

Appeal No. B259791

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

JACK FRY, GARY CLINE, SANDRA CARLSEN, YVETTE
MORENO, LOS ANGELES RETIRED FIRE & POLICE
ASSOCIATION, INC., THE BOARD OF THE LOS ANGELES
DEPARTMENT OF FIRE AND POLICE PENSIONS,

Petitioners, Real Party in Interest and Respondents,

v.

CITY OF LOS ANGELES,

Respondent and Appellant.

Appeal from Superior Court for the County of Los Angeles
Case No. BS 140201, Hon. Joanne O'Donnell, Judge

**APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES
FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF IN
SUPPORT OF RESPONDENT AND APPELLANT**

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**APPLICATION FOR PERMISSION TO
FILE *AMICUS CURIAE* BRIEF**

Pursuant to California Rule of Court 8.2000(c), the League of California Cities (the “League”) respectfully requests permission to file the attached *amicus curiae* brief in support of Respondent and Appellant, the City of Los Angeles (the “City”).¹

The League is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee 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 League’s arguments may assist the Court in deciding this matter. The decision of the trial court below could potentially have broad implications for the ability of cities to constitutionally delegate discretionary power to administrative agencies. While all cities take advantage of administrative delegations to ensure efficient administration of the law, such delegations also require adequate checks to ensure that fundamental policy decisions are made by those most accountable to the electorate. When the trial court concluded that Petitioners have a vested right in having a fiduciary agent other

¹ Counsel certifies that this brief was not authored in whole or in part by any party or any counsel for a party in this case, and that no person or entity has made any monetary contribution intended to fund the preparation or submission of this brief.

than the City Council make substantive policy determinations about the health care subsidies at issue in this matter, it effectively transformed the City's temporary delegation into an irrevocable delegation. The League believes that an irrevocable delegation of a city's core sovereign functions is inconsistent with representative government and will needlessly hamstring cities that may opt to avoid delegations rather than be confronted with an unexpected defeasance of their own authority.

Accordingly, the League requests that this Court accept and file the attached *amicus curiae* brief.

Respectfully submitted,

Dated: July 15, 2015

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

In accordance with California Rules of Court 8.208 and 8.498(d), the League of California Cities is a nonprofit organization with no parent corporation and no stock.

Respectfully submitted,

Dated: July 15, 2015

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TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| I. INTRODUCTION | 6 |
| II. ARGUMENT..... | 9 |
| A. Delegations Require Adequate Safeguards To Ensure Accountability to the Electorate. | 9 |
| B. Delegations Of Municipal Authority Cannot Be Irrevocable. | 11 |
| III. CONCLUSION..... | 18 |

TABLE OF AUTHORITIES

Page(s)

Cases

| | |
|---|--------|
| <i>A.L.A. Schechter Poultry Corp. v. United States</i> (1935) 295 U.S. 495..... | 17 |
| <i>Alexander v. State Pers. Bd.</i> (2000) 80 Cal. App. 4th 526..... | 16 |
| <i>Arizona State Legislature v. Arizona Independent Redistricting Comm'n</i> (June 29, 2015) 576 U.S. ____ | 8, 13 |
| <i>Bagley v. City of Manhattan Beach</i> (1976) 18 Cal. 3d 22 | 15 |
| <i>Bellus v. City of Eureka</i> (1968) 69 Cal. 2d 336 | 11 |
| <i>Birkenfeld v. City of Berkeley</i> (1976) 17 Cal. 3d 129 | 6, 16 |
| <i>Bock v. City Council</i> (1980) 109 Cal. App. 3d 52 | 17 |
| <i>California State Employees' Assn. v. Flourney</i> (1973) 32 Cal. App. 3d 219 | 15 |
| <i>City of Downey v. Bd. of Admin.</i> (1975) 47 Cal. App. 3d 621 | 11 |
| <i>City of Redwood City v. Moore</i> (1965) 231 Cal. App. 2d 563 | 11 |
| <i>Department of Transportation v. Association of American Railroads</i> (2015) 576 U.S. ___, 135 S.Ct. 1225 | 14 |
| <i>Gaylord v. City of Pasadena</i> (1917) 175 Cal. 433 | 6 |
| <i>Gerawan Farming, Inc. v. Agric. Labor Relations Bd.</i> (2015) 236 Cal. App. 4th 1024..... | 10 |
| <i>Golightly v. Molina</i> (2014) 229 Cal. App. 4th 1501 | 12, 13 |
| <i>Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.</i> (1980) 448 U.S. 607..... | 17 |
| <i>Irwin v. City of Manhattan Beach</i> (1966) 65 Cal. 2d 13 | 12 |

