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VIA ELECTRONIC FILING
(TRUEFILING)

Chief Justice Tani G. Cantil-Sakauye
Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *City of Oxnard v. Aaron Starr* (2022) 87 Cal.App.5th 731 - amicus letter in support of City of Oxnard's Petition for Review, Supreme Court Case No. S278838

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The League of California Cities ("Cal Cities") submits this letter as amicus curiae in support of the City of Oxnard's petition for review of *City of Oxnard v. Starr* (2022) 87 Cal.App.5th 731 (the "Opinion") regarding the following question for review: "Do Measure M's requirements constitute an invalid act of administration via initiative?" (City Pet. at 6.) The Opinion injects added uncertainty into the scope of the power of initiative and referendum. The law is clear that the initiative and referendum power may be exercised over legislative matters, but not administrative or executive acts. But determining whether a particular initiative or referendum is legislative as opposed to administrative or executive has proven to be difficult, resulting in inconsistency in approach in published appellate court decisions.

By determining that the initiative in question—Measure M—is legislative, in part because it is "reasonable" and embodies policies endorsed by state law or consistent with state law, the Opinion has further muddled the law. The Opinion's test risks further encouraging initiative proponents to pursue initiatives that improperly intrude on administrative and executive decision-making. This will result in more frequent initiative disputes, many of which will end up in court. Review is necessary to clarify the test for determining whether an initiative or referendum is legislative or administrative. Clarifying the test would reduce the incidence of initiative disputes, to the benefit of cities and initiative proponents alike, and the courts.

Cal Cities is an association of 478 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. Cal Cities 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.

Facts

Respondent Aaron Starr ("Starr") sponsored several initiatives in the City of Oxnard (the "City"), including Measure M. The voters passed Measure M, which restricts when and how the City's legislative bodies conduct their meetings. The City brought this action to have Measure M and another measure declared void as administrative rather than legislative in nature. Starr filed an anti-SLAPP motion to strike, which the trial court denied. The Court of Appeal reversed as to Measure M, holding that Measure M is legislative in nature.

The law distinguishing legislative from administrative action is unclear

"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*").) The right is not without limit. 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*").) "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*.)

The question is how a court is to decide whether a particular initiative or referendum is legislative or administrative. 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.").) For ease of reference, we refer to the formulation repeated in these decisions as the "*Fishman/Southwest Diversified* Test."

Though widely adopted, the *Fishman/Southwest Diversified* 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.) In *Cross Creek*, however, 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.)

The Opinion has further muddied the waters on the administrative/legislative distinction

The Opinion holds that Measure M is legislative. (Slip op. at 13.) The Opinion acknowledges the lack of clarity in existing law: "The difference between legislative and administrative acts is easy to say in the abstract, but it can be difficult to apply in the concrete." (*Id*.) After citing the policy of liberally construing the initiative power, the Opinion analyzes Measure M in six sentences. (*Id*. at 13-14.) The Opinion makes three analytical points:

1. Measure M "does not simply carry out a plan already adopted. It creates new rules for the conduct of City council meetings." (*Id*. at 13.)

2. Measure M's new rules "are reasonable." (*Id*.)

3. The policies embodied in Measure M are endorsed by the Brown Act and consistent with the California Constitution because Measure M's new rules are "intended to increase the public's ability to have information about and to participate in the decisions made by its public agencies." (*Id*. at 14, citing Gov. Code § 54950; Cal. Const., art. I, § 3, subd. (b)(1), (2).)

These points do not justify the Opinion's conclusion that Measure M "may be reasonably interpreted as legislative." The Opinion's first analytical point, that Measure M does not carry out an existing plan, but rather creates new rules, is a fair paraphrasing of the *Fishman/Southwest Diversified* Test. But it is a mere conclusion. The Opinion is devoid of analysis of why Measure M's provisions are "new rules" and are not simply carrying out the City's existing Sunshine Ordinance.

