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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
Dept. 3

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Date: July 6, 2009
Time: 10:30 a.m.
Crtrm.: 3

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I.

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 rules in the City's Charter ("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. Plaintiffs sued the five elected members of the City Council of the City and the City Clerk ("Defendants") for declaratory and injunctive relief.

Before the Court is Plaintiffs' motion for a preliminary injunction. It basically seeks all remedies Plaintiffs seek on the merits, except a final declaration as to the validity of the Charter initiative provisions. And plaintiffs filed it more than six months after the City Clerk did not accept their petition. As to the facts, it is supported solely by a verified complaint that is subject to a pending motion to strike.

II.

STATEMENT OF FACTS

A. The Initiative Process

Plaintiffs allege, and Defendants agree, that the relevant Charter provision is Section 903 and that section 903 incorporates provisions of the California Elections Code by reference.[1] (Complaint, ¶¶ 2-3.)

The process for placing a voter initiative on the ballot in the City is relatively straightforward. Proponents of the initiative must first 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

[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.

proponents. Cal. Elec. Code §§ 9202, 9203. The City Attorney prepares a ballot title and a summary (in five hundred words or less), which is provided to the proponents. Cal. Elec. Code § 9203. The proponents must 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. The proponents must provide proof of publication to the City Clerk within ten days after publication. Cal. Elec. Code § 9206. (*See* Norris Declaration filed in support of this Opposition ("Norris Decl."), ¶ 2.)

Within 180 days of the receipt of the ballot title and summary, the proponents must file the signed petition with the City Clerk. Cal. Elec. Code § 9208. The City Clerk determines the number of registered voters in the City (according to the last report of the San Diego County Elections Official to the Secretary of State pursuant to Cal. Elec. Code section 2187, effective at the time the Notice of Intent was filed), and provides the petition to the San Diego County Registrar of Voters to examine the signatures. Cal. Elec. Code § 9210. The San Diego County Registrar of Voters has 30 days, excluding weekends and holidays, to verify the signatures on the petition. Cal. Elec. Code §§ 9211, 9114, 9115. The City Clerk then notifies the proponents of the sufficiency or insufficiency of the signatures. Cal. Elec. Code § 9114. If there are sufficient signatures, the City Clerk then presents certification of the results of the verification process to the City Council at the next regular scheduled meeting. Cal. Elec. Code § 9114. If the petition is signed by 15% of the registered voters in the City effective at the time the Notice of Intent was filed, the City Council can take one of the following three actions: (1) adopt the ordinance without alteration (Cal. Elec. Code § 9214(a)); (2) call a special election to be held at least 88 days and not more than 103 days from the date of the election order (Cal. Elec. Code §§ 9214(b), 1405(a)); or (3) order a report from any city agency, which report must be presented to the City Council no later than 30 calendar days after the City Clerk presents the certification. Cal. Elec. Code §§ 9214(c), 9212. (*See* Norris Decl., ¶ 3.)

B. <u>The Plaintiffs' Three Petitions</u>

Plaintiffs withheld from the Court information about the history of their contracting law petition. They first filed a petition with the City Clerk on May 23, 2008, and the City Clerk rejected it for violations of the California Elections Code. Plaintiffs litigated and lost in California courts a challenge to that rejection. What undergirds this case is a string of errors by Plaintiffs, not a First

Amendment violation by the Defendants. Further, neither of the organizational plaintiffs attempted to be a proponent. (*See* Norris Decl., ¶ 4.)

1. The First Petition

The first petition was commenced on January 24, 2008 by the filing of a Notice of Intent titled "Open Competition And Anti-Discrimination In Contracting Ordinance." Plaintiff Kneebone and nonparty John Mercado pursued that petition. (Ex. 1 to Norris Decl.) The City Attorney prepared a ballot title and a summary in 500 words or less, and provided it to the City Clerk, who provided it 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 of the 10-day period required by Cal. Elec. Code § 9206. (*See* Norris Decl., ¶ 5.)

On May 23, 2008, Kneebone and Mercado submitted their petition with approximately 15,222 signatures. That same day, the City Clerk wrote to Kneebone and Mercado informing them that she was unable to accept the petition due to their noncompliance with Cal. Elec. Code § 9206. (*See* Norris Decl., ¶ 6, Ex. 2.)

On May 29, 2008, Plaintiffs Kneebone and Chula Vista Citizens for Jobs and Fair Competition ("CVC") filed a Complaint and Petition for Declaratory Relief, Preemptory Writ of Mandate, Alternative Writ of Mandate and Restraining Orders/Injunctive Relief in the San Diego County Superior Court. (Ex. 3 to Norris Decl.) The pleadings sought a declaration that the proponents had complied with the requirements of the Elections Code in publishing the Notice of Intent in *The Star-News*, and for a writ of mandate compelling the City Clerk to accept the petitions and to process and forward them to the San Diego County Registrar of Voters to begin the process of verifying the signatures on the petition. (*See* Norris Decl., ¶ 7.)

