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CLERK SUPREME COURT

May 6, 2014

The Honorable Chief Justice Tani Cantil-Sakauye
And Honorable Associate Justices of the Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783

RE: Douglas Vagim, et al. v. City of Fresno and Douglas Sloan
Supreme Court Case No.: S217668

LETTER BRIEF OF THE LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES AND ASSOCIATION OF CALIFORNIA WATER AGENCIES

The League of California Cities, California State Association of Counties and Association of California Water Agencies respectfully submit this letter in support of the Petition for Review filed by the City of Fresno and its city attorney Douglas Sloan (collectively "City"). This case involves broad issues of significant public interest to Amici, their members and the millions of Californians they serve. Moreover, the issues presented have occurred in the past and will recur if judicial guidance is not provided on the timing and availability of pre-election judicial review of disputed fiscal initiatives. Accordingly, Amici write to support the City's position and to urge this Court to grant the City's Petition for Review.

This case involves a proposed ballot initiative that appears to violate established limitations on initiatives by setting rates below the level necessary to deliver essential government services, such as to 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 invalid initiatives before they are submitted to the voters. Such pre-election review serves an important and judicially recognized purpose by allowing local legislative bodies to seek judicial review of initiatives before they must 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 permissible timing for pre-election initiative review. This case provides an opportunity to establish a clear rule permitting early pre-election initiative review that allows sufficient time for an initiative to be placed on the ballot if it survives judicial review.

INTERESTS OF AMICI CURIAE

The Association of California Water Agencies (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.

The California State Association of Counties (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 (League) is an association of 472 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 have statewide or nationwide significance. The Committee has identified this case as having such significance.

Members of ACWA, CSAC, and the League have a significant interest in cases such as this which involve pre-election review of fiscal initiatives that affect the ability of local public agencies to establish budgets, plan for critically needed infrastructure, allocate fiscal resources and levy property related fees.

ARGUMENTS

This case comes before the Court in the context of an ongoing crisis gripping California. On January 17, 2014, California's Governor "proclaimed a State of Emergency and directed state officials to take all necessary actions to prepare for these drought conditions" (*Governor Brown Declares Drought State of Emergency* (Jan. 17, 2014) State of California <http://www.gov.ca.gov/news.php?id=18368> [as of Feb. 24, 2014]).

The Governor's declaration notes that snowpack in California's mountains was approximately 20 percent of the normal for January. (*Supra*). The April 30th report of the Department of Water Resources put it at just 18 percent, the fifth lowest snowpack ever recorded. California's reservoirs, rivers and groundwater are also at significantly lower than normal levels.

(*Supra*). These extremely dry conditions have persisted since 2012, which adversely impacts not only residential and commercial water use, but also the low-income and agricultural communities that depend on water to support the agriculture industry in the state's farming regions. (*Supra*).

By April, "February and March storms brought some promise to the state, but have not broken the drought's three-year grip as reservoirs, rainfall totals and the snowpack remain critically low" (*Despite Snowstorms, Snowpack Still Far Below Normal* (April 1, 2014) State of California <http://www.ca.gov/drought/topstory/top-story-3.html> [as of April 23, 2014]).

The challenge California's public agencies face today, with drastically fewer resources and increased service demands in the face of the most severe drought in over a century, is unprecedented.

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 for desperately needed water infrastructure improvements without even the most rudimentary planning or financial analysis.

THE COMPLEXITY OF RATE-MAKING

The scope and complexity of water resource management, and correspondingly, setting water rates, 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). Public agencies, varying greatly in size and in the areas they serve, manage complex water resource systems and fund their vital services through service rates, fees, and charges.

To make rates, public agencies must account for and balance a significant number of varied factors to establish reserve accounts, plan for infrastructure maintenance and improvements while ensuring their bills can be paid when due. Other constraints on decision makers include the need to ensure sufficient revenues, to avoid "rate shock" by smooth rate ramps, to access bond markets, to comply with bond covenants, and to guard against unforeseen circumstances, all while accounting for fluctuations in water demand and usage that vary with weather and economic conditions.

The cost of administering a public utility and delivering essential services is properly recovered from rates. Of necessity, a public agency's cost to administer utility services includes the cost of governance, including elections. Water purveyors 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 and the protracted uncertainty that a disputed initiative imposes on a utility and its fiscal and infrastructure planners.

THE RIGHT OF LOCAL LEGISLATIVE BODIES TO SEEK PRE-ELECTION GUIDANCE FROM THE JUDICIAL BRANCH IS WELL-ESTABLISHED

Mission Springs recently and firmly established that a local legislative body may seek pre-election judicial review of a proposed initiative "where the validity of a ballot measure is concerned." (*Mission Springs*, *supra*, 218 Cal.App.4th at p. 910).

