No. C096398

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

COUNTY OF PLACER
Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF PLACER
Respondent,

PLACER COUNTY DEPUTY SHERIFFS' ASSOCIATION,
and NOAH FREDERITO
Real Parties in Interest.

Superior Court of California, County of Placer, Dept. 42,
The Honorable Michael W. Jones, Presiding (Tel. 916-408-6000),
Superior Court Case No.: S-CV-0047770

PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE, PROHIBITION, AND/OR OTHER APPROPRIATE RELIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Cal. Rules of Court, Rule 8.208)

The undersigned counsel of record for Real Parties in Interest Placer County Deputy Sheriffs' Association certifies that no person or entity other than the parties to this proceeding have either (1) an ownership interest of 10 percent or more in any party that is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in California Rules of Court, Rule 8.208, subdivision (e)(2).

Executed this 23rd day of June, in Sacramento, California.

/s/ David E. Mastagni
David E. Mastagni
Attorneys for Real Parties in Interest
PLACER COUNTY DEPUTY SHERIFFS' ASSOCIATION

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I. INTRODUCTION

Real Parties in Interest, the Placer County Deputy Sheriffs' Association ("DSA") and Noah Frederito (collectively, "RPI"), respectfully request the Court of Appeal summarily dismiss the County of Placer's ("County") petition for an extraordinary writ of mandate and request to stay all proceedings. The petition fails to satisfy even threshold requirements to bring an extraordinary writ to appeal an interim order denying, in part, the County's demurrer and granting leave to amend. The County has failed to demonstrate any cognizable irreparable harm, instead objecting that without a stay it might be served discovery.

Additionally, this Court should not consider the new legal arguments raised on appeal in an overt attempt to mimic the arguments raised in *Pacifica Firefighters Association v. City of Pacifica* (2022) 76 Cal.App.5th 758, a factually and legally distinguishable case. The RFI opposed the legal arguments raised in the demurrer, and changing legal theories on appeal is prejudicial to the litigants and the trial court. Further, the County has adequate legal remedies to properly raise its new arguments in a summary judgment motion, at the merits hearing on the writ, or by appealing a final judgment.

While the County's argument regarding impermissible delegation of legislative authority in the demurrer was predicated only on Article XI, Section 1(b) of the California Constitution, the appeal newly raises "state general law" (Petition, p. 27), to argue by analogy that Government Code section 36506, which *Pacifica* relied upon and which has no application to counties, is dispositive of the RPI's claims. *Pacifica* did not consider the County's basis for demurrer, Article XI, Section 1(b), and Government Code section 25300 mirrors that Article, not section 36506. The County never raised Government Code section 25300, nor argued it should be construed differently than the identical language in Article XI, Section 1(b), which the

Supreme Court held "neither guarantees nor restricts" the voters' right to initiatives over local employee compensation. (*Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Ca1.4th 765, 776-777 (*Voters*).)

Similarly, the County raises a new Meyers-Milias-Brown Act ("MMBA") preemption argument to mirror the issues raised in *Pacifica*. The demurrer argued Measure F interfered with the duty to bargain over wages as set forth in Government Code 3505. The demurrer never argued Measure F conflicted with the MMBA sections involving impasse procedures, nor that it required the imposition of terms. (Gov. Code §§ 3505.4 and 3505.7.)

Pacifica's initiative did not set salaries. Rather, it established impasse procedures in conflict with A.B. 646 and mandated post- factfinding imposition of certain minimum terms. Issues relating to A.B. 646 and the impasse process were never raised by the demurrer because they are not implicated by Measure F.

Here, the parties bargained and agreed to submit a proposal to the voters to annually maintain parity with the average base salary of deputies in three contiguous counties, in full compliance with our Supreme Court's precedent harmonizing direct democracy rights with the MMBA's bargaining obligations. (See *Boling v. Public Employment Relations Board* (2018) 5 Cal.5th 898 (*Boling*); *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591 (*Seal Beach*).) Now the County argues Measure F conflicts with sections 3505.4 and 3505.7 simply to pigeonhole *Pacifica.*

Notwithstanding the County's vehement assertion that the trial court denied the demurrer "sole[ly]" based on the stage of the proceedings and failed to understand its arguments, the trial court correctly explained that its ruling is based on Supreme Court precedent requiring the courts to zealously guard and liberally construe the reserved initiative rights of the electorate. (PA 634-635.) The court further explained that none of the cases cited in the

County's demurrer were on all fours with the instant action. (*Ibid.*) Thus, none of the County's cases foreclosed RPI's claims. (PA 635.) The court properly denied the demurrer holding the County failed to meet its burden of establishing an inability to proceed on any of the theories espoused. (PA 635-36.) Bolstering its reasoning, the court pointed out that all other challenges to the people's initiative powers cited by the County were decided after a substantive review beyond the pleading stage. (*Ibid.*) Additionally, the County's claim that granting leave to amend was an abuse of discretion speciously attempts to reverse the standard for granting leave to amend.

In short, the lower ruling was correct. None of the cases cited by the County preclude the claims set forth in the Second Amended Petition. More importantly, the County has failed to acknowledge the unequivocal statement in *Voters* holding that Article XI, Section 1(b) does not prohibit initiatives over local employee compensation. (*Voters, supra,* 8 Ca1.4th at pp. 776-777.) *Pacifica* construed different statutes and legal arguments to invalidate a materially different initiative. Although *Pacifica* has little application to this case, the County is free to raise its new arguments at a later stage of the proceeding.