Although Plaintiffs Kneebone and CVC initially obtained a temporary restraining order, the court denied their motion for a preliminary injunction. (Ex. 4 to Norris Decl.) The court found that the proponents of the petition failed to comply with Cal. Elec. Code § 9206 when they failed to file their proof of publication within ten days of publication. Accordingly, the court held that the signatures gathered by the proponents between February 25, 2008 and May 1, 2008 were not valid.

This error resulted in failing to submit the required number of signatures to put the initiative on the ballot. Plaintiffs Kneebone and CVC filed a petition for writ of mandate and a request for stay to 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, Ex. 5.)

2. The Second Petition

One month after the loss in the Court of Appeal, Plaintiffs Kneebone and Breitfelder filed a second Notice of Intent, this time titled the "Fair and Open Competition Ordinance." (Ex. 6 to Norris Decl.) Contrary to implications in Plaintiffs' moving papers, neither CVC nor Associated Builders and Contractors of San Diego, Inc. ("ABC") was named in the filing. (*See* Norris Decl., ¶ 9.) Plaintiffs Kneebone and Breitfelder complied with the publication requirements, identifying themselves as the proponents of the petition. (*See* Norris Decl., ¶ 10; Ex. 7 to Norris Decl.)

On November 12, 2008, Plaintiffs Kneebone and Breitfelder submitted a letter to Defendant Norris with the petition and, according to Plaintiffs, 23,285 signatures. (Ex. 8 to Norris Decl.) Again, the individuals submitted the signed Petition without reference to the organizational Plaintiffs. (*See* Norris Decl., ¶ 11.)

On November 13, 2008, Defendant Norris wrote to Plaintiffs Kneebone and Breitfelder informing them that she was unable to accept the Petition due to noncompliance with Cal. Elec. Code §§ 9207 and 9202(a). (Ex. 9 to Norris Decl.) In her letter, Defendant Norris advised the individual Plaintiffs that the Elections Code requires that the name of at least one proponent of the initiative appear on the Notice of Intent. However, the Notice of Intent included on the Petition submitted did not contain either of the individual proponents' names. In fact, it did not include any signatures of any individual *or* organization. The only names that appear on the Petition are at the bottom of the last page in very small font in an entry that states, "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." (*See* Norris Decl., ¶ 12, Ex. 8.)

Defendant Norris's November 13, 2008 letter led to several letters. None of the letters raised or discussed any First Amendment problems with the denial of the Petition. The first letter, on November 14, 2008 was written to Defendant Norris by attorney Charles Bell on behalf of his clients,

Plaintiffs Kneebone and Breitfelder. (Ex. 10 to Norris Decl.) Bell argued various technicalities in support of his claim that the Petition should be accepted. (*See* Norris Decl., ¶ 13.)

On November 20, 2008, Plaintiffs Kneebone and Breitfelder, and Bill Baber, all identifying themselves as officers of CVC, wrote to Defendant Norris. (Ex. 11 to Norris Decl.) In their letter, the individual Plaintiffs argued that the organizational Plaintiffs were proponents of the initiative, and that because the organizational Plaintiffs' name appeared on each section of the Petition, this satisfied the California Elections Code. (*See* Norris Decl., ¶ 14.)

On December 12, 2008, Deputy City Attorney Jill Maland responded to the December 12, 2008 letter. (Ex. 12 to Norris Decl.) She addressed each of the points raised by the individual Plaintiffs and confirmed that the City was unable to accept the Petition because the Notice of Intent on the Petition was not properly signed by at least one proponent. (*See* Norris Decl., ¶ 15.)

3. The Third Petition

Having already botched two initiative petitions, the individual Plaintiffs embarked on a third petition. Rather than submitting a new Notice of Intent in November or December 2008 when they knew their Second Petition was not going to be accepted, the individual Plaintiffs waited until March 13, 2009 to submit their third Notice of Intent, again titled the "Fair and Open Competition Ordinance." (Ex. 13 to Norris Decl.) This Notice of Intent, like the second Notice of Intent submitted on August 28, 2008, was signed by Plaintiffs Kneebone and Breitfelder. The Notice of Intent was published in *The Star-News* on April 3, 2009 with the individual Plaintiffs' signatures, and the proof of publication was filed with the City Clerk on April 6, 2009. (Ex. 14 to Norris Decl.) Over three months have now passed since the proponents received the City Attorney's ballot title and summary, but the individual Plaintiffs have not submitted their petition with signatures to the City Clerk. Until they do so, the City Clerk cannot start processing the petition for verification of signatures and submission to the City Council. (*See* Norris Decl., ¶ 16.)

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C. There is Probably Insufficient Time To Process the Second Petition and Schedule a Special Election Before December 7, 2009.

Plaintiffs seek to enjoin Cal. Elec. Code § 9202's requirement that proponents be "natural persons," and Cal. Elec. Code § 9207's requirement that the proponent's name and signature be on the petition. Even if the Court were to issue such an injunction, insufficient time remains to process the second petition for a special election to be held before December 7, 2009. (*See* Norris Decl., ¶ 17.)

