12-55726

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

Plaintiffs and Appellants,

v.

DONNA NORRIS, et al.,

Defendants and Appellees,

STATE OF CALIFORNIA,

Intervenor, Defendant and Appellees.

On Appeal from the United States District Court
for the Southern District of California

No. 3:09-cv-00897-BEN-JMA
The Honorable Roger T. Benitez, Judge

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STATEMENT OF JURISDICTION

This brief is filed by appellee State of California ("California" or "the State"). The State intervened in this action to defend the constitutionality of four elections statutes of general application in California.

The State agrees with the statement of jurisdiction filed by appellants Chula Vista Citizens et al. ("plaintiffs").

ISSUES PRESENTED

1. California requires the official proponent of an initiative to be an elector (an individual with the qualifications to vote), not a corporation or association. Does this requirement "suppress political speech on the basis of the speaker's corporate identity" in violation of the First Amendment? *See Citizens United v. Federal Elections Com'n*, 558 U.S. 310, 913 (2010).
2. California requires that municipal initiative petitions bear a Notice of Intent which bears the names of one-to-three proponents. Does this requirement violate the First Amendment rights of would-be proponents who wish to remain anonymous?

STATEMENT OF FACTS

Appellants' brief compresses the facts into one paragraph. To assist the Court, the facts are described in more detail below.

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 the California Elections Code for the conduct of municipal initiative, referendum, and recall elections.[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

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[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.

proponents. Cal. Elec. Code §§ 9202, 9203.[3] 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 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 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.

Proponents may begin to circulate initiative petitions immediately after publication. § 9207. An initiative petition is 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

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

with all other applicable requirements of the Elections Code. §§ 9201, 9207. Proponents have a total of 180 days to file signed petitions with the City Clerk. § 9208. The City Clerk then has about 40 days to verify the signatures on the petition. §§ 9211, 9114, 9115. The City Clerk must notify 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 fifteen percent 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 between ten and fifteen percent 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, UNSUCCESSFUL EFFORT TO QUALIFY AN OPEN COMPETITION INITIATIVE

On August 28, 2008, two Chula Vista residents – plaintiffs Lori Kneebone and Larry Breitfelder – filed a Notice of Intent to circulate an initiative petition for a "Fair and Open Competition Ordinance"[4] with the

[4] In a nutshell, the proposed ordinance would have prohibited the City from entering into project labor agreements (agreements that all City (continued…)

Chula Vista City Clerk. ER 92 (Dkt. 1). After receiving a Title and Summary from the City Attorney, they filed with the City Clerk proof that they had published both the Notice of Intent and Title and Summary. ER 96-97 (Dkt. 1). On November 12, 2008, plaintiffs Kneebone and Breitfelder submitted petitions bearing some 28,000 signatures. SER[5] 92 (Dkt. 59-2). The City Clerk rejected the petitions because the Notice of Intent printed in the petitions did not bear the names of Kneebone and Breitfelder as the initiative's proponents.[6] SER 97 (Dkt. 59-2).

Plaintiffs objected to the rejection of the initiative petitions. According to plaintiffs, the "true" initiative proponents all along had been two unincorporated associations that had paid all the expenses associated with qualifying the initiative, plaintiff Chula Vista Citizens for Jobs and Fair Competition major funding by Associated Builders & Contractors PAC and Associated General Contractors PAC to promote fair competition ("CVC"), and plaintiff Associated Builders & Contractors, Inc., San Diego Chapter

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(…continued)
construction projects must be performed by labor receiving the prevailing union wage).

[5] "SER" refers to Appellee State of California's Supplemental Excerpts of Record.

[6] The Notice of Intent earlier printed in the newspaper had correctly included the names of plaintiffs Kneebone and Breitfelder. ER 96 (Dkt. 1).

("ABC"). SER 98 (Dkt. 59-2); ER 44-45, 61 (VC[7] ¶¶ 22, 27, 131). Plaintiffs stated that the associational plaintiffs (CVC and ABC) had wanted to be the proponents of the initiative from the outset but were aware that city and state law required proponents to be individuals (ER 60 (VC ¶ 123)), that the individual plaintiffs agreed to be proponents as proxies for the associational plaintiffs (ER 60 (VC ¶ 124)), and that the individual plaintiffs refused to have their names printed on the initiative petitions because they "did not want to be identified before the masses of the City's voters in such a fashion, but rather wanted to engage in anonymous political speech." ER 48, 51, 61 (VC ¶¶ 48, 63, 131).

