No. 12-55726

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.

Appeal from a Judgment
Of the United States District Court, Southern District of California,
No. 3:09-cv-00897-BEN-JMA; Hon. Roger T. Benitez, Judge

BRIEF FOR APPELLEES DONNA NORRIS ET AL.

Charles A. Bird
MCKENNA LONG & ALDRIDGE LLP
600 West Broadway, Suite 2600
San Diego, California 92101-3372
619.236.1414

Attorneys for Donna Norris, Cheryl Cox, Pamela Bensoussan, Steve Castaneda, John McCann and Rudy Ramirez

Corporate Disclosure Statement Required By Rule 26.1, Federal Rules of Appellate Procedure

Appellees Donna Norris, et al., are employees or elected officials of the City of Chula Vista, a charter city organized under the Constitution of the State of California.

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STATEMENT OF JURISDICTION

This is the brief of defendants and appellees ("City Defendants"), who were sued in their official capacity as officers of the City of Chula Vista, California ("City"). The State of California ("State"), intervenor below, is filing a separate appellee's brief. City Defendants join that brief to the extent it discusses issues of concern to City Defendants.

A. Federal Subject Matter Jurisdiction

City Defendants agree in general with plaintiffs' statement of federal subject matter jurisdiction subject to issue 1, *post*.

B. Appellate Jurisdiction

City Defendants agree with plaintiffs' statement of appellate jurisdiction.

ISSUES PRESENTED

1. Should the Court of Appeals decide the constitutionality of what plaintiffs call a State of California and City enforcement policy if there is doubt whether the enforcement policy conforms to California law?

This issue arose from the District Court's sua sponte order for supplemental briefing on plaintiffs' motion for preliminary injunction.

City Defendants' Supplemental Excerpts of Record ("CD ER") 68. When the District Court denied the motion without considering the issue, the issue appeared to drop out of the case. Arguments in the Brief of Appellants ("blue brief") push abstention into the case again.

2. In California law, an elector is a United States citizen 18 years of age or older, residing in an election precinct at least 15 days before an election. Cal. Elec. Code § 321 (West 2004)04). May California state or municipal law reserving electors' inherent power to enact municipal law by ballot initiative restrict to the municipality's electors the legal capacity to file an initiative petition?

This issue is raised by plaintiffs' complaint. 2 ER 41-42, 72-73. The District Court decided California and municipal law are constitutional in its order granting the State's motion for summary judgment, in which City Defendants joined as to this issue. 1 ER 4-12.

3. May California law applicable to municipal direct legislation require initiative petitions circulated for voter signature to disclose the name of the elector who commenced the initiative process?

While this issue is raised in the complaint and is decided in the District Court's order granting summary judgment, City Defendants have deferred entirely to the State on the issue. This brief does not discuss the disclosure issue.

STATEMENT OF THE CASE

A. Function of an Official Proponent

This appeal tests how California and the City regulate the process by which citizens can propose and enact legislation. Specifically, the acts an elector must carry out to put initiative legislation on a ballot are these:

- File with the City Clerk a Notice of Intent to Circulate a Petition ("Notice of Intent") and the proposed measure, signed by at least one but not more than three proponents. Cal. Elec. Code §§ 9202 (West 2012)12), 9203 (West 2000)00).
- Publish the Notice of Intent, including the ballot title and summary prepared by the City Attorney, before collecting any signatures. Cal. Elec. Code §§ 9205 (West 2012), 9207 (West 2012)12).
- Provide proof of publication to the City Clerk within ten days after publication. Cal. Elec. Code § 9206 (West 2012)12).

- File the petition signed by the necessary number of voters within 180 days after receiving the ballot title and summary.

Cal. Elec. Code § 9208 (West 2012)12).

A person who undertakes these acts is a "proponent" of an initiative. Cal. Elec. Code § 342 (West 2010).[1] The blue brief profits illegitimately from using "proponent" both in the full range of meanings found in a dictionary[2] and as a State election law term of art. City Defendants hereafter use "Proponent" for the statutory term and "proponent" to differentiate the popular meaning. One need not be a Proponent of an initiative to be a proponent of the measure—that is, to speak for it, to publish for it, to gather signatures for it, and to

[1] Cal. Elec. Code § 342 provides: " '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."