Page(s)

Kugler v. Yocum
(1968) 69 Cal. 2d 3717, 9, 10

Martin v. Cnty. of Contra Costa
(1970) 8 Cal. App. 3d 85616

Panama Refining Co. v. Ryan
(1935) 293 U. S. 388.....9

People's Fed. Sav. & Loan Ass'n v. State Franchise Tax Bd.
(1952) 110 Cal. App. 2d 6966

Slavich v. Walsh
(1947) 82 Cal. App. 2d 2288, 15

Stone v. Mississippi
(1880) 101 U.S. 814.....11

Sturgeon v. Cnty. of Los Angeles
(2010) 191 Cal. App. 4th 34416

Wilke & Holzheiser, Inc. v. Dep't of Alcoholic Beverage Control
(1966) 65 Cal. 2d 3496, 9

Statutes

Los Angeles Charter and Administrative Code, art. II, § 24514

Other Authorities

Peter H. Aranson, Ernest Gellhorn, and Glen O. Robinson
(1982) *Theory of Legislative Delegation*, 68:1 Cornell L. Rev.....9

I. INTRODUCTION

For close to a century, our courts have recognized that, out of “necessity, if for no better grounded reason, it has become increasingly imperative that many quasi-legislative and quasi-judicial functions, which in smaller communities and under more primitive conditions were performed directly by the legislative or judicial branches of the government, are intrusted to departments, boards, commissions, and agents.” (*Gaylord v. City of Pasadena* (1917) 175 Cal. 433, 436.)

Because “truly fundamental issues should be resolved by the Legislature,” California courts permit the delegation of legislative functions only where the grant of authority is “accompanied by safeguards adequate to prevent its abuse.” (*Wilke & Holzheiser, Inc. v. Dep’t of Alcoholic Beverage Control* (1966) 65 Cal. 2d 349, 369.) A legislative body must also affirmatively establish discernible standards for the agency to apply in administering and enforcing the regime in practice. (*See People’s Fed. Sav. & Loan Ass’n v. State Franchise Tax Bd.* (1952) 110 Cal. App. 2d 696, 700 [invalidating a statute giving officials “uncontrolled and unguided power” to set the rate of a tax deduction].) Such standards are not only an essential check on the danger of *ad hoc* or arbitrary agency decision-making, but also ensure that the exercise of political judgments is left to those who are directly accountable to the public for their policy choices. (*See Birkenfeld v. City of Berkeley* (1976) 17 Cal. 3d 129, 167 [explaining that a legislative body cannot delegate the power to formulate public policy, but that the legislature may avoid a non-

delegation problem by “declar[ing] a *policy*, [and] fix[ing] a primary *standard* . . .”] (emphasis added.)

Delegations of legislative authority are permissible only so long as the Legislature does not engage in a “total abdication” of its decisionmaking authority. (*Kugler v. Yocum* (1968) 69 Cal. 2d 371, 384.) The subject case presents a related dilemma: Whether, by judicial fiat, authority delegated to an administrative body can itself become a vested right, such that once delegated, a legislative body can no longer control, modify, or reclaim that authority which it indisputably has, and must retain, to protect the core aspect of a deliberative democracy.

