In the Court of Appeal of the State of California
First Appellate District, Division 5

James V. Lacy, Michael Denny, United States Justice Foundation, and California Public Policy Foundation, Plaintiffs/Respondents, v. **City and County of San Francisco** and John Arntz, Defendants/Petitioners.	Court of Appeal No. **A165899** *Super. Ct. No. CPF-22-517714*

Appeal from Judgment of the Superior Court
for the City and County of San Francisco
Hon. Richard B. Ulmer, Jr., Judge

Petition for Rehearing

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In this case, Plaintiffs/Respondents (Respondents) challenged San Francisco's noncitizen voting program under the California Constitution. Respondents neither alleged nor argued that that the program diluted the voting power of United States citizens or that it otherwise violated the equal protection clauses of the United States or California Constitutions.

Looking to section III of the Court's opinion, Respondents petition for rehearing because the Court decided the equal protection issue, which was not raised by any party, without briefing from the parties. Because the parties did not raise the issue, the Court should not have decided it. That mistake of law warrants rehearing (*In re Jessup's Estate* (1889) 81 Cal. 408, 472) where the most appropriate solution is removal of section III from the opinion.

If the Court otherwise intends to preserve section III, then it should order supplemental briefing so the parties can address the issue. (Gov. Code § 68081; *People v. Alice* (2007) 41 Cal.4th 668, 674-679 (*Alice*).) Alternatively, the Court should depublish section III.

A. The Court should not have decided the equal protection question because it was not part of this case and was raised only by an amicus curiae.

Starting at the beginning, Respondents' complaint never alleged that San Francisco's noncitizen voting program violated the equal

protection clause of the United States or California Constitutions.[1] That argument was not in either party's trial or appellate court briefing.[2] To the extent the City's program invokes equal protection questions, those questions were not Respondents' case.

Amicus curiae Immigration Reform Law Institute (IRLI) might have preferred that Respondents address the equal protection issue and therefore brought the issue to the Court's attention. But by considering the issue, the Court ignores the general rule that an amicus curiae must accept the case as it is found because "California courts refuse to consider arguments raised by amicus curiae when those arguments are not presented in the trial court and are not urged by the parties on appeal." (*California Assn. for Safety Education v. Brown* (1994) 30 Cal.App.4th 1264, 1274-1275.)

Avoiding this rule, the Court looked to *Sacramento County Employees' Retirement System v. Superior Court* (2011) 195 Cal.App.4th 440 (*SCERS*) for an exception. (Opn. at 29.) Based on *SCERS*, the Court concluded that it could consider an issue first raised by an amicus curiae "under the theory that an appeal should be affirmed if the judgment is correct on any theory" and the issue is one that will support affirmance. (*SCERS* at p. 475.) But the Court interpreted the exception too broadly.

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[1] See 1 APP 3-11 (the complaint).

[2] See 1 AA 23 *et seq.* (Respondents' trial court brief) and *id*. at 3 APP 279 *et seq.* (reply).

The exception goes back to *E.L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 510-511 (*E.L. White*). Based on the appellate record before it, *E.L. White* deviated from the general rule that an amicus curiae "may not launch out upon a juridical expedition of its own unrelated to the actual appellate record." (*Ibid* [cleaned up].) It did so in an appeal from an order sustaining a general demurrer without leave to amend where the court was required to affirm the judgment if it was correct on any theory. (*Id*. at p. 511.)

There can be no doubt that the demurrer at issue in *E.L. White* is different from the final judgment on the merits that is at issue here. For one, the demurrer in *E.L. White* precluded the possibility of a factual record. Therefore, reversal meant only that remand would give the parties an opportunity to develop that record. Here, however, the case was complete, so the scope of review was limited to that record.

Nonetheless, Respondents are otherwise cognizant of the fact that reviewing courts will generally seek to preserve any judgment that is correct in law even if given for the wrong reason. (See, *e.g.*, *Little v. Los Angeles County Assessment Appeals Bds.* (2007) 155 Cal.App.4th 915, 925, fn. 6.) But there must be a line. That line is the new issue's relationship to the case: "If the trial court's decision is correct on any theory *applicable to the case*, [courts] affirm the order regardless of the correctness of the grounds on which the lower court reached its conclusion." (*Robles v. Chalilpoyil* (2010) 181 Cal.App.4th 566, 573 [emphasis added].) The Court's consideration of IRLI's equal

protection argument went too far because that theory was not applicable to the case Respondents presented.

