E055176

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

MISSION SPRINGS WATER DISTRICT,

Plaintiff and Respondent,

v.

KARI VERJIL, AS RIVERSIDE COUNTY REGISTRAR OF VOTERS,

Defendant,

v.

TIM RADIGAN BROPHY, *ET AL.*,

Real Parties in Interest, Appellants.

Appeal from an Order Denying a Special Motion to Strike
By the Superior Court, Riverside County
Case No. INC 1105569, Hon. Harold Hopp

APPELLANTS' ANSWER TO THE BRIEF OF AMICI DISTRICTS, CITIES AND COUNTIES

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APPELLANTS' ANSWER TO THE BRIEF OF AMICI DISTRICTS, CITIES AND COUNTIES

For the most part, the amicus brief filed by the Association of California Water Agencies *et al.*, adds nothing new to the analysis in this case. The brief mainly repeats the arguments made by respondent Mission Springs Water District, all of which appellants addressed and refuted in their Opening Brief and Reply Brief.

Accordingly, appellants will respond with citations to the pages in their briefs where the answers to amici's arguments appear. Where some new point or authority has been raised, appellants will address it.

Amici argue that ordinary declaratory relief is a proper method to test an initiative that has qualified for an imminent election. Appellants answered this argument in their Opening Brief at pages 5-13, and in their Reply Brief at pages 4-13. In sum, when "the Legislature [has] manifested an intent to fully occupy the field ... by enacting a comprehensive statutory scheme," local agencies are not free to chart their own course. *Howard Jarvis Taxpayers Assn. v. City of San Diego* (2004) 120 Cal.App.4th 374, 386. Here, "*[t]he Elections Code contains a comprehensive scheme* regula-ting the process for proposing, qualifying, and conducting an election on [local] initiatives and referenda. ... Article 5 provides for a period of public examination of the official elections materials and specifies in Section 9190 that: 'During the 10-calendar day examination period ..., any voter of the jurisdiction ... may seek a writ of mandate or an injunction requiring any or all of the materials to be amended or deleted.'" *Songstad v. Superior Court* (2001) 93 Cal.App.4th 1202, 1206-07 (citations omitted). Because the Legislature has provided a specific, expedited writ procedure for litigating whether an initiative is prohibited by law from appearing on the ballot for which it qualified, that

procedure is exclusive and precludes the use of other forms of action such as declaratory relief that "could delay [resolution] for a lengthy period, because the court would be under no statutory obligation to schedule briefing and hearings to expedite a decision, as would a court in a proceeding pursuant to the Act." *Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 429.

Amici argue that, if the anti-SLAPP statute applied to declaratory relief actions challenging voter initiatives, then no initiative could ever be challenged before its election. Amicus Brief at 18. Appellants answered this argument in their Opening Brief at pages 13-15, and in their Reply Brief at pages 41-42. If the anti-SLAPP statute on its face applies to a baseless action brought to derail a valid voter initiative (and of course it does), then "the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language." *Sutter's Place v. Superior Court* (2008) 161 Cal.App.4th 1370, 1381-82. Nor is it necessary for the court to do so, since the anti-SLAPP statute already protects valid initiative challenges: (1) by authorizing dismissal only when the plaintiff sues a person to chill his protected activity, whereas a proper election writ is against the Registrar to prevent him from sending something invalid to the printer; (2) by authorizing dismissal only when the plaintiff cannot show a probability of success on the merits, and (3) by awarding attorney fees to a plaintiff who succeeds against a frivolous motion. Civ. Proc. § 425.16(b)(1) and(c)(1).

Amici argue that *City of Cotati v. Cashman* (2002) 29 Cal.4th 69 was a pre-election challenge of a voter initiative, and thus controls whether the anti-SLAPP statute applies here. Appellants answered this argument in their Reply Brief at pages 14-18. *Cotati* was neither a pre-election challenge, nor a challenge of a voter initiative. *Cotati* was a post-enactment action by a city council to validate its own ordinance. *Id.* at 72. *Cotati* held that the council's

own ordinance was not an act of civilian speech or petition that the City was trying to suppress; the defendant Owners therefore "failed to meet their threshold burden of demonstrating that City's action is one arising from *Owner's* protected speech or petitioning." *Id.* at 76. In the case at bar, however, the District has sued appellants to challenge *appellants*' initiatives. The initiatives, having been written by appellants, are appellants' speech, and are being used by appellants to petition for redress. The initiatives fit perfectly the definition of protected activity in the anti-SLAPP statute because they are writings, and acts in furtherance of the right of petition, and address a public matter. Code of Civ. Proc. § 425.16(e); *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 73.

