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When to Run, Walk or Crawl to the Courthouse: An Overview of the California Supreme Court's Recent Jurisprudence Concerning the Proper Timing of Legal Challenges to Initiative Measures

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INTRODUCTION

The California Constitution reserves to California voters the "initiative power" – the power to directly propose legislation and enact the same into law by a majority-vote of the electorate.¹ Added to the California Constitution in 1911 as part of a package of Progressive reform measures championed by Governor Hiram Johnson, the initiative power is based on the theory that all power of government ultimately resides in the people.² Today, Californians are using the initiative process with greater frequency than ever before. Of the twenty-four states with an established initiative process, Californians' use of the initiative is second only to Oregonians'.³ Between 1990 and 2000, over 450 state initiative measures circulated for signatures, with forty percent garnering the necessary votes on election day.⁴

A similar trend has emerged at the local level.⁵ The use of the local initiative, brought about as early as 1898 by another Progressive era reform – municipal "home rule" – reached new heights in the 1990's with over 730 local initiatives circulated for signature in California.⁶ On average, voters in large, growing and economically diverse cities were more likely to use the initiative power than were voters in smaller, less diverse cities. At both the local and state levels, the initiative process is increasingly directed at some of the most contentious substantive policy areas of the day. Recent state measures included proposals on abortion, stem-cell research, access to health care, criminal penalties, redistricting, and the rights of same-sex couples.⁷ The most common topics addressed by

local initiatives are land use, local governance and safety.⁸

As stakeholders in these hotly debated state and local issues increasingly rely on initiatives as their vehicle of choice to advance policy, the necessity of litigation as an adjunct to the political campaign for or against such measures increases. One needs look no further than the November 2005 Special Election for evidence of this fact: stakeholders instituted legal proceedings, in one form or another, against half of the measures that appeared on that ballot. Now, more than ever, lawyers representing stakeholders in ballot measure contests must be prepared to advise their clients with respect to ballot measure litigation. In so doing, a threshold issue must be confronted: when is the proper time to bring such a challenge – before or after the election?

The purpose of this article is to assist counsel in answering this question. In Part I, we review the status of the law concerning the proper timing of challenges to initiative measures prior to the November 2005 Special Election. In Part II, we review two California Supreme Court cases decided in the wake of that election – *Costa v. Superior Ct.* and *Independent Energy Producers v. McPherson* – in which the Court sought to further clarify the proper time for bringing challenges to initiative measures. Finally, in Part III, we analyze the framework stated in these decisions for determining when judicial review of a measure should be sought before an election ("pre-election review") and when it should be sought after an election ("post-election review").

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I. SENATE V. JONES AND THE LAW OF PRE-ELECTION REVIEW PRIOR TO THE NOVEMBER 2005 SPECIAL ELECTION

Prior to the November 2005 Special Election, the California Supreme Court’s decision in *Senate v. Jones*⁹ (“*Jones*”) was the leading case regarding the appropriate timing for judicial review of initiative measures in California. *Jones* concerned a pre-election challenge to an initiative measure designated as Proposition 24 on the March 7, 2000 election ballot, which proposed transferring the power of reapportionment from the Legislature to the Supreme Court and made changes (including reductions) to the compensation of legislators and other statewide officers. The petitioners in *Jones* challenged the constitutionality of Proposition 24 on two main grounds: (1) that it embraced more than one subject in violation of the “single-subject rule” and (2) that it constituted a constitutional revision in excess of the people’s initiative power.

Before concluding that Proposition 24 was unconstitutional on single-subject grounds, the Court in *Jones* first addressed the propriety of pre-election review.¹⁰ It observed that, in the absence of a clear showing of invalidity, “it is usually more appropriate to review constitutional and other challenges to ballot propositions after an election rather than to disrupt the electoral process.”¹¹ However, the Court noted that this strong presumption against pre-election review applied only to challenges based on the alleged unconstitutionality of the *substance* of a proposed measure.¹² Thus, the Court explained that under its prior decisions, pre-election review was *not* necessarily precluded where a challenge was based on a claim that the measure could not properly be submitted to the voters in the first instance because it was not legislative in character or because it amounted to a constitutional revision in excess of the initiative power.¹³