The equal protection argument is not applicable to this case because Respondents did not plead that claim. As master of their case, Respondents had the right (if they chose) to craft the complaint in a way that avoids federal jurisdiction. (*Moreau v. San Diego Transit Corp.* (1989) 210 Cal.App.3d 614, 620; *Caterpillar Inc. v. Williams* (1987) 482 U.S. 386, 392.)[3] By focusing on claims arising under the California Constitution, Respondents did this.[4] In so doing, they passed on the equal protection claim.[5] Because Respondents could not have asserted the equal protection claim in this Court, IRLI could not do so either.

A problem in deciding the equal protection issue in the context of this case is that Respondents developed a factual record in accordance with the complaint they filed. They did not develop a record that considered equal protection. This is a problem because equal protection questions are mixed questions of fact and law. (See *Eldridge v. Sierra View Local Hospital Dist.* (1990) 224 Cal.App.3d 311, 327 [denying summary judgment of equal protection claim due to

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[3] See also *Caldera Pharmaceuticals, Inc. v. Regents of University of California* (2012) 205 Cal.App.4th 338, 362 (plaintiff was bound by the claims pled even though the complaint suggested there could have been more).

[4] Respondents' argument under the California Constitution was limited to articles II, IX, and XI. Respondents did not claim a violation of equal protection under the California Constitution (art. I, § 7).

[5] Cf. *Wheelright v. County of Marin* (1970) 2 Cal.3d 448, 457 (trial court did not abuse its discretion in denying plaintiff's request to reopen case and present evidence it could have presented earlier).

unresolved factual questions]; see also *Pierre v. State of La.* (1939) 306 U.S. 354, 358.) Therefore, if the Court wants to consider the equal protection issue, it should remand this case back to the trial court in a way that gives Respondents leave to amend the complaint to state that claim. After the trial court resolves that claim, this Court could consider the issue on a more complete record.[6]

For these reasons, IRLI's equal protection argument is totally alien to the case at bench; indeed, it has no applicability to it whatsoever. This is different from cases where courts have applied the exception. For example, in *SCERS, supra*, the issue was a request for public records under the California Public Records Act. (195 Cal.App.4th at p. 446.) Certain media outlets sought information that would identify public employees and the amount of their pensions, and the government opposed disclosure. (*Id.* at pp. 446-447.)

Some *SCERS* amicus curiae argued—for the first time—that individual retirees were entitled to notice before their information could be disclosed. (195 Cal.App.4th at pp. 472-743.) Their argument was premised "on the assumption that individual pensions are personal, confidential information", which was the ultimate question already before the court. (*Id.* at p. 473.) Based on the record before it,

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[6] This Court's opinion suggests a belief that Respondents would not be able to present a valid equal protection claim. (Opn. at 29-33.) But the Court does not have jurisdiction to make that presumption. Moreover, fairness suggests that if the Court is going to decide the issue, then it should do so after Respondents have had every opportunity to state the claim. (Cf. *Stockton v. Superior Court* (2007) 42 Cal.4th 730, 747 [giving plaintiffs every opportunity to state a claim in response to a successful demurrer].)

SCERS had already rejected the fundamental precept of the amici's argument. (*Ibid.*) As such, the amici's argument was essentially the same as the party's argument, but perhaps with a slightly different spin. In other words, it was applicable to the case. IRLI's argument in this case, however, is not applicable because IRLI not only presented a new theory of the case but it also presented an entirely new claim (and it did so in an argument that was barely eight pages long).

When *SCERS* considered the exception before it, it considered that the exception can be an extension of the rule that allows parties to "raise a purely legal issue for the first time on appeal … where the issues touch on public policy and the facts are undisputed." (195 Cal.App.4th at p. 473, citing *Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, 502-503.) While there is no doubt that this case involves important questions of public policy, the factual question is less clear because the parties did not create a factual record with equal protection in mind. Rather than expanding its analysis of undisputed facts to touch a related issue, the Court expanded its analysis to include an unrelated issue where there are no facts.[7]

When *Lavie* considered this issue, it was especially concerned about the precedential impact of a decision that might be resolved on a less-than-complete record. (105 Cal.App.4th at p. 503.) That is problematic here because the Court's opinion has the effect of

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[7] Respondents recognize that some facts in the record may be relevant to the equal protection issue. But because the parties did not develop that record with equal protection in mind, the existing record is insufficient.

creating binding precedent on an equal protection issue that the parties did not address. On this point, an eight-page amicus curiae brief should not result in a precedential opinion on the subject.