[2] "1 : one who makes a proposal : one who lays down and defends a proposition : one who argues in favor of something (as an institution, a policy, a legislative measure, a doctrine) : ADVOCATE, SUPPORTER — opposed to *opponent* 2: the propounder of a legal instrument (as a will for probate)." Webster's Third New Int'l Dictionary 1819 (1971) (all punctuation and typography original).

pay money for all kinds of advocacy and support. *Perry v. Brown*, 265 P.3d 1002, 1017-18 (Cal. 2011) ("Under these and related statutory provisions . . ., the official [P]roponents of an initiative measure are recognized as having a distinct role—involving both authority and responsibilities that differ from other supporters of the measure—with regard to the initiative measure the proponents have sponsored.") The District Court agreed in a reasoned and researched opinion. ER 6-8.

B. Proceedings Below

Plaintiffs commenced this action in April 2009, summarizing it as an attack on "the constitutionality of California Elections Code §§ 9202, 9205, and 9207 as incorporated into the Chula Vista, California Charter ('the Charter') § 903 (2006), and enforced by agents of the City." 2 ER 41. Plaintiffs alleged the provisions "require that [one who wishes to undertake an initiative petition] be a natural person, as opposed to a corporation or other association." *Id.* The complaint described such a person as " 'the [P]roponent.' " *Id.* Plaintiffs alleged they "challenge the City's interpretation of the California Elections Code and their (sic) Charter that a '[P]roponent' must be a natural person" as "unconstitutional under the First

Amendment. . . ." 2 ER 42; *see* 2 ER 72-73. Plaintiffs did not allege the interpretation was incorrect. 2 ER 41-42, 72-73. Rather, they alleged the laws violated the First Amendment. 2 ER 41-42, 73-75.

Plaintiffs sued City Defendants in their official capacities: City Clerk, Mayor, and members of the City Council. 2 ER 56-58. Plaintiffs did not allege City Defendants have any personal interest in the challenged laws, or that their interpretation or enforcement was in any way adverse to the interests of citizens of the City. *Id.*

Plaintiffs moved for a preliminary injunction; their papers admitted that only a natural person may be the Proponent of an initiative. CD ER 69-70. The District Court ordered the parties to brief whether California law requires a Proponent to be a natural person. CD ER 68. Contradicting their moving papers, plaintiffs responded that corporations and associations may be Proponents. CD ER 66-67. Intervenor State responded that a Proponent must be a natural person. CD ER 64-65. City Defendants joined the State and argued the District Court should abstain if it concluded there was any doubt in interpreting the Charter and relevant statutes. CD ER 62-63. The District Court denied the preliminary injunction in an order that did not discuss abstention. CD ER 60-61.

City Defendants answered, thematically stating that as to most of the allegations of the complaint their roles in enforcing California election laws were ministerial and accordingly they deferred to the State to defend those laws. 2 ER 35. City Defendants undertook to defend only "the substance and clarity of the requirement that only electors of the City of Chula Vista may be [P]roponents of Chula Vista municipal ordinances. . . ." 2 ER 35, 38. City Defendants raised affirmative defenses that the complaint was moot because plaintiffs qualified their initiative for the ballot and that the District Court should abstain from interpreting the challenged laws in the absence of definitive interpretation by a California court. 2 ER 38-39.

The State moved for summary judgment. Dkt. No. 55. The State treated the elector requirement as a foundational fact. CD ER 59. City Defendants joined the motion on the issue of the elector requirement. CD ER 45-46.

Plaintiffs moved for summary judgment. Dkt. No. 54. In their statement of undisputed facts, they admitted Charter § 903 limits Proponents to natural persons. CD ER 48. "This provision, along with [Cal. Elec. Code §§] 9202, 9205, and 9207 (incorporated in the Charter) require that [P]roponents of initiative petitions must be

natural persons. . . ." *Id.* Nevertheless, in a footnote in their memorandum, they failed to regard City Defendants' joinder in the State's supplemental briefing on interpretation of California law, refrained from arguing whether California or the City requires a Proponent to be an elector, and claimed the District Court could decide the First Amendment question based on the City's "enforcement position" regardless of what applicable law means. CD ER 53, n.3.

City Defendants opposed plaintiffs' motion as to the elector requirement. Dkt. No. 57. City Defendants argued the requirement is both an element of state law and native to the Charter, through the reservation of initiative powers to the City's electors. CD ER 43-44. In opposing plaintiffs' motion, the State unequivocally interpreted California law to require proponents of local initiatives to be natural persons. CD ER 39-41; *see* CD ER 01 (State's reply in support of its motion).

The District Court granted the State's motion for summary judgment and denied plaintiffs'. 1 ER 2-26.

