OFFICE OF COUNTY COUNSEL
COUNTY OF TEHAMA

727 Oak Street
Red Bluff, California 96080
530-527-9252 Telephone
530-527-9255 Facsimile

ARTHUR J. WYLENE
County Counsel

BRIAN BRIGGS, Deputy
ADAM RADTKE, Deputy
SARAH DICKINSON Deputy
TRISHA WEBER, Deputy

Arminda Searcy, Office Manager
Trish Pardo, Legal Secretary
Amber Gravitt, Legal Secretary

June 13, 2016

Honorable Chief Justice Tani Gorre Cantil-Sakauye
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

VIA OVERNIGHT DELIVERY

Re: Letter Supporting Review – *County of Kern v. T.C.E.F., Inc.*
(Cal. Supreme Court Case No. S234542)

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to California Rules of Court, rule 8.500(g), the California State Association of Counties (CSAC)[1] and the League of California Cities (League)[2] respectfully support the Petition for Review filed by the County of Kern.

While describing its holding in this case as "narrow," the Court of Appeal has in fact dramatically altered the effect of a referendum petition under California law. The referendum is fundamentally a negative action. Unlike an initiative, it does not establish the law the voters do want; rather, it merely expresses one particular thing they *don't* want – at one particular time.[3] For this reason, the law has long given legislative bodies substantial latitude to respond to citizen referenda, allowing them to

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[1] The California State Association of Counties (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.

[2] The League of California Cities is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as being of such significance.

[3] "The two main agencies of direct legislation are the initiative and the referendum. The initiative operates entirely outside the States' representative assemblies; it allows voters [to] petition to propose statutes or constitutional amendments to be adopted or rejected by the voters at the polls. While the initiative allows the electorate to adopt positive legislation, the referendum serves as a negative check. It allows voters [to] petition to refer a legislative action to the voters [for approval or disapproval] at the polls. The initiative [thus] corrects sins of omission by representative bodies, while the referendum corrects sins of commission." (*Arizona State Legislature v. Arizona Independent Redistricting Com'n* (2015) 135 S.Ct. 2652, 2660.)

enact alternative legislation "avoiding, perhaps, the objections made to the first ordinance"[4] – or simply to wait and try the same approach again after a suitable lapse of time. The Court of Appeal decision here turns all of this on its head, and treats the referendum like an initiative freezing the status quo and tying the hands of the legislative body. That is not the law, and the principles articulated by the Court of Appeal will detrimentally affect the conduct of public business if not corrected by this court.

More specifically, the Court of Appeal introduces two substantial deviations from the rules set forth in prior caselaw – both in California and elsewhere – either of which would independently warrant this court's attention.

I. "ADDITIONAL ACTIONS" AND "PRACTICAL EFFECTS"

Perhaps most significant is the Court of Appeal's expansion of the "*Stratham* rule"[5] beyond *legislative* acts, into a new and far-reaching category of "additional action that has the practical effect of implementing the essential feature of the protested ordinance."[6]

Unlike some states,[7] California does not permit immediate wholesale reenactment of a legislative act suspended or defeated by referendum. Rather, our state follows the nationwide majority rule first articulated by *In re Megnella (*Minn. 1916) 157 N.W. 991 and adopted in California by *Ex parte Stratham* (1920) 45 Cal.App. 436, 440, under which the legislative body "cannot enact another ordinance in all essential features like the repealed ordinance" but "may, however, deal further with the subject-matter of the suspended ordinance by enacting an ordinance essentially different from the ordinance protested against, avoiding, perhaps, the objections made to the first ordinance. If this be done, not in bad faith, and not with intent to evade the effect of the referendum petition, the second ordinance should not be held invalid for this cause."[8] The "*Stratham* rule" is implicit in the California

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[4] (*Ex parte Stratham* (1920) 45 Cal.App. 436, 440.)

[5] (See Pet. for Rev., pp. 7-8.)

[6] (Opn. at p. 2.)

[7] (See, e.g., *Reynolds v. Bureau of State Lottery* (Mich.App. 2000) 610 N.W.2d 597, 604-607; *Bird v. Town of Old Orchard Beach* (Me. 1981) 426 A.2d 370, 373; *Cornell v. Mayor and Council* (N.J. 1967) 229 A.2d 630, 631; *McBride v. Kerby* (Ariz. 1927) 260 P. 435, 438, overruled in part on other grounds *Adams v. Bolin* (Ariz. 1952) 247 P.2d 617.)