The City rejected these objections and refused to process the initiative petitions. SER 102 (Dkt. 59-2).

III. PLAINTIFFS' SECOND, SUCCESSFUL EFFORT TO QUALIFY AN OPEN COMPETITION INITIATIVE

On March 13, 2009, Kneebone and Breitfelder filed a second Notice of Intent to circulate an open competition ordinance. SER 90 (Dkt. 59-2). Plaintiffs complied with statutory requirements and the qualification process went smoothly. The proposal was supported by the required number of signatures and appeared on the June 8, 2010 general municipal election

[7] "VC" refers to plaintiffs' verified complaint, Docket 1.

ballot as Proposition G. Proposition G was approved by a 18,783 to 14,906 vote margin and took effect on July 23, 2010.[8] SER 90-91 (Dkt. 59-2).

According to plaintiffs, the circumstances surrounding the choosing of proponents for the second attempt were the same as the circumstances surrounding the first. The "true" initiative proponents were the organizational plaintiffs; the individual plaintiffs served as proxy proponents because that was the only way to get the measure on the ballot. ER 61 (VC ¶¶ 137-144.) The individual plaintiffs stated that they again did not want their names to be printed on the initiative petitions, but allowed it so that the measure could be passed. (*Id*.) Plaintiff Breitfelder stated that he would never again allow his name to be used as a proponent if he was required to have his name printed on initiative petitions. ER 64 (VC ¶ 147.)

STATEMENT OF THE CASE

This action concerns plaintiffs' first, unsuccessful attempt to qualify an open competition ordinance. The complaint was filed on April 28, 2009 – after the City Clerk had refused to process the first initiative and during the efforts to qualify the second initiative. ER 40 (Dkt. 1).

[8] Proposition G was adopted during the course of the district court litigation concerning plaintiffs' first attempt to qualify an open competition ordinance.

Plaintiffs are two organizations and two individuals involved in efforts to qualify an open competition initiative:

- "Chula Vista Citizens for Jobs and Fair Competition major funding by Associated Builders & Contractors PAC and Associated General Contractors PAC to promote fair competition." CVC is an unincorporated association and a ballot measure committee. ER 43 (VC ¶ 43).
- "Associated Builders & Contractors, Inc., San Diego Chapter." ABC is an association of construction related businesses. ER 53 (VC ¶ 75.)
- Lori Kneebone. She is a registered voter in Chula Vista and a proponent of both proposed initiatives. ER 48 (VC ¶¶ 44-45.)
- Larry Breitfelder. He is a registered voter in Chula Vista and a proponent of both proposed initiatives. ER 50 (VC ¶¶ 59-60.)

Defendants are the Chula Vista City Clerk, the Mayor, and the members of the City Council. ER 56-58 (VC ¶¶ 94-113.)

Plaintiffs' 48-page, 207-paragraph verified complaint sought a declaration that California and Chula Vista law are unconstitutional – both facially and as-applied – in that they (a) require that proponents of municipal

initiatives be human beings (as opposed to corporations or associations) and (b) require the names of one-to-three proponents appear on municipal initiative petitions. ER 80 (Dkt. 1). Plaintiffs also sought an injunction barring the City Clerk from enforcing these laws, and specifically sought an injunction ordering the City Clerk to process the signatures submitted in support of the first initiative petition. *Id.*

On June 4, 2009, plaintiffs moved for a preliminary injunction ordering the City Clerk to process the first petition. ER 112 (Dkt. 7).

On June 11, 2009, the district court certified to the California Attorney General that the constitutionality of California Elections Code sections 342, 9202, 9205, and 9207 was at stake, and that the State would have 60 days to intervene, should it choose to do so. ER 113 (Dkt. 17). The State 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. SER 119 (Dkt. 27). The motion was granted. ER 114 (Dkt. 30).

