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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CHULA VISTA CITIZENS FOR JOBS AND FAIR COMPETITION, LORI KNEEBONE, LARRY BREITFELDER, and ASSOCIATED BUILDERS AND CONTRACTORS OF SAN DIEGO, INC.,

Plaintiffs,

v.

DONNA NORRIS, in her capacity as City Clerk for the City of Chula Vista, MAYOR CHERYL COX, in her official capacity as Mayor and Member of the Chula Vista City Council, and PAMELA BENSOUSSAN, STEVE CASTANEDA, JOHN McCANN, and RUDY RAMIREZ, in their official capacity as Members of the Chula Vista City Council,

Defendants.

Case No. 09-CV-0897-BEN-JMA

The Hon. Roger T. Benitez
Courtroom 3

CITY DEFENDANTS' PARTIAL OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [DOC. 54]

Date: August 8, 2011
Time: 10:30 a.m.
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INTRODUCTION

Four plaintiffs ("plaintiffs") allege they gathered enough voter signatures to require an election on their proposed amendments to City of Chula Vista ("City") ordinances. They admit, however, that they violated the voter initiative provision in the City Charter of the City of Chula Vista ("Charter") in getting those signatures. In their 207-paragraph complaint, plaintiffs allege City officials should have accepted their initiative petition and called an election because the Charter rules violate the First Amendment to the United States Constitution ("First Amendment"). Plaintiffs sued the five elected members of the City Council of the City and the City Clerk ("City Defendants") for declaratory and injunctive relief. Although the case is moot because plaintiffs later succeeded in qualifying their initiative for the ballot, the Court has preserved jurisdiction on the theory that the issues of the case are likely to recur and escape review.

Before the Court is plaintiffs' motion for summary judgment. City Defendants hereby oppose that motion to the extent plaintiffs claim that Charter § 903 is unconstitutional by requiring that the proponents of initiatives be electors of the City ("the elector requirement"). Consistently with their Answer to Complaint, City Defendants otherwise defer to the State in the matter of interpretation and constitutionality of statutes contained in the California Elections Code.

Plaintiffs allege, and City Defendants agree, that the relevant Charter provision is § 903 and that § 903 incorporates provisions of the California Elections Code by reference.[1] (Complaint, ¶¶ 2-3.) City Defendants disagree, however, with plaintiffs' attempt to characterize the basis of the elector requirement as Elections Code incorporation. (See Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment ("Plf.Mem.") at 1:7-9, 2:1-9.) The elector requirement is native to the Charter, being expressed in the first sentence of § 903: "There are hereby reserved to the electors of the City the powers of the

[1] Section 903 of the Charter states:

> There are hereby reserved to the electors of the City the powers of the initiative and referendum and of the recall of municipal elective officers. The provisions of the Elections Code of the State of California, as the same now exists or may hereafter be amended governing the initiative and referendum and of the recall of municipal officers, shall apply to the use thereof in the City so far as such provisions of the Elections Code are not in conflict with this Charter.

initiative and referendum and of the recall of municipal elective officers." Plaintiffs also mischaracterize the requirement, treating it as a limitation of initiative sponsors to natural persons, when it correctly is a limitation to natural persons eligible to vote in the City.

LEGAL DISCUSSION

I.

ALLOWING ONLY ELECTORS TO COMMENCE THE INITIATIVE PROCESS DOES NOT CREATE A FIRST AMENDMENT ISSUE

Plaintiffs fail even to attempt to explain the nature of the initiative. Plf.Mem. at 1-6. They simply assume that the legal acts necessary to create a ballot proposition are political speech. *Id.* at 1-2. Plaintiffs err. In this part I, City Defendants will show the legal acts constituting sponsorship are acts of self-government, exercising the inherent, reserved power of citizens to legislate for the political entity in which they reside. Therefore, nothing in the First Amendment, as applicable to the states since *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940), applies to a state or local law that permits only citizens of a political entity to engage in the legal acts necessary to create a ballot proposition.