Therefore, in the interests of fairness and judicial economy this Court should not grant this writ nor consider new legal theories on appeal. In light of the Supreme Court's instruction in *Voters* and the County's inability to cite any authority precluding the RPI from proceeding on its legal theories, the County cannot establish that the denial of the its demurrer and granting of leave to amend was an abuse of discretion.

II. RELEVANT BACKGROUND

In 1976, the voters of Placer County passed an initiative known as Measure F. (Petitioner's Appendix ("PA") 647-648 (Second Amended Petition ("SAP") ¶ 5); PA 406-407.) Measure F, which was most recently codified in Section 3.12.040, fixed the salaries of sworn employees of the

Placer County Sheriffs' Office at the average salary for each comparable position in the sheriff's offices for Nevada, El Dorado, and Sacramento counties. (*Ibid.*)

In 1980, the voters established the Placer County Charter, which was codified in County Code section 3.14.020. (PA 648 (SAP ¶ 7).) Charter section 302(b) provides that the "Board shall provide, by ordinance, for the number of assistants, deputies, clerks, and other persons to be employed from time to time in the several offices and institutions of the county, and for their compensation." (*Ibid.*) Section 604 provides that all laws in effect at "all laws of the county in effect at the County Code section effective date of this Charter shall continue in effect according to their terms unless contrary to the provisions of this Charter." (PA 648 (SAP ¶ 8).) Section 607(a) provides "[t]he electors of the county may be majority vote and pursuant to general law … [e]xercise the powers of initiative and referendum." (PA 408-416.) Prior to 2020, the County has consistently construed Measure F's salary setting provisions as harmonious with the Charter's general grant of authority to the Board of Supervisors ("Board") to provide for compensation. (PA 648-649 (SAP ¶ 9).)

In 2002, both the County and the DSA wanted to negotiate a base salary that deviated from the Measure F formula. (PA 649 (SAP ¶ 12).) The County's representatives informed the DSA that Measure F formula set the base salary. Mutually desiring to eliminate Measure F, the County agreed to place "Measure R" asking the voters whether to repeal Measure F. (*Ibid.*) The County informed the voters that "[a] 'NO' vote on this measure is a vote to retain the existing ordinance." (PA 649-650 (SAP ¶¶ 12, 14); PA 664-670.) Measure R did not pass, and as a result in 2006, the County placed Measure A on the ballot once again seeking to repeal Measure F. (PA 649-650 (SAP ¶¶ 12, 14).) The voters rejected Measure A. In 2003, the then County CEO wrote an editorial where he unequivocally explained to the

public that Measure F set deputies' base salary and that the initiative measure remained in full force and effect until the public voted to modify to repeal it. (PA 649 (SAP ¶ 13).)

Over the past 44 years, County has adhered to the Measure F formula. The County has affirmed Measure F multiple times through the adoption of ordinances modifying the classifications subject to its formula as set forth in Placer County Code section 3.12.040. (PA 650 (SAP ¶ 19).) The parties historically incorporated the Measure F formula in their labor agreements and negotiated other pays and benefits so that base salary was only about half of compensation. (PA 650 (SAP ¶ 17).) As recently as January 12, 2021, the Board adopted an Ordinance amending Section 3.12.040 to exclude certain managers and affirming the application of Measure F to DSA members. (PA 650 (SAP ¶ 20).)

On September 28, 2021, the Board adopted Ordinance 6104-B, which effectively amended Section 3.12.040 to repeal the Measure F formula. (PA 655-656 (SAP ¶ 67); PA 764-783.) On September 28, 2021, the Board also adopted Resolution 6105-B, which increased the base salaries of deputies and sergeants by 1.09% and 1.41%, respectively, above the amount set by Measure F in February of 2021. (PA 655 (SAP ¶ 61); PA 760-763.) The Board adopted these Ordinances without placing the repeal of the voter-enacted Measure F on the ballot. (PA 655 (SAP ¶ 65).)

RPI filed a Verified Petition for Writ of Mandate and Complaint for Declaratory Relief on December 21, 2021. (PA 005-177.) Petitioners filed an Amended Petition ("Amended Petition") on January 21, 2022. (PA 183-348.) The Amended Petition alleges the following causes of action against the County: (1) Violation of Election Code § 9125, by repealing County Code Section 3.12.040 without voter approval; (2) Violation of the California Constitution, by imposing a wage adjustment that deviated from the formula previously set by Placer County Code § 3.12.040; and (3) a

request for declaratory relief regarding the first two causes of action. (PA 194-196 (First Amended Petition ("FAP") ¶¶ 76-93).)

On February 2, 2022, the County filed and served a notice of demurrer and demurrer to all three causes of action. (PA 349-373.) The County concurrently filed a supporting request for judicial notice. (PA 388-392.) The County also filed a motion to strike various portions of the Amended Petition the County believed to be irrelevant and improper. (PA 374-387.) A hearing was scheduled for March 3, 2022, for both the demurrer and the motion to strike.

On February 17, 2022, the RPI filed their oppositions to the County's demurrer and motion to strike. (PA 453-474; PA 480-500.) The RPI concurrently filed a notice of errata as to the Amended Petition. (PA 423-452.)

On February 24, 2022, the County filed reply briefs in support of its demurrer and motion to strike. (PA 520-532; PA 533-545.)

On March 2, 2022, the Superior Court continued the hearing on the County's demurrer and motion to strike until March 24, 2022. (PA 558.)

On March 23, 2022, the Superior Court continued the hearing again, until April 7, 2022. (PA 566.)

On March 29, 2022, the County filed a request for judicial notice of new authority. (PA 567-596.)

The Superior Court heard oral argument on April 7, 2022 and took the matter under submission. (PA 631.)