The preliminary injunction motion was argued on August 19, 2009. ER 114 (Dkt. 34). The next day, the district court ordered supplemental briefing on the proper statutory construction of the challenged statutes. SER 115 (Dkt. 35). On March 18, 2010, the district court denied the preliminary

injunction as moot in light of the fact that plaintiffs' second attempt to qualify an initiative had by that time succeeded and qualified for the June 2010 municipal election ballot. SER 111 (Dkt. 42.) The Court also stayed further proceedings until resolution of *Doe v. Reed*, 130 S. Ct. 2811 (2010), a case which posed the question whether the signers of a referendum petition have a First Amendment right to remain anonymous. *Id.*

Once the stay was lifted, plaintiffs and the State filed cross-motions for summary judgment. ER 115, 116 (Dkt. 54, 55). The City defendants joined the State's motion on the issue of the elector requirement. CD ER[9] 45-46 (Dkt. 56). After argument, the district court granted the State's motion and denied plaintiffs' motion. Regarding the requirement that initiative proponents be electors, the district court found strict scrutiny to be inappropriate because serving as an official initiative proponent "is not pure speech. It is a legislative act." ER 11 (Dkt. 70). It went on to uphold the elector requirement as "a rational, reasonable, and necessary measure to protect Chula Vista's form of self-government[.]" *Id.*

Regarding the requirement that initiative petitions bear the names of one-to-three proponents, the court below observed that the right to speak

[9] "CD ER" refers to the City Defendants' Supplemental Excerpts of Record.

anonymously is "'not unlimited . . . and the degree of scrutiny varies depending on the circumstances and the type of speech at issue.'" ER 15 (Dkt. 70) (quoting *In re Anonymous Online Speakers*, 661 F.3d 1168, 1172-73 (9th Cir. 2011)). The court applied an "exacting scrutiny" test that requires a disclosure requirement to be "'substantially related to a sufficiently important government interest.'" ER 17 (Dkt. 70) (quoting *Human Life of Wash. v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010), *cert. denied* 131 S. Ct. 1477 (2011)). The court found the burden on plaintiffs (disclosure of one to three names) to be "slight," the interests of the government to be "substantial," and upheld the disclosure requirement. ER 13 (Dkt. 70).

The court entered judgment for the State, and plaintiffs appealed that judgment. ER 1, 28 (Dkt. 71, 75).

STANDARD OF REVIEW

A district court's grant or denial of summary judgment is reviewed de novo. *Humane Soc. of U.S. v. Locke*, 626 F.3d 1040, 1047 (9th Cir. 2010). A summary judgment may be affirmed on any ground that has support in the record, whether or not relied on by the district court. *Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 860, n.17 (9th Cir. 1995).

SUMMARY OF ARGUMENT

Plaintiffs raise two novel challenges to California laws governing municipal initiatives.

First, plaintiffs challenge the California requirement that initiative proponents must be electors (individuals qualified to vote). Plaintiffs assert that corporations and associations have a First Amendment right to be the official proponents of initiatives. This argument fails because the act of proposing an initiative is the first step in the legislative process. As a legislative act, it is legitimately limited to members of the legislative body, the electorate. Many other legislative acts – such as signing initiative petitions and voting – are likewise restricted to the electorate.

Second, plaintiffs challenge the requirement that municipal initiative petitions bear the names of one-to-three proponents. Plaintiffs assert that this requirement is subject to strict scrutiny because it bans "anonymous petition-circulation speech." AOB at 34. 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. Second, a law governing the contents of 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 (1999) (quoting *Clark v. Burleigh*, 4 Cal. 4th 474, 491 (1992)). Third, even if general First Amendment law governing compelled disclosure in the electoral context were applicable to initiative petitions, the challenged statutes would be subject to the test announced in the Supreme Court's recent *Doe v. Reed* decision, and the challenged statutes would pass that test.

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 set forth in the district court's well-reasoned decision granting the State's summary judgment motion, there is no legal substance to the radical claims made in this action.

ARGUMENT

I. THE CHALLENGED STATUTES ARE NOT UNCONSTITUTIONAL BECAUSE THEY REQUIRE THE PROPONENT OF AN INITIATIVE TO BE AN ELECTOR.

A. The Initiative Power is Reserved to the People of California.

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.[10] 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.*

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[10] 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).

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."[11]

Acting pursuant to article II, section 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.[12] The requirement that proponents be natural persons

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[11] "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.

[12] 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.

applies not just to municipal initiatives like Chula Vista's Proposition G, but to all California initiatives: state, county, municipal, and district. § 342. The State is aware of no state that allows corporations or associations to be the proponents of initiatives.

