G051016

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION THREE

Harold P. Sturgeon,

Plaintiff and Appellant,

vs.

County of Los Angeles, *et al.*,

Defendants and Respondents.

Appeal from the Superior Court of California, County of Los Angeles
The Honorable Kirk H. Nakamura
Superior Court Case No. BC541213

APPELLANT HAROLD P. STURGEON'S REPLY BRIEF ON APPEAL

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INTRODUCTION

Sturgeon's complaint – his second challenge since 2006 to the County's payment of "supplemental judicial benefits" – puts squarely at issue the inherent conflict between the interim, temporary nature of SB X2 11 and the inexorable passage of time. *Sturgeon I* held that the benefits at issue were compensation and, because they had never been "prescribed" by the Legislature, violated Article VI, Section 19 of the California Constitution.[1] *Sturgeon II* held that SB X2 11 was an interim measure that "prescribed" payment of the benefits to then-sitting judges for the balance of the judges' terms in office.[2] In reaching this conclusion, the Court in *Sturgeon II* expressly declared that SB X2 11 was not a permanent fix to the constitutional defect identified in *Sturgeon I* and that the hastily enacted measure only sought to preserve the status quo until a comprehensive judicial compensation scheme could be enacted.

Six years have passed since the February 2009 legislation was enacted. Judges have left the bench and new judges have been appointed or elected. All or nearly all of the judges who have remained on the bench since 2009 have begun new, six-year terms.

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[1] *Sturgeon v. County of Los Angeles*, 167 Cal.App.4th 630 (2008) ("*Sturgeon I*").

[2] *Sturgeon v. County of Los Angeles*, 191 Cal.App.4th 344, 348, 352, 354, 355 (2010) ("*Sturgeon II*").

SB X2 11 made no fundamental policy choice about the payment of benefits to these new judges and judges who began new terms following the statute's enactment. The statute is ambiguous at best in this regard. As a result, while SB X2 11 may have satisfied Article VI, Section 19 of the California Constitution as an interim measure for judges who were sitting on the bench six years ago, it does not do so for new judges or judges who have begun new terms. Because such judges constitute all or nearly all currently sitting judges, the County's continued payment of the benefits is unlawful. By arguing to the contrary, it is the County – not Sturgeon – that is asking this Court to sit as a "super legislature" and now make permanent what the Legislature never intended to be permanent.

Sturgeon does not seek to "dictate" the "reasonable timing" of any legislative action. Nor does he raise any "entirely new" challenges to the "supplemental judicial benefits" at issue. The County's claims to the contrary are distortions of Sturgeon's arguments. The decision of the trial court must be vacated and the case remanded for further proceedings.

ARGUMENT

I.

Sturgeon's complaint plainly alleges that the County's payment of "supplemental judicial benefits" six years after the enactment of SB X2 11 is illegal because the 2009 legislation was never intended to be a permanent

authorization. Clerk's Transcript ("CT") at p. 26, ¶¶ 19-20 and pp. 31-32, ¶¶ 34 and 39. *Sturgeon II* repeatedly states that SB X2 11 was only an interim measure. It uses the word "interim" to describe SB X2 11 at least 5 times. *Sturgeon II*, 191 Cal.App.4th at 348, 352, 354, and 355. As *Sturgeon II* found, SB X2 11 authorized payment of the benefits "for the balance of any judge's term of office." *Sturgeon II*, 191 Cal.App.4th at 353. The Court declared, "Thus, as to sitting judges, benefit payments for the balance of their terms are clearly now 'prescribed' under the strictest interpretation of the term." *Id.*

Those judges' terms are now over.[3] The benefits – "prescribed" on an interim basis "for the balance of any judge's term of office" – are no longer authorized. Recognizing this truth does not seek to dictate the timing of future legislative enactments, as the County claims. It simply recognizes the temporary nature of the Legislature's authorization.

II.

Sturgeon II's repeated references to the "interim nature" of SB X2 11 were not mere "predictions" about future legislation, as the County suggests. They were essential to the Court's ruling. *Sturgeon II*, 191

[3] Because the County never argued to the contrary, any opposition on this point has been waived. *See Smith v. Adventist Health System/West*, 182 Cal.App.4th 729, 746 (2010) (argument is waived when one party is aware of the other party's position and fails to oppose it).

Cal.App.4th at 352. In *Sturgeon I*, the Court found that sensitivity to substantial variations in judicial compensation was an important part of any Article VI, Section 19 analysis:

> Because the legislative responsibility with respect to judicial compensation, including of necessity the participation of the executive branch, is now the principal means of protecting the independence of the judicial branch, in considering compensation judges receive, we must be careful that in fact the Legislature has exercised its prescriptive role. In particular, unlike the concern employees might receive excessive pay . . . we must in addition be sensitive to the potential that, in the absence of proper direction from the Legislature, judges might be subject to substantial variations in compensation determined solely by local authorities.

