KAMALA D. HARRIS
Attorney General of California
ZACKERY P. MORAZZINI
Supervising Deputy Attorney General
GEORGE WATERS
Deputy Attorney General
State Bar No. 88295
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 323-8050
Fax: (916) 324-8835
E-mail: George.Waters@doj.ca.gov
Attorneys for Intervenor
State of California

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 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF 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: 4/28/2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

CONSTITUTIONAL PROVISIONS

COURT RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION AND SUMMARY OF ARGUMENT

This motion for summary judgment 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.

Plaintiffs marshal an extraordinary array of First Amendment artillery in an effort to show that the challenged statutes put an oppressive burden on First Amendment rights of initiative proponents. But the reality is much different. The reality is that the local initiative process in California is wide-open, easy-to-use, and robust. As a 2004 study concluded:

> 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.

As will be shown below, there is no legal substsance to the radical claims made in this action. According, the State requests that this Court grant its motion for summary judgment.

/ / /

/ / /

/ / /

/ / /

FACTS AND PROCEDURAL HISTORY

I. STATUTORY FRAMEWORK FOR MUNICIPAL INITIATIVES

Chula Vista, as a charter city, is empowered to adopt its own rules concerning municipal elections.[1] Like many other charter cities, Chula Vista has incorporated by reference the California Elections Code.[2] 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.[3] The City Attorney prepares a ballot title and a summary (in five hundred words or less), which is provided to the proponents. § 9203. The proponents must publish the Notice of Intent, including the ballot title and summary prepared by the City Attorney, prior to collecting signatures. §§ 9205, 9207. The proponents must provide proof of publication to the City Clerk within ten days of publication. § 9206.

Within 180 days of the receipt of the ballot title and summary, the proponents must file signed petitions with the City Clerk. § 9208. The Registrar has about 40 days to

---

[1] 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[.]"

[2] 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.

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

verify the signatures on the petition. §§ 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 then 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 titled "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 of the 10-day period required by Elections Code § 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. 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 second Notice of Intent titled the "Fair and Open Competition Ordinance" was filed with the City Clerk by Plaintiffs Kneebone and Breitfelder. (Norris Decl., Exh. 6.) This time plaintiffs filed the proof of publication on time, 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 the initiative proponent was not the individuals, but an unincorporated association – CVC. (Norris Decl., Exh. 11.) At the end of it all, 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, again titled the "Fair and Open Competition Ordinance." (Norris Decl., Exh. 14.) This time 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 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 and "listed her name as a proponent" of Proposition G. (Complaint ¶¶ 44-45.)
- Larry Breitfelder. He is a registered voter in Chula Vista and "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. Fed. R. Civ. Pro. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To survive summary judgment, a party is required to set forth affirmative evidence and specific facts showing there was a genuine dispute on a material issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). To meet its burden, a party is required to "do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Even if a party disputes some material facts, summary judgment must be granted "unless there is sufficient evidence favoring the nonmoving for a jury to return a verdict" in its favor. *Anderson*, 477 U.S. at 243. "Where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate." *Uhl v. Swanstrom*, 79 F.3d 751, 754 (8th Cir. 1996).

/ / /

/ / /

/ / /

/ / /

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

A. The Burden Of The Challenged Statutes Is Minimal: They Require The Disclosure Of The Name Of *One To Three* Electors Who Support A Proposed Initiative.

As the very first step in the municipal initiative process, Section 9202 requires one to three proponents[4] to submit a "Notice of Intent to Circulate Petition" to the City Clerk. The Notice of Intent must be signed, it must be accompanied by the text of the proposal, and it may (at proponents' option) include a 500-word statement explaining the reasons for the proposal. 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).

Section 9205(a) requires the Notice of Intent (including the names of the proponents) to be published once in a newspaper of general circulation.[5] The proponents may begin circulating initiative petitions for signature immediately after publication. The circulated petitions must themselves bear the Notice of Intent, including the names of the proponents.[6]

---

[4] Any elector in a municipality may be a proponent. See Cal. Const., art. II, § 11(a); § 342. "'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." § 321.

[5] Section 9205(a) states:

> 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.

[6] Section 9207 states:

> The proponents may commence to circulate the petitions among the voters of the city for signatures by any registered voter of the city

(continued…)

Taken together, these statutes require a municipal initiative petition to bear the name of at least one proponent who is eligible to vote in that municipality.[7] This is the requirement that plaintiffs challenge as oppressive and unconstitutional.