[8] This rule has been applied in California numerous times, as discussed in the *Petition for Review*, and represents the majority rule nationwide. (See generally Annot., *Power of legislative body to amend, repeal, or abrogate initiative or referendum measure, or to enact measure defeated on referendum* (1954) 33 A.L.R.2d 1118; 6 McQuillin, Municipal Corporations (3rd. ed. 2016 rev.) § 21.11; *Hitchins v. Mayor and City Council* (Md. 1958) 138 A.2d 359, 364; *Ginsberg v. Kentucky Utilities Co.* (Ky.App. 1935) 83 S.W.2d 497, 501; *All Peoples Congress of Jersey City v. Mayor and Council* (N.J.Sup. 1984) 480 A.2d 948, 951; *Town of Trumbull v. Ehrsam* (Conn. 1951) 166 A.2d 844, 847-848; *Utah Power & Light Co. v. Ogden City* (Utah 1938) 79 P.2d 61, 63-64; *Hall v. City and County of Denver* (Colo. 1946) 177 P.2d 234, 239; *Freels v. Sumner County Bd. of County Com'rs* (Tenn.App. 1986) 1986 WL 4605.)

Constitution, and has been held applicable across the board, not only to counties and general law cities, but also to charter cities and the Legislature itself.[9]

Throughout the entire body of caselaw applying the *Stratham* rule, both in California and elsewhere, it has never been suggested that the rule restricts anything other than legislative actions.[10] This is an obvious corollary of the fundamental principle that the referendum power "may review only legislative decisions, but not matters that are strictly executive or administrative."[11] Well-established precedent thus dictates that the correct approach under the *Stratham* rule "begins with a comparison of the terms of the legislation challenged by referendum and the subsequent legislation, focusing on the features that gave rise to popular objection."[12] ("[T]he language of the [new] ordinance" also provides the objective framework for evaluating the good faith of the legislative body, a critical component of the *Stratham* analysis.[13])

However, the Court of Appeal here explicitly invites reviewing courts to look beyond the existence (or absence) of "a new legislative enactment that can be compared, provision by provision, with the protested ordinance,"[14] and engage in a free-ranging inquiry into "the totality of the circumstances of a particular case" to

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[9] (*Rubalcava v. Martinez* (2007) 158 Cal.App.4th 563, 570-574; *Assembly of State of Cal. v. Deukmejian* (1982) 30 Cal.3d 638, 678.) Notwithstanding the Court of Appeal's efforts to find support for its approach in the text of Elections Code section 9145 (Opn. at pp. 19-20), *Rubalcava* makes clear that the application and contours of the *Stratham* rule have not been dependent on the statutory referendum provisions applicable to a particular entity. Kern County's Petition for Review is rightly concerned that the Court of Appeal opinion here could lead to a different rule for counties subject to Section 9145 than for other public entities. (Pet. for Rev., at pp. 15-19.) Perhaps the greater concern is that the Court of Appeal's new rule will *not* be so limited, and that counties, cities, and the Legislature will *all* similarly face arguments that their administrative and executive actions are inconsistent with some prior referendum.

[10] To the contrary, *Lindelli v. Town of San Anselmo* (2003) 111 Cal.App.4th 1099 *explicitly assumed* that the rule applies only to legislative acts – and proceeded to engage in several pages of analysis regarding whether the subsequent action in that case was legislative in character and thus subject to the rule. (*Id.* at pp. 1112-1114.) The other cases on point, both in California and other majority rule jurisdictions, involve patently legislative matters such statutes, ordinances, bond issuances, property purchases, franchise agreements, etc.

[11] (*Yesson v. San Francisco Municipal Transportation Agency* (2014) 224 Cal.App.4th 108, 118.)

[12] (*Lindelli, supra,* 111 Cal.App.4th at p. 1111.)

