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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CHULA VISTA CITIZENS FOR JOBS AND FAIR COMPETITION, et al.,

Plaintiffs,

v.

DONNA NORRIS, et al.,

Defendants.

09-cv-0897-BEN-JMA

INTERVENOR STATE OF CALIFORNIA'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Date: August 8, 2011
Time: 10:30 a.m.
Dept: 3
Judge The Honorable Roger T. Benitez
Trial Date N/A
Action Filed: April 28, 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

COURT RULES

OTHER AUTHORITIES

INTRODUCTION AND SUMMARY OF ARGUMENT

This opposition is filed by Intervenor State of California. The State intervened in this action to defend the constitutionality of four elections statutes of general application in California.

The claims asserted by plaintiffs in this action are novel. They assert that the First Amendment prohibits a law that requires the disclosure of the identity of an initiative proponent on the face of an initiative petition. They also assert that corporations have a First Amendment right to be the proponent of an initiative. These assertions, if adopted by this Court, would be unprecedented. California has long required the names of initiative proponents to appear on municipal and county initiative petitions, and no state allows corporations to be the legal proponent of an initiative.

The primary issue in this case is what First Amendment test should be applied to state and municipal laws that govern the content of an initiative petition. Plaintiffs assert that the challenged statutes regulate political speech and therefore are subject to strict scrutiny. They are mistaken. An initiative petition is a statutory creation. As such, it is a non-public forum in which expressive activity is subject to reasonable regulation. *San Francisco Forty-Niners v. Nishioka*, 75 Cal.App.4th 637, 648 (Cal.App. 1999); *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992). Even if the Court were to conclude that initiative petitions are subject to general First Amendment law governing compelled disclosure in the electoral context, the challenged statutes would not be subject to strict scrutiny. Rather, they would be subject to the exacting scrutiny test announced in the Supreme Court's recent *Doe v. Reed* decision. The challenged statutes pass either test.

As will be shown below, there is no legal substance to the radical claims made in this action. The local initiative process in California is wide-open, easy-to-use, and robust. Accordingly, plaintiffs' summary judgment motion should be denied.

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FACTS AND PROCEDURAL HISTORY[1]

I. STATUTORY FRAMEWORK FOR MUNICIPAL INITIATIVES

Chula Vista, as a charter city, is empowered to adopt its own rules concerning municipal elections.[2] Like many other charter cities, Chula Vista has incorporated by reference the California Elections Code.[3] Thus, while this case arises in the City of Chula Vista, the issues presented here are common to the vast majority of California municipalities.

The process for putting a municipal initiative on the ballot is straightforward. Initiative proponents must first file with the City Clerk a Notice of Intent to Circulate a Petition ("Notice of Intent") and the text of the proposed measure, signed by at least one but not more than three proponents. §§ 9202, 9203.[4] The Notice of Intent must be in substantially the following form:

> Notice of Intent to Circulate Petition
>
> Notice is hereby given by the persons whose names appear hereon of their intention to circulate the petition within the City of _____ for the purpose of _____. A statement of the reasons of the proposed action as contemplated in the petition is as follows:

§ 9202(a). Within 15 days the City Attorney must prepare a title and a summary (in five hundred words or less), which is provided to the proponents. § 9203. If the city has a newspaper of general circulation (as does Chula Vista), proponents must publish in that newspaper the Notice of Intent, and the ballot title and summary prepared by the City Attorney. § 9205(a). Proponents must provide proof of publication to the City Clerk within ten days of publication. § 9206.

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[1] The parties have filed cross-motions for summary judgment. This section is similar to the corresponding section of Intervenor State Of California's Memorandum Of Points And Authorities In Support Of Motion For Summary Judgment filed May 31, 2011.

[2] Cal. Const., art. XI, § 5(b): "It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for: . . . (3) conduct of city elections[.]"

[3] Chula Vista City Charter, art. IX, § 903:

> 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.

[4] Unless otherwise noted, all citations are to the California Elections Code.

Proponents may begin to circulate initiative petitions immediately after publication. § 9207. An initiative petition may be circulated in separate "sections." § 9201. Each section must contain the Notice of Intent and the title and summary prepared by the City Attorney, and must further comply with all other applicable requirements of the Elections Code. § 9201, 9207. Within 180 days of the receipt of the title and summary, the proponents must file signed petitions with the City Clerk. § 9208. The City Clerk then has about 40 days to verify the signatures on the petition.[5] §§ 9211, 9114, 9115. The City Clerk then notifies the proponents of the sufficiency or insufficiency of the signatures. § 9114.

If there are sufficient signatures, the City Clerk presents a certification to the City Council at its next regularly scheduled meeting. § 9114. If the petition is signed by 15% of the registered voters in the City, the City Council can either adopt the ordinance as is or call a special election on the proposal. §§ 9214, 1405(a). If the petition is signed by 10% of the voters, the City Council can either adopt the ordinance as is or submit the proposal at the next regularly-scheduled election. §§ 9215, 1405(b).

II. PLAINTIFFS' FIRST EFFORT TO QUALIFY AN OPEN COMPETITION INITIATIVE (UNSUCCESSFUL).

Plaintiffs' first petition was initiated on January 24, 2008 by the filing of a Notice of Intent to circulate an "Open Competition And Anti-Discrimination In Contracting Ordinance." This Notice of Intent was submitted by two proponents, Plaintiff Kneebone, and John Mercado, who is not a plaintiff in this action. (Norris Decl., Exh. 1.) The City Attorney prepared a ballot title and a summary which was promptly provided to the proponents. On February 15, 2008, the proponents published the Notice of Intent in *The Star-News*, a weekly Chula Vista publication. However, the proponents did not file the proof of publication until May 1, 2008, which was outside the 10-day period required by section 9206. (*See* Norris Decl., ¶ 5.)