A. Creating a Ballot Proposition Is an Act of Self-Government, Not Petitioning or Speech Activity

In California constitutional law, the initiative is an inherent power of direct legislation reserved to the people, not a power of petition granted to the people. At the state level, Art. IV, § 1 of the California Constitution provides: "The legislative power of this State is vested in the California Legislature which consists of the Senate and the Assembly, but the people reserve to themselves the powers of initiative and referendum." Further explaining, Art. II, § 8 of the California Constitution provides: "The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." The California Supreme Court explicitly recognizes the initiative as an inherent power that the people have reserved, not a power granted to the people. "Drafted in light of the theory that all power of government ultimately resides in the people, the [1911] amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them." *Associated Home Builders etc., Inc. v. City*

of Livermore, 18 Cal.3d 582, 591 (1976). "The initiative was viewed as one means of restoring the people's rightful control over their government, by providing a method that would permit the people to propose and adopt statutory provisions and constitutional amendments." *Strauss v. Horton*, 46 Cal.4th 364, 421 (2009). The key text of California law therefore has always addressed the initiative as a power of electors. *See* Cal. Const., Art II, § 8; *Associated Home Builders*, 18 Cal.3d at 591. An elector is a United States citizen 18 years of age or older and a resident of an election precinct at least 29 days prior to an election. Cal. Elec. Code § 321.

If the City were a general law city, the California Constitution would automatically reserve the initiative power in the City's electors, subject to implementation by the Legislature. Cal. Const., Art. II, § 11. Specifically the California Constitution provides: "(a) Initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide. Except as provided in subdivisions (b) and (c), this section does not affect a city having a charter."[2] *Id.*

But the City is a charter city. Under California law, a charter city's charter may, "in respect to municipal affairs supersede all laws inconsistent therewith, and in regard to municipal affairs such cities may make and enforce all ordinances and regulations subject only to restrictions and limitations imposed in their several charters." *Campen v. Greiner*, 15 Cal.App.3d 836, 840 (1971). "Within its scope, such a charter is to a city what the state Constitution is to the state." *Id.* Further, it "is competent in such charters to provide for conduct of city elections." *Id.*

The City provides for the initiative in Charter § 903. In its own first sentence, Charter § 903 explicitly recognizes that the inherent power of the people is the genesis of the initiative. Again: "There are hereby *reserved* to the electors of the City the powers of the initiative. . . ." Charter § 903, italics added. A city charter provision for initiative or referendum is of the same

[2] The other subdivisions are limits on local initiative measures that are not relevant to the source of the initiative power. In full, they provide: "(b) A city or county initiative measure may not include or exclude any part of the city or county from the application or effect of its provisions based upon approval or disapproval of the initiative measure, or based upon the casting of a specified percentage of votes in favor of the measure, by the electors of the city or county or any part thereof. [¶] (c) A city or county initiative measure may not contain alternative or cumulative provisions wherein one or more of those provisions would become law depending upon the casting of a specified percentage of votes for or against the measure."

reserved-power character as the state constitutional provision, and may reserve even more legislative power than that reserved by the constitution. *Hunt v. Mayor & Council of Riverside*, 31 Cal.2d 619, 622 (1948). When a charter incorporates Election Code "procedures relative to initiative and referendum [that] is to facilitate the exercise of the reserved rights, not to define or circumscribe them." *Campen*, 15 Cal.App.3d at 841. The statutory incorporation important to the elector requirement is Cal. Elec. Code § 321, which, together with the first sentence of § 903, defines an elector as a United States citizen 18 years of age or older and a resident of a Chula Vista voting precinct at least 29 days before an election. Other incorporated provisions of the Elections Code are congruent with, but not necessary to, the elector requirement. For example, only an elector can petition a state court to amend the title assigned to a petition by the city attorney. Cal. Elec. Code § 9204. And only a registered voter's signature is valid to qualify a petition for the ballot. Cal. Elec. Code §§ 9207, 9209.

