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File No.: Citizens2016

May 22, 2018

Court of Appeal-State of California
Fourth Appellate District
750 B Street, Third Floor
San Diego, CA 92101

Re: Citizens Oversight, Inc., et al. v. Michael Vu, et al
Case No.: D071907

Honorable Court:

This letter brief responds to the Court's directive, when, on May 8, 2018, the Court issued the following order[1]:

"Election Code section 15360 was amended, effective January 2, 2018, in a manner that might render this appeal moot as to the declaratory judgment and mandamus. On this court's own motion, the parties are directed to submit simultaneous letter briefs by May 22, 2018, addressing this issue. The parties are further directed to address the effect of the amendment of the statute and potential mootness on the trial court's award of attorney fees."

Preliminary Statement:

On January 10, 2017, the trial court entered judgment on causes of action for declaratory relief and mandamus. County filed appeal of the judgment on February 3, 2017. Citizens filed a cross-appeal of the judgment on March 17, 2017. County filed its second appeal on an award of attorneys' fees on April 27, 2017. Thus, there are three consolidated appeals at stake here.

The issue of mootness is not, nor does it necessarily create, an algorithmic outcome.[2] There is plenty of discussion as to what renders a controversy moot but much of the discussion is inconsistent.[3] The word moot is frequently used abstractly and is often applied to any case unsuitable for judicial determination. At its essence, the meaning of mootness for judicial disputes relates to those cases in which a justiciable controversy once existing between the parties is no longer at issue due to some change in circumstance after the case arose.[4] Dismissal of the appeals for mootness at this stage is entirely discretionary requiring a balance of factors

[1] Appellants and Cross-Respondents Michael Vu and County of San Diego referred to as "County". Respondents and Cross-Appellants Citizens Oversight Inc. and Raymond Lutz referred to as "Citizens."

[2] General usage confuses mootness with such other doctrines such as ripeness, justiciability, abstract or hypothetical questions, and requests for advisory opinions.

[3] Kates, Don B., Barker, William T., *Mootness in Judicial Proceedings: Toward a Coherent Theory*, 62 California Law Review 1335 (1974).

[4] Note, *Mootness on Appeal in the Supreme Court*, 83 Harv. L. Rev. 1672-1673 (1970).

discussed herein.

Discussion:

A. Amended Legislation:

Unquestionably, the legislative process is not static. The challenged statute was amended effective January 2, 2018. The legislative process for post-election audits continues. Recently, Assemblymember William Quirk introduced a further bill (AB 2125) to implement the "risk limiting audit." During instant trial herein, testimony was received from Professor Philip Stark from UC Berkeley who testified that we would be best served to use his "risk limiting audit" process (procedure that ensures a large, predetermined minimum chance of requiring a full manual tally whenever a full manual tally would show an electoral outcome that differs from the outcome reported by the voting system for an audited contest) instead of the 1% manual tally. Although AB2125 is in the beginning stages of amendment, it demonstrates that "risk limiting audit" is a more efficient and accurate way to assure that machine counts are accurate and to catch mistakes or nefarious conduct. Ultimately, we must have a post-election audit that assures the public of the accuracy of our electoral process.

Thus, as suggested by County in briefing, further legislative process is improper for substantive review of substantial evidence or *de novo* review of a judgment. Trial court judges are not required to be clairvoyant but must interpret a statute as it exists when the controversy is decided by the court. The trial court in this case interpreted Elections Code section 15360 as it existed at the time of trial and judgment. In fact, the act of amending the statute is *prima facie* evidence that the statute needed clarification.

B. To Moot or Not to Moot

Although the amended version of Elections Code section 15360 went into effect on January 2, 2018, there is no question that the parties' controversy was justiciable and that the full breadth of the facts and law were tried in the trial court after the 2016 Presidential Primary. This Court's inquiry is whether the later act of amending the subject legislation makes moot the appeals or any of the three appeals.

