

Case No. E077772

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO**

SAN BERNARDINO COUNTY BOARD OF SUPERVISORS,
Plaintiff and Appellant,

NADIA RENNER,
Intervenor and Appellant,

v.

LYNNA MONELL,
Defendant and Respondent.

**[PROPOSED] AMICUS CURIAE BRIEF OF THE
CALIFORNIA STATE ASSOCIATION OF COUNTIES IN
SUPPORT OF PLAINTIFF AND APPELLANT SAN BERNARDINO
COUNTY BOARD OF SUPERVISORS**

On Appeal from the San Bernardino County Superior Court
Case No. CIVSB2025319
The Honorable Donald R. Alvarez

Jennifer B. Henning (SBN 193915)
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814-3941
Tel: (916) 327-7535 Fax: (916) 443-8867
jhenning@counties.org

Attorney for Amicus Curiae
California State Association of Counties

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... 3

I. INTRODUCTION..... 5

II. ARGUMENT..... 7

 A. The Legal Theories Advanced by the Parties in this Case
 Require Consideration of the Public Policy Impacts of the
 Initiative..... 7

 B. Counties Deliver Critical Programs and Services in this
 State, and the Complexity of Overseeing County Government
 Requires Dedicated and Focused Leadership, Which is
 Thwarted by Undercomensation. 10

 1. A major function of counties is to deliver services
 on behalf of the State..... 10

 2. Attracting quality leadership to oversee the delivery
 of State services is critical, but would be significantly
 negatively impacted by this initiative. 12

CONCLUSION 16

CERTIFICATION OF COMPLIANCE..... 18

TABLE OF AUTHORITIES

Cases

<i>Anderson v. City of San Jose</i> (2019) 42 Cal.App.5th 683	8
<i>Chase v. Kalber</i> (1915) 28 Cal.App. 561	6
<i>City of Huntington Beach v. Becerra</i> (2020) 44 Cal.App.5th 243	8
<i>Committee of Seven Thousand v. Superior Court</i> (1988) 45 Cal.3d 491	8
<i>County of Riverside v. Superior Court</i> (2003) 30 Cal.4th 278.....	8
<i>DeVita v. County of Napa</i> (1995) 9 Cal.4th 763	5, 7
<i>Dimon v. County of Los Angeles</i> (2008) 166 Cal.App.4th 1276	6
<i>Fenton v. City of Delano</i> (1984) 162 Cal.App.3d 400	9
<i>Jahr v. Casebeer</i> (1999) 70 Cal.App.4th 1250.....	12
<i>Mission Springs Water Dist. v. Verjil</i> (2013) 218 Cal.App.4th 892	8
<i>People v. Parmar</i> (2001) 86 Cal.App.4th 781	12
<i>Ruegg & Ellsworth v. City of Berkeley</i> (2021) 63 Cal.App.5th 277	9
<i>San Francisco Fire Fighters v. Board of Supervisors</i> (1979) 96 Cal.App.3d 538	6
<i>Simpson v. Hite</i> (1950) 36 Cal.2d 125.....	6
<i>Totten v. Board of Supervisors</i> (2006) 139 Cal.App.4th 826.....	9

Statutes

Gov. Code, § 25303.....	12
Pen. Code, § 1170.....	11

Attorney General Opinions

41 Ops.Cal.Atty.Gen. 463 (1960).....	15
--------------------------------------	----

Law Review Articles

Dellay, <i>Curbing Influence Peddling in Albany: The 1987 Ethics in Government Act</i> (1988) 53 Brook. L. Rev. 1051.....	16
Hopper, Austin & Forman, <i>Shifting the Paradigm or Shifting the Problem? The Politics of California's Criminal Justice Realignment</i> (2014) 54 Santa Clara L. Rev. 527	11
Vaugh, <i>Ethics in Government and the Vision of Public Service</i> (1990) 58 Geo. Wash. L. Rev. 417.....	16
Zale, <i>Compensating City Councils</i> (2018) 70 Stan. L. Rev. 839	passim

Government Publications

Legis. Analyst, *The State of California's Probation System*, analysis of 1994-1995 Budget Bill (1993-1994 Reg. Sess.)..... 11