Specifically, the acts that must be carried out by an elector to create an initiative petition are these:

- File with the City Clerk a Notice of Intent to Circulate a Petition ("Notice of Intent") and the proposed measure, signed by at least one but not more than three proponents. Cal. Elec. Code §§ 9202, 9203.
- Publish the Notice of Intent, including the ballot title and summary prepared by the City Attorney, prior to collecting any signatures. Cal. Elec. Code §§ 9205, 9207.
- Provide proof of publication to the City Clerk within ten days after publication. Cal. Elec. Code § 9206.
- File the petition signed by the necessary number of voters within 180 days of the receipt of the ballot title and summary. Cal. Elec. Code § 9208.

At bottom, then, the legal acts necessary to create an initiative ballot proposition are of the same character as the acts necessary to introduce a bill in Congress or the California Legislature. *See Strauss v. Horton*, 46 Cal.4th a 421; *Associated Home Builders*, 18 Cal.3d at 591. Nothing in Charter § 903 or the incorporated statutes prohibits corporations from recruiting, advocating, financing, or otherwise supporting any of those legal acts; or affects any corporate advocacy of the

petition; or affects corporate participation in signature gathering; or otherwise limits a corporation's associational or advocacy activities.

B. Not a Single Case Cited by Plaintiffs Applies First Amendment Principles to the Legal Acts Essential to Create a Ballot Proposition

In the usual jargon, this is a case of first impression. But the novelty of plaintiffs' position goes beyond the usual jargon. There is no record that anybody has ever attacked a state law similar to the elector requirement before. None of the cases cited in plaintiffs' motion addresses the issue, even in dictum or by implication. City Defendants brief plaintiffs' cases in the order in which plaintiffs cite them.

Citizens United v. Federal Election Commission, 558 U.S. ___, 130 S.Ct. 876 (2010) holds that "Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether." *Id.* at 886. The word "initiative" appears only in a dissent. *Id.* at 981 (dis. op. of Thomas, J.).

Prete v. Bradbury, 438 F.3d 949 (9th Cir. 2006) holds that Oregon's ban on per-signature payment to initiative signature gatherers does *not* violate the First Amendment. *Id.* at 951. Before concluding that an important regulatory interest supported the ban, *id.* at 969-971, the court commented that "the circulation of initiative and referendum petitions involves 'core political speech,' and is, therefore, protected by the First Amendment," *id.* at 961, quoting *Meyer v. Grant*, 486 U.S. 414, 421-22. Plaintiffs sorely abuse *Prete* by citing it for the proposition that "[i]nitiative petitions are 'core political speech.'" Plf.Mem. 2:17. It is the *circulation* of the petition, not the petition itself, of which the court spoke in *Prete*. 438 F.3d at 961.

Meyer v. Grant, 486 U.S. 414, holds that the First Amendment forbids states from prohibiting compensation of initiative petition signature gatherers. *Id.* at 415-416. It is the source of the quotation: "Thus, *the circulation of a petition* involves the type of interactive communication concerning political change that is appropriately described as "'core political speech.'" *Id.* at 421-22, italics added. Like *Prete*, it says nothing about whether the legal acts essential to creating a ballot proposition are political speech at all.

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First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) is a citation within a citation. Plf.Mem. at 3:11. In any event, it concerns whether a state can bar a corporation from making campaign contributions to support or oppose a ballot measure. *Bellotti*, 435 U.S. at 767. The cited footnote catalogs corporations' constitutional rights, not one of which is to be an elector, legislator, or sponsor of an initiative. *Id.* at 778 n.14.

Federal Election Commission v. Massachusetts Citizens for Life, 479 U.S. 238 (1986) involves federal election campaign contribution limits, not ballot initiatives. *Id.* at 241. Plaintiffs cite a portion of the plurality opinion that has nothing to do with initiatives. *Id.* at 255.