Sturgeon I, 167 Cal.App.4th at 654.

In *Sturgeon II*, Sturgeon argued that SB X2 11 did not resolve any truly fundamental issues because it left in place a compensation scheme characterized by the Judicial Council as a "hodgepodge," "patchwork quilt" of varying benefits "not based on any rational consistent statewide plan or formula," but resulting from the "individual history of each court and county." *See* CT at pp. 25-26, ¶¶ 18-20. The interim nature of SB X2 11 led the Court to conclude that SB X2 11 satisfied Article VI, Section 19, despite the wide disparity in judicial compensation it authorized:

> Finally, Sturgeon argues Senate Bill X2 11 is invalid because it does nothing to immediately address the disparity in judicial benefits paid by various counties throughout the state. Because Senate Bill X2 11 is an interim measure, waiting further legislative action, we find this argument unpersuasive.

Sturgeon II, 191 Cal.App.4th at 354. The Court's finding that SB X2 11 was only an interim measure balanced out the fact that SB X2 11 authorized – on a temporary basis and only for the remainder of then-sitting judges terms' – wide disparity in judicial compensation. The Court concluded, "Thus, whatever permanent remedy the Legislature eventually adopts will be entitled to the well-established 'judicial deference to the legislative branch.'" *Id.* at 355. The interim, temporary nature of SB X2 11 cannot be divorced from the Court's conclusion in *Sturgeon II*. It lies at the very heart of the Court's decision.

III.

The County's rhetorical question – it asks "[h]ow a prediction about what the Legislature 'will' do at some undefined time *in the future* [could] serve as the lynchpin for a court's analysis about the constitutionality of a statute as it is *presently drafted*" – is easily answered. SB X2 11 can be understood as a fundamental policy choice only if it is interpreted as an interim, stopgap measure that preserved the status quo for then-sitting judges – judges who had relied on the existence of the benefits. *See* Stats. 2009, ch. 9, § 1(c). In fact, if SB X2 11 were read as anything other than an interim, temporary authorization for then-sitting judges only, the provision would not have satisfied Article VI, Section 19. It would represent a default to the policy choices of the 58 counties and county-based courts in

the State, some of which likely did not know or did not believe they had authority to pay "supplemental judicial benefits." It would be an abrogation of the Legislature's constitutional responsibilities. *Sturgeon I*, 167 Cal.App.4th at 653-54.

IV.

Given the interim nature of SB X2 11's authorization, Sturgeon's present complaint is not – as the County asserts – that the Legislature failed to enact a permanent fix to the constitutional defect identified in *Sturgeon I*. Sturgeon's complaint is that the County's continued payment of benefits exceeds SB X2 11's own, limited authorization of the benefits. Because SB X2 11 authorized the continued payment of benefits for the balance of sitting judges' terms of office and all if not nearly all judges sitting in 2009 have either left the bench or begun new six year terms, the benefits are no longer "prescribed."

This is not a non-justiciable question. Sturgeon's complaint asks the Court to determine whether SB X2 11 "prescribes" benefits for new judges or judges who began new, six-year terms following the statute's enactment in 2009. Undertaking this quintessential legal analysis does not intrude on the Legislature's constitutional prerogatives. It certainly did not do so in *Sturgeon I* or *Sturgeon II*. It does not ask the Court to rule on the "wisdom" of SB X2 11. Nor does it ask the Court to decide a "purely

political" question. It only requires the Court to undertake the same legal analysis undertaken in both *Sturgeon I* and *Sturgeon II*.[4] Specifically, the Court must decide whether the Legislature has "effectively resolve[d] the truly fundamental issues" and "establish[e]d an effective mechanism to assure the proper implementation of its policy decisions" with respect to new judges and judges who began new, six-year terms. *Sturgeon I*, 167 Cal.App.4th at 653; *Sturgeon II*, 191 Cal.App.4th at 353.

V.

The County's reliance on *Bautista v. State of California*, 201 Cal.App.4th 716 (2011), *Munoz v. City of San Diego*, 37 Cal.App.3d 1 (1974), *Coshow v. City of Escondido*, 132 Cal.App.4th 687 (2005), and its other "political question" cases is misplaced. *Bautista* is not "on point" as the County claims. In *Bautista*, the plaintiffs challenged the adequacy of heat illness prevention regulations applicable to all outdoor places of employment. *Bautista*, 201 Cal.App.4th at 722-23. The plaintiffs believed the regulations did not protect outdoor workers sufficiently and, after their efforts to advocate for improvements to the regulations were unsuccessful, the plaintiffs asserted they were "left with no choice but to ask the Court to require the State to take action." *Id.* at 723. Unlike Sturgeon, the plaintiffs

[4] The Court did not undertake this analysis in *Sturgeon I* or *Sturgeon II* because the issue was not ripe. It required the passage of time and the expiration of then-sitting judges' terms to become ripe.

in *Bautista* did not present the Court with any legal standard – Article VI, Section 19 – against which the regulations could be measured. They simply wanted more protection for workers. The Court found that it could not grant the plaintiffs the relief they requested:

> We cannot formulate a decree that addresses the wisdom of the policies embodied in the existing regulations simply because appellants perceive the solution to preventing heat illnesses among farmworkers differently from the Standards Board, the agency entrusted by the Legislature to adopt safety standards.

