaic Lake Water Agency* (2016) 1 Cal.App.5th 1084, 1096.)

agreement and a bond purchase agreement, and approving additional actions related thereto."

On December 9, pursuant to California Rules of Court, rules 3.1200 et seq. and Code of Civil Procedure sections 861 and 861.1, the city filed an ex parte application seeking an order to issue, publish, and mail the summons, and to set a deadline for filing an answer to the complaint for validation. The following day, the trial court issued an order granting the city's application.

HJTA filed an answer to the complaint for validation, alleging that the city lacked authority to issue the bonds because it had not obtained the approval of two-thirds of its voters, is not subject to any " 'obligation imposed by law' " that would exempt the bond issuance from the debt limitation set forth in article XVI, section 18, subdivision (a) of the California Constitution, and failed to state facts sufficient to constitute a cause of action.[6] HJTA asked the court to deny the relief requested in the complaint for validation and declare the invalidity of the resolution and the proposed issuance of bonds.

On February 16, 2023, the trial court entered judgment validating the resolution, the issuance and sale of the bonds, and the execution and delivery of the trust agreement, the bond purchase agreement, and supplemental and related contracts and agreements. The court held that the city is "required under the [c]harter to establish, fund and maintain actuarially sound [r]etirement [p]lans," and, that, to maintain such actuarially sound retirement plans, "the [c]ity is required to pay the [u]nfunded [l]iability." The court reasoned that, since the establishment, funding, and maintenance of actuarially sound retirement plans are obligations imposed by law, the issuance of the proposed bonds is exempt from the constitutional debt limitation set forth in article XVI, section 18 of the California Constitution.

[6] The city filed a motion to strike HJTA's answer as untimely filed. The trial court denied the city's motion. The timeliness of HJTA is not at issue in this appeal.

II. DISCUSSION

HJTA argues the city's actions violate the constitutional debt limitation provision. HJTA maintains that, with the resolution, the city "proposes to incur a debt exceeding the current year's income," which is unconstitutional absent voter approval. HJTA denies that the city already has an obligation to pay the unfunded liability (rendering it a preexisting debt), because the unfunded liability is not a fixed dollar amount that is currently due and payable. Further, HJTA contends the city lacks statutory authority to issue the bonds as refunding bonds because the unfunded liability cannot be characterized as " 'revenue bonds' " under section 53583.

HJTA argues that issuance of the proposed new bonds would create "new debt"—rather than convert existing debt—an action HJTA alleges requires voter approval on the grounds that "if there is no obligation imposed by law in the first place, new financing of something else is not constitutionally authorized without voter approval." HJTA contends the unfunded liability is not a debt but is merely "an actuarial projection." It characterizes the city's actions as "prepayment of future pension benefits."

The city responds to HJTA's constitutional claim in two ways. It argues the imposed by law exception applies because the city is obligated by the terms of the city charter to provide actuarily sound pension plans, which includes paying the unfunded liability. Alternatively, the city maintains that the proposed bond issuance does not implicate the constitutional debt limitation at all. The resolution authorizing the issuance of the bonds states that the bonds can be issued only if they result in savings to the city. As the city already owes the unfunded liability to its current and former employees, issuance of the bonds merely changes the form of an existing debt and does not contravene the constitutional debt limitation. In addition, the city asserts statutory authority to issue the bonds under section 53583, subdivision (a).

A. *Legal Background*

1. City Charters

Under article XI, section 3 of the California Constitution, "a county or city may adopt a charter by majority vote of its electors voting on the question." (Cal. Const., art. XI, § 3, subd. (a).) The Constitution further provides that "[a] charter may be amended, revised, or repealed in the same manner." (*Ibid*.) "The charter of a municipality is its constitution" (*Brown v. City of Berkeley* (1976) 57 Cal.App.3d 223, 231), and "a charter city may not act in conflict with its charter." (*Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 171 (*Domar*).)

2. Public Employee Pensions

Pensions are " 'an integral part of the employment contract' " (*Carman v. Alvord* (1982) 31 Cal.3d 318, 332 (*Carman*)) that "help induce faithful public service and provide agreed subsistence to retired public servants who have fulfilled their employment contracts." (*Id*. at p. 325, fn. 4.) As such, " 'pension laws are to be liberally construed to protect pensioners and their dependents from economic insecurity.' " (*County of Orange v. Association of Orange County Deputy Sheriffs* (2011) 192 Cal.App.4th 21, 41 (*County of Orange*).)

"A public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment" (*Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863 (*Betts*)), or " 'upon the performance of services for a public employer.' " (*Cal Fire Local 2881 v. California Public Employees' Retirement System* (2019) 6 Cal.5th 965, 985 (*Cal Fire*).) "While payment of these benefits is deferred, and is subject to the condition that the employee continue to serve for the period required by the statute, the mere fact that performance is in whole or in part dependent upon certain contingencies does not prevent a contract from arising, and the employing governmental body may not deny or impair the contingent liability any more than it can refuse to make the salary payments which are immediately due." (*Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 855 (*Kern*).)

A public employee's pension rights "may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity." (*Betts*, *supra*, 21 Cal.3d at p. 863.) The employee's vested right "is their reasonable expectation that the city would meet its statutory obligations to finance the unfunded liability for past accumulated debt." (*Association of Blue Collar Workers v. Wills* (1986) 187 Cal.App.3d 780, 792.)