The Los Angeles City Council (“City Council”) permissibly delegated to the Board of the Los Angeles Fire and Police Pensions System (the “Board”) the authority to make annual adjustments to the subsidy paid by the City to defray the cost of retirees’ medical insurance premiums (the “Subsidy”). The trial court concluded that the delegation itself—*i.e.*, the Board’s ability to adjust the Subsidy within designated limits—constituted a benefit under its vested rights analysis. (Vol. 10, AA002493.) This “one-way ratchet” theory of delegation would mean that once a city confers discretion on a subordinate agency that might be construed as a benefit to city employees, the city loses any ability to undo its delegation or take back its legislative authority, as the City did here.

By interpreting the City’s delegation so as to divest the City of “ultimate control” over the delegated subject, the trial court created a constitutionally deficient delegation. The Board is not a politically

accountable entity and yet the trial court found that the Board's fiduciary obligation to employee-plan members, distinct from the Council's obligations to its wider constituency, constituted a contractual benefit to those employees protected from impairment. This removal of decisionmaking authority from accountable, elected representatives and its permanent transfer to a board comprised of nonelected members is precisely the sort of approach to delegated authority the nondelegation doctrine exists to prevent.

An irrevocable delegation of policymaking authority is unconstitutional under California jurisprudence. (*Slavich v. Walsh* (1947) 82 Cal. App. 2d 228, 235 [“It needs no citation of authority to establish the principle that the Legislature may not thus divest itself of its constitutionally granted powers.”].) It is for this exact reason that California courts construe statutory delegations narrowly. In those instances where a statute seems to confer an exceedingly broad delegation, it is often the legislative body's ability to override and take back its authority that avoids constitutional infirmity—a point recognized by the U.S. Supreme Court this term in *Arizona State Legislature v. Arizona Independent Redistricting Comm'n* (June 29, 2015) 576 U.S. ____.

The trial court's decision diverges from this approach and threatens to impair the ability of state and municipal legislatures to exercise or delegate authority in a constitutionally sound manner.

Accordingly, this Court should reverse the trial court's decision and uphold the constitutional authority of cities to revoke any delegation, particularly as to their core sovereign functions.

II. ARGUMENT

A. Delegations Require Adequate Safeguards To Ensure Accountability to the Electorate.

California's nondelegation doctrine places special emphasis on the presence of safeguards to check an agency's exercise of delegated authority. (*Kugler*, 69 Cal. 2d at 376, quoting *Wilke & Holzheiser*, 65 Cal. 2d at 369 ["[T]he most perceptive courts are motivated much more by the degree of protection against arbitrariness than by the doctrine about standards."].) On the one hand, this approach recognizes that a doctrinal focus on standards to guide subordinate actors can defeat the purpose of delegation if it inhibits the "flexibility and practicality" of allowing such actors to make substantive policy decisions themselves. (*Panama Refining Co. v. Ryan* (1935) 293 U.S. 388, 421.) On the other, it furthers the core purpose of the nondelegation doctrine by ensuring that a politically accountable body retains some authority to check an agency's exercise of discretion. (See Peter H. Aranson, Ernest Gellhorn, and Glen O. Robinson (1982) *Theory of Legislative Delegation*, 68:1 Cornell L. Rev. at 4 [discussing competing justifications for the nondelegation doctrine, including "fear of the delegate's possible misuse of power" and the "belief that the people have agreed to relinquish their most important power only to representatives that they alone have chosen"].)

Because the doctrine finds a constitutional violation where there has been a "total abdication" of legislative authority, the delegation must, at minimum, insure some retained oversight and control by the delegating entity. "This doctrine rests upon the premise that the

legislative body must itself effectively resolve the truly fundamental issues. It cannot escape responsibility by explicitly delegating that function to others or by failing to establish an effective mechanism to assure the proper implementation of its policy decisions.” (*Kugler v. Yocum*, 69 Cal. 2d at 376–77.)

