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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF PLACER

PLACER COUNTY DEPUTY SHERIFFS' ASSOCIATION and NOAH FREDERITO, Petitioners, v. COUNTY OF PLACER, Respondent.	Case No. S-CV-0047770 Complaint Filed: December 21, 2021 **RESPONDENT COUNTY OF PLACER'S REPLY TO PETITIONERS' OPPOSITION TO DEMURRER TO PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY RELIEF** Date: March 3, 2022 Time: 8:30 a.m. Dept.: 42 **(*Exempt from filing fees pursuant to Gov. Code, § 6103.)**

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I. INTRODUCTION

This case arises from the Placer County Board of Supervisors' efforts to negotiate and determine compensation for deputy sheriffs in order to provide salary increases greater than what the formula the parties have historically used would provide, and the Deputy Sheriffs' Association's attempt to prevent the Board from exercising their authority – and fulfilling their obligation as elected representatives – to do so. Petitioners argue that the Board has no authority to determine or even negotiate over salary due to a 1976 ballot initiative, Measure F, which on its face conflicts with the Constitution, the MMBA, and the County Charter. The County has repeatedly explained to the DSA the legal grounds for why a ballot initiative depriving the Board of Supervisors of authority to negotiate and set compensation is void and unenforceable.

Case law showing Measure F is unconstitutional is well-established. Nonetheless, the DSA continues the present charade, presenting arguments that are facially specious and blatantly mischaracterizing both governing law and the County's legal arguments. While Petitioners claim that their goal is to protect the will of the voters, Placer County voters enacted a County Charter in 1980 that expressly designates the Board of Supervisors as responsible for negotiating and setting compensation, and the voters go to the polls every two years to select their representatives on the Board. Petitioners seek to deprive the Board of its constitutional and charter-given authority to determine salaries, and to deprive both the Board and themselves of the right to negotiate salaries. This Court should disregard these spurious arguments, and sustain the demurrer without leave to amend.

II. ARGUMENT

A. PETITIONERS' ARGUMENTS IN SUPPORT OF THE FIRST CAUSE OF ACTION ARE UNAVAILING

1. The Opposition Fails To Address a Well-Established Exception to the Presumptively Broad Right of Initiative.

Petitioners repeatedly assert that the right to initiative is generally coextensive with the legislative power of the local governing body; however, the Opposition conveniently omits the exception to this rule that forms the basis for the County's demurrer, namely that in certain cases,

authority over a particular matter is "delegated exclusively to the County's governing body, precluding the right to initiative and referendum." (*Gates v. Blakemore* (2019) 39 Cal.App.5th 32, 38, [citing *DeVita v. City of Napa* (1995) 9 Cal.4th 763 , 776]; *Citizens for Jobs & the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311, 1326.) Instead, the Opposition disingenuously argues that the County's constitutional argument is premised solely on the holdings of *Meldrim v. Board of Supervisors* (1976) 57 Cal.App.3d 341 and *Jahr v. Casebeer* (1999) 70 Cal.App.4th 1250, which addressed a separate constitutional sentence. By so doing, Petitioners avoid the clear legal question before this Court: Can a local initiative divest the County's governing body of the right and duty to negotiate and set salaries for County employees? The answer is "no."

The County demurs on the grounds that Measure F as enacted in 1976 violates Article XI, Section 1(b) of the California Constitution by depriving the Board of Supervisors of its constitutional authority to set employee compensation. Section 1(b) assigns the authority to set compensation for County employees specifically to the county's "governing body." *Meldrim* and *Jahr* show how Courts of Appeal have interpreted the term "governing body" in the analogous situation of supervisor compensation. That situation may be covered by a different *sentence* in Section 1(b), but that sentence is nonetheless part of the very same section of the Constitution; Petitioners would have this Court infer that the term "governing body" carries a different meaning in two sentences of the same constitutional provision.