Both state and municipal law require that the city's pension plans be actuarily sound. State law provides that "any city may establish a retirement system for its officers and employees and provide for the payment of retirement allowances, pensions, disability payments, and death benefits, or any of them." (§ 45301.) Further, it requires that a city pension or retirement system "be on a sound actuarial basis." (§ 45342; see also *Valdes v. Cory* (1983) 139 Cal.App.3d 773, 785, fn. 5 (*Valdes*) [observing this statute "requires cities which elect to adopt their own retirement system [] do so on a 'sound actuarial basis' "].)

Article XV, section 1500 of the charter, as last amended and approved by the voters on November 2, 2010, states that "the [c]ouncil shall provide, by ordinance or ordinances, for the creation, establishment and maintenance of a retirement plan or plans for all officers and employees of the [c]ity. . . . [T]he [c]ouncil shall not establish any new or different plan after November 3, 2010 that is not actuarially sound." (Charter, art. XV, § 1500.)

Article XV, section 1504 of the charter reinforces this requirement. "Any retirement plan or system established for officers or employees of the [p]olice or [f]ire [d]epartments shall be actuarially sound." (Charter, art. XV, § 1504, subd. (c).) In addition, article XV-A, section 1508-A, subdivision (a) of the charter, recognizing "the interests of the taxpayers and the responsibilities to the plan beneficiaries," requires all pension plans to "be operated in conformance with [a]rticle XVI, [s]ection 17 of the California Constitution" (also known as the 1992 California Pension Protection Act), including subjecting all plans "to an annual actuarial analysis that is publicly disclosed in order to assure the plan has sufficient assets." Article XVI, section 17, subdivision (e) of the California Constitution provides, in relevant part, that "[t]he retirement board of a public pension or retirement system, consistent with the exclusive fiduciary responsibilities vested in it, shall have the sole and exclusive power to provide for actuarial services in order to assure the competency of the assets of the public pension or retirement system."

The two retirement plans at issue are codified in the city's municipal code at title 3, chapters 3.28 et seq. (federated plan) and 3.36 et seq. (police and fire plan), respectively. Under both plans, the city's retirement board is charged with "maintaining the actuarial soundness" of the plans consistent with article XVI, section 17 of the California Constitution. (See, e.g., San José Mun. Code, ch. 3, §§ 3.28.200.A, 3.28.350.B, 3.36.540.B.)

3. Bond Issuance

Section 53583, subdivision (a) of the Government Code permits any local agency to "issue bonds pursuant to this article or any revenue bond law under which the local agency is otherwise authorized to issue bonds for the purpose of refunding any revenue bonds of the local agency."[7] Section 53580, subdivision (c) defines " 'refunding bonds' " as "bonds issued to refund bonds." Section 53550, subdivision (b) defines " '[b]onds' " as, in relevant part: "[B]onds, warrants, notes or other evidence of indebtedness of a local agency." Section 53570, subdivision (b)(1) defines " '[r]evenue bonds' " as, in

[7] A " 'local agency' " is defined under section 53580, subdivision (a) as "public district, public corporation, authority, agency, board, commission, county, city and county, city, school district, or other public entity or any improvement district or zone thereof."

relevant part: "Bonds, warrants, notes, or other evidence of indebtedness of a local agency payable from funds other than the proceeds of ad valorem taxes or the proceeds of assessments levied without limitation as to rate or amount by the local agency upon property in the local agency."

The proceeds of any refunding bonds issued pursuant to article 11 of the Government Code "may be applied to the purchase, retirement at maturity, or redemption of the bonds to be refunded either at their earliest redemption date or dates, any subsequent redemption date or dates, upon their purchase or retirement maturity, or paid to a third person to assume the local agency's obligation to make the payments, and may, pending that application, be placed in escrow and invested or reinvested in any obligations or securities, and any interest or other increment earned or realized on any such investment may be applied to the payment of the bonds to be refunded or to the payment of interest on the refunding bonds, as provided in the proceedings of the local agency authorizing the issuance of the refunding bonds." (§ 53584.)

In addition, article XII, section 1222 of the charter authorizes the city to issue revenue bonds "for any purposes other than those specified in [s]ections 1220 [for off-street parking or airport facilities] and 1221 [for public utilities] only under and pursuant to the laws of the State of California."

B. *Analysis*

In considering the applicability of article XVI, section 18 to the challenged resolution, "we apply the familiar principles of constitutional interpretation, the aim of which is to 'determine and effectuate the intent of those who enacted the constitutional provision at issue.' " (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 444 (*Silicon Valley Taxpayers' Assn.*).) In doing so, we "look first to the language of the constitutional text, giving the words their ordinary meaning." (*Leone v. Medical Board* (2000) 22 Cal.4th 660, 665.) We review questions of constitutional and statutory interpretation de novo.[8] (*City of Lafayette v. East Bay Mun. Utility Dist.* (1993) 16 Cal.App.4th 1005, 1013.) "[W]e construe [a] charter in the same manner as we would a statute." (*Domar*, *supra*, 9 Cal.4th at p. 171.)