The extent of the safeguards necessary depends on the degree of discretion afforded to the administrative agency. Where delegations are expansive, safeguards are all the more necessary to ensure that some politically accountable body retains the final say over delegated matters. In *Gerawan Farming, Inc. v. Agric. Labor Relations Bd.* (2015) 236 Cal. App. 4th 1024 (petition for review pending), the Court of Appeal found that a statutory delegation to a third-party with the *de facto* power to impose collective bargaining agreements (“CBAs”) on certain agricultural employers was unconstitutional. There, the court noted that this third-party had a “considerable range of power to determine all aspects of a compelled CBA,” with limited statutory guidelines. (236 Cal. App. 4th at 1075.) Because of the breadth of that delegation, the court found that a robust means of legislative review was necessary “to meaningfully protect the parties against favoritism or unfairness in regard to the determination of the CBA’s terms.” (*Id.*) Particularly where the subordinate agency has interests that diverge from those of the legislature or its wider constituency, safeguards against politically insulated policymaking are critical.

These checks on the delegation of legislative authority apply in the context of municipal control over public employee compensation.

(See *City of Redwood City v. Moore* (1965) 231 Cal. App. 2d 563, 576.) Under article XI, section 3 of the California Constitution, “[t]he provisions of a [city] charter are the law of the State and have the force and effect of legislative enactments.” Further, article XI, section 5 of the constitution vests chartered municipalities with plenary legislative jurisdiction over “municipal affairs,” subject only to the limits of the City’s Charter, and explicitly places the regulation of public employees’ compensation within the province of the municipal legislature. This regulation of public employee compensation includes health benefits, as through a pension system. (See *Bellus v. City of Eureka* (1968) 69 Cal. 2d 336, 345 [observing that “establishment of an employee pension plan is a municipal affair”]; *City of Downey v. Bd. of Admin.* (1975) 47 Cal. App. 3d 621, 629 [“It is clear that provisions for pensions relate to compensation and are municipal affairs within the meaning of the Constitution.”].) Thus, the nondelegation doctrine applies to prevent the delegation of authority over municipal employee compensation without adequate safeguards to ensure oversight by the City Council.

B. Delegations Of Municipal Authority Cannot Be Irrevocable.

It has long been a tenet of California’s nondelegation jurisprudence that a delegation must be revocable in order to withstand constitutional scrutiny. (See *Stone v. Mississippi* (1880) 101 U.S. 814, 818.) Such revocation is necessary because “the legislature cannot bargain away the police power of a State,” and so future legislatures must have the ability to undo a delegation. (*Id.*)

Without the power to revoke a delegation, the legislature loses its most basic tool of oversight. Here, if the City Council cannot take back the authority it delegated, the politically accountable entity can no longer assert any meaningful control over the decisionmaking.

The ability of a legislature to intervene if an administrative agency fails to properly execute the delegated function is a necessary safeguard of political accountability. In *Irwin v. City of Manhattan Beach* (1966) 65 Cal. 2d 13, the California Supreme Court considered a challenge to a municipality's delegation of certain public works projects to the oversight of private entities. The Court upheld the delegation specifically because the city council maintained "broad power to revoke" the delegated authority. (*Id.* at 24.) Because the city council was in a position to ensure that the "public benefit remains dominant" in the project, the delegation did not hinder accountability to the electorate. (*Id.*)

Similarly, in *Golightly v. Molina* (2014) 229 Cal. App. 4th 1501, the Court considered whether the city had unconstitutionally delegated authority to appropriate and expend funds for social services. Of particular importance to the Court's analysis was the fact that the budget-setting decisions implicated by the delegation constituted "a fundamental legislative function . . . vested by law in the board of supervisors." (*Id.* at 1517.) Because fundamental legislative functions must be conducted by politically accountable entities, the Court approved the delegation only because the board of supervisors "retained its budgeting authority" and "retained authority

to modify or rescind its delegation of [] authority to the County CEO.”
(*Id.*)

The link between the revocability of a delegation and the maintenance of accountability to the electorate was highlighted by the U.S. Supreme Court this term in *Arizona State Legislature*. There, the Court considered the constitutionality of a delegation of certain redistricting determinations to an independent commission. The dissent in particular raised concerns about a delegation that seemed to “set up an unelected, unaccountable institution that permanently and totally displaces the legislature from the redistricting process.” (576 U.S. at ___, slip op. at *36 [Roberts, C.J., dissenting].) But the majority found no problem with the legislature delegating “their authority to a commission, ***subject to their prerogative to reclaim the authority for themselves.***” (*Id.* at *16 [emphasis added].) It is the backstop of revocation that can check an otherwise overbroad delegation by ensuring that some politically accountable entity has ultimate responsibility for the delegated authority.

