



General Municipal Litigation Update

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GENERAL MUNICIPAL
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I. PUBLIC FINANCE

A. *Department of Finance et al. v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, review denied

Holding: Under Article XIII B, section 6, the State must only reimburse cities and counties for certain costs to comply with stormwater discharge permits, specifically if it is for a “new program” or “higher level of service” to abate water pollution. The State need not reimburse for costs if the permittee can levy a fee to cover those costs without voter approval. Cities cannot impose stormwater drainage fees for costs of non-development permit conditions (without voter approval). They can impose street-sweeping fees, and valid regulatory fees on developers for costs to comply with development-related conditions.

Facts/Background: Article XIII B, section 6 of the California Constitution requires the state to provide a subvention of funds to compensate local governments for the cost of a new program or higher level of service mandated by the state. It need not fund mandates, however, if local governments have authority to fund them by imposing fees. The Commission on State Mandates decides test claims for mandate reimbursement.

Cities and counties throughout the state operate municipal separate storm sewer systems (MS4s). Pursuant to the Federal Water Pollution Control Act (Clean Water Act), section 402(p), stormwater permits are required for discharges from an MS4 serving a population of 100,000 or more. The Clean Water Act created the National Pollutant Discharge Elimination System (NPDES) which is operated by the State to permit water pollutant discharges that comply with all statutory and administrative requirements. Accordingly, every 5 years, cities and counties must obtain a stormwater discharge permit from one of nine regional water boards or from the State Water Resources Control Board. This case tests whether the State is obligated to reimburse cities and counties for the very considerable costs of complying with those permits and the latest chapter of a dispute that dates to 2007.

San Diego County and its cities have been litigating the cost of that region’s 2007 stormwater discharge permit under state and federal water laws for 15 years. The 2007 permit was a renewal of a NPDES permit first issued in 1990 and renewed in 2001. The San Diego Regional Board found that, despite discharge pollutant management programs, urban runoff discharges were causing violations of water quality standards. The permit

included new or modified requirements to manage regional runoff, including street-sweeping, catch-basin cleaning, development controls to reduce runoff, education programs, and required regional coordination. San Diego County estimated the cost of compliance at \$66 million over the permit life.

In 2008, San Diego County and the cities within it filed a test claim with the Commission seeking subvention for eight challenged conditions. In 2010, the Commission on State Mandates found six of the eight permit conditions were reimbursable state mandates under 1990's Proposition 9, the Gann Limit. These conditions required permittees to provide a new program of abating water pollution, and the permittees did not have legal authority to levy a fee for the conditions since doing so required voter approval.

The State Department of Finance challenged the Commission's decision in the Sacramento Superior Court by writ of administrative mandate; the permittees cross-appealed. In a remand trial following an initial appeal, the trial court upheld the Commission's decision in its entirety and denied the petitions.

Analysis: The Third Appellate District reversed in part and affirmed in part.

First, the Court determined that Article XIII B, section 6 applied here. Under Section 6, if the state by statute or executive order requires a local government to provide a "new program" or a "higher level of service" in an existing program, it must "provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service." The appellate court agreed the conditions required permittees to provide a new program. "Permittees were providing stormwater drainage systems, and the permit required them to provide a new program of water pollution abatement services in forms which permittees had not provided before and which benefitted the public." The court explained that Section 6 requires subvention whether the new program is imposed directly by law, or as a condition of a regulatory permit required by a state agency.

Next, the Court of Appeal determined application of Section 6's subvention for "costs", which excludes expenses recoverable from sources other than taxes. The Commission and the trial court found that six of the eight challenged permit conditions were reimbursable mandates because permittees did not have authority to levy a fee for those conditions without voter approval. The other two challenged conditions — requiring the creation and implementation of a hydromodification management plan and low-impact-development requirements for certain new development — were not reimbursable

mandates because permittees could levy fees for those conditions without voter approval.

The appellate court first summarized the voter approval requirements under Prop. 218, noting it exempts “fees or charges for sewer, water, and refuse collection services.” Additionally, no part of Prop. 218, including its owner protest and voter approval requirements, applies to fees levied on real property development or fees that result from a property owner’s voluntary decision to seek a government benefit.

The Court of Appeal concluded **storm drainage fees** require voter approval under Proposition 218 and are not exempt “sewer” fees. It found it unnecessary to determine if 2017’s SB 231 (Hertzberg, D-Los Angeles) could undermine *Howard Jarvis Taxpayers Assn. v. City of Salinas*’ conclusion that Prop. 218’s provision exempting certain preexisting assessments distinguishes “sewer” from “flood control” services because the statute did not exist when the NPDES permit was granted in 2007 and was not retroactive. However, it revisited *Salinas*’ analysis, placed it on a much stronger intellectual footing, and effectively disagreed with SB 231 — “sewers” for purposes of the partial exemption from Proposition 218 for water, sewer and refuse removal fees are limited to sanitary sewers and exclude storm sewers. It also noted Prop. 218’s liberal construction requirement to disfavor government revenue authority and the 15-year delay between *Salinas* and the adoption of SB 231, suggesting the Legislature was changing, not clarifying, the law.

As to **street-sweeping**, the Court concluded this amounts to refuse collection within the meaning of Proposition 218, expanding local government’s fee authority over earlier understandings and disqualifying these costs for mandate reimbursement. The court noted there may be challenges in making such a fee proportional to the cost to serve each parcel as Prop. 218 requires, but the fact of local fee authority was enough to exempt street-sweeping from the State’s duty to fund mandates.

The **development requirements** were, perhaps unsurprisingly, exempt from Props. 218 and 26 as real estate development and permitting fees. The court read *Salinas* narrowly as to its rejection of a fee based on impervious coverage, finding such a distinction can be a valid basis for a service, permitting, or regulatory fee.

The case is bad news for State funding of expensive water-quality mandates and an exemption from Prop. 218’s voter-approval requirement for stormwater fees. It is better news for local authorities to fund street sweeping and similar water quality programs,

perhaps including catch-basin cleaning and filtration, as non-voter-approved refuse collection fees.

**B. *Cultiva La Salud, et al. v. State of California* (2023) 89
Cal.App.5th 868**

Holding: The penalty provision in the Keep Groceries Affordable Act of 2018 that deprives charter cities of sales and use tax revenue if they impose taxes on sugar-sweetened beverages and other items is unconstitutional. The penalty unconstitutionally uses the threat of crippling penalties to chill charter cities from exercising their rights under the state constitution’s home-rule provision.

Facts/Background: In 2018, the California Legislature passed the Keep Groceries Affordable Act of 2018 (Rev. & Tax. Code §§ 7284.8–7284.16). The Act prohibits charter cities, counties, and other local governments from imposing taxes, fees, or assessments on certain grocery items, including sodas and other sugar-sweetened drinks. It imposes a penalty for its violation applicable only to charter cities — the only agencies which might avoid preemption by the statute. The penalty requires the Department of Tax and Fee Administration to end its contract to collect all sales and use taxes for a charter city that imposes a tax or fee on “groceries.”

