Case No. F068569

In the Court of Appeal, State of California

FIFTH APPELLATE DISTRICT

DOUGLAS VAGIM et al.,
Plaintiffs and Respondents

vs.

CITY OF FRESNO AND DOUGLAS SLOAN,
Defendants and Appellants.

Appeal from the Superior Court of the State of California
County of Fresno. Case No. 13CECG03206

Honorable M. Bruce Smith, Judge Presiding

APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF AND AMICUS CURIAE BRIEF OF THE ASSOCIATION OF CALIFORNIA WATER AGENCIES, THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND THE LEAGUE OF CALIFORNIA CITIES

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE PRESIDING JUSTICE:

Pursuant to Rule 8.200(c) of the California Rules of Court, the Association of California Water Agencies ("ACWA"), California State Association of Counties ("CSAC"), and the League of California Cities ("League") (sometimes collectively referred to herein as "Amici") respectfully request permission to file the joint amici curiae brief combined with this application. Each applicant organization represents public agencies with substantial interest in this case because each is a local government funded by local taxes, assessments, fees, and charges subject to initiative reduction or repeal pursuant to California Constitution article XIII C, § 3. Further, each proposed amicus represents agencies that provide water, sewer, or other public utility service subject to statutory and constitutional requirements for the setting of service fees and charges at issue in this case, including the requirements of California Constitution article XIII D, § 6. (See Cal. Const. art. XIII C, § 1 (b) and art. XIII D, § 2(a).) Also, each represents agencies that are subject to adoption of initiative ordinances pursuant to Article XIII C, § 3. This case involves a challenge to the legality of a proposed initiative relating to the revenues and consequently the fiscal integrity of a local government agency.

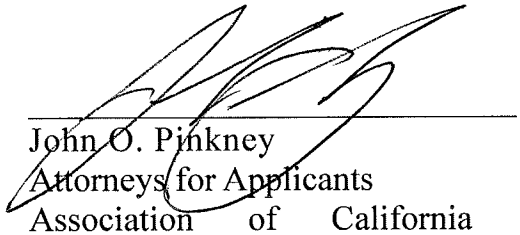
The applicants' attorneys have examined the briefs on file in this case and are familiar with the issues involved and the scope of the briefing. The applicants respectfully submit that a need exists for additional briefing regarding the statewide impact of a decision by this Court on this matter.

For the reasons stated in this application and further developed in the Introduction and Interest of Amici portion of the proposed brief, the applicants respectfully request leave to file the amicus curiae brief combined with this application.

The amici curiae brief was authored by the undersigned. No other party, person, or entity made a monetary contribution to fund its preparation or submission.

Respectfully submitted:
Slovak Baron Empey Murphy & Pinkney LLP

DATED: February 27, 2014



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AMICUS CURIAE BRIEF

I. INTRODUCTION

A. Interest of Amicus

This case involves an initiative that violates established limitations on initiatives by setting rates below the costs to continue delivering essential government service and provide a safe and adequate water supply to the customers that rely exclusively on the City for water. Numerous reported decisions, including the recent decision in *Mission Springs Water District v. Verjil* (2013) 218 Cal.App. 4th 892 ("*Mission Springs*"), make clear that public agencies may challenge initiatives before they are submitted to the voters. Pre-election initiative review serves an important and judicially recognized public purpose by allowing local legislative bodies to seek review of initiatives from the judicial branch of government before public agencies incur the expense (political, social, and fiscal) of an election to consider a potentially invalid law. However, the published decisions do not provide clear guidance on the proper timing for pre-election initiative review. This case provides an opportunity to establish a clear rule permitting early pre-election initiative review where the review is conducted in a manner that allows sufficient time for a validated initiative to be placed on the ballot. As set forth in Appellants' Opening Brief, the Appellants' good faith approach to seeking early review allowed sufficient time for the initiative to be placed on the ballot if deemed valid.

Furthermore, without duplication, amici fully endorse Appellants' arguments contesting Respondents' position that this case was rendered moot by issuance of the initiative's title and summary. The issuance of a

title and summary by Fresno's city attorney may have resolved Respondents' demand for a title and summary, but the controversy and dispute over the validity of the initiative was not resolved by the mere issuance of a title and summary. For the reasons addressed in Appellants' reply brief, a justiciable controversy exists and the underlying controversy over the validity of the initiative continues. But even if the case were moot, this Court should still rule on the validity of the initiative as established case law supports courts exercising their discretion to rule on moot issues where a case involves broad issues of public interest that are likely to recur. This case does present issues of significant public interest to Amici, its members and the people they serve. Moreover, the issues presented in this case have occurred repeatedly in the past and will continue to occur if judicial guidance is not provided on the timing for pre-election judicial review of initiatives. Accordingly, Amici write to support Appellants' position and urge this Court to confirm that Appellants properly sought review of the initiative at the earliest opportunity and that the initiative at issue is invalid for the reasons stated in Appellants' Opening Brief.