Buckley v. Valeo, 424 U.S. 1 (1976) reviewed the campaign contribution limits of the Federal Election Campaign Act of 1971 as amended in 1974. *Id.* at 6. It has nothing to do with initiatives. It is cited for the indisputable propositions that the First Amendment has a clause protecting freedom of association, *id.* at 15, and that membership disclosure laws can unduly burden the right of association, *id.* at 64. It then upholds mandatory campaign contribution disclosure. *Id.* at 66-68.

NAACP v. Alabama, 357 U.S. 449 (1958) concerns privacy of membership lists of nonprofit advocacy organizations. *Id.* at 462. It has nothing to do with initiatives.

Simmons v. United States, 390 U.S. 377 (1968) arises from an armed robbery of a federally insured financial institution. *Id.* at 379. The cited part concerns whether a defendant can be compelled to give testimony that could be used against him at trial in order to assert a Fourth Amendment claim of illegal search. *Id.* at 391, 393.

Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006) holds that Congress did not violate the First Amendment by requiring law schools that object to military discrimination against homosexuals to allow on-campus military recruiting or forfeit all federal financial assistance. *Id.* at 51, 70.

Bourgeois v. Peters, 387 F.3d 1303 (11th Cir. 2004) concerns magnetometer searches conducted as a condition of allowing protestors to attend a demonstration on public property. The cited section criticizes the municipality for compelling protestors to undergo an illegal search in order to participate in protected First Amendment activity. *Id.* at 1324.

Lefkowitz v. Cunningham, 431 U.S. 801 (1977) held unconstitutional a New York law that immediately discharged from office any officer of a political party who refused to waive the Fifth Amendment right against self-incrimination in an investigation of his conduct in office. *Id.* at 802-803, 807, 808.

Dolan v. City of Tigard, 512 U.S. 374 (1994) is a Fifth Amendment takings case. *Id.* at 377. It mentions the doctrine of unconstitutional conditions, but it does not even stand for the balancing test proposition cited in plaintiffs' memorandum. *Id.* at 385.

United States v. Midgett, 342 F.3d 321 (4th Cir. 2003) is a criminal case in which the trial court erroneously compelled the defendant to choose between the right to represent himself and the right to testify on his own behalf. *Id.* at 322. *United States v. Scott*, 909 F.2d 488 (11th Cir. 1990) is identical. *Id.* at 488-489.

In sum, plaintiffs *assumed* that the legal acts necessary to create an initiative ballot proposition are First Amendment speech or association, then cited cases why limiting the right to engage in those acts violates the First Amendment. Plf.Mem. 1-6. But the cited authority does nothing to clothe plaintiffs' naked assumption with any fabric of reasoning or precedent. Plaintiffs have simply not made a recognizable First Amendment argument.

C. Regulation of Who Can Commence an Initiative Does Not Implicate the First Amendment

1. Doe v. Reed, Not Analyzed by Plaintiffs, Does Not Compel Finding First Amendment Issues

What is truly remarkable about plaintiffs' argument is the failure to discuss *Doe v. Reed*, 561 U.S. ___, 130 S.Ct. 2811 (2010), on which plaintiffs rely for unrelated points. *See, e.g.*, Plf.Mem. at 9-10.) The constitution of the State of Washington reserves to the people the power of initiative and referendum, similarly to the California Constitution. *Doe*, 130 S.Ct. at 2815-2816. A Washington referendum petition must be signed by registered Washington voters in number equal to or greater than four percent of the votes cast in the previous gubernatorial election. *Id. Doe* considered whether Washington's act requiring disclosure of public records was invalid to the extent it required disclosure of referendum petitions, thus revealing who signed the petitions. *Id.* at 2815, 2817. The court concluded there was no violation. *Id.* at 2821.