C. Statement of Facts

In the first half of 2008, individual plaintiff Kneebone and another person attempted to qualify what they call an open competition initiative for popular vote in the City. CD ER 54. They failed because they did not timely file the required proof of publication of their Notice of Intent. CD ER 54-55.

In the second half of 2008, individual plaintiffs Kneebone and Breitfelder attempted to qualify the same initiative for popular vote in the City. CD ER 55. The City Clerk rejected the initiative documents because the Notice of Intent was not signed by anyone; rather, it bore only a small-font notation that circulation was "[p]aid for by Chula Vista Citizens for Jobs and Fair Competition, major funding by Associated Builders & Contractors PAC and Associated General Contractors PAC to promote fair competition." CD ER 55-56. The rejection of the petition was the subject of plaintiffs' complaint and unsuccessful motion for preliminary injunction. CD ER 56-57.

In 2009, individual plaintiffs Kneebone and Breitfelder circulated the same initiative successfully, and it was adopted in an election on June 8, 2010. CD ER 57-58.

Plaintiff Chula Vista Citizens for Jobs and Fair Competition is an unincorporated association. CD ER 47. Plaintiff Associated Builders and Contractors of San Diego, Inc. is a corporation with construction related businesses as members and was a primary funder of the three initiative processes. *Id.* Plaintiffs relied on their verified complaint as the sole evidence that the organizational plaintiffs wanted to serve as Proponents of the initiatives and the individual plaintiffs became Proponents only at the urging of the organizations. CD ER 49, 50-52.[3] The individual plaintiffs' testimony established their high level of sophistication in local initiative politics. CD ER 02-38.

SUMMARY OF ARGUMENT

1. Under the California Constitution, the initiative power is an element of the inherent political power of the people which the people have reserved out of the delegation of other elements of inherent power to the California Legislature. Cal. Const. arts. II, § 1; II, § 8; IV, § 1. The initiative power is reserved to "electors," *id.*, art. II, § 8, who are human beings eligible to vote, Cal. Elec. Code § 321. Both in

[3] In opposing the State's motion for summary judgment, plaintiffs incorporated their moving statement of undisputed facts as the statement of facts on which they based their opposition. CD ER 42.

language and in principles of governance, Charter § 903 identically reserves the local initiative power to the electors of the City. Plaintiffs question the meaning of the California Constitution and the Charter. They do so as a rhetorical device, arguing the State and the City Defendants cannot have any governmental interest in a supposedly incorrect interpretation of the organic documents. Plaintiffs are not entitled to the device. They must either take their interpretation argument to state court or face the full force of the public interests undergirding the elector requirement. The text of the California Constitution and Charter, authoritative California case law, and context incontestably support only one interpretation: only human beings eligible to vote may be Proponents of initiatives. But if the Court were to entertain any doubt, either abstention or reference to the California Supreme Court would be required. *Arizonans for Official English v. Ariz.*, 520 U.S. 43, 75-80 (1997).

2. An elector's actions as a Proponent are legal acts of introducing legislation, not communicative or associational activities. *Strauss v. Horton*, 207 P.3d 48, 84 (Cal. 2009); *Associated Home Builders of Greater Eastbay, Inc. v. City of Livermore*, 557 P.2d 473, 477 (Cal. 1976); *S.F. Forty-Niners v. Nishioka*, 89 Cal.Rptr.2d 388,

396 (Cal.Ct.App. 1999). Therefore plaintiffs have not raised a First Amendment argument at all. *See*, *e.g.*, *Doe v. Reed*, 130 S.Ct. 2811, 2818 (2010); *Angle v. Miller*, 673 F.3d 1122, 1133-34 (9th Cir. 2012); *Molinari v. Bloomberg*, 564 F.3d 587, 602 (2d Cir. 2009). The entire blue brief argument against the elector requirement relies on the false premise that an elector's essential legislation introduction actions as Proponent cannot be separated from that person's optional advocacy, support, and association involved in trying to convince voters to adopt the measure. Neither the record nor the blue brief contains evidence or argument that the elector requirement restricts initiative proposals from reaching the ballot. As a result, plaintiffs' unique and breathtaking argument for a corporate right to act as an elector lacks both authority and legal reasoning.