Articles

(Lofstrom & Raphael, *Impact of Realignment of County Jail Populations* (2013) Public Policy Instit. of California 11

Carnes & Hansen, *Does Paying Politicians More Promote Economic Diversity in Legislatures?* (Nov. 2016) *American Pol. Science Rev.*, Vol. 110, No. 4 13

Reed & Karpilow, *Understanding the Child Welfare System in California: A Primer for Service Providers and Policy Makers* 5 (2002) 10

Scott Graves, *County Budgets: Where Does the Money Come From? How Is It Spent?* (Calif. Budget & Policy Center, Apr. 2018) 11

I. INTRODUCTION

This case raises several critical legal issues that go to the heart of effective governance at the local level. An initiative ballot measure that significantly restricts the years of service and salaries for members of a County's governing body will have a direct impact on the candidate pool for the office, the competitiveness of elections, and the members' responsiveness to constituents and ability to oversee a complex organization that is responsible for some of the most critical functions of our civic life, from public health to social services, from criminal justice to emergency response, and more.

The legal arguments raised by the parties and considered by the trial court below require consideration of the policy outcomes of the challenged initiative. For example, the trial court addressed application of the exclusive delegation doctrine, which bars exercise of the initiative power where the Legislature has delegated discretionary authority to the local legislative body. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763.) An essential element of determining whether a matter is exclusively delegated to a local legislative body is whether the subject matter is one of statewide concern. (*Id.* at p. 780 [“[T]he Legislature’s constitutional authority to restrict the local right of initiative or referendum generally derives from its partial preemption of local government authority pursuant to the fulfillment of a

state mandate or objective.”].) ¹

Additionally, the parties have argued, and the trial court considered, application of the “impairment of essential government function” doctrine. Under this long-standing doctrine, the initiative power cannot be used to “impair or wholly destroy the efficacy of some other governmental power.” (*Chase v. Kalber* (1915) 28 Cal.App. 561, 569–57; See *Simpson v. Hite* (1950) 36 Cal.2d 125, 134 [“The initiative . . . is not applicable where the inevitable effect would be greatly to impair or wholly destroy the efficacy of some other governmental power, the practical application of which is essential.”].) As Appellant San Bernardino County Board of Supervisors notes, where this doctrine applies it is an independent reason to invalidate an initiative. (Bd. of Supervisors Reply Br., pp. 22-23.)

To evaluate application of these legal principles, it is critical to understand the real-world impact of this initiative. This amicus brief

¹ The trial court considered the exclusive delegation doctrine and applied *DeVita* to assess whether it applies to restrict the initiative power on the issue of wages for members of a Board of Supervisors. (Trial Ct. Opinion, pp. 6-7.) Curiously, however, in its application of the doctrine, the court glossed over the significance of whether Boards of Supervisors’ salaries are of statewide significance. Instead, the court merely cites two cases to conclude that such salaries are a matter of local concern. (*Ibid*, citing *Dimon v. County of Los Angeles* (2008) 166 Cal.App.4th 1276, 1281, and *San Francisco Fire Fighters v. Board of Supervisors* (1979) 96 Cal.App.3d 538, 543-44.) Of course, these opinions are inapposite as they involve employee wages and not salaries for Boards of Supervisors. This leaves a significant element of the exclusive delegation doctrine unaddressed by the trial court below.

provides information to assist this Court in understanding the role that counties play in providing and implementing critical programs and services on behalf of the State and the demonstrated negative impact undercompensation of elected officials has on effective governance. Determining whether the legal doctrines of exclusive delegation and impairment of essential government functions apply to this case requires an evaluation of the impact of the initiative. Therefore, the policy considerations presented in this brief are a critical component in determining the validity of the challenged initiative.

II. ARGUMENT

A. The Legal Theories Advanced by the Parties in this Case Require Consideration of the Public Policy Impacts of the Initiative.