On May 17, 2022, the Superior Court issued a written order on the County's motions. (PA 632-639.) The court granted both of the County's requests for judicial notice. (PA 633.) The court overruled the County's demurrer as to the First Cause of Action (Violation of Elections Code § 9125) and Third Cause of Action (Declaratory Relief). (PA 635-636.) The

court sustained the demurrer to the Second Cause of Action, but granted leave to amend. (PA 636.)

On May 25, 2022, RPI filed a Second Amended Petition in the Superior Court. (PA 645- 834.) The Second Amended Petition alleges that the County's actions violated the California Constitution's protections of the voters' initiative power and Elections Code section 9125, which dictates that "no ordinance proposed by initiative petition…shall be repealed or amended except by a vote of the people." (PA 656-657 (SAP ¶¶ 73-77).) RPI also allege that regardless of the enforceability of the 1976 vote enacting Measure F, pursuant to Charter Section 607 powers, the electorate twice voted to retain Measure F, and the California Constitution prohibits the County's subsequent repeal nullifying the will of the voters. (PA 657-660 (SAP ¶¶ 78-114.) The petition also alleges the County failed to implement the requisite January 2022 salary adjustment.

On June 13, 2022, the County filed this petition for extraordinary writ of mandate with the California Court of Appeal, Third Appellate District requesting to stay all superior court proceedings. (Petition, p. 1-44.)

III. LEGAL DISCUSSION

A. The Writ Petition Should be Summarily Denied due to Multiple Procedural Defects.

The Court should dismiss the petition without considering the merits of the County's argument because the petition does not meet the threshold requirements for bringing an extraordinary writ. Moreover, the petition is primarily based upon new claims and legal issues not raised at the trial court. These new legal arguments may not be raised in appeal, particularly because the County still has the ability to raise its new arguments in a summary judgment motion, at the merits hearing on RPI's writ, or on appeal of final judgment. In the interest of fairness and judicial economy, the County should not be permitted to bypass the litigation process by filing an extraordinary

writ.

1. The Writ Petition Should be Denied because the Petitioner Has an Adequate Remedy at Law and Faces No Threat of Irreparable Harm.

As a prerequisite to appellate review on a petition for writ of mandate, the petitioner must demonstrate two threshold requirements. First, the petitioner must show there is no "adequate remedy, in the ordinary course of law." (Code Civ. Proc., §§ 1086, 1103.) Second, the petitioner must demonstrate a threat of irreparable harm if the writ is not granted. (*Los Angeles Gay & Lesbian Center v. Superior Court* (2011) 194 Cal.App.4th 288, 300.) Writ review should be summarily denied if either of these threshold requirements is absent. Here, both are absent.

a. The County Will Have an Adequate Remedy at Law Before the Trial Court.

This writ petition should be summarily denied because the County will have an adequate remedy in the normal course of litigation as the case proceeds through discovery and dispositive motions toward an appealable judgment and order. Various policy reasons discourage immediate writ review of interlocutory orders. "[P]erhaps the most fundamental reason for denying writ relief is the case is still with the trial court and there is a good likelihood purported error will be either mooted or cured by the time of judgment." (*Science Applications Internat. Corp. v. Superior Court* (1995) 39 Cal.App.4th 1095, 1100 (*Science Applications*).) "Petitioners seeking extraordinary writs do not always consider that a purported error of a trial judge may (1) be cured prior to trial, (2) have little or no effect upon the outcome of trial, or (3) be properly considered on appeal." (*Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1273 (*Omaha Indemnity*).)

Here, the County will have numerous opportunities to bring the same

legal challenges throughout the course of the trial court proceedings. Thus, if there was any error in the trial court's ruling on the demurrer, it should be "cured" by the time there is a final judgment. (*Science Applications, supra,* 39 Cal.App.4th at p. 1100.) Because the County has multiple adequate remedies at law, extraordinary writ relief is not justified or appropriate.

First, the County has an adequate remedy because it can bring a motion for summary judgment. In ruling on the County's demurrer, the trial court did not make a "determination as to whether the claims will ultimately prevail once substantive review has been conducted." (PA 636: 8-9.) Instead, the court merely found that the allegations were "sufficiently pleaded to proceed with litigation" and the cases cited by the County were distinguishable from the case at hand. (PA 635: 8-9; 636: 7.) If the County truly believes there is no genuine dispute of material fact, it does not need to wait for the parties to complete discovery, but rather can bring a motion for summary judgment immediately. (See Code Civ. Pro. § 437(a)(1).) A motion for summary judgment is the appropriate context for the trial court to evaluate the undisputed facts and dispositively decide the merits of this novel legal issue. Moreover, in its summary judgment motion the County would not be limited to the legal theories raised in its demurrer, and would be free to raise all the new legal claims it attempts to raise in this petition.

Second, the County also has an adequate remedy because it is entitled to a merit hearing on RPI's underlying writ. At this juncture, the County will also be free to raise new arguments not raised in the demurrer. At the hearing stage, the record will be more fully developed, facilitating a final ruling on the merits regarding these complex and novel legal issues.

Finally, review of a ruling on a demurrer normally lies on by appeal from the subsequent judgment. (Eisenberg et al., Cal. Practice Guide: Civ. App. & Writs (The Rutter Group) § 15.11, 15.50; *see also* Code Civ. Proc., § 906; *Cryolife, Inc. v. Superior Court* (2003) 2 Cal.Rptr.3d 396.)) "[S]uch

an appeal is normally presumed to be an adequate remedy at law, thus barring immediate review by extraordinary writ." (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 913.) Because the County will ultimately have an opportunity to raise these issues in an appeal from final judgment, this Court does not need to immediately review them by extraordinary writ.