Petitioners mischaracterize the rulings of both *Meldrim* and *Jahr* when they assert that "The courts reasoned that the Legislature's inclusion of the term 'referendum' indicated that the Legislature intended to foreclose the right to initiative as to supervisors' compensation." (Opposition, p. 11.) This assertion conflates two separate legal issues in an attempt to minimize the import of the decisions. The Court in *Meldrim* unambiguously stated that it based its holding – that supervisor compensation is not subject to initiative – entirely on the clear assignment of compensation-setting authority to the "Governing body (and not the 'county' or the 'voters')." (*Meldrim, supra,* 57 Cal.App.3d at 343.) Contrary to Petitioners' assertion, the *Meldrim* decision was not "predicated upon" the specific mention that supervisor compensation is subject to referendum. The decision's discussion of that issue appears only later in the decision – after

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stating that further explanation of the Court's interpretation of Section 1(b) was "unnecessary" – to reject a counter-argument that the inclusion of the word "referendum" carried with it an implied right to initiative. (*Id.* at 345.) *Jahr* similarly addressed as *independent* questions whether the term "governing body" includes "voters" and whether an express right of referendum implies a right of initiative. (*Jahr*, *supra*, 70 Cal.App.4th at 1254-55.) The court answered "no" to both.

To summarize, the County demurs on the principle that – although the initiative power is *generally* broad – where the Constitution delegates exclusive authority to a county's "governing body" this precludes the right to initiative. (*Gates*, *supra*, 39 Cal.App.5th at 38.) As with compensation for county supervisors, Section 1(b) specifically delegates authority over county employee compensation to the "governing body." *Meldrim* and *Jahr* held the term "governing body" as used in Section 1(b) excludes the electorate. Similarly, Section 302 of the County Charter assigns authority even more clearly to the "Board of Supervisors."

The Opposition never addresses the County's argument that Measure F unconstitutionally restricts the Board of Supervisors' ability to determine the Sheriff's Office budget by taking the largest contributing factor – deputy salaries – out of the Board's hands. (See *Totten v. Board of Supervisors* (2006) 139 Cal.App.4th 826.)

2. *Kugler v. Yocum* and *Spencer v. City of Alhambra* Are Distinguishable.

The Opposition repeatedly argues that *Kugler v. Yocum* (1968) 69 Cal.2d 371, and *Spencer v. City of Alhambra* (1941) 44 Cal.App.2d 75, have affirmed the right to set public employee compensation by initiative. But neither of these cases are relevant to the interpretation of Article XI, Section 1(b) of the Constitution. *Kugler* addressed whether an initiative was a proper means to fix a minimum salary for firefighters in the City of Alhambra. (*Kugler*, *supra*, 69 Cal.2d at 373.) *Spencer* addressed a similar, earlier, initiative for police officers in the same city. (*Spencer*, *supra*, 44 Cal.App.2d at 76.) Both decisions concluded that the initiative was a proper exercise of the initiative power under the City Charter, which granted the electorate the right to adopt any ordinance which the City Council might enact. (*Kugler*, *supra*, 69 Cal.2d at 374; *Spencer*, *supra*, 44 Cal.App.2d at 78.) Thus, both decisions concerned the provisions of a city charter, "which by and large is the supreme law as to municipal affairs." (*Meldrim*, *supra*,

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57 Cal.App.3d at 345 [citing *Duran v. Cassidy* (1972) 28 Cal.App.3d 574, 583].)

By contrast, when Measure F appeared on the ballot in 1976, Placer County was a general law county, meaning that the proper delegation of salary-setting authority was governed exclusively by the Constitution, Article XI, Section 1(b). Neither *Kugler* nor *Spencer* ever addressed this constitutional provision, which applies only to counties, not to cities. Thus, these cases are irrelevant to the interpretation and enforcement of Section 1(b).

3. The Opposition Misconstrues *Voters for Responsible Retirement.*

The Opposition boldly asserts that *Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765 ("*VFRR*") "unequivocally foreclosed" the County's argument regarding Section 1(b) and that *VFRR* "broadly supports initiative powers over local employee compensation." This assertion fundamentally misconstrues the decision in that case.

As the Fourth District Court of Appeal noted, "[t]he Supreme Court [in *VFRR*] was focused on whether employee compensation was subject to referendum, not whether [compensation setting] could be accomplished through initiative." (*Center for Community Action & Environmental Justice v. City of Moreno Valley* (2018) 26 Cal.App.5th 689, 702.) The only discussion in *VFRR* regarding Article XI, Section 1(b) specifically concerns the referendum power: The respondent argued that the specific language that county supervisor compensation is subject to referendum implied that other compensation decisions were not; the appellant argued that legislative history showed a clear intent to subject employee compensation decisions to referendum; the Court rejected both arguments, concluding that Section 1(b) neither guarantees nor restricts the right to referendum over employee compensation. (*Id.* at 648-651.)