When reviewing and interpreting a statute, " 'our fundamental task [] is to determine the Legislature's intent so as to effectuate the law's purpose. [Citation.] We begin by examining the statute's words, giving them a plain and commonsense meaning. [Citation.] We do not, however, consider the statutory language "in isolation." [Citation.] Rather, we look to "the entire substance of the statute . . . in order to determine the scope and purpose of the provision . . . . [Citation.]" [Citation.] That is, we construe the words in question " 'in context, keeping in mind the nature and obvious purpose of the statute . . . .' [Citation.]" [Citation.] We must harmonize "the various parts of a statutory enactment . . . by considering the particular clause or section in the context of the statutory framework as a whole." ' " (*San Diegans for Open Government v. City of San Diego* (2015) 242 Cal.App.4th 416, 428–429 (*San Diegans*).) " 'Where uncertainty exists, consideration should be given to the consequences that will flow from a particular interpretation.' " (*Kerollis v. Department of Motor Vehicles* (1999) 75 Cal.App.4th 1299, 1304–1305.)

1. Constitutional Debt Limitation

We begin by examining the legal status of the city's obligation to pay the unfunded liability.

The charter states that the city "shall provide, by ordinance or ordinances, for the creation, establishment and maintenance of a retirement plan or plans for all officers and employees of the City." (Charter, art. VX, § 1500.) Article XV-A, section 1508-A of the charter, read together with article XVI, section 17 of the California Constitution and

[8] Although the city asserts there are factual issues in dispute related to the accounting standards, we disagree with this characterization and apply de novo review to the questions at issue in this appeal.

section 45342, requires that the city do so on an actuarially sound basis "to assure the competency of the assets of the public pension or retirement system." (Charter, art. XV-A, § 1508-A; Cal. Const., art. XVI, § 17, subd. (e); § 45342.) The use of the term "shall" in this context describes a legal obligation. (See *Wright v. Compton Unified Sch. Dist.* (1975) 46 Cal.App.3d 177, 181–182.) Public employees have "a vested right to 'integrity and security of the source of funding for the payment of [pension] benefits.' " (*Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1136 (*Wilson*).)

In approving the charter, the city's voters enacted the city's obligation to provide actuarially sound pension plans to its officers and employees. On November 8, 2016, the voters reaffirmed their support of the city's retirement plan obligations, including its obligation to maintain the plans on an actuarially sound basis, by approving Measure F.[9]

California law has long held that a municipality that has enacted a pension plan incurs an obligation, protected by the constitutional contract clause (U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9), to make pension payments to covered employees. In *Kern*, the California Supreme Court rejected the contention that a city could escape the obligation to pay a pension to a city firefighter by repealing the pension provisions before the employee was entitled to retire. The court reasoned "there is little reason to make a distinction between the periods before and after the pension payments are due. It is true that an employee does not earn the right to a full pension until he has completed the prescribed period of service, but he has actually earned some pension rights as soon as he has performed substantial services for his employer." (*Kern*, *supra*, 29 Cal.2d at p. 855.)

Our Supreme Court in *Kern* decided that the city incurred the obligation to pay the employee the pension payments in the same way—and at the same time—as it did his

[9] Measure F amended article XV-A of the charter in accordance with the statement of decision in *San Jose Police Officers Association v. City of San Jose, et al.* (Feb. 20, 2014, No. 1-12-CV225926) to require voter approval of any increases in employee retirement benefits, modify disability retirement benefits, and maintain the retirement plans in an actuarially sound manner.

salary. The employee "is not fully compensated upon receiving his salary payments because, in addition, he has then earned certain pension benefits, the payment of which is to be made at a future date. While payment of these benefits is deferred, and is subject to the condition that the employee continue to serve for the period required by the statute, the mere fact that performance is in whole or in part dependent upon certain contingencies does not prevent a contract from arising, and the employing governmental body may not deny or impair the contingent liability any more than it can refuse to make the salary payments which are immediately due. . . . [I]n our opinion it cannot do so at any time after a contractual duty to make salary payments has arisen, since a part of the compensation which that employee has at that time earned consists of his pension rights." (*Kern*, *supra*, 29 Cal.2d at p. 855.)

In other words, "the receipt of pension benefits is granted constitutional protection because the benefits constitute a portion of the compensation awarded by the government to its employees, paid not at the time the services are performed but at a later time." (*Cal Fire*, *supra*, 6 Cal.5th at p. 985; *Alameda County Deputy Sheriff's Assn. v. Alameda County Employees' Retirement Assn.* (2020) 9 Cal.5th 1032, 1077 ["It is the nature of pension rights as deferred compensation that caused *Kern* to hold them protected under the contract clause."].)

The California Supreme Court in *Kern* grounded its conclusion that pension rights enjoy constitutional protection on the importance of public employee pensions. It described that objective as "to induce competent persons to enter and remain in public employment." (*Kern*, *supra*, 29 Cal.2d at p. 856.) It added, "It is obvious that this purpose would be thwarted if a public employee could be deprived of pension benefits, and the promise of a pension annuity would either become ineffective as an inducement to public employees or it would become merely a snare and a delusion to the unwary." (*Ibid*.) Underscoring the special nature of pension obligations in California law, the California Supreme Court has identified only three conditions of public employment as protected by the constitutional contract clause: pensions, earned salary, and judicial compensation. (*Cal Fire*, *supra*, 6 Cal.5th at p. 986.)