Here, the Council’s delegation to the Board, if deemed irrevocable, necessarily forecloses public oversight. The Board is a nine-member body—five members are appointed by the Mayor and four members are current and former police and fire department members, who are each elected by members of their respective organizations and serve fixed terms. The Board constituency, then, is necessarily distinct from the broader constituency of the City Council, and not subject to any form of public accountability via the ballot box. In fact, it was the non-representative nature of the Board that partially

justified the trial court’s decision, as the Board has a fiduciary duty not to a wider electorate but to the employee-plan members themselves. (*See* Vol. 10, AA002498 [finding that the delegation to the Board constituted a benefit to employee-plan members because of its “fiduciary duty to Petitioners”].) When a legislative function is delegated to an unelected body specifically designed not to take into account the policy wishes of the electorate, it is imperative that the actually accountable government entity retains some authority to ensure the proper exercise of the legislative function. (*Cf. Department of Transportation v. Association of American Railroads* (2015) 576 U.S. ___, 135 S.Ct. 1225, 1232 [Amtrak’s status as a “private entity” does not violate separation of powers principles, noting that, in addition to controlling Amtrak’s stock and Board of Directors “the political branches exercise substantial, statutorily mandated supervision over Amtrak’s priorities and operations”].) There is a self-evident distinction between the imposition of fiduciary duties (even those created by the Constitution) and the maintenance of public oversight in how such duties are discharged.

Moreover, revocability is the *only* avenue for such oversight in the present circumstances. Article II, section 245 of the City Charter specifically exempts the Board from the City Council’s veto power over its subordinate officers and agencies. (Los Angeles Charter and Administrative Code, art. II, § 245, subdivision (d)(2).) While there is no doubt that the City Council had the authority both to make policy decisions as to the amount of the Subsidy and to delegate that decisionmaking authority to the Board, the fact that the Board

generally enjoys broad discretion to administer the City's pension system speaks to the need for adequate checks and balances where the Constitution expects them. Because there is a politically insulated body largely immunized from direct City Council oversight, it becomes imperative for the Council to have some means of reigning in the Board's decisionmaking should it diverge from the City's legislative policies. For that reason, the City's inability to permanently bargain away its sovereign power is a necessary check on an otherwise unfettered delegation.

This rule against permanent divestiture of core legislative functions is particularly relevant “[w]ith regard to irrevocable delegation of the fixing of salaries of public employees.” (*California State Employees’ Assn. v. Flourney* (1973) 32 Cal. App. 3d 219, 234.) In *Flourney*, the Court found that the Legislature had the authority to refuse appropriations to an administrative agency that had been delegated the responsibility for fixing wages of certain public employees. The Legislature retained this oversight because it could not otherwise “divest itself of its constitutionally granted powers.” (*Id.*; see also *Bagley v. City of Manhattan Beach* (1976) 18 Cal. 3d 22, 25 [“the city council may not delegate its power and duty to fix compensation”].) This holding derives from *Slavich v. Walsh*, in which the Court of Appeal directly confronted the question of “whether the legislature has constitutional power to withdraw a delegation of power once granted,” and found that it plainly did. (82 Cal. App. 2d at 235.)