On May 23, 2008, Ms. Kneebone and Mr. Mercado submitted their petition with approximately 15,222 signatures. That same day, the City Clerk wrote to Ms. Kneebone and Mr.

[5] In practice, signature verification for the City of Chula Vista is done by the San Diego County Registrar of Voters. (*See* Norris Decl., ¶ 3.)

Mercado informing them that she was unable to accept the petition because they had not filed their proof of publication within the 10-day period required by section 9206. (Norris Decl., Exh. 2.)

On May 29, 2008, Plaintiffs Kneebone and Chula Vista Citizens for Jobs and Fair Competition ("CVC") filed an action in San Diego County Superior Court seeking a writ of mandate compelling the City Clerk to accept and process the petitions. (Norris Decl., Exh. 3.) Although plaintiffs initially won a temporary restraining order, their motion for a preliminary injunction was denied. (Norris Decl., Exh. 4.) Plaintiffs Kneebone and CVC then filed a petition for writ of mandate and a request for stay in the California Court of Appeal. On July 9, 2008, the California Court of Appeal denied the petition for writ of mandate. (*See* Norris Decl., ¶ 8, Exh. 5.)

III. PLAINTIFFS' SECOND EFFORT TO QUALIFY AN OPEN COMPETITION INITIATIVE (UNSUCCESSFUL).

One month after the loss in the Court of Appeal, a Notice of Intent to circulate a "Fair and Open Competition Ordinance" was filed with the City Clerk by Plaintiffs Kneebone and Breitfelder. (Norris Decl., Exh. 6.) This time plaintiffs timely filed the proof of publication, but when they later submitted their initiative petitions for verification, it turned out that the initiative petitions did not bear the names of the proponents. (Norris Decl., Exh. E-2.) The City Clerk informed Plaintiffs Kneebone and Breitfelder that she was unable to accept the petitions due to non-compliance with sections 9207 and 9202(a). (Norris Decl., Exh. 9.)

An exchange of correspondence followed during which plaintiffs offered several reasons why the initiative petitions should be processed. (*See* Norris Decl., ¶¶ 13-15.) In a November 20, 2008 letter, plaintiffs asserted for the first time that an unincorporated ballot measure committee – "Chula Vista Citizens for Jobs and Fair Competition major funding by Associated Builders & Contractors PAC and Associated General Contractors PAC to promote fair competition" – was a proponent of the initiative. (Norris Decl., Exh. 11.) Plaintiffs claimed that the ballot measure committee's name had appeared on the initiative petitions and that this statement was sufficient to

inform voters of the identity of the proponents.[6] Plaintiffs did not claim that the names of the individual plaintiffs appeared on the initiative petitions. The Chula Vista City Attorney rejected plaintiffs' various contentions and confirmed that the initiative petitions would not be processed. (Norris Decl., Exh. 12.)

On June 4, 2009, plaintiffs filed a motion for preliminary injunction in this Court. Generally speaking, plaintiffs sought an order compelling the City Clerk to process the initiative petitions and, if supported by sufficient signatures, to place the initiative on a ballot to be voted on no later December 7, 2009. (Dkt. # 7; Norris Decl. ¶ 16.) The motion was denied. (Dkt. # 42; Norris Decl., Exh. 13.)

IV. PLAINTIFFS' THIRD EFFORT TO QUALIFY AN OPEN COMPETITION INITIATIVE (SUCCESSFUL).

On March 13, 2009, Plaintiffs Kneebone and Breitfelder filed a third Notice of Intent, this time to circulate a "Fair and Open Competition Ordinance." (Norris Decl., Exh. 14.) Plaintiffs complied with all statutory requirements and the qualification process went smoothly. Plaintiffs submitted the required number of valid signatures and the measure appeared on the June 8, 2010 General Municipal Election ballot as Proposition G. Proposition G was approved by a 18,783 – 14,906 margin and took effect on July 23, 2010. (*See* Norris Decl., ¶¶ 18-25.)

V. EARLIER PROCEEDINGS IN THE PRESENT CASE.

On April 28, 2009 plaintiffs filed a 48-page, 207-paragraph complaint for declaratory and injunctive relief and shortly thereafter filed a motion for preliminary injunction. (Dkt. ## 1, 7.) Plaintiffs are:

- "Chula Vista Citizens for Jobs and Fair Competition major funding by Associated Builders & Contractors PAC and Associated General Contractors PAC to promote fair competition." (Complaint ¶ 19.) This is an unincorporated association and a

[6] The following words appeared in tiny type at the bottom of the last page of the petition: "Paid for by Chula Vista Citizens for Jobs and Fair Competition, major funding by Associated Builders & Contractors PAC and Associated General Contractors PAC to promote fair competition." (Norris Decl., Exh. 8, p. 5.)

ballot measure committee. For obvious reasons its name will be abbreviated as "CVC."

- "Associated Builders & Contractors, Inc., San Diego Chapter." (Complaint ¶ 75.) This is an association of construction related businesses. Its name will be abbreviated "ABC."
- Lori Kneebone. She is a registered voter in Chula Vista who "listed her name as a proponent" of Proposition G. (Complaint ¶¶ 44-45.)
- Larry Breitfelder. He is a registered voter in Chula Vista who "listed his name as a proponent" of Proposition G. (Complaint ¶¶ 59-60.)

