May 31, 2012

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Hon. Tani Cantil-Sakauye, Chief Justice
Associate Justices of the Supreme Court
350 McAllister Street
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Re: Request for Depublication
McDonough v. Superior Court (City of San Jose)
Court of Appeal Case No. H038126 (Super Ct. No. 112CV220781)

Dear Chief Justice Cantil-Sakauye and Honorable Associate Justices:

Pursuant to California Rules of Court, Rule 8.1125, the California State Association of Counties and the League of California Cities respectfully request that this Court depublish the Sixth District Court of Appeal's opinion in *McDonough v. Superior Court (City of San Jose)*, filed on April 10, 2012. As set forth in this letter, the opinion creates confusion about the application of Elections Code section 9295's requirements for issuing a writ of mandate to change ballot language prior to an election, and it should be depublished.

I. Interests of CSAC and the League in Depublication of the Opinion.

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 is an association of 469 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 arc of statewide or nationwide significance. The Committee has identified this case as being of such significance.

Cities and counties are on the front line of the elections process in California. City Clerks administer federal, state and local procedures through which local government representatives are selected, and ballot measures are submitted to the voters. From election pre-planning to certification of election results and filing of final campaign disclosure documents, the City Clerk manages the process which forms the foundation of our election system. The Registrar of Voters is the county elections official and conducts all federal, state, county, school district, and special district general and special elections. The Registrar of Voters is responsible for all components of election management, including voter registration, poll worker and polling place recruitment, ballot creation, voting system security, ballot processing and vote tallying, community outreach and education, and candidate services. Strict deadlines are established for each of these important tasks, and must be met to ensure that the election process is not disrupted.

Further, cities and counties routinely place measures on the ballot and are charged with preparing the ballot title and question for those measures, as well as information about the measures that appears in the ballot pamphlet provided to all voters. As a result, cities and counties must regularly draft ballot questions, resolutions, ordinances, and impartial analyses that require them to make difficult editorial decisions about how to inform voters about the subject of the measure, in many cases with a statutorily limited number of words. (See, e.g., *Horneff v. City and County of San* Francisco (2003) 110 Cal.App.4th 814, 822 [75-word limit on ballot questions relevant in determining the legal adequacy of a question].) There is a significant interest in understanding the parameters of permissible language, and in clear standards for challenging that language.

For these reasons, CSAC and the League have carefully reviewed the opinion in this case, and respectfully request that it be depublished for the reasons set forth below.

II. The Opinion Should be Depublished Because it Does Not Contain Sufficient Analysis to Distinguish the Outcome in this Case From Future Cases Challenging Ballot Language.

A. The opinion creates confusion and uncertainty in the ballot preparation process.

Election Code section 9295 provides that a writ of mandate or injunction may only issue when it "will not substantially interfere with the printing or distribution of official election materials as provided by law." (Elec. Code, § 9295, subd. (b)(2).) The court acknowledged that language, but went on to conclude, without citation to statute or case law, that the ballot deadlines could be disregarded because they should not be elevated above the court's "duty to address the important substantive questions raised in the

petition." (Slip Op., p. 5.) The result of this conclusion will be constant uncertainty for cities and counties in the ballot preparation process.

The unsupported conclusion of the court to disregard the Registrar of Voters' informed discretion concerning printing deadlines warrants depublication for several reasons. First, the court's decision to issue a writ after the deadline provided by the Registrar of Voters can be interpreted as a new rule inconsistent with those established by the Legislature: interference with a ballot printing deadline is not an independent basis for denying a writ, even where the elections official has determined that doing so could interfere with the conduct of the election. Certainly in this case, the court issued the writ beyond the deadline despite the statutory language precluding a writ where it interferes with ballot printing and thus with the conduct of the election. Equally troubling, the court provides no explanation for how to resolve the conflict between going beyond the Registrar's deadline and the language in the statute. Instead, the opinion merely recites the court's efforts to resolve the substantive issues as quickly as possible. The opinion therefore creates confusion for future cases about whether interference with the printing schedule alone is a basis to deny a writ.

Second, if the opinion does in fact hold that interference with the printing or distribution schedule is not an independent basis for denying a writ, but can be overridden by a particular's court view of the "important substantive questions," the opinion does not provide any standards for determining whether a question is sufficiently important to override the printing deadlines determined by the election official. There is no guidance to petitioners on what they must show to establish that their concerns will permit the legal process to extend beyond the printing deadline and thereby interfere with the conduct of the election. Without such analysis, the opinion does not add to the body of law in this area, but merely creates confusion and invites untimely judicial challenges to ballot materials. This alone warrants depublication.

Third, the opinion suggests that courts may substitute their own judgment about ballot preparation deadlines for those of the Registrar of Voters without any finding that the deadlines were improperly set by the Registrar or evidence that delay will not substantially interfere with the conduct of the election. In doing so, it conflicts with decisions recognizing the importance of election deadlines, and prohibiting courts from second-guessing officials involved in the process of preparing elections materials. (*Barnes v. Wong* (1995) 33 Cal.App.4th 390, 396 ["The lower court's reason for granting the petition is no more than a substitution of the court's view of the most important public policy—ensuring that the public receive information on the conflicting positions concerning the proposed recycling ordinance—for that of the local legislative body's—promoting evenhanded administration of election laws by establishing firm filing

deadlines"]; *Martinez v. Superior Court* (2006) 142 Cal.App.4th 1245, 1248 [court may not substitute its judgment in preparation of ballot materials].)