Prior to *Jones*, however, a question existed as to the proper timing of review of single-subject challenges. On the one hand, the presumption against pre-election review – seemingly grounded in considerations of judicial self-restraint – suggested that review should wait until actual passage of the challenged measure clearly compelled it.¹⁴ On the other hand, placement of clearly invalid measures on the ballot could tend to degrade the electorate’s confidence in the electoral process.¹⁵

In the end, the Court’s answer in *Jones* – that pre-election review of a single-subject

challenge may be appropriate – rested neither on judicial restraint nor the affect on the electoral process. Instead, the Court focused on the precise language of the constitutional single-subject rule. Article II, section 8, subdivision (d) of the state constitution explicitly provides that “[a]n initiative measure embracing more than one subject *may not be submitted to the electors* or have any effect.” (Emphasis added.) Based on this language, the Court explained that pre-election review of single-subject challenges was not only permissible, but “expressly contemplated” by the state constitution.¹⁶

However, the Court in *Jones* suggested that the propriety of pre-election review of a single-subject challenge would depend on the strength of that claim. The Court noted that while declining to adjudicate a single-subject challenge to a state initiative measure in *Brosnahan v. Eu*, it recognized that pre-election review might be appropriate upon “a clear showing of invalidity.”¹⁷ Combining this precedent with the explicit language of the single-subject provision, the Court in *Jones* therefore held that where challengers are able to demonstrate that there is a strong likelihood that the initiative violates the single-subject rule, pre-election review of the measure is appropriate.¹⁸

II. THE 2005 SPECIAL ELECTION CASES: COSTA V. SUPERIOR CT. AND INDEPENDENT ENERGY PRODUCERS V. MCPHERSON

Following the November 2005 Special Election, the California Supreme Court issued two decisions in which it sought to clarify the proper timing of challenges to ballot measures – *Costa v. Superior Ct.*¹⁹ (“*Costa*”) and *Independent Energy Producers v. McPherson*²⁰ (“*IEP*”).

A. COSTA V. SUPERIOR CT.

In *Costa* the Court reviewed a pre-election challenge to Proposition 77, an initiative measure that (like Proposition 24 in *Jones*) proposed stripping the Legislature of reapportionment power. The Attorney General brought a pre-election challenge after learning that the text that the measure’s proponents submitted to the Attorney General for a title and summary differed from the text contained on the initiative petitions circulated among the voters for signatures. Specifically, the Attorney General sought a writ of mandate directing the Secretary of State to withhold Proposition 77 from the ballot. Both the trial court and the Court of Appeal for the Third Appellate District concluded that the

discrepancies between the text of the measure submitted to the Attorney General and the text on the signature petitions warranted withholding the measure from the ballot.

Proposition 77’s proponents then filed an emergency petition in the Supreme Court, in response to which the Court issued an emergency order staying the appellate court’s decision. The Court’s order stated that, in the absence of a showing that the discrepancies between the two versions of the measure had misled persons signing the initiative petition, it was not appropriate to deny the voters the opportunity to vote for it. The Court stated that it would decide after the election whether to retain jurisdiction to resolve the issues raised in the petition.

Although the voters rejected Proposition 77 in the November 2005 Special Election, the Court retained jurisdiction, in part, to provide guidance concerning the proper time to review so-called “procedural” challenges to initiative measures. The Court began by reiterating the general rule that it is usually more appropriate to review constitutional challenges to ballot measures after an election, unless the claims concern the scope of the people’s initiative power or the single-subject rule.²¹ By contrast, the Attorney General based his request to withhold Proposition 77 from the ballot on the claimed defect in the petition-circulation process. The Court characterized this type of claim as a “procedural challenge” – one based on an asserted failure “to comply with the essential procedural requirements necessary to qualify an initiative measure for the ballot.”²² As to such claims, the Court held that pre-election review is appropriate because “if the threshold procedural prerequisites have not been satisfied, the measure is not entitled to be submitted to the voters.”²³