The Supreme Court held that a *voter* who signs a petition is engaged in an expressive act that also has legislative significance. *Doe*, 130 S.Ct. at 2817-2818. Therefore, the court reviewed the validity of the public records disclosure act under the First Amendment. *Ibid.* In contrast, the legislative acts necessary to commence an initiative petition, although in some senses expressive, should be treated as entirely governmental in character and therefore not subject to First Amendment scrutiny. The court observed in *Doe* that "[t]o the extent a regulation concerns the legal effect of a particular activity in that process, the government will be afforded substantial latitude to enforce that regulation. *Id.* at 2818. In contrast to the compelled disclosure in *Doe*, the elector requirement concerns *only* the legal effect of a particular activity—that is, who may engage in the acts of commencement with valid legal effect. Everything about *Doe* should be read in the context of the long history cited in it of applying the First Amendment to state regulations that suppress advocacy or compel disclosure of advocates. *See id.* at 2817-2818.

2. Circuit Authority Holds There Is No First Amendment Issue in Regulations That Do Not Directly Affect Expression or Association

No federal constitutional right compels states to provide for statewide or local direct citizen legislation. *Stone v. City of Prescott*, 173 F.3d 1172, 1174-1175 (9th Cir. 1999); *see Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210-1211 (10th Cir. 2002). Plaintiffs do not appear to argue otherwise. Of course, states that have initiative processes must not impair First Amendment political speech about the proposals that citizens generate. *Doe v. Reed*, 130 S.Ct. at 2817.

Challenges to the structures of initiative schemes themselves are normally rejected without the need to apply a First Amendment balancing test. *Molinari v. Bloomberg*, 564 F.3d 587 (2d Cir. 2009) recently and effectively illustrates. In *Molinari*, the plaintiffs claimed that New York unreasonably burdened the First Amendment rights clustered around the state's initiative process by allowing legislative bodies to amend popularly passed measures. *Id.* at 590. The Second Circuit held that the chilling effect argument did not even raise a First Amendment issue. *Id.* at

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602. The court stated: "As our Sister Circuits (and the Nebraska Supreme Court)[3] have recognized, plaintiffs' First Amendment rights are not implicated by referendum schemes *per se* (and certainly not by the City Council's amendment of a law previously enacted by a referendum), but by the regulation of advocacy within the referenda process, *i.e.*, petition circulating, discourse and all other protected forms of advocacy. Even if plaintiffs are correct that the enactment of Local Law 51 will make it more difficult for plaintiffs to organize voter initiatives and referenda in the future, 'the difficulty of the process alone is insufficient to implicate the First Amendment, as long as the communication of ideas associated with the [referendum process] is not affected.'" *Id.* It specifically held that First Amendment balancing under *Anderson v. Celebrezze*, 460 U.S. 780 (1983) was unnecessary. It distinguished that entire line of authority because "[t]hese cases all involve direct restrictions on speech or access to the ballot." (*Id.* at 604-605.) And "access to the ballot" can only mean access by candidates, not initiative proponents, because even a requirement that 15 percent of the registered voters of a political subdivision sign petitions to qualify a ballot initiative does not raise a First Amendment issue. *Id.* at 602, citing *Wellwood v. Johnson*, 172 F.3d 1007, 1008-1009 (8th Cir. 1999). Such a requirement "'in no way burden[s] the ability of supporters of local-option elections to make their views heard.'" *Id.*

D. Plaintiffs Do Not Raise a First Amendment Claim

The position of the individual plaintiffs is as far afield as that of the plaintiffs in *Molinari*, 564 F.3d 587. Charter section 903 expressly makes them eligible to sponsor initiatives, so the ban argument at pages 2-3 of their memorandum does not apply. Neither Charter section 903 nor any other law purports to regulate anything plaintiffs speak or publish about an initiative measure, so the disfavored speakers' speech argument at pages 3-4 does not apply. The speech-by-proxy argument fails for at least two reasons. First, none of the cited authorities suggests that a person