B. Description of Amicus Curiae

ACWA is a non-profit public benefit corporation organized and existing under the laws of the state of California since 1910. ACWA is comprised of over 450 water agencies, including cities, municipal water districts, irrigation districts, county water districts, California water districts and special purpose agencies. ACWA's Legal Affairs Committee, comprised of attorneys from each of ACWA's regional divisions throughout the State,

monitors litigation and has determined that this case involves issues of significance to ACWA's member agencies.

CSAC is a non-profit corporation. Its membership consists of all 58 California counties. CSAC sponsors a Litigation Coordination Program, administered by the County Counsels' Association of California and overseen by the Association's Litigation Overview Committee, comprised of county counsels from throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The League of California Cities is an association of 470 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, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as having such significance.

C. Amici Have a Unity of Interest Because Their Members are Local Governments Subject to Laws Governing Initiatives and to Articles XIII C and XIII D of the California Constitution.

The local agencies represented by ACWA, CSAC, and the League have a significant interest in cases, such as this, that involve limitations on

initiatives, particularly those that affect the ability of local public agencies to establish budgets, allocate fiscal resources, and levy property related fees, and those concerning the procedures by which pre-election judicial review may be obtained. Amici organizations represent local public agencies throughout California that establish local taxes, assessments, fees, or charges that may be reduced or repealed by initiative pursuant to California Constitution article XIII C, § 3. This case involves a challenge to the validity of an initiative relating to the revenues and consequently the fiscal integrity of a local government agency and therefore generates even greater concern for amici's members.[1]

II. ARGUMENT

A. The Rate-Making Process.

Regardless of whether a particular local agency member is a general purpose government, such as a city or county, or a special district responsible for providing water, sewer, refuse collection, or another utility service, each is confronted with the complexity of providing essential governmental services with increasingly scarce resources. The challenge

[1] Amici adopt the description of facts as set forth in the Appellants' Opening Brief at pages 3 through 16. Respondents' brief, which focuses on the issue of mootness, does not refute key legal and factual issues raised by Appellants. Specifically, Respondents do not refute Appellants' position that the City of Fresno has a duty to provide a safe and adequate water supply to those compelled to rely on City water. (RB, p.12). In addition, Respondents chose not to dispute the fact that the 2008 rates proposed in their initiative would be inadequate to sustain a safe and adequate water supply as such rates would not produce sufficient revenue for critically needed water treatment facilities much less maintenance and replacement of aging water infrastructure.

California's public agencies face today with drastically less resources and increased service demands in the face of the most severe drought in over one hundred years is unprecedented in California's history.

The scope and complexity of water resource management, and correspondingly, setting rates to pay for those activities, have been recognized as "unequalled by virtually any other type of activity presented to the courts." *Brydon v. East Bay Mun. Utility Dist.* (1994) 24 Cal.App.4th 178, 203-204. Public agencies manage complex water resource systems and fund these vital services through service rates, fees, and charges. These agencies range from small (a few hundred or thousand customers) to large (several hundred thousand to more than a million customers), from predominately agricultural and rural districts to populous cities. Part of their responsibility as resource managers is to set rates that appropriately allocate the "full cost" of water, including not only costs to operate and maintain a water delivery system, but the full cost of sustaining the supply of water from day to day, season to season, year to year, and generation to generation.

To avoid inefficient and non-beneficial use of California's limited water resources and to avoid the risks to public health and safety that result from under-funded water systems, the Legislature has mandated that local agencies set rates that are sufficient to meet revenue requirements.

The Revenue Bond Law of 1941, applicable to the water, sewer, solid waste and other enterprises of many local agencies, including cities and counties, requires that public agencies be operated efficiently,

economically and maintained in good repair and working order, (Gov. Code §§ 54513, 54516), and that rates and charges be set at levels sufficient to pay debt service, meet bond covenants, and pay maintenance and operation expenses and other obligations. (Gov. Code § 54515.)

Local agencies frequently fund utility operations from a variety of revenue sources, including capacity charges,[2] connection charges,[3] standby charges,[4] investment earnings, tax revenues if the agency has tax authority (or benefits from property taxes because it had tax authority prior to the adoption of Proposition 13 in 1978), as well as rate revenue. The portion of the revenue required by an agency to provide safe, adequate and lawful service (it's so-called "revenue requirement") that must be satisfied by rates is determined by:

1. totaling budgeted costs of the enterprise operation (operating and maintenance expenses, debt service, capital needs to be funded on a pay-as-you-go basis, changes in reserves, etc.),

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[2] A capacity charge or fee is a charge used to accumulate capital to provide capital facilities necessary to provide ongoing utility service. (*San Marcos Water Dist. v. San Marcos Unified Sch. Dist.* (1986) 42 Cal.3d 154 (characterizing capacity charges for purposes of local governmental immunity from property taxes).)