The burden of this disclosure requirement is minimal. Before an initiative petition is circulated, its proponents have already publicly disclosed their names on two occasions: when they first submit the proposal for preparation of a title and summary (§ 9202(a)), and when they publish the Notice of Intent in a newspaper of general circulation (§ 9205). Plaintiffs do not object to these disclosures. But the point is that by the time proponents' names are printed on initiative petitions, their identities are already known – the impact on proponents' privacy is negligible because their names have already been published in a newspaper of general circulation.

The challenged statutes place no burden on any particular individual. The statutes simply require from one to three individuals to be publicly identified with an initiative proposal. The decision as to who those individuals will be is an important one because "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). But no one is forced to be a proponent. If any individual is uncomfortable playing that role, there will almost certainly be others.[8] No one has ever suggested that an initiative proposal has failed for want of a proponent.

(…continued)

> after publication or posting, or both, as required by Section 9205, of the title and summary prepared by the city attorney. Each section of the petition shall bear a copy of the notice of intention and the title and summary prepared by the city attorney.

[7] 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.

[8] There are 100,025 registered voters in Chula Vista. *See* Report of Registration – (continued…)

B. The Burden Of These Disclosure Statutes On Plaintiffs Kneebone And Breitfelder Was Nonexistent Because These Two Plaintiffs Inserted Themselves Into The Public Controversy Concerning Proposition G On Every Possible Occasion.

Considering the allegations of Count 1 – that compelled disclosure of a proponent's name on an initiative petition is unconstitutional – it is difficult to imagine two more unlikely plaintiffs than Lori Kneebone and Larry Breitfelder. Both took active roles in promoting Proposition G in every possible way to every possible audience using every possible medium.

Mrs. Kneebone's involvement in the Proposition G is summarized by one exchange during her deposition:

> Q. Would it be fair to say that it was no secret to anybody in Chula Vista that you were a supporter of Proposition G?
>
> A. It was no secret.

(Waters Decl., Exh. 1-2, ll. 15-18.) Her public activities in support of Proposition G, as described in her deposition, included:

- She Authored the REBUTTAL TO THE ARGUMENT AGAINST PROPOSITION G in the Voter Information Pamphlet (Waters Decl., Exh. 3-15.)
- She appeared before the City Council at least twice to speak in support of Proposition G. The City Council meetings were aired on public cable TV. (Waters Decl., Exh. 1-3, l. 10 – Exh. 1-5, l. 21.)
- She appeared and was identified (both by name and by picture) on at least two mailers in support of Proposition G that went out to all residents of Chula Vista. (Waters Decl., Exh. 1-6, l. 21 – Exh. 1-9, l. 19; Exh. 1-14, Exh. 1-15.)

(…continued)

State Reporting Districts, San Diego County, Run Date: 5/2/11, available at http://www.sdcounty.ca.gov/voters/Eng/Eline.shtml.

- She appeared in a video in support of Proposition G that was available on YouTube and on the Yes on G website. (Waters Decl., Exh. 1-10, l. 25 – Exh. 1-13, l. 23.).

Mr. Breitfelder was a candidate for the Chula Vista City Council on the June 8, 2010 municipal election ballot, the same ballot on which Proposition G appeared. His public activities in support of Proposition G, as described in his deposition, included:

- He was "basically the spokesperson" for Proposition G. He appeared before the City Council to speak in support of Proposition G on at least one occasion. (Waters Decl., Exh. 2-4, l. 16 – Exh. 2-5, l. 6.)
- He authored the ARGUMENT IN FAVOR OF PROPOSITION G in the Voter Information Pamphlet. (Waters Decl., Exh. 3-14.)
- In connection with his campaign for City Council, he supplied information to the League of Women Voters to post on their website. His submission included a list of "Biographical Highlights," which included the statement "Advocate for Fair and Open Competition in bidding for city construction projects (Prop G)." (Waters Decl., Exh. 2-8, l. 23 – Exh. 2-9, l. 22; Exh. 2-11.)
- He was president of an organization named The Chula Vista Taxpayers Association, which publicly supported Proposition G and sent out mailers to that effect. (Waters Decl., Exh. 2-6, l. 17 – Exh. 2-7, l. 21; Exh. 2-10.) It was common knowledge that the Association supported Proposition G and it was common knowledge that its president, Larry Breitfelder, supported Proposition G. (Waters Decl., Exh. 2-2, l. 22 – Exh. 2-3, l. 18.)

