IN THE CALIFORNIA COURT OF APPEAL

SECOND APPELLATE DISTRICT -- DIVISION SIX

AARON STARR, Appellant, v. CITY OF OXNARD, Respondent.	Court of Appeal Case No. B314601 Trial Court Case No. 56-2020-00539039-CU-MC-VTA

On Appeal From Ventura County Superior Court
Honorable Henry Walsh

APPLICATION TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] AMICUS CURIAE BRIEF OF LEAGUE OF CALIFORNIA CITIES

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IN THE SECOND APPELLATE DISTRICT, OF THE STATE OF CALIFORNIA

Case No. B314601

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

This is the initial certificate of interested entities or persons submitted on behalf of Amicus Curiae League of California Cities in the case number listed above.

The undersigned certifies that there are no interested entities or persons that must be listed in this certificate under California Rules of Court, rule 8.208.

Dated: September 1, 2022 BEST BEST & KRIEGER LLP

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF THE CITY OF OXNARD

Pursuant to Rule 8.200 subdivision (c)(1) of the California Rules of Court, the League of California Cities ("Cal Cities") respectfully applies for permission to file an Amicus Curiae Brief in support of Respondents City of Oxnard.

Cal Cities is an association of 479 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents and enhancing the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State, which monitors litigation of concern to municipalities and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The issues in this appeal concern the limits of the electorate's right to initiative and referendum as guaranteed by article II, section 11 of the California Constitution. More specifically, the appeal addresses (1) whether an initiative's sponsor may serve as a proper defendant when a city seeks a declaration holding that an approved initiative is illegal; (2) whether the initiative process can be used to dictate how cities conduct their open meetings; and (3) whether the initiative process can be used to control how cities spend their general tax revenues. Cal Cities has a direct interest in ensuring that its

members have a means of challenging illegal initiatives and that the initiative process is not permitted to interfere with its member's administrative (as opposed to legislative) functions. Any decision by this court will have significant impacts on Cal Cities' member cities.

The undersigned attorneys have carefully examined the briefs submitted by the parties and represent that Cal Cities' brief, while consonant with the City of Oxnard's arguments, will highlight a number of critical points that Cal Cities believes warrant further analysis. In this way the proposed amicus curiae brief will assist the court in deciding the matter.

The undersigned attorneys also represent that they authored this brief in whole, on a pro bono basis; that their firm is paying the full cost of preparing and submitting the brief; and that no party to this action, or any other person, authored the brief or made any monetary contribution to help fund the preparation and submission of the brief. (Cal. Rules of Court, Rule 8.200(c)(3).)

For these reasons, the Cal Cities respectfully requests leave to file the Amicus Curiae Brief attached.

Dated: September 1, 2022

BEST BEST & KRIEGER LLP

By: /s/ Gregg W. Kettles
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LEAGUE OF CALIFORNIA CITIES

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INTRODUCTION

A city should not be barred from obtaining post-election judicial review of an initiative when all relevant city officials agree that the initiative is illegal. But this is the rule that appellant Aaron Starr ("Starr") would have this court adopt. Starr sponsored two initiatives in the City of Oxnard ("City"). Measure M restricts when and how the City's legislative bodies conduct their meetings. Measure N ties the continued existence of an earlier general tax measure (Measure O) to improving the pavement conditions of the City's streets and alleys. Both Measure M and Measure N (the "Measures") were approved by the voters. The trial court ruled that Starr was a proper defendant in the City's challenge to the Measures, and ruled that both Measures were invalid. As the official proponent of the Measures, Starr is the obvious candidate to defend them and Cal Cities agrees with the City that an initiative proponent, such as Starr, may be properly named as a defendant in a post-election initiative challenge by a city.

Further, Cal Cities agrees with the City that both Measure M and Measure N are beyond the scope of the initiative power. Although there are aspects of the measures that may arguably be legislative, the legislative aspects are not severable from the

administrative aspects and therefore, both Measures are invalid. Accordingly, the trial court's judgment in favor of the City should be affirmed.

