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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF VENTURA

EDWARD J. LACEY; LEIGHTON ARMSTRONG; SCOTT A. PETERSON; ERIC MIRABELLI; and CITIZENS FOR RETIREMENT SECURITY, a California political committee,

Petitioners/Plaintiffs,

v.

MARK A. LUNN, Ventura County Clerk-Recorder/Registrar of Voters; and the VENTURA COUNTY BOARD OF SUPERVISORS,

Respondents/Defendant,

DAVID P. GRAU, RICHARD C. THOMPSON and JAMES McDERMOTT,

Real Parties in Interest.

Case No. 56-2014-00454309-CU-WM-VTA

AMICUS CURIAE BRIEF BY CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONERS/PLAINTIFFS EDWARD J. LACEY, ET AL.

DATE: August 4, 2014
TIME: 8:30 a.m.
DEPT: 43
JUDGE: Hon. Kent Kellegrew

California State Association of Counties (CSAC) submits this amicus curiae brief in support of Edward J. Lacey, et al., Petitioners/Plaintiffs in this case.

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I.

NATURE OF CSAC'S INTEREST

All of California's counties have an interest in the issue of statewide importance presented in this case: whether the constitutional and legislative authority granted to Boards of Supervisors to set compensation for county employees is a power that can be exercised by the voters via initiative. CSAC is a non-profit corporation, consisting of the 58 California counties. CSAC is the appropriate entity to bring this interest to the attention of this Court, since CSAC is the nonprofit corporation formed by the counties specifically to advance the interests of California counties. All of California Counties belong to a public retirement system, with 20 of the 58 having elected to belong to retirement systems governed by the County Employees Retirement Law of 1937 ("CERL," Gov. Code, § 31450 et seq.).

While the question of whether the power of initiative can be used for this purpose has not been directly answered by the courts, the relevant guiding authority makes clear that the answer to this question is no. Rather, compensation, including the provision of retirement benefits, is a quintessential government function in the exclusive control of the Board of Supervisors. Thus, the measure titled "Repeal of County Employee Pension Plan and Creation of Defined Contribution Plan for New Employees" ("Initiative") is unlawful, and this court should grant the petition for writ of mandate and order the measure removed from the November 2014 ballot.

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II.
THE INITIATIVE ABRIDGES AND DEROGATES THE CONSTITUTIONAL AUTHORITY GIVEN TO COUNTIES TO ESTABLISH AND PROVIDE COMPENSATION FOR THEIR EMPLOYEES

Section 1(b) of article XI of the California Constitution gives the governing body of each California county the plenary authority to provide for the compensation of county employees. The provision reads:

> (b) The Legislature shall provide for county powers, an elected county sheriff, an elected district attorney, an elected assessor, and an elected governing body in each county. Except as provided in subdivision (b) of Section 4 of this article, each governing body shall prescribe by ordinance the compensation of its members, but the ordinance prescribing such compensation shall be subject to referendum. The Legislature or the governing body may provide for other officers whose compensation shall be prescribed by the governing body. The governing body shall provide for the number, compensation, tenure, and appointment of employees.

(Cal. Cont., art. XI § 1(b) ("Section 1(b)".)

The provision discusses three different areas of county compensation:

- Compensation of the governing body is established by the governing body itself, subject to referendum.
- Compensation of all other officers is established either by the Legislature or the governing body.
- Compensation of all other employees is established by the governing body.

The Initiative makes changes to retirement benefits, which are a form of compensation. (*County of Orange v. Association of Orange County Deputy Sheriffs* (2011) 192 Cal.App.4th 21, 42-43 (citing *Sweesy v. Los Angeles County Peace Officers' Retirement Bd* (1941) Cal.2d 356, 360).) Thus, the issue in this case is whether the public retains the initiative power over employee compensation when Section 1(b) delegates that authority to the "governing body." The courts have already determined that the reference to the "governing body" in the first clause – involving setting compensation for the governing body itself – can only refer to the Board of Supervisors, and not the people through an initiative. (*Jahr v. Casebeer* (1999) 70 Cal.App.4th 1250, 1255.) This Court

now must decide whether the term "governing body" in the third clause – related to employee compensation – is similarly limited.