Id. at 735.

Munoz concerned a challenge on equal protection grounds to the compensation paid by the City of San Diego to the members of its city council. In *Munoz*, the Court of Appeal determined that "the amount of such salaries is a purely political question" committed to the electorate, not to the courts, under Article XI, Section 5 of the California Constitution and was unreviewable as a result. 37 Cal.App.3d at 4.

Coshow concerned a challenge to a city's choice of approved chemical additives to comply with a state-mandated water fluoridation plan. The Court of Appeal found the city's choice was a "distinctively legislative process" and that it "d[id] not have the authority to exercise its independent judgment with respect to the performance of legislative functions." 132 Cal.App.4th at 706.

Sturgeon does not challenge the "wisdom" of the Legislature in enacting SB X2 11 or "perceive" the solution to judicial compensation differently from the Legislature, as in *Bautista*. He does not challenge the amount of compensation received by any judge, as in *Munoz*. Nor does he ask the Court to "exercise its independent judgment with respect to the performance of legislative functions," as in *Coshow*. He challenges whether the Legislature "prescribed" payment of benefits to new judges or judges who began new, six-year terms following SB X2 11's enactment. Neither *Bautista*, *Munoz*, *Coshow*, nor any of the County's other cases demonstrate that the Court is incapable of making this determination without overstepping its judicial authority. Sturgeon raises a quintessential legal question that the Court is completely competent to decide, just as it did in both *Sturgeon I* and *Sturgeon II*.

VI.

Also incorrect is the County's assertion that Sturgeon's "ambiguity" argument is new. It is not.[5] Throughout this litigation, Sturgeon has clearly and consistently argued that SB X2 11 was an interim, temporary measure,

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[5] The County's claim that Sturgeon articulated his challenge to SB X2 11 "no less than four times" and never raised his "ambiguity" argument misses its mark. Sturgeon's first challenge to SB X2 11 – shortly after the statute was enacted in 2009 – did not raise the issue of treatment of new judges or judges who began new terms because the statute had just been enacted. It was not ripe. *See also supra* p. 7, note 4.

not a permanent solution to the constitutional defects identified in *Sturgeon I*. While *Sturgeon II* decided that SB X2 11 "prescribed" the benefits for the balance of sitting judges' terms of office, the statute did not "effectively resolve[d] the truly fundamental issue" with respect to new judges and sitting judges who have begun new six year terms. *Sturgeon I*, 167 Cal.App.4th at 653. As Sturgeon demonstrated in his opening brief and in this reply, SB X2 11 is ambiguous at best about the authorization of benefits to new judges or judges who began new terms following the enactment of SB X2 11. Sturgeon did not make a new argument in pointing out this ambiguity. He developed and elaborated on the legal theory he set forth in his complaint.[6] Because SB X2 11 is ambiguous about authorizing benefits to new judges and judges who begin new terms, the statute does not resolve the "truly fundamental" issue of whether these judges are to receive benefits.

The County tries to avoid this conclusion by citing two provisions in SB X2 11, both of which plainly refer to then-sitting judges, not new judges

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[6] The County's argument about Sturgeon's prayer for relief is also baseless. Again, since SB X2 11 was enacted more than 6 years ago, all or nearly all of the judges on the court are either new judges or have begun new six-year terms. Under the circumstances, the fact that Sturgeon's prayer for relief in Sturgeon seeks a blanket declaration that the benefits violate Article VI, Section 19 is a distinction without a difference. Nor has the County identified a single judge who is not new or has not begun a new six-year term.

or judges who began new terms following SB X2 11's enactment. The first does so expressly: "Judges of a court whose judges received supplemental benefits . . . as of July 1, 2008, shall continue to receive supplemental benefits." Gov't Code § 68220(a). The second states in its entirety, "The county is also authorized to elect to provide benefits for all judges in the county."[7] Gov't Code § 68220(b). This single, cryptic sentence, which appears in SB X2 11's "termination" section, not in its "authorization" section, makes no reference to new judges or judges who began new terms following SB X2 11's enactment. The sentence is far too slender of a reed to support the weighty claim that the Legislature intended to permanently authorize the payment of benefits to all judges for ever and ever.