As described above, the California Elections Code provides a process for voter initiatives. Once the signed petition is submitted to the City Clerk, the City Clerk determines the number of registered voters in the City effective at the time the Notice of Intent was filed. The City Clerk then provides the petition to the San Diego County Registrar of Voters to examine the signatures. The Registrar of Voters has 30 days from the date of filing of the petition, excluding Saturdays, Sundays and holidays to verify the signatures on the petition. Cal. Elec. Code § 9114. If there are a sufficient number of signatures, the City Clerk then presents the certification of the results of the verification process to the City Council at its next regular meeting. At the City Council meeting, assuming that the ordinance is not adopted, it can either be submitted to the voters for a special election that shall be held not less than 88 nor more than 103 days after the date of the order of election (Cal. Elec. Code § 1405(a)), or be referred for a report from any City agency pursuant to Cal. Elec. Code § 9212. This report must be presented to the City Council no later than 30 calendar days after the City Clerk presents the certification. Cal. Elec. Code § 9214(c). (*See* Norris Decl., ¶ 18.)

In this case, the City Council is likely to order a report to determine the economic impact of the proposed ballot initiative. Because the measure proposes to amend the Chula Vista Municipal Code to add a chapter regarding contracting on public works projects, the measure may have a fiscal impact on the City. While the proposed measure states that it is to aid in lowering the cost of public works projects, that has not been analyzed or evaluated by any agency of the City. Therefore, there is a good possibility that the City Council would order a report from an appropriate City agency pursuant to Cal. Elec. Code § 9212, before calling for a special election. (*See* Norris Decl., ¶ 19.)

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Therefore, even assuming that the Court issued Plaintiffs' requested preliminary injunction on July 6, 2009, and the City Council took action as soon as possible at their next regular scheduled Tuesday meeting, the timeline would be as follows:

DATE	EVENT
July 6, 2009	City Clerk submits signed petition to San Diego County Registrar of Voters to verify signatures
August 17, 2009	Last day for San Diego County Registrar of Voters to verify signatures
September 1, 2009	Next scheduled meeting of City Council.[2] City Council orders a report from a City agency
October 1, 2009	Last day for agency to submit report and for the City Council to order a special election
December 28, 2009	First possible date for special election (88 days after October 1, 2009)

(*See* Norris Decl., ¶20.)

Plaintiffs could have avoided this problem by filing their complaint and motion for preliminary injunction earlier. On November 13, 2008, they knew that their Second Petition would not be accepted, and the reasons why. After several letters, they were again informed on December 12, 2008 that the City was unable to accept their Second Petition. Unlike the situation after their First Petition was denied, when they sued within six (6) days, Plaintiffs waited over five months until April 28, 2009 to file their Complaint in this case. They then delayed another five weeks until June 4, 2009 to file their motion for a preliminary injunction. All tolled, Plaintiffs' motion for preliminary injunction was filed over six and one-half months after they were first informed that their Second Petition would not be accepted. Plaintiffs fail to explain the reasons for the delay or why they should be heard to request extraordinary and urgent relief after their own extended delay.

If a special election could be scheduled by December 7, 2009, it would be a stand-alone election. The San Diego County Registrar of Voters Office estimated that it would cost approximately $525,000 to $600,000 to conduct such an election for the City. (*See* Norris Decl., ¶ 21.)

[2] Besides needing 72 hours to post the matter for the City Council meeting, the meetings of August 18, 2009 and August 25, 2009 have been cancelled.

III.

AUTHORITY AND ARGUMENT

A. Legal Standard for Granting a Motion for Preliminary Injunction

A preliminary injunction is an extraordinary remedy never awarded as of right. *Munaf v. Geren*, 553 U.S. __, 128 S.Ct. 2207, 2218-19 (2008). In each case, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987). "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

A plaintiff seeking a preliminary injunction must establish (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm to plaintiffs in the absence of preliminary relief; (3) the balance of equities tips in plaintiffs' favor; and (4) an injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, __ U.S. __, 129 S.Ct. 365, 374 (2008).

Plaintiffs seek a mandatory injunction in this case. Such relief is "subject to heightened scrutiny and should not be issued unless the facts and law clearly favor the moving party. *Dahl v. HEM Pharmaceuticals Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993).

Plaintiffs seek to enjoin elected members of a local government. A federal court must exercise restraint when a plaintiff seeks to enjoin any non-federal government agency, be it local or state. *Midgett v. Tri-County Metro. Transp. Dist. of Oregon*, 254 F.3d 846, 851 (9th Cir. 2001).

Finally, the Court of Appeals accords district courts substantial discretion to deny an injunction. *Dept. of Parks and Rec. v. Bazaar Del Mundo Inc.*, 448 F.3d 1118, 1123 (9th Cir. 2006).

