Case No. D066755

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DISTRICT ONE

CITY OF EL CENTRO, et al.,
Plaintiffs and Appellants,

v.

DAVID LANIER, et al,
Defendants and Respondents,

STATE BUILDING & CONSTRUCTION TRADES COUNCIL OF CALIFORNIA,
Intervener and Respondent.

APPLICATION TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PLAINTIFFS AND APPELLANTS CITY OF EL CENTRO, ET AL.

On Appeal from a Judgment of the San Diego County Superior Court
Case No. 37-2014-00003824-CU-WM-CTL
The Honorable Joel R. Wohlfeil

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The California State Association of Counties ("CSAC")[1] seeks leave to file the attached amicus brief.

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

Though this case arises in the context of a dispute between charter cities and the State over implementation of California's Prevailing Wage Law, the underlying legal issues are much broader and significant for local government. In fact, counties are not implicated in the Prevailing Wage Law dispute. Counties do not possess the broad authority granted to charter cities, which provides the legal basis for charter cities to elect not to implement the Prevailing Wage Law. CSAC did not participate in the 2012 litigation that challenged the application of the Prevailing Wage Law to charter cities, and counties do not contest the application of the Prevailing Wage Law to counties here.

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[1] No party or counsel for a party authored the attached brief, in whole or in part. No one made a monetary contribution intended to fund the preparation or submission of this brief.

Rather, CSAC submits this brief to focus on an issue of general significance to CSAC's member counties: To what extent can the State condition its discretionary funding to achieve a result that would be unconstitutional if it attempted to achieve that same result directly? The proposed brief evaluates that question outside of the Prevailing Wage Law context to provide this court with a broader perspective when considering the issue.

CSAC's counsel has reviewed the party and real party in interest briefing in this case, and does not seek duplicate those arguments here. Instead, the proposed brief focuses on the unconstitutional conditions doctrine as a tool for evaluating the legal issues presented by this case, and provides some examples of how conditioning state funds on waiver of constitutional rights creates significant concerns beyond prevailing wage.

For the foregoing reasons, CSAC respectfully requests that this Court accept the accompanying amicus curiae brief.

Dated: November 4, 2015 Respectfully submitted,

/s/

By: _____

JENNIFER B. HENNING

Attorney for Amicus Curiae
California State Association of Counties

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I. INTRODUCTION

For the California State Association of Counties ("CSAC"), this case is not about the Prevailing Wage Law. (Lab. Code, § 1700 et seq.) Counties do not possess the breadth of municipal "home rule" powers that are afforded to charter cities in the California Constitution. (*Dibb v. County of San Diego* (1994) 8 Cal.4th 1200, 1207.) As such, the Supreme Court's decision in *State Building and Construction Trades Council of California, AFL-CIO v. City of Vista* (2012) 54 Cal.4th 547 ("*Vista*"), does not apply to counties, and SB 7, which enacted Labor Code section 1782, is not directed at counties. Indeed, CSAC did not seek to participate as amicus in the *Vista* litigation, and does not challenge here the applicability of the prevailing wage law to counties.

This case, however, raises an issue that goes beyond prevailing wage, and even beyond municipal home rule powers: To what extent can the State condition its discretionary funding to achieve a result that would be unconstitutional if it attempted to achieve that same result directly? That issue is of particular interest to CSAC's member counties.

Unlike cities, counties are political subdivisions of the State. (Gov. Code, § 23000; *Kahn v. Sutro* (1986) 114 Cal. 316, 319.) Counties have long been characterized as agencies of the State, implementing many of the State's programs and policies by delegation. (*Pacific Ry. Co. v. Costa*

(1927) 84 Cal.App. 577; *County of Los Angeles v. Riley* (1936) 6 Cal.2d 625, 627.) This relationship between the State and counties has caused significant strain over fiscal resources through the years, resulting in various constitutional protections that guarantee specified revenue and limit the programs and services that counties can be required to perform without adequate funding. (See, e.g., Cal. Const., art. XIII B, § 6; art. XIII, § 36.)

Beyond that, the constitution grants counties plenary authority over the salary and benefits of their employees (Cal. Const., art. XI § 1(b); *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278), protects against delegation of their local affairs (Cal. Const., art XI, § 11; *County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322), and grants counties specified charter powers (Cal. Const., art XI, § 4; *Pearson v. County of Los Angeles* (1957) 49 Cal.2d 523).

These constitutional powers and protections, provided to counties by the electorate, must be abided. The State cannot be permitted to render such constitutional provisions meaningless by imposing conditions on the receipt of discretionary State funding that requires the constitutional protections to be waived. Though the State certainly has mechanisms to achieve its policy objectives, including the ability to provide financial incentives, there is a meaningful limit on its ability to do so at the expense of the powers and protections granted by the constitution to cities and

counties. Failing to recognize the limit renders the constitution provisions largely illusory.