Cal Cities agrees with the City that an initiative proponent is a proper defendant in a post-election initiative challenge. This conclusion is supported by case law. There appears to be no binding precedent holding that an official initiative proponent may be named as a defendant to a post-election initiative challenge without the proponent's consent. But there is ample analogous authority pointing to that conclusion. In *Perry v. Brown* (2011) 52 Cal.4th 1116, our Supreme Court held that an initiative proponent may, and almost always should, be allowed to intervene to defend an initiative when the government does not. (*Id*. at 1152.) Additionally, several Court of Appeal decisions have held that an initiative proponent may be sued in an initiative challenge brought *before* the initiative is put on the ballot. (*See, e.g*., *Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769, 772, 779 ("*Widders*").) It is, therefore, a logical extension of these authorities to rule that an official initiative proponent is a proper defendant to a challenge brought *after* the initiative is put on the ballot and approved by the voters.

Doing so is supported by sound public policy. There may be no other person with a sufficient stake and interest in defending the challenged initiative to enable a city to obtain judicial review.

Unless the initiative proponent is eligible to be sued in a post-election initiative challenge, cities risk being denied access to the courts. An initiative proponent is more likely than anyone else to vigorously defend the initiative. Ruling that an initiative proponent is a proper defendant to a post-election initiative challenge will encourage responsible use of the initiative power and safeguard the initiative process. Such a ruling would also be consonant with other powers and responsibilities vested in initiative proponents by the Legislature.

Cal Cities agrees with the City that Measure M and Measure N are invalid because the measures contain administrative acts and administrative acts are not the proper subject of initiative. The local electorate's right to initiative and referendum embraces legislative acts but does not extend to administrative acts. The case law distinguishing the two is not always clear. To provide needed clarity for cities, this Court should reaffirm that the best guide for determining when an initiative constitutes an impermissible administrative act is to see if it is designed to carry out an already established policy. If an initiative is merely declarative of an already existing public purpose, or does not actually change an established public purpose, the initiative is administrative and invalid. (*See, e.g., Citizens for Jobs and the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311, 1322 ("*County of Orange*").)

Applying this test, Measure M and Measure N must be struck down because they overwhelmingly address administrative acts. Measure M compels the City to adopt *Robert's Rules of Order Newly Revised*, hire a professional parliamentarian to train staff, record staff presentations in advance of public meetings and limit staff at public meetings to answering questions, and allow each member of the public to speak for at least three minutes on any item that has already been considered by that legislative body. Measure M's stated purpose is to "to improve disclosure and public participation on matters that come before the Oxnard City Council and other local legislative bodies." (3 AA 518, Section 4.) This is a paraphrase of the City's pre-existing Sunshine Ordinance, which was adopted in 2018. That Ordinance states that it seeks to ensure "that the public have an opportunity to understand the government's activities and to communicate its concerns to its elected and appointed representatives." (Cal Cities' Motion for Judicial Notice ("RJN"), Exhibit A, Oxnard Municipal Code § 2-220.) And even assuming some provisions of Measure M may be considered legislative acts, they cannot be severed from the rest of Measure M. Measure M must be struck in its entirety.

Measure N is also defective. Measure N seeks to undo the general purpose revenue source created by an earlier initiative, Measure O. By tying the continued existence of Measure O to a

requirement that the City's streets and alleys meet a specified pavement criteria, Measure N strips the City of discretion regarding how Measure O funds are to be spent. Measure N is an administrative act and is invalid.

LEGAL DISCUSSION

A. An initiative proponent is a proper defendant in a post-election challenge to that initiative

1. There is no authority barring an initiative proponent from being named as a defendant in a post-election initiative challenge, and ample authority suggesting that it is proper to do so

Starr argues that an initiative proponent is not a proper defendant in a post-election initiative challenge. But Starr cites no authority so holding. While there is no authority directly on point, the weight of analogous authority suggests that an initiative proponent may be properly named as a defendant in a post-election lawsuit challenging the initiative, even without the proponent's consent.

Initiative proponents are no strangers to lawsuits challenging the validity of their initiatives. "The decisions in which official initiative proponents (or organizations that have been directly involved in drafting and sponsoring the initiative measure) have been permitted to participate as parties in California proceedings involving challenges to an initiative measure are legion." (*Perry v. Brown* (2011) 52 Cal.4th 1116,

1143 ("*Perry*") (citing authorities). *See, e.g., City of Burbank v. Burbank-Glendale-Pasadena Airport Auth*. (2003) 113 Cal.App.4th 465, 482 ("*Burbank*") (community activist who supported initiative intervened to defend it against challenge brought by city after initiative was put on ballot and approved by the voters).) *Perry* held that an initiative proponent may be allowed to intervene to defend the initiative when the government does not. (*Id*. at 1152.)