[3] A connection charge is a one-time fee imposed on the developer of a new building for the establishment of new service to that building. Such charges are not subject to Proposition 218. (*Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409.)

[4] A standby charge is a charge imposed on property to recover the cost of facilities necessary to make service available to that property on demand. (Gov't Code §§ 54984 et seq. (Uniform Standby Charge Procedures Act), under Proposition 218 a standby charge is treated as an assessment. Cal. Const. art. XIII D, § 6 (b)(4).)

2. deducting the revenue expected to be generated by other sources such as investment income, taxes, standby charges, and capacity charges, and

3. spreading the required revenue over the level of service or volume of commodity expected to be sold during the relevant rate period.

To ensure sufficient revenues and avoid "rate shock" by smooth rate ramps (either up or down),[5] obtain access to the bond market (which demands reserves to ensure repayment), meet bond covenants (i.e., contractual promises to lenders to impose rates sufficient to ensure repayment of debt and maintenance of the capital facilities which secure that debt), and guard against unforeseen circumstances, public agencies must establish reserve accounts, while ensuring their bills can be paid when due.

Moreover, setting water rates amounts to predicting the weather, as the volume of water sold varies with the weather. In wet seasons, few water their lawns. In dry seasons, most do. In extended droughts, like the one California now faces, the volume of water sold can decrease significantly due to voluntary or mandated usage reductions or rationing. Accordingly,

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[5] Rate-makers often use rate-smoothing devices, like loans to a utility fund in one year, to be paid back in another, or flows into and out of a rate-smoothing reserve, to protect customers from "rate shock" that would arise if rates changed suddenly and significantly to cover the cost of replacing a major water tank, for example, in a single year. It would not be good rate-making practice to spike user rates in that year sufficient to cover the cost of that capital facility given the water tank has a long service life. Moreover, equity counsels spreading the cost of a long-lived facility over the ratepayers who benefit from it and not just those in the year it is built.

rate-setting involves the reasoned exercise of discretion to establish appropriate rates that will meet the obligations of an agency without exceeding the cost of service.

The power to set water rates arises from a public agency's "proprietary and quasi-public capacity." (*County of Inyo v. Public Utilities Com.* (1980) 26 Cal.3d 154,161.) Public agencies that operate their water systems as prudent business owners have historically recovered all costs incurred in providing water to their customers; including the costs of building, maintaining, operating, administering, and improving their systems.[6] Although limited in the post-Proposition 218 era, *Hansen v. City of San Buenaventura* (1986) 42 Cal.3d 1172, 1181 establishes the unsurprising principle that rates must satisfy the revenue requirement of a public water service.[7] Post-Proposition 218 cases acknowledge this

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[6] The Legislature has defined "water" for the purposes of Proposition 218 as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." (Wat. Code § 53750, subd. (m).)

[7] *Hansen* states, "Revenue requirements are allocated to various classes [of customers] based on each group's proportionate use of the system, including use of physical plant facilities and consumption of water, among other elements. A preliminary step in determining revenue requirements is the establishment of appropriate classes among which costs will be allocated. The next step is to calculate the costs which properly should be assessed each group. For this analysis, two alternative methods exist: the cash basis and the utility basis. Very generally, the cash method sets revenue requirements based on actual operating and maintenance expenses plus allowable charges for system replacement, debt principal repayment, and other capital costs. The utility method also considers actual operating and maintenance expenses, but instead of looking to cash expenses such as system replacement and debt principal repayment, the method focuses on depreciation attributable to outside use and on rate of return on investment." (*Hansen v. San Buenaventura,* 42 Cal.3d at 1181.)

principle as well. (*Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal.App.4th 914, 922 ("Cities are still entitled to recover all of their costs for utility services through user fees."); *Howard Jarvis Taxpayers Ass'n v. City of Roseville* (2002) 97 Cal.App.4th 637, 647-648; *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586.)

The cost of administering a public utility is, of course, a proper cost to be recovered from rates. Of necessity, a single-purpose public agency's cost to administer a utility service includes the cost of governance, including elections. Water purveying agencies and their rate payers have a clear interest in addressing the validity of initiatives at the earliest practicable opportunity, thereby avoiding the costs of pointless elections on illegal initiative proposals.

B. The Right of Local Legislative Bodies to Seek Pre-Election Guidance from the Judicial Branch is Well-Established.

The recent decision in *Mission Springs Water District v. Verjil* (2013) 218 Cal.App.4th 892 ("*Mission Springs*") firmly established that a public agency's legislative body may seek pre-election review of a proposed initiative from the judicial branch "where the validity of a ballot measure is concerned." (*Mission Springs*, supra, 218 Cal.App.4th at p. 15.)