Other than collective references to the electorate's "initiative and referendum powers," *VFRR* never addresses the scope of the initiative power specifically.[1] (E.g. *id.* at 652.) Several subsequent court decisions have expressly rejected the suggestion that initiative and referendum powers are always coextensive. (E.g. *Jahr*, *supra*, 70 Cal.App.4th at 1259; *Center for Community Action*, *supra*, 26 Cal.App.5th at 706.) Of these, *Jahr*, discussed above, recognized the decision in

[1] "An opinion is not authority for propositions not considered." (*Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195.)

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VFRR, and still reaffirmed the holding in *Meldrim* that Section 1(b)'s delegation of compensation-setting authority to the "governing body" precludes legislation by initiative.

The various broad statements in *VFRR* about the general scope of the initiative power are at best *dicta*. They have no bearing on whether the specific assignment of compensation-setting authority to the Board of Supervisors precludes legislation by initiative.

4. <u>The County's Ability To Provide Employment Benefits Other than Salary Does Not Cure Measure F's Constitutional Invalidity, Nor Does it Make Measure F Consistent With the County Charter.</u>

At several points, the Opposition argues that Measure F is consistent with the Board's authority to set compensation – under either the Constitution or the County Charter – because its formula only governs "salary" and not the whole field of "compensation." This argument gets the issue backwards. As the Opposition concedes, compensation is a broad term that includes both salary and other benefits. Courts have repeatedly held that a statute cannot infringe on the governing body's constitutional authority over compensation, even if it would only govern one aspect of total compensation. In both *In re Work Uniform Cases* (2005) 133 Cal.App.4th 328, 338, and *Curcini v. County of Alameda* (2008) 164 Cal.App.4th 629, 643, the First District Court of Appeal held that various Labor Code provisions – on uniform allowances and overtime pay, respectively – could not apply to counties because they would interfere with the governing body's exclusive authority over "compensation" under Section 1(b). Following that reasoning, Petitioners' argument that it would be consistent with the Constitution – or the Charter, which similarly provides the Board with broad authority over employee "compensation" – to take away the Board's authority over the single largest aspect of compensation is clearly specious.

The Opposition's only other response to the argument that the County Charter legally superseded Measure F is a brief statement that the enactment of Charter Section 607 "bolstered the initiative powers of the Placer County [electorate]."[2] However, Charter Section 607 is irrelevant to the validity of Measure F: Measure F was enacted in 1976, prior to the Charter. And

[2] Section 607(a) of the County charter states that the electors of Placer County may "by majority vote and pursuant to general law … Exercise the powers of initiative and referendum."

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at no point after 1980 have Placer County voters enacted a similar ballot initiative. If, *arguendo*, voters had authority to re-enact Measure F after 1980, they have not done so.[3]

5. Any Non-Initiative Action to Adopt or Implement the Measure F Formula Is Irrelevant to Whether Measure F Is Enforceable *As a Ballot Initiative* For Purposes of Elections Code § 9125.

The Opposition makes much of the fact that over the years various traditional County ordinances and resolutions – i.e. Board actions that were *not* enacted by way of initiative – have adopted or implemented the salary-setting formula originally set forth in Measure F, such as by codifying the formula in County Code section 3.12.040, or incorporating it into the County's labor agreement with the DSA. Petitioners also cite to a 2003 editorial in the Auburn Journal by then-County CEO Jan Christofferson discussing Measure F. The County does not dispute that these events occurred, but they are also irrelevant to the Petitioners' claim that the County's repeal of Section 3.12.040 in September 2021 violated Elections Code section 9125.

Section 9125 provides: "No ordinance proposed by initiative petition and adopted either by the board of supervisors 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." The plain statutory language shows that this *only* applies to an ordinance "proposed by initiative petition." To the extent the County may have enacted a traditional ordinance setting a salary formula, incorporated a salary formula into a labor agreement, or implemented a policy of providing salary increases according to a formula, none of these actions fall under the protection of Section 9125, and any of them could be repealed or withdrawn without voter approval. A newspaper editorial by a County official certainly would not create an enforceable ballot initiative where none previously existed. Accordingly, none of these issues have any bearing on whether the County's repeal of Section 3.12.040 violated Section 9125.

To the extent Petitioners are arguing that prior representations and actions by the County

[3] As discussed in more detail below, the failed attempts to *repeal* Measure F by way of a ballot measure are not equivalent to an initiative petition affirmatively *enacting* the same provision. And the County maintains that even after 1980, and even if enacted as a Charter Amendment, a ballot initiative containing the same terms as Measure F would still be preempted by the MMBA.