C. The Challenged Statutes Meet Constitutional Muster Because They Are Substantially Related To The Government's Vital Interest In Providing Information To The Electorate.

Recent cases, particularly *Doe v. Reed*, ___ U.S. ___, 130 S.Ct. 2811 (2010), have clarified the law applicable to disclosure statutes in the electoral context.

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 1815. 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. The question presented to the Supreme Court was whether the Washington Public Records Act violates the First Amendment by requiring disclosure of the identity of those who sign referendum petitions. *Id*. at 2817.

The Supreme Court upheld the Washington Public Records Act as applied to referendum petitions and in doing so clarified the applicable standard of review. 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.

Ibid. (citations and internal quotation marks omitted).

Applying this test, the Court upheld the challenged disclosure provision. As to the first prong, Washington's interest in preserving the integrity of the electoral process obviously was important:

> The State's interest in preserving the integrity of the electoral process is undoubtedly important. 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.

Id. at 2819 (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, there is an important interest in providing information to the electorate. "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, supra,* 5 Cal.3d at 522. Second, there is an important interest in preserving the integrity of the electoral process. *Reed, supra*, 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 informational interests. *See Reed, supra*, 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. 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, supra*, 130 S.Ct. at 2818 (emphasis added). The *actual burden* of the required disclosure is minute. It applies to a maximum of three people. By the time that proponents' names appear on the petitions, the 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. *Id.* at 2816.

The challenged statutes do not violate the First Amendment because they are substantially related to important government interests. The constitutional provisions confirm that only electors can exercise the power of initiative and referendum.

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

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 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.[9] As the California Supreme Court has explained:

---

[9] 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.

(continued…)

> 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."[10]

Acting pursuant to Article II, § 11(a), the Legislature has adopted statutes to implement the initiative process at the state and local level, and – as required by the Constitution – has required initiative proponents to be natural persons.[11] 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.

(…continued)

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

[10] "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.

[11] 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.

§ 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*, ___ U.S. ___, 130 S.Ct. 876, 899 (2010) ("The Court has recognized that First Amendment protection extends to corporations.") But the challenged statutes put no limit on the associational plaintiffs' speech, and they place no limit on the amount of money the associational plaintiffs can spend to broadcast their speech. For that matter, the challenged statutes do not prohibit the associational plaintiffs (or anyone else) from acting as a proponent 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 the dictionary sense, the organizational plaintiffs are proponents of Proposition G, particularly the ballot measure committee – CVC – which apparently was formed solely to promote an Open Competition ordinance. (Complaint ¶ 19.) And because the measure got 18,783 Yes votes, there are probably hundreds, maybe thousands, of other proponents in Chula Vista.

The effect of the challenged statutes is simply to require that one to three residents and electors in a municipality be publicly identified in support of an initiative proposal. The fact that the challenged statutes give a separate status to natural persons does not differentiate them from many other electoral laws. For example, only human beings are allowed to vote. Cal. Const., art. II, § 2. Only human beings are allowed to run for public office. Cal. Const., art. V, § 2 [Governor]; art. IV, § 2(c) [Legislature]. Only human beings are allowed to sign initiative petitions. Cal. Const., art. II, § 8(b). All of these activities are protected by the First Amendment. Yet corporations and unincorporated associations enjoy none of these rights.

The fact that associations and corporations enjoy First Amendment rights does not ipso facto grant them all the constitutional rights of natural persons. Unincorporated associations and 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 *Cal. Teachers Assn v. State Bd. of Educ.*, 271 F.3d 1141, 1151 (9th Cir. 2001).

While plaintiffs' individual complaints will be dealt with below, 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.[12] (Waters Decl., Exh. 3-6 – Exh. 3-12.) 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.[13] (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." This definition uses common English words and is easy to comprehend.

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:

[12] 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.

[13] 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.

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 statutory requirement is simply that the notice bear the *names* of the proponents. *See* 83 Ops.Cal.Atty.Gen. 139, 142. But the incorrect advice had no practical effect because the petitions submitted by plaintiffs in support of their second petition did not bear the names of the proponents and therefore were properly rejected.

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.

CONCLUSION

For the reasons set forth above, Intervenor State of California's motion for summary judgment should be granted.

Dated: May 31, 2011

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
ZACKERY P. MORAZZINI
Supervising Deputy Attorney General

/s/ *George Waters*

GEORGE WATERS
Deputy Attorney General
Attorneys for Intervenor
State of California

SA2009311244
10706957.doc