On June 11, 2009, the Court certified to the California Attorney General that the constitutionality of sections 342, 9202, 9205 and 9207 was at stake, and that the State of California would have 60 days to intervene, should it choose to do so. (Dkt. # 17.) On August 10, 2009, the State of California moved to intervene, stating it took no position on the preliminary injunction and that intervention "will be limited to the issue of the constitutionality" of the challenged statutes. (Dkt. # 27, p. 3, ll. 12-16.) The State's motion to intervene was granted; the order notes that "the State only seeks to intervene on the constitutionality of these statutes." (Dkt. # 30, p. 2, ll. 7-8.)

On March 18, 2010, the Court, noting that plaintiffs' third initiative had qualified for the June 2010 general election, denied the preliminary injunction as moot. (Dkt. # 42.) The Court also stayed proceedings until resolution of *Doe v. Reed*, 130 S.Ct. 2811 (2010), a case which posed many of the issues raised by plaintiffs in the present action. Once *Doe v. Reed* was decided, the stay was lifted. (Dkt. # 44.)

ARGUMENT

I. LEGAL STANDARD ON SUMMARY JUDGMENT

Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Pro. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

II. THE CHALLENGED STATUTES ARE NOT UNCONSTITUTIONAL IN THAT THEY REQUIRE DISCLOSURE OF A PROPONENT'S NAME ON INITIATIVE PETITIONS. [COUNT 1.]

The primary issue in this case is what First Amendment test should be applied to state and municipal laws that govern the content of an initiative petition. The thrust of plaintiffs' argument is that the challenged statutes are subject to strict scrutiny because they ban "anonymous petition-circulation speech." Plaintiffs' Memorandum at 8. Plaintiffs are mistaken. The challenged statutes are not subject to strict scrutiny for three reasons. First, as a factual matter, the challenged statutes do not prohibit anonymous petition-circulation speech; those who circulate petitions need not identify themselves. California requires only that identity of an initiative's proponents be disclosed on initiative petitions. Second, an initiative petition is not subject to strict scrutiny. An initiative petition is a "'non-public forum' in which expressive activity can be subject to reasonable regulation." *See San Francisco Forty-Niners v. Nishioka*, 75 Cal.App.4th 637, 647 (Cal.App. 1999), quoting *Clark v. Burleigh*, 4 Cal.4th 474, 491 (Cal. 1992). Third, even if initiative petitions were subject to general First Amendment law governing compelled disclosure in the electoral context, the challenged statutes would not be subject to strict scrutiny. Rather, they would be subject to the exacting scrutiny test announced in the Supreme Court's recent *Doe v. Reed* decision and, as shown below, the challenged statutes pass that test.

A. The Challenged Statutes Do Not Prohibit Anonymous Petition-Circulation Speech.

As the first step in the municipal initiative process, California law requires one to three proponents to submit a Notice of Intent to the City Clerk. § 9202. Any elector in a municipality may be a proponent.[7] Initiative petitions must themselves bear (among other things) the Notice of Intent, including the names of the proponents. § 9207. Taken together, these statutes require a municipal initiative petition to bear the name of at least one proponent who is eligible to vote in

[7] *See* Cal. Const., art. II, § 11(a); "Initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide." See also § 321: "'Elector' means any person who is a United States citizen 18 years of age or older and a resident of an election precinct at least 15 days prior to an election."

that municipality.[8] This is the requirement that plaintiffs challenge as oppressive and unconstitutional.

The challenged statutes do not suffer from the myriad constitutional flaws alleged by plaintiffs in their opening memorandum. They do not require the identity of petition circulators to be disclosed on badges worn by the circulators;[9] they do not require the identity of petition circulators to be disclosed on financial disclosure forms either pre- or –post-election;[10] and they do not prohibit the distribution of anonymous handbills at public meetings.[11] However, California law does require that municipal initiative petitions bear the name of at least one proponent. Plaintiffs have cited no authority holding that such a requirement is unconstitutional – there is none.

B. An Initiative Petition Is A Non-Public-Forum And Is Subject To Reasonable Government Regulation.

There is no doubt that the challenged statutes, which govern the content of an initiative petition, trigger scrutiny under the First Amendment. The First Amendment "has its fullest and most urgent application" to political speech. *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214, 223 (1989). But the conclusion that an initiative petition is political speech merely begins the inquiry:

> Even protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities. Recognizing that the Government, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated, the Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other

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[8] In the present case, the Chula Vista City Attorney took the position that an initiative petition must bear both the names and *signatures* of the proponents. This is wrong. The petition need bear only the names. *See* 83 Ops.Cal.Atty.Gen. 139, 142, "the city clerk is required to reject a petition that does not contain a notice of intent with the name or names of the proponents of the initiative[;]" *Myers v. Patterson*, 196 Cal.App.3d 130, 138-39 (1987). This error is inconsequential here because the initiative petitions at issue did not bear the names of the proponents, and therefore could not have been counted even under a correct reading of the statute.

[9] *See Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 197 (1999).

[10] *See (WIN) Washington Initiatives Now v. Rippie*, 213 F.3d 1132, 1135 (9th Cir. 2000).

[11] *See McIntyre v. Ohio Elections Com'n*, 514 U.S. 334, 338, fn. 3 (1995).

> purposes. Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum.

Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 799-800 (1985) (internal citations and quotation marks omitted).

