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May 19, 2022

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California Court of Appeal
Third Appellate District
914 Capitol Mall, Fourth Floor
Sacramento, CA 95814

Re: *City of San Diego v. Commission on State Mandates*
Case No. C092800
Request for Publication (CRC, rules 8.1105 & 8.1120)

Honorable Administrative Presiding Justice and Associate Justices of the Third District Court of Appeal:

The California State Association of Counties and the League of California Cities request that this Court publish its April 29, 2022 opinion in *City of San Diego v. Commission on State Mandates*, Case No. C092800, pursuant to California Rules of Court, rule 8.1120.

I. Interest of Requestors

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels 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 (Cal Cities) is an association of 479 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and 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.

II. The Opinion Satisfies the Standard for Publication

Rule of Court 8.1105, subdivision (c) provides that an opinion “should be certified for publication in the Official Reports” if it meets any one of nine enumerated standards. The Opinion in this case satisfies at least two of these standards: (1) Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance or court rule; and (2) Involves a legal issue of continuing public interest. Thus, publication is warranted.

A. The decision significantly elaborates and clarifies existing law on the issue of what constitutes a governmental function.

In *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, the California Supreme Court noted that the mandate provisions of section 6, article XIII B of the California Constitution do not define the term “program.” (*Id.* at p. 56.) The Court went on to conclude that “that the drafters and the electorate had in mind the commonly understood meanings of the term -- programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.” (*Ibid.*)

Since the *County of Los Angeles* decision, there has been very little analysis in published opinions about what constitutes a governmental function. The courts have found, for example, that “public schooling clearly constitutes a governmental function...” (*San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 879.) Similarly, the education of handicapped children is “clearly” a governmental function. (*Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.) But these statements are conclusory with no analysis as to why such result is so clear.

The Court’s analysis in the Opinion here draws general principles from the facts and reasoning of the existing cases in a manner not fully articulated in those opinions. Several passages in the Opinion outline principles that while perhaps implicit in prior cases, have not previously been expressed with clarity. For example, following a review of *County of Los Angeles* and related cases that followed, the Court concludes that the caselaw demonstrates “that a function can be ‘peculiar to’ government even if it not exclusive to government.” (Slip Op., p. 10.) The Court goes further, however, by applying a common dictionary definition to the term “peculiar” to conclude a service is “peculiar”

to local government (and therefore a government program for purposes of the constitutional subvention requirement) if it is “particularly associated” with local governments, even if not provided exclusively by government. This very helpful analysis does not occur anywhere else in published caselaw.

Similarly, the Opinion also explains the factors that should be considered in evaluating when a service is peculiar to government. For example, in this case, the Court accepted as true that a significant proportion of water providers in the State are private. However, because those private providers only serve a small proportion of the total population, the Court found that the number of private providers was not determinative in answering the question of whether provision of water is a government function. (Slip Op., p. 14.) This explanation of the importance of not only how a service is provided, but the size of the population that receives the service from public agencies, will be useful to litigants and the courts in future mandates cases, and is not currently provided in published caselaw.

The Opinion also addresses a proposed new test for determining whether a service is a government function: whether it is essential to local government. (Slip. Op., p. 15.) The Opinion declines to adopt the new test, noting it is not present in existing case law and that much of what is commonly known as local government functions are not “truly essential” to local government. (*Ibid.*) Publication of this conclusion will guide trial courts in future cases in which a similar argument is made.

B. The determination that water service is a governmental function itself has important precedential value.

Aside from the general principles related to mandate claims outlined above, the specific finding in this case that water service is a governmental function meets the standard for publication. In California, issues surrounding water and water quality are always of critical importance, though perhaps that is never more apparent than it is now as the State faces yet another successive year of drought. There is increasing prevalence of new State statutes and regulations related to the provision of water on a variety of issues, including conservation requirements, Per- and Polyfluoroalkyl Substances (PFAS), water system consolidation, and more.

Thus, this case involves a legal issue of continuing public significance. Its publication will avoid litigation in future mandate claims over the question of whether water service is a “program or service” for purposes of the subvention requirements in section 6 of article XIII B of the California Constitution.

For these reasons, CSAC and Cal Cities request that the Court publish the Opinion.

Respectfully Submitted,

/s/

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[All Parties Served Via True Filing]