In this case, the Registrar of Voters submitted a declaration describing in great detail the reason the ballot language needed to be finalized ten days before the deadline to submit the ballot to the printers. These reasons included all the significant work that is required to finalize text in a format proper for ballot printing, not the least of which is the time consuming process of translating the text into several languages and verifying the accuracy of those translations.

The opinion disregards these facts, identifies no contrary evidence that delay will not substantially interfere with the conduct of the election, and even goes so far as to suggest in a footnote that the date the ballot goes to the printer is the real deadline. (Slip Op., p. 5, fn 6.) It is absurd to suggest that despite the undisputed steps that must be taken to finalize ballot language, a court may disregard the fact-based schedule and process established by the Registrar to ensure timely delivery of a completed package to the printer, and instead rely on the date the language must actually be sent to the printer. There is simply no feasible way to receive the final language and send it to the printer on the same day. The opinion therefore warrants depublication because the precedent it would establish allowing courts to substitute their judgment on ballot deadlines for those of the Registrar of Voters is unworkable.

Finally, by ignoring the statutory language that precludes the issuance of writs interfering with ballot printing or distribution, the opinion disregards a Legislative determination on how to balance the need to resolve legal disputes with the realities of printing and mailing ballots. Elections Code section 9295 provides ten calendar days following the deadline for submission of ballot materials within which to obtain a writ of mandate, and then only if the writ does not interfere with the printing and distribution deadlines. (Elec. Code, § 9295, subd. (b).) Although this is an accelerated statute of limitations period, it is a recognition by the Legislature that delay in publication and distribution of a voter guide denies voters the right to review and consider all of the information in the guide, including those pertaining to other measures. The opinion provides no consideration or analysis on how its decision to act beyond the timeframes established by the Registrar of Voters comports with the balancing of these competing interests undertaken by the Legislature.

B. The opinion causes confusion over the standard used to evaluate ballot titles and questions.

Elections Code section 9295 requires "clear and convincing proof that the material in question is false, misleading, or inconsistent with the requirements of this chapter. . . ."

(Elec. Code, § 9295, subd. (b).) This opinion causes confusion in how that standard is applied, warranting its depublication. The opinion provides no analysis on how the ballot material is false or misleading. Indeed, the opinion never once states, and therefore does not actually hold, that the material under review is false or misleading. Instead, the court uses other terms to describe the ballot language, such as "biased position," and "partisan and prejudicial." The court also explains that the language must be "neutral, unbiased" and comport with "standards of impartiality."

To be clear, CSAC and the League take no position on whether the language before the court actually violates the standard set forth in Section 9295. But because that standard was not applied in the opinion, local agencies are without clear guidance on when ballot language crosses the line.

For example, measures to approve bond sales and special taxes are frequently placed on the ballot, and the funds generated by those measures are required by law to be used for specific purposes. If a measure raised revenue for road repairs, it would not be "false" or "misleading" to say the bond proceeds or special taxes would be used to repair roads (which could be subject to a writ under Section 9295), but is it "unbiased" and "neutral" to describe the ways in which the funds would be used? Or does such language improperly promote the measure by highlighting the positive uses of the funds rather than other aspects of the proposed measure? By not holding closely to the statutory standard, the opinion sweeps too broadly. (See *Horneff v. City and County of San Francisco* (2003) 110 814, 820 ["Within certain limits what is and what is not an important provision is a question of opinion. Within those limits the opinion of the [responsible official] should be accepted by this court"].)

Equally concerning, there is no analysis to help distinguish improper ballot language from other circumstances where language reflecting positive outcomes resulting from passage of the measure is permissible. The court made no effort to identify the "proof" presented by petitioners to meet the very high "clear and convincing" standard of the statute. (See *In re Angelina P.* (1981) 28 Cal.3d 908, 919, disapproved on another ground in *In re Cody W.* (1994) 31 Cal.App.4th 221, 229 [clear and convincing proof standard requires petitioner to submit evidence "sufficiently strong to command the unhesitating assent of every reasonable mind"].) The absence of such analysis compounds the confusion that this decision will cause for public agencies in evaluating whether a statement in a ballot question fails to comply with the requirements of the Elections Code and provides no guidance to other courts regarding how to apply this decision as precedent.

CSAC and the League understand that a ballot title and question must be reasonably informative for voters regarding the nature and effect of a proposed measure.

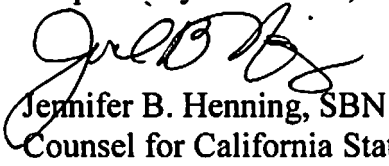
At the same time, however, our member cities and counties must have guidance on how to demonstrate that language does not run afoul of the standard. This opinion should be depublished because rather than providing such guidance, it leaves cities and counties to guess about whether their adopted language may go too far.

III. Conclusion

The ballot language considered in this opinion may have been improper in the eyes of the court. But the Legislature has determined that a writ may only issue under specified circumstances— only where the printing and distribution schedule is not disrupted, and only where the language is shown to be false or misleading by the very high standard of clear and convincing proof. The court may not substitute its judgment for that of the Registrar of Voters and conclude that the actual ballot language deadline is the same day the materials must be at the printers. The court may not disregard the high legal threshold established by the Legislature for issuing a writ under Section 9295 and conclude without analysis of any specific proof offered that the language is unlawful because it is partisan.

CSAC and the League request that the Court depublish the opinion based on the confusion and disruption to the election process that will result if it remains precedent for future cases.

Respectfully Submitted,



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Proof of Service Attached