The County's petition does not deny that it will be able to raise these challenges before the trial court and eventually will be able to challenge any final ruling on appeal. Instead, the County alleges there is an inadequate remedy at law because it would be forced to "spend time and resources" litigating its case through the normal process. (Petition, p. 19 ¶ 39.) However, case law makes clear that appeal cannot be considered an inadequate remedy "merely because more time would be consumed by pursuing it through the ordinary course of law than would be required in the use of an extraordinary writ." (*Baeza v. Superior Court* (2011) 201 Cal.App.4th 1214, 1221 [citing *Hogya v. Superior Court* (1977) 75 Cal.App.3d 122, 128-129].) Therefore, the County has multiple adequate remedies at law and an extraordinary writ is not necessary or appropriate.

b. The County Will not be Irreparably Harmed by Litigating This Matter.

Irreparable harm is seldom established merely by the fact that, if the trial court ruling is wrong, petitioner will have to bear the time and expense of going to trial unnecessarily. (Eisenberg et al., *supra,* § 15.13.1.) The Fourth District in *Ordway v. Superior Court*, explained "a trial does not generally meet the definition of 'irreparable injury,' being at most an irreparable inconvenience." (*Ordway v. Superior Court* (1988) 198 Cal.App.3d 98, 101, fn. 1 [disapproved on other grounds by *Knight v. Jewett* (1992) 3 Cal.4th 296].) The appellate court also explained that public policy and judicial efficiency disfavor the granting of extraordinary writs:

> [I]t is not fair to parties on appeal who have often waited years for the final resolution of their disputes to have litigants in the pretrial stage elbow their way into the line at our door. Appellate courts should not encourage the use of extraordinary writs as a method of reviewing rulings made in the law and motion department of the trial court. Rather, there is wisdom in adhering to the policy of allowing appellate review by way of extraordinary relief only when other remedies have been fully exhausted.
>
> (*Ibid.* [internal citations omitted].)

The only "harm" the County has claimed is that litigating the action will be more expensive and time consuming than a writ proceeding. (Petition, p. 19 ¶ 39, p. 20 ¶¶ 42-43.) This inconvenience is not unique to this matter, but is merely the normal course of litigation which almost all litigants find frustrating. This showing of "irreparable inconvenience" is insufficient to meet the County's burden. (*Omaha Indemnity*, *supra*, 209 Cal.App.3d at p. 1274.)

The County's main concern appears to be that RPI may "propound substantial discovery… for collateral purposes." (Petition, p. 9.) However, avoidance of discovery is not a significant or irreparable harm, except in narrow circumstances where an erroneous discovery ruling threatens the loss of a privilege and for which there is no adequate legal remedy. (*Raytheon Co. v. Superior Court* (1989) 208 Cal.App.3d 683, 686 [citing, *Sav–On Drugs, Inc. v. Superior Court* (1975) 15 Cal.3d 1, 5].) Interlocutory review by writ is the only adequate remedy in such cases, since once privileged matter has been disclosed there is no way to undo the harm which consists in the very disclosure. (*Roberts v. Superior Court* (1973) 9 Cal.3d 330, 336.) Orders regarding discovery are generally not appealable and review of discovery rulings by extraordinary writ is disfavored. (*O'Grady v. Super. Ct.*

(2006) 139 Cal.App.4th 1423, 1439.) Although the County is not appealing a discovery order, their claim of irreparable harm is predicated entirely on avoiding discovery and speculative accusations that RPI might abuse the discovery process. (Petition pp. 9-10, 19-20.) The County has made no showing that RPI will propound improper discovery or that no adequate remedies, such as objecting to improper discovery, exist. To the contrary, our Supreme Court has explained that the delay and burden on the appellate courts of such interim review is likely to result in greater harm to the judicial process by reason of protracted delay than is the enforcement of a possibly improper discovery order. (*Pacific Tel. & Tel. Co. v. Superior Court* (1970) 2 Cal.3d 161, 170.) In light of the Supreme Court's reasoning, the mere avoidance of hypothetical discovery with no showing that the trial court intends to compel the disclosure of privileged information cannot constitute irreparable harm.

Because the County cannot meet either of these threshold requirements, the Court needs to look no further to deny the petition.

2. The Writ Petition Should be Denied Because it Raises New Issues Not Brought Before the Trial Court.

The County's petition should be summarily denied because it raises a number of new issues and legal arguments not raised at the trial court. Overtly seeking to tether its claims and legal arguments to *Pacifica,* the County raises several new legal arguments and theories from that case, including that the passage of Measure F violated Government Code section 25300 and was preempted by the MMBA because it interfered with the County's ability to impose its last, best and final offer ("LBFO") after factfinding. Moreover, even considering the merits of these newly raised legal theories, *Pacifica* is distinguishable from this case and does not warrant dismissal of RPI's claims at the pleadings stage.

"As a general rule, theories not raised in the trial court cannot be

asserted for the first time on appeal; appealing parties must adhere to the theory (or theories) on which their cases were tried. This rule is based on fairness—it would be unfair, both to the trial court and the opposing litigants, to permit a change of theory on appeal; and it also reflects principles of estoppel and waiver." (Eisenberg et al., *supra*, § 8:229.) Litigants cannot circumvent this rule by claiming the new arguments were "implied by" or are "derivative of" their trial court arguments. (*Vallejo Police Officers Assn. v. City of Vallejo* (2017) 15 Cal.App.5th 601, 621 (*Vallejo*).) Similarly, writ relief will be denied if the grounds for relief were not asserted at the trial court level. (Eisenberg et al., *supra*, § 15:23.) Thus, by failing to raise these arguments in its demurrer, the County waived them for purposes of this appeal. (See *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1065-1066 [a party may not raise for the first time on appeal issues not raised in the trial court] (*Pool*); *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468 ["the rule that contentions not raised in the trial court will not be considered on appeal is founded on considerations of fairness to the court and opposing party, and on the practical need for an orderly and efficient administration of the law"].)

a. The County Waived the Argument that Measure F Violated "State General Law."