The Court buttressed its holding in *Costa* with concerns over mootness. The Court pointed out that once an election takes place, the matter is “*a fait accompli*” – a completed act.²⁴ California courts have long been loathe to overturn the results of an election based on an asserted procedural defect in the petition-circulation process, at least to the extent that such defects are not alleged to have effected the material before the voters or the fairness or accuracy of the election result.²⁵ In light of this “well-established remedial limitation” the *Costa* Court concluded that it would be unfair to postpone the determination of procedural challenges to a ballot measure until after the election because such a claim will likely be moot by that time.²⁶

B. INDEPENDENT ENERGY PRODUCERS ASSOCIATION V. MCPHERSON

Four months after *Costa*, the Court again offered guidance concerning the propriety of pre-election review of challenges to ballot measures in *IEP*. *IEP* involved a pre-election challenge to Proposition 80, an initiative measure relating to energy regulation that, among other things, contained provisions conferring additional jurisdiction on the California Public Utilities Commission (“PUC”). Unlike the procedural challenge advanced in *Costa*, the petitioners in *IEP* attacked Proposition 80 on the grounds that it could not lawfully be placed on the ballot because the California Constitution permits only the Legislature, and not the people through the initiative process, to confer additional jurisdiction on the PUC.²⁷ After the Court of Appeal ordered Proposition 80 removed from the ballot, the Supreme Court issued an emergency order, as it did in *Costa*, restoring the measure to the ballot and indicating that it would decide after the election whether to retain jurisdiction in the matter, which it did.

On review, the Court held that the general rule eschewing pre-election review of initiative measures that it affirmed in *Jones* did not apply to the type of challenge advanced by the *IEP* petitioners. Similar to claims that a measure constitutes a revision, claims that the people lack the authority to legislate in a particular area go to the question of whether the measure is one that may be enacted by initiative in the first instance.²⁸ Thus, the Court in *IEP* held that pre-election review of such claims is not necessarily or presumptively improper.²⁹

Having opened the door to pre-election review of such claims, the Court in *IEP* then appeared to immediately qualify its holding by admonishing courts about the propriety of doing just that. Specifically, the Court in *IEP* instructed courts facing this type of pre-election challenge to be mindful of the fact that, unlike procedural challenges, challenges based on a claim that the measure cannot be lawfully enacted through the initiative process will not become moot if the measure is approved by the voters.³⁰ This includes challenges based on the single-subject rule, that the measure is not legislative in character, or that the proposed measure constitutes a constitutional revision beyond the scope of the initiative power. While it is appropriate for courts facing these types of challenges at the pre-election stage to also consider the potential costs that delayed resolution may have on the voters’ confidence in the initiative process, the *IEP* Court concluded by

stating that:

Nonetheless, because 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 – will often be the wiser course.³¹

We now turn to an examination of the framework that emerged from these decisions.

III. THE PROPER TIMING OF CHALLENGES TO INITIATIVE MEASURES AFTER COSTA AND IEP

After *Costa* and *IEP*, it appears that the California Supreme Court divides initiative measure challenges into three categories for purposes of determining when review is proper – procedural, substantive and subject-matter limited. Whether pre-election review of a claim is available will therefore depend upon into which category that challenge falls.

A. PROCEDURAL CHALLENGES

After *Costa*, it now appears clear that “procedural challenges” – those based on a measure’s alleged failure to satisfy the necessary prerequisites for placement on the ballot – are subject to pre-election review. The Court’s holding in *Costa* embraced the view that such claims go to the measure’s entitlement to appear on the ballot and would likely evade judicial review on the basis of mootness or considerations of judicial self-restraint if not heard prior to the election. In addition to challenges based on alleged defects in the circulation process, the Court in *Costa* characterized as “procedural challenges” those claims alleging:

- failure to meet format, timing or signature requirements applicable to local and state initiative petitions;³²
- insufficiency of Attorney General’s title and/or summary;³³
- failure to include a short title across the top of every page of signature petition;³⁴ and,
- failure to submit an accurate copy of the text for title and summary.³⁵