Under these principles of California law, the city has an obligation to pay future pension benefits to its current and former employees, who have already earned them. In addition, the city has an obligation to maintain its retirement plans "on a sound actuarial basis" that assures that the plans have the assets to make such future payments. (§ 45342; Cal. Const., art. XVI, § 17, subd. (e).) The city seeks to satisfy this duty by issuing bonds that will enable it to fund its unfunded liability in a manner that reduces the city's costs. It is far from obvious that the challenged resolution triggers the constitutional debt limitation. After all, that provision applies when a city "*incur[s]* any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year." (Cal. Const., art. XVI, § 18, subd. (a), italics added.) The actions that incurred the city's existing liability—enacting the pension plans and employing the individuals covered by them—have already occurred. Further, the unfunded liability in this case arose out of unexpected changes in interest rates and market conditions, rendering inadequate the current assets set aside for pension payments that have already been earned but have not yet been paid.

Nevertheless, HJTA asserts that refunding the unfunded liability cannot be a legally imposed obligation because financial obligations not payable "today" are not debt. In its view, the city's issuance of the bonds incurs a *new* debt, which does trigger the constitutional debt limitation. For this contention, HJTA relies on the decision in *County of Orange*, *supra*, 192 Cal.App.4th at page 34.

In *County of Orange*, the Second District Court of Appeal considered the legality of a county retirement board's modification of the retirement formula in a manner that resulted in higher pension payments for certain public employees. (*County of Orange*, *supra*, 192 Cal.App.4th at pp. 30–31.) Several years later, the county sued the board to rescind the more generous pension terms. The county argued that the board's earlier action violated the constitutional debt limitation because the additional debt exceeded the county's available funds for the year and no exceptions to the constitutional debt limitation applied. (*Id*. at p. 33.) The Court of Appeal rejected the county's argument, ruling that the board's previous decision to change the pension plan did not incur a legally enforceable obligation within the meaning of the constitutional debt limitation. (*Id*. at p. 39.)

We decide that *County of Orange* does not control here. In that case, the Court of Appeal was asked whether the retirement board's estimate of the cost of *increasing* pension benefits triggered the constitutional debt limitation. The court decided that it did not. It described the $100 million of unfunded liability as "an actuarial estimate projecting the impact of a *change in a benefit plan*, rather than a legally enforceable obligation measured at the time of the County's 2001 resolution approving the 3% at 50 formula." (*County of Orange*, *supra*, 192 Cal.App.4th at pp. 36–37, italics added.)

The facts here are materially different. With the challenged resolution, the city does not seek to increase pension benefits but instead to issue bonds to provide an income stream for a liability it has already incurred. As the California Supreme Court said in 1896, "merely to fund or refund an existing debt is not to 'incur an indebtedness or liability' " within the meaning of the constitutional debt limitation. (*City of Los Angeles v. Teed* (1896) 112 Cal. 319, 327 (*Teed*).) "A bond is not an indebtedness or liability—it is only the evidence or representative of an indebtedness; and a mere change in the form of the *evidence* of indebtedness is not the creation of a new indebtedness within the meaning of the constitution." (*Ibid*.)

Contemporary professional accounting standards support the characterization of the unfunded liability as a current debt. The current Government Accounting Standards

Board (GASB)[10] standards—GASB Nos. 67 and 68, enacted in June 2012— require governments to include pension plans' unfunded liability as a deficit on their balance sheets. (See Statement No. 67 of the Governmental Accounting Stds. Bd.: Financial Reporting for Pension Plans, an amendment to GASB Statement No. 25, No. 327-B (June 2012) <https://gasb.org/page/ShowPdf?path=GASBS67.pdf&title=GASBS%2067> [as of April 26, 2024], archived at: <https://perma.cc/8TMS-FMWY >; Statement No. 68 of the Governmental Accounting Stds. Bd.: Accounting and Financial Reporting for Pensions, an amendment of GASB Statement No. 27, No. 327-C (June 2012) <https://gasb.org/page/ShowPdf?path=GASBS+68.pdf&title=GASBS%2068> [as of April 26, 2024], archived at: <https://perma.cc/RF5B-DETQ>.)[11]

That the city's obligation to make these pension payments will not occur in a single calendar year does not mean that the obligation is not a debt. As our Supreme Court observed in *Carman*, " 'The term "indebtedness" has no rigid or fixed meaning, but rather must be construed in every case in accord with its context.' [Citations.] It can include all financial obligations arising from contract . . ., and it encompasses 'obligations which are yet to become due as [well as] those which are already matured.' [Citation.] We hold that indebtedness as traditionally understood covers obligations arising under [the c]ity's pension plan." (*Carman*, *supra*, 31 Cal.3d at pp. 326–327.)

When construing whether the city's decision to transform an existing debt (here, the unfunded portion of the future pension payments already earned) into a new form of

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[10] The GASB is "an independent, private-sector organization, that establishes accounting and financial reporting standards for state and local governments that follow Generally Accepted Accounting Principles" (GAAP). The city follows GAAP.

[11] In *County of Orange*, the court relied in part on the now-superseded GASB Nos. 25 and 27 to reach its conclusion. Under the former provisions, "[w]hile some pension liabilities must be reported on the balance sheet, the [unfunded liability was] not one of them." (*County of Orange*, *supra*, 192 Cal.App.4th at p. 39.) The current version of the standards requires that the unfunded liability be reported as a current deficit on the city's balance sheet.

indebtedness (the bonds) "incur[s] any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year" (Cal. Const., art. XVI, § 18, subd. (a)), we must " 'effectuate the intent of those who enacted the constitutional provision at issue' " (*Silicon Valley Taxpayers' Assn.*, *supra*, 44 Cal.4th at p. 444).