The County's demurrer challenged the constitutionality of Measure F based on Article XI, Section 1(b) of the California Constitution. (See PA 363-366.) In its petition, the County relies on *Pacifica*, a case dealing exclusively with the statutory grant of authority to the city council under Government Code section 36506, to bolster its constitutional argument and to make the entirely new argument that Measure F impermissibly delegated the statutory authority granted to the board of supervisors under Government Code section 25300. (Petition, pp. 25-33; *Pacifica, supra,* 76 Cal.App.5th 758.) These arguments are unpersuasive, and more importantly, the County waived these arguments by failing to raise them in its demurrer.

First, by failing to raise the argument that Measure F violated "state general law" in the trial court, the County waived this legal theory. Rather, than wait until further in litigation (such as in a motion for summary judgment) to address this new legal theory, the County attempts to raise it now by interweaving its statutory arguments with its constitutional arguments. (See Petition, pp. 25-33.) The County's argument in the trial court focused entirely on the Constitution's grant of authority in Article XI, Section 1(b). (PA 363-366.) The demurrer never argued that Government Code section 25300 prohibited delegation of the Board's authority or that section 25300 should be interpreted differently than Article XI, Section 1(b). Thus, any appellate review of the lower court's ruling on the demurrer must be limited to the County's constitutional theory. (See *Pool, supra,* 42 Cal.3d at pp. 1065-1066.)

The fact that *Pacifica* was decided after the parties submitted briefing on the demurrer does not excuse the County's failure to raise this legal theory at the trial court. While the parties could not have known what the final ruling would be in *Pacifica*, the underlying theories raised by the parties in *Pacifica* were always available to the parties here. The existence of Government Code section 25300 was always known (or should have been known) to the County.[1] However, the County chose not to raise or even cite this statute in its demurrer, presumably because they believed it was duplicative of the constitutional grant of authority under Article XI,
Section 1(b). On appeal, the County now raises section 25300 and argues it should be construed to have the same meaning as section 36506 despite the obvious differences in statutory language. By raising this new argument, RPI

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1 The same law firm that represents the County in this case represented the city in *Pacifica*. Therefore, there is no reasonable excuse as to why the County could not have briefed this available legal theory prior to the ultimate ruling in *Pacifica.*

and the lower court were denied the opportunity to consider whether section 25300 should be construed consistent with the identical language in the Constitution or section 36506, which uses the term "fix" instead of "provide."

To the extent the County argues *Pacifica* is dispositive on the constitutional issue raised in its demurer, this argument is erroneous. The County's reliance on *Pacifica* to argue a new interpretation of section 25300 is subordinate to the California Constitution and the Supreme Court's holding that Article XI, Section 1(b) "neither guarantees nor restricts" the voters' right to referendum and initiatives over local employee compensation. (*Voters, supra,* 8 Ca1.4th at pp. 776-777.) *Pacifica* never addressed the constitutional grant of authority to the governing body to provide compensation under Article XI, Section 1(b). Rather, *Pacifica* was focused solely on the claim that the city council could not delegate to the voters its authority to fix employee compensation under Government Code section 36506. (*Pacifica, supra,*76 Cal.App.5th at pp. 766-772.) Because the Supreme Court has held the section of the California Constitution raised in the County's demurrer does not place a categorical bar on the people's right to initiative and referendum over employee compensation, the trial court correctly ruled that RPI's claims were viable and could not be dismissed at the pleadings stage. (See *Voters, supra,* 8 Ca1.4th at pp. 776-777.)

Finally, *Voters* also precludes the County's newly raised argument that *Pacifica* is dispositive in proving that Measure F improperly delegates the Board's authority in violation of Government Code section 25300. First, the statutory language at issue in *Pacifica* is materially different. Government Code section 36506 states that "the city council *shall fix* the compensation of all appointive officers and employees." (Emphasis added.) However, Government Code section 25300 states "[t]he board of supervisors… *shall provide for* the number, compensation, tenure, appointment and conditions

of employment of county employees. (Emphasis added.) The latter mirrors the language in Section 1(b) of the Constitution which states "[t]he governing body *shall provide for* the number, compensation, tenure, and appointment of employees." (Emphasis added.)

Thus, *Pacifica* cannot be dispositive as to this issue because "fix" and "provide for" have distinct and different meanings. Fix means "to announce" or "to establish." (*Fix*, Black's Law Dictionary (11th ed. 2019).) Whereas, "provide for" means "to cause something to be available or to happen in the future" or "to supply what is needed." (*Provide for*, Merriam-Webster.com Dictionary <https://www.merriam-webster.com/dictionary/provide%20for> (as of June 19, 2022).) Because of the difference in statutory language, it is doubtful that *Pacifica*'s reasoning has any application to Government Code section 25300.

Because Government Code section 25300 mirrors the language in the Constitution, rather than that in section 36506, the analysis of the language in *Voters* controls. The County's new argument not only strains credibility in its statutory construction, but also is directly contradicted by higher authority. Accordingly, the lower court correctly ruled that *Pacifica* did not dispose of the RPI's case.