The numerous decisions supporting pre-election review of proposed ballot measures confirm that public agencies may challenge a proposed ballot measure before suffering the expense and community division of placing an invalid measure on the ballot (See *Mission Springs*, supra; *Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769 ("*Widders*"); *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205; *City of Riverside v. Stansbury* (2007) 155 Cal.App.4th 1582, disagreed with on other grounds

in *Mission Springs* at pp. 906-907; *City of San Diego v. Dunkl* (2001) 86 Cal.App.4th 384 ("*Dunkl*"); and *Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013 ("*Citizens*").)

The California Supreme Court has made clear that where a proposed measure is beyond the electorate's power to adopt, the measure must be removed from the ballot. (*American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 695-696). The California Supreme Court explained: "Although real party in interest recites principles of popular sovereignty which led to the establishment of the initiative and referendum in California, those principles do not disclose any value in putting before the people a measure which they have no power to enact." (*Id.* at 697).

In addition to the rule of law allowing for pre-election review of initiatives, the California Supreme Court has provided clear instruction on the rationale supporting pre-election review of initiatives: "The presence of an invalid measure on the ballot steals attention, time and money from the numerous valid propositions on the same ballot. It will confuse some voters, frustrate others, and an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure, tends to denigrate the legitimate use of the initiative procedure." (*Senate of the State of California v Jones* (1999) 21 Cal.4th 1142, 1154 ("*Senate v. Jones*"); *American Federation of Labor v. Eu*, supra, 36 Cal.3rd 687; 695 – 696.)

Other decisions have stressed that pre-election review is appropriate because there is no value "in putting before the people a measure which they have no power to enact." *Dunkl*, supra, 86 Cal.App.4th at 394; *Widders*, supra, 167 Cal.App.4th at 780; see also *deBottari v. City Council* (1985) 171 Cal. App.3rd 1204, 1209 (In this case, addressing an invalid referendum, the court also noted at p. 1213, "Judicial deference to the

electoral process does not compel judicial apathy towards patently invalid legislative acts.")

As explained in the following cases:

> "If an initiative ordinance is invalid, no purpose is served by submitting it to the voters. The costs of an election – and of preparing the ballot materials necessary for each measure – are far from insignificant. Proponents and opponents of a measure may both expend large sums of money during the election campaign. Frequently, the heated rhetoric of an election campaign may open permanent rifts in the community ... that the people's right to directly legislate through the initiative process is to be respected and cherished does not require the useless expenditure of money and creation of emotional community divisions concerning a measure which is for any reason legally invalid." (*Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1023; *Riverside v. Stansbury* (2009) 155 Cal.App.4th 1582, 1592, (citing *Citizens*) disagreed with on other grounds in *Mission Springs*).

In *Dunkl*, supra, the defendants circulated an initiative to reverse a ballpark project the City of San Diego was pursuing through a memorandum of understanding. (*Dunkl*, supra, 86 Cal.App.4th at 388.) The City and Padres baseball team both sued the initiative proponents seeking declarations the initiatives were invalid. Ultimately, the court granted summary judgment for the City.

As the court in *Dunkl* pointed out, there is no right to place an invalid initiative on the ballot. (*Dunkl,* supra, 86 Cal.App.4th at 389.) Costs are incurred in postponing the challenge to an initiative measure until after the measure has been submitted to and approved by the voters. Such costs can be considered by a court in determining the propriety of pre-election intervention. (*Senate v. Jones*, supra, 21 Cal.4th 1142, 1154).

In *Widders*, a citizen of the city of Ojai prepared two proposed ballot initiatives that directed the city council to exercise its "informed judgment" to craft and adopt laws relating to chain stores and affordable housing. The city attorney advised the initiative proponent that the proposed initiatives were an improper exercise of the constitutional initiative power because they failed to propose actual legislation. The city attorney refused to prepare ballot titles and summaries for the initiatives and filed a pre-election declaratory relief action seeking judicial review of the proposed initiatives. The initiatives' proponent argued that the city's declaratory relief action was filed "at the very beginning of the initiative process, when the possibility of the initiative qualifying and being filed with the city was speculative at best, and long before the city would even possibly face any affirmative duty to take anything more than *de minimis* action. The proponents also argued that the only fiscal cost at such an early stage in the process would be the *de minimis* cost associated with the actual preparation of a ballot title and summary.

Relying on *Citizens*, the Second District Court of Appeal was not persuaded by the proponent's arguments, noting that

> "Fiscal costs are not the only relevant consideration. Frequently, the heated rhetoric of an election campaign may open permanent rifts in a community. That the people's right to directly legislate through the initiative process is to be respected and cherished does not require the useless expenditure of money and creation of emotional community divisions concerning a measure which is for any reason illegally invalid." *Widders*, supra, 167 Cal. App. 4th at 781.