Amici argue that *City of Riverside v. Stansbury* (2007) 155 Cal.App.4th 1582 correctly interpreted *Cotati* and the anti-SLAPP statute, and need not be reconsidered. Amicus Brief at 20. Appellants answered this argument in their Opening Brief at pages 15-20, and in their Reply Brief at pages 19-24. For the reasons above, *Stansbury* erred when it misread *Cotati* as creating a blanket exemption from the anti-SLAPP statute for actions challenging the validity of a voter initiative. Again for reasons stated above, *Stansbury* was mistaken in believing that if the anti-SLAPP statute applied, then "no one could ever challenge an initiative's constitutionality prior to the election." *Stansbury*, 155 Cal.App.4th at 1585. Finally, *Stansbury* seemingly looked beyond the four corners of the statute to improperly take into consideration the plaintiff's good faith motive: "[T]he City was simply asking for guidance as to the constitutionality of the proposed initiative." *City of Riverside v. Stansbury*, 155 Cal.App.4th at 1590-91. As the Second District observed in *City of Santa Monica v. Stewart*, however, the anti-SLAPP statute does not distinguish between cases "motivated by a desire to punish [the proponent] or chill the

exercise of its First Amendment rights" and those where "the goal was only to obtain a judicial determination that ... the Initiative was unconstitutional." "This type of distinction is untenable in the anti-SLAPP context because it is at odds with the language and purpose of the anti-SLAPP statute. The statute applies to claims 'based on' or 'arising from' statements or writings made in connection with protected speech or petitioning activities, regardless of any motive." *Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, 269.

Amici argue that if the Legislature disagreed with *Stansbury*, it could have amended the anti-SLAPP statute. Amicus Brief at 22. This argument, which is raised for the first time by amici, assumes the Legislature must scour each of the roughly 1,100 court of appeal opinions published annually because it, rather than the Supreme Court, has the duty of policing the courts of appeal. Amici cite no authority for this idea, nor explain who in the Legislature would be responsible for such a task. Contrary to this idea, the Court Supreme Court has said, "We frequently have expressed reluctance to draw conclusions concerning legislative intent from legislative silence or inaction." *People v. Farley* (2009) 46 Cal.4th 1053, 1120.

Amici argue that, even if an initiative petition is an act of free speech or petitioning, the District is likely to prevail on the merits because appellants' initiatives require voter approval of future rate increases. Appellants answered this argument in their Opening Brief at pages 23-28. As said there, each initiative contains what appellants call a "relief valve" provision, without which the rates would be stuck at their rolled-back amount. The provision reads, "Notwithstanding Section 9323 of the California Elections Code, beginning January 1, 2013, and for each fiscal year thereafter, the District may adjust these ... rates by the percentage increase, if any, in the Consumer Price Index published by the federal Bureau of Labor Statistics for the region

applicable to the Mission Springs Water District." Appendix at 29, §§ 2.B., 3.C., and Appendix at 31, § 2.B. The initiatives do not require voter approval of future rate increases. Absent this language, Elections Code section 9323 would *fix* the rates at the reduced amount approved by the voters unless and until the District obtained subsequent voter approval to change them. Section 9323 provides: "No ordinance proposed by initiative petition and adopted either by the district board without submission to the voters or adopted by the voters shall be repealed or amended except by a vote of the people, *unless provision is otherwise made in the original ordinance.*" Thus, section 9323 expressly authorizes initiatives to contain a term such as the one attacked here. The term allows the District board to raise rates every year to keep pace with the cost of living, without the need to return to the voters for approval of an amendment to the initiative.