In sum, the demurrer's failure to raise any argument relating to section 25300 precludes consideration of this new argument on appeal.

b. The County Failed to Raise the Argument that Measure F was Preempted by the MMBA because it Interfered with MMBA Impasse Procedures.

At the trial court, the County argued that Measure F is preempted by the MMBA because it removes deputies' salaries from bargaining. (PA 367:1- 368:6; PA 529:13- 530:10.) This claim was based on Government Code section 3505. The County now argues in the petition that Measure F is preempted because it impermissibly prevents the County from implementing

its LBFO after impasse procedures under Government Code section 3505.7. (Petition, pp. 33-35.) Tellingly, the demurrer never cited section 3505.7 nor raised interference with the imposition of terms and conditions. (PA 367:1-368:6; PA 529:13- 530:10.) Because this new argument was not raised at the trial court, it should be deemed waived.

In its demurrer, the County argued Measure P was preempted by the MMBA because mandatory subjects within the scope of representation could not be the subject of a voter initiative. (PA 367:1- 368:6; PA 529:13- 530:10.) The opposition cited to Supreme Court precedent harmonizing the MMBA bargaining obligations with the reserved initiative powers of direct democracy. (PA 464-470; *Boling, supra,* 5 Cal.5th 898 [MMBA required the city to meet and confer with the union prior to placing an initiative on the ballot which would have reduced employee pensions]; *Seal Beach, supra,* 36 Cal.3d 591 [MMBA's requirement that the city council meet and confer with the unions prior to submitting an initiative to the voters related to the disciplinary penalty for strikes did not conflict with city council's constitutional authority.]). The MMBA does not broadly forbid the passage of initiatives related to wages, hours, or working conditions, it merely requires that the governing body meet and confer with the union prior to placing such initiatives on the ballot. The legal issue on the demurrer was whether the DSA and the County satisfied their MMBA requirement to negotiate over salaries by agreeing to submit Measure F to the voters in 1976.

The County now shifts its argument to raise a new legal theory based on *Pacifica* that Measure F is preempted by the MMBA because it interferes with the statute's factfinding procedures under Government Code section 3505.4 and the County's ability to impose or not impose its LBFO under section 3505.7. (Petition, pp. 34-35.) The County should be estopped from raising this new theory on appeal. (See *Pool, supra,* 42 Cal.3d at pp. 1065-1066.) This is not a derivative argument, but rather a new legal theory

predicated on different sections of the MMBA that were not briefed or argued. (*Vallejo, supra,* 15 Cal.App.5th at p. 620.) By choosing not to raise these arguments, the County waived them and they should not be considered for the first time on appeal.

Moreover, the new theories raised in *Pacifica* and adopted on appeal are not applicable to the facts of this case. The initiative measure at issue in *Pacifica* established factfinding procedures, including criteria the factfinding panel needed to consider, which differed from the procedures laid out in Government Code section 3505.4. (*Pacifica, supra,* 76 Cal.App.5th at pp. 761-762.) If, following factfinding, the parties could not come to an agreement as to salary, the measure required the city impose a salary based on the salaries of firefighters in surrounding localities. (*Id.* at p. 763.)

Section 3505.7 does not require the County to impose terms after impasse procedures. The *Pacifica* initiative did not establish salary. Instead, it required the parties to bargain over salary, but also required imposition of a minimum salary after factfinding in the absence of an agreement. The *Pacifica* court's reasoning focused on the conflict between the factfinding procedures and imposition requirements of the initiative and the MMBA. (*Id.* at pp. 774-775.) In fact, the court limited the scope of its MMBA preemption analysis to the enactment of A.B. 646, which established the mandatory factfinding process. The court suggested that but for the adoption of A.B. 464, the initiative would not have been preempted by the MMBA. (*Id.* at p. 775.)

Here, Measure F does not alter the factfinding criteria in any way, nor mandate imposition of any terms or conditions of employment after completion of the factfinding process. Instead, it enacted an annual salary adjustment after the parties agreed to submit the initiative to the voters and it was approved. (PA 647-648 (SAP ¶ 5); PA 406-407.)

Further, Measure F is distinguishable from the *Pacifica* initiative in that it requires wage increases to occur annually, resulting in consistent moderate salary increases and eliminating the possibility that the County will be suddenly forced to pay enormous raises. Part of the court's concern in *Pacifica* was due to the fact that the salary formula was only required to be imposed when the parties could not reach a contract. This resulted in the parties going years without resorting to utilizing the initiative. When it finally came into play, it would have required huge wage increases (over 21% in one year) having massive economic consequences on the city. (*Id.* at p. 741.) Because Measure F automatically takes affect each year and is tied to the salaries of local agencies, it has not and cannot result in the sudden increases the court was concerned with in *Pacifica*. Rather, Measure F is more akin to the ordinance examined by the Supreme Court in *Kugler* because it "contains built-in and automatic protections that serve as safeguards" by tethering annual salaries to the annual salary of surrounding agencies. (See *Kugler v. Yocum* (1968) 69 Cal.2d 371, 382 ["Los Angeles is no more anxious to pay its firemen exorbitant compensation than is Alhambra. Los Angeles as an employer will be motivated to avoid the incurrence of an excessive wage scale; the interplay of competitive economic forces and bargaining power will tend to settle the wages at a realistic level."].)