The court in *Widders* went on to explain that this rationale applies early in the initiative process:

> "The circulation of a petition, particularly in a small town, can invoke the same level of 'heated rhetoric' capable of creating 'permanent rifts in a community' that a full-blown election campaign can. (*Id.*)

In light of the above reported decisions, there is substantial and well-founded authority for pre-election review of initiatives.

Here, the City of Fresno was presented with an initiative it immediately knew would eliminate revenues for infrastructure critically needed to satisfy the City's duty to ensure an adequate and clean water supply for its community. When any water purveying agency is confronted with an initiative that it is certain will render it unable to comply with its charter and statutory mandates to provide a safe and adequate water supply, service agency debts, and pay maintenance and operating expenses, it is incumbent upon the agency's legislative body to seek review from the judicial branch of government – before incurring the expense of an election on a measure that can never be enacted. Seeking such pre-election review is certainly supported by a significant body of case law. Moreover, logic and good public policy dictate that agencies seek such review at the earliest opportunity and thereby allow sufficient time for the initiative to be placed on the ballot should its validity be affirmed. Amici urge clearly defined bright-line guidance from this Court confirming that agencies may seek judicial review after concluding that an initiative is legally defective.

To illustrate amici's point, if an agency is presented with an initiative that blatantly discriminates against a legally protected class, it is incumbent upon the agency and its legislative body to seek judicial review at the earliest opportunity. Nothing is gained by delaying review until after the

initiative proponents collect signatures and submit the petitions to the registrar for verification.

Likewise, no purpose is served in delaying judicial review until after a divisive and damaging election on a measure that is legally infirm and can never be implemented. Where a legislative body of an agency is concerned with the constitutionality or legality of a proposed initiative, its remedy is - and has always been - to seek review from the judicial branch of government. Provided a pre-election challenge is conducted sufficiently early to allow an initiative to be placed on the ballot if validated, there is little advantage in judicial review occurring by way of a post-election lawsuit after voters have weathered the elements, taken time off work and cast their sacred ballot – only to learn after the election their vote was invalidated by judicial decree. Initiative proponents also benefit from early judicial review, before they invest the considerable time and money to gather signatures for submission to the registrar.

This is precisely the rationale applied by the court in endorsing pre-election review of both facial and substantive initiative challenges in *Mission Springs*, and the other cases cited above.

C. Bifurcating Initiative Challenges into Pre and Post-Election Actions is Illogical and Ineffective.

In *Citizens*, a group of citizens sought to compel the City of Riverside to place a repugnantly unconstitutional anti-gay initiative on the ballot. The initiative would have repealed existing ordinances relating to gay rights, required voter approval for any future ordinances on the subject and prohibited funding for AIDS - related programs or for any individual or group that advocated gay rights.

The proposed ordinance went beyond the power of the electorate because it violated the equal protection clause and because the provisions

prohibiting funding of individuals, organizations and activities that promote, encourage, endorse, legitimize or justify homosexuality was "unconstitutionally vague" and therefore violated due process. (*Citizens*, supra, 1 Cal. App. 4th at 1026 - 1027, 1031 - 1032.)

The appellate court provided a detailed analysis explaining that, while courts traditionally conduct pre-election review of measures to determine whether the measures are beyond the power of the electorate to adopt (referring to this as "ultra vires impropriety"), it is also appropriate for courts to consider pre-election substantive challenges to initiatives. The Court applied the federal concept of "pendent jurisdiction" by analogy. As explained in the Court's opinion:

> "[i]f we are 'permitted' . . . to conduct a pre-election review of a particular measure on the issue of the electorate's power, there is no logical reason why we should be prohibited from reaching all the challenges raised to the measure.
>
> "Further, such a rule would encourage multiple litigation of the most mischievous sort. Having found no 'ultra vires' impropriety, a court would be compelled to permit a measure to be submitted to the voters without addressing even the most patent issues of substantive invalidity. The voters, having been apparently assured that the measure would be effective if approved, would not unreasonably feel betrayed when the court later entertained a new challenge which proved successful. We reject this position". (*Id.*, fn. 5 at p. 1024.)

The rationale in *Citizens* applies here. This Court has before it a controversy over whether the initiative in issue will set rates below the cost to deliver vital government services. Such a challenge to the initiative may be addressed in a single, efficient action prior to the social, political and fiscal expense of gathering signatures, of funding campaigns and ultimately holding an election on an illegal initiative that can never be enforced. This

is particularly true where, as here, the public agency affirmatively takes steps to ensure judicial review can be conducted quickly to allow sufficient time for the initiative to be placed on the ballot if validated.