For purposes of forum analysis, the Supreme Court has divided all public property into three categories. First is the traditional public forum, where speech regulations are subject to strict scrutiny. *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). Second is the designated public forum, an area that the State has opened for expressive activity by part or all of the public. Speech regulations in a designated public forum are also subject to strict scrutiny. *Id.* at 678. Finally there is the non-public forum, which consists of all remaining public property. Here "[t]he challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." Id. at 679.

In *Clark v. Burleigh*, 4 Cal.4th 474, 491 (Cal. 1992), the California Supreme Court held that a judicial candidate's statement contained in a ballot pamphlet is a non-public forum in which expressive activity can be limited by reasonable regulations. The Court noted that a candidate statement is a statutory creation that permits a judicial candidate to place a 200-word statement in the ballot pamphlet so long as the statement is "limited to a recitation of the candidate's own personal background and qualifications and shall not in any way make reference to other candidates for judicial office or to another candidates qualifications, character, or activities." *Burleigh*, 4 Cal.4th at 478, 485. The Court further noted that the statute in question restricted only one channel of communication to the voters, and was viewpoint neutral. *Burleigh*, 4 Cal.4th at 467-468. The Court upheld the statute as a reasonable regulation on speech. *Burleigh*, 4 Cal.4th at 468.

Burleigh was followed by *San Francisco Forty-Niners v. Nishioka*, 75 Cal.App.4th 637 (Cal.App. 1999), which considered the question whether a municipal initiative petition could be disqualified from the ballot because the petition contained false statements about the effect of the initiative. In *Nishioka*, a citizens group circulated an initiative petition that would have halted

efforts to finance and build a new stadium at San Francisco's Candlestick Point. *Nishioka*, 75 Cal.App.4th at 640. The challenged initiative petition contained false representations concerning the contents, purpose, and effect of the proposed initiative, in violation of California Elections Code section 18600, which prohibits such false statements in an initiative petition. *Nishioka*, 75 Cal.App.4th at 645. A superior court entered a writ of mandate prohibiting the registrar of voters from qualifying the initiative for the ballot. *Nishioka*, 75 Cal.App.4th at 643. On appeal, proponents of the initiative claimed that the superior court's order was an unconstitutional prior restraint. The Court of Appeal held that an initiative petition is a non-public forum subject to reasonable government regulation, and upheld the superior court judgment:

> An initiative petition fits the definition of expressive activity in a nonpublic forum, not the traditional public forum of unregulated political speech. The initiative petition with its notice of intention is not a handbill or campaign flyer — it is an official election document subject to various restrictions by the Elections Code, including reasonable content requirements of truth. It is the constitutionally and legislatively sanctioned method by which an election is obtained on a given initiative proposal.

Nishioka, 75 Cal.App.4th at 648.

The conclusion that an initiative petition is a non-public forum is compelled by the structure of the California Elections Code. An initiative petition is a statutory creation and every aspect of it is regulated by statute. The first page of a municipal initiative petition must contain the title of the petition (prepared by the City Attorney) and the text of the measure (§ 9201); the text of the proposal must appear in at least 8-point type (§ 9203(b)); each section of a petition must bear a copy of the notice of intent and the title and summary (§ 9207); the title and summary must be printed across the top of each page on which signatures are to appear (§ 9203(b)); the heading of a proposal must be in a statutorily-prescribed form (§ 9203(b)). The only element of an initiative petition left to the discretion of an initiative proponent is the most important element: the proposal itself.

The requirement that an initiative petition to bear the names of one to three proponents is reasonable because this information informs voters that the petition has the backing of a fellow

elector.[12] For the same reason, every bill in the California Legislature is introduced by a member of the Legislature, whose name appears at the top of the printed bill. (*See* Waters Decl., Exh. 5.) Further, the requirement is viewpoint-neutral; it applies to all initiative proponents. The requirement therefore passes the reasonable scrutiny test applicable to non-public fora.

C. The Disclosure Statutes Also Pass The Constitutional Test Announced In The Supreme Court's Recent *Doe v. Reed* Decision.

The present case was stayed for several months pending resolution of *Doe v. Reed*, 130 S.Ct. 2811 (2010), a case which addressed many of the same issues presented here. *Reed* – which upheld a Washington disclosure statute much more Draconian than the statutes challenged here – demonstrates that there is no constitutional infirmity in the California statutes.

Reed was a challenge to a Washington law that required the State of Washington to disclose the name and contact information (including the address) of those who sign initiative and referendum petitions. *Reed*, 130 S.Ct. at 2815. Washington had passed a law that expanded the rights of same-sex domestic partners. An organization named Protect Marriage Washington then circulated a referendum petition and eventually submitted 137,000 petition signatures. The referendum appeared on the ballot and Washington voters approved the challenged law by a 53% to 47% margin (in other words, the referendum was defeated). During the election campaign, two groups sought access to the referendum petitions and issued a press release stating their intention to post the names of the referendum petition signers online in a searchable format. *Id.* at 2816. Washington took the position that the referendum petitions are disclosable public records. Signers of the referendum petition filed a complaint and sought a preliminary injunction to prevent disclosure of names and contact information of petition signers. A district court entered a preliminary injunction prohibiting disclosure; the Ninth Circuit reversed. *Id.* at 286-2817. The question presented to the Supreme Court was whether the Washington Public Records Act

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[12] See *Cornelius, supra*, 473 U.S. at 808: "The Government's decision to restrict access to a nonpublic forum need only be *reasonable;* it need not be the most reasonable or the only reasonable limitation. In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated." (Emphasis in original.)

violates the First Amendment by requiring disclosure of the identity of the 137,000 people who signed the referendum petitions. *Id.* at 2817.