In their opening brief, plaintiffs attempt to inject an issue into the appeal that was not raised in the summary judgment motions below. Plaintiffs now contend that California and City law, when properly understood, actually do *not* require that the proponents of a municipal initiative be electors. AOB at 7. But plaintiffs fail to inform the Court that all parties to the summary judgment proceedings agreed that municipal and state law *do* require proponents to be electors.[13] The Court should disregard

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[13] Plaintiffs' Statement of Undisputed Facts #25 stated:

> 25. The City's 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 officers." Charter § 903 (emphasis added). *This provision, along with Code Sections 9202, 9205, and 9207 (incorporated by the Charter), require that proponents of initiative petitions must be natural persons ("Natural Person Requirement").* (VC ¶ 10; Answer ¶ 7, lines 13-14.) Thus, the City prohibits plaintiffs ABC and Chula Vista Citizens, as well as all incorporated and unincorporated associations, from serving as a proponent of an initiative petition. (*Id*.)

(continued…)

this issue because plaintiffs conceded it for the summary judgment motions. *U.S. v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978) (generally a court of appeal will not consider an issue conceded in the district court). Plaintiffs offer no explanation why an exception should be made in this case. *See In re Mercury Interactive Corp. Securities Litigation*, 618 F.3d 988, 992 (9th Cir. 2010).

In any event, assuming for the sake of argument that plaintiffs could raise this issue on appeal, it has no merit. As set forth above, the California Constitution explicitly grants the right to propose initiatives and referenda to electors. *See* Cal. Const., art. II, § 8(a), art. IV, § 1. An unbroken line of

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(…continued)
SER 2 (Dkt. 59-4) (emphasis added). The State admitted the truth of this statement. *Id*. The City did not file a separate response to plaintiffs' Statement of Undisputed Facts, but the City did join the State's summary judgment motion to the extent that it argued that "The Challenged Statutes are Not Unconstitutional in that they Require the Proponent of an Initiative be a Natural Person." SER 108 (Dkt. 56); SER 110 (Dkt. 55-1).

The Court also should note that plaintiffs' verified complaint alleges that "At issue in this lawsuit is the constitutionality of California Elections Code §§ 9202, 9205, and 9207 as incorporated into the Chula Vista Charter ("the Charter") § 903, and enforced by agents of the City. *These provisions require that those who wish to undertake an initiative petition [must] be a natural person, as opposed to a corporation or other association.*" ER 41 (Dkt. # 1, ¶ 3) (emphasis added). The State's answer and the City's answer admitted that state law requires "that the proponents be individual electors (not corporations or associations.)" SER 117 (Dkt. 27-1); SER 114 (Dkt. 36).

cases recognize that the right of initiative is limited to electors. *See*, *e.g.*, *Strauss*, 46 Cal. 4th at 421 ("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."); *Associated Home Builders etc., Inc. v. City of Livermore*, 18 Cal. 3d 582, 591 (1976) (1911 constitutional amendment reserved right of initiative to the electors of cities and counties); *Builders Assn. of Santa Clara-Santa Cruz Counties v. Superior Court*, 13 Cal. 3d 225, 231 (1974) (initiative "represents an exercise by the people of their reserved power to legislate"); *Carlson v. Cory*, 139 Cal. App. 3d 724, 730 (1982) (initiative is power of electors to propose statutes or amendments); *Harnett v. Sacramento County*, 195 Cal. 676, 679-680 (1925) (California Constitution reserves "to the people of the state the power to propose laws or amendments").

Consistent with the constitution, the Elections Code requires the proponents of an initiative to file with the City Clerk a Notice of Intent "signed by at least one, but not more than three, proponents." § 9202(a); *Myers v. Patterson*, 196 Cal. App. 3d 130, 138-39 (1987). The Notice of Intent must state that "Notice is hereby given by the persons whose names appear hereon of their intention to circulate the petition[.]" *Id*. The plain

import of this language, particularly when read in the context of applicable constitutional provisions, is that proponents must be electors.