Respondents now contend that the City must separately pursue its declaratory relief action or file a post-election challenge, thereby setting the stage for multiple pre-election and post-election actions. Such strategic gamesmanship does not serve the interests of the affected public agency, the electorate or the initiative proponents. To the contrary, an inefficient, multi-action approach to addressing an initiative's validity unnecessarily increases expenses for the affected public agency (and its rate payers), the proponents, and destroys the confidence of voters who cast their votes only to later learn that their votes were struck down along with the initiative.

Rather than encouraging multiple pre and post-election actions and appeals over the validity of the initiative, the better, logical and efficient approach for all concerned is for this Court to address the initiative's validity now, in an efficient, pre-election action.

Respondent's argument that the case is now moot and that the controversy must be resolved through future pre and post-election litigation would lead to a costly and divisive multiplicity of lawsuits, some of which would likely conclude after the voters have spoken. If the post-election litigation and appeals take a year or more and the initiative is ultimately found invalid, the City will then be forced to deal with the prospect of retroactively billing customers for the difference between the initiative's lower 2008 rates and the higher pre-initiative rates. Such an approach would cause customers severe financial hardship; divide the community; as well as breed contempt and distrust for the City, the courts and the election process. If this Court addresses the underlying controversy pre-election, in

the present action, the City's challenges will be efficiently resolved and eliminate the risk of such rate-payer hardship.

The initiative is either valid or it is not. If it is invalid, case law dictates that it not be submitted to the voters.

D. <u>This Case Presents Issues of Increasing Public Interest That are Likely to Recur</u>.

As thoroughly addressed in Appellants' briefs, the underlying controversy over the validity of the initiative persists following the City Attorney's compliance with this Court's order compelling him to provide a title and summary for the disputed initiative. But even if the case were moot, this Court should still render a decision on the validity of the initiative. The rule regarding mootness is tempered by the Court's discretionary authority to decide moot issues. When an action involves a matter of continuing public interest that is likely to recur, a court may exercise inherent discretion to resolve that issue, even if an event occurring during the pendency of the appeal normally would render the matter moot. (*Morehart v. County of Santa Barbara* (1994) 7 Cal 4th 725, 746-747; *Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal. 2d 536, 542 ("*Eye Dog Foundation*"); *Bullis Charter School v. Los Altos School Dist.* (2011) 200 Cal.App. 4th 1022, 1033-1034 ("*Bullis*").)

Another exception exists when, despite the happening of subsequent events, material questions remain for the court's determination. (*Eye Dog Foundation*, supra, 67 Cal.2d at p.541; *Bullis*, supra, 200 Cal.App. 4th at p. 1034). This exception has been applied to declaratory relief actions on the basis that the court must do complete justice once jurisdiction has been assumed. (*Eye Dog Foundation*, supra, 67 Cal.2d at pp. 541-542.) Now that this Court has assumed jurisdiction, it should dispense complete justice by ruling on the initiative's validity.

In the present case, there can be no debate that the issues presented are matters of significant public interest that are likely to recur. California is in the midst of a devastating drought of historic proportions. The severity of the drought led to the Governor declaring a state of emergency on January 17, 2014, noting that the drought is "perhaps the worst drought that California has ever seen since records (began) about 100 years ago." The situation is not expected to improve. In fact, 2014 is projected to be the driest water year on record. (See Governor's January 17, 2014 Emergency Proclamation at www.gov.ca.gov/news.php?id=18368 (accessed on February 24, 2014); the National Oceanic and Atmospheric Administration "NOAA", National Climatic Data Center Reports at http://www.ncdc.noaa.gov/sotc/drought/#det-wus (accessed on February 24, 2014)).

The Governor's declaration notes that snowpack in California's mountains was approximately 20 percent of the normal for January. (*Id.*) California's reservoirs, rivers and groundwater are also at significantly lower than normal levels. (*Id.*) These extremely dry conditions have persisted since 2012, which adversely impacts not only residential and commercial water use, but also agriculture and the low-income and agricultural communities that depend on water to support the agriculture industry in the state's farming regions. (*Id.*) The Governor's proclamation calls upon municipalities to implement their local water storage contingency plans immediately. Local agencies are also called upon to update their legally required urban and agricultural water management plans.

The United States Congress, California's Governor and California legislators are scrambling to provide relief and financial aid to California to face the anticipated increase in wildfires, devastating impacts on

agriculture, drying wells in the Central Valley and resulting water quality and contamination issues caused by declining water, which results in the concentration of groundwater contaminants. California's immediate future and the future of the Central Valley, in particular, are bleak and will test the ability of local and state leadership to mitigate the drought's inevitably harsh consequences. Already, unprecedented drastic measures have been taken due to the drought. For example, in late January, for the first time in the 54-year history of the State Water Project, California officials announced they were cutting off the flow of water from the northern part of the State to the South, affecting both farms and cities. (California Department of Water Resources news archive at: http://www.water.ca.gov/news/archive/index.cfm, see document entitled "DWR Drops State Water Project Allocation to Zero, Seeks to Preserve Remaining Supplies", on this web page, accessed on February 24, 2014).