Numerous decisions support pre-election review of proposed ballot measures and confirm that public agencies may challenge a proposed ballot measure before bearing the expense and community division of an election on a plainly invalid initiative (*E.g., 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,* 218 Cal.App.4th 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*)).

This Court has made clear that, if a proposed initiative is beyond the electorate's power, it must be removed from the ballot. (*American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 695–696). This Court reasoned: "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 p. 697).

This Court also stated the justification for 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 State of Cal. v Jones* (1999) 21 Cal.4th 1142, 1154 (*Senate v. Jones*); *American Federation of Labor v. Eu, supra,* 36 Cal.3d 687 at pp. 695-696).

Other decisions find pre-election initiative review 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 p. 394; *Widders, supra,* 167 Cal.App.4th at p. 780; see also *deBottari v. City Council* (1985) 171 Cal. App.3d 1204, 1209 (*deBottari*). *DeBottari* stated as to an invalid referendum, "Judicial deference to the electoral process does not compel judicial apathy towards patently invalid legislative acts." (*deBottari*, 171 Cal.App.3d at p. 1213.))

The Court of Appeal made the point in these terms:

> 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, supra,* 1 Cal.App.4th at p. 1023; *City of Riverside v. Stansbury, supra,* 155 Cal.App.4th at p. 1592 (citing *Citizens*)).

In the present case, the City was presented with an initiative it 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 is certain to 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 judicial review — before incurring the expense of an election on an initiative that cannot be enacted. As noted above, a significant body of case law supports such pre-election review. Moreover, logic and good public policy dictate that agencies seek such review at the earliest opportunity to allow sufficient time for the initiative to be placed on the ballot should it survive judicial review.

No purpose is served in delaying judicial review until after a divisive and damaging election on an initiative that 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 judicial review. 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.

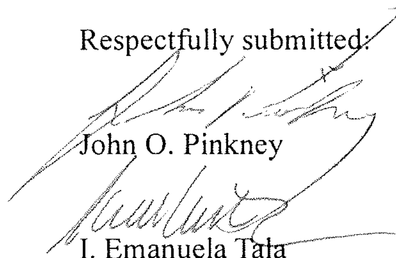
Despite the persuasive rationale and ample case support for early pre-election review of invalid initiatives, current reported cases do not provide clarity regarding the permissible timing for pre-election initiative challenges as demonstrated by the rulings of the Fresno Superior Court and the Fifth District Court of Appeal in this case. Accordingly, Amici urge this Court to grant the city's Petition to confirm in unmistakable terms that agencies may seek early judicial review if they conclude an initiative is legally defective.

CONCLUSION

Local agencies charged with the responsibility to plan for and deliver urgently needed water services have a compelling interest in the outcome of this case and support the Petition for Review. Such agencies require clarity on the question of when they may obtain pre-election review of a disputed initiative, particularly where the initiative may impair an agency's ability to deliver essential services and pay existing debts, while undermining years of painstaking and legally required infrastructure planning. For all these reasons, Amici respectfully urge this Court to grant the City's Petition.

DATED: May 6, 2014

Respectfully submitted,



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PROOF OF SERVICE
Court of Appeal, Fifth Appellate District
Douglas Vagim, et al. v. City of Fresno, et al.
Supreme Court Case No.: S217668
Appellate Court Case No. FO68569 / F068541
Superior Court Case No. 13CECG03206

I, Andrea Goldsmith, 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 May 6, 2014, I served the document(s) described as **LETTER BRIEF OF THE LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES AND ASSOCIATION OF CALIFORNIA WATER AGENCIES** 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

__X__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.

__X__BY OVERNIGHT DELIVERY: I caused such document to be delivered overnight from Palm Springs, California, to the business address maintained by the above person(s) as last indicated by that person on a document that he or he has filed in the above-entitled cause and served on this party.

__X__ BY ELECTRONIC MAIL: Service by facsimile was made either pursuant to a Court Order, pursuant to an agreement between the parties permitting the same, or as a professional courtesy in addition to other proper service. The electronic mail was sent to an electronic mail address maintained by the person(s) on whom the document(s) is/are served as last given by that/those person(s). I personally requested a "read receipt" for this electronic mail message, and, unless disallowed by the recipient, received the same.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 6, 2014, at Palm Springs, California.

ANDREA GOLDSMITH [signature]

SERVICE LIST

VAGIM v. CITY OF FRESNO
Case Number S217668

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