Even if there were some doubt about the constitutional language (and there is not), the fact is that for 100 years California has in practice required initiative proponents to be electors.[14] This in itself removes any possible doubt as to the interpretation of state law. *See Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 369 (1940) ("It would be a narrow conception of

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[14] Plaintiffs mistakenly cite a number of cases for the proposition that "[i]t appears taken for granted that organizations can serve as proponents." AOB at 11. As the district court noted, none of these decisions address the question whether an organization can be the official, legal proponent of an initiative. ER 10 (Dkt. 70), n.9. These cases use the term "proponent" in a non-technical sense, and no one denies that an organization can be an initiative "proponent" in the everyday sense of the word. *See American Heritage Dictionary, Second College Edition* (Houghton Mifflin 1985) at 993 (defining "proponent" as "One who argues in support of something; advocate"). The issue presented in this appeal is whether a corporation or association can be the official, legal proponent of an initiative within the meaning of California law.

As for plaintiffs' argument that a 2009 amendment to the statutory definition of "proponent" for statewide initiatives (defining them as electors) creates a negative inference that the proponents of municipal initiatives may be associations (because they are defined as "persons"), this is speculative. *See* AOB at 9. Plaintiffs point to nothing in the legislative history or elsewhere to suggest that the Legislature intended to create a separate standard that would allow corporations to be the proponents of municipal initiatives, while prohibiting corporations from being the proponents of statewide initiatives. Had this been the Legislature's intent, it would have said so very clearly.

jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice cannot supplant constitutional guarantees, but it can establish what is state law.").

State courts are the primary expositors of state law. *Moore v. Sims*, 442 U.S. 415, 429 (1979). The state authorities discussed above conclusively determine that in California the initiative power belongs to the people.

B. The Act of Proposing an Initiative Is a Legislative Act Properly Limited to Members of the Legislative Body – the Electorate.

The submission of an initiative petition is the first step in a legislative process:

> 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. Because an initiative petition is a legislative document, it is legitimately limited to members of the legislative body, in this case the electorate. The distinction between electors and non-electors is manifested in a wide range of elections statutes. Only electors are allowed to vote. Cal. Const., art. II, § 2. Only electors are allowed to run

for public office. *Id.*, art. V, § 2 [Governor], art. IV, § 2(c) [Legislature]. Only electors are allowed to sign initiative petitions. *Id.*, art. II, § 8(b). Only electors are allowed to sign nominating papers necessary to qualify candidates for the ballot. § 8060. And only electors (elected legislators) are allowed to introduce bills to the Legislature. Standing Rules of the Senate, 2011-12 Regular Session, Rule 28.5; Standing Rules of the Assembly, 2011-12 Regular Session, Rule 47.[15]

All the activities above are legitimately limited to electors because the electors are the sovereign; it is the electors – not corporations and associations – who are empowered to elect public officials and to adopt or reject initiatives. No doubt there is a healthy dose of expressive activity in these activities. For example, there is a significant speech element to the act of introducing a bill in the Legislature. And there is a significant speech element to the act of signing an initiative petition. *Doe v. Reed*, 130 S. Ct. 2811, 2818 (2010) (petition signing is expressive conduct). Nonetheless, no one would suggest that a corporation has a right to introduce a bill or sign an initiative petition.

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[15] Available at http://clerk.assembly.ca.gov/clerk/BILLSLEGISLATURE/PARLIAMENTARY.HTM.

Plaintiffs assert that the issue presented is whether the official function of proponents can be limited to "natural persons," as opposed to corporations or associations. AOB at 6. But the real question is whether the official function can be limited to electors. This is an important distinction because there is a geographical component to being an elector; an elector is a person who resides in the relevant jurisdiction and who possesses the qualifications for voting. § 321; *see People v. Darcy*, 59 Cal. App. 2d 342, 349 (1943) (elector is one who has the qualifications to vote but may not have complied with the legal requirements). As the district court noted, if the elector requirement is removed, the geographical requirement also is removed. ER 9. Plaintiffs evidently propose a world in which non-residents and corporations with no long-term interest in the welfare of Chula Vista and no roots in Chula Vista could propose legislation for the chartered city of Chula Vista. This is not idle speculation; plaintiff "Associated Builders & Contractors, Inc., San Diego Chapter" is a San Diego entity. And even if, in plaintiffs' brave new world, a geographical limit could be imposed on initiative proponents, it might be difficult to determine the legal residence of a ballot measure committee such as plaintiff "Chula Vista Citizens for Jobs and Fair Competition major funding by Associated Builders & Contractors PAC and Associated General Contractors PAC to promote fair competition."