The Supreme Court concluded that the disclosure required by the Washington Public Records Act does not violate the First Amendment and affirmed the judgment of the Ninth Circuit. *Reed*, 130 S.Ct. at 2821. The Court declined to apply strict scrutiny, noting that "the PRA is not a prohibition on speech, but instead a *disclosure* requirement. [D]isclosure requirements may burden the ability to speak, but they do not prevent anyone from speaking." *Id.* at 2818 (emphasis in original) (citations, ellipses, and internal quotation marks omitted). Rather the Court applied an "exacting scrutiny" test:

> We have a series of precedents considering First Amendment challenges to disclosure requirements in the electoral context. These precedents have reviewed such challenges under what has been termed "exacting scrutiny." That standard requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest. To withstand this scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.

Ibid. (citations and some internal quotation marks omitted).

Applying this test, the Court upheld the challenged disclosure provision. As to the first prong, the Court found that Washington's interest in preserving the integrity of the electoral process was "undoubtedly important." *Id.* at 2819. The Court stressed that "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *Ibid.* (citations and internal quotation marks omitted). As to the second prong, the disclosure law was substantially related to that interest because it helped ensure that only referenda supported by sufficient signatures would be placed on the ballot. *Ibid.*

Both prongs of the *Reed* test easily are met here. California has two important interests in the challenged disclosure statutes. First, because the right to propose initiative legislation is limited to electors, there is an important interest in providing information as to who is formally proposing the legislation. "Providing information to the electorate is vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment." *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990,

1005 (9th Cir. 2010), *cert. denied* 131 S.Ct. 1477 (2011). "A voter may reasonably seek to judge the precise effect of a measure by knowledge of those who advocate or oppose its adoption[.]" *Brown v. Superior Court,* 5 Cal.3d 509, 522 (1971). Second, there is an important interest in preserving the integrity of the electoral process. *Reed*, 130 S.Ct. at 2819. This interest is not limited to preventing fraud, it "extends more generally to promoting transparency and accountability in the electoral process[.]" *Ibid.*

The challenged disclosure statutes also have a "substantial relation" to California's important interests. *See Reed*, 130 S.Ct. at 2818. Assuming that California can require initiatives to have proponents (and it can), there is no conceivable objection to a law that requires petition-signers to be informed who the proponents are. By way of analogy, every bill in the California Legislature is introduced by a member of the Legislature, whose name appears at the top of the printed bill. (See Waters Decl., Exh. 5.)

The "substantial relation" requirement is particularly easy to meet here because "the strength of the governmental interest must reflect the seriousness of the *actual burden* on First Amendment rights." *Reed,* 130 S.Ct. at 2818 (emphasis added). The record in the present case demonstrates that the *actual burden* of the required disclosure is minute.

First, the challenged disclosure requirement applies to a maximum of three people. By the time that proponents' names appear on the petitions, their names have already been published in a newspaper of general circulation. By any measure, the impact of the California law is insignificant compared to the impact of the law upheld in *Reed*, which required disclosure of the names and addresses of more than 137,000 initiative signers. *Reed*, 130 S.Ct. at 2816.

Second, there is no evidence that the disclosure requirement has chilled use of the initiative process. California has the most active local initiative system in the country. As a 2004 study stated:

> Results from a recent national survey suggest that Californians are more likely than the residents of any other state to exercise [the power of initiative and referendum]. In the November 2000 election, over half of all U.S. local measures relating to growth and development appeared on the ballot in California (Meyers and Puentes, 2001).

Tracy M. Gordon, *The Local Initiative in California* (Public Policy Institute of California, 2004), p. v.[13] More than 60 municipal initiatives qualified for the ballot during calendar years 2009-2010 alone. (Waters Decl., Exh. 4.) This is the number that qualified for the ballot; the number circulated (all of which require at least one proponent) is necessarily higher.

Third, no one (including plaintiffs) has claimed that any initiative proposal has ever failed for want of a proponent. Californians frequently confront controversial initiative proposals. As but one example, this November San Franciscans will vote on a proposal to ban circumcision of male minors. (Waters Decl., Exh. 6.)

To the extent that plaintiffs attempt state an as-applied challenge, their burden is to show "a reasonable probability that the compelled disclosure of personal information will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Reed, supra*, 130 S.Ct. at 2820 (internal brackets omitted). They have wholly failed to meet this burden. They concede that they were subject to no threats, harassment, or reprisals as a result of being proponents of the Chula Vista Measure G. Plaintiff Kneebone's responses to interrogatory questions on this topic were unequivocally "no." (*See* Waters Decl., Exh. 7, pp. 2 - 3 [Plaintiff Lori Kneebone's Response to First Set of Interrogatories].) Plaintiff Breitfelder's responses were unequivocally "no" as to whether he had been subjected to threats or harassment. (Waters Decl., Exh. 8, pp. 3 - 4 [Plaintiff Larry Breitfelder's Response to First Set of Interrogatories]. He did, however, claim to be the victim of what he referred to as a "reprisal," specifically:

> In 2010, I campaigned as a candidate for City Council of the City of Chula Vista. As a result of being publicly identified as a proponent of the Fair and Open Competition Ordinance, large scale "soft money" expenditures were made opposing my bid for City Council, including electioneering communications sent to working families which described me as an "anti-worker activist," and the "Anti-Union Candidate" who was "[b]acked by anti-union contractors."

(*Id.* at p. 5.)