Moreover, to the extent the County argues *Pacifica* should be extended to bar any voter initiatives that limit the employer's ability to impose its LBFO, such an expansion is incompatible with the Supreme Court precedent in *Boling* and *Seal Beach.* This interpretation of *Pacifica* would overturn nearly 40 years of precedent holding that matters within the scope of representation may be the subject matter of a voter initiative, so long as the MMBA meet and confer obligations are first met. (See *Seal Beach, supra,* 36 Cal.3d 591; *Boling, supra,* 5 Cal.5th 898.) As discussed above, the court in *Pacifica* focused on the adoption of A.B. 646 creating mandatory

factfinding procedures. The greater concern in *Pacifica* was its mandate to impose after impasse procedures fail. It is not a sweeping holding that the ability to impose removes initiative powers from the ambit of Article II, Section 11.

The right to impose or not impose has long preceded A.B. 646, which merely elevated factfinding from a discretionary impasse process to a statewide mandate and renumbered the statutory authority to impose from section 3505.4 to 3505.7. (See Gov. Code § 3505.4 prior to A.B. 646 amendments; See also Legis. Counsel's Dig., Assem. Bill No. 1852 (1999–2000 Reg. Sess.))

Accordingly, A.B. 646 does not justify the deviation from long standing precedent holding that matters within the scope of representation may be the subject matter of a voter initiative if the employer's meet and confer obligations are first met. To the extent the County is interpreting *Pacifica* this way, such interpretation must yield to higher authority.

Moreover, the County's overreaching interpretation of *Pacifica* has no bearing on this case because Measure F does not require imposition of any term at the end of factfinding or otherwise. Rather, Measure F 's annual adjustments do not require nor constitute an imposition under Government Code section 3505.7. Thus, even if the County's reading of *Pacifica* were correct, section 3505.7 would not preempt Measure F.

In sum, the writ should be denied because the County should be estopped from raising new legal arguments on appeal and the trial court correctly ruled that *Pacifica* is distinguishable and is not dispositive of the plead Causes of Action.

B. <u>The Trial Court Did Not Err in Overruling the Demurrer as to the First and Third Cause of Action and Granting Leave to Amend on the Second.</u>

1. The Trial Court was Correct in Overruling the Demurrer as to

the First and Third Cause of Action.

An appellate court reviews an order on demurrer de novo. (*San Bernardino v. Superior Court* (2015) 239 Cal.App.4th 679, 683.) However, the reviewing court must affirm the judgment on the demurrer if it is correct on *any* theory. (*Weikel v. TCW Realty Fund II Holding Co.* (1997) 55 Cal.App.4th 1234, 1244; *Hendy v. Losse* (1991) 54 Cal.3d 723, 742, as mod. on den. of rehg. (Jan. 16, 1992).) To withstand a general demurrer, a plaintiff "need only plead facts showing that he may be entitled to some relief." (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496; see also *Woods v. Superior Court* (1981) 28 Cal.3d 668, 673 ["demurrer must be overruled if the moving party has alleged facts entitling him to some form of relief"]; *Foy v. Greenblott* (1983) 141 Cal.App.3d 1, 13-14 ["We approach this problem with recognition of the well accepted principle that ... upon a consideration of all the facts stated it must appear plaintiff is entitled to some relief, notwithstanding that the facts may be inartfully stated, or may be intermingled with a statement of other facts irrelevant to the cause of action, or plaintiff may demand relief to which he is not entitled under the facts alleged."].)

Here, the County misunderstands the consequences of a court's denial of a demurrer petition. The trial court was not obligated to dispositively decide the entire case at the pleadings stage. Rather, the court merely needed to determine that, assuming the truth of the complaint's factual allegations, RPI's complaint alleged facts sufficient to state a cause of action. (*Redfearn v. Trader Joe's Co.* (2018) 20 Cal. App. 5th 989, 996.) If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint survives a demurrer. (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal. 3d 94, 103 (*Barquis*).)

RPI's complaint alleges multiple theories regarding the validity of Measure F and the unlawfulness of the County's conduct in repealing it without a vote. The trial court correctly found that any one of these theories was sufficient to state a cause of action. (*Barquis, supra,* 7 Cal. 3d at 103.)

The trial court correctly noted that none of the cases cited by the County considered the same facts and legal issues. (PA 635:8-9.) Therefore, as the allegations raised in the First Cause of Action presented a viable claim, dismissal was inappropriate at the pleadings stage. (PA 636.)

Further, despite the County's assertions otherwise, many of the questions presented by the DSA's petition involve mixed questions of fact and law, and cannot be dismissed purely only legal grounds. For example, the demurrer argues that Measure F was superseded by the County Charter in 1980, whereas RPI argue that it was determined to be compatible with the Charter at the time. (PA 368:8- 369:6; PA 648-49 (SAP ¶ 9).) This factual consideration is relevant to the court's ultimate determination as to the compatibility of Measure F and the Charter because government actions are presumed to have been regularly performed. (See Evid. Code § 664; see also *Walker v. Los Angeles Cnty.* (1961) 55 Cal. 2d 626, 636.) Additionally, RPI's petition makes the argument that the 2002 and 2006 votes not to repeal Measure F must be protected from nullification pursuant to Article II, Section 11 (PA 657-58 (SAP ¶¶ 84-96).) The understanding of the Board in 1980 and the meaning and implication of the 2002 and 2006 votes are not a purely legal question. Because the County has not cited any authority directly foreclosing these theories, dismissal on the pleadings was not appropriate or justified. The court correctly determined that the parties need to further develop the record.