An initiative proponent may also be made a party to a lawsuit challenging an initiative where the proponent did not seek to intervene. Several cases have held that an initiative proponent may be named as a defendant in a lawsuit challenging the validity of the proposed initiative before it is put on the ballot. (*Widders*, 167 Cal.App.4th 769, 772, 779 (initiative proponent proper defendant in lawsuit filed by city attorney seeking declaratory relief challenging validity of proposed initiative); *City of San Diego v. Dunkl* (2001) 86 Cal.App.4th 384, 391, 397 ("*Dunkl*") (initiative proponents were proper defendants in lawsuit filed by city seeking declaratory relief challenging validity of proposed initiative and seeking injunctive relief against its continued circulation); *City of Atascadero v. Daly* (1982) 135 Cal.App.3d 466, 468, 469 (initiative proponent was proper defendant in lawsuit filed by city to determine whether proposed ordinance could properly require the city to submit any

revenue-raising measure to the voters).)

The only question is whether these cases authorizing suit against the initiative proponent *before* the vote should be extended to the situation at hand, where the initiative is challenged *after* it has been put on the ballot and approved. The answer is "yes." Ruling that an initiative proponent is a proper defendant in a post-election initiative challenge is supported by sound public policy.

2. Ruling that an initiative proponent is a proper defendant in a post-election challenge is supported by sound public policy

There are a number of policy reasons why an initiative proponent is a proper defendant to a post-election initiative challenge.

First, there is no consistent, practical alternative to naming the initiative proponent as a defendant to a post-election initiative challenge brought by a city. There may be no city official with a sufficient stake and interest in defending the challenged initiative to be properly named as a defendant. (*See City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 60 (trial court properly dismissed as non-justiciable city's lawsuit against city clerk seeking to prevent clerk from implementing initiative and a declaration that initiative was unconstitutional).) Naming every city resident as a defendant would be unwieldy. How would service be effectuated among thousands, or tens of

thousands, of residents? How would they appear in the action? Requiring a city to name each one of its own residents as a defendant in a post-election initiative challenge would also sow widespread discord and risk weakening confidence in local government. Allowing the initiative proponent to be named as a defendant in a post-election initiative challenge is a practical alternative

Second, an initiative proponent is more likely than anyone else to vigorously defend the initiative because they have a demonstrated interest in the validity of the initiative. The Court of Appeal cited the initiative proponent's interest in the initiative to support making the proponent a proper defendant to a pre-election challenge. (*Dunkl*, 86 Cal.App.4th at 397 ("these defendants [initiative proponents] were properly named because they were the proponents of the measure and had the necessary interest in the subject matter to be named as parties").) This same policy supports making the initiative proponent a proper defendant to a post-election challenge.

Third, ruling that the initiative proponent is a proper defendant to a post-election initiative challenge will help safeguard the initiative process. As indicated, the initiative proponent is more likely than anyone else to vigorously defend the initiative. The Supreme Court said as much in ruling that the initiative proponent should be allowed to intervene in a post-

election initiative challenge: "[W]e believe the trial court in most instances should allow intervention by proponents of the initiative. To fail to do so may well be an abuse of discretion. Permitting intervention by the initiative proponents under these circumstances would serve to guard the people's right to exercise initiative power, a right that must be jealously defended by the courts." (*Perry*, 52 Cal.4th at 1148-1149 (internal quotation marks omitted).)

If Starr's position were accepted, an initiative proponent would be allowed to cause an initiative to be put before the voters and adopted, and then avoid being called upon to defend what the proponent set in motion. Starr's rule would not encourage responsible use of the initiative power. Instead, it would encourage a short-sighted view among initiative proponents of just getting an initiative adopted by the voters, with insufficient regard for the initiative's legality. Letting initiative proponents off the hook would encourage irresponsible initiative drafting. This would be a disservice to the initiative power.

Fourth, with power comes responsibility. The law regularly imposes duties on those exercising rights. For example, those who drive a car, build a house, or keep a dog may be liable in negligence for the consequences of their actions. (See, e.g., *Sabella v. Wisler* (1963) 59 Cal.2d 21, 28 (home builder who constructed dwelling on improperly compacted lot liable to

homeowners in negligence).) Similar principals operate outside the law of torts. Some responsibilities voluntarily assumed may not be freely shed. These include, for example, the responsibility to support a child or represent a client. (See *In re Marriage of Schopfer* (2010) 186 Cal.App.4th 524, 526 (child support order made during child's minority need not be modified simply because custodial parents no longer have custody of the child after she turns 18); Cal. Rules of Professional Conduct, rule 1.16, subd. (b) (listing the limited circumstances in which an attorney may withdraw from representing a client).)

