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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DIANA SERAFIN et al.,

Petitioners,

v.

THE SUPERIOR COURT OF
RIVERSIDE COUNTY,

Respondent;

STEPHEN FLYNN,

Real Party in Interest.

E056868

(Super.Ct.No. RIC1208403)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. Daniel A. Ottolia,
Judge. Petition granted.

Lepiscopo & Associates Law Firm, Peter D. Lepiscopo, William P. Morrow,
James M. Griffiths and Michael W. Healy for Petitioners.

No appearance for Respondent.

Bell, McAndrews & Hiltachk, Charles H. Bell, Thomas W. Hiltachk and Paul Gough for Real Party in Interest.

The court has read and considered the record in this proceeding and has concluded that issuance of a peremptory writ in the first instance is required to resolve this matter as expeditiously as possible. (Code Civ. Proc., § 1088; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178-179; *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1222-1223, disapproved on another ground in *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 724, fn. 4.)

The Supreme Court has stated that “it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people’s franchise, in the absence of some clear showing of invalidity.” (*Brosnahan v. Eu* (1982) 31 Cal.3d 1, 4 (*Brosnahan I.*))

The Supreme Court later explained, “preelection review of an initiative measure may be appropriate when the challenge is not based on a claim that the substantive provisions of the measure are unconstitutional, but rests instead on a contention that the measure is not one that properly may be enacted by initiative. (See, e.g., *American Federation of Labor v. Eu* (1984) 36 Cal.3d 687 [initiative may not be used to apply for the convening of a federal constitutional convention]; *McFadden v. Jordan* (1948) 32 Cal.2d 330 [initiative may not be used to revise, rather than to amend, California Constitution].)” (*Independent Energy Producers Assn. v. McPherson* (2006) 38 Cal.4th 1020, 1029 (*Independent Energy*).)

Independent Energy concerned an initiative measure that conferred additional regulatory authority upon the Public Utilities Commission. It was challenged on the basis that the California Constitution permits only the Legislature, and not the people through the initiative process, to confer additional authority upon that agency. The Supreme Court determined that “preelection review of such a claim is not necessarily or presumptively improper.” (*Independent Energy, supra*, 38 Cal.4th at p. 1030.) While it was not improper, the Supreme Court cautioned that courts presented with such a preelection challenge should bear in mind that this type of challenge could also be made after the election. This was unlike procedural challenges, such as those relating to the petition-circulating process, which could be remedied only prior to an election and that usually will become moot after an election. “[B]ecause this type of challenge is one that can be raised and resolved after an election, deferring judicial resolution until after the election—when there will be more time for full briefing and deliberation—often will be the wiser course.” (*Ibid.*)

In fact, in *Independent Energy*, the Court of Appeal had intervened prior to the election and directed that the initiative measure be removed from the ballot. At the time of the Court of Appeal’s decision, the period for public inspection of the material to be included in the ballot pamphlet was about to commence. The Supreme Court granted an emergency petition and voted to grant review, ordering the ballot measure back on the ballot. The measure was defeated at the election, but the Supreme Court issued its opinion elucidating the rules regarding preelection review. It opined that the Court of Appeal’s intervention was understandable because it believed that the measure was

unquestionably invalid, but the Supreme Court granted review and ordered the measure be restored to the ballot because it was not convinced that it was invalid.

As in *Independent Energy*, it was not improper for the trial court to grant preelection review of this challenge, but we must conclude that it was unwise. We acknowledge that courts have intervened in similar circumstances and ordered removal of an initiative measure from the ballot, such as in *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491. However, these rulings occurred somewhat earlier in the ballot process. In addition, the trial court may not have addressed all issues arising from this matter, including the effect of the severability clause. Even if the severability clause is ultimately determined not to have any impact on the overall validity of the initiative, the failure to address the issue demonstrates that it was ill-advised for the trial court to entertain the challenge. Real party in interest delayed several months before bringing a legal action to remove the proposal from the ballot, and this delay, combined with the fact that the measure can be challenged after the election if it is approved, are decisive factors in persuading this court to order that the proposal remain on the ballot.

DISPOSITION

Let a peremptory writ of mandate issue directing the Superior Court of Riverside County to set aside its order granting real party in interest's petition for writ of mandate and the writ of mandate issued on August 6, 2012, and to issue a new and different order denying the petition.

Petitioner is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

Real party in interest's request for judicial notice is granted.

Petitioners are to recover their costs.

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McKINSTER
Acting P. J.

We concur:

KING
J.

CODRINGTON
J.