Delegations of fundamental legislative functions, such as a city's determination of public employee compensation, are constitutionally permissible when the delegation is conditional or revocable. In another case of a delegation involving public employee compensation, the Court of Appeal found that the delegation was "not an abdication of the Legislature's duty to prescribe [] compensation." (*Martin v. Cnty. of Contra Costa* (1970) 8 Cal. App. 3d 856, 862.) Critically, the statute provided "for interim changes" in compensation decisions "subject to review by the Legislature." (*Id.*) This oversight would prevent "violation of the legislative policy" and avoid nondelegation concerns. (*Id.*) An approach focused on appropriate oversight reflects California's concern with "establishing a safeguard that will prevent any deviation from [the legislature's] policies" by an administrative agency. (*Sturgeon v. Cnty. of Los Angeles* (2010) 191 Cal. App. 4th 344, 354 [upholding a delegation where the Legislature had the authority "to review and abrogate any termination of benefits it believes is inappropriate" by the agency].)

By the same token, in the case of a ratemaking delegation to a rent control board, the California Supreme Court found that a delegation was unconstitutional because the ratemaking system established rents of "indefinite duration" and lacked any "adjustment mechanism . . . to provide for changes in circumstances." (*Birkenfeld*, 17 Cal. 3d at 169.) The overriding concern in these cases is that the legislature remains in a position to reassert control of a delegated function if changed circumstances should warrant it. (*See Alexander v. State Pers. Bd.* (2000) 80 Cal. App. 4th 526, 538 [finding "adequate

safeguards” in part because the discretionary decisions delegated to the agency were each “limited in duration to five years”].) This same principle should advise in favor of allowing the Los Angeles City Council to retain oversight of its delegation to the Board, particularly when changed circumstances may warrant modification of the City’s policy. The City Council cannot permanently divest itself of the ability to ensure that delegated authority continues to be exercised in the public interest.

Because a permanent divestiture of the legislature’s authority to fix the Subsidy would create serious constitutional problems, the trial court should not have inferred irrevocability from the delegating statute. “When a statute delegates power with inadequate protection against unfairness where such protection can be easily provided, the reviewing court may insist that such protection be included or, in the alternative, declare the legislation invalid.” (*Bock v. City Council* (1980) 109 Cal. App. 3d 52, 57–58.) Because the abiding concern of the nondelegation doctrine is the need for adequate safeguards against usurpation of legislative authority, the trial court should not infer the *absence* of a key safeguard in considering the constitutionality of a delegation. Instead, the court should have taken the approach that the United States Supreme Court outlined in *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.* (1980) 448 U.S. 607, where it rejected a reading of a statute that would create “such a ‘sweeping delegation of legislative power’ that it might be unconstitutional.” (*Id.* at 646 [citing *A.L.A. Schechter Poultry Corp. v. United States* (1935) 295 U.S. 495, 539].) When faced with a question of the scope of a

delegation, “[a] construction of the statute that avoids this kind of open-ended grant should certainly be favored.” (*Id.*) The simplest interpretation of the delegation ordinance is that any power given thereunder could be taken back just as easily. The trial court could have avoided creating a constitutionally impermissible delegation by acknowledging the implicit revocability of any delegation of the municipal function.

III. CONCLUSION

Appropriate delegations of policymaking authority are necessary tools for the administration of states and cities alike. But the ability of legislative bodies to revoke their own delegations is a necessary safeguard against the usurpation of sovereign functions by unelected decisionmakers. The City has the authority to *lend* its responsibilities to subordinate agencies, but it cannot give those responsibilities away. For these reasons, this Court should reverse the trial court’s decision that the City irrevocably delegated its authority to the Board.

Respectfully submitted,

Dated: July 15, 2015

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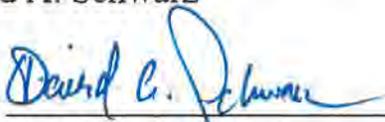
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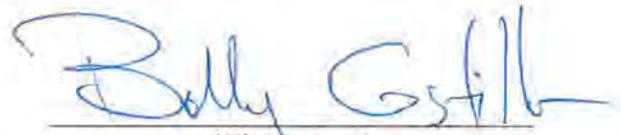
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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

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Jack Fry, et al. v. City of Los Angeles

Court of Appeal No. B259791

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