The constitutional debt limitation was enacted for the purpose of curtailing "municipal extravagance" in the form of unchecked capital investments that resulted in large, long-term debt. (*Compton Community College*, *supra*, 165 Cal.App.3d at p. 88; *San Francisco Gas*, *supra*, 62 Cal. at p. 642.) In contrast to disfavored "municipal extravagance," public policy in California encourages pension plans as a means by which governments may induce and reward long-term public service to a municipality's citizens. (See *Bellus v. City of Eureka* (1968) 69 Cal.2d 336, 351; see also *Cal Fire*, *supra*, 6 Cal.5th at p. 983.) Likewise, the charter states that the city's "financial ability to provide basic services is essential to the health, safety, quality of life and well-being of its residents." (Charter, art. XV-A, § 1501-A.)

As our Supreme Court has highlighted, pension benefits for public employees are constitutionally protected "because the benefits constitute a portion of the compensation awarded by the government to its employees, paid not at the time the services are performed but at a later time." (*Cal Fire*, *supra*, 6 Cal.5th at p. 985.) These benefits are currently owed, and "may not be destroyed, once vested." (*Betts*, *supra*, 21 Cal.3d at p. 863.) The city undoubtedly must pay these pension obligations.

The city's ability to manage its pension resources in a financially prudent manner forms part of its constitutional contractual obligation to its employees. "[U]nder California law there is a strong preference for construing governmental pension laws as creating contractual rights for the payment of benefits, and when feasible to do so such laws should be construed as guaranteeing full payment to those entitled to its benefits 'with the provision of adequate funds for that purpose.' " (*Wilson*, *supra*, 52 Cal.App.4th at p. 1131.) "Actuarial soundness of the [pension] system is necessarily implied in the total contractual commitment, because a contrary conclusion would lead to express impairment of employees' pension rights." (*Id*. at p. 1133; see also *Valdes*, *supra*, 139 Cal.App.3d at p. 785, fn. 5.)

We acknowledge that bond issuance carries independent costs. Depending on the terms of the bonds, such an additional cost might well trigger the constitutional debt limitation. However, under the terms of the challenged resolution, the city may not issue the bonds unless they result in a savings to the city.[12]

In fulfillment of its duty under the charter, the city will assess market conditions as they evolve to determine whether the issuance of the bonds, and the terms of any such issuance, will be financially prudent. The city will be exercising its authority to issue the bonds "in a manner tailored to the exigencies of its activities and in the light of the practical considerations of the market place." (*Redevelopment Agency v. Shepard* (1977) 75 Cal.App.3d 453, 459; see also *Lisenby*, *supra*, 180 Cal. at p. 60 [noting that "[i]t rests entirely with the governing body of the town or city to determine" how to manage its indebtedness in light of market trends].)

In summary, under the terms of the city charter, the city has an obligation to provide pensions to city employees and maintain them in an actuarily sound manner. The

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[12] HJTA points out that the city may miscalculate whether the bond issuance will result in a savings to the city. But HJTA's speculative argument based on hypothetical circumstances is insufficient to show that the city's issuance of the proposed bonds will result in the incurrence of debt that violates the constitutional debt limitation. (*Wilson v. L. A. County Civil Service Com.* (1952) 112 Cal.App.2d 450, 452–453 [" 'A judicial tribunal ordinarily may consider and determine only an existing controversy, and not a[n] . . . abstract proposition.' "]; *Id*. at p. 453 [" '[A]s a general rule it is not within the function of the court to act upon or decide a . . . speculative, theoretical or abstract question or proposition.' "].) If the city errs in its fiscal calculations, it may be vulnerable to a constitutional challenge at that time. That issue, however, is not currently before us. We are tasked only with examining whether the challenged resolution violates section 18, subdivision (a) of the California Constitution.

unfunded liability in this case consists of pension obligations the city has already incurred, the payment of which is constitutionally protected by the contract clause. The city has elected to fulfill its contractual commitment to its employees to fund those payments in an actuarially sound manner through the issuance of bonds on the condition that they result in a savings to the city. Under these circumstances, we decide that, by passing the challenged resolution, the city has not "incur[red] any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year." (Cal. Const., art. XVI, § 18, subd. (a).) Therefore, the city is not required to seek voter approval before issuing the bonds.

2. Authority to Issue Bonds as Refunding Bonds to Refund Revenue Bonds

HJTA maintains that, because the unfunded liability cannot itself be characterized as "revenue bonds," the city does not have statutory authority to issue the bonds in question as refunding bonds because there are no bonds to refund. The city counters that it has statutory authority to issue the bonds under section 53583, subdivision (a).

Section 53583, subdivision (a) permits the city to "issue bonds for the purpose of refunding any [of the city's] revenue bonds." Under section 53580, " 'refunding bonds' " are defined as "bonds issued to refund bonds" and " 'bonds' " are defined as "bonds as defined in [s]ection 53550, or revenue bonds as defined in [s]ection 53570." (§ 53580, subds. (b), (c).) " 'Bonds' " are defined in section 53550, subdivision (b) as "bonds, warrants, notes or *other evidence of indebtedness*" of a city. (Italics added.) Revenue bonds are defined in section 53570, subdivision (b)(1) as "[b]onds, warrants, notes, or *other evidence of indebtedness*" of the city. (Italics added.)