3. Plaintiffs eschew the sole potential constitutional argument against the elector requirement—that it excessively and without good reason stifles political debate by restricting ballot access of legislative proposals. *See Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983); *Angle*, 673 F.3d at 1133-34. If plaintiffs made the argument, they would fail. At bottom, plaintiffs' theory of injury is that to commence a ballot initiative, an organization or a human being who is not an

elector must persuade an elector to be a Proponent. There is no evidence in the record or in the world of politics that the need for an elector as Proponent has ever stifled political debate. The trivial burden is justified by a need to maintain the initiative as an element of self government reserved to the people and only the people. *See*, *e.g.*, *Strauss*, 207 P.3d at 84. After all, only human beings eligible to vote hold elected public offices, vote, and sign initiative petitions. The trivial burden is also justified by limiting the risk that business interests targeted by a citizen initiative would attempt to derail it by commencing multiple related initiatives to confuse voters and discredit the process, hoping to cause the citizen initiative to fail for lack of signatures. Such cynical activities both impair public interest and faith in elections and impose unreasonable costs on public agencies responsible to administer elections.

ARGUMENT

I.

ALTHOUGH THE ELECTOR REQUIREMENT SHOULD BE CLEAR, THE COURT SHOULD DIRECT ABSTENTION OR REFERENCE IF THE COURT IS IN DOUBT

The first major heading of the blue brief claims the elector requirement is unconstitutional. The first subheading disappoints. That subheading and the appended argument claim City Defendants and the State misinterpret California law to require a Proponent to be an elector. Blue Brief at 7-12. Plaintiffs' acknowledged purpose is to deprive City Defendants and the State of policy grounds supporting the elector requirement on the theory that there is no requirement. *Id.* at 7-8. This is unfair advocacy. If City Defendants and the State are right that elector status is essential to be a Proponent, they are entitled to support the constitutionality of the requirement with every applicable public interest. But if City Defendants and the State err in interpreting their organic laws, the proper judicial action is for state courts to declare the error as a matter of state law, not for federal courts to constitutionalize a so-called enforcement policy.

In this part of their brief, City Defendants will show there is no genuine issue of interpretation: the elector requirement means only a natural person eligible to register to vote may be a Proponent under the California Constitution and the Charter. City Defendants will also show that if an interpretation issue existed, it should be left to the California state courts.[4]

Another blue brief error must be debunked as a predicate to the substance of the discussion. Plaintiffs falsely imply that a difference exists between the interests of the City's citizens and City Defendants in the so-called enforcement policy. First, this argument is fatuous because City Defendants are parties to this case solely in representative capacity. No evidence exists that any City citizen other than the individual plaintiffs disagrees with the elector requirement. More importantly, the elector requirement resides in the Charter's own text, not merely in an incorporation of California statute. Plaintiffs alleged, and City Defendants agree, that the relevant Charter

[4] City Defendants also agree with the State that plaintiffs conceded this issue.

provision is § 903.[5] ER 41, ¶¶ 2-3. The elector requirement is native to the Charter, being expressed in the first sentence of § 903: "There are hereby reserved to the electors of the City the powers of the initiative and referendum and of the recall of municipal elective officers." Plaintiffs also mischaracterize the requirement, treating it as a limitation of initiative Proponents to natural persons, when it correctly is a limitation to natural persons eligible to vote in the City. Cal. Elec. Code § 321.[6]

A. No Doubt Should Exist—Only Electors May Propound Initiatives

1. As a Matter of State Constitutional Law, Initiative Is a Power of the Electors—That Is, the People

In California constitutional law, the initiative is an inherent power of direct legislation reserved to and by the people, not a power

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[5] Section 903 of the Charter states: "There are hereby reserved to the electors of the City the powers of the initiative and referendum and of the recall of municipal elective officers. The provisions of the Elections Code of the State of California, as the same now exists or may hereafter be amended governing the initiative and referendum and of the recall of municipal officers, shall apply to the use thereof in the City so far as such provisions of the Elections Code are not in conflict with this Charter."

[6] Cal. Elec. Code § 321 provides: "'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."

of petition granted to the people. "All political power is inherent in the people." Cal. Const. art II, § 1. Article IV, § 1 of the California Constitution provides: "The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum." Further explaining, article II, § 8 of the California Constitution provides: "The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." Analysis of the California Constitution should end with this text. It explicitly limits to "electors" the capacity "to *propose* statutes and amendments to the Constitution. . . ." *Id.*, italics added. Curiously, the blue brief italicizes both "propose" and "adopt or reject" in quoting article II, § 8, then claims the State Constitution says nothing about who may be a "proponent." Blue Brief at 9-10. But this case is strictly about who may be a Proponent, and therefore the blue brief concedes the interpretive argument.