The drought is affecting all of California. The last two years were the driest in recorded history for the Colorado River. As a result, lower flows in the Colorado River have prompted the federal government to reduce to the lowest levels in history the amount of water flowing from Utah's Lake Powell Reservoir into Lake Mead and the lower Colorado River. In 1999, Lake Mead was completely full, but the drought has resulted in Lake Mead water levels dropping 120 feet. The decision to reduce flows into Lake Mead will lower the lake's water level an additional twenty feet by July 2014. These events are historically unprecedented.

Perhaps most ominous is the fact that state and local leaders still do not know how bad the drought will be or how long it will last. While state and local officials cannot bring rain or snow, it is incumbent upon them to take action to adopt measures to make beneficial use of the state's greatly diminished water resources. Being wise water stewards in the drought's

epicenter, the Fresno City council has been planning for years to transition from nearly exclusive reliance on groundwater and to take advantage of its vital surface water rights by constructing a treatment facility to utilize surface water (4JA 607, 616-617). As explained in Appellants' Opening Brief at pages 5-6, because Fresno's groundwater levels have fallen so low, the planned surface water production will be cheaper once treatment works are built (7JA 1289; see also Appellant's Opening Brief at pp. 5-6). The surface water treatment investment will save costs equal to what residents pay under the increased rates the initiative at issue seeks to rescind. (7JA 1289; See also Appellants' Opening Brief at p. 6.) Appellants' Opening Brief also addresses urgently needed improvements required to reduce ongoing leaks and failures that accompany operating 1,780 pipe miles of mains that are aged from 30 to over 70 years. (7JA 1281, 1292-1293).

The City of Fresno faces issues similar to cities, counties and water districts throughout California as they work in earnest to fulfill their legal, fiduciary and moral duty to provide an ongoing, safe and adequate water supply for the residents that rely exclusively on them for one of life's most vital necessities–water.

With the knowledge of the improvements needed to meet community needs for water on an ongoing basis, the City of Fresno complied with the requirements of Proposition 218 and successfully adjusted rates to meet the infrastructure demands it faces if it is to continue providing clean and adequate water to the 550,000 souls that call Fresno home.

It was under these circumstances of historic drought conditions and declining ground water levels that the initiative proponents walked into Fresno City Hall and presented their plans to undo years of planning and eviscerate hopes of building desperately needed improvements without

even the most rudimentary planning or financial analysis. Respondents' objective is merely to bring about lower rates for current users, without planning for immediate infrastructure needs or dealing with both the short and long term impact of the present historic drought.

While Respondents concede that Appellants have a duty to provide a safe and adequate water supply, they fail to refute Appellants' evidence demonstrating that the initiatives will imminently undermine the City's ability to do so.

Respondents' actions are but one example of a reckless scenario that each year impedes and impairs the efforts of local public officials to plan for future water needs and ensure ongoing quality water supplies.

Local officials work diligently throughout the state to fulfill their legal duty to ensure a safe and adequate water supply for those they serve. Yet, their efforts can be entirely undermined by initiative proponents armed with pen and paper (but no planning, studies or analysis) and a complete disregard for the duties they take on when they elect to circulate rate-reduction initiatives and thereby step into the shoes of a local agency's legislative body. As the court explained in *Mission Springs*, supra, the district's legislative body could not set water rates so low that they were inadequate to pay the costs to pay the district's operating expenses, provide for repairs and depreciation of works owned and operated by the district and service debt. (*Mission Springs*, supra 218 Cal.App 4th at pp. 20-231). In *Mission Springs*, the district, like Appellants here, introduced uncontradicted evidence that the initiatives, if enacted, would set water rates so low that they would be inadequate to cover its operating costs. The court held that by stepping into the shoes of the legislative body, the initiative proponents and voters were bound by the same rate setting requirements imposed on the district's legislative body (i.e., to set rates at a

the level sufficient to operate the district, deliver water, provide for repairs and depreciation of works and service debt). (*Id.*)

Local agencies charged with the responsibility and duty to plan for and design urgently needed water infrastructure have a compelling interest in the outcome of this case and require clarity on the question of when they may file a pre-election challenge to an unlawful initiative, which may impair an agency's ability to deliver essential services, pay existing debts and undermine years of painstaking and legally required infrastructure planning.

The plethora of cases cited in the parties' briefs demonstrate that there is a lack of clear direction on the issue of when public agencies may and/or should challenge an initiative they are certain will render the agency unable to fulfill its duty to provide essential government services. From the perspective of Amici, such challenges should be permitted and encouraged as soon as an agency becomes aware that a proposed initiative will substantially impair its ability to provide essential government services. An early challenge allows for a prompt decision without impairing the initiative's chance of being placed on the next available ballot if validated. The later in the process an initiative is challenged, the greater the likelihood that a validated initiative will not make it onto a pending ballot.