The courts have found that the Board of Supervisors has plenary authority over employee compensation, at least as against Legislative interference. (*County of Sonoma v. Superior Court (Sonoma County Law Enforcement Assn.*) (2009) 173 Cal.App.4th 322; *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278.) In these cases, the courts reviewed State legislative efforts to require mandatory interest arbitration after a county and bargaining unit reached impasse. In both cases, the court concluded that such attempts at legislative interference were impermissible because of the Board of Supervisors' exclusive authority over employee compensation. (*Ibid.*)

Plenary authority in the Board of Supervisors over employee compensation should similarly be found as against the initiative power. First, as the California Supreme Court noted, the history of Section 1(b) shows the voters' intent to vest control over compensation with the "Board of Supervisors." (*County of Riverside, supra*, 30 Cal.4th at p. 285-286.) Specifically, the Supreme Court has found that Section 1(b)'s predecessor, the former article XI, section 5, was amended in 1933 to "transfer control over compensation of most county employees and officers from the Legislature to the *boards of supervisors.*" (*Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 772 (emphasis added).) "According to the Supreme Court, the purpose of the 1933 amendment was 'to give greater local autonomy to the setting of salaries for county officers and employees, removing that function from the centralized control of the Legislature.' Thus, under section 1, subdivision (b) 'the county, not the state, *not someone else*, shall provide for the compensation of its employees.' " (*County of Sonoma, supra*, 173 Cal.App.4th at p. 338, citing *County of Riverside, supra*, 30 Cal.4th at p. 285, (emphasis added).) Indeed, the ballot argument in favor of the 1933 amendment made clear that the measure "'gives the board *complete authority* over the number, method of appointment, terms of office and employment, and compensation of

all deputies, assistants, and employees.'" (*County of Riverside, supra,* 30 Cal.4th at p. 286, citing Ballot Pamp., Special Elec. (June 27, 1933) argument in favor of Prop. 8, p. 10 (italics in original).) Thus, the history of the constitutional provision shows that the public understood the term "governing body" for purposes of setting employee compensation to mean the Board of Supervisors, and the initiative power may therefore not be used to set compensation.

Second, the courts have established a test for whether a particular statute exclusively delegates to a Board of Supervisors, excluding the right of initiative. This test is somewhat fluid, rather than being fixed or mechanical in its application. (*Pettye v. City and County of San Francisco* (2004) 118 Cal.App.4th 233, 244 [noting that the test is interpretative, rather than a fixed, mechanical one].) There are two parts to the test: (1) whether the words of the statute show an intent to exclusively delegate. In this part of the test, the words "Board of Supervisors" evidence a stronger inference than the generic words of "governing or legislative body;" and (2) whether the statute addresses an issue of statewide concern. (*City of Burbank v. Burbank-Glendale-Pasadena Airport Auth.* (2003) 113 Cal.App.4th 465, 476, citing *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 496 ("*COST"*).)

The statutory provision implementing Section 1(b) is Government Code section 25300. This section states: "*The board of supervisors* shall prescribe the compensation of all county officers and shall provide for the number, compensation, tenure, appointment and conditions of employment of county employees…." (Gov. Code, § 25300 (emphasis added).) As noted by numerous courts, the specific reference to "board of supervisors" rather than a generic reference to a legislative body is strong evidence of exclusive delegation. (*COST, supra,* 45 Cal.3d at p. 512; *Citizens for Planning Responsibly v. County of San Luis Obispo* (2009) 176 Cal.App.4th 357, 373; *Totten v. Board of Supervisors* (2006) 139 Cal.App.4th 826, 834; *Pettye, supra,* 118 Cal.App.4th at p. 242; *City of Burbank, supra,* 113 Cal.App.4th at p. 476.)

As to the issue of whether county employee compensation addresses an issue of statewide concern, the question is not black and white. "The point is that the state/local dichotomy is one of degree. [The court's] inquiry is whether a statutory scheme that contemplates spheres of local decisionmaking under a statewide scheme also reflects an intention that only the representatives of the people, but not the people themselves, can make those decisions." (*Pettye, supra,* 118 Cal.App.4th at p. 246.) Thus, while there is no question that local employee salaries are local affairs (*County of Riverside, supra,* 30 Cal.4th at p. 289), there are still statewide concerns that are evidenced in the statutory scheme beginning with Government Code section 25300 et seq., which delegates exclusively to the Board of Supervisors a variety of management issues (compensation, supervision of employees, etc.).