B. Plaintiffs Cannot Establish a Likelihood of Irreparable Harm

Plaintiffs spend less than a page discussing irreparable harm (Motion, 23:12-24:4), cite only two cases, and summarily claim they will be irreparably harmed if their requested injunction is

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denied.[3] In doing so, Plaintiffs ignore that irreparable harm "is the single most important prerequisite for the issuance of a preliminary injunction.... Accordingly, the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered." *Rodriguez v. DeBuono*, 175 F.3d 227, 233-34 (2nd Cir. 1999) (quotations omitted).

Plaintiffs must show a likelihood of irreparable harm in the absence of preliminary relief; a possibility of irreparable harm is insufficient even if Plaintiffs demonstrate a strong likelihood of prevailing on the merits. *Winter*, 129 S.Ct. at 375-376. "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.*

Plaintiffs must also demonstrate "immediate threatened injury." *Caribbean Marine Services Co., Inc. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988). Establishing a risk of irreparable harm in the indefinite future is not enough. The harm must be shown to be imminent. *Midgett*, 254 F.3d at 850-851.

The primary purpose of a preliminary injunction is to preserve the status quo pending a determination on the merits. *Chalk v. United States Dist Ct.*, 840 F.2d 701, 704 (9th Cir. 1988). Injunctive relief that would alter the status quo, such as that requested by Plaintiffs here, is subject to higher scrutiny and carries a heavy burden of persuasion. *Tom Doherty Assocs., Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27, 32-34 (2nd Cir. 1995).

Here, the Plaintiffs have failed to show a likelihood of irreparable harm if a preliminary injunction is not issued at this time. Plaintiffs only recite that they are abstractly injured daily by not

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[3] While there is a presumption of irreparable injury where First Amendment rights are *clearly* being infringed, Plaintiffs' claims based on the two cited cases go too far. Further, the citation to *Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L' Antisemitisme*, 433 F.3d 1199, 1234 (9th Cir. 2006) is inappropriate. It is to a *concurring and dissenting* opinion, and the quotation is from the district court opinion that was *reversed and remanded with directions to dismiss*. The quoted Supreme Court case, *Elrod v. Burns*, 427 U.S. 347 (1976), involved First Amendment rights that were clearly being threatened or impaired, which is not true here.

Plaintiffs' citation to *Brown v. Cal. Dept. of Transp.*, 321 F.3d 1217 (9th Cir. 2003) is to the wrong volume – it is 321 F.3d, not 32 F.3d. Moreover, the appellees' First Amendment rights in *Brown* were clear and were being impaired, which again is not true here.

having a right to circulate an initiative petition anonymously. Nothing in the moving papers demonstrates a need for a decision on a preliminary injunction on any particular day. Plaintiffs have failed to provide any schedule or other information identifying critical dates for reaching an election by December 7, 2009. As to their circulation of the Third Petition, their showing of irreparable harm is not even based on declarations that provide any information about the pragmatic consequences of action or inaction. Rather, they rely almost entirely on an abstract theory of daily harm caused by disclosure of their names. As to their Second Petition, the complaint openly admits they are circulating the Third Petition, and if it qualifies, the rejection of the Second Petition is harmless.

Further, Plaintiffs' moving papers admit that Plaintiff Kneebone has not decided that she would not be a proponent again. (Motion at 4:24-26.) Plaintiff Kneebone is the Vice-President of CVC, and has openly campaigned for the initiatives. As the California Elections Code only requires one proponent, Plaintiff Kneebone's support of a ballot initiative is sufficient. There is no need for Plaintiffs Breitfelder, CVC or ABC to be proponents. This does not mean that the remaining Plaintiffs can not openly support and fund the initiatives, or speak out on their behalf. They are free to do so. No irreparable injury exists.

Further, there is no urgency or need to issue the preliminary injunction at this time. Plaintiffs argue that they need the preliminary injunction to issue now so they can proceed to a special election by December 7, 2009. As explained *ante*, Plaintiffs waited too long to bring this action. Even if the Court granted the requested preliminary injunction on July 6, 2009, there is probably insufficient time to process the Second Petition and schedule a special election before December 7, 2009. Accordingly, there is no irreparable harm justifying the issuance of a preliminary injunction.

C. Plaintiffs Cannot Establish a Likelihood of Success on the Merits

As the motion for preliminary injunction demonstrates, Plaintiffs argue to apply principles of First Amendment law declared by the United States Supreme Court to the mechanics of a state's initiative process, and neither United States Supreme Court nor Ninth Circuit precedent appears to be on point.

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1. Plaintiffs' Petitions Were Properly Rejected for Statutory Defects

As a preliminary matter, Plaintiffs' petitions were properly rejected by the City Clerk under the applicable regulations. "[E]lection officials have a ministerial duty to reject initiative petitions which suffer from a substantial … statutory defect which directly affects the quality of information provided to the voters." *San Francisco Forty-Niners v. Nishioka*, 75 Cal.App.4th 637, 644-45 (1999). Initiative measures suffering from "Elections Code violations resulting in voter confusion or misinformation" must be invalidated. *Id.* at 644-45. Accordingly, a City Clerk must reject an initiative petition "that does not contain a copy of the 'notice of intent' with the name or names of the proponents." Op.Cal.Atty.Gen. No. 00-410 (June 9, 2000), 2000 WL 772040; *Myers v. Patterson*, 196 Cal.App.3d 130, 138-39 (1987).