Identifying the initiative proponent as a proper defendant to a post-election initiative challenge is consistent with the initiative proponent's statutory responsibilities. The Legislature has adopted statutes to formalize and facilitate the initiative process. (*Perry*, 53 Cal.4th at 1141.) Statutes explicitly identify the official proponents of an initiative measure and describe the proponents' authority and duties. (*Id*. at 1141-1142.) Initiative proponents are required to submit the text of the proposed initiative to the Attorney General, pay a fee, and manage and supervise the process by which signatures for the initiative are obtained. (*Id*. at 1141-1142 and fn. 13 (citing Elections Code sections).) "[T]he official proponents of an initiative measure are recognized as having a distinct role—involving both authority and responsibilities that differ from other supporters of the

measure—with regard to the initiative measure the proponents have sponsored." (*Id.* at 1142.) There would be no initiative without a proponent starting the process and taking the necessary steps to get it on the ballot. It is not unreasonable to require the initiative proponent to see the process through by allowing them to be named as a defendant.[1]

B. The local electorate's right to initiative and referendum does not extend to administrative acts

"California's Constitution guarantees the local electorate's right to initiative and referendum, and that right is generally coextensive with the local governing body's legislative power." (*The Park at Cross Creek, LLC v. City of Malibu* (2017) 12 Cal.App.5th 1196, 1203 ("*Cross Creek*").) Often hailed as "one of

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[1] Allowing the initiative proponent to be named as a defendant in a post-election initiative challenge will not put an unreasonable burden on the proponent. Initiative lawsuits are typically disputes over the law, not the facts. (See, e.g., *Strauss v. Horton* (2009) 46 Cal.4th 364, 386 ("the principal issue before us concerns the scope of *the right of the people, under the provisions of the California Constitution, to change or alter the state Constitution itself* through the initiative process so as to incorporate such a limitation as an explicit section of the state Constitution") (emphasis in original).) Initiative lawsuits typically require little or no discovery. Like any defendant, an initiative proponent could choose not to defend the initiative. The result would be default and entry of judgment invalidating the initiative. It is highly unlikely a defaulting proponent would face any personal liability as a result.

the outstanding achievements of the progressive movement of the early 1900's," and seen as the embodiment "of the theory that all power of government ultimately resides in the people," the right to initiative and referendum have been "jealously guard[ed]" by the courts. (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591.)

However, these rights are not without limit. Thus, while "[t]he electorate has the power to initiate legislative acts," it does not have the power to initiate "administrative or adjudicatory ones." (*Cross Creek*, 12 Cal.App.5th at 1203; see also *Lincoln Property Co. No. 41 Inc. v. Law* (1975) 45 Cal.App.3d 230, 234 ("*Lincoln Property*") ("[I]t is established beyond dispute that the power of referendum [or initiative] may be invoked only with respect to matters which are strictly legislative in character.").) "Under an unbroken line of authorities, administrative or executive acts are not within the reach of the referendum [or initiative] process." (*Lincoln Property*, 45 Cal.App.3d at 234.) "The plausible rational for this rule espoused in numerous cases is that to allow the referendum or initiative to be invoked to annul or delay the executive or administrative conduct would destroy the efficient administration of the business affairs of a city or municipality." (*Id.*)

This case presents an opportunity for the Court of Appeal to better articulate how to distinguish between legislative acts on

the one hand, and administrative or executive acts on the other. Existing published decisions have provided some guidance. "Legislative acts generally are those which declare a public purpose and make provisions for the ways and means of its accomplishment." (*Fishman v. City of Palo Alto* (1978) 86 Cal.App.3d 506, 509 ("*Fishman*").) "Administrative acts, on the other hand, are those which are necessary to carry out the legislative policies and purposes already declared by the legislative body." (*Id.*; see also *Southwest Diversified, Inc. v. City of Brisbane* (1991) 229 Cal.App.3d 1548, 1555 ("*Southwest Diversified*") ("The power to be exercised is legislative in nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it.").)