As noted above, the potential application of legal doctrines to this case requires consideration of the public policy impacts of Measure K. One of those legal theories is the exclusive delegation doctrine. The California Supreme Court has found that “the local electorate's right to initiative and referendum is guaranteed by the California Constitution, article II, section 11, 5 and is generally co-extensive with the legislative power of the local governing body.” (*DeVita, supra*, 9 Cal.4th at p. 775.) Notwithstanding that general rule, the presumption in favor of the public’s initiative power is rebutted when the Legislature exercises its power to preempt all local legislation in matters of statewide concern. (*Id.* at p. 776.) “The paramount

factors ... are: (1) statutory language, with reference to ‘legislative body’ or ‘governing body’ deserving of a weak inference that the Legislature intended to restrict the initiative and referendum power, and reference to ‘city council’ and/or ‘board of supervisors’ deserving of a stronger one; [and] (2) the question whether the subject at issue was a matter of ‘statewide concern’ or a ‘municipal affair,’ with the former indicating a greater probability of intent to bar initiative and referendum [citation].” (*Ibid*; *Mission Springs Water Dist. v. Verjil* (2013) 218 Cal.App.4th 892, 912.)

As to the second prong, “[i]n matters of statewide concern, the state may if it chooses preempt the entire field to the exclusion of all local control. If the state chooses instead to grant some measure of local control and autonomy, it has authority to impose procedural restrictions on the exercise of the power granted, including the authority to bar the exercise of the initiative and referendum.” (*Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 511.)

Importantly, “the decision whether a state law addresses a statewide concern is a legal issue to be decided by the court.” (*City of Huntington Beach v. Becerra* (2020) 44 Cal.App.5th 243, 272, citing *Anderson v. City of San Jose* (2019) 42 Cal.App.5th 683, 707, and *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 286 [“The judicial branch, not the legislative, is the final arbiter of this question”].)

“Although legislative declarations of intent to preempt local law are not determinative, courts accord ‘great weight’ to the Legislature’s evaluation of what constitutes a matter of statewide concern and ‘defer to legislative estimates regarding the significance of a given problem and the responsive measures that should be taken toward its resolution.’” (*Ruegg & Ellsworth v. City of Berkeley* (2021) 63 Cal.App.5th 277, 312 (citations omitted).) Thus, should this Court determine that the exclusive delegation doctrine potentially applies to initiatives related to Boards of Supervisors’ salaries in charter counties, it will need to evaluate the policy impact of the measure to determine whether there is a statewide interest in ensuring the members of a County’s governing body are adequately compensated.

A second principle that requires evaluation of the public policy impacts of Measure K is applicability of the “impairs essential government functions” doctrine. Under this principle, an initiative is invalid if its application would seriously impair essential government functions. (*Totten v. Board of Supervisors* (2006) 139 Cal.App.4th 826, 838; See *Fenton v. City of Delano* (1984) 162 Cal.App.3d 400, 407.) Appellant Board of Supervisors explains how the low salary, the lack of an inflator, and costs over which the County has no control will inevitably cause the County to violate State law if the initiative is reinstated. There are further policy considerations, as outlined below, that directly address the ability to provide essential government functions. These public policy impacts should

also be considered by the Court in evaluating the merits of application of the impairment of essential government function doctrine.

B. Counties Deliver Critical Programs and Services in this State, and the Complexity of Overseeing County Government Requires Dedicated and Focused Leadership, Which is Thwarted by Undercompensation.

This Court must consider the public policy implications of Measure K in resolving the legal issues presented in this case. The salaries of members of Boards of Supervisors implicates the quality of governance and who may serve on a governing body, which is a critical issue given counties' role in implementing many programs and services on behalf of the State.

1. A major function of counties is to deliver services on behalf of the State.

As legal subdivisions of the state, California's 58 counties play a key role in delivering public services at the local level on behalf of the State. Counties operate an array of health and human services programs on behalf of the State, including foster care,² public health and mental health services, and Medi-Cal (California's Medicaid program). (Scott Graves, *County Budgets: Where Does the Money Come From? How Is It Spent?* (Calif.