Here, Plaintiffs' failed to timely file a proof of publication for the First Petition under Cal. Elec. Code section 9206. (*See* Norris Decl., ¶ 8.) Consequently, the First Petition suffered a substantial statutory defect and was properly rejected. Plaintiffs failed to include any proponent's name on the Notice of Intent for the Second Petition. (*See* Norris Decl., ¶ 12.) Consequently, it too was defective and properly rejected. Plaintiffs have not submitted any voter signatures for the Third Petition, so there is nothing for the City Clerk to process. (*See* Norris Decl., ¶ 16.)

2. The City Clerk's Acts Do Not Raise a First Amendment Issue

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. "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 key text of California law therefore has always addressed the initiative as a power of electors. *See* Cal. Const., Art 1, § 11; *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.

By incorporating the California Elections Code, Section 903 of the Charter reserves the power of initiative to the electors. Consequently, the power of initiative is one of natural persons;

organizations cannot create direct citizen legislation any more than they can be elected to California's Assembly or Senate. The City Clerk enforced both the Elections Code and fundamental California constitutional history by requiring natural persons to sign the Notice of Intent.

The Charter's reservation of the right to the power of initiative to natural persons makes sense. Natural persons who are citizens meeting certain requirements have the right to vote on the initiatives. Organizations have no right to vote, under any circumstances. *See*, U.S. CONST. amend. XVI, § 1; U.S. CONST. amend. XXVI, § 1; Cal. CONST., Art. II, § 2; Cal. Elec. Code § 2300(a).

Plaintiffs have failed to raise a cognizable First Amendment issue because they have not even addressed the initiative as an inherent power of direct legislation that can only reside in, and has been reserved to, the electors. Rather, they treat the initiative as if it were a process of petitioning a branch of government for redress of grievances. Although local government can obviate an initiative by enacting the proposed legislation, the initiative is not a petition for redress but is most analogous to a bill introduced in the legislative assembly of the relevant governmental body. Organizations can advocate passage or rejection but cannot be authors.

Neither the Elections Code nor the Charter restricts an organization's political speech. Organizations are free to promote, advocate, support or oppose any initiative as their members deem appropriate. In this respect, this matter is unlike the First Amendment cases cited by Plaintiffs. For instance, unlike in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 768-69 (1978), these regulations do not restrict organizations from making any contributions or expenditures influencing the outcome of issues submitted to the voters. Organizations may make any contributions or expenditures related to an initiative as their membership deems appropriate.

The Plaintiffs' First Amendment rights to circulate initiative petitions and to use paid circulators to solicit signatures for the petition, protected by *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988), are in no way restricted here. Organizations are free to do either for any petition.

The Plaintiffs are not forced to choose between any Constitutional rights as in *Simmons v. United States*, 390 U.S. 377, 394 (1968) (impermissible to force a criminal defendant to waive his Fifth Amendment right to assert his Fourth Amendment rights). Organizations simply have no right to the power of initiative. And the proponents are not required to reveal any group affiliations by the

placing their name on a Notice of Intent because the regulations do not require organizations to identify themselves as supporters in the petition. There is no choice to be made between privately associating and freely speaking in an initiative petition.

The requirement that a natural person's name appears on the Notice of Intent does not decrease the pool of persons available to circulate petitions or "limit 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. These regulations place no restrictions on circulating whatsoever.

Far from establishing a probability of success, Plaintiffs' complaint and memorandum demonstrate that Plaintiffs probably will not fulfill the first requirement for a First Amendment challenge: the California Elections Code provisions incorporated in the Charter are not restrictions on protected speech or petitioning at all but rather govern California's process of direct citizen legislation. Accordingly, Plaintiffs fail to establish a likelihood that the probably will succeed on the merits.

3. Requiring Proponents To Be Natural Persons Survives Strict Scrutiny

Even if the requirement for a natural person to propound and sign the Notice of Intent restricted protected speech, the restriction would not violate the First Amendment. Restrictions of protected speech are evaluated under the strict scrutiny standard. Accordingly, any restrictions on protected speech must be "narrowly tailored to serve a compelling state interest." *Buckley*, 525 U.S. at 191-92, n.12. But even under strict scrutiny, "[s]tates allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process." *Id*. The requirement of a natural person's name and signature on the Notice of Intent survives strict scrutiny and is within the leeway provided to states regarding the regulation of the initiative process.

The Notice of Intent conveys information beyond the text of the petition and the reasons supporting it. Op.Cal.Atty.Gen. No. 00-410; *Myers,* 196 Cal.App.3d at 138-39. "A voter may reasonably seek to judge the precise effect of a measure by knowledge of those who advocate or oppose its adoption, and he may gain such knowledge only through pre-election disclosure requirements…." *Myers,* 196 Cal.App.3d at 138-39; *see also, Alliance for a Better Downtown*

Millbrae v. Wade, 108 Cal.App.4th 123, 132 (2003). For instance, a voter "might decide *against* signing because the proponents *do not* include anyone he or she recognizes." *Myers*, 196 Cal.App.3d at 138-39 (emphasis added).