Amici argue that if an initiative contains any provision beyond strictly "reducing or repealing" a tax, assessment or fee, the initiative is invalid because Article XIII C, § 3 is the sole source of authority for adjusting government revenues via initiative. Amicus Brief at 24. Appellants answered this argument in their Opening Brief at pages 23-25. The initiative power "is generally coextensive with the power of the [governing body] to enact statutes." *Santa Clara Trans. Auth. v. Guardino* (1995) 11 Cal.4th 220, 253. Even before Proposition 218 added article XIII C to the constitution in 1996, the Supreme Court held that fees and taxes are subject to the people's initiative power. "Nothing in the constitutional reservation of the initiative power expressly precludes exercise of the initiative to repeal a tax measure." *Rossi v. Brown* (1995) 9 Cal.4th 688, 696. In fact, "taxation [is] not only a permitted subject for the initiative, but was an intended object of that power." *Id.* at 699.

Amici argue that *Bighorn-Desert View Water Agency v. Verjil* (2006)

39 Cal.4th 205 prohibits the automatic CPI increase provided in appellants' initiatives. Amicus Brief at 27. Appellants answered this argument in their Opening Brief at pages 26-27, and in their Reply Brief at pages 31-32. *Bighorn* agrees with the explanation above regarding the need for a "relief valve" provision. The rate roll-back initiative at issue in *Bighorn* contained a provision requiring future voter approval–not just to increase the rates affected by the initiative–but also to increase any *other* existing fee or charge, and to impose any *new* fee or charge. *Bighorn*, 39 Cal.4th at 210. "To some extent," the Court said, "this portion of the initiative is superfluous, because under Elections Code section 9323 voter approval is required before a local district's governing board may amend an ordinance adopted by initiative, unless the ordinance provides otherwise. (See *DeVita v. County of Napa* [1995] 9 Cal.4th [763] at p. 788 ....) Therefore, if the voters were to approve an initiative lowering the Agency's water rate or other charge, the Agency's governing board would need voter approval before it could change the rate or charge that had been set by initiative. The Agency's governing board would not need voter approval, however, to increase a charge that was not affected by initiative or to impose an entirely new charge." *Bighorn*, 39 Cal.4th at 219-220. It was only this latter feature of Kelley's provision–the requirement of voter approval to impose or increase entirely unrelated charges not affected by the rollback–that the Court invalidated as overreaching.

Amici argue that *Howard Jarvis Taxpayers Assn. v. City of San Diego* (2004) 120 Cal.App.4th 374 is another case that prohibits the automatic CPI increase in appellants' initiatives. This case was not cited by the District. In *San Diego*, there were competing measures on the ballot–a hotel owners' measure and a City measure. The hotel owners' measure increased the number of votes needed to approve a city general tax (such as a hotel tax) from a

simple majority to two-thirds. The City's measure increased the votes needed to pass the hotel owners' measure. Both passed. Both sides brought post-election challenges against the other's measure. The trial court upheld the hotel owners' measure, and invalidated the City's measure. The City appealed. The court of appeal affirmed the invalidation of the City's measure, but also found the hotel owners' measure invalid because it attempted to change a voter approval threshold established by the constitution and state law. *San Diego* has nothing to say about the issues in the case at bar. Appellants' initiatives nowhere attempt to change any voter approval threshold or take any action not authorized by the constitution or state law. To the contrary, article XIII C, section 3 expressly provides: "Notwithstanding any other provision of this Constitution ... the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge." And, as noted above and in *Bighorn*, Elections Code section 9323 authorizes initiatives to include a provision granting the District pre-approval, without the need to return to the voters, to periodically amend the rates set by the initiatives, to increase them above their rolled-back amounts.