In the present case, Appellants sought judicial guidance regarding the initiative's validity at the earliest opportunity. As evidence of the City's good faith, the City stipulated to an expedited briefing schedule to allow for prompt judicial review. By taking such prompt and good faith actions, the City ensured the initiative could be timely placed on the ballot if deemed valid.[8]

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[8] Respondents' then disregarded the agreed upon briefing schedule and filed

For the above reasons, Amici urge this Court to recognize and follow the well-established body of law permitting pre-election review. Amici also urge this Court to establish a bright line rule, that agencies may seek early, pre-election judicial guidance regarding the validity of initiatives where the review is conducted in a manner that allows sufficient time for a validated initiative to be placed on the next available ballot. Absent such guidance from this Court, public agencies will lack clear direction as to the proper timing for pre-election initiative challenges.

E. The Record Demonstrates That the Proposed Initiative Will Impair Essential Government Service.

While the initiative process is well established in California, it is not without limitations. In *Mission Springs*, supra, the initiative proponents contended in their briefing that they had the right, through the initiative process, to set rates so low that it would bankrupt the district. Here, the City of Fresno is at the top of the short list of cities facing potential insolvency. Forcing any city to ignore its debt obligations, urgently needed infrastructure demands and impending water quality regulations and roll rates back six years would be financially reckless. The result of such fiscal initiatives is to undermine statewide and local efforts and obligations to provide safe and adequate water supplies. In *Santa Clara County Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, the Supreme Court acknowledged that an initiative may be invalidated if it threatens the inevitable or wholesale destruction of a public agency and its ability to provide an essential government service. (*Id.* at 254). An initiative's potential adverse impact on governmental finances justifies a narrow

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the writ proceedings from which this appeal arises.

application of the initiative power. (*Citizens for Jobs & the Economy v. County of Orange* (2002) 94 Cal. App.4th 1311, 1331).

The Fresno City Council cannot adopt rates that would violate its obligations as a utility to be self-sufficient without charter amendment. Likewise, the City Council cannot ignore state and federal water quality mandates and impending regulations that will mandate costly infrastructure to provide safe and adequate water supplies to those the City serves. The voters cannot do by initiative what the City Council itself does not have the power to do. (*Bagley v. City of Manhattan Beach* (1976), 18 Cal.3d 22, at 26.) On this ground alone, the proposed initiative is invalid.

III. CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to provide Appellant and all public agencies with a clear rule permitting early challenge of legally infirm initiatives.

DATED: February 27, 2014

Respectfully submitted:
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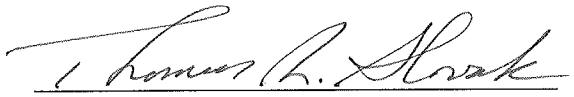
Attorneys for Applicants Association of California Water Agencies, California State Association of Counties and the League of California Cities

CERTIFICATION OF COMPLIANCE WITH CAL. R. CT. 8.204, subd. (c)(1)

Pursuant to California Rules of Court, rule 8.204, subd. (c)(1), the foregoing Appellant's Opening Brief contains 6,441 words (including footnotes, but excluding the tables and this Certificate) and is within the 14,000 word limit set by rule 8.204, subd. (c)(1). In preparing this certificate, I relied on the word count generated by Word version 14, included in Microsoft Office Professional Plus 2010.

Executed on February 27, 2014, at Palm Springs, California.

Slovak Baron Empey Murphy & Pinkney LLP



Thomas S. Slovak

PROOF OF SERVICE

Court of Appeal, Fifth Appellate District
Douglas Vagim, et al. v. City of Fresno, et at.
Case No. FO68569
Trial Court Case No. 13CECG03206

I, Erika Garduno, declare:

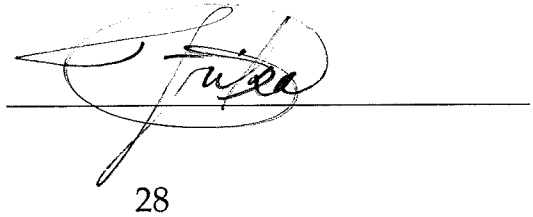
I am employed in the County of Riverside, State of California. I am over the age of 18 and not a party to the within action. My business address is 1800 East Tahquitz Canyon Way, Palm Spring, California 92262. On February 27, 2014, I served the document(s) described as **APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF AND AMICUS CURIAE BRIEF OF THE ASSOCIATION OF CALIFORNIA WATER AGENCIES, THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND THE LEAGUE OF CALIFORNIA CITIES** on the interested parties in this action as by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

See Attached Service List

✓ BY MAIL: 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 Penn Valley, 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 February 27, 2014, at Palm Springs, California.

ERIKA GARDUNO 

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