[3] The Second Circuit quoted *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997), and its analysis referred to: *Stone v. City of Prescott*, 173 F.3d at 1175; *Save Palisade FruitLands*, 279 F.3d at 1212; *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099 (10th Cir. 2006) (en banc); *Marijuana Policy Project v. United States*, 304 F.3d 82, 84-85 (2002); *Wellwood v. Johnson*, 172 F.3d 1007, 1008-1009 (8th Cir. 1999); *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 297 (6th Cir. 1993); and *Pony Lake School District v. State Committee for Reorganization of School Districts*, 710 N.W.2d 609, 624-625 (Neb. 2006).

who might (or might not) speak for a corporation has standing to assert a legally competent corporation's claim of First Amendment rights. *See* Plf.Mem at 4, citing *Citizens United v. Federal Election Commission*, 130 S.Ct. at 897-898, 913; *Meyer v. Grant*, 486 U.S. at 424; *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. at 255 (plurality opinion). In fact, the individual plaintiffs do not appear to argue they have a First Amendment claim derivative of the corporate plaintiffs'. Plf.Mem. 4, 6-7. Second, the argument assumes that the legal act of signing a petition and delivering it to the City Clerk to create an initiative is speech, which City Defendants refuted in parts A and B, *ante*. Finally, the unconstitutional condition argument at pages 4-6 of plaintiffs' memorandum relies on claims that the corporate plaintiffs are put to a choice between expression and privacy of association, so it does not apply

The corporate plaintiffs also do not raise a First Amendment claim. The disfavored speaker, proxy, and unconstitutional condition arguments are surplusage. Charter section 903 bans corporations along with all natural persons who are not electors of the City from engaging in the conduct of commencing an initiative petition. If the legal acts that create an initiative measure to be circulated among voters were speech, balancing under *Anderson v. Celebrezze*, 460 U.S. 780 would be required. But, as City Defendants established in parts A through B, *ante*, those legal acts are not speech. They are acts of self-government reserved to the electors of the City.[4]

E. Equal Protection Applies—and There Is No Violation

City Defendants do *not* argue that state and local initiative law is immune from federal constitutional analysis so long as it does not directly burden advocacy within the initiative process. Rather, the initiative law itself is properly reviewed under the Equal Protection Clause of the Fourteenth Amendment. *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969). For example, a restriction of the right to vote in a revenue bond referendum to only those registered voters who also pay property taxes would violate equal protection. *Id.*

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[4] Plaintiffs wisely do not contend that the elector requirement decreases the pool of persons available to circulate petitions or "limit[s] the number of voices who will convey the initiative proponents' message." *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 194-95. Rather, organizations can fully participate in circulating petitions and in advocacy.

There is no equal protection problem here. The elector requirement distinguishes between registered voters and all legal and natural persons who are not registered voters. The foundation of equal protection jurisprudence in the electoral context is equal weight of every eligible citizen's vote. *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). The elector requirement does not discriminate *among* voters. Corporations do not vote; only natural persons vote. U.S. Const. amend. XVI, § 1; U.S. Const. amend. XXVI, § 1; Cal. Const., Art. II, § 2. In the electoral context, "economic interests" are not recognizable interests for equal protection analysis. *Reynolds*, 377 U.S. at 562 ("Legislators are elected by voters, not farms or cities or economic interests."). Corporations are not a suspect class in equal protection analysis. *Burlington N. R. Co. v. Ford*, 504 U.S. 648, 651; *Tran Qui Than v. Regan*, 658 F.2d 1296, 1305 (9th Cir. 1981). Since an economic entity has no fundamental interest in participating in government as a citizen and is not a member of a suspect class, the elector requirement need only have a rational basis. *Burlington*, 504 U.S. at 651. It does, for the reasons detailed in the hypothetical First Amendment balancing, *post*, Part II. The elector requirement does not violate any recognized equal protection doctrine.