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which (expressly or implicitly) suggested Measure F was legally binding now estop the County from asserting that Measure F was constitutionally invalid from the start, that argument fails as a matter of law, for several reasons. First, in order for estoppel to apply, a representation must generally be a statement of *fact*; a statement about a legal issue – such as the constitutionality of a ballot measure – does not preclude the party making it from later changing its position. (*Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1315 [citing *McKeen v. Naughton* (1891) 88 Cal. 462, 467].) Second, estoppel may not be invoked to contravene constitutional provisions that define a public entity's powers. (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 28 ["[N]o court has expressly invoked principles of estoppel to contravene directly any statutory or constitutional limitations."].) Third, the law particularly disfavors estoppel where the party raising the argument is represented by counsel, as attorneys are charged with knowledge of the law in California. (*Kunstman v. Mirizzi* (1965) 234 Cal.App.2d 753, 757; *Tubbs v. Southern Cal. Rapid Transit Dist.* (1967) 67 Cal.2d 671, 679.) Here, Petitioners were represented by Counsel who had equal access to the state constitution, county charter and the MMBA at all relevant times.

6. <u>The Failed 2002 and 2006 Ballot Measures Have No Legal Effect.</u>

Intermingled with its arguments about other County actions and representations, the Opposition places particular emphasis on the election results of 2002 and 2006, when Measure R (2002) and Measure A (2006) proposed to repeal County Code section 3.12.040, and both measures were rejected by the voters. (Opposition pp. 14-15.) Petitioners argue that "any alleged defects regard[ing] the 1976 enactment were cured by the 2002 and 2006 initiative elections to retain it." (Opposition p. 14.) This argument is fundamentally flawed for two reasons.

First, the Opposition presupposes that the 2002 and 2006 election results had some legal effect, even though both measures ***failed***. As a matter of law, a failed legislative action has no legal effect whatsoever. Whatever the legal status of Measure F was at the time of each repeal attempt, a failed ballot measure does not – and cannot – affect that status in the slightest. Second, neither Measure R nor Measure A were *initiatives*. An initiative is an ordinance enacted through Elections Code sections 9100 to 9126, including a petition and a signature-gathering process. Neither Measure R nor Measure A were placed on the ballot through this procedure. Rather, both

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measures were placed on the ballot directly by a Board resolution at the request of the DSA. (See Petition, Exhibits A and C [as corrected in Petitioners' February 17, 2022 Notice of Errata].)

With this in mind, it is readily apparent that the 2002 and 2006 elections cannot support Petitioners' claim that the County violated Elections Code section 9125. Again, Section 9125 prohibits the County from repealing or amending without voter approval any "ordinance proposed by initiative petition and adopted either by the board of supervisors without submission to the voters or adopted by the voters." Neither Measure R nor Measure A qualify for this protection: neither measure was an "ordinance proposed by initiative petition," neither was ever adopted either by the Board or by the voters, and neither measure addressed the Board's authority under the Charter. These elections are simply irrelevant to Petitioners' causes of action.

7. <u>The MMBA Preempts Local Laws That Interfere With Collective Bargaining Procedure.</u>

Responding to the County's argument that Measure F fails to leave room for either party to negotiate over salary, the Opposition argues that "the mere fact that the subject matter of an initiative is within the scope of bargaining under the MMBA, does not automatically mean that the MMBA preempts it" and that the MMBA "merely requires that the governing body meet and confer with the union prior to placing such initiatives on the ballot." (Opposition, p. 17.) This is a disingenuous mischaracterization of both the County's argument and the applicable law, and entirely misses the point. The cases cited in the Opposition – *Boling v. Public Employment Relations Board* (2018) 5 Cal.5th 898 and *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591 – discuss the MMBA's restrictions relating to when a public agency can sponsor a ballot initiative affecting negotiable subjects. This is a separate issue from whether the MMBA preempts the actual substance of the initiative.

As the Supreme Court held in *VFRR*, it is indisputable that the procedures set forth in the MMBA – including the process by which salaries are fixed – are a matter of statewide concern and preempt inconsistent local procedures. (*VFRR*, *supra*, 8 Cal.4th at 781.) In particular, mandatory negotiable subjects, such as wages, cannot be declared "nonnegotiable." (*Huntington Beach Police Officers' Assn. v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 503-505.)

