

<b>No:</b>	
<b>Caption:</b>	City of Santa Barbara vs Heather Poet
<b>Hearing Date:</b>	Tue Jul 10, 2007 9:30

**Nature of Proceedings:** Motion Strike

Special Motion to Strike (anti-SLAPP)

Ruling: For reasons stated below, the court grants the special motion to strike pursuant to CCP § 425.16 filed by defendant Heather Poet.

Background:

On May 31, 2006, defendant Heather Poet filed a ballot initiative petition to enact a Santa Barbara city ordinance mandating that marijuana offenses by adults are the lowest law enforcement priority in the city. This was known as "Measure P" and the "Lowest Law Enforcement Priority Policy Ordinance." On November 7, 2006, Measure P went before the city electorate and received a majority "yes" vote. Measure P also requires the City to annually urge federal and state authorities to enact similar laws; prohibits City police and employees from accepting or renewing any formal deputization or commissions by a federal law enforcement agency for investigating, etc. adult marijuana offenses; prohibits the City from accepting any state or federal funding for investigating, etc. any adult marijuana offenses; establishes a Community Oversight Committee that would hear grievances of citizens and to oversee timely implementation of the measure; and authorizes a writ of mandate by any citizen for failure to comply with the ordinance's priorities. The City has filed a complaint for declaratory relief that Measure P is not legislative in nature; is preempted by federal and state law; conflicts with provisions of the Santa Barbara City Charter; and, to the extent there are any valid provisions of the measure, they are not severable from provisions which are not properly the subject of an initiative measure.

Motion:

Defendant moves to strike the complaint pursuant to CCP § 425.16(b)(1). She contends she has been sued solely based on her participation in the democratic process. Aside from her petition as the initiative sponsor, defendant is indistinguishable from the rest of the City's residents and voters. She also contends that the City cannot show that it is likely to prevail on its claims.

Opposition:

The City contends that it is not suing defendant because of her exercise of free speech but because the substance of Measure P mandates the method of enforcing marijuana laws. The City indicates that, without defendant to sue, it will have no one it can sue to determine the constitutionality of Measure P. Enforcement of federal and state criminal laws regarding

use and possession of marijuana is an administrative matter as the charging function of the criminal process is within the exclusive control of the executive branch of government. Requiring the City Clerk to send annual letters to state and federal officials requesting those governments take immediate steps to enact similar laws is not a legislative act. State marijuana laws constitute a comprehensive statewide scheme for regulation of marijuana and Measure P conflicts and interferes with that scheme. It would be pointless to enact laws and then preclude their enforcement by declaring enforcement the very last thing that should be done. Measure P is an obstacle to the enforcement of federal laws by telling police that enforcement of federal marijuana laws is the lowest priority. Measure P conflicts with § 604 of the City Charter which provides that the City Administrator shall be responsible for the proper administration of the City and supervises enforcement of the laws of the states pertaining to the City; § 607 which precludes an member of the City Council from giving orders to any subordinate of the City Administrator. The council has adopted SBMC § 2.33.030, which provides that the Police Chief is responsible for the supervision of the personnel of the police department and for performance of the functions of the department subject to the supervision of the City Administrator.

Reply:

Defendant contends that the City's argument that the suit does not arise from defendant's protected activity lacks merit and the cases it cites are distinguishable. Defendant contests the City's arguments on the merits as more fully discussed below.

Analysis:

The City of Santa Barbara has reserved to the electors of the city the powers of initiative and referendum. City Charter § 1303. Essentially, the City set up its voters as a legislative body. In an election held on November 7, 2006, the voters enacted Measure P, the "Lowest Law Enforcement Priority Policy Ordinance," which, among other provisions, mandates that marijuana offenses by adults are the lowest law enforcement priority in the City. The City's more traditional legislative body – the City Council – decided to challenge the constitutionality of Measure P and instructed the City Attorney to file a declaratory relief action. Not being able to sue itself and apparently finding suit against all of its electors untenable, the City filed suit against defendant Heather Poet, the sole sponsor of the initiative. Deeming herself a defendant in a lawsuit solely based on her participation in a public forum, defendant brought a motion to strike the City's complaint pursuant to California's "anti-SLAPP" statute.

CCP § 425.16(b)(1) provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." The court's task in ruling on a special motion to strike under this statute is a two-pronged analysis described as follows:

First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's

burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b) (2), the trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'

*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.