Amici argue that the severability clause in appellants' initiatives cannot be used to sever the "invalid" authorization to make CPI adjustments. Amicus Brief at 31. Appellants are not worried that the CPI adjustment provision is invalid, so they are not concerned about the efficacy of the severability clause. The clause reads, "The provisions of this measure are severable. If any provision of this measure or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application." Appendix at 29, § 4, and Appendix at 31, § 3. An almost identical severability clause was included on a voter initiative in *Rental Housing Assn. of Northern Alameda County v. City of Oakland* (2009)

171 Cal.App.4th 741, and opponents of the initiative made the same argument that amici make here: "Appellants contend the invalid provisions of the Ordinance are not severable from its remainder and because the Ordinance is not severable, it is therefore void in its entirety. We disagree." *Id.* at 769. The court explained the test for severance: "'Although not conclusive, a severability clause normally calls for sustaining the valid part of the enactment, especially when the invalid part is mechanically severable. The final determination depends on whether the remainder is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidity of the statute, or constitutes a completely operative expression of the legislative intent [and is not] so connected with the rest of the statute as to be inseparable.'" *Id.* at 770 (quoting *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 821). Here, the allegedly invalid part of appellants' initiatives (the authorization to make CPI adjustments) is "mechanically severable" in that it appears separately as its own section, not amid some other paragraph. Further, "the remainder is complete in itself," since the remainder is the main gist of the initiatives, which is to roll back the 20% and 40% rate increases. Whether the remainder "would have been *adopted* by the legislative body" without the "invalid" part is impossible to know since the District here unlawfully withheld the initiatives from the electorate. The alternative question, whether voters would have signed the initiative petitions without the "invalid" part is easily answered. The voters who signed the petitions obviously wanted to keep their water and sewer rates affordable. Removing the "invalid" authorization for the District board to increase rates in the future would only keep rates even more affordable. Clearly, then, those voters would have still have signed the petitions. For these reasons, even if the District were to prevail on its challenge to the CPI

provision, the initiatives are severable and cannot be held invalid in their entirety.

Finally, amici argue that the Court can consider now "respondent District's concerns regarding the impact of the proposed initiative[s] on its ability to honor its bond covenants and other contracts." Amicus Brief at 36. Appellants answered this argument in their Opening Brief at pages 33-37, and in their Reply Brief at pages 33-37. Appellants showed that the table of future revenue and expenses prepared by the District's declarant is wildly exaggerated. Reply at 35-40. More fundamentally, however, there has been no trial, or even an opportunity for discovery or deposition. How could this Court pass on the District's factual allegations of as-applied invalidity without an evidentiary record? It is because the District's impairment theories are based on contested factual allegations requiring a trial that appellants have repeatedly argued these theories are disallowed as part of any pre-election challenge, which must be commenced and concluded using the expedited Elections Code writ procedure in order to avoid delaying the printing and mailing of ballots. Appellants cited six Supreme Court decisions unanimously holding that such substantive challenges to an initiative must wait until *after* the election to be filed. *Independent Energy Producers v. McPherson* (2006) 38 Cal.4th 1020, 1029; *Costa v. Superior Court* (2006) 37 Cal.4th 986, 1005; *State Senate v. Jones* (1999) 21 Cal.4th 1142, 1153; *American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 695; *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 665-66; *Brosnahan v. Eu* (1982) 31 Cal.3d 1, 4.

CONCLUSION

Amici's brief does not change the analysis. The District, a creature of statute with limited powers, had no authority to declare initiatives unconstitutional or withhold them from the ballot. Rather, it had a mandatory

duty under state law to order them onto the ballot for which they had qualified and then, if it believed them to be invalid for some reason, to seek a writ under the Elections Code directing the Registrar to remove them before sending the ballot to the printer. By instead shelving the initiatives and suing their proponents on trumped-up grounds using this time-consuming action for declaratory relief, thus guaranteeing that these time-sensitive initiatives would never be presented to the voters, the District has abused judicial process for the purpose of chilling First Amendment rights. The anti-SLAPP statute was designed to strike such cases and penalize the plaintiffs who bring them by awarding attorney fees to the defendants whose First Amendment rights have been violated. This Court should reverse the denial of appellants' motion to strike.

DATED: June 20, 2012.

Respectfully submitted,

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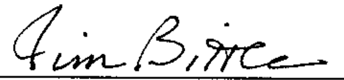

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WORD COUNT CERTIFICATION

I certify, pursuant to Rule 8.204(c) of the California Rules of Court, that the attached brief, including footnotes, but excluding the caption page, tables, the signature block and this certification, as measured by the word count of the computer program used to prepare the brief, contains 3,016 words.

DATED: June 20, 2012.

Timothy A. Bittle
Counsel for Appellants

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