II. ARGUMENT

A. The State May Not Impose Unconstitutional Conditions on the Receipt of State Funds.

It is a well-established rule that if the government could not have constitutionally ordered a person or entity to take a particular action, it cannot also attempt to pressure the person or entity into taking that same action. (*Cal. Bldg. Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 459-460.) Conversely, "a funding condition cannot be unconstitutional if it could be constitutionally imposed directly." (*Rumsfeld v. Forum for Academic and Institutional Rights* (2006) 547 U.S. 47, 60 [the distinction between an unconstitutional condition and a constitutional nonsubsidy is whether the condition could have been constitutionally imposed directly]; *Cal. Bldg. Industry Assn., supra*, 61 Cal.4th at 437-438 ["Where a restriction on the use of property would not constitute a taking of property without just compensation if imposed outside of the permit process, a permit condition imposing such a use restriction does not require a permit applicant to give up the constitutional right to just compensation in order to obtain the permit and thus does not constitute an exaction so as to bring into play the unconstitutional conditions doctrine."].)

1. The fact that receipt of the conditioned funds is voluntary does not remedy the unconstitutional condition issue.

It is not relevant that the State is under no obligation to provide the funding that is subject to the condition. The voluntary nature of the funding is not sufficient to allow an unconstitutional condition. That faulty logic was rejected by the California Supreme Court nearly 70 years ago. (*Danskin v. San Diego Unified School Dist.* (1946) 28 Cal.2d 536.) In *Danskin*, the Court reviewed a school district that limited use of its buildings only to organizations whose members agreed with the District's views. The Court rejected the District's argument that voluntary use of the building removed the constitutional problem:

> The state is under no duty to make school buildings available for public meetings [citations]. If it elects to do so, however, it cannot arbitrarily prevent any members of the public from holding such meetings. [Citations.] Nor can it make the privilege of holding them dependent on conditions that would deprive any members of the public of their constitutional rights. A state is without power to impose an unconstitutional requirement as a condition for granting a privilege even though the privilege is the use of state property [citations]. . . . It is true that the state need not open the doors of a school building as a forum and may at any time choose to close them. Once it opens the doors, however, it cannot demand tickets of admission in the form of convictions and affiliations that it deems acceptable.

(*Id.* at pp. 545-547.)

Similarly, in *Bagley v. Washington Township Hospital District* (1966) 65 Cal.2d 499, the Supreme Court found "utterly discredited" that

notion that if the government benefit is voluntary, unconstitutional conditions can be imposed. (*Id.* at pp. 504-505 ["Although an individual can claim no constitutional right to obtain public employment or to receive any other publicly conferred benefit, the government cannot condition admission to such employment or receipt of such benefits upon any terms that it may choose to impose."].) In *Bagely*, the Court noted that there is a limit to this principle, stating that the Court "cannot accept the apparent suggestion of some few cases that government may *never* condition the receipt of benefits or privileges upon the non-assertion of constitutional rights." (*Id.* at p. 505 (emphasis in original).) "In doing so, however, government bears a heavy burden of demonstrating the practical necessity for the limitation." (*Id.* at pp. 505-506.)

Thus, contrary to Defendants' assertion that the Plaintiff cities were under an obligation to show a significant budgetary impact resulting from SB 7 in order to prevail on their claim (Respond. Brief, pp. 19-21), the courts have found that the burden is in fact on the governmental entity imposing a condition that impacts constitutional rights to demonstrate its necessity. (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 213.) "Neither the party complaining of the unconstitutional condition, nor this Court, bears the burden of establishing that effective and less restrictive alternatives exist. The burden of proof is borne by the government entity that seeks to impose the condition." (*Id.* at p. 214, fn. 20.)

2. *Department of Finance v. Commission on State Mandates* does not authorize funding conditioned on a waiver of constitutional rights.

Defendants and Real Parties in Interest rely on *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, to support their argument that the State is authorized to condition funds on participation in the Prevailing Wage Law. (See Respond. Brief, p. 24; Real Parties Brief pp. 16-17.) However, the *Department of Finance* opinion addresses a completely different question, and does not contradict or repudiate the general unconstitutional conditions principles outlined above. The entire thrust of that opinion is whether a particular program created an unfunded mandate under Article XIII B, section 6 of the California Constitution. The answer to that narrow question rests on whether the program is truly voluntary, or is so coercive as to become mandatory. In answering that question, the Court concluded that a program with strings attached to incentivize particular behavior is not necessarily a "mandate" within the meaning of Article XIII B, section 6. In other words, the *Department of Finance* opinion is limited to the question of whether the State's actions triggered a constitutional obligation. (*Dept. of Finance, supra*, 30 Cal.4th at p. 734 [review granted to determine the definition of the term "state mandate" as it appears in article XIII B, section 6].)