The Groceries Act was a political bargain with the soda industry. Its ban on local soda taxes for 13 years (until January 1, 2031) was in exchange for the beverage industry’s withdrawal from the 2018 ballot of a proposed initiative constitutional amendment that would have greatly restricted state and local finances (requiring a 2/3 vote for nearly all new revenues).¹ Cities’ — including Berkeley, San Francisco, Oakland and Albany — adoption of soda taxes to discourage their distribution and unhealthy consumption threatened the soda industry’s bottom line.

Cultiva La Salud (a nonprofit promoting healthy diets) and Martine Watkins (a Santa Cruz City Council member suing in her individual capacity) sued the Department challenging the Act’s penalty provision. Plaintiffs argued the penalty is unconstitutional because it seeks to override Article XI, Section 5 of the California Constitution by severely penalizing charter cities if they properly exercise their constitutional home rule

¹ An updated version of that measure has qualified for the 2024 ballot and can be viewed here: <https://oag.ca.gov/system/files/initiatives/pdfs/21-0042A1%20%28Taxes%29.pdf> (as of Apr. 14, 2023).

authority.

In Plaintiffs' view, the Legislature understood that the home rule doctrine might prevent the state from banning charter cities from taxing sugar-sweetened drinks. As a workaround, the Legislature created the penalty to discourage charter cities from testing whether soda taxes are within the home rule power, thus diminishing local authority and impairing the role of courts. Plaintiffs sought a declaration that the Groceries Act's penalty provision is unlawful, an injunction barring its enforcement, and a writ of mandate directing the Department not to implement it.

The Department argued the case was not ripe— the case should only be decided after a charter city had enacted a tax triggering the Act's penalty — after a city is brave enough to risk all its sales taxes to test this issue. The Department also argued the penalty provision only penalizes a charter city when its grocery tax “would *otherwise* be a valid exercise of the local government's constitutional powers, *in the absence of the Groceries Act.*” In other words, the penalty applies only if the Groceries Act is the sole reason for finding that the tax is prohibited. And they argued any offending language in the penalty could be severed to save the rest of the provision.

The trial court ruled in Plaintiffs' favor, first finding the case is ripe because it is a facial challenge, and it raises an important legal question that might never be answered otherwise. The court reasoned that charter cities, like Santa Cruz, may never enact a local tax on sugary beverages out of fear of facing the financial risk of the penalty provision being imposed and losing all their sales and use tax revenues. Indeed, this record shows that at least two cities immediately dropped discussion of soda taxes when this bill became law. On the merits, the court found the penalty unlawful because it only penalizes charter cities that validly exercise their constitutional rights. The Department appealed.

Analysis: The Third Appellate District affirmed.

On ripeness, the appellate court agreed with the trial court's analysis. The court found the facts were “sufficiently congealed” to allow resolution of the facial challenge to the Act. A contrary finding would provide a framework for insulating laws from judicial review: “The state could enact laws — even constitutionally suspect ones — that threaten exorbitant penalties against those who violate their terms, and because no one would likely violate these laws for fear of the penalties, no claim would ever be ripe for review.” Charter cities rely heavily on sales and use tax revenues (commonly upwards of 1/3 of

their general funds), and none wanted to risk the penalty just to challenge it in court.

On the merits, the appellate court rejected the Department’s argument that the penalty is limited, applying only if the Groceries Act is the sole reason for finding a charter city’s tax prohibited. The appellate court first looked at historical context for the home rule provision and the Groceries Act. The court discussed the Bradley-Burns Uniform Local Sale and Use Tax Law of 1955 prohibiting local governments (including charter cities) from levying preempted taxes. This list was extended in 1996 to cover hotel bed taxes on meals served by hotels.

The Groceries Act took inspiration from the Bradley-Burns Act. The appellate court noted that in section 7284.12 of the Act, as in the 1996 amendment to Bradley-Burns, the Legislature evidenced a concern about its ability to preempt charter cities taxes. Like the structure of the Bradley-Burns Act, the Groceries Act first prohibits local governments from enacting certain types of taxes, but then as a backstop, threatens severe penalties if these prohibitions proved ineffective. The court found that both laws “seek to prevent charter cities from enacting certain taxes, either through a direct prohibition or, if that proves ineffective, through the threat of severe penalties.”

Based on this, the appellate court held section 7284.12 improperly threatens crippling penalties to chill charter cities from exercising their constitutional rights. As our Supreme Court has explained, “If a law has no other purpose ... than to chill the assertion of constitutional rights by penalizing those who chose to exercise them, then it [is] patently unconstitutional.” (*In re King* (1970) 3 Cal.3d 226, 235–236.) The appellate court said the Groceries Act’s intentional penalty on a charter city’s lawful exercise of its constitutional powers cannot stand.

The court rejected the Department’s effort to limit the scope of the penalty, finding no basis for it in the statutory text or in logic. The court said that if the Legislature wanted to only penalize a charter city’s tax that violates the Groceries Act, it would have said that. It didn’t: “[W]e find no rational reason for concluding that the Legislature wanted to impose penalties when a charter city’s tax violated the Groceries Act, but then wanted to impose no penalties when the city’s tax happened to violate some other law too.”

The court also found severance improper since the Department’s suggested edits would have created new penalties (penalties against counties and general law cities). Severance can only be used to correct offensive language that is grammatically, functionally, and

volitionally separable, not a tool to rewrite legislative intent.

A similar debate in Sacramento may be likely soon given the California Business Roundtable's resurrection for the 2024 ballot of the proposed initiative constitutional amendment bartered for a soda tax ban in 2018. Featured in that debate will be so-called "VMT taxes" which propose to tax sprawling developments to fund the transportation improvements they require.

II. GOVERNMENT CLAIMS ACT

A. *Malear v. State of California* (2023) 89 Cal.App.5th 213

Holding: The claim presentation requirement of the Government Claims Act is met even though plaintiff sued before the public entity defendants denied his government claim, where plaintiff subsequently filed an amended complaint as of right after the claim was denied but before he served the defendants the original complaint and before they appeared in the action. This constituted substantial compliance with the claim presentation requirement.

Facts/Background: San Quentin inmate Steven Malear filed a complaint alleging that defendants State of California and California Department of Corrections and Rehabilitation failed to take reasonable action to summon medical care for prisoners. The State transferred a large number of inmates from the Chino Institute for Men to San Quintin in May 2020. The transferees were at risk of developing serious COVID-19 infections (they were over the age of 65 and/or had underlying health conditions), and although they had tested negative two weeks earlier, several inmates had COVID-19 at the time of the transfer, with some showing symptoms before leaving the transfer bus. At the time, San Quentin had no cases of COVID-19 among its prisoners. A month later, San Quentin reported over 1,400 COVID-19 cases, including Malear, and some prisoners died from the disease.

Plaintiff alleged prison employees failed to take reasonable steps to summon immediate medical care; they failed to timely screen or test transferees before introduction into San Quentin; and failed to establish a proper medical treatment plan. Plaintiff sued for a class of all current and former San Quentin inmates diagnosed with COVID-19 from the time of the transfer to the present.