Sturgeon II did not go nearly so far as to declare that SB X2 11 authorized benefits to new judges and judges who have begun new terms. It only found that, under SB X2 11, "counties are given the option of terminating benefits to judges who were not sitting when Senate Bill X2 11 was passed and terminating benefits for sitting judges when the terms they were serving when the legislation was adopted expired." *Sturgeon II*, 191 Cal.App.4th at 354. Termination is not authorization, however. The quoted passage concerns safeguards put in place by the Legislature to

[7] None of the provisions of section 68220(b) appear to apply to court-provided benefits. *Compare* Gov't Code § 68220(a) *with* Gov't Code § 68220(b).

ensure that its policy choice was carried out. It does not concern authorization. If the Court in *Sturgeon II* had found that SB X2 11 permanently authorized benefits or authorized them for new judges or judges who began new, six-year terms following the statute's enactment, it could have said so expressly. It did not. It only stated expressly that benefits were authorized for the balance of any sitting judge's term of office. *Sturgeon II*, 191 Cal.App.4th at 353. Again, SB X2 11 is ambiguous at best about whether it authorizes benefits for new judges or judges who began new, six-year terms following SB X2 11's enactment. It does not resolve this "truly fundamental" issue.

VII.

By claiming otherwise, it is the County – not Sturgeon – that asks the Court to sit as a "super legislature" and make permanent what the Legislature never intended to be permanent. The County's overly expansive reading of SB X2 11 also ignores the admonition in *Sturgeon I* that, in determining whether the Legislature has exercised its prescriptive role, the Court must be sensitive to the potential that judges might be subject to substantial variations in compensation in the absence of proper direction from the Legislature. *Sturgeon I*, 167 Cal.App.4th at 654. Treating SB X2 11's interim authorization as permanent ignores that admonition. The payment of benefits to new judges and judges who began

new terms following the enactment of SB X2 11 has not been "prescribed" within the meaning of Article VI, Section 19, and the County's continued payment of benefits to these judges is unlawful.

VIII.

In January 2015, before Sturgeon filed his opening brief, he asked this Court to transfer this appeal to the Fourth Appellate District, Division One panel that decided *Sturgeon I* and *Sturgeon II*. In his moving papers, Sturgeon demonstrated that, because the Orange County Superior Court judge who heard this case was sitting by designation as a judge of the Los Angeles County Superior Court, the appeal properly should have been sent to the Second Appellant District, then reassigned to an appropriate appellate court to avoid any appearance of conflict, as occurred in both *Sturgeon I* and *Sturgeon II*. Sturgeon also demonstrated that, because the Division One panel's decisions in *Sturgeon I* and *Sturgeon II* are directly at issue in this appeal – "*Sturgeon III*" – that same Division One panel should hear and decide *Sturgeon III*. He also demonstrated that significant judicial resources could be conserved and efficiencies gained if the same Division One panel heard and decided his appeal. The Court denied the motion on February 26, 2015, without explanation.

Sturgeon hopes that, now that his appeal has been fully briefed, the Court will appreciate the importance of both curing the error of directing

this appeal to an improper appellate district[8] and having the Division One panel that heard and decided both *Sturgeon I* and *Sturgeon II* also hear and decide this appeal. It was in response to the Division One panel's *Sturgeon I* opinion that the Legislature enacted SB X2 11, and it is the same Division One panel's decision in *Sturgeon II* that is so directly at issue in this appeal. To not cure this error would ignore the authority of the Division One panel and create the appearance of improper forum shopping by the judiciary on a matter of substantial importance to all judges across the State.

[8] Transfer to the proper court is mandated by statute. Gov't Code § 68915; *see also People v. Nickerson*, 128 Cal.App.4th 33 (2005) (transferring misdirected appeal to proper court after appeal was fully briefed).

CONCLUSION

For the foregoing reasons and for the reasons set forth in his opening brief, Plaintiff-Appellant Harold P. Sturgeon respectfully requests that the judgment of the Superior Court be reversed and the case be remanded for further proceedings.

Dated: April 1, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 3,891 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: April 1, 2015

Sterling E. Norris

PROOF OF SERVICE

I am employed in the City of Washington, District of Columbia. I am over the age of 18 and not a party to the within action. My business address is 425 Third Street, S.W., Suite 800, Washington, D.C. 20024.

On April 1, 2015, I served the foregoing document described as:

APPELLANT HAROLD P. STURGEON'S
REPLY BRIEF ON APPEAL

on the parties in this action by placing a true and correct copy thereof in a sealed envelope addressed as follows:

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I delivered said documents to an authorized courier or driver authorized to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person to whom it is to be served on the next business day.

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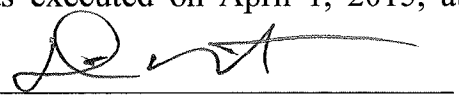

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