First, the CERL itself shows that there is a statewide concern involved in providing pensions to county employees. If that were not the case, the Legislature would have left it to individual counties to establish whatever pension program (or no program) they wanted, in the way charter cities can do. (See *Bellus v. Eureka* (1968) 69 Cal.2d 336.) This statewide concern is also shown in the general intent language in the CERL, which states that there is "a public obligation to county and district employees who become incapacitated by age or long service in public employment and its accompanying physical disabilities by making provision for retirement compensation and death benefit as additional elements of compensation for future services and to provide a means by which public employees who become incapacitated may be replaced by more capable employees to the betterment of the public service without prejudice and without inflicting hardship upon the employees removed." (Gov. Code, § 31451.)

Further, "the people of the entire state are legitimately concerned that local government not be held hostage to competing economic interests in the salary-setting debate." (*Jahr v. Casebeer* (1999) 70 Cal.App.4th 1250, 1259 [noting the statewide interest in local salary setting despite the local nature of compensation rooted in home

rule authority].) Finally, even without the initiative power, the public still retains the powers it holds as part of our representational democracy. All meetings pertaining to county employee salaries must be open and public sessions. (Gov. Code, § 25307.) And, of course, the "voters are free to express their displeasure with individual supervisors at the ballot box." (*Jahr, supra,* 70 Cal.App.4th 1255.)

Thus, both the history of Section 1(b) and its implementing legislation demonstrate an intent to exclusively delegate the authority to set employee compensation to the Board of Supervisors. The Initiative is therefore unlawful and should be ordered removed from the ballot.

III.
THE INITIATIVE POWER MAY NOT INTERFERE WITH A BOARD OF SUPERVISORS' ABILITY AND DUTY TO CARRY OUT ESSENTIAL GOVERNMENTAL FUNCTIONS

As a separate and independent reason, the Initiative is unlawful because it interferes with the ability of the Board of Supervisors to carry out its essential function in managing the County's finances. The Initiative reflects a growing trend to use the initiative power to supplant the role of elected boards in their management of local entities' fiscal affairs. "[M]anaging a county government's financial affairs has been entrusted to elected representatives, such as a county board of supervisors, and is an essential function of the board." (*Citizens for Jobs and the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311, 1332-1333.) Courts have recognized that the initiative, as a way to determine budgetary priorities, is ill suited to the weighing process required during adoption of a budget and determination of fiscal needs:

> [T]he initiative is in essence a legislative battering ram...It is deficient as a means of legislation in that it permits very little balancing of interests or compromise, but it was designed primarily for use in situations where the ordinary machinery of legislation had utterly failed in this respect.

(*AFL-CIO v. Deukmajian* (1989) 212 Cal.App.3d 425, 430.)

One fundamental shortcoming of the initiative process when addressing a significant aspect of a county's budget, such as employee compensation, is that fact that it lacks a mechanism to allow the electorate to weigh competing demands. This is the essence of the budget process.

> The budgetary process entails a complex balancing of public needs in many and varied areas with finite financial resources available for distribution among those demands. It involves independent political, social, and economic judgments which cannot be left to individual officers acting in isolation; rather, it is, and indeed must be, the responsibility of the legislative body to weigh those needs and set priorities for the utilization of the limited revenues available.

(*County of Butte v. Superior Court* (1985) 176 Cal.Ap.3d 693, 698-699.)

This describes precisely the reason why budgeting by initiative is ineffective and contrary to the public interest. Such initiatives typically provide a single question to the voters – whether to direct or restrict funding for a particular purpose. The voters are usually asked to make their decision in isolation, with no opportunity to consider the source of the funding or its impact on other programs and projects of the agency. Thus, this type of initiative is typically a referendum on the popularity of a particular cause rather than the critical and complex balancing of needs that is at the heart of the budgeting process. Such a comprehensive budget process is established by the County Budget Act, and responsibility for it is exclusively delegated to the Board of Supervisors. (Gov. Code, § 29000 et seq.; *Totten v. Board of Supervisors* (2006) 139 Cal.App.4th 826, 834.)