Prong 1: Defendant has satisfied her burden. The suit arises out of defendant's right of petition or free speech under the United States or California Constitution in connection with a public issue. *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43 is a case on point. There, the City of Pasadena (its case was consolidated with Santa Monica's) filed a cross-complaint against an initiative sponsor seeking declaratory relief regarding the constitutionality of the statute. The initiative sponsor had sued Pasadena because it failed to implement the initiative. The court granted the sponsor's anti-SLAPP motion to strike the cross-complaint because both its sponsorship of the initiative and its lawsuit to require Pasadena to enforce it were clearly protected activities. *Id.* at 75.

The City contends that *City of Cotati v. Cashman* (2002) 29 Cal.4th 69 should control the court's analysis. In that case the city adopted a mobilehome park rent stabilization program. Mobilehome park owners sued the city in federal court seeking declaratory relief, an injunction, and damages allegedly resulting from City's ordinance. The owners alleged that there was a controversy between the parties over whether the city effected an uncompensated regulatory taking through the ordinance. The city then filed its own suit in state court against the owners for declaratory relief regarding the constitutionality of the ordinance. The court rejected the notion that whether the city intended to chill public participation or whether the suit in fact had any chilling effect was relevant at all to the analysis. *Id.* at 74-76. Then the court turned to whether the action arises from protected activity. "That a cause of action arguably may have been triggered by protected activity does not entail that it is one arising from such." *Id.* at 78. For the suit to be subject to an anti-SLAPP motion, the "act underlying the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech." *Id.* There, the act underlying the city's suit was not the earlier federal law suit, but the controversy between it and businessmen, who wanted to charge higher rents, over the validity of the city's ordinance.

Here, the City of Santa Barbara has not sued defendant because she has taken any position on the constitutionality of Measure P nor is she the subject of high priority enforcement of marijuana laws seeking Measure P's enforcement. (The court in no way implies that defendant has violated any law which would make her the subject of enforcement, regardless of priority.) All that the City has alleged and all it appears that defendant has done is engage in the initiative process. In fact, the City admits that it was in a quandary about how to get the issue before a court and it settled on defendant as "initiative proponent" for jurisdictional purposes. The City does not contest that participation in the initiative process is a protected activity. Since that is all defendant has done, the suit arises out of protected activity. Defendant has satisfied her burden of

establishing that the City's complaint against her arises out of her exercise of her right of petition or free speech under the United States or California Constitution in connection with a public issue.

Prong 2: It is now up to the City to demonstrate a probability of prevailing on its claim. It is the "duty of the courts to jealously guard the people's right of initiative and referendum" and the courts will "apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled." *American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 708 [citations omitted]. The City faces a presumption that the challenged legislation does not violate the Constitution. *People v. Superior Court (Romero)* (1996) 13 Cal. 4th 497, 509. Even if a serious doubt of constitutionality is raised the court will seek a construction of the statute so as to uphold it. *Id.* The "presumptions favor the validity of initiative measures and mere doubts as to validity are insufficient; such measures must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears." *Rossi v. Brown* (1995) 9 Cal.4th 688, 711.

Legislative vs Administrative Action: The City seems to set its police department apart from its legislative authority. The City argues that the legislative policy has been set by the state and federal governments and the City has only administrative authority – exercised through the Chief of Police and the City Administrator – over its department. Defendant contends that an act is legislative if it declares a public purpose and makes provisions for ways and means of its accomplishment. *Lindelli v. Town of San Anselmo* (2003) 111 Cal.App.4th 1099, 1113. Defendant says Measure P does this by declaring the purpose "to make investigations, citations, arrests, property seizures, and prosecutions for adult marijuana offenses, where the marijuana was intended for adult personal use, the city of Santa Barbara's lowest law enforcement priority." SBMC § 9.145.020.A. The measure goes on to describe how that is implemented. Defendant points out that a legislative body may limit an agency's exercise of enforcement power "either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." *Heckler v. Chaney*, 470 U.S. 821, 833 (1985). "The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it." *City of San Diego v. Dunkl* (2001) 86 Cal.App.4th 384, 399. (In *Dunkl*, an initiative determined that conditions of a memorandum of understanding regarding construction of a baseball park had not been met. That MOU was entered into after voters had approved a measure calling for financing of the ballpark. The court invalidated the latter initiative because it dealt with the administrative details of carrying out the earlier initiative.)