Though widely adopted, the above test has been criticized as "not precise" and resulting in "inconsistency in approach . . . ." (*San Bruno Committee for Economic Justice v. City of San Bruno* (2017) 15 Cal.App.5th 524, 530.) For example, in *Yost v. Thomas* (1984) 36 Cal.3d 561 ("*Yost*"), the California Supreme Court held that the adoption of a specific plan is a legislative act. (*Id*. at 570.) The Court noted that both "the amendment of a general plan" and "the rezoning of land" are legislative acts, and that the adoption of a specific plan shared substantial similarities with both. (*Id*. at 570–571.) However, in *Cross Creek*, the Court of

Appeal held that an initiative "requir[ing] the city council to prepare a specific plan for every development project [in excess of 20,000 square feet] and to put that plan on the ballot for voter approval" was administrative and not permitted. (*Cross Creek, supra*, 12 Cal.App.5th at 1205.) While the initiative claimed to set forth a policy that "all development projects greater than 20,000 square feet must have a specific plan approved by voters," the Court of Appeal disagreed, noting that the initiative lacked a "legislative policy" because it required only the submission of specific plans without setting "substantive policy or standards for those plans." (*Id*. at 1206.) The Court of Appeal also deemed the initiative invalid because it both withdrew administrative authority and complicated it at the same time. (*Id*. at 1207–1208.) The initiative both "usurp[ed] administrative authority" and "add[ed] 'layers' to the administrative process" by requiring the city to "prepare a report, subject to a public hearing," while at the same time prohibiting the city from taking any action on a specific plan pending voter approval. (*Id*.) Ultimately, because the initiative lacked a valid legislative purpose, and because it "invalidly annul[ed] or delay[ed] executive or administrative conduct," the Court of Appeal held that it exceeded the initiative power. (*Id*. at 1208.)

The absence of a bright line rule to distinguish between initiatives that are legislative and initiatives that are

administrative is detrimental to cities. The absence of clarity encourages initiative proponents to draft initiatives that improperly direct administrative or executive conduct. Cities facing initiatives they believe to be illegal are left with no choice but to use scarce public resources to file suit.

The best guide for determining when an initiative constitutes an impermissible administrative act is to see if it is designed to carry out an already established public policy. In *Simpson v. Hite* (1950) 36 Cal.2d 125 ("*Simpson*"), the California Supreme Court struck down an initiative that challenged a city's selection of a site for a courthouse. In so doing, the California Supreme Court noted that "[b]y state law boards of supervisors [we]re required to provide 'suitable quarters' for superior and municipal courts," and that the board of supervisors could not perform such a duty "without selecting and designating the sites of the buildings to house the courts, as well as the character and size of the buildings." (*Id.* at 127, 130.) The initiative clearly constituted an administrative act because "the *only* discretion left to the local government by the Legislature . . . was the choice of a site for a municipal and superior court." (*Yost,* 36 Cal.3d at 573 (explaining *Simpson*).)

And in *County of Orange*, 94 Cal.App.4th 1311, the Court of Appeal struck down an initiative because, among other issues, it impermissibly interfered with the administrative or executive

acts of the county's board of supervisors. (*Id.* at 1331–1334.) The case involved two initiatives: Measure A and Measure F. Measure A—approved in 1994—amended the county's general plan to permit civilian aviation at a closed military air base and "created a process for the [c]ounty to develop a reuse plan for [the closed military base] . . . ." (*Id.* at 1317.) Measure F—approved in 2000—required certain projects, "include[ing] . . . new or expanded jail facilities, hazardous waste landfills, and airport projects," to be approved "by a two-thirds vote of the voters voting at a County General Election." (*Id.* at 1319.) In striking down Measure F, the Court of Appeal noted,

> Measure F would add layers of voter approval and hearing requirements to the implementing decisions anticipated by Measure A to be made by the Board. "In so doing, the proposed initiative is an effort to administratively negate the legislative purpose of [Measure A]." (*City of San Diego v. Dunkl* (2001) 86 Cal.App.4th 384, 402.) Here, as in [*Dunkl*], there is no overt statement that the previous legislative policy declared by the prior initiative will be changed, but the manner in which Measure F would restrict the Board's administrative discretion with voter approval requirements places the subject initiative "firmly within the administrative category of voter

> enactments, which are not permitted. As such the proposed initiative is beyond the power of the voters to adopt." (*City of San Diego v. Dunkl, supra*, 86 Cal.App.4th at 402.)

(*County of Orange*, 94 Cal.App.4th at 1333–1334.)