With all due respect to Mr. Breitfelder, the fact that his very public support for Proposition G may have cost him votes in his contemporaneous candidacy for City Council is not a "reprisal"

[13] Available at http://www.ppic.org/main/policyarea.asp?i=5&view=all.

that could exempt him from a generally-applicable disclosure requirement.[14] In a democracy, the fact that a candidate may gain or lose votes based on his position on policy issues is not a "reprisal," it is a necessary result of a healthy democratic system. In any event, Mr. Breitfelder's decision to be a proponent of Proposition G was purely volitional. California law requires only one legal proponent; Proposition G would have appeared on the Chula Vista ballot with or without Mr. Breitfelder's appearance as a proponent.

The challenged disclosure statutes do not violate the First Amendment because they are substantially related to California's vital interest in informing voters who is seeking to shape their views on initiative legislative proposals. *See Brumsickle, supra*, 624 F.3d at 1017.

III. THE CHALLENGED STATUTES ARE NOT UNCONSTITUTIONAL IN THAT THEY REQUIRE THE PROPONENT OF AN INITIATIVE BE AN ELECTOR. [COUNT 2.]

California law requires initiative proponents to be electors. California does not, as suggested by plaintiffs, draw a line between individuals and corporations. Rather, California law distinguishes between electors (who can propose and vote on initiatives) and all others (who cannot). This distinction is compelled by the California Constitution and by common sense; it does not offend the First Amendment.

Article II, section 8(a) of the California Constitution defines the initiative power as the power of electors: "The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." Article II, section 11(a), governing local initiatives, grants the initiative power to local electors: "Initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall

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[14] *Compare Brown v. Socialist Workers '74 Campaign Committee (Ohio)* 459 U.S. 87, 99 (1982), where the Socialist Workers Party was excused from Ohio's campaign expense reporting law after introducing proof of a four-year campaign of government and private harassment, including:

> threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members' property, police harassment of a party candidate, and the firing of shots at an SWP office. There was also evidence that in the 12-month period before trial 22 SWP members, including four in Ohio, were fired because of their party membership.

provide." The powers of initiative and referendum are explicitly reserved to the people of the State of California:

> The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum.

Cal. Const., art. IV, § 1.

The initiative and referendum were a reaction to a constitutional crisis at the beginning of the Twentieth Century. Simply put, it was widely perceived that the California Legislature had been bought by a corporation – the Southern Pacific Company.[15] As the California Supreme Court has explained:

> 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." In California, a principal target of the movement's ire was the Southern Pacific Railroad, which the movement's supporters believed not only controlled local public officials and state legislators but also had inordinate influence on the state's judges, who – in the view of the progressive movement – at times improperly had interpreted the law in a manner unduly favorable to the railroad's interest. *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, 420-421 (2009) (internal citations omitted) (emphasis added). Thus the 1911 ballot argument in favor of adopting the initiative explained that "The initiative will reserve to the people the power to propose and to enact laws which the legislature may have refused or neglected to enact, and to themselves propose constitutional amendments for adoption."[16]

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[15] Governor Hiram Johnson (the leader of the Progressive Movement and the moving force behind the adoption of the initiative) drove this point home in his 1911 inaugural speech:

> For many years in the past, shippers, and those generally dealing with the Southern Pacific Company, have been demanding protection against the rates fixed by that corporation. The demand has been answered by the corporation by the simple expedient of taking over the government of the State; and instead of regulation of the railroads, as the framers of the new Constitution [that is, the Constitution of 1879] fondly hoped, the railroad has regulated the State.

Independent Energy Producers Ass'n v. McPherson, 38 Cal.4th 1020, 1039 (2006) (bracketed language in original).

[16] "Reasons Why Senate Constitutional Amendment No. 22 Should Be Adopted," 1911 General Election, available at http://holmes.uchastings.edu/cgi-bin/starfinder/22169/calprop.txt.

Acting pursuant to article II, § 11(a) of the California Constitution, the Legislature has adopted statutes to implement the initiative process at the state and local level, and – as required by the California Constitution – has required initiative proponents to be natural persons.[17] The requirement that proponents be natural persons applies not just to municipal initiatives like Chula Vista's Proposition G, but to all California initiatives: state, county, municipal, and district. § 342. Intervenor is aware of no State that allows corporations or associations to be the proponents of initiatives.

The associational plaintiffs in the present case (one ballot measure committee and one unincorporated association) assert that the challenged statutes violate their right of free speech. No one would deny that corporations have First Amendment rights, in particular the right to free speech. *See Citizens United v. Federal Election Com'n*, 130 S.Ct. 876, 899 (2010) ("The Court has recognized that First Amendment protection extends to corporations.") But the challenged statutes do not limit the associational plaintiffs' speech. Plaintiffs can say anything they want about initiatives, and they can spend any amount of money to broadcast their views. Further, in an important way, the associational plaintiffs can act as proponents of Proposition G. "Proponent" is a common English noun that means "One who argues in support of something; advocate." *American Heritage Dictionary, Second College Edition* (Houghton Mifflin 1985) at 993. In ordinary usage, the organizational plaintiffs are proponents of Proposition G. This is particularly true of the ballot measure committee, which apparently was formed solely to promote Proposition G. (Complaint ¶ 19.) And because the measure got 18,783 Yes votes, there are probably hundreds, maybe thousands, of other Chula Vistans who can claim to be proponents of Proposition G.