B. SUBSTANTIVE CHALLENGES

Consistent with *Jones* and prior cases, the Court in *Costa* and *IEP* again reaffirmed the rule that review of substantive challenges to the provisions of proposed initiative measures is not

appropriate until after an election. This rule appears to be grounded in considerations of judicial self-restraint which counsel against deciding questions that could become moot if the voters fail to approve the challenged measure. Once a measure is adopted, however, substantive challenges to the provisions of a ballot measure will usually become ripe for review.³⁶

C. SUBJECT-MATTER LIMITED AND/OR SCOPE OF INITIATIVE POWER CHALLENGES

While the framework the Court set out in *Costa* and *IEP* provides a fair degree of certainty as to when procedural or substantive challenges should be brought, it provides almost no certainty with regard to the proper timing for challenges based on subject-matter or scope of the initiative power. Among these types of challenges are those which claim that the measure:

- violates the state single-subject rule;³⁷
- constitutes a constitutional revision in excess of initiative power;³⁸
- is being used to apply for the convening of a federal constitutional convention;³⁹
- violates the one-reapportionment-per-decade rule;⁴⁰
- seeks to legislate, through local law, a matter of federal policy;⁴¹ or,
- seeks to exercise, through the initiative process, power that the state constitution confers exclusively in the Legislature (e.g., reapportionment; additional jurisdiction to PUC).⁴²

After *IEP*, the availability of pre-election review for such claims appears to depend on the challengers’ ability to persuade a court that they are likely to prevail. At first blush, this standard seems to be entirely result-orientated. But upon further reflection, it also may reveal the Court’s assessment of how to best balance the interests of those seeking redress for (legitimate) claims concerning a proposed initiative measure against the broader interest in avoiding unnecessary interference with the initiative process.

Under the standard set out in *IEP*, where a strong showing is made that the electorate lacks the power to enact a measure through the initiative process in the first instance, the balance tips in favor of pre-election review. If one accepts the Court’s view that placement of otherwise invalid measures on the ballot is likely to reduce public confidence in the initiative process, this is a logical outcome. By contrast, where it is not

clear that the challenged measure is invalid, the need to interfere with the initiative process before an election is less compelling – especially since the types of claims in this category will generally not become moot after the election. Put differently, the standard in *IEP* seems to indicate that courts should only risk interfering with the initiative process where the failure to do so could cause more harm than good.

Significantly, the concerns expressed by the Court in *IEP* concerning unnecessary interference with elections also appear to track recent statements by the United States Supreme Court. Four months after *IEP*, the United States Supreme Court in *Purcell v. Gonzalez*⁴³ vacated an order issued by a motions panel of the Ninth Circuit enjoining Arizona’s voter identification procedures. The panel issued its order enjoining the Arizona laws after the district court denied plaintiffs’ request for a preliminary injunction and only weeks prior to the election, but before the district court issued its findings of fact. As a result, the panel’s order omitted any statements of fact or any indication, in the Supreme Court’s view, of the reasoning underlying it. In vacating the order, the Court explained that in weighing the relative interests involved in requests for orders affecting elections, courts should weigh “considerations specific to elections cases,” including how conflicting orders affecting elections “. . . can themselves result in voters’ confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.”⁴⁴

Although the application of this statement beyond the facts presented in *Purcell* is unclear, it does appear consistent with the standard set out by the California Supreme Court in *IEP*. The standard announced in *IEP* should, presumably, decrease the risk of conflicting orders concerning subject-matter and/or scope of power challenges to initiative measures because only those challenges with a high probability of success are eligible for pre-election review.

CONCLUSION

Given the increased use of the initiative process at the state and local level, the California Supreme Court wisely took the opportunity in *Costa* and *IEP* to articulate a framework setting out the proper timing for legal challenges to such measures. While that framework provides a fair degree of certainty concerning the proper timing

of procedural and substantive challenges, it provides far less clarity as to the proper time to review subject-matter and/or scope of power challenges. Ultimately, only time and experience will reveal whether that standard is a success or failure.