Here, there is no plan regarding priority of enforcement. The City emphasizes that the state has adopted a clear policy criminalizing the use of marijuana. But Measure P does not decriminalize marijuana possession. The state has enacted countless criminal statutes and the local police enforce local ordinances as well. That statutory scheme does not preclude legislative prioritizing of enforcement of the various legislative enactments by legislative act of the locality that expends money to enforce those laws. Prioritizing law enforcement is a bigger policy issue than day-to-day discretionary functions of the police. Measure P sets the overall priority, it does not determine what individual charging decisions should be made and which should not. While the oversight committee receives "any

grievances from individuals who believe they were subjected to law enforcement activity contrary to the lowest law enforcement priority policy,” the committee has no authority to even ask that the police of the district attorney dismiss any filed charge. SBMC § 9.145.069.B.2.

The court finds that, overall, Measure P is a proper legislative enactment.

#### Instructing City to Urge State/Federal Legislation:

The City contends that the provision of Measure P that calls for the City Clerk to send annual letter to state and federal officials requesting that those governments take immediate steps to enact similar laws is invalid because it is not legislative in character. The City relies on *American Federation of Labor v. Eu*, supra. There, the California Supreme Court directed the Secretary of State not to take any action to place a statewide proposed balanced budget initiative on the general election ballot. That initiative was a resolution calling on Congress to submit a balanced budget amendment and applied to Congress for a constitutional convention to propose such an amendment. The court held that the initiative powers are limited under the California Constitution to the adoption or rejection of “statutes” and that does not include a resolution which merely expresses the wishes of the enacting body. *American Federation of Labor v. Eu*, supra, 36 Cal.3d at 708. The court distinguished its earlier decision which allowed a San Francisco initiative that called for a ceasefire and troop withdrawal in Vietnam to go to the voters. *Farley v. Healey* (1967) 67 Cal.2d 325. The court relied on the broad initiative power set forth in San Francisco’s City Charter, which allowed the voters to adopt by initiative “any ordinance, act or other measure which is within the power conferred upon the board of supervisors to enact.” *Id.* at 328. Since the board of supervisors could adopt such a resolution, so could the voters. *Id.* at 329. Both the *Farley* and *Eu* decisions acknowledge that a City’s charter may provide for broader initiatives than the California Constitution provides for statewide initiatives.

The City says that its charter authority is the same as the state’s because § 1303 of the City’s Charter provides that the provisions of the California Election Code “shall apply to the use thereof in the City” so long as the Election Code provisions do not conflict with Santa Barbara law. The Supreme Court in *Eu* did not rely on the Elections Code but on the definition of “initiative” in the California Constitution, which reads: “The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.” Cal Const, Art. II § 8(a). Santa Barbara did not adopt the definition from the constitution into its charter. In fact, the Elections Code defines “city measure” as including “any proposed city charter, any proposed amendment to a city charter, any proposition for the issuance of bonds by the city, any advisory question, or any other question or proposition submitted to the voters of a city.” Elec. Code § 306 [emphasis added]. The Election Code simply provides for the administration of the election, it does not govern the subject matter of initiatives, except to provide that “the same subject matter shall not be voted upon twice within any 12-month period at a special election.” Elec. Code § 9218. The court does not find that the Santa Barbara City charter limits initiatives to statutes. Indeed, to so find, the court would have to graft definitions into the City Charter that the City did not incorporate.

Even if providing for the expression of the City's position on state and federal legislation were not a proper subject for a city measure, the court must view the constitutionality of Measure P in light of its "crucial provisions." The court in *Eu* noted that "the crucial provisions of the balanced budget initiative do not adopt a statute or enact a law." *American Federation of Labor v. Eu*, supra, 36 Cal.3d at 694. The court blocked the initiative in *Eu* because that measure "sought only to express the policy views of the voters." *Pala Band of Mission Indians v. Bd. of Supervisors* (1997) 54 Cal.App.4th 565, 578. Here, the letter writing provision is only one of many provisions, none of which the City challenges because they are in the nature of a resolution.

The court is not convinced that Measure P is beyond the type of initiative authorized in the City charter. Further, reading the statute as a whole, the court is not convinced it fails as a legislative enactment.