² California is one of only 11 states to use a state-supervised but county-administered model for foster care. (Reed & Karpilow, *Understanding the Child Welfare System in California: A Primer for Service Providers and Policy Makers* 5 (2002).) All 58 counties administer the foster care system under the authority of the California Department of Social Services. (*Ibid.*)

Budget & Policy Center, Apr. 2018) p. 1.)³ Counties also play a significant role in the State’s criminal justice system, including probation. “Although probation is operated by counties, it is particularly important to the state because thousands of offenders in the state prison and Youth Authority system have, at one time or another, been part of the probation system.” (Legis. Analyst, *The State of California’s Probation System*, analysis of 1994-1995 Budget Bill (1993-1994 Reg. Sess.) p. 2.)⁴ Counties also house tens of thousands of people annually in their county jails who previously would have been sent to state prison for specified non-serious, non-violent, non-sex offenses. (Pen. Code, § 1170, subd. (h); Hopper, Austin & Forman, *Shifting the Paradigm or Shifting the Problem? The Politics of California’s Criminal Justice Realignment* (2014) 54 Santa Clara L. Rev. 527, 531-532.) Without this partnership with counties, the State would have been unable to meet the population caps imposed upon its State prisons by the federal courts. (Lofstrom & Raphael, *Impact of Realignment of County Jail Populations* (2013) Public Policy Instit. of California p. 11.)⁵ County

³ This document is available online at:
https://calbudgetcenter.org/app/uploads/Fact-Sheet_County-Budgets-Where-Does-the-Money-Come-From-How-Is-It-Spent_04.2018.pdf

⁴ This document is available online at:
https://lao.ca.gov/1994/reports/state_of_cal_probation_system_281_0394.pdf.

⁵ This document is available online at:
<https://gspp.berkeley.edu/assets/uploads/research/pdf/p73.pdf>

Boards of Supervisors also set the budgets for the offices of the Sheriff, District Attorney and the Public Defender. (See Gov. Code, § 25303; *People v. Parmar* (2001) 86 Cal.App.4th 781, 798 [“While the office of district attorney itself is elective, the district attorney is dependent upon county funds budgeted by the county board of supervisors.”].)

In short, counties play a unique role in carrying out State programs and services. Indeed, 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.)

2. Attracting quality leadership to oversee the delivery of State services is critical, but would be significantly negatively impacted by this initiative.

There is an undeniable connection between salaries provided to members of a governing body and good governance. Social science research shows that “undercompensation can lead to elected office being open only to those wealthy enough to afford it; risks a less effective, accountable and transparent government; and can result in conflicts of interest and corruption.” (*Zale, Compensating City Councils* (2018) 70 Stan. L. Rev. 839.) When politicians are paid more, “they introduce more legislation and miss fewer votes, they are more in-step with their constituents ideologically, . . . they favor citizen interests over business interests, and they face more competition from qualified challengers.”

(Carnes & Hansen, *Does Paying Politicians More Promote Economic Diversity in Legislatures?* (Nov. 2016) *American Pol. Science Rev.*, Vol. 110, No. 4, p. 699.)⁶

More specifically, undercompensation limits office to only those we can afford to serve. “While few go into government work to get rich, common sense, as well as the political science research on the issue, tells us that pay is a consideration for at least some people in making the decision to enter – or continue with – government service. Without adequate compensation, legislative office is simply not an option for some who would otherwise be interested in serving but cannot afford to.” (Zale, *supra*, at p. 843.) Further, low pay not only excludes some from the pool of candidates but also may lower the quality of the candidates in the pool because “individuals with more professional experience typically would have to accept a larger pay cut from their private sector salaries to run for office when legislative compensation is low.” (*Id.* at p. 884.)

Assuming the positions would be part-time to make up for the salary reduction is no solution to this problem because “in practice, there are a limited number of careers that offer the flexibility needed to maintain outside employment while also serving twenty hours per week in a part-time council position. . . . [H]ourly and salaried employees are less likely to

⁶ This document is available online at:
<https://people.duke.edu/~nwc8/salaries.pdf>

have the flexibility to devote the additional hours needed for a part-time counsel position, which may entail attending weekly midday council meetings and responding to time-sensitive constituent requests.” (Zale, *supra*, at p. 885.) Even if the position is nominally part-time, expectations and actual demands of elected office impose nearly full-time responsibilities, which further limits the pool of candidates with outside careers that can accommodate such a schedule. (*Ibid.*)

Perhaps more important than the pool of candidates is the implications for the quality of governance. “While the public might appreciate [governing board members’] decision not to spend additional public funds on their own salaries in the short term, failing to raise compensation to adequate levels may be a ‘penny-wise, pound foolish’ decision that is not ultimately in the public interest.” (Zale, *supra*, at p. 843.) The impacts on good governance are raised in at least three ways—effectiveness, accountability, and transparency. (*Id.* at p. 884.)