[13] (*Reagan v. City of Sausalito* (1962) 210 Cal.App.2d 618, 631.) The Court of Appeal summarily rejected any inquiry into the legislative body's good faith (objective or otherwise), holding that "[o]ur test need not concern itself with the state of mind of the members of the board of supervisors because their good or bad faith does not affect the practical, substantive impact of their actions on the electorate." (Opn. at p. 23-24.) This holding fails to recognize the centrality of this inquiry to virtually every case applying the *Stratham* rule. (See, e.g., *Rubalcava, supra,* 158 Cal.App.4th at p. 578.) Addressing the *Stratham/Megnella* line of cases, the Utah Supreme Court recently noted that "*[t]he key question* discussed by these cases is a local government's good faith or, in other words, whether the local government's purpose in revisiting a law that has been challenged by referendum is to evade that referendum." (*Carpenter v. Riverton City* (Utah 2004) 103 P.3d 127, 129.)

[14] (Opn. at p. 22.)

determine "the practical effect of a board's additional action."[15] There is no "category of information that can or should be ignored when assessing the practical impact of the additional action" and thus no apparent limit on the types of actions that may, individually or collectively, be found to contravene the principles outlined by the Court of Appeal.[16] This new approach "jumps the rails" of the referendum power, and will cause chaos that may be best demonstrated by a few examples:

- An ordinance rezoning property from industrial to commercial to permit a retail development project is successfully challenged by referendum. The county planning commission subsequently determines that the proposed retail project is consistent with the pre-existing industrial zoning, and issues a conditional use permit. (Further assume, for the sake of argument, perhaps that the administrative record and "totality of the circumstances" includes evidence of hostility by the planning commission and county staff toward the referendum.) Is this action invalid simply because it has the practical effect of implementing the essential feature of the referended ordinance, or is its validity rather to be measured by its actual consistency with the pre-existing zoning? (In other words, does the referendum merely disapprove the proposed commercial zoning, or does it also dictate the county's administrative and executive actions under the existing ordinances?)
- State legislation mandating that California Environmental Quality Act review of certain projects include consideration of particular environmental effects (e.g., greenhouse gasses, sea level rise, environmental justice, etc.) is suspended or disapproved by referendum. The Governor thereafter issues an executive order requiring state agencies to include such review in their CEQA analyses as lead or responsible agencies – or perhaps the Resources Agency amends the CEQA Guidelines to require such review. Are these "additional actions" automatically impermissible under "*Kern v. T.C.E.F.*," or are they to be judged by the Governor's (or Resources Agency's) authority under pre-existing law?
- An ordinance requiring city contractors to pay their employees a living wage is disapproved through the referendum process. The city's procurement chief thereafter elects to include such provisions in most city contracts as the exercise of their discretion. Although there is a "theoretical possibility" that the city council could reject these provisions, as a "practical" matter such contracts are routinely approved on the council's consent agenda. May a contractor refuse to comply with these provisions on the grounds that they illegally implement the referended ordinance?

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[15] (Opn. at p. 24-25.)

[16] (*Ibid.*)

The foregoing are certainly only hypotheticals, but demonstrate the complications and hazards inherent in extending the "*Stratham* rule" beyond the legislative acts to which the right of referendum itself applies.[17]

Not only is there no warrant in law for this expansion, there is no reason for it in public policy. The validity of administrative and executive actions is measured by the existing legislatively-adopted rules. An "additional action" that is inconsistent with pre-existing law (i.e., without the referended legislation) is invalid on that basis, and the law provides adequate remedy; whereas actions permissible under existing law – which would have been lawful if the referenced legislation had never been proposed – do not become unlawful because of their similarity to the failed legislation. As noted, a referendum, unlike an initiative, does not alter existing law. The Court of Appeal's approach ignores this, and invites challenge to otherwise lawful actions alleged to have the "practical effect" of implementing the challenged legislation. Review should be granted to clarify that that *Stratham*'s bar applies only to legislative acts, and no further.

II. "THE STATUS QUO ANTE AND ESSENTIAL FEATURE"

The facts of this case do, of course, involve a subsequent legislative action – Ordinance No. G-8257, repealing Chapter 5.84 of the Kern County Code. Had the Court of Appeal employed the traditional *Stratham* analysis, comparing this ordinance provision-by-provision to the referended Ordinance No. G-8191, rather than its essentially subjective inquiry into the "totality of the circumstances," it might well have reached a different result. However, the Court of Appeal introduced a second novelty into the *Stratham* rule that further clouded its approach.