II.

IF THE FIRST AMENDMENT APPLIED, THE ELECTOR REQUIREMENT PASSES MUSTER

In this part, City Defendants assume *arguendo* that by forcing a corporation that wants to sponsor an initiative to persuade an elector to do so, the elector requirement affects corporations' First Amendment rights. Two new questions then arise: (1) what is the standard of review when a content-neutral election regulation indirectly affects a First Amendment right and (2) what interests does the City (in line with California and all its municipalities) have in limiting initiative sponsorship to its electors. This part will answer those questions.

A. The Voting Process Cases Provide "Ordinary Litigation" Balancing as the Standard of Review

Storer v. Brown, 415 U.S. 724 (1974) is a landmark in constitutional jurisprudence of candidate ballot access, a jurisprudence that is helpful here. *Storer* considered a California law that required, among other things, a voter registered as a party member to disaffiliate from the

party for a full year before being eligible to run for office as an independent. *Id.* at 726-727. The court applied an Equal Protection Clause analysis. *Id.* at 730. It recognized "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Id.* The court expected it would be "very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases; and the rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause." *Id.* "Decision in this context, as in others, is very much a 'matter of degree,' [citation], very much a matter of 'consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.'" *Id.* The court upheld the restriction. *Id.* at 736-737.

In *Anderson v. Celebrezze*, 460 U.S. 780, the Supreme Court considered the constitutionality of an Ohio statute that required an independent candidate for President of the United States to file campaign papers 229 days before the general election, a date also before the Ohio partisan primary election. *Id.* at 783. In a 5-4 decision, *id.* at 806, the court adopted a First Amendment associational model to analyze the burden on candidates and voters of such an early filing deadline, *id.* at 787 n.7. Nevertheless, the majority cited *Storer*, quoted the language recognizing the right of states to regulate elections and ballot access, *id.* at 788, and appended a footnote stating: "We have upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself" *id.* at 788 n.8. And it adopted the *Storer* analytical process: "a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all

these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." *Id.* at 789.

The Supreme Court then named *Storer* and *Anderson* as the parents of the "'ordinary litigation' test" in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 345 (1995). The court distinguished the ordinary litigation balancing test to be applied to ballot access regulations from the analysis applied to direct prohibition of First Amendment expression, such as distribution of anonymous leaflets advocating positions on ballot measures. *Id.* Before *McIntyre*, though, other cases had used the same balancing test without naming it. *See, e.g., Burdick v. Takushi*, 504 U.S. 428, 433, 442 (1992) (upholding Hawaii's prohibition on write-in voting in general election); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214, 217 (1986) (balancing test applies even when a political party's associational rights are directly burdened).

Nothing in *Doe v. Reed*, 130 S.Ct. 2811, suggests that the Supreme Court overruled so well established a test as ordinary litigation balancing. To the contrary, the court cited *Burdick v. Takushi* for the proposition that "[w]e allow States significant flexibility in implementing their own voting systems." *Id.* at 2818. The court carefully tied the phrase "exacting scrutiny" to the direct First Amendment burden of revealing the identity of an otherwise anonymous advocate. *Id.* at 2818.

B. If Balancing Were Necessary, the Elector Requirement Is Valid

If signing and delivering a proposed petition to the City Clerk were advocacy under the First Amendment, plaintiffs still would not prevail. Charter § 903 does not impose an outright ban on corporate political speech, see Plf.Mem. at 3, but rather bans only the acts of creating and filing the proposed legislation. Given the narrow scope of prohibited conduct, the fact that the prohibition is part of regulating the basic election process, and the broad scope of permissible conduct, the Court would be required to apply the balancing test under *Anderson v. Celebrezze*, 460 U.S. at 789. Parts A and B of plaintiffs' argument ignore the entire line of ballot access cases and therefore provide no basis for summary judgment. Applying the balancing test would sustain the elector requirement.