Whether the city has the authority to issue the bonds turns on whether the unfunded liability is "evidence of indebtedness" as used in sections 53550, subdivision (b) and 53570, subdivision (b)(1). If "evidence of indebtedness" includes the unfunded liability, the city has the authority under section 53583 to issue the bonds. As the city has not cited any authority other than section 53583 to issue the bonds, if the unfunded liability does not qualify as "evidence of indebtedness," we must conclude the city lacks the necessary statutory authority.

HJTA argues that the phrase " 'evidence of indebtedness' " is a term of art that refers to "written *negotiable* instruments" (italics added), which would not encompass the unfunded liability. In support of this claim, HJTA cites to Civil Code section 1916.5, subdivision (b)(5) for the meaning of " ' "[e]vidence of debt," ' " defined therein as " 'a note or negotiable instrument.' "[13] However, Civil Code section 1916.5 limits the use of that definition of "evidence of debt" to "*this section*" (italics added) and states that it is "applicable only to a mortgage contract, deed of trust, real estate sales contract, or any note or negotiable instrument issued in connection therewith." (*Id*., subds. (b)(1), (d).) Civil Code section 1918.5 includes the same definition and similarly limits its use to the chapter in which it appears, chapter 7.5, which governs mortgage loans. (*Id*., subd. (a).) Therefore, by their own terms, the Civil Code definitions are not applicable here.

HJTA also relies upon a provision from the Corporate Securities Law of 1968 (Corp. Code, § 25117). This provision, too, does not directly apply to bonds to fund public employee pensions. (See, e.g., *Hamilton Jewelers v. Department of Corporations* (1974) 37 Cal.App.3d 330, 335.) Nevertheless, our courts have interpreted the definition of "evidence of indebtedness" in the corporate security context as "includ[ing] not only 'a promissory note or other simple acknowledgment of a debt owing [but]' " also " 'all contractual obligations to pay in the future for consideration presently received.' " (*People v. Coster* (1984) 151 Cal.App.3d 1188, 1193; see also *Hamilton*, at p. 334.) City employees' pensions "fall squarely within that definition" (*Coster*, at p. 1193) since pensions are " 'an integral part of the employment contract' " (*Carman*, *supra*, 31 Cal.3d at p. 332) and deferred payment for services rendered during employment (*Kern*, *supra*,

[13] This appears to be a typographical error as Civil Code section 1916.5 does not contain a subdivision (b)(5). We assume HJTA intended to reference subdivision (d)(5).

29 Cal.2d at p. 855). Therefore, although not directly applicable, the Corporation Code definition does support a broad reading of "evidence of indebtedness."

For its part, the city relies on Government Code section 53583 as statutory authority to issue the bonds. Section 53583 itself delineates the bond issuance authority by referencing two other provisions (sections 53550, subdivision (b) and 53570, subdivision (b)(1)). It is these provisions that define bonds as "bonds, warrants, notes or *other evidence of indebtedness*." (Italics added.)

Neither of these provisions further defines "other evidence of indebtedness." The Government Code defines the phrase in only one instance, which applies to the sale of *state* bonds under title 1.[14] The only question before us in this appeal is the *city*'s authority to issue bonds, which is addressed in a different title of the Government Code, title 5. (§§ 53400–53595.55.) Therefore, the provision applicable to state bonds, too, is inapplicable.

Having examined HJTA's arguments to the contrary, we conclude that the Government Code does not specifically define the phrase "evidence of indebtedness" as used in sections 53550, subdivision (b) and 53570, subdivision (b)(1). We therefore give the words in the definition " 'a plain and commonsense meaning' " (*San Diegans*, *supra*,

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[14] Section 5700, which applies to title 1, division 6, chapter 9 addressing the sale of state bonds, states, " 'Bonds' as used in this chapter means (a) any bonds or other evidences of indebtedness issued after the effective date of this chapter by the state or any state department, board, agency or authority or (b) any bonds or other evidences of indebtedness issued by any joint powers agency created under Chapter 5 (commencing with [s]ection 6500) of [d]ivision 7 that are payable from payments made with respect to a lease or sale of property to or from the state or any state department, board, agency, or authority. For purposes of this chapter, 'evidence of indebtedness' includes, but is not limited to, certificates of participation or interests in any rental or lease payments or installment purchase payments, in an aggregate principal amount exceeding $10,000,000, to be made by the state or any state department, board, agency, or authority with respect to buildings or other capital improvements."

242 Cal.App.4th at p. 428), while considering them " ' "in the context of the statutory framework as a whole." ' " (*Id*. at p. 429.)

The phrase "other evidence of indebtedness" appears in sections 53550, subdivision (b) and 53570, subdivision (b)(1) in a list. "Established canons of statutory construction assist us in ascertaining the meaning of a term primarily defined by way of a list of examples and the meaning of examples enumerated on such a list." (*Harrod v. Country Oaks Partners, LLC* (2024) 15 Cal.5th 939, 952.) Under the doctrine of *ejusdem generis*, " '[w]hen a statute contains a list or catalogue of items,' " we " 'determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope.' " (*Friends of Oceano Dunes, Inc. v. San Luis Obispo County Air Pollution Control Dist.* (2015) 235 Cal.App.4th 957, 965 (*Friends of Oceano Dunes*).)