If organizations were permitted to circulate Notices of Intent without a natural person's name , members of organizations would carefully select misleading or vague organization names to garner voter support for a proposition despite its content. Preventing voter manipulation such as this and thereby protecting the integrity of the initiative process is a compelling state interest. And, the requirement is narrowly tailored as there is no other way to prevent this kind of voter deception. Therefore, these regulations satisfy strict scrutiny.

Further, the requirement that a Notice of Intent include a natural person's name and signature is nothing like the regulation requiring petition circulators to wear name badges when circulating petitions found unconstitutional in *Buckely*. For instance, here the identification of the proponents' names on the Notice of Intent does not expose the proponent to "heat of the moment" harassment. *Buckley*, 525 U.S. at 199; see also, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 358 (1995). The proponent is not required to be present at the time circulators solicit signatures. And even if the proponent chose to be present, the proponent is not required to identify himself or herself to the voter in the course of requesting the voter's signature.

Consequently, the requirement that a natural person sign the Notice of Intent would not be unconstitutional, even if it restricted protected speech (it doesn't), and the Plaintiffs cannot establish they are likely to succeed on the merits.

4. Requiring Disclosure on the Circulated Version Is Not Unconstitutional

The First Amendment doctrine applicable to the right to engage in anonymous political speech is well established. As above, restrictions on such speech are subject to strict scrutiny, meaning they must be "narrowly tailored to serve a compelling state interest." *Buckley*, 525 U.S. at 192, n.11; *Meyer*, 486 U.S. at 420; *McIntyre*, 514 U.S. at 345-46, n.10. The requirement that the proponent's name appear on a circulated Notice of Intent satisfies this test and is, therefore, not unconstitutional.

California, and by incorporation the City, have compelling interests in ensuring the integrity of the initiative process and that voters receive information of the highest quality in evaluating whether

to sign a petition. Further, California and the City have a compelling interest in overseeing and enforcing their election regulations. Requiring the proponent's name to appear on the Notice of Intent circulated to voters for signature is the only manner in which these interests can be satisfied. Identifying the proponent at a later time or another place is too late if the circulator has already secured the voter's signature. Consequently, the requirement is narrowly tailored to a compelling state interest and satisfies strict scrutiny.

Plaintiffs cite no cases on point. For instance, *McIntyre* held unconstitutional an Ohio statute requiring, among other things, that the author include his or her name and address on any handbill, advertisement or any other form of general publication designed to in any way influence voters. *McIntyre*, 514 U.S. at 338, n.3. The court specifically distinguished the Ohio statute from cases involving the "election code provisions governing the voting process itself." *Id*. at 344-45. Further, the court found Ohio's informational interest insufficient because the name of the author, *in the context of a handbill*, added little information to the author's message. *Id*. at 348-49. Moreover, in her concurring opinion, Justice Ginsburg noted that the opinion did not "hold that the State may not in other, larger circumstances require the speaker to disclose its interest by disclosing its identity" and recognized "that a State's interest in protecting an election process 'might justify a more limited identification requirement.'" *Id*. at 358 [Ginsburg concurring].

The requirement at issue here is exactly that: a more limited identification requirement justified by the state's interest in protecting an election process. For instance, this identification requirement explicitly applies only to the Notice of Intent accompanying a petition to put an initiative on the ballot. It does not apply to handbills or other publications designed to influence voters. Rather, it applies only to the documents intimately involved in commencing the voting process by the initiative's proponents. In other words, these statutes govern the election process itself.

American Civil Liberties Union of Nevada v. Heller, 378 F.3d 979 (2004) also dealt with an identification requirement for handbills and advertisements, as opposed to statutes governing the election process. *(WIN) Washington Initiatives Now v. Rippie*, 213 F.3d 1132 (9th Cir. 2000) involved disclosure of payments made to circulators and the names of the circulators, not the proponents of a petition. *Cal. Pro-life Council v. Getman*, 328 F.3d 1088, 1106 (9th Cir. 2003) and *Canyon Ferry*

Road Baptist Church v. Unsworth, 556 F.3d 1021, 1032 (9th Cir. 2009) both involved disclosures required by California's campaign finance disclosure laws. And, as discussed above, the requirement that the Notice of Intent name its proponents is quite different than the *Buckley* requirement that circulators of a petition wear name badges while circulating the petition for voter signatures. *Buckley*, 525 U.S. at 194-95.

Plaintiffs argue their anonymous advocacy theory with cases so factually dissimilar as to be no indication that the Plaintiffs will likely succeed on the merits. For instance, *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) involved restrictions on state employees' rights to engage in political fund raising. *Board of Airport Comm's v. Jews for Jesus*, 482 U.S. 569 (1987) involved the distribution of religious literature in a public airport. Finally, *NAACP v. Alabama*, 357 U.S. 449 (1958) involved a state's demand for all the names and addresses of members of an association. Requiring the proponent's name on a circulated petition does not come close to the serious First Amendment issues raised by these cases.