ENDNOTES

1. Cal. Const. art. II, § 8; §§ 9, 13 & 14 also reserve to the voters the powers of recall and referendum.
2. *Associated Home Builders v. Livermore* (1976) 18 Cal.3d 582, 591.
3. Tracy M. Gordon, *The Local Initiative in California* (Public Policy Institute of California, 2004), p. 2.
4. *Id.* at pp. vi & 19.
5. Gordon, *supra* at p. 4.
6. *Id.* at pp. vi & 19.
7. See, e.g., Proposition 73 (2005) & Proposition 85 (2006) [abortion]; Proposition 71 (2004) [stem cell research]; Proposition 78, Proposition 79 (2005) & Proposition 72 (2004) [health care]; Proposition 66 (2004) & Proposition 36 (2000) [criminal sentencing]; Proposition 77 (2005) [redistricting]; Proposition 22 (2000) [same-sex couples].
8. Gordon, *supra*, at p. vi.
9. (1999) 21 Cal.4th 1142.
10. *Jones, supra*, 21 Cal.4th at 1153.
11. *Id.* at p. 1153, quoting *Brosnahan v. Eu* (1982) 31 Cal.3d 1, 4, quotations omitted.
12. *Jones, supra*, 21 Cal.4th at 1153.
13. *Ibid.*, citing *Brosnahan, supra*, 31 Cal.3d at 4.
14. *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 666.
15. *American Federal of Labor v. Eu* (1984) 36 Cal.3d 687, 697.
16. The dissent disagreed. “[A] single-subject challenge does not present [a] generic or jurisdictional issue. Rather, a single-subject challenge requires a careful examination of the measure’s particular provisions, or in other words, a review of its substance.” *Id.* at p. 1171 (dis. opn. of Kennard, J.), citing *Schmitz v. Younger* (1978) 21 Cal.3d 517.
17. *Jones, supra*, 21 Cal.4th at 1154, citing *Brosnahan, supra*, 31 Cal.3d at 4.
18. *Jones, supra*, 21 Cal.4th at 1154, citing *California Trial Lawyers Assn. v. Eu* (1988) 200 Cal.App.3d 351, 357.

19. (2006) 37 Cal.4th 986.
20. (2006) 38 Cal.4th 1020.
21. *Costa, supra*, 37 Cal.4th at 1005.
22. *Id.* at p. 1006.
23. *Ibid.*
24. *Costa, supra*, 37 Cal.4th at 1007.
25. *Id.* at pp. 1006-1007.
26. *Id.* at p. 1007.
27. *IEP, supra*, 38 Cal.4th at 1023.
28. *IEP, supra*, 38 Cal.4th at 1029-1030.
29. *Ibid.*
30. *IEP, supra*, 38 Cal.4th at 1030.
31. *Ibid.*
32. *Costa, supra*, 37 Cal.4th 986.
33. *Boyd v. Jordan* (1934) 1 Cal.2d 468; *Epperson v. Jordan* (1938) 12 Cal.2d 61; *Clark v. Jordan* (1936) 7 Cal.2d 248; *Zarembeg v. Superior Ct.* (2004) 115 Cal.App.4th 111.
34. *Zarembeg, supra*, 115 Cal.App.4th 111.
35. *Jones, supra*, 21 Cal.4th 1142.
36. See, e.g., *Calfarm Insurance Company v. Deukmejian* (1989) 48 Cal.3d 805 (challenge to amendments enacted by Proposition 103 [insurance regulation]); *People’s Advocate v. Independent Citizens’ Oversight Committee* (2006) 2006 WL 1417983 (challenge to amendments enacted by Proposition 71 [stem-cell research funding]); *National Audubon Society, Inc. v. Davis* (2002) 307 F.3d 835 (challenge to amendments enacted by Proposition 4 [protection of species].)
37. *Jones, supra*, 21 Cal.4th at 1153-1154.
38. *McFadden v. Jordan* (1948) 32 Cal.2d 330.
39. *American Federal of Labor, supra*, 36 Cal.3d 687.
40. *Legislature v. Deukmejian, supra*, 34 Cal.3d 658.
41. *Farley v. Healey* (1967) 67 Cal.2d 325
42. *IEP, supra*, 38 Cal.4th 1020; *Legislature v. Deukmejian, supra*, 34 Cal.3d 658.
43. 2006 WL 2988365 (U.S.).
44. *Purcell, supra*, 2006 WL 2988365 at *7.

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