The *Department of Finance* case does not address the question presented in this case: Whether, once a constitutional right has been

established, conditions on a government program can be imposed that require infringement on that constitutional right. *Department of Finance* was merely focused on whether a constitutional right was established in the first instance (i.e., whether the school district was entitled to a subvention under article XIII B, section 6). Thus, *Department of Finance* only answered the preliminary question as to whether there is a constitutional duty with respect to a program. It did not address the next question—whether the State can avoid that constitutional duty through conditions on State funds.

In the present case, the Supreme Court has already declared that there is a constitutional right for plaintiff cities not to comply with the Prevailing Wage Law. The question now is whether the State can condition State funding on waiver of that right. *Department of Finance* sheds no light on that issue. Similarly, the statutory provisions cited by Defendants as other examples of conditioned funds are unhelpful to this court. Those citations contain no analysis on whether the State could directly impose the condition, or whether such imposition would be unconstitutional if imposed directly. (Respond. Brief, p. 25.)

As shown in this brief, if the State could not have constitutionally imposed the requirement directly, it cannot condition receipt of the funds on waiver of that constitutional right without meeting a very heavy burden.

B. The Trial Court's Lack of Any Discernable Limit on Conditioning State Funds as a Means of Evading Constitutional Requirements Has Consequences Far Beyond the Prevailing Wage Law and Municipal Home Rules Powers.

As noted in the introduction, counties have no direct interest in the *Vista* decision, which was based on authority granted only to charter cities. The concern for counties with SB 7 and this case is the potential for the State to evade all manner of constitutional protections by conditioning receipt of State funds for other programs and activities.

For example, cities and counties are constitutionally entitled to receive a subvention of funds for the costs of programs and services mandated upon them by the State, with limited exceptions. (Cal. Const., art. XIII B, § 6.) The purpose of this provision is "to preclude the State from shifting financial responsibility for carrying out governmental functions to local agencies. . . ." (*Calif. School Boards Assn. v. State of California* (2011) 192 Cal.App.4th 770, 786.) The provision was amended in 2003 (Proposition 1A) in what the State has acknowledged was a political compromise between local governments and the State to address ongoing deferrals of mandate payments. (*Id.* at p. 788.) In order to perform its constitutional duty with respect to a mandated program, the Legislature must make an appropriation of the full required amount, or it can suspend the operation of the mandate, and thereby alleviate local agencies of the requirement to perform the program or service. (Cal.

Const., art. XIII B, § 6, subd. (b)(1); *Calif. School Boards Assn. v. Brown* (2011) 192 Cal.App.4th 1507, 1521.)

This carefully constructed political compromise to address the fiscal and policy relationship between the State and local government, which was approved by the voters, would have little meaning if the State could restrict the receipt of other State funding only to those cities and counties that agreed to continue providing mandated services without the required State subvention. And yet, under the trial court's reasoning, there is nothing prohibiting the State from such conduct.

The concern over using such tactics to avoid constitutional protections is not unfounded. For example, the Legislative Analyst's Office prepared a report this year concerning the Governor's proposal to suspend the Interagency Child Abuse and Neglect Investigation Reports (ICAN) mandates on local government. (Legis. Analyst, *Paying for a State Mandate on Local Child Protective Agencies*, analysis of 2015-2016 Budget (Feb. 2015)("LAO Report").)[2] The Commission on State Mandates previously concluded that several ICAN activities require State subventions. (Statement of Decision, *In re Test Claim Penal Code sections 11165.1 (Interagency Child Abuse and Neglect Investigation Reports)*, Com. on State Mandates Case No. 00-TC-22 (Dec. 6, 2007).) The LAO

[1] Available on the Legislative Analyst's Office's website at: http://lao.ca.gov/reports/2015/budget/ICAN/ICAN-022415.pdf

Report noted the budget impact of the ICAN mandate-- $90.4 million in 2015-2016 for prior year obligations and several million dollars in ongoing costs. (*LAO Report, supra,* at p. 1.) The LAO Report further noted that suspension of the mandate would allow the State to defer the $90.4 million in prior-year claims, and that the Governor's proposed budget provided a $4 million grant made available to help fund the ICAN costs for those to local agencies that elected to voluntarily continue with ICAN requirements. (*Ibid.*)