Finally, the Court should disregard the petition's misstatements of the trial court's order. The petition falsely claims that the court did not make a substantive ruling on the demurrer and based its ruling "sole[ly]" on grounds

that the County's cited decisions addressed "challenges brought beyond the pleading stage." (Petition, p. 18.) However, the trial court correctly explained that its ruling is based on Supreme Court precedent requiring the courts to zealously guard and liberally construe the reserved initiative rights of the electorate. (PA 634-635.) The court further explained that none of the cases cited in the County's demurrer were on all fours with the instant action, and thus, none of the County's cases foreclosed RPI's claims. The court properly denied the demurrer holding the County failed to meet its burden of establishing an inability to proceed on any of the theories espoused. The court then bolstered its reasoning by pointing out that all other challenges to the people's initiative powers cited by the County were decided after a substantive review beyond the pleading stage.

Second, the County accuses the court of misunderstanding its motion as arguing that Evidence Code section 9125 itself is unconstitutional. (Petition, p. 18.) By selectively quoting portions of the order, the County deceptively argues that the court erred by misunderstanding its argument. In fact, the court aptly summarized the County's argument as "respondent asserts the claims for violations under Election Code section 9125 cannot stand since the allegations rely on Measure F, which was invalid and unconstitutional." (PA 635.) The later phrase refers to Measure F, not section 9125. Accordingly, this Court should disregard the County's misrepresentations of the lower court's order.

Thus, the trial court was correct in holding that Plaintiff's complaint alleged facts demonstrating that they may be entitled to some relief, making dismissal at the pleadings stage improper. (PA 636.)

2. The Trial Court Did Not Abuse its Discretion in Granting RPI Leave to Amend the Second Cause of Action.

The trial court's order granting leave to amend is reviewed for abuse of discretion. (*McMahon v. Craig* (2009) 176 Cal.App.4th 1502, 1509

(*McMahon*).) Unless an original complaint shows on its face that it is incapable of amendment, denial of leave to amend constitutes an abuse of discretion. (*King v. Mortimer* (1948) 83 Cal. App.2d 153, 158.)

The County claims that the trial court abused its discretion in granting leave to amend because the Second Cause of Action, in part, alleged a violation of Ordinance 3.14.020, which was no longer in effect at the time of the accused violation. However, this cause of action also alleged violations of the County's duty under the California Constitution. (PA 019:24- 020:10.) These claims were separate from and not derivative of the First Cause of Action alleging a violation of Elections Code section 9125. The SAP, which the County refuses to address, makes this distinction clear and demonstrates the Second Cause of Action is capable of being amended to state a claim. Despite the assertions in footnote 3 of the petition, the County cannot ignore the SAP, which is the operative pleading at the time of this appeal. (Petition, p. 16, fn. 3.)

The amended Second Cause of Action alleges that the 2002 and 2006 votes are expressions of the public's will and are entitled to constitutional protection against nullification. (See *Assembly of State of Cal. v. Deukmejian* (1982) 30 Cal.3d 638, 678; PA 657-58 (SAP ¶¶ 84-96).) The SAP alleges the California Constitution Article II, Section 11 and Charter Section 607(a) create a clear present, and ministerial duty under the law for Respondent to comply with Placer County Code Section 3.12.040 unless amended or repealed by the voters. (PA 660 (SAP ¶ 112).)

As demonstrated by the fact that RPI did amend the Second Cause of Action to allege a constitutional violation, the court was correct to grant leave to amend. Thus, because RPI showed a "reasonable possibility to cure any defect by amendment" the court did not abuse its discretion in granting leave to amend. (*McMahon, supra,* 176 Cal.App.4th at p. 1509.)

IV. CONCLUSION

For the foregoing reasons, the Court should summarily deny the County's extraordinary writ. Because the County will not suffer irreparable harm from exhausting its legal remedies, this Court need not proceed any further in denying the requested relief. Even should the Court overlook these procedural defects, the County's inability to cite any authority precluding RPI from proceeding on their legal theories demonstrates that the denial of the demurrer and granting of leave to amend were not an abuse of the trial court's discretion.

Respectfully submitted,

Dated: June 23, 2022 MASTAGNI HOLSTEDT, A.P.C.

By: /s/ David E. Mastagni
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PLACER COUNTY DEPUTY SHERIFFS' ASSOCIATION

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204, Rule 8.490)

The undersigned counsel of record hereby certifies pursuant to California Rules of Court, Rule 8.204 and Rule 8.490, the brief being filed has been produced using 13-point roman type and contains 8,975 words, inclusive of the tables of contents and authorities and this certificate.

Executed this 23rd day of June, in Sacramento, California.

/s/ David E. Mastagni
David E. Mastagni
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PLACER COUNTY DEPUTY
SHERIFFS' ASSOCIATION

PROOF OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the above-entitled action. My business address is 1912 I Street, Sacramento, California 95811-3151.

On the date below, I served the following document(s):

- **PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE, PROHIBITION, AND/OR OTHER APPROPRIATE RELIEF**

On the parties identified below addressed as followed:

Michael D. Youril Email: myouril@lcwlegal.com Telephone: 559-256-7813 Lars T. Reed Email: lreed@lcwlegal.com Telephone: 916-584-7011 Liberty Cassidy Whitmore 400 Capitol Mall, Suite 1260 Sacramento, California 95814	Attn: Clerk of Court Placer County Superior Court 10820 Justice Center Drive Roseville, California 95678

✓ **BY U.S. FIRST-CLASS MAIL**
I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this firm's business practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully paid.

✓ **BY ELECTRONIC SERVICE.** On **June 23, 2022**, I transmitted such document by electronic mail to the above listed e-mail address. I did not receive notification that my electronic mail was undeliverable.

I declare under penalty of perjury, under the laws of the State of California, United States of America, that the foregoing is true and correct and was executed on **June 23, 2022,** at Sacramento, California.

/s/ Renee Ramirez
RENEE L. RAMIREZ