The Court of Appeal treated the referendum petition as not just temporarily returning the County to the status quo, but as affirmatively requiring that it remain there. As the Court of Appeal put it, "[i]n other words, additional action by a board of supervisors violates section 9145 *if it fails to return to the status quo ante on the essential feature of the protested ordinance*."[18] However, *Stratham* and its predecessors and progeny have never required this. As noted above, the referendum

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[17] The Court of Appeal "doubles down" on its expansive reconstruction of the *Stratham* rule elsewhere in the opinion, by reiterating that its approach "is geared towards the practical effect of the board's additional action because substance, not form, is the proper test for determining the real character of conduct or a transaction. By addressing the practical effect, our interpretation is not limited to additional action that achieves a result identical to that of the protested ordinance." (Opn. at p. 23.) The well-established distinction between legislative and administrative or executive acts likewise looks to substance, rather than form - but it is the *substantive character of the action*, not the "practical effects" that governs the right of referendum. (See *Yesson, supra,* 224 Cal.App.4th at pp. 122-123.) An executive action that "achieves a result identical to that of the protested ordinance" through other means remains an executive action. It would not itself be subject to referendum, and prior to this instant Court of Appeal decision, would not be barred by a prior referendum.

[18] (Opn. at p. 22.) It is worth noting that, as a purely statutory matter, the County of Kern has literally complied with the command of Elections Code section 9145 by repealing the challenged Ordinance No. G-8191. By its terms, the statute requires no more. The rest is entirely a matter of constitutional law and implication, not statutory text. The Court of Appeal's efforts to find support for its new analytical approach in Section 9145's requirement that the referended ordinance be "entirely repeal[ed]" would be deeply concerning if limited to that statute (for the reasons set forth in the Petition for Review), and perhaps even more concerning if not so limited.

is not an initiative in favor of the status quo, and expresses no electoral preference for the current state of affairs. The voters may be equally or more unhappy with the status quo, but prefer a solution that differs in some aspect. For this reason, the traditional *Stratham* rule does *not* use the status quo as its touchstone or, judging the validity of subsequent legislation by comparison thereto. Rather, the rule compares the new legislation *to the old*, judging its similarities and differences. New legislation may indeed drastically alter the status quo, in any manner, provided that it differs in some essential feature from the challenged former proposal.[19]

The Court of Appeal compounds this novelty with another. The correct inquiry under *Stratham* is not just the *similarities* between the defeated proposal and the legislative body's subsequent "actions," but more importantly the *differences*. As evident from the cases noted above, the new legislation may share many essential features in common with the defeated proposal, provided there is at least one meaningful difference. The Court of Appeals's conclusion that that legislative body must "not take additional action that has the practical effect of implementing the essential feature of the protested ordinance" thus represents a serious deviation from the *Stratham* rule. Future legislative actions may indeed implement the essential feature of the protested legislation, provided that they also include revisions or additional features sufficiently distinguishing the new legislation from the old.[20]

Viewed in this light, many of the differences articulated by Kern County between Ordinance Nos. G-8191 and G-8257 take on real substance – particularly the availability of discretionary review and permitting for marijuana dispensaries.[21] There is, of course, a substantial difference between a land use ordinance inflexibly prohibiting certain uses, and an ordinance under which such uses may be permitted through a conditional use permit[22] – although the "practical effect" may be the same if

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[19] *Rubalcava* and *Reagan* are particularly notable as cases involving very substantial alterations to the status quo on virtually all of the essential features of the challenged legislation, that were nonetheless upheld under the *Stratham* analysis. (Indeed, failure to maintain the status quo relating to essential elements of the referended legislation may be not merely permissible, but affirmatively necessary in some cases. For instance, *Chandis Securities Co. v. City of Dana Point* (1996) 52 Cal.App.4th 475 rejected constitutional challenges to a referendum disapproving a proposed mixed use development project. However, the property remained designated for mixed use development in the city's general plan, and the court warned the city that future "unnecessary delays in approving a proposed development or repetitive denials of specific plans complying with the city's general plan" could result in a regulatory taking. *Id.* at p. 484.) The Court of Appeal's description of the *Stratham* rule as "significantly limit[ing] the authority of a city council to make changes that address the subject matter of the protested ordinance" (opn. at p. 22) is perplexing, and not fairly reflective of the cases applying the rule either in California or other jurisdictions.