Ultimately, the Court of Appeal held that Measure F was "*mainly administrative in nature*, by dictating how and what spending may take place on a matter in which a controlling, although flexible and open-ended, legislative policy has already been established." (*Id.* at 1334 (emphasis added).)

The holdings in *Dunkl* and *San Bruno Committee for Economic Justice v. City of San Bruno* (2017) 15 Cal.App.5th 524 ("*San Bruno*") reinforce this method of analysis. In *Dunkl*, voters in the City of San Diego approved an initiative—Proposition C—allowing the city to enter into a memorandum of understanding ("MOU") to form a public-private partnership with the Padres. (*Dunkl,* 86 Cal.App.4th at 389–390.) Proposition C and the MOU "established the policy for the [c]ity" and also set forth "the ways and means to implement such policy by any necessary and appropriate administrative and nonlegislative acts . . . ." (*Id.* at 390.) When, one year later, voters attempted to introduce a new initiative declaring the "contingencies and conditions subsequent" set forth in the MOU as "failed, . . . unsatisfied, or . . . defeated by nonperformance," the Court of Appeal struck down that initiative

as impermissibly administrative because it did not seek to change the policy set forth by Proposition C, "but rather [sought] to change the substance of the implementing decision that were created by [Proposition] C." (*Id.* at 402.) And in *San Bruno*, the Court of Appeal held that a local interest group could not place a referendum on the ballot challenging a resolution adopting a contract to sell city-owned property to a private developer. (*San Bruno,* 15 Cal.App.5th at pp. 531, 535.) The resolution "pursue[d] an existing legislative plan" that the city adopted through several prior "legislative actions setting forth the manner in which [the property] would be developed . . . ." (*Id.* at 534.)

Thus, the key to determining whether an initiative is "mainly administrative in nature" (*County of Orange*, 94 Cal.App.4th at 1334)—and thereby not permitted—is to examine the initiative's stated public purpose. If it is merely declarative of an already existing public purpose, or does not actually change an established public purpose, the initiative is administrative and not allowed. When this test is applied to Measure M and Measure N, it becomes clear that both measures are mainly administrative in nature and, therefore, unlawful.

1. Measure M is "mainly administrative in nature" and must be struck down

Measure M injects itself into the minutiae of meetings held

before the City Council of Oxnard and other legislative bodies, and the rules of procedure to be used by these bodies, by amending several sections of Chapter 2, Article 1, Division 1 of the Oxnard Municipal Code ("OMC"). (3 AA 518.) Chapter 2 of the OMC concerns rules regarding administration of the various bodies and agencies of the City. (RJN, Exhibit B.) Chapter 2, Article 1 contains rules regarding the City's legislative bodies, and Chapter 2, Article 1, Division 1 contains rules pertaining specifically to the City Council. (RJN, Exhibit C.)

Measure M introduces at least three exceedingly particular amendments to the OMC. First, Measure M compels the City Council to adopt *Robert's Rules of Order Newly Revised*, and hire a professional parliamentarian to train "members of the [C]ity's legislative bodies on Robert's Rules." (3 AA 518 at §§ 2-1(B)(1), 2–1.3.) Second, it requires staff presentations to be recorded in advance of public meetings and limits staff to answering questions posed by the legislative body during meetings. (3 AA 518 § 2-1.4.) Third, it permits members of the public to speak for at least three minutes on an agenda item and requires the City to place on the agenda an opportunity to speak "on any item that has already been considered by a committee composed exclusively of members of the legislative body." (3 AA 518 § 2-1.5.)

Measure M states that its public purpose is "to improve disclosure and public participation on matters that come before

the Oxnard City Council and other local legislative bodies." (3 AA 518, Section 4.) This is not a novel purpose. Rather, it is duplicative of the intent and purpose behind Ordinance No. 2948, the City's Sunshine Ordinance, which was adopted on November 13, 2018 and codified as OMC Chapter 2, Article IV. (RJN, Exhibit D.) The City's Ordinance states in its "Findings and Purpose:"

> Democracy in our representative form of government requires that the public have an opportunity to understand the government's activities and to communicate its concerns to its elected and appointed representatives, and that those representatives have an adequate opportunity to consider those concerns and then act effectively and in a timely manner. This article codifies the city's public policy concerning participation in the deliberations of the city's policy bodies, and clarifies and supplements the Brown Act. It is an affirmation of good government; and a continued commitment to open and democratic procedures. It is an effort to expand our residents' knowledge, participation and trust. As procedures of government change and evolve, so also must the laws designed to guarantee the process remains visible.