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[17] Section 342 states in its entirety:

> "Proponent or proponents of an initiative or referendum measure" means, for statewide initiative and referendum measures, the elector or electors who submit the text of a proposed initiative or referendum to the Attorney General with a request that he or she prepare a circulating title and summary of the chief purpose and points of the proposed measure; or for other initiative and referendum measures, the person or persons who publish a notice or intention to circulate petitions, or, where publication is not required, who file petitions with the elections official or legislative body.

But the term "proponent" has a legal meaning in addition to its common meaning. The effect of the challenged statutes is simply to require that one to three residents and electors in a municipality be publicly identified as proponents of an initiative proposal. The fact that the challenged statutes give a separate status to electors does not differentiate them from other electoral laws. For example, only electors are allowed to vote. Cal. Const., art. II, § 2. Only electors are allowed to run for public office. Cal. Const., art. V, § 2 [Governor]; art. IV, § 2(c) [Legislature]. Only electors are allowed to sign initiative petitions. Cal. Const., art. II, § 8(b). Only electors are allowed to sign nominating papers necessary to qualify candidates for the ballot. § 8060. Only electors (elected legislators) are allowed to introduce bills to the Legislature. (Waters Decl., Exh. 5.) All of these activities are protected by the First Amendment. Yet corporations and unincorporated associations enjoy none of these rights.

Plaintiffs' challenge rests almost entirely on one decision, *Citizens United v. Federal Election Com'n*, which invalidated a federal law that prohibited corporate independent expenditures in connection with federal elections. *Citizens United v. Federal Election Com'n*, 130 S.Ct. 876, 913, 917 (2010). Specifically, plaintiffs rely on the Court's statement that "Government may not suppress political speech on the basis of the speaker's corporate identity." *Id.*, 130 S.Ct. at 913. For two reasons, *Citizens United* does not undermine the California requirement that only electors can formally propose initiatives. First, *Citizens United* did not create a new rule for speech in a non-public forum. The independent expenditures at issue in *Citizens United* were expenditures for private speech in private media. Second, the Ninth Circuit has declined to extend *Citizens United* to corporate speech other than independent expenditures. In *Thalheimer v. City of San Diego*, 2011 WL 2400779 (9th Cir. 2011), the Court upheld a San Diego ordinance that prohibits all corporate contributions to candidates, but allows individual contributions. The Court noted that "While the scope of that holding has yet to be fully developed, the *Citizens United* opinion demonstrates concern about laws that target particular speakers, such as corporations, based on their status, whereas the City's law draws a functional line between individual donors and all non-individuals." *Thalheimer*, 2011 WL 2400779, *14.

Here too, California has drawn a functional line between electors (who can propose and vote on initiative proposals) and non-individuals (who cannot).

The fact that corporations enjoy First Amendment rights does not ipso facto grant them all the constitutional rights of electors. Corporations have no constitutional right to be an initiative proponent as defined by the challenged statutes.

IV. THE CHALLENGED STATUTES ARE NOT UNCONSTITUTIONALLY VAGUE. [COUNTS 3-5.]

The Ninth Circuit has recently summarized the law on First Amendment vagueness challenges:

> "A law is unconstitutionally vague if it fails to provide a reasonable opportunity to know what conduct is prohibited, or is so indefinite as to allow arbitrary and discriminatory enforcement." *Tucson Woman's Clinic v. Eden,* 379 F.3d 531, 555 (9th Cir. 2004) (citations omitted); *see also Canyon Ferry,* 556 F.3d at 1030 (finding unconstitutional vagueness where an entity "had no way of knowing *ex ante* " that its conduct would be covered by the challenged statute). "Nevertheless, perfect clarity is not required even when a law regulates protected speech," *Cal. Teachers Ass'n v. State Bd. of Educ.,* 271 F.3d 1141, 1150 (9th Cir. 2001), and "we can never expect mathematical certainty from our language," *Grayned v. City of Rockford,* 408 U.S. 104, 110, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

Brumsickle, supra, 624 F.3d at 1019. The central inquiry in a vagueness challenge is whether a statute's "'deterrent effect on legitimate expression is both real and substantial, and if the statute is not readily subject to a narrowing construction by the state courts.'" *Id.* at 1020, quoting *California. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1151 (9th Cir. 2001).

The Court should note that there is ample evidence that the challenged statutes have no "real and substantial" deterrent effect on political expression. *See Brumsickle, supra*, 624 F.3d at 1020. Plaintiffs themselves admit in their verified complaint that they "have done initiative petitions in the City in the past, and intend to do initiative petitions in the City in the future[.]" (Complaint ¶ 176.) The challenged statutes were obviously no deterrent to plaintiffs' past initiatives. The challenged statutes were no deterrent to plaintiffs' third and successful attempt to pass a Fair and Open Competition ordinance. (Norris Decl., ¶¶ 18-25.) The challenged statutes were no deterrent to the proponents of San Diego County propositions A and B, which appeared

on the same ballot as did Chula Vista Proposition G.[18] (Waters Decl., Exh. 3-6 – Exh. 3-12.) And the challenged statutes were no deterrent to the proponents of more than 60 other municipal initiatives throughout California that qualified for the ballot during the calendar years 2009-2010.[19] (Waters Decl., Exh. 4.)

Definition of Proponent. Section 342 defines the "proponent" of a municipal initiative as "the person or persons who publish a notice or intention to circulate petitions, or, where publication is not required, who file petitions with the elections official or legislative body." Plaintiffs complain that section 342 is ambiguous because it does not define what "publish" means. (Plaintiffs' memorandum at p. 22, l. 7.) But when considering a vagueness challenge, "The particular context is all important." *American Communications Ass'n, C.I.O., v. Douds*, 339 U.S. 382, 412 (1950). Section 9202(a) states that a notice of intent, filed at the very beginning of the municipal initiative process, must be signed by "at least one, but not more than three proponents[.]" Article II, section 8(a) of the California Constitution defines the initiative power as the power of *electors*. When read in context, the term "proponent" refers to the electors who sign the notice of intent and thereafter submit proof of publication to the City Clerk.