[20] The *Stratham* rule also gives due credence to the legislative body's determination that the differences meaningfully address the popular objection giving rise to the referendum. This is consistent with the presumption of validity given to all legislative actions. (*Rubalcava, supra,* 158 Cal.App.4th at p. 575; *Reagan, supra,* 210 Cal.App.2d at p. 631; *Gilbert v. Ashley* (1949) 93 Cal.App.2d 414, 416.) The instant CA abandoned this credence when rejecting the good faith inquiry heretofore central to the analysis of this issue. (See footnote 13, *supra*.)

[21] (Opn at pp. 25-26.)

[22] (See, e.g., *County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861, 866, fn. 4 and 870-871 [marijuana dispensary ordinance requiring facilities to obtain a conditional use permit not equivalent of a ban].)

no permit applications are ever submitted (as here), or if an application is denied for reasons valid under pre-existing law. Further, in this case, Kern County's subsequent legislative actions include not only the repeal of Chapter 5.84 (with the effects noted above), but also the contemporaneous submission of a comprehensive new ordinance to the voters (Measure G), whose features were carefully (and successfully) designed to win popular approval. This is precisely the type of action "sufficient to show a good faith effort on the part of the [Board] to present a different 'package' for the consideration of the people" in conformance with the *Stratham* rule.[23] Recovery of the proper analytical focus would have clear impact on this case.

Perhaps more importantly, however, regardless of the outcome of this case, the Court of Appeal's re-envisioning of the *Stratham* rule represents a substantial incursion into the legislative authority of local governing bodies (and the Legislature) that is not warranted by precedent or justified by the policies underlying the referendum power. Review should be granted so that this court may articulate the correct rule for judging the validity of legislative actions taken in the wake of a citizen referendum.

For all of these reasons, CSAC and the League respectfully request that the Petition for Review be granted. Thank you for your consideration.

Very truly yours,

ARTHUR J. WYLENE
Tehama County Counsel

AJW/as

cc: Service List

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[23] (*Freels, supra,* 1986 WL at p. 6.) The Court of Appeal gave the Kern County Board of Supervisors no credit for including Measure G in its "package" of subsequent actions, but ironically held that the invalidation of that measure four years later was "[o]ne of the circumstances relevant" to assessing the practical impact of the County's actions. (Opn. at p. 25.) Suffice it to say that judging the validity of a legislative body's post-referendum actions based on events occurring years later is unprecedented in the caselaw – anywhere. The Board's good faith in attempting to address popular concern over a complete dispensary ban is quite clear, and is all that the *Stratham* rule requires. The fact that this attempt was ultimately not completely successful has never before been held to invalidate the legislative body's action. The uncertainties and hazards to public governance posed by the Court of Appeal's new approach in this regard are readily apparent.

PROOF OF SERVICE

I, the undersigned, am employed in the City of Red Bluff, County of Tehama, State of California; my business address is 727 Oak Street, Red Bluff, CA 96080. I am over the age of eighteen years and not a party to the within action. On the date below I caused the following papers to be served a follows:

Letter Supporting Review – County of Kern v. T.C.E.F., Inc. (Cal. Supreme Court Case No. S234542)

Causing a true copy thereof, enclosed to be delivered to the office of each party shown below at the address indicated and by leaving the same with a person apparently in charge and over the age of eighteen years;

(X) Placing a true copy there, enclosed in a sealed envelope with first-class postage thereon fully paid, in the United States mail at Red Bluff, California, addressed as follows:

Jeffrey V. Dunn
Sigrid K. Asmundson
Best Best & Krieger LLP
18101 Von Karman Avenue, Ste. 1000
Irvine, CA 92612

Michael M. Hogan
Hogan Law APC
225 Broadway, Suite 1900
San Diego, CA 92101

Abraham A. Labbad
Law Offices of Abraham A. Labbad
11123 Lemay Street
North Hollywood, CA 91606

Court of Appeal
Fifth Appellate District
2424 Ventura Street
Fresno, CA 93721-3004

Hon. David Lampe
Kern County Superior Court
1415 Truxtun Ave.
Bakersfield, CA 93301-4172

I declare under penalty of perjury that the foregoing is true and correct, executed at Tehama County, California, on June 13, 2016.

Arminda Searcy

ARMINDA SEARCY