In section 53570, subdivision (b)(1) the phrase "other evidence of indebtedness" appears at the end of a list that reads "[b]onds, warrants, notes, or other evidence of indebtedness."[15] Black's Law Dictionary defines the term "bond" in various ways. The broadest definition states that "bond" means "[a]n obligation; a promise." (Black's Law Dict. (11th ed. 2019) p. 218, col. 1.) "[B]ond" is also more narrowly defined as "[a] written promise to pay money or do some act if certain circumstances occur or a certain time elapses; a promise that is defeasible upon a condition subsequent; esp., an instrument under seal by which (1) a public officer undertakes to pay a sum of money if he or she does not faithfully discharge the responsibilities of office, or (2) a surety

[15] Black's Law Dictionary does not define "evidence of indebtedness," but, rather, refers to the definition of "security" (Black's Law Dict., *supra*, at p. 703, col. 1) where the phrase appears in the definition of "security" from title 15 of the United States Code (Black's Law Dict., at p. 1626, cols. 1–2), addressing commerce and trade. Title 5 of the United States Code, which governs government organization and employees and, thus, is arguably of greater relevance to the question before us, does not define "evidence of indebtedness."

undertakes the responsibility to pay if the public officer so fails." (Black's Law Dict., at p. 218, col. 1.)

The term "warrant" is defined as, alternately, "[a] document conferring authority, esp. to pay or receive money" and "[a]n order by which a drawer authorizes someone to pay a particular sum of money to another." (Black's Law Dict., *supra*, at p. 1901, col. 2.) The term "note" is defined as "[a] written promise by one party (the *maker*) to pay money to another party (the *payee*) or to bearer" that "is a two-party negotiable instrument." (Black's Law Dict., at p. 1275, col. 2.)

The terms in the list that precede "evidence of indebtedness," are similar in that each refers to a written promise to pay or a direction to make specified payments.[16] However, they are not all negotiable—or transferable—instruments. For example, warrants are not always transferable. (See, e.g., *People ex rel. Barry v. Gray* (1863) 23 Cal.125, 126; *A.G. Spalding & Bros. v. Contra Costa County* (1936) 12 Cal.App.2d 262, 264; *People v. Mares* (2007) 155 Cal.App.4th 1007, 1015.) Moreover, California and its cities may use warrants to pay employees' salaries (see, e.g., *Lotts*, *supra*, 13 Cal.App.2d at p. 635; *Compton Community College*, *supra*, 165 Cal.App.3d at p. 86; *City of San Diego v. Dauer* (1893) 97 Cal. 442, 443–444), and employees' pensions constitute an element of their compensation (see, e.g., *Betts*, *supra*, 21 Cal.3d at p. 863; *Cal Fire*, *supra*, 6 Cal.5th at p. 985; *Westly v. Board of Administration* (2003) 105 Cal.App.4th 1095, 1105–1106 [noting that the state pays retirement funds via warrants]).

The city's unfunded liability derives from its pension obligations under the charter and municipal code and from its contractual obligations to its employees. These promises are written, and the right to payments under them are vested. As a result, they

[16] In other sections of the Government Code, the phrase "evidence(s) of indebtedness" also appears in lists that include all manner of promises, including bonds, notes, warrants, contracts, obligations, and judgments. (See, e.g., §§ 1095, 17700, 25210.6, 43740, 43744, 53511, 53570, 53822.)

are similar to the other listed items in the relevant definitions of "bonds" and "revenue bonds," using the narrower definition of "bond" denoting a written promise to pay money or do some act if certain circumstances occur.

Legislative history also supports a broader reading of "revenue bonds" than HJTA's narrow interpretation. Section 53570 originally defined " 'revenue bonds' " as "bonds, warrants, notes or other evidence of indebtedness of a local agency denominated revenue bonds under any law of this state and payable from funds other than the proceeds of ad valorem taxes or the proceeds of assessments levied upon property in the local agency." (Stats. 1972, ch. 531, § 15, p. 919.) The Legislature amended the definition in 1985 to remove the phrase "denominated revenue bonds under any law of this state," loosening the definition and removing the limitation on the phrase "other evidence of indebtedness." (Stats. 1985, ch. 1033, § 9, pp. 3422–3423.)

The choice of the broader, more flexible concept of indebtedness over the narrower and more restrictive terms of "securities" or "negotiable instruments" in the "revenue bonds" definition suggest a legislative intent to broaden a city's authority to refund indebtedness beyond that of refunding of bonds, securities, or negotiable instruments. (See, e.g., *Carman*, *supra*, 31 Cal.3d at p. 328 [" '[A]ny indebtedness' can include all obligations to pay money, whether or not evidenced by bonds, notes, or security."].) Further, section 53570 was amended only one year after the decision in *Coster.* The Legislature is deemed to be aware of statutes and judicial decisions already in existence and to enact or amend statutes in light of them. (*River's Side at Washington Square Homeowners Assn. v. Superior Court* (2023) 88 Cal.App.5th 1209, 1235.) While the statute examined in *Coster* is not directly applicable, that the opinion concluded " 'evidence of indebtedness' " includes " 'all contractual obligations to pay in the future for consideration presently received' " (*Coster*, *supra*, 151 Cal.App.3d at p. 1193), supports a broad reading of the phrase in section 53570.

We conclude that the phrase "other evidence of indebtedness" may include unfunded liability as it is understood here, a representation of a city's deferred obligation to pay its employees. Such an interpretation neither renders the other instruments on the list redundant, nor makes "evidence of indebtedness" " 'markedly dissimilar' " to those other instruments. (See *Friends of Oceano Dunes*, *supra*, 235 Cal.App.4th at p. 965.)