The associational plaintiffs assert that the challenged statutes violate their right of free speech. It is settled that corporations have First Amendment rights, in particular the right to free speech. *See Citizens United*, 130 S. Ct. at 899 (2010) ("The Court has recognized that First Amendment protection extends to corporations.") But the challenged statutes impose no meaningful limit on speech. California law places no limit on what corporations and associations can say about initiatives. And California law places no limit on how much corporations and associations can spend to broadcast their views. For that matter California law does not prohibit the associational plaintiffs (or anyone else) from acting as a proponent of an initiative in the unofficial, ordinary speech sense of the word. *See* footnote 14, *supra*. In normal usage, the organizational plaintiffs were proponents of Proposition G, particularly the ballot measure committee – CVC – which apparently was formed solely to promote an Open Competition ordinance. ER 43 (VC ¶ 19.) And because the measure got 18,783 Yes votes, Proposition G probably had hundreds, perhaps thousands, of other proponents in Chula Vista. The only effect of California law is to prohibit corporations and associations from formally proposing an initiative to the electorate.

Plaintiffs' challenge rests almost entirely upon two cases, *Citizens United* and *Meyer v. Grant*, 486 U.S. 414 (1988). Both are inapposite.

Citizens United concerned a federal law that prohibited corporate spending on "electioneering communications" – broadcasts aired in the run-up to an election that support or oppose a federal candidate. *Id.* at 887, 913. Violations were punishable as a felony. *Id*. at 897. The statute at issue in Citizens United imposed "censorship . . . vast in its reach," a near-total ban on corporate political speech during the critical period immediately before an election. *Id*. at 907. This violated the First Amendment precept that government "may not suppress political speech on the basis of the speaker's corporate identity." *Id.*, 130 S. Ct. at 913. *Citizens United* does not undermine the California requirement that only electors can formally propose initiatives because the elector requirement has a negligible effect on corporate speech and is the inevitable consequence of limiting legislative acts to members of the legislative body. *See First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 778 (1978) (certain First Amendment guarantees are unavailable to corporations and associations because their historic function has been limited to individuals).

Meyer involved a Colorado statute that made it a felony to pay initiative petition circulators. *Meyer*, 486 U.S. at 416. The Supreme Court held that this statute violated the First Amendment because it

> restricts political expression in two ways: First, it limits the number of voices who will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion.

Id., 486 U.S. at 422-423. The elector requirement at issue here does neither. California puts no limit on the number of people plaintiffs can enlist to circulate their message. Plaintiffs themselves point out that initiative petitions are generally circulated by paid signature-gatherers, that plaintiffs themselves employed paid signature-gatherers, and that they succeeded in qualifying their measure for the ballot. AOB at 41; ER 61-62, 64 (VC ¶¶ 129-130, 132, 145). Plaintiffs do not allege that the elector requirement puts any burden at all on the ability to qualify measures for the ballot. The evidence is to the contrary. More than 60 municipal initiatives qualified for the ballot during calendar years 2009-2010 alone.[16] SER 39-71 (Dkt. 59-3).

[16] This is the number that qualified for the ballot; the number circulated (all of which require at least one proponent) is necessarily higher.

By all accounts, California has the most active local initiative system in the country.[17]

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 the formal proponent of an initiative.

II. THE CHALLENGED STATUTES ARE NOT UNCONSTITUTIONAL BECAUSE THEY REQUIRE DISCLOSURE OF A PROPONENT'S NAME ON INITIATIVE PETITIONS.

A. The Burden of the Challenged Statutes is Minimal: They Require Disclosure of the Name of One To Three Electors Who Support a Proposed Initiative.

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. The Notice of Intent must be signed, it must be

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[17] 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. (Available at http://www.ppic.org/main/publication.asp?i=348.)

accompanied by the text of the proposal, and it may (at proponents' option) include a 500-word statement explaining the reasons for the proposal. §§ 9202(a), 9203. 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. The proponents may begin circulating initiative petitions for signature immediately after publication. § 9207. The circulated petitions must themselves bear the Notice of Intent, including the names of the proponents. § 9207; *see also* 83 Ops.Cal.Atty.Gen. 139, 142 (2000) ("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").