Before filing suit, Plaintiff properly filed a government claim with the State. He did not, however, wait for denial of his claim, instead filing the original complaint a few weeks later. His complaint failed to allege compliance with the Government Claims Act.

Just two days after he filed his original complaint, the State Government Claims Program notified plaintiff of rejection of his claim (within the 45-day window to do so).

Malear then waited another three months — within the six months permitted under Government Code § 945.6 after rejection of his claim — before filing an amended complaint as of right. It was identical to the original, except that it included allegations of his claim and the State’s rejection of it. He then served defendants with both complaints (the original and amended).

The State demurred, arguing Malear failed to strictly comply with the claim presentation statutes. They also attacked the substantive claims, arguing immunity and that Malear failed to state sufficient facts to withstand demurrer.

The trial court sustained the demurrer without leave to amend, concluding Malear sued prematurely and could not cure this defect by filing an amended complaint after denial of the claim. In other words, the trial court required strict compliance with Government Claims presentation requirements.

Analysis: The First District Court of Appeal reversed, publishing the portion of its opinion addressing claim presentation requirements.

The Court first looked to Government Code § 945.4, which requires that “no suit for money or damages may be brought against a public entity ... **until** a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected.” If the public entity provides written notice of its rejection of a claim, any suit must be brought against the public entity no later than 6 months after the notice is personally delivered or mailed. (Gov. Code, § 945.6, subd. (a)(1).) If written notice of denial is not given, plaintiff has 2 years from accrual of the cause of action to sue. (*Id.*, subd. (a)(2).)

The State argued this language, as well as *Lowry v. Port San Luis Harbor District* (2020) 56 Cal.App.5th 211, mandate strict compliance with the presentation requirements — that presentation and denial of a government claim are jurisdictional prerequisites for suit.

The plaintiff in *Lowry* sued a harbor district the same day he applied for leave to present a late government claim. When the late claim request was rejected, he served the complaint. The trial court dismissed, finding plaintiff failed to comply with the Act because he filed a complaint before his claim was rejected.

Malear distinguished *Lowry* because Malear timely filed an amended complaint as of right. The deficient, original complaint no longer had any legal effect as either a pleading or basis for judgment, and the amended complaint properly alleged denial of his government claim and was filed and served before defendants appeared. The court held these acts were sufficient to establish substantial compliance with the claiming requirement.

The court noted appellate courts have “long found compliance with the Act even though complaints were filed prematurely,” citing *Cory v. City of Huntington Beach* (1974) 43 Cal.App.3d 131 and the Supreme Court’s more recent *State of California v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234. Both allowed substantial, not strict, compliance, with claim presentation requirements in the absence of prejudice to the public agency defendant. *Malear* also recited *Bodde*’s pronouncement that noncompliance with the claim presentation requirement does not divest the trial court of subject matter jurisdiction. Here, the prematurity defect ceased to exist when the plaintiff filed his amended complaint, and because he did so less than 6 months after his claim was denied, the defendants “received every benefit which a provision for rejection prior to suit is intended to serve.”

Finally, the court concluded *DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, does not reject the substantial compliance test for cases involving prematurity defects. *DiCampli-Mintz* involved section 915, subdivision (a), which identifies the individuals who may receive claims on behalf of a local public entity (“clerk, secretary, or auditor”), and the acceptable methods of delivery (personal or mail delivery to these individuals, or “to the governing body at its principal office”). The issue there was whether claim presentation to the wrong entity substantially complies with the Act if the party served has a duty to notify the proper statutory agent. The Court of Appeal said “yes”; the Supreme Court reversed, concluding it was uncontested the claim was never delivered, mailed, nor actually received by a “clerk, secretary, or auditor.” The Supreme Court explained that finding substantial compliance under these circumstances would create uncertainty in the claim presentation process and disserve the statute’s purpose.

Malear clarified that *DiCampli-Mintz* does not abrogate the substantial compliance doctrine in all cases, as the State argued. The requirements and purpose of section 945.4 are met on *Malear*'s facts — timely claim presentation provided the State sufficient information to investigate and act on the claim before litigation, and the State could consider its impact on fiscal planning to avoid similar liabilities in the future. Importantly, *Malear* noted the litigation did not begin in earnest until the Plaintiff served the amended complaint on the State, when its investigation of the claim was complete.

The court declined to speculate on the merits of *Malear*'s action, simply noting it presents a novel theory of public entity liability under Government Code section 845.6 and finding the allegations sufficient to withstand demurrer.

Malear is narrow. It makes clear that substantial compliance depends upon the facts and the particular Government Claims Act presentation requirements at issue. The takeaway is that public agencies should themselves strictly comply with the Act and demur when a plaintiff's noncompliance may prejudice the agency's defense.

III. ELECTIONS

A. *Lathus v. City of Huntington Beach* (9th Circuit 2023) 56 F.4th 1238

Holding: A volunteer member of a municipal advisory board is the “public face” of the elected official who appointed her to the body and may be fired for purely political reasons. The appointing elected official's dismissal of the volunteer member for her failure to immediately denounce a violent group with whom she had appeared did not violate the First Amendment.

Facts/Background: Huntington Beach City Councilperson Kim Carr appointed Shayna Lathus to the city's Citizen Participation Advisory Board (“CPAB”) after Lathus lost a 2018 election for a Council seat. Under the Municipal Code, each councilperson appoints one member to the 7-person CPAB and may remove that member without cause. The CPAB's is to “provide citizen participation and coordination in the City's planning processes, with an emphasis on addressing issues faced by low- and moderate-income households.”

After her appointment, Lathus was photographed at an immigrants' rally standing near individuals whom Carr believed to be Antifa members. Carr instructed Lathus to publish a statement on social media denouncing Antifa. Lathus did so, believing her CPAB title depended on it. She made a public statement condemning violence and discussing the importance of civic engagement, but didn't specifically mention Antifa. Carr found the statement insufficient, and removed Lathus from CPAB, explaining "those that do not immediately denounce hateful, violent groups do not share my values and will not be a part of my team."

Lathus sued the City for retaliation for exercising her First Amendment rights to free speech, association, and assembly, and claiming that Carr's demand for a public statement amounted to unconstitutionally compelled speech. In addition to damages, Lathus sought reinstatement.

The trial court granted a motion to dismiss. Citing *Blair v. Bethel School District*, 608 F.3d 540 (9th Cir. 2010), the trial court found that Carr was permitted to consider the political ramifications not only when she appointed Lathus, but also when she removed her.

Analysis: The Ninth Circuit affirmed, identifying the critical issue as whether Lathus was effectively a "political extension" of Carr on the CPAB. Because Lathus was effectively Carr's "public face" on the CPAB, it affirmed.

The Court noted that Lathus's activity was protected by the First Amendment. The Court distinguished *Blair*, where an elected school board removed a member from the post of vice president after he publicly criticized the school superintendent. The Court found no First Amendment violation as Blair "retained the full range of rights and prerogatives" of an elected board member, and his fellow board members were likewise exercising their right to replace Blair with someone that represented the board majority's views. Here, Lathus' volunteer status did not by itself strip her of First Amendment protection. Her dismissal was not simply the result of a political leadership election.