With no precedent or even dictum on point, Plaintiffs cannot establish that they are likely to succeed on the merits.

5. The Relevant Sections of the California Elections Code Are Not Unconstitutionally Vague or Overbroad

A statute is unconstitutionally vague "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits."[4] *Hill v. Colorado*, 530 U.S. 703, 732 (2000); *Connally v. Gen. Const. Co.*, 269 U.S. 285, 391 (1926). In contrast, a statute is not unconstitutionally vague if the likelihood "that anyone would not understand" the "common words seems quite remote." *Hill*, 530 U.S. at 732. Further, a "statute will be upheld if its terms can be made reasonably certain by reference to other definable sources." *Costa Mesa v. Soffer*, 11 Cal.App.4th 378, 387 (1992).

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[4] A statute is also unconstitutionally vague "if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill*, 530 U.S. at 732. Here, Plaintiffs do not, and could not, allege the statutes at issue encourage arbitrary or discriminatory enforcement.

Plaintiffs contend that the meaning of "proponent" as used in Cal. Elec. Code section 9202 is unconstitutionally vague. (Motion, 19:7-20:5.) But the Elections Code defines what it means in common words as follows:

> "Proponent or proponents of an initiative or referendum measure" means … 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.

Cal. Elec. Code § 342. This definition uses common words that provide people of ordinary intelligence a reasonable opportunity to understand what is meant by "proponent." The use of the word "publish" in this definition adds no ambiguity. Rather, Plaintiffs engage in a cute trick by having an organization pay the cost of publication and then trying to work back from that act to create an ambiguity not native to the statute. (Motion, 18:14-15[emphasis in original], 19:19-20:5.) Even if "publish" were not a common word likely to be understood, it can be made reasonably certain by reference to Cal. Elec. Code section 9205, which describes the requirement for publication, which plainly requires the proponent of the initiative *to cause* publication as a condition of validity of the petition.[5]

Cal. Elec. Code section 9207 provides, in relevant part: "Each section of the petition shall bear a copy of the notice of intent and the title and summary prepared by the city attorney." Plaintiffs argue that the term "bear a copy" as used in this section is unconstitutionally vague. (Motion, 20:21-

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[5] Cal. Elec. Code section 9205 provides:

> A notice of intention and the title and summary of the proposed measure shall be published or posted or both as follows: [¶] (a) If there is a newspaper of general circulation, as described in Chapter 1 (commencing with Section 6000) of Division 7 of Title 1 of the Government Code, adjudicated as such, the notice, title, and summary shall be published therein at least once. [¶] (b) If the petition is to be circulated in a city in which there is no adjudicated newspaper of general circulation, the notice, title, and summary shall be published at least once, in a newspaper circulated within the city and adjudicated as being of general circulation within the county in which the city is located and the notice, title, and summary shall be posted in three (3) public places within the city, which public places shall be those utilized for the purpose of posting ordinances as required in Section 36933 of the Government Code. [¶] (c) If the petition is to be circulated in a city in which there is no adjudicated newspaper of general circulation, and there is no newspaper of general circulation adjudicated as such within the county, circulated within the city, then the notice, title, and summary shall be posted in the manner described in subdivision (b).

22:10.) But, taken in context and in this modern era of copy machines, the expression "bear a copy" presents no more than a remote possibility that anyone of ordinary intelligence would not understand what is meant.

Cal. Elec. Code section 9202 provides:

> 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:

Plaintiffs contend that, as used in this section, "substantially the following form" is unconstitutionally vague because it fails to specify what information can be left out of some or all of the required notices. (Motion, 22:13-23:11.) But this is nonsense. "Substantially" is a common word likely to be understood by everyone and, moreover, a term used frequently in statutes of all kinds with a long standing judicially recognized meaning. *See e.g., Board of Governors of Federal Reserve System v. Agnew*, 329 U.S. 441, 449 (1947); *Peick v. Pension Benefit Guaranty Corp*., 539 F.Supp. 1025, 1060-61 (N.D. Ill. 1982); *Cruz v. Town of Cicero*, 1999 WL 560989, *16 (N.D.Ill. 1999)["'substantially alter' … is not beyond the grasp of persons of ordinary intelligence"].

Plaintiffs further argue that Cal. Elec. Code section 9202 is overbroad. (Motion, 20:6-18, 23:4-11.) A statute is constitutionally overbroad if a court reasonably can predict or assume "that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Hill*, 530 U.S. at 731 (2000).

To begin with, there is no constitutionally protected speech at issue here as explained *ante*. But even if there were, Plaintiffs offer no explanation for why the court should predict or assume that section 9202 would lead a prospective initiative proponent to refrain from commencing the process.

None of the Elections Code sections at issue are either unconstitutionally vague or overbroad and the Plaintiffs cannot establish that they are likely to succeed on the merits.