**Preemption:** The City argues that Measure P is preempted by both state and federal drug laws. A "city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Cal Const, Art. XI § 7. "[L]ocal legislation is 'contradictory' to general law when it is inimical thereto." *Sherwin-Williams Co. v. City of L.A.* (1993) 4 Cal.4th 893, 898. A local ordinance is not inimical to a state statute if it "does not prohibit what the statute commands or command what it prohibits." *Id.* at 902.

The City contends that Measure P practically prohibits enforcement of H&S Code § 11357, which criminalizes the possession of marijuana. First, this is a facial challenge to the statute. "A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application...." *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084. Nothing in the statute prohibits enforcement of state law and the court will not speculate on the effect of the implementation of Measure P for purposes of this analysis. The City contends that Measure P improperly intrudes on the judgment and discretion of police officers to arrest persons who commit offenses in their presence as authorized by Penal Code § 836. But Measure P does not prohibit exercise of that discretion, it just orders the priority of that exercise. If the City Council adopted a budget that necessitated moving a narcotics officer to the homicide division, the officer's priorities would have changed and there would be no improper infringement on the officer's discretion in the exercise of his assigned duties. Measure P's effect is no different. Police officers can still arrest those who violate drug possession laws in their presence. The voters have simply instructed them that they have higher priority work to do. The City's citation to cases involving a police officer's liability when he exercises his discretion [*Tomlinson v. Pierce* (1960) 178 Cal.App.2d 112, 116-117; *Michenfelder v. City of Torrance* (1972) 28 Cal.App.3d 202] are not helpful to this analysis.

Nor does Measure P impermissibly conflict with the federal Controlled Substances Act. The federal preemption standard is set forth in 21 USC § 903: "No provision of this title shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this title and that State law so that the

two cannot consistently stand together.” Santa Barbara is free to decline to enforce federal criminal statutes. It is up to the federal government to enforce its laws. Indeed, the Tenth Amendment to the United States Constitution prohibits the federal government from impressing “into its service--and at no cost to itself--the police officers of the 50 States.” *Printz v. United States*, 521 U.S. 898, 922 (1997). A local law may fall if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000). But if the federal government cannot impress the Santa Barbara Police Department into its service, the fact that the department assigns a low priority to the enforcement of a federal law does not stand as an obstacle to federal authorities enforcing federal law.

The City’s citation to *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001), is misplaced. The Supreme Court simply held that medical necessity is not a defense to federal drug laws. It did not opine that it was an improper exercise of California’s authority to provide that it is a defense to state laws.

Nothing in state or federal law preempts the priority of enforcement measure adopted by the voters of Santa Barbara.

City Charter: Finally, the City contends that Measure P conflicts with §§ 604 and 607 which define the powers and duties of the City Administrator and provide that the City Council shall not give orders to a subordinate to the City Administrator. The court does not see a conflict. Surely the City does not suggest that the City Council invades the province of the City Administrator when it enacts laws for the Administrator’s subordinates to enforce. Here, the voters, in their legislative capacity, have established a priority in enforcement of a particular type of law. They have adopted an ordinance. The City Administrator is to supervise the enforcement of the ordinances of the City. Charter § 604(g). (§ 604(g) also provides that the Administrator shall supervise the enforcement of “laws of the State pertaining to the City.” But H&S Code § 11357 is not a state law that pertains to the City.) Measure P is just another ordinance the City Administrator must see to it that his subordinates must enforce.

Charter § 702 provides that the City Council may provide for the “organization, conduct and operation of the several officers and departments of the City.” The City says that, pursuant to § 702, the City Council adopted SBMC 2.33.030, making the Police Chief responsible for the supervision and control of the department and the performance of the department’s functions, subject to the supervision of the City Administrator. From these provisions, the City extrapolates that the charter and ordinances make clear that the manner of enforcing laws is left to the discretion of city administrators. But the fact that the City has to rely on an ordinance, not just the charter, belies its argument. It is the prerogative, of the legislature, including the vox populi through the initiative process, to adopt ordinances that guide the City’s employees in the performance of their official tasks.

Measure P does not offend the provisions of the City Charter.

The court finds that the City has failed to carry its burden of demonstrating a likelihood of prevailing on the merits of its claim. Therefore, the court will not permit this suit arising out

of an individual's exercise of her constitutional right to participate in the process of formulating laws to go forward.

The court will grant the special motion to strike.

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