However, the Court found *Blair* instructive in its holding that government officials' First Amendment rights are not absolute. For example, the 9th Circuit noted an appointed public official can be removed for engaging in otherwise protected First Amendment activity if political affiliation is an appropriate requirement for effective performance of his or her office. The Court considered whether Lathus' CPAB service fit this description.

Examining the Municipal Code, the Court noted the CPAB advises on matters of policy and solicits public input, and each member is appointed and removable by one councilmember. The CPAB members also speak to the public and other policymakers for the appointing councilmember. In other words, Lathus was Carr’s “public face” on the board, and the public was entitled to assume that she spoke for Carr. Also, because CPAB was a conduit between the community and Council on issues regarding low- and middle-income housing and development, a councilperson was entitled to an appointee who represents her views and priorities. Because Lathus could undermine Carr’s credibility and goals, she could be dismissed for lack of political compatibility.

On the claim of compelled speech, the Court reasoned the same. Lathus argued that a coerced statement about her rally attendance was a condition to keeping her position. But, for the same reasons, the Court said an elected official can compel the public speech of her representative where that speech will be perceived as the elected official’s own. “Just as Carr was entitled to political loyalty from her appointee to the CPAB, she was also entitled to compel that appointee to espouse her political philosophy.”

The opinion has been criticized for its potential impact on citizen participation advisory boards, who now have to face the choice between serving their communities or suppressing their own views. Of course, on the other side of the coin, this was nothing more than an individual political appointment and removal, not official government action or an impediment to Lathus expressing her views as an individual.

B. *Law Office of Carlos R. Perez v. Whittier Union High School District* (2023) 87 Cal.App.5th 463

Holding: A law firm was entitled to collect its “cost of work product” under the California Voting Rights Act (CVRA) with respect to a demand letter resulting in a school district changing from at-large to district Board elections, even though the law firm only identified prospective, not retained, plaintiffs and the law firm paid for the work product costs.

Facts/Background: Under the CVRA’s safe harbor procedure, a prospective CVRA plaintiff may notify a political subdivision by demand letter before filing suit to challenge an at-large election system. If the political subdivision declares its intent to change to a district-based election system within a 45-day cure period (and does so within 90 days),

the “prospective plaintiff” who gave notice “may within 30 days of the ordinance’s adoption, demand reimbursement for the cost of the work product generated to support the notice.” Generally, these include attorney fees and costs for demography services, capped at \$30,000 (adjusted for inflation since 2017) for all prospective plaintiffs.

On September 2, 2018, the Perez law firm sent a letter to Whittier Union High School District demanding conversion from at-large to district elections of trustees. The law firm provided statistical evidence to support its claim that voting within the District was racially polarized and at-large elections disadvantaged Latino voters. Within the safe harbor period, the Trustees enacted Resolution No. 1819-11 proposing to convert to districts. After conducting public hearings on how to redraw its districts, the District officially adopted the change in February 2019.

The Perez firm immediately sought \$30,000 for its fees and other costs relating to the demand letter, which included time spent by the lawyers communicating with its client on case strategy, legal research, and meetings with expert demographer Jesus Garcia, as well as costs of purchasing GIS data and software licenses.

The District sought to avoid fees, arguing that the Perez firm had not identified a client for whom they threatened suit and the statute did not allow recovery of the expert’s expenses.

The firm petitioned for writ of mandate. The trial court denied the petition, finding section 10010 allows fees to a “prospective plaintiff” who has formally retained counsel. Here, there was no evidence the law firm actually represented anyone, nor that a prospective plaintiff incurred the costs and fees of the demand letter. In other words, for the \$15,000 demographer expense, “the law firm did not pass the cost onto a prospective plaintiff **who paid the expense** and then was entitled to reimbursement.” (Emphasis by Court of Appeal.) The law firm later sought attorney fees and costs under CCP section 1021.5, which the trial court also denied because the firm did not prevail on the petition or obtain a favorable judgment.

Analysis: The Second District reversed.

First, it found the trial court had applied an overly restrictive interpretation of the CVRA’s “prospective plaintiff” requirement. Section 10010 is satisfied by the law firm having likely clients — it need not name an individual who had formally retained the

firm. In the trial court, the firm provided evidence that no fewer than four community leaders, including Perez’s wife, were willing to sue if the District did not comply with the demand letter. The Court said this was enough — “prospective” “is a term of anticipation, not certainty.” The Court contrasted this to a situation where the law firm “dreamed up a legal claim for a hypothetical client.” Thus, the work was done for a “prospective plaintiff” for purposes of the CVRA.

Second, the appellate court concluded the “cost of work product” for which a prospective plaintiff is entitled to reimbursement is not limited to out-of-pocket expenditures by the prospective plaintiff, but also includes costs an attorney advances. The Court found nothing in either the language or intent of the CVRA to require that a plaintiff actually incur the cost for the statute to require reimbursement. The court explained that the allocation between lawyer and client of who pays costs, and when, is “a matter of free contract.” Lawyers may choose to bear costs on contingency. And attorneys’ fees may be awarded, even though the plaintiff was either never obligated to pay fees or could defer them to the end of litigation. “In these situations, nothing would be gained by requiring the lawyer to force the client to pay the costs merely to obtain reimbursement of those costs.” Such limitation, the Court said, would turn the CVRA on its head. It is “a remedial statute designed to equalize the voting power of disenfranchised minority communities that traditionally lack socioeconomic resources.” The Legislature could not have intended to require poor clients to front substantial costs before receiving section 10010’s benefits.

The appellate court remanded determination whether attorney’s fees are recoverable as costs of work product, and whether the firm was entitled to fees under section 1021.5.

While the constitutionality and application of the CVRA remains subject to challenge in federal and state courts, agencies with an at-large election system remain susceptible to CVRA demand letters, with the concomitant obligation to reimburse a prospective plaintiff for his work product costs. Cities should calendar all deadlines that flow upon receipt of a CVRA demand letter, and remember that while reimbursement of fees is statutorily mandated, it remains the plaintiff’s duty to prove those costs with detailed evidence.

C. **Clark v. Weber (9th Circuit 2022) 54 F.4th 590**

Holding: California’s recall procedure does not violate the 14th Amendment’s one-person, one-vote principle, nor the right to vote for a candidate of choice. The recall law’s requirement that an incumbent receive majority vote to remain in office, whereas a successor can be elected with mere plurality, does not violate the one-person, one-vote requirement. That the recalled officer is not permitted to appear as a successor candidate on the recall ballot does not violate a voter’s right to vote for a candidate of his or her choice.

Facts/Background: Article II of the California Constitution governs recalls. Until recent statutory amendments,² a recall ballot typically posed two questions. First, whether the official should be removed from office, followed by the option to choose “yes” or “no”. If a majority votes “yes,” the official “shall be removed from office upon the qualification of his successor” under Elections Code § 11384. The second question asks voters to choose a successor from a list of candidates. Pursuant to Article II, § 15(c), the official subject to recall may not be a candidate in the recall election. When the recall vote is successful, the candidate receiving the most votes on question two will be the successor, even if he or she wins by only a plurality.