Declaratory relief was available to Citizens because there was an "actual controversy." The trial court's judgment granting declaratory relief is therefore proper for *de novo* review in both the County's appeal and Citizens' cross-appeal. If this court finds that no future conduct will be affected, then considerations of judicial economy would dictate a holding of mootness.[5] Moreover, although intellectual curiosity as to this Court's substantive ruling on the flawed post-election audit procedure of the County of San Diego's Registrar of Voters is tempting, any affirmed or reversed substantive rulings of the trial court judgment, or remanding for further hearings any part of the ruling, would be an exercise of futility because the mandamus remedy provided can no longer be enforced due to the amended statute.

[5] Note, *Mootness on Appeal, supra* note 3, at 1675.

"An action that involves only abstract or academic questions of law cannot be maintained. [Citation.] And an action that originally was based on a justiciable controversy cannot be maintained on appeal if all the questions have become moot by subsequent acts or events." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 749, p. 814; see also *Streator v. Linscott* (1908) 153 Cal. 285, 288.)

If the issues on appeal are rendered moot, a reversal would be without practical effect, and the appeal will be dismissed. (9 Witkin, *supra*, Appeal, § 749, p. 814*; In re Jessica K.* (2000) 79 Cal.App.4th 1313, 1315–1316, citing *Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541).

Some courts have discussed a "public interest exception" to mootness based upon judicial economy. (See *In re William M.* (1970) 3 Cal. 3d 16, in which the California Supreme Court wrote: "If a case raises an issue of broad public interest that is likely to recur, the court may exercise an inherent discretion to resolve that issue even though an event occurring during its pendency would normally render the matter moot.") Here, the likeliness of recurrence would have to be evaluated and challenged under successive legislation. Thus, any exception because this matter is in the public interest is mitigated.

Alternatively, because a finding of mootness is entirely discretionary, some have suggested that there be a continuum of interest where by the earlier the indicia of mootness is created the more likely it be found and, conversely, the later such indicia presents mootness the less likely it be found. Here, all resources by the parties and the judicial system have been expended. All the parties await the outcome of their hard work and presentation. The Court would be exercising sound discretion to weigh the equities in favor of completing the task of issuing a decision on the merits of this case. (*Cf. Powell v. McCormick* (1969) 395 U.S. 486; *De Giorgio Farms Fruit Corp. v. Department of Employment* (1961) 56 Cal. 2d 54.)

Concerning the County's third appeal on the trial court's award of attorney's fees pursuant to Code of Civil Procedure Section 1021.5, attorney fees were awarded after the trial court made findings to establish "(1) plaintiffs' action 'has resulted in the enforcement of an important right affecting the public interest,' (2) 'a significant benefit, whether pecuniary or nonpecuniary has been conferred on the general public or a large class of persons' and (3) 'the necessity and financial burden of private enforcement are such as to make the award appropriate.' " (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 935.)

The legislative amendment and continued attention to post-election audit processes is directly related to the outcome of this case. As such, the "enforcement of an important right" and the "significant benefit conferred to the general public" are evidenced by the act of continuing legislation for post-election audits. The legislative amendment does make moot, however, further review of this award of attorney fees for the same reasons of judicial economy that make review of the declaratory judgment and mandamus moot. Where probability of recurrence or the need to review the controversy have ceased, judicial review is moot as a matter of judicial economy. Further remand to the trial court for motions concerning additional attorney fees is warranted given the legislative amendment and additional legislative processes underway.

Conclusion

Our awakening democracy is responding to reports of voter suppression, infiltration into our electoral and voter registration systems by foreign powers and inadequate election audit processes are all under scrutiny. In California, the public concern and awareness to electoral processes is more attuned than ever before. The dynamic nature of bringing challenges in court and the resultant continuing legislative action demonstrate the public interest and involvement in these matters.

The very nature of mootness requires the finding of some indicia changing the need for adjudication and the balancing of equities, including, but not limited to, the continuum of interest, the nature of the public interest and judicial economy. Should the Court decide that the amendment to the challenged statute renders the appeals moot, then a dismissal of all appeals is in order allowing the judgment to stand on its own but without any power of further enforcement. Should the Court decide to proceed on the merits of the case, judicial economy is served by the fact that parties and judicial system have nearly expended all resources for that outcome.

Respectfully Submitted,

By: /s/ Alan L. Geraci
CARE Law Group PC
Attorneys for Citizens

cc Ray Lutz

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Alan L. Geraci
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