The Opinion's second point of analysis, that Measure M's new rules "are reasonable," is made out of whole cloth. The Opinion implies that an initiative measure is legislative if its provisions are reasonable, and administrative if its provisions are unreasonable. But the Opinion cites no authority to support this new "reasonableness" test. There are a few problems with it.

Whether something is legislative versus administrative and whether something is reasonable versus unreasonable are conceptually distinct inquiries. A legislative act might be either reasonable or unreasonable. So too may an administrative act be either reasonable or unreasonable. The ultimate question is whether an initiative imposes rules on the administration of the business affairs of a city or municipality, rules that—whether sensible policy or not—should be determined by the city or municipality itself. A reasonableness test is not suitable for determining whether an initiative offends this principle or not.

Further, adding a "reasonableness" test to the inquiry makes it harder to determine whether an act is legislative or administrative. The *Fishman/Southwest Diversified* Test has already been criticized as imprecise and resulting in inconsistent approaches. The Opinion's reasonableness test is not a bright line rule, but a subjective standard. Rather than clarifying the law, the Opinion has only occluded it.

The Opinion's third point of analysis, that the policies embodied in Measure M are endorsed by the Brown Act and consistent with the California Constitution, begs the question. A rule that is administrative might also reflect policies endorsed by the Brown Act and consistent with the California Constitution. An initiative that "annulled or delayed executive or administrative conduct," to paraphrase a policy rationale behind the legislative/administrative distinction, might nonetheless reflect policies endorsed by state statutory and constitutional law. Hypothetically, an initiative might require that city council staff reports be accompanied by compelling and easy to understand graphics and animations, and that snacks be provided to members of the public at public meetings. Such an initiative might be motivated by a policy to increase public participation at meetings, and thereby reflect the policies endorsed by the Brown Act and be consistent with the California Constitution. But this would not prevent the initiative from "destroy[ing] the efficient administration of the business affairs of a city or municipality." (*Lincoln Property*, 45 Cal.App.3d at 234.)

The law to determine whether an initiative is legislative or administrative was unclear before the Opinion. The Opinion has added considerations that are vague and ill-suited to the inquiry, making the law even less clear.

Clarity as to whether an initiative is legislative or administrative will reduce initiative disputes and ease judicial resolution of those disputes

The absence of a bright line rule to distinguish between initiatives that are legislative and initiatives that are administrative is detrimental to cities, initiative proponents, and the courts. The Opinion moves the law in the wrong direction, making it more difficult than ever to predict whether an initiative will be deemed legislative, and upheld, or administrative, and overturned. If left to stand the Opinion will embolden initiative proponents to draft initiatives that improperly direct administrative or executive conduct. Initiative proponents will be encouraged to play the odds that a court might uphold an initiative that wrongly delves into administration because it is "reasonable" or embodies policies found in other legislation. Cities will be left with no choice but to resist such initiatives that aggressively intrude on executive and administrative decision-making, increasing the frequency of initiative disputes, many of which will end up in court. The case presents the Court with an opportunity to avoid these consequences by clarifying the law.

Conclusion

Cal Cities asks this Court grant review to clarify the law regarding how to distinguish between legislative and administrative acts, and thereby provide more certainty as to whether a particular initiative or referendum is valid exercise of that power or not.

Respectfully submitted,

Gregg W. Kettles
of BEST BEST & KRIEGER LLP

GWK:vcg

Cc: See attached Proof of Service

Certificate of Service

City of Oxnard v. Aaron Starr
Supreme Court Case No. S278838
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 March 31, 2023, I served the document(s) described as MOTION FOR JUDICIAL NOTICE IN SUPPORT OF APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES TO FILE AN AMICUS BRIEF on the interested parties in this action addressed as follows:

SEE ATTACHED SERVICE LIST

☒ 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 March 31, 2023, at Los Angeles, California.

/s/ Tatiana Palomares

City of Oxnard v. Aaron Starr
Supreme Court Case No. S278838
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