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. 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. So 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 – they 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 be others.[18] No one has ever suggested that an initiative proposal has failed for want of a proponent.

The challenged statutes are narrowly focused – they regulate the contents of the initiative petition itself. For that reason they do not suffer from the myriad constitutional flaws alleged by plaintiffs in their opening brief. They do not require the identity of petition circulators to be disclosed on badges worn by the circulators;[19] they do not require the identity of petition circulators to be disclosed on financial disclosure forms either pre-or-post-election;[20] they do not prohibit the distribution of anonymous handbills at public meetings;[21] and they do not require disclosure of funding sources on handbills and other election-related publications.[22] As the district court noted, none of the authorities cited by plaintiffs address the

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[18] There are approximately 100,000 registered voters in Chula Vista. *See Report of Registration – State Reporting Districts, San Diego County, Run Date: 3/30/12*, available at http://www.sdcounty.ca.gov/voters/Eng/Eline.shtml.

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

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

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

[22] *See American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979, 981 (9th Cir. 2004).

constitutionality of the requirement that municipal initiative petitions bear the name of one-to-three official proponents. ER 15 (Dkt. 70).

B. The Burden of the Disclosure Statutes on Plaintiffs Kneebone and Breitfelder Was Nonexistent Because These Two Plaintiffs Thrust Themselves into the Public Controversy Concerning Proposition G on Every Possible Occasion.

Considering the nature of plaintiffs' claim – 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.

SER 6 (Dkt. 59-3). 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. SER 37 (Dkt. 59-3).

- 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. SER 7-9 (Dkt. 59-3).
- 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. SER 10-13 (Dkt. 59-3).
- She appeared in a video in support of Proposition G that was available on YouTube and on the Yes on G website. SER 14-17 (Dkt. 59-3).

Mr. Breitfelder is a very public figure in Chula Vista. He 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. SER 34 (Dkt. 59-3). 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. SER 24-25 (Dkt. 59-3).
- He authored the ARGUMENT IN FAVOR OF PROPOSITION G in the Voter Information Pamphlet. SER 36 (Dkt. 59-3).

- 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)." SER 28-31 (Dkt. 59-3).
- He was president of an organization named The Chula Vista Taxpayers Association, which publicly supported Proposition G and sent out mailers to that effect. SER 26-27, 30 (Dkt. 59-3). It was common knowledge that the Association supported Proposition G and it was common knowledge that its president, Larry Breitfelder, supported Proposition G. SER 22-23 (Dkt. 59-3).

C. The Challenged Statutes Pass the Constitutional Test Applicable to Speech in a Non-Public Forum Such as an Initiative Petition.[23]

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

[23] This issue was raised below in the State's Opposition to Plaintiffs' Motion for Summary Judgment. SER 106 (Dkt. 59).

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 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*, *supra*, 4 Cal. 4th 474, 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. *Id.* at 491. 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." *Id.* at 485. The Court further noted that the statute in question restricted only one channel of communication to the voters, and was viewpoint neutral. *Id.* at 467-468. The Court upheld the statute as a reasonable regulation on speech. *Id.* at 468.

Burleigh was followed by *San Francisco Forty-Niners v. Nishioka*, *supra*, 75 Cal. App. 4th 637, which considered 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 proposing an ordinance that would have halted efforts to finance and build a new stadium at San Francisco's Candlestick Point. *Id*. at 640. The challenged initiative petition contained a Notice of Intent (signed by three proponents) that made 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.[24] *Id*. at 639, 645. A superior court entered a writ of mandate prohibiting the registrar of voters from qualifying the initiative for the ballot. *Id*. 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

[24] In many cases, the question of whether political statements are true or false might pose delicate First Amendment issues. No such issues were presented in *Nishioka* because the proponents of the initiative did not contest the falsity of the statements. *Nishioka*, 75 Cal. App. 4th at 645-646.

> 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.

Id. 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 the proponent is the most important element: the proposal itself.

The requirement that an initiative petition 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, that one among their number

is advancing the proposal.[25] 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. SER 72 (Dkt. 59-3). Further, the requirement is viewpoint-neutral; it applies to all initiative proponents. This is all that is needed for the requirement to pass the reasonable scrutiny test applicable to non-public fora.