(RJN, Exhibit A, Oxnard Municipal Code § 2-220, "Findings and Purpose.")

Based on the above, Measure M is mainly administrative in nature. Just like in *San Bruno*, Measure M does not attempt to introduce a new legislative policy but merely co-opts an existing legislative policy as a means to strip the City of all discretion regarding how, and when, to conduct its meetings of legislative bodies. (See *San Bruno,* 15 Cal.App.5th at 534 (striking down referendum that failed to introduce new legislative policy).) Furthermore, the Measure goes far beyond providing the City with the "ways and means" to accomplish a legislative purpose. (*Fishman*, 86 Cal.App.3d at 509.) Instead, it robs the City of discretion and dictates several exact actions it must perform. For example, the City is ordered to adopt *Robert's Rules of Order* and hire a parliamentarian, but no substantive policy is offered as to why it must be these particular parliamentary rules, other than a generic reference to a policy already adopted by the City. (*See Cross Creek,* 12 Cal.App.5th at 1206 (rejecting initiative requiring all plans for structures over 20,000 square feet to be approved by voters because the initiative imposed requirements without reference to a substantive policy).)

The same is true of Measure M's requirements that staff pre-record all presentations, that speakers be given at least three minutes to comment and be permitted to discuss already

addressed matters, and that meetings take place at particular times. Just as in *Simpson v. Hite*, certain policies regarding disclosure and public participation are already mandated by state and local laws—in particular the Brown Act and the City's own Sunshine Ordinance—while the discretion as to how best accomplish these policies is left to the City. (*See Simpson*, 36 Cal.2d 125 at 127, 130 (initiative could not override board of supervisors selection of location for superior and municipal court building when state law required such a building within the county but vested the board with discretion to select location).) These rules are administrative because they "merely pursue[ ] a plan already adopted by the legislative body itself, or some power superior to it." (*Southwest Diversified*, 229 Cal.App.3d at 1555.)

Furthermore, Measure M prohibits the City from being flexible in determining how to best promote disclosure and public participation. Pursuant to Election Code section 9217, "[n]o ordinance that is either proposed by initiative petition and adopted by the vote of the legislative body of the city without submission to the voters, or adopted by the voters, shall be repealed or amended except by a vote of the people, unless provision is otherwise made in the original ordinance." No such provision is included in Measure M. Thus, to the extent that Measure M's amendments actually inhibit disclosure and public participation, the City is paralyzed to do anything about it.

Measure M merely mimics an already established legislative policy, and robs the City of discretion in how to best enact that policy by controlling the minutia of City meetings without serving any additionally articulated public policy. Measure M is thus mainly administrative in nature and is not permitted. (*See County of Orange,* 94 Cal.App.4th at 1334 (finding initiative to be administrative because it "dictat[ed] how and what spending [could] take place on a matter in which a controlling, although flexible and open-ended legislative policy ha[d] already been established.").)

Lastly, to the extent the Court of Appeal finds any provision of Measure M to be legislative in character, that provision must be stricken as well because it cannot be severed from the rest of Measure M. There are "three criteria for severability: the invalid provision must be grammatically, functionally, and volitionally separable." (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 821 (citations omitted).) Even when, as here, an ordinance contains a severability clause, "[s]uch a clause . . . does not conclusively dictate it." (*Santa Barbara Sch. Dist. v. Superior Court* (1975) 13 Cal.3d 315, 331.) Rather, "[t]he part to be severed must not be part of a partially invalid but unitary whole." (*People's Advocate, Inc. v. Superior Court* (1986) 181 Cal.App.3d 316, 332.) "The remaining provisions must stand on their own, unaided by the invalid

provisions nor rendered vague by their absence nor inextricably connected to them by policy considerations." (*Id.*) That cannot happen here.

For example, in Section 2 of Measure M, the proponents state that Measure M is designed to promote public participation by holding meetings at certain times and by imposing parliamentary procedures to reduce the likelihood of "prolonged disorderly meetings, and thus reducing the likelihood that residents will be able to remain in attendance long enough to participate." (3 AA 518.) The use of pre-recorded presentations is also designed to cut down on the "considerable time . . . consumed making [staff] presentations." (*Id.*) However, once these components of Measure M are removed, its goals become untenable and it stops functioning as designed. Meetings will start late and, based on the proponents' own admissions, will likely last long into the night, interfering with the public participation the measure is meant to promote. Thus, because Measure M is designed like a house of cards according to its own Findings and Declarations, removal of a single component causes the whole measure to crash down.