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The first step of analysis is to determine "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." *Anderson v. Celebrezze*, 460 U.S. at 789. The sole asserted injury is deprivation of the capacity to be a proponent of an initiative. Part C of plaintiffs' argument identifies the real content of the injury: a corporation or a natural person who is not a Chula Vista elector must persuade a Chula Vista elector to commence the initiative process. *See* Plf.Mem. at 4. Part D of plaintiffs' argument is illogical. It relies on the unstated premise that a corporation could persuade *only* one of its members to commence the initiative process and attempts then to reason that the elector requirement therefore compels a corporation to forfeit the right of privacy of its membership list. Plaintiffs' papers contain no statement of purportedly undisputed fact and contain no evidence that, assuming a nonprofit corporation with members is involved, only members of such a corporation could be persuaded to sponsor an initiative measure. And if plaintiffs had articulated the fact essential to their unconstitutional condition theory, they probably would have recognized it as nonsense and would not have made the argument. The asserted injury, then, is only this: any nonnatural person and any natural person who is not an elector of the City must persuade an elector to commence the initiative process. Plaintiffs' papers say nothing about what would be just, beneficial, or important in allowing corporations and other strangers to sponsor initiatives, or what is unjust or harmful in the elector requirement.

The second step is to "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson v. Celebrezze*, 460 U.S. at 789.

California's primary interest, and the primary interest of its municipalities like the City, is that only the people themselves shall exercise the right of self-government reserved in the initiative. The California Supreme Court has explained that interest and its history. "'The amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's.'

[Citation.] The progressive movement, both in California and in other states, grew out of a widespread belief that 'moneyed special interest groups controlled government, and that the people had no ability to break this control.'" *Strauss v. Horton*, 46 Cal.4th at 421. The Southern Pacific Railroad was a particular target because people believed it corruptly controlled local and state public officials, including judges. *Id.* The 1911 ballot pamphlet concluded with this argument: "'Are the people capable of self-government? If they are, this amendment should be adopted. If they are not, this amendment should be defeated.'" *Id.* at 421, n.18.

Nothing could be more essential to the grass roots democracy principles undergirding the initiative than that general corporations (e.g. Southern Pacific Railroad) and nonprofit corporations functioning as moneyed special interest groups (e.g. PACs) not be allowed to be proponents of ballot propositions.

Restricting direct participation in political decisions to citizens or electors is at the core of constitutional government. To be a Representative, one must be a natural person and a citizen for seven years. U.S. Const., Art. I, § 2. A Senator must be a citizen for nine years. U.S. Const., Art. I, § 3. After the passing of the generation alive when the Constitution was adopted, a President must be a natural born citizen. U.S. Const., Art. II, § 1. Only natural persons vote. U.S. Const. amend. XVI, § 1; U.S. Const. amend. XXVI, § 1. The same is so in California. Cal. Const., Art. II, § 2. Only natural persons run for public office. *E.g.* Cal. Const., Art IV, § 2(c) (Legislature); Cal. Const., Art. V, § 2 (Governor). Only natural persons can sign initiative petitions. Cal. Const., Art. II, § 8(b).

There are corollary pragmatic interests. Municipalities in particular should not be forced to incur the expense and controversy of the initiative qualification process and an election unless a bona fide member of the body politic cares enough about a proposition to serve as a sponsor. There is enough cynicism about how the statewide initiative process has evolved; letting special interest groups be the legal sponsors of initiatives can only discredit the process.

Having to find an elector to sponsor an initiative is a trivial injury in comparison to the legitimate public interests in the elector requirement. In the weighing of all factors, *Anderson v. Celebrezze*, 460 U.S. at 789, the elector requirement is constitutional.

CONCLUSION

Plaintiffs' attack on the elector requirement has no foundation in constitutional law and violates fundamental American political doctrine that the power to govern resides in the people and the governments created by the people. Plaintiffs' motion should therefore be denied.

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