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In cases where courts have assessed whether prevailing-wage statutes conflict with the MMBA, they have been careful to note that voter-enacted restrictions on the collective bargaining process are only appropriate to the extent they leave the governing body a considerable degree of discretion. For example, in *City of Fresno v. People ex rel. Fresno Firefighters, IAFF Local 753* (1999) 71 Cal.App.4th 82, the Court of Appeal upheld a prevailing-wage charter provision because it only set the City's *initial* bargaining position, noting that "[d]ifferent considerations would be involved if the charter section in question actually set wages." Here, Measure F actually sets wages. By setting a fixed formula for setting deputies' salaries every year in perpetuity, it fundamentally changes the parties' bargaining procedure, removing salaries from the scope of bargaining and declaring it non-negotiable. This is clearly inconsistent with the MMBA.

B. THE SECOND CAUSE OF ACTION FAILS

1. <u>Petitioners Failed to Respond to the First Stated Grounds for the County's Demurrer to the Second Cause of Action.</u>

The County demurred to the Second Cause of Action on two grounds. The first is that the Second Cause of Action is entirely derivative of the First Cause of Action, and therefore necessarily fails if the First Cause of Action fails. The Opposition does not appear to dispute that the Second Cause of Action is derivative of the First. Indeed, the Opposition confirms that the Second Cause of Action presupposes that the 1976 ballot initiative is enforceable. (Opposition, p. 19:7-15.) Because the First Cause of Action fails as a matter of law, the Second also fails.

2. <u>To the Extent the Second Cause of Action Attempts to Assert a Constitutional Claim, It Remains Uncertain.</u>

The County also demurred to the Second Cause of Action on the grounds that its statement that the United States and California Constitutions, along with Placer County Code section 3.12.040, "create a clear, present, and ministerial duty under the law" for the County to set deputy sheriffs' compensation according to the Measure F formula, was uncertain. (Demurrer, p. 14.) The Opposition explains that "the Constitution" requires courts to "fashion protections against efforts to nullify the will of the voters" and that this somehow forms a basis for a constitutional cause of action "separate and independent from the requirements of [Elections

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Code] Section 9125." (Opposition, p. 19.)

This still leaves fatally uncertain the question of what specific cause of action the Petition is attempting to assert, and thus what legal questions the County must address in responding to it. And notably, although the Petition specifically cites to the United States Constitution, the Opposition does not at any point reference any provision of federal law, either constitutional or otherwise. If, as the Petition alleges, there is a federal constitutional claim alleged therein (in which case this matter would be subject to federal jurisdiction and removal to federal court) the County has no way to ascertain what such a claim might be.

C. PETITIONERS FAILED TO OPPOSE THE COUNTY'S DEMURRER TO THE THIRD CAUSE OF ACTION

The County demurred to the Third Cause of Action on the grounds that it is wholly derivative of substantive claims that are invalid as a matter of law. (*Ball v. FleetBoston Fin'l Corp.* (2008) 164 Cal. App. 4th 794, 800.) The Opposition does not respond to this portion of the County's demurrer. Failure to oppose a motion is a constructive concession to the merits of the motion on the grounds set forth in the moving papers. Accordingly, if the Court sustains the County's demurrers to the first and second causes of action – which for the reasons explained above it must – Petitioners' failure to oppose the County's demurrer to the derivative request for declaratory relief must also be sustained.

III. CONCLUSION

For the reasons outlined above and in the County's original filing, the Demurrer to each and every cause of action should be sustained. As explained in the County's original filing, amendment would be futile, and leave to amend should be denied.

Dated: February 24, 2022

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF FRESNO

I am employed in the County of Fresno, State of California. I am over the age of 18 and not a party to the within action; my business address is: **5250 North Palm Ave, Suite 310, Fresno, California 93704.**

On **February 24, 2022**, I served the foregoing document(s) described as **RESPONDENT COUNTY OF PLACER'S REPLY TO PETITIONERS' OPPOSITION TO RESPONDENT'S DEMURRER TO PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY RELIEF** in the manner checked below on all interested parties in this action addressed as follows:

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☑ **(BY U.S. MAIL)** 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 Fresno, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☑ **(BY ELECTRONIC SERVICE)** By electronically mailing a true and correct copy through Liebert Cassidy Whitmore's electronic mail system from cdewey@lcwlegal.com to the email address(es) set forth above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

Executed on **February 24, 2022**, at Fresno, California.

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

Constance Dewey