As to effectiveness, “[e]ven if highly qualified candidates are undeterred by low pay, if elected representatives are not provided with the resources required to do quality work – including compensation adequate to ensure that they can devote the needed attention to the public service – then they are unlikely to be able to produce quality results. As one scholar observed, undercompensation creates a kind of catch-22: ‘It’s really irrational We don’t want to equip politicians with the resources to do

their jobs, and then we blame them when things don't work the way we want.” (*Id.* at p. 886.) In this way, there is a disconnect between what is commonly said to be the goal for local government (a part-time citizen legislature doing the job as a public service) and the expectations of the voters (24/7 responsiveness and availability to address an increasingly complex set of issues). (*Id.* at p. 888.)

Accountability is another concern. Low pay “may make it more likely that those in the position view it as a quasi-volunteer role and therefore do not devote the necessary time or attention to the job. While voters can signal their disapproval by voting them out of office, low-paid legislative positions may not even attract enough electoral competition to offer voters an alternative option. In addition, subsequent candidates may have little incentive to perform more effectively because [members] are essentially serving as low-paid volunteers.” (Zale, *supra*, at p. 889, citing 41 Ops.Cal.Atty.Gen. 463, 480 (1960) [noting the need to pay those in public service such that they will “perform their work zealously” and “not be subject to a host of corrupting influences.”].)

Finally, undercompensation may increase the risk of conflicts of interest and corruption. “When lawmakers are paid relatively low salaries, . . . they will be likely to hold outside employment unless they have an independent source of income. More outside employment, in turn, increases the prospect of conflicts of interest. While existing conflict of interest laws

may be adequate to respond to the increased risk that results, the greater stress put on conflict of interest rules in lower-paid legislative bodies may limit their utility as prophylactic rules.” (Zale, *supra*, at pp. 890-891. See Dellay, *Curbing Influence Peddling in Albany: The 1987 Ethics in Government Act* (1988) 53 Brook. L. Rev. 1051, 1076 [need for ethics rules to limit problems created by outside employment decreases when salaries are increased].) Similarly, higher compensation can help insulate against corrupting influences and create less incentive to engage in corrupt transactions than lower-paid officials. (Vaugh, *Ethics in Government and the Vision of Public Service* (1990) 58 Geo. Wash. L. Rev. 417, 442.)

In short, there are substantial policy considerations related to recruiting and retaining high quality local leaders and principles of good governance. This policy is fundamental in evaluating the legal issues presented in this case, and the trial court erred in failing to engage in this analysis.

III. CONCLUSION

While the initiative power plays a significant role in California, it is not absolute. It can be limited when a matter is exclusively delegated to the local governing body or when it impairs essential government functions. Evaluating application of these principles requires a consideration of the public policy implications of the initiative. That analysis must take into

consideration the critical programs and services that counties carry out on behalf of the State, and the role that salaries play in the good governance necessary to meet those obligations.

Dated: May 13, 2022

Respectfully submitted,

/s/

By _____
Jennifer B. Henning, SBN 193915

Attorney for Amicus Curiae
California State Association of Counties

**CERTIFICATION OF COMPLIANCE WITH
CALIFORNIA RULES OF COURT, RULE 8.204(c)(1)**

I hereby certify that this brief has been prepared using proportionately double-spaced 13-point Times New Roman typeface. According to the word count feature in my Microsoft Word software, this brief contains 3,548 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 13th day of May, 2022 in Sacramento, California.

Respectfully submitted,

/s/

By: _____
JENNIFER B. HENNING

Attorney for Amicus Curiae
California State Association of Counties