D. Alternatively, the Challenged Statutes Pass the Compelled Disclosure Test Announced in the Supreme Court's Recent *Doe v. Reed* Decision.

The present case was stayed for several months in the district court pending resolution of *Doe v. Reed*, 130 S. Ct. 2811 (2010), a case which considered a First Amendment challenge to a law that compelled disclosure of the names and addresses of those who sign referendum petitions. *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.

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[25] *See Cornelius*, 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.)

Reed was a challenge to a Washington law that required the state 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 2816-2817. 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 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. *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.

Id. (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." *Id*. (citations and internal quotation marks omitted). As to the second prong, the Court found the disclosure law substantially related to the State's interest because it helped ensure that only referenda supported by sufficient signatures would be placed on the ballot. *Id*.

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." *Brumsickle*, 624 F.3d at 1005. "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." *Id*.

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. It is no different from the requirement that every bill in the California Legislature be introduced by a member of the Legislature, whose name appears at the top of the printed bill. Legislation is inherently a public act, regardless of the forum in which it takes place.

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). As explained above, the record in this 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. As described above, California has the most active local initiative system in the country.[26] *See* pp. 26-27, *supra*. The requirement that official proponents be disclosed imposes no practical burden on the exercise of First Amendment rights. No one, including plaintiffs, has claimed that any initiative proposal has failed for want of a proponent.

To the extent that plaintiffs attempt to 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 wholly failed to carry this burden in the district court. They conceded that they were subject to no threats, harassment, or reprisals as a result of being proponents of the Chula Vista Measure G.[27] Plaintiff Kneebone's responses to interrogatory

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[26] *See* Tracy M. Gordon, *The Local Initiative in California* (Public Policy Institute of California, 2004), p. v. (Available at http://www.ppic.org/main/publication.asp?i=348.)

[27] As the district court noted, the individual plaintiffs testified at their depositions that the reason they did not want their names in the initiative petitions was not a desire to remain anonymous, rather they wanted voters to

(continued…)

questions on this topic were unequivocally "no." SER 74-75 (Dkt. 59-3). Plaintiff Breitfelder's responses were unequivocally "no" as to whether he had been subjected to threats or harassment. SER 79-80 (Dkt. 59-3). 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."

SER 80-81 (Dkt. 59-3).

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" that could exempt him from a generally-applicable disclosure requirement.[28] In a democracy, the fact that

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(…continued)
know that the "correct" proponents were associational plaintiffs ABC and CVC. ER 22-23 (Dkt. 70).

[28] *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

(continued…)

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*, 624 F.3d at 1017.

(…continued)
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.

CONCLUSION

For the reasons set forth above, the judgment of the district court should be affirmed.

Dated: October 12, 2012

Respectfully Submitted,

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12-55726

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

Plaintiffs and Appellants,

v.

DONNA NORRIS, et al.,

Defendants and Appellees,

STATE OF CALIFORNIA,

Intervenor, Defendant and Appellees.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: October 12, 2012

Respectfully Submitted,

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/S/ GEORGE WATERS

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR 12-55726

I certify that: (check (x) appropriate option(s))

[X] 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **opening/answering/reply/cross-appeal** brief is

[X] Proportionately spaced, has a typeface of 14 points or more and contains 9,749 words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words

or is

[ ] Monospaced, has 10.5 or fewer characters per inch and contains ____ words or ___ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

[ ] 2. The attached brief is **not** subject to the type-volume limitations of Fed.R.App.P. 32(a(7)(B) because

[ ] This brief complies with Fed.R.App.P 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages.

or

[ ] This brief complies with a page or size-volume limitation established by separate court order dated _____ and is

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[ ] 3. Briefs in **Capital Cases**.
This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 and is

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☐ 4. **Amicus Briefs**.

☐ Pursuant to Fed.R.App.P 29(d) and 9th Cir.R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

or is

☐ Monospaced, has 10.5 or few characters per inch and contains not more than either 7,000 words or 650 lines of text,

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☐ Not subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed.R.App.P. 32 (a)(1)(5).

October 12, 2012

Dated

/s/ George Waters

George Waters
Deputy Attorney General

9th Circuit Case Number(s) 12-55726

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CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) October 12, 2012 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) /s/ Brenda Apodaca

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Signature (use "s/" format) /s/ Brenda Apodaca