The proceeds of refunding bonds issued pursuant to section 53583 "may be applied to the . . . redemption of the bonds to be refunded either at their earliest redemption date or dates, any subsequent redemption date or dates, upon their purchase or retirement maturity, or paid to a third person to assume the local agency's obligation to make the payments."[17] (§ 53584.) The statute allows the city to issue bonds for the purpose of refunding the city's indebtedness, here, in the form of the unfunded liability, and grants the city flexibility with respect to the timing of the refunding of the unfunded liability.

The refunding of the unfunded liability using the proceeds from the refunding bonds converts the debt represented by the unfunded liability into debt in the form of bonds. Such refunding does not create new debt.[18] As our Supreme Court has consistently held, "merely to fund or refund an existing debt is not to 'incur an indebtedness or liability.' A bond is not an indebtedness or liability—it is only the evidence or representative of an indebtedness; and a mere change in the form of the *evidence* of indebtedness is not the creation of a new indebtedness within the meaning of

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[17] "[R]edemption" has been broadly defined as " '[t]he payment of principal and unpaid interest on bonds *or other debt obligations*.' " (*Carman*, *supra*, 31 Cal.3d at p. 327, citing Black's Law Dict. (5th ed. 1979) p. 1149.)

[18] The city has indicated that the cost of issuing the bonds will be paid from the bond proceeds. This action is authorized pursuant to section 53556, which reads, in relevant part: "The designated costs of issuing the refunding bonds may be paid by . . . the proceeds of sale of the refunding bonds" or "the interest or other gain derived from the investment of any of the proceeds of sale of the refunding bonds." Section 53587 gives the city the discretion to include such refunding bond issuance costs in determining the amount of refunding bonds to issue.

the constitution." (*Teed*, *supra*, 112 Cal. at p. 327; see also *Lisenby*, *supra*, 180 Cal. at p. 59.)

In *Lisenby*, the charter city of Long Beach was obligated to pay a judgment to persons injured in the collapse of a public building. The city adopted an ordinance to provide for the issuance of a bond to refund the indebtedness that resulted from that judgment. (*Lisenby*, *supra*, 180 Cal. at pp. 54–55.) The city's mayor and treasurer refused to sign the bond on the grounds that doing so would cause the city to incur debt in violation of the constitutional debt limitation. (*Id*. at p. 55.) Our Supreme Court disagreed, concluding that the refunding of the city's existing debt, which arose "by operation of law," is exempt from the constitutional debt limitation. (*Id*. at p. 59.) In reaching this conclusion, the Supreme Court stated, "To 'fund' an outstanding debt of a municipal corporation which is payable presently or at short periods is to convert such indebtedness into a more permanent form with an extended time of payment and with interest which is regular and which may also be reduced. The usual method of 'funding' such a debt is by the issuance of bonds." (*Ibid*.) The debt represented by the judgment was converted to a debt represented by the bond obligations.

For the reasons explained above, we have decided that the debt the city seeks to refund already exists, in the form of the unfunded liability. The issuance of bonds will refund and convert the existing debt into a different form. We conclude the city has this authority under section 53583, subdivision (a), and we reject HJTA's arguments to the contrary.

III. DISPOSITION

The judgment is affirmed. Respondents are awarded costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

Danner, J.

WE CONCUR:

Greenwood, P. J.

Bromberg, J.

H050889
The City of San Jose v. Howard Jarvis Taxpayers Association et al.

Trial Court:	Santa Clara County Superior Court
Trial Judge:	Hon. Sunil R. Kulkarni
Counsel for Defendants and Appellants Howard Jarvis Taxpayers Association, Citizens for Fiscal Responsibility and Pat Waite:	Jonathan M. Coupal Timothy A. Bittle Laura E. Dougherty Howard Jarvis Taxpayers Foundation
Counsel for Plaintiff and Respondent The City of San Jose:	Allison E. Burns Brian P. Forbath Gregory J. Maestri Stradling Yocca Carlson & Rauth

PROOF OF SERVICE

I, Kiaya Algea, declare:

I am employed in the County of Sacramento, California. I am over the age of 18 years, and not a party to the within action. My business address is: 1201 K Street, Suite 1030, Sacramento, California 95814. My electronic service address is: kiaya@hjta.org. On June 10, 2024, I served:

- **PETITION FOR REVIEW**

on the interested parties below, using the following means:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on June 10, 2024, at Sacramento, California.

Kiaya R. Algea

SERVICE LIST

BRIAN P. FORBATH ALLISON E. BURNS GREGORY MAESTRI STRADLING YOCCA CARLSON & RAUTH A Professional Corporation 660 Newport Center Drive, Suite 1600 Newport Beach, CA 92660-6422 E: bforbath@stradlinglaw.com aburns@stradlinglaw.com gmaestri@stradlinglaw.com T: (949) 725-4000 *Attorneys for Plaintiff and Respondent* *The City of San Jose* **Via TrueFiling**	Hon. Sunil R. Kulkarni Santa Clara County Superior Court, Dept. 1 191 North First Street San Jose, CA 95113 **Via U.S. Mail**

STATE OF CALIFORNIA
Supreme Court of California

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

6/10/2024

Date

/s/Kiaya Algea

Signature

Dougherty, Laura (255855)

Last Name, First Name (PNum)

Howard Jarvis Taxpayers Foundation

Law Firm