In the present case, the record demonstrates that plaintiffs' claim of vagueness as to the term "proponent" is a post-hoc rationalization invented to pursue a legal agenda. On August 28, 2008, the City Clerk received a notice of intent to circulate an initiative petition signed by two individuals, plaintiffs Lori Kneebone and Larry Breitfelder. (Norris Decl., Exh. 6, p. 1.) On November 11, 2008, the City Clerk received signatures in support of that petition accompanied by a cover letter signed by plaintiffs Kneebone and Breitfelder. The cover letter began "As

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[18] The procedure for qualifying county initiatives is virtually identical to the process for qualifying municipal initiatives. A Notice of Intention must be submitted to the county registrar by one to five proponents. § 9103(a). Once a title and summary has been prepared, the proponents must publish the title and summary, and the Notice of Intention, in a newspaper of general circulation. § 9105(b). Prior to circulation of petitions, proponents must file proof of publication with the county registrar. § 9105(b). Each initiative petition must bear a copy of the Notice of Intention. § 9108.

[19] Section 9213 requires the elections official of every California municipality to file a biennial report regarding local initiatives. The Secretary of State then publishes a report summarizing that information. The Secretary of State's *Report on Municipal Initiative Measures During 2009-2010 (EC § 9213)* is attached to the Waters Declaration as Exhibit 4.

proponents of the proposed "Fair and Open Competition in Contracting" petition, filed with your office on August 28, 2008 here in Chula Vista, we hereby are officially submitting 23,285 signatures[.] (Norris Decl., Exh. 6, p. 1 (emphasis added).) It was not until November 20, 2008, *after* the petitions were rejected, that the City Clerk received a letter claiming that the campaign committee formed to support the was a proponent of the initiative.[20] (Norris Decl., Exh. 11, p. 2.) The record is clear that the individual plaintiffs understood themselves to be the proponents of Proposition G, an understanding that was shared by the City Clerk.

Bear a copy. Section 9207 requires in pertinent part that "Each section of the petition shall bear a copy of the notice of intention and the title and summary prepared by the city attorney." Read in context, this requirement is straightforward. The required notice is defined by section 9202:

> The notice shall be signed by at least one, but not more than three, proponents and shall be in substantially the following form:
>
> Notice of Intent to Circulate Petition
>
> Notice is hereby given by the persons whose names appear hereon of their intention to circulate the petition within the City of _____ for the purpose of _____. A statement of the reasons of the proposed action as contemplated in the petition is as follows:

Regrettably, in the present case the City of Chula Vista gave incorrect advice that the notice had to include the signature of the proponents. The requirement is simply that the notice bear the *names* of the proponents. *See* 83 Ops.Cal.Atty.Gen. 139, 142; *Brumsickle, supra*, 624 F.3d at 1020 (campaign finance statute not vague when clarified through judicial interpretation). But the incorrect advice had no practical effect because the petitions submitted by plaintiffs in support of

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[20] Plaintiffs' theory was that the ballot measure committee could be considered to be the proponent because it had paid for publication of the Notice of Intent. Plaintiffs then argued that the Notice of Intent had in fact presented the name of a proponent because at the bottom of the last page, in tiny type, appeared the statement "Paid for by Chula Vista Citizens for Jobs and Fair Competition, major funding by Associated Builders & Contractors PAC and Associated General Contractors PAC, to promote fair competition." (Norris Decl., Exh. 8, p. 5.) Plaintiffs have never contended that the individual plaintiffs' names appeared on the initiative petitions, despite the fact that plaintiffs concede that the individual plaintiffs were proponents. (See Norris Decl., Exh. 6, p. 1.

their second petition did not bear the names of the proponents and therefore were properly rejected. (Norris Decl., Exh. 8, pp. 2-5 (copy of initiative petition).)

In substantially the following form. Section 9202, quoted above, sets out a model form for a Notice of Intent and requires that such notices be in "substantially the following form[.]" This statute is a simple and direct roadmap; all a proponent has to do is follow it. The "in substantially the following form" language provides leeway to accept notices with minor but inconsequential variations in language. *Cf. California Teachers Ass'n, supra,* 271 F.3d at 1152 ("The terms 'overwhelmingly' and 'nearly all,' like 'curriculum' and 'instruction,' are terms of common understanding.")

"The touchstone of a facial vagueness challenge in the First Amendment context, however, is not whether *some* amount of legitimate speech will be chilled; it is whether a *substantial* amount of legitimate speech will be chilled." *California Teachers Ass'n, supra,* 271 F.3d at 1152 (emphasis in original). Plaintiffs have presented no evidence that would sustain a finding that the challenged California initiative statutes chill a substantial amount of speech. California has the most active local initiative process in the country. Tracy M. Gordon, *The Local Initiative in California* (Public Policy Institute of California, 2004), p. v.[21]

The challenged statutes are not unconstitutionally vague.

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[21] Available at http://www.ppic.org/main/policyarea.asp?i=5&view=all.

CONCLUSION

For the reasons set forth above, plaintiffs' motion for summary judgment should be DENIED.

Dated: July 25, 2011

Respectfully Submitted,

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