A.W. Clark filed a § 1983 challenge to the September 2021 recall election for Governor Newsom, claiming the process violated his 14th Amendment due process and equal protection rights by denying him an equally weighted vote and his right to vote for his candidate of choice. Clark intended to vote “no” on the first questions, but wanted to vote for Governor Newsom as the successor candidate.

The district court denied Clark’s motion for preliminary injunction, and the Ninth Circuit affirmed. The recall election proceeded on September 14, 2021, when a majority of the voters answered “no” on question one, defeating the effort to remove Governor Newsom. Because Clark sought both prospective relief and nominal damages, the court found this did not moot the case.

Following the recall election, Secretary of State Weber moved to dismiss, which the trial granted for the same reasons it had denied preliminary relief. Clark appealed.

² Elections Code, § 11382, effective January 1, 2023 (Ch. 790, Stats. 2022).

Analysis: The Ninth Circuit affirmed.

First, the Court agreed that the recall procedures do not violate the 14th Amendment's one-person, one-vote requirement. Clark argued that voters who support the incumbent only get to vote once, whereas voters who favor the incumbent's removal can cast two votes ("yes" on the recall, and then a vote on the successor). The Court rejected this since even those who vote "no" on the recall can still select their preferred successor from the list of qualified candidates. "[A]ll voters enjoyed an equal right to vote on both questions, and all votes cast on each question were afforded equal weight."

The Court likewise rejected Clark's assertion of vote dilution based on the majority removal requirement, as contrasted with the plurality successor threshold. The Court clarified that the ballot election process is essentially two separate, simultaneous elections. The first determines whether the incumbent is removed from office; the second chooses a successor. But every vote, according to the Court, is weighted equally in each election, and "the right to equal representation is not violated simply because the two elections require different vote thresholds or because one election is decided by a plurality vote."

The Court also found unpersuasive Clark's challenge to Article II, § 15(c) based on his inability to choose a candidate of his choice. Applying *Burdick v. Takushi* (1992) 504 U.S. 428, the Ninth Circuit found prohibiting an incumbent from running in a recall election does not severely restrict the right to vote. The Court analogized this to California's term limits on state officials, upheld in *Bates v. Jones* (9th Cir. 1997) 131 F.3d 843. There, the Court held term limits do not amount to a severe restriction on the right to vote because they were a "neutral candidacy qualification, such as age or residence" and made "no distinction on the basis of the content of protected expression, party affiliation, or inherently arbitrary factors such as race, religion, or gender."

The restriction on a recall's successor candidates is similarly neutral. In fact, the Court found Article II, § 15(c)'s restrictions less burdensome than term limits since it only bars an incumbent for one election. Too, the Court found California asserted a sufficient interest in maintaining the efficacy of its recall procedure: it "prevent[s] the anomalous result that an officer recalled by a majority would be immediately returned to office by a slim plurality." The provision thus prevents an endless cycle of recall elections.

Clark also argued Article II, § 15(c) conflicts with California’s later-enacted Proposition 14 (the Top Two Candidates Open Primary Act), which he contended invalidated § 15(c)’s plurality vote by requiring only two candidates for congressional and statewide office appear on the ballot, ensuring a winner by majority vote. The Ninth Circuit found the district court had not abused its discretion to refuse supplemental jurisdiction over the state law claim since there was no issue of federal constitutional law cognizable under § 1983.

Clark received support from legal academics, including Berkeley Law Dean Erwin Chemerinsky and Law Professor Aaron S. Edlin, who argued that because Newsom could receive far more votes than any other candidate but still be removed from office, the structure is not only unfair to the governor, but to voters alike. They envisioned a scenario in which, if Newsom were recalled, a candidate winning the plurality of votes on the second question received fewer votes than a minority of people voting not to support the recall in the first question.

IV. OPEN GOVERNMENT

A. *Travis v. Brand* (2023) 14 Cal.5th 411

Holding: The standard for fees under Government Code section 91003(a) of the Political Reform Act is different for prevailing plaintiffs and prevailing defendants. A prevailing defendant cannot recover fees absent a showing the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so.

Facts/Background: Redondo Beach residents approved Measure G in 2010 to authorize a \$400 million redevelopment of the City’s King Harbor and Pier. The City made an exclusive agreement for the project with private developer CenterCal Properties, LLC. Project opponents labelled the project “Walmart by the Sea” and qualified an initiative (Measure C) to place zoning restrictions on the project. Voters approved Measure C on the March 7, 2017 ballot.

These events triggered lawsuits, including one for injunctive relief against Measure C supporters for failing to disclose the entities supporting the measure as the Political Reform Act requires. These included a PAC, Rescue Our Waterfront, formed primarily to support Measure C. Other supporters were the Mayor and a Councilmember who allegedly controlled the PAC.

The trial court ruled for defendants after a bench trial, finding the PAC was a general-purpose committee under Government Code section 82027.5 — not primarily formed to support Measure C — and that neither the Mayor nor the Councilmember had significant control or influence over the PAC. The trial court awarded defense costs and fees under Government Code section 91003(a) of almost \$900,000, finding the action was frivolous, unreasonable, and groundless and filed solely to stifle defendants’ free speech.

The Second District Court of Appeal affirmed, holding that section 91003(a) grants trial courts discretion to award fees and costs “to a plaintiff or defendant who prevails.” According to the appellate court, a single standard applies equally to prevailing plaintiffs and defendants. Section 91003(a) allows the court discretion to award fees and costs “to a plaintiff or defendant who prevails.” It rejected two decisions — *People v. Roger Hedgecock for Mayor Com.* (1986) 183 Cal.App.3d 810 and *Community Cause v. Boatwright* (1987) 195 Cal.App.3d 562 — requiring a prevailing defendant show an action is frivolous, unreasonable, or without foundation to recover fees.

Analysis: Resolving this split of authority, the California Supreme Court adopted the asymmetrical standard of *Hedgecock* and *Boatwright*.

Plaintiff argued it must be harder for a prevailing defendant to collect fees to serve the purpose of the Political Reform Act. A contrary rule would chill private enforcement of the Act. The Supreme Court agreed. The Court analogized, first, to fee standards under Title VII of the Civil Rights Act prohibiting employment discrimination. In *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978), the fee statute was also silent on the applicable standard. *Christiansburg* emphasized that a private plaintiff in a Title VII action is the chosen instrument of Congress to vindicate the statute’s purpose, and a fee to a prevailing plaintiff is assessed against a violator of the law. These justifications do not apply equally to a prevailing defendant. Instead, allowing defendants to recover their fees simply because a plaintiff does not prevail would undercut Congress’ efforts to promote enforcement of the statute and deter employment discrimination. The Court thus added a necessary finding the claim was frivolous, unreasonable, and groundless. It also noted application of the *Christiansburg* standard to FEHA in *Williams v. Chino Valley Independent Fire District* (2015) 61 Cal.4th 97, to achieve the same policy goals.