The courts have viewed unfavorably attempts to manage local agency budgets via initiative. For example, in *Citizens for Jobs*, the proposed measure ("Measure F") included a provision that expressly limited how the Orange County Board of Supervisors could expend funds for project planning. Proposed expenditures that did not follow the formula required voter approval. The court found that these spending restrictions

impermissibly interfered with the Board's exercise of fiscal discretion, and declared the measure unlawful:

> Taken together, these and other factors indicate that Measure F impermissibly intrudes into Board prerogatives, particularly with respect to the functions of the Board in managing its financial affairs and in carrying out the public policy declared by Measure A. The terms of Measure F seek to broadly limit through procedural restrictions the power of future legislative bodies to carry out their duties, as prescribed to them by their own inherent policy power. As such, the measure should not be considered to have a proper legislative subject matter.

(*Citizens for Jobs, supra,* 94 Cal.App.4th at p. 1331, citing *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 796-799.)

In *Totten,* the court considered an initiative that directed a certain percentage of the County of Ventura's Proposition 172 / Local Public Safety funds to be used for specified Ventura County public safety agencies. The court concluded that the initiative was unlawful because it "seriously impair[ed] the exercise of [the County's] essential governmental function of managing the county's financial affairs....[The County] would have no discretion to decrease public safety funding below this level if the crime rate plummeted, if improved efficiency or innovations reduced public safety costs, or if the required level of public safety funding prevented the county from adequately funding state-mandated programs unrelated to public safety." (*Totten, supra,* 139 Cal.App.4th at p. 839.)

In similarly egregious ways, initiatives that govern precisely how much a Board of Supervisors can or must contribute toward employee retirement restrict a Board of Supervisors' ability to react to changing fiscal and policy needs.[1] In determining

[1] Though this Initiative would move employees from a defined benefit to a defined contribution retirement plan, if employee retirement benefits is an area in which the Board of Supervisors does not have exclusive control and the initiative power is permissible, then an initiative requiring more generous retirement benefits would also be permissible, having equally profound impacts on the ability of a Board of Supervisors to manage the fiscal concerns of a county. Either way, setting retirement benefits by initiative intrudes into the Board's ability to manage its fiscal affairs, and is therefore unlawful.

compensation and benefit levels, as well as allocating limited fiscal resources among a myriad of governmental programs and services, the Board of Supervisors necessarily exercises interdependent political, social and economic judgments regarding funding priorities. (*Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal.4th 827, 302, citing *Anderson v. Superior Court* (1998) 68 Cal.App.4th 1240, 1249.) One of those funding priorities is employee compensation. However, other funding priorities include both mandated and discretionary public programs and services. In establishing and funding those priorities, the Board must weigh and determine its jurisdiction's needs. (*Ibid.*)

The Initiative would unlawfully restrict that process. It would require all new employees hired after July 2015 to be enrolled in a Defined Contribution Plan, over which the Board would have no administrative control. The Initiative sets the County's contributions to the Plan, and does not permit these amounts to be changed by the Board. The Initiative places a five-year restriction on increases in pensionable compensation for safety and tier one members, without exception. Thus, no matter what future changes occur in employment conditions in Ventura County, especially as the County attempts to compete with other employers both locally and statewide for employees, and no matter what impact the Initiative might cause on other programs and services, the Initiative would permanently constrain the Board's ability to prudently expend funds on a major component of its costs – employee compensation – in order to best manage all of the County's public services.

Courts consistently hold invalid those initiatives that impact a local governing body's ability to provide for its essential government functions. (*See, e.g., Totten v. Board of Supervisors* (2006) 139 Cal.App.4th 826; *Community Health Assn. v. Board of Supervisors of Humboldt County* (1983) 146 Cal.App.3d 990; *City of Atascadero v. Daly* (1982) 135 Cal.App.3d 446; *Myers v. City Council of Pismo Beach* (1966) 241 Cal.App.2d 237.) This Court should do the same, and conclude that because the Initiative

unlawfully restricts the Board of Supervisors' exclusive delegated authority over its budget, it cannot lawfully be placed before the voters.

IV.

CONCLUSION

The Initiative violates Section 1(b)'s exclusive delegation to the Board of Supervisors over employee compensation. It also impermissibly interferes with the Board of Supervisors' exclusive authority to control its budget and carry out essential government functions. For both reasons, this Court should grant the petition for writ of mandate and order the Initiative removed from the November 2014 ballot.

DATED: _____, 2014

By: _____
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