The City may take the position that there are sufficient undisputed facts in the record to decide the issue. That is an easy position for it take because it was successful. But if the shoe were on the other foot, the City's position would surely be different. There can be little doubt that the City would vehemently object to a decision affirming the judgment below based on equal protection not only because Respondents did not raise the issue[8] but also because the City did not have the opportunity to brief the issue. That objection would be well founded.

B. If the Court considers the equal protection issue, then it should order supplemental briefing from the parties.

Assuming that the Court could consider IRLI's argument, it should not have resolved the equal protection issue without ordering supplemental briefing from the parties. (Gov. Code § 68081.) Because the Court did not order supplemental briefing, it should order a rehearing on the equal protection issue. (*Ibid.*)

Respondents recognize that section 68081 does not require rehearing if the parties had an opportunity to brief an issue. (*Alice, supra*, 41 Cal.4th at p. 677.) But Respondents' answer to the amicus curiae briefs is not the type of opportunity the Supreme Court

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[8] See *Younger v. State of California* (1982) 137 Cal.App.3d 806, 813-814.

contemplated. For Respondents' their so-called "opportunity" to address the equal protection issue would have been their response brief. (*Ibid.*) But equal protection was not an issue Respondents could permissibly raise. (*Lavie, supra*, 105 Cal.App.4th at p. 503; *Younger, supra*, 137 Cal.App.3d at pp. 813-814.)

Rather than opening the door to expanding on IRLI's argument, Respondents' opportunity to answer the amici briefs was only an opportunity for them to respond to the amici arguments. Going further, Respondents' answer to those arguments was not an opportunity to try and introduce extra-record evidence to support an entirely new claim.[9] The City was positioned differently because it could rebut IRLI's argument without regard for the possibility that there might be more. This set up a situation where the Court had a one-sided view of the issue without the possibility of Respondents' full argument on the subject.

The Code is further limited and only applies in situations where the court's decision is "*based upon* an issue which was not proposed or briefed by any party to the proceeding." (Gov. Code § 68081 [emphasis added]; see also, *e.g.*, *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 692, fn. *) Because the Court ruled in the City's favor on the constitutional questions at issue, it could be said that the Court's opinion relating to equal protection is *dicta* and that the ultimate decision was not "based upon" that reasoning. But taking the

[9] If Respondents took the liberty of expanding upon IRLI's argument, the City would have needed an opportunity to respond.

opinion as a whole, the Court's equal protection section is presented as an alternative means of affirming the judgment below. Therefore, a different conclusion on the equal protection issue would have resulted in a different outcome. This means that the Courts' decision was based upon the equal protection issue.

C. The Court could alternatively depublish section III of its opinion.

As an alternative to modification or rehearing, the Court could depublish section III of its opinion. As discussed above, the published opinion will have a precedential effect on third parties without full briefing from and a record developed by the parties in the case. The unpublished opinion will confirm the outcome as between these parties without out binding other parties to a decision that was based on a less-than-complete record.

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CONCLUSION

Section III of the Court's opinion exceeds the Court's authority in this case. Section III should be removed or otherwise modified to fit within the scope of the Court's authority. If not removed, the Court should allow supplemental briefing to address the issue. For these reasons, Petitioner respectfully requests that the Court grant this petition.

Dated: August 23, 2023

Respectfully submitted,
LAW OFFICE OF CHAD D. MORGAN

By: /s/
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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 2,300 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By: 

Chad D. Morgan

PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that:

I am a citizen of the United States, over the age of 18, and not a party to this action. My business address is 40729 Village Drive #8, Big Bear Lake, CA 92315.

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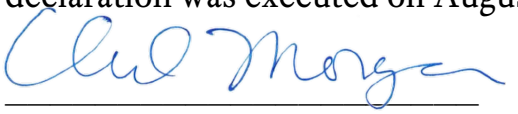
I served the party listed above via first class mail by depositing the foregoing into a postage-paid envelope and deposited it for collection with the United States Postal Service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on August 23, 2023 at Anaheim, California.



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