2. Measure N is an administrative act that must be struck down

Measure N dictates conditions for the continued existence of a general tax approved by the City's voters in 2008. Known as

Measure O, the 2008 tax is "a general purpose retail transactions and use tax" that "increased the sales tax in Oxnard by ½ cents for twenty years." (3 AA 501, 581.) Funds from Measure O are used

> to provide enhanced levels of vital community services including police, fire and emergency response, increasing street paving and sidewalk/pothole repair to improve traffic flow, expanding youth recreation, after-school and anti-gang prevention programs, acquiring property for parks/open space preservation, upgrading water drains, improving senior services, increasing building code compliance, and other general City services . . . .

(3 AA 500.)

In short, Measure O is considered a "general purpose revenue source," and the funds raised by it are not required to be spent in any particular manner. (3 AA 501.) Measure N seeks to undo this.

Measure N would require all funds raised by Measure O—plus tens of millions of additional dollars—to be spent solely on street repair. (3 AA 512; 6 AA 1438–1455.) It does this by pegging the continued existence of Measure O to a requirement that the City's streets meet a specific criteria—the Pavement Condition Index ("PCI")—by a given date. (3 AA 512.) Failure to

meet the specified PCI by the given date causes Measure O to sunset. (3 AA 512.) Ultimately, Measure N strips the City of any and all discretion regarding how Measure O funds are to be spent. The City is left with deciding to dedicate all Measure O funds, plus a substantial amount of general funds, to street repair, or forgoing Measure O entirely. It is this substantial restriction of the City's administrative discretion that renders Measure N invalid.

County of Orange is once again on point. In that case, as mentioned above, voters of the County of Orange passed Measure A, which authorized the County to proceed with planning a conversion process to establish civilian airport use at a former military base. (94 Cal.App.4th at 1316.) Six years later, the voters passed Measure F, which placed a number of spending and procedural restriction upon the County regarding the planning and implementation process for the conversion. (*Id.*) The Court of Appeal held that Measure F was "mainly administrative in nature" because a legislative policy had already been established in Measure A. (*Id.* at 1334.)

The same is true here. Measure O introduced a "flexible and open-ended, legislative policy" (*id.*), geared towards ensuring that the City had the means "to provide enhanced levels of vital community services including . . . general City services" through a ½ cent sales tax. (3 AA 500.) Measure N imposes rigid

mandates on Measure O that would force the City to spend all Measure O funds on street repair. Just like in *County of Orange*, Measure N is impermissibly administrative because it "dictates how and what spending may take place . . . ." (*County of Orange*, 94 Cal.App.4th at 1334.) Thus, Measure N is not a valid subject of an initiative measure and the trial court's judgment must be upheld.

CONCLUSION

For the reasons stated above, and for those set forth in the City's respondent's brief, this court should affirm the trial court's judgment in favor of the City.

Dated: September 1, 2022

BEST BEST & KRIEGER LLP

By: /s/ Gregg W. Kettles
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CERTIFICATE OF WORD COUNT

The text of this brief consists of 5,817 words according to the word count feature of the computer program used to prepare this brief.

Dated: September 1, 2022 BEST BEST & KRIEGER LLP

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CERTIFICATE OF SERVICE

City of Oxnard v. Aaron Starr
Second Appellate District, Division Six Case No. B314601
Superior Court Case No. 56-2020-00539039-CU-MC-VTA

I, Tatiana Palomares, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 300 South Grand Avenue, 25th Floor, Los Angeles, California 90071. My email address is: tatiana.palomares@bbklaw.com. On September 1, 2022, I served the document(s) described as APPLICATION TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] AMICUS CURIAE BRIEF OF LEAGUE OF CALIFORNIA CITIES on the interested parties in this action addressed as follows:

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☒ BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, by causing the documents to be sent to the persons at the e-mail addresses listed on the service list on September 1, 2022, from the court authorized e-filing service at TrueFiling. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

☒ BY MAIL: By placing a true copy thereof enclosed in a sealed envelope. The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Pasadena, California, in the ordinary course of business. I am aware

that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

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

Executed on September 1, 2022, at Los Angeles, California.

/s/ Tatiana Palomares

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that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

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

Executed on September 1, 2022, at Los Angeles, California.

/s/ Tatiana Palomares

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