The LAO Report did not stop there, however. The Report expressed concern that the grant proposal would make ICAN compliance "uneven" because some agencies may decide not to participate in the grant program. (*Ibid.*) The LAO Report acknowledges that the only way to require ICAN activities to continue is to fund the mandated services, but that doing so would require $90.4 million in the 2015-2016 budget plus ongoing costs. (*Id.* at p. 6.) The suggested solution? Linking receipt of a local agencies' Proposition 172[3] funding to those agencies agreeing to continue providing ICAN mandates without the required State subvention. The LAO Report suggested that the ICAN mandates could be called "best practices" for law enforcement as a way to justify withholding Proposition 172 funds,

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[2] Proposition 172, the Local Public Safety Protection and Improvement Act of 1993, dedicates ½ cent of sales taxes to a special revenue fund for city and county public safety services. (Cal. Const., art. XIII, § 35; Gov. Code, § 30052.)

notwithstanding the Commission on State Mandate's determination that the constitution requires subventions for the ICAN mandates :

> [I]t would be reasonable for the Legislature to consider reducing or withholding allocation of resources to local law enforcement agencies that do not follow these best practices. In particular, the Legislature could require that, as a condition of receiving Proposition 172 funds, cities and counties ensure that their law enforcement agencies carry out ICAN mandated activities. As the vast majority of city and county law enforcement agencies receive Proposition 172 funding, this arrangement likely would ensure that ICAN mandated activities continue in most parts of the State.

(*Id.* at p. 7.)

Certainly the State has a policy interest in seeing the ICAN mandates performed, but those mandated services are expensive and would have an impact on the State's budget. Can the constitutional right to the subvention payments be avoided by conditioning other funding on performing the mandates without a subvention? Clearly, the answer must be no or the constitutional right to receive subventions for mandated services would be rendered meaningless. Yet that is precisely what the trial court ruling would allow.

This same significant risk exists for counties related to the historic public safety realignment that took place in 2011. Under 2011 Realignment, counties assumed responsibility for billions of dollars of public safety services, including specified child abuse and mental health services, and incarcerating and providing services to low level offenders.

(Cal. Const., art. XIII, § 36 ("Proposition 30").) In exchange, counties are constitutionally protected, among other things, against any legislative or regulatory changes to realigned programs that result in an overall cost increase for counties. (Cal. Const., art. XIII, § 36, subds. (c)(3) & (4).) Counties are also constitutionally guaranteed a revenue stream to carry out Realignment programs. (Cal. Const., art. XIII, § 36, subds. (b) and (d).)

If the protections and rights afforded to counties in Proposition 30 could be avoided by conditioning other State funding on counties agreeing to waive Proposition 30 protections, the entire balanced structure of rights and responsibilities that is the premise of 2011 Realignment would cease to exist. The purpose of the measure and the intent of the voters in adopting it would be eviscerated.

Counties are also afforded other constitutional rights and protections, which would equally be at risk should the State be permitted to coerce indirectly what it cannot constitutionally achieve directly. (See, e.g., Cal. Const., art. XI § 1(b) [plenary authority over employee compensation as against Legislative interference]; *County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322; *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278.) The lower court must be reversed to avoid this result.

III. CONCLUSION

The implications of this case go beyond the Prevailing Wage Law and the scope of the municipal affairs powers of charter cities. Rather, the

trial court decision compromises all of the constitutional rights and protections the voters have provided to local government. If the State may coerce cities and counties into waiving their constitutional protections by imposing conditions that could not be imposed directly, the constitutional protections are largely rendered meaningless. At a minimum, the case law instructs that the State bears a heavy burden in imposing a condition that would be unconstitutional if it were made directly. The lower court's opinion fails to recognize that burden, but rather permits the State to merely allege advancement of a State policy objective to avoid constitutional restrictions. In so doing, the lower court erred and should be reversed.

Respectfully Submitted,

/s/

Date: November 4, 2015

_____

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

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the word count feature in my Microsoft Word software, this brief contains 2,922 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 4th day of November, 2015 in Sacramento, California.

Respectfully submitted,

/s/

By: _____
JENNIFER B. HENNING
Attorney for Amicus Curiae

Proof of Service by Mail

City of City of El Centro v. Lanier
Case No. D066755

I, Ashley D. Rafford, declare:

That I am, and was at the time of the service of the papers herein referred to, over the age of eighteen years, and not a party to the within action; and I am employed in the County of Sacramento, California, within which county the subject mailing occurred. My business address is 1100 K Street, Suite 101, Sacramento, California, 95814. I served the within **APPLICATION FOR PERMISSION TO FILE AND PROPOSED AMICUS CURIAE BRIEF BY CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PLAINTIFFS AND APPELLANTS CITY OF EL CENTRO ET AL.** by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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/s/

ASHLEY D. RAFFORD