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Finally, if Court entertained suspicions about the specificity or breadth of any of the relevant statutes, it should abstain to give the courts of California an opportunity to construe the statutes definitively. Abstention under *Railroad Comm'n v. Pullman*, 312 U.S. 496, 85 L. Ed. 971 (1941) is appropriate "when three concurrent criteria are satisfied: (1) the federal plaintiff's complaint must require resolution of a sensitive question of federal constitutional law; (2) that question must be susceptible to being mooted or narrowed by a definitive ruling on state law issues; and (3) the possibly determinative state law must be unclear." *United States v. Morros*, 268 F.3d 695, 703-04 (2001). As Plaintiffs' own complaint and memorandum demonstrate, this case involves a sensitive question of how the First Amendment applies to a state's process of direct citizen legislation, all of Plaintiffs' contentions about vagueness or overbreadth could be mooted by a definitive ruling on the meaning of the challenged Election Code provisions, and Plaintiffs themselves claim the state law is unclear. A definitive construction by a California court would cure vagueness or overbreadth. *See Coleman v. C.I.R.*, 791 F.2d 68, 71 (7th Cir. 1986); *People v. Barrera*, 14 Cal.App.4th 1555, 1571-72 (1993). Therefore the technical challenges to the Charter would qualify for *Pullman* extension if they had arguable merit.

D. Plaintiffs Cannot Establish that the Balance of Equities Tips in Plaintiffs' Favor

Plaintiffs must show that the balance of equities tips in their favor. *Winter*, __ U.S. __, 129 S.Ct. at 374. "[T]he real issue in this regard is the degree of harm that will be suffered by the plaintiff or the defendant if the injunction is *improperly* granted or denied." *Scotts Co. v. United Ind. Corp.*, 315 F.3d 264, 284 (4th Cir. 2002) (emphasis in original).

If Plaintiffs were likely to prevail on the merits, their showing of irreparable harm remains limited to the abstraction of daily denial of intangible First Amendment rights. On the other hand, if a preliminary injunction is improperly granted, the City will be forced to change its procedures and process a petition and Notice of Intent that does not properly identify the petition's proponents. If the proponents anonymously collect sufficient voter signatures, the County Registrar of Voters will incur the costs of verify the signatures on an improper petition. (Norris Decl., ¶ 18.) Additionally, the City will incur the cost of an agency report regarding the improper petition, and ultimately, the cost of a special election on a petition improperly placed on the ballot. (Norris Decl., ¶¶ 19-21.) These costs

are substantial. (Norris Decl., ¶ 21.) The City also has an important interest on behalf of the people of Chula Vista to ensure the integrity of the initiative process, the quality of information presented to the voters, and the proper use of the public's funds.

Sammartano v. First Judicial Dist. Court, 303 F.3d 959, 973 (9th Cir. 2002), cited by Plaintiffs, does not compel a conclusion that the balance of hardships here tips sharply in Plaintiffs' favor. Rather, in *Sammartano*, the court found the balance of hardships weighed in favor of the district court's ruling because no evidence supported the appellees's asserted harm. *Id*. at 973 ["there is insufficient evidence in the current record to support the argument that Appellants' clothing will, in fact, cause such interference or disruption"]. Here, the evidence supports the City's asserted harm.

Therefore the balance of equities does not weigh in Plaintiffs' favor and their motion should be denied.

E. Plaintiffs Cannot Establish that an Injunction is in the Public's Interest

"In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger*, 456 U.S. at 312. Thus, the "award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right…." *Id*.

Although there is a significant public interest in upholding First Amendment principles, the public interest has "been found to be overcome by a strong showing of other competing public interests, especially where the First Amendment activities of the public are only limited, rather than entirely eliminated." *Sammartano*, 303 F.3d at 974.

Here, again, the First Amendment is not at issue. But even if it was, the evidence strongly supports the City's assertion of competing interests in ensuring the integrity of the initiative process, the quality of information presented to the voters and the proper use of the public's funds. Further, if there were an unconstitutional restriction on the public's First Amendment rights here (there is not), the restriction would be limited to one document: the Notice of Intent. No other communication is at issue here. Therefore, Plaintiffs cannot establish that an injunction is in the public's interest.

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F. If the Court Granted an Injunction, a Bond from Plaintiffs Would Be Required

Ordinarily, a court "may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed.R.Civ.P. 65(c). Plaintiffs address this issue in a single sentence: " No security should be required because Defendants have no monetary stake." (Opposition at 25:26.). Plaintiffs cite no legal authority for this proposition, and Defendants have been unable to find any legal authority for Plaintiff's argument. If the Court issues the preliminary injunction requested by Plaintiffs, it should also require Plaintiffs to provide security to cover the estimated cost of the special election they request.

IV.

CONCLUSION

Plaintiffs have established none of irreparable harm, probable success on the merits, a balance of equities in their favor, or public interest to support their proposed injunction. Plaintiffs' motion for a preliminary injunction should be denied.

DATED: June 22, 2009

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