These same justifications promote an asymmetrical standard for fees under the Political

Reform Act. The Court discussed how the Political Reform Act is vitally important to California’s republican form of government. The financial disclosure requirements seek to ensure a better-informed electorate and to prevent corruption. The Court noted that one of the Act’s objectives is that “adequate enforcement mechanisms should be provided to public official and private citizens in order that this title will be vigorously enforced.” (citing Gov. Code, § 81002, subd. (f).) And one method of enforcement is through private actions for injunctive relief. Thus, voters intended it would be “robustly enforced to promote the important public policy of transparency.”

Both *Hedgecock* and *Boatwright* adopted the *Christiansburg* standard to encourage private enforcement of the Political Reform Act. They reasoned that a rule allowing the routine award of attorney fees to prevailing defendants could discourage all but the most airtight claims. In fact, an asymmetrical rule was even more warranted under the Political Reform Act than other statutes since the actionable wrong is the adulteration of the political process.

This Court applied the *Christiansburg* standard for these same reasons: “[a] rule subjecting unsuccessful plaintiffs to substantial financial risk in Political Reform Act cases, where the plaintiff often will have suffered no particularized harm, would discourage all but a few from seeking to enforce laws vital to ensuring transparency in the political process.” A non-prevailing plaintiff is guilty only of bringing an unsuccessful suit. The Court found no overriding equitable reason to award fees to a prevailing defendant in a Political Reform Act action unless the lawsuit “was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so.”

We may continue to see application of this asymmetrical fee standard beyond Title VII, FEHA, and now Political Reform Act cases. It has been applied in other contexts where private enforcement is encouraged — the Clean Water Act, Real Estate Settlement Procedures Act, ADA, Endangered Species Act, and Voting Rights Act. The Court affirmed that it makes no difference whether a fee provision’s text treats the parties alike. Identifying the proper standard to guide the trial court’s discretion depends instead on a construction of the statute in conjunction with the purpose of the statutory scheme.

**B. *Freedom Foundation v. Superior Court of Sacramento County*
(2022) 87 Cal.App.5th 47**

Holding: (1) The exemption to disclosure under the Public Records Act for agency records related to activities governed by the Dills Act relating to collective bargaining by the State is not limited to documents revealing an agency’s deliberative processes. The exception also covers any records that reveal the agency’s impressions, evaluations, opinions, recommendations, meeting minutes, research, work products, theories, or strategies for an agency’s participation in collective bargaining. (2) Public documents are in an agency’s “possession” if it actually possesses them, or has the right to control the records either directly or through another. Mere access to another’s records is not enough.

Facts/Background: In January 2020, Freedom Foundation submitted a PRA request to CalHR seeking documents relating to the total number of state employees paid by the State in each month in 2018 and 2019, and for each collective bargaining unit / labor organization, the number of employees paid by the State and amount of pay and union dues or representation fees withheld by the State from employees’ pay. It filed a second PRA seeking detailed personal information for each employee in specified bargaining units (e.g., job classification, employee identification numbers, pay rate/salary, email address and work location). CalHR declined to disclose documents, arguing they were protected under the Ralph C. Dills Act and Government Code section 6254, subd. (p)(1) [now § 7298.405]. CalHR also responded that CalHR does not control State Controller’s Officer (SCO) data, which the plaintiff must get from SCO.

Freedom Foundation filed a petition for writ of mandate and complaint for declaratory and injunctive relief seeking to compel Department of Human Resources (CalHR) to disclose the records. CalHR opposed, submitting declarations explaining how and why its labor relations division obtains custom reports of statewide data from SCO to evaluate bargaining proposals, develop strategies for collective bargaining, and inform and advise the Director of Labor Relations, and explaining its limited access to SCO information.

The trial court denied the petition and complaint, finding the information on CalHR’s evaluations, opinions, strategy, and bargaining positions is confidential. The court found persuasive that the raw data petitioner sought was not maintained separately from collective bargaining strategy documents. The court concluded CalHR was not required to create a separate document, and had no obligation to search SCO’s database for

responsive documents.

Freedom Foundation sought an appellate writ (the sole means of appellate review under the Public Records Act), arguing the collective bargaining exemption under Gov. Code § 6254, subdivision (p)(1) [§ 7298.405] is limited to information that reveals an agency's deliberative processes. They also argued CalHR was obligated to search SCO's database in response to the records requests.

Analysis: The appellate court denied relief on all grounds.

First, the court rejected Freedom Foundation's argument it sought aggregate data, not all of which revealed CalHR's deliberative process. Section 6254, subdivision (p)(1) [§ 7298.405] exempts from disclosure "records of state agencies related to activities governed by" the Dills Act "that reveal a state agency's deliberative processes, impressions, evaluations, opinions, recommendations, meeting minutes, research, work products, theories, or strategy." (Emphasis by Court of Appeal.) Petitioner argued this list all falls within deliberative processes, and that each listed item should be interpreted relative to the first. In other words, that "deliberative" modifies each item in the list. The appellate court disagreed.

The court looked to the statute's words and context, construing the PRA broadly to effectuate its purpose to further public access to information, but also deferring to the Legislature's clearly expressed intent to exclude or exempt information. The court found section 6254, subdivision (p)(1) [§ 7298.405] unambiguous — it is not limited to documents which reveal an agency's deliberative processes, but also covers any records that reveal the agency's impressions, evaluations, opinions, recommendations, meeting minutes, research, work products, theories, or strategies. Thus, if a record implicates any of the listed items as part of an agency's participation in collective bargaining, it is exempt. The court explained that to depart from this literal reading of a clearly worded statute would violate the separation of powers.

Freedom Foundation argued that at a minimum, they were entitled to redacted documents revealing only the aggregate information sought. While public agencies are generally required to produce portions of documents not subject to exemption, the court explained that they are under no obligation to attempt "selective disclosure" of records that are not reasonably segregable. Even if other information could be redacted from the document over which CalHR asserted the collective bargaining privilege, disclosing that

information would still reveal CalHR’s research and evaluations conducted pursuant to the Dills Act.

Finally, CalHR was not required to search SCO’s databases. In evaluating CalHR’s potential “possession” of these documents, the court explained section 6253(c) [§ 7922.535] covers both actual and constructive possession. An agency has constructive possession of records if it has the right to control the records, either directly or through another. Here, SCO had actual possession of the database information. CalHR had no power or authority to manage, direct, or oversee that information. The court found CalHR’s mere ability to access the SCO database was not enough. Such a rule would effectively transform any privately held information that a state or local agency has contracted to access into a disclosable public record.

V. MISCELLANEOUS

A. *Kirk v. City of Morgan Hill* (2022) 83 Cal.App.5th 976

Holding: A Morgan Hill City ordinance requiring the theft or loss of a gun to be reported within 48 hours is not preempted by a state law requiring missing guns be reported within 5 days. Local governments may impose stricter gun regulations than state law, and the City ordinance does not conflict with the more permissive state standard for one can comply with both.

Facts/Background: As part of the Safety for All Act of 2016 (Prop. 63), Penal Code section 25250, subdivision (a) requires notification when a gun is lost or stolen to “a local law enforcement agency in the jurisdiction in which the theft or loss occurred.” The owner or possessor of the gun must report theft or loss within 5 days of when they knew or reasonably should have known the firearm was stolen or lost. A first offense is subject to a \$100 fine; a second, a \$1,000 fine; and a third, up to a 6-month jail term. (Pen. Code § 25265.)

Morgan Hill adopted its own reporting requirement in 2018. It requires a reporting to the Morgan Hill Police Department of a missing or stolen gun within 48 hours. This requirement applies if the gun owner lives in Morgan Hill or the loss occurs there. A reporting violation is a misdemeanor punishable by up to 6 months in jail, or a \$1,000 fine. The City staff supported a shorter reporting period since early notification allows police to more readily identify stolen weapons during their investigations, and therefore

reduces the chance those weapons will be used in future crimes.

Plaintiff Kirk and the California Rifle & Pistol Association sought declaratory relief action that State law preempted the City ordinance. The Giffords Law Center to Prevent Gun Violence defended the City.

The trial court found no preemption, granting the City summary judgment.

Analysis: The Sixth District Court of Appeal affirmed.

The appellate court first noted that cities have broad authority to make and enforce their own laws under the California Constitution. While local laws must not conflict with state laws, local legislation conflicts with statute only if it duplicates or contradicts state law, or if it intrudes in an area the Legislature has intended to occupy completely.

“Duplication” means that the local law must be coextensive with the state law — in other words, both laws must impose the same requirement or prohibition. Since the Morgan Hill law imposes a more stringent requirement —two days reporting period, instead of five — the appellate court found the laws are not duplicative. The court rejected plaintiffs’ theory that duplication resulted since a criminal conviction for violating the ordinance would bar prosecution for violation of the state law on double jeopardy grounds. Not so, the court said, since it is possible to violate the ordinance without violating state law (i.e., by reporting violation on day three). Duplication only occurs where the ordinance covers no new ground — and here it does since it mandates a shorter reporting period.

Nor does the ordinance contradict state law. The court noted that a person who obeys the ordinance’s command to report a missing gun within 48 hours will not violate Penal Code § 25250’s five-day rule. And the 48-hour requirement does not otherwise obstruct the purpose of the state law, which is to ensure prompt reporting of missing firearms. A shorter reporting period is, of course, consistent with this purpose.

Finally, the court found there was no indication the local law intrudes on an area the electorate intended to completely occupy by initiative. The statute expresses no intent to occupy the field of gun regulation. Nor did the court find implied intent to do so. It noted that the California Supreme Court has already recognized significant local interests in firearm regulation. While the Legislature has preempted certain areas of gun regulation

— like licensing requirements and the manufacture, possession, and sale of imitation firearms — it has generally allowed local regulation of gun control. And the state concern reflected in the statute is merely that local law enforcement authorities be promptly notified of a lost or stolen gun. The statute, according to the court, is “entirely tolerant of local regulation furthering its purpose by requiring even earlier notification.”

The City hailed the victory as progress toward more restrictive local regulations for gun safety. The City’s ordinance also requires the safe storage of firearms and a ban on ammunition magazines that can hold more than 10 rounds, which were not tested in the lawsuit. We will continue to see an abundance of litigation on state versus federal handgun regulations, in light of the U.S. Supreme Court’s decision last year in *New York State Rifle and Pistol Association v. Bruen*, 142 S.Ct. 2111 (June 23, 2022) establishing a new standard for evaluating firearms regulations under the Second Amendment. Those cases have focused to date primarily on the constitutionality of California’s 1999 Unsafe Handgun Act (litigating the propriety of restricting chamber load indicators, magazine disconnect mechanisms, and microstamping). E.g., *Renna et al. v. Bonta et al.*, 20-CV-02910 (S.D. Cal., filed Nov. 10, 2020); *Boland et al. v. Bonta et al.*, 23-55276 (9th Cir., filed March 7, 2023).

B. *Trujillo v. City of Los Angeles* (2022) 84 Cal.App.5th 908

Holding: A CCP 998 settlement offer automatically expires when a trial court orally grants the offeror’s summary judgment motion. Plaintiff’s acceptance of the City’s CCP 998 offer after the trial court orally granted summary judgment to the City, but before judgment was entered, was inoperative.

Facts/Background: Plaintiff Trujillo sued the City of Los Angeles for a dangerous condition of a sidewalk. Trujillo tripped on an uneven sidewalk in a residential area while jogging. The City had not received any complaints or requests for repair of that sidewalk section. In September 2020, the City moved for summary judgment, asserting it was not a “dangerous condition” because the differential in elevation between the two sidewalk squares was trivial.

The court set a hearing on the summary judgment motion. A few days earlier, the City made a 998 offer to settle the case for \$30,000 — plaintiff had not responded to it at the time of the hearing and was still within the statutory 30 days to accept. A 998 offer is

generally open for 30 days unless unequivocally rejected or formally revoked; if not accepted by the end of the 30-day period, it is deemed rejected by operation of law.

At the hearing, the court orally granted the City's motion, and the hearing ended by 3:18 p.m. The court then issued a minute order including its oral ruling. Immediately after the hearing, at 3:22 p.m., plaintiff's counsel emailed the City purporting to accept the 998 offer. Plaintiff's counsel then filed the executed offer with the court just 7 minutes later. The City objected to plaintiff's belated attempt to accept its 998 offer after the court had orally granted the City summary judgment.

Two months later, the trial court entered judgment for the City, implicitly ruling that plaintiff's acceptance of the City's 998 offer was inoperative. Plaintiff filed a motion to compel the trial court to enter judgment on the 998 offer. The trial court denied the motion. The court said it orally issued a ruling granting the City's motion for summary judgment on the merits, that its oral ruling reflected a determination that plaintiff's action lacked merit, and that ruling terminated plaintiff's power to accept the City's offer. Accordingly, plaintiff's purported acceptance of the 998 offer did not form a valid compromise agreement. Plaintiff appealed.

Analysis: The Second District Court of Appeal affirmed.

The appellate court considered when, if at all, a trial court's grant of summary judgment terminates an outstanding 998 offer. The parties offered multiple rules: (1) when the summary judgment hearing commences; (2) when the court orally rules; (3) when the court memorializes its oral ruling in a minute order; (4) when the court enters judgment; or (5) only when the statutory 30 days expire.

The court looked to section 998's text and purpose. First, the statute states an offer may be made "prior to the commencement of" trial or arbitration "of a dispute to be resolved by arbitration." Because the sole purpose of trial is also to resolve disputes, a section 998 offer may only be made when a dispute remains to be resolved. Citing in *Blair v. Pitchess* (1971) 5 Cal.3d 258, the appellate court explained a grant of summary judgment resolves **all disputes** in a case, providing such a ruling preclusive effect in future litigation. So, no 998 offer is operative after a grant of summary judgment.

Second, the appellate court found section 998's purpose supports this result. Section 998 is intended to encourage the early settlement of disputes, such that parties can eliminate

the costly uncertainty inherent in litigation. According to the court, “[i]f a party has the option of accepting a settlement offer **even after** a court has resolved the dispute the litigation presents, then that party has no incentive whatsoever to accept that offer before the court does so.” A rational party would just wait and see how the court rules — and then accept the offer to “resurrect its defunct claims.” This would discourage early settlement, undermining section 998’s purpose. Because a dispute is resolved and the outcome of the litigation becomes certain and known when a trial court orally grants summary judgment, that is when an outstanding 998 offer lapses.

The Court rejected the contention that a summary judgment ruling must be written, not oral, to extinguish a 998 offer since CCP section 437c allows oral rulings. So, too, it rejected the argument that the court must first enter judgment or a minute order as these steps take time to complete. The Court also declined to accept that commencement of a summary judgment hearing was enough — it is the grant of the motion that resolves the dispute and terminates a 998 offer. All of these proposals would promote gamesmanship, not advance early settlement.

Because plaintiff did not communicate her acceptance of the 998 offer until after the trial court orally granted summary judgment to the City, the acceptance was not effective.

C. *Brianna Bolden-Hardge v. Office of the California State Controller, et al.* (9th Circuit 2023) 63 F.4th 1215

Holding: The district court improperly dismissed plaintiff’s complaint challenging the State Controller’s Office’s refusal to allow a religious addendum to the public-employee loyalty oath set forth in the California Constitution. She adequately stated claims under Title VII of the Federal Civil Rights Act and the California Fair Employment and Housing Act, and she should have been granted leave to amend her claims under the Free Exercise Clause of the federal and state constitutions.

Facts/Background: When Brianna Bolden-Hardge was offered a position at the California Office of the State Controller, she was asked to take California’s loyalty oath. Art. XX, § 3 of the California Constitution requires all public employees, except those “as may be by law exempted,” to swear or affirm to “support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic” and to “bear true faith and allegiance” to those constitutions.

As a devout Jehovah's Witness, Bolden-Hardge objected to the oath because it would violate her religious beliefs by requiring her to pledge primary allegiance to the federal and state governments rather than to God and to affirm her willingness to engage in military action despite her pacifist convictions. She requested an accommodation from the Controller's Office to sign the oath with an addendum specifying that her allegiance was first to God, and that she would not take up arms. The Controller's Office rejected this proposal, rescinding the job offer. Bolden-Hardge returned to a lower-paying job at the California Franchise Tax Board, which permitted her addendum.

Boden-Hardge sued the Controller's Office and the California State Controller in her official capacity, alleging their refusal to allow her proposed addendum to the loyalty oath violated Title VII for failure-to-accommodate her religion and disparate impact, FEHA for failure to accommodate, and the federal and state Free Exercise Clauses. She sought declaratory relief and damages (for all but the state Free Exercise claim). The State defendants moved to dismiss for lack of subject matter jurisdiction and failure to state a claim.

The federal district court granted the motion, denying leave to amend.

Analysis: The Ninth Circuit reversed.

The Court held plaintiff had standing to seek damages. As pleaded, she lacked the actual and imminent threat of future injury to seek prospective relief, though she could seek to cure this defect by amendment. Generally, a plaintiff lacks standing when there is no indication of a continued wish to work for that employer; were plaintiff to allege she sought reinstatement with the Controller's Office, prospective relief would be available. Plaintiff could seek damages against the Controller's Office under Title VII, which abrogates states' sovereign immunity, and FEHA, which subjects state employers to damage claims. As pleaded, she could not pursue damages for her Free-Exercise claim since § 1983 does not provide a cause of action to sue state entities or state officials in their official capacities. But, the Court held she should have been permitted leave to amend to seek damages from the State Controller in her individual capacity. Because plaintiff had standing to seek damages under Title VII and FEHA, the Court had jurisdiction to consider the merits of those claims.

Title VII and FEHA forbid an employer from denying an applicant a job because of

religion. Both statutes require employers to accommodate job applicants' religious beliefs unless doing so would impose an undue hardship. A burden-shifting test applies to both statutes. In essence, the employee must first plead a prima facie case of failure to accommodate religion. If the employee is successful, the employer can show it was nonetheless justified in not accommodating the employee's religious beliefs or practices, or that it could not reasonably accommodate the employee without undue hardship.

The Court held plaintiff pleaded a prima facie case of failure to accommodate religion under both statutes. She adequately alleged she held a bona fide religious belief that conflicted with the "faith and allegiance" component of the loyalty oath. The Controller's Office argued the loyalty oath does not require its takers to pledge loyalty to government over religion, and so there is no conflict. The Court disagreed. The burden to allege a conflict with religious beliefs is fairly minimal. The Court noted the apparent rationale for the oath requirement is to ensure that if an oath taker's religion ever comes in conflict with the federal or state constitutions, religion must yield. The Court said there is clearly an actual conflict: "[i]f an employee cannot claim 'first loyalty to God,' she must, by implication, owe first loyalty to something else — here, the federal and state constitutions."

The Court rejected the Controller's Office's argument undue hardship should be presumed. This, the Court said, is a triable affirmative defense. Defendants sought to apply a presumption for **private** employers, immunized from liability for failure to accommodate if accommodating the employee's religious beliefs requires the employer to violate federal or state law. (*Sutton v. Providence St. Joseph Med. Ctr.* (9th Cir. 1999) 192 F.3d 826). The Court declined to extend this to public employers for policy reasons: "[T]o exempt the Controller's Office from a federal accommodation requirement **solely** because the requested accommodation would violate state law would essentially permit states to legislate away any federal accommodation obligation, raising Supremacy Clause concerns." (Original emphasis.) And here, there was no evidence that allowing the requested addendum to the loyalty oath would in fact violate State law considering other agencies were willing to do so.

The Court also held that plaintiff adequately pleaded disparate impact. On the first prong of the test requiring a showing of a significant disparate impact on a protected class or group, the Controller's Office argued statistics are strictly necessary. The Court disagreed. A plaintiff need not support a claim with statistics at the pleading stage if the disparate impact is obvious. The Court accepted as true Bolden-Hardge's allegation that

other Jehovah's witnesses share her belief, and thus the oath requirement would impact all or substantially all Jehovah's Witnesses seeking government employment.

Moreover, at the pleading stage, the Court held the Controller's Office did not show it was entitled to a business necessity defense. The Controller's Officer argued the loyalty oath is a business necessity because public employees must be committed to working within and promoting the fundamental rule of law while on the job. The Court recognized this defense might be proven later, but this was not apparent from the complaint or judicially noticeable documents. And could be questioned given the State's alleged practice of exempting some employees from the oath's requirement.

Of course, the Ninth Circuit's decision simply revives this lawsuit which will continue on remand. The Ninth Circuit acknowledged the Controller's Office may have viable defenses. Due to the nature of the claims, summary judgment seems unlikely.