The California Supreme Court explicitly recognizes the initiative as an inherent power that the people have reserved, not as a power granted to the people. "Drafted in light of the theory that all power of government ultimately resides in the people, the [1911]

amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them." *Associated Home Builders*, 557 P.2d at 477. "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*, 207 P.3d at 84. The key text of California law therefore has always addressed the initiative as a power of electors. *See* Cal. Const. art. II, § 8; *Associated Home Builders*, 557 P.2d at 477; see *Perry v. Schwarzenegger*, 628 F.3d 1191, 1196 (9th Cir. 2011).

No corporation, partnership, LLC, or unincorporated association has ever been an elector. No such organization could have participated in *reserving* for itself or its like kind the capacity to be a Proponent. If analysis did not stop with the text, it should stop with this organic logic.

If secondary evidence were needed, it confirms that the people of California in adopting the initiative process meant for only electors to propose and adopt initiatives.

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. *Strauss*, 207 P.3d at 84. 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." *Indep. Energy Producers Ass'n v. McPherson*, 136 P.3d 178, 190 (Cal. 2006) (bracketed language in original).

As the California Supreme Court has explained: "The progressive movement, both in California and in other states, grew out of a widespread belief that 'moneyed special interest groups controlled government, and that the people had no ability to break this control.' In California, a principal target of the movement's ire was the Southern Pacific Railroad, which the movement's supporters

believed not only controlled local public officials and state legislators but also had inordinate influence on the state's judges, who—in the view of the progressive movement—at times improperly had interpreted the law in a manner unduly favorable to the railroad's interest. The initiative was viewed as one means of restoring the people's rightful control over their government, by providing a method that would permit the people to propose and adopt statutory provisions and constitutional amendments." *Strauss*, 46 Cal.4th at 420-21 (internal citations omitted). 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." *Reasons Why Senate Constitutional Amendment No. 22 Should Be Adopted*, 1911 General Election Ballot Pamphlet (Oct. 10, 1911), available on line through the U. C. Hastings Law Library, most recently at http://library.uchastings.edu/library/guides/california-research/ca-ballot-pamphlets.html, and partially quoted in *Armstrong v. County of San Mateo*, 194 Cal.Rptr. 294, 314 (Cal.Ct.App. 1983) (Smith, J., dissenting).

It is inconceivable that Hiram Johnson, his fellow Progressives, or the voters who adopted the initiative in 1911, would have proposed or supported a measure that would have allowed the Southern Pacific Company to propose initiatives. Yet that is what plaintiffs advocate.

2. The Charter Is Congruent with State Law

If the City were a general law city, the California Constitution would automatically reserve the initiative power in the City's electors, subject to implementation by the Legislature. Cal. Const. art. II, § 11. Specifically the California Constitution provides: "(a) Initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide. Except as provided in subdivisions (b) and (c), this section does not affect a city having a charter."[7] *Id.*

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

But the City is a charter city. Under California law, a charter city's charter may, "in respect to municipal affairs supersede all laws inconsistent therewith, and in regard to municipal affairs such cities may make and enforce all ordinances and regulations subject only to restrictions and limitations imposed in their several charters." *Campen v. Greiner*, 93 Cal.Rptr. 525, 527 (Cal.Ct.App. 1971).[8] "Within its scope, such a charter is to a city what the state Constitution is to the state." *Id.* Further, it "is competent in such charters to provide for conduct of city elections." *Id.*

The City provides for the initiative in Charter § 903. In its own first sentence, Charter § 903 explicitly recognizes that the inherent power of the people is the genesis of the initiative. Again: "There are hereby *reserved* to the electors of the City the powers of the initiative. . . ." Charter § 903, italics added. A city charter provision for initiative or referendum is of the same reserved-power character as the state constitutional provision, and may reserve even more legislative power than that reserved by the constitution. *Hunt v. Mayor & Council of Riverside*, 191 P.2d 426, 428 (Cal. 1948). Thus,

[8] *Campen* was partially disapproved on a ground that emphasizes the force of the initiative power under city charters. *Rossi v. Brown*, 889 P.2d 557, 574 (Cal. 1995).

unless some good reason exists to conclude otherwise, a charter's language should mean what the same language means in the State Constitution. *See id.* When a charter incorporates Elections Code "procedures relative to initiative and referendum [that] is to facilitate the exercise of the reserved rights, not to define or circumscribe them." *Campen*, 93 Cal.Rptr. at 527. The statutory incorporation important to the elector requirement is Cal. Elec. Code § 321, which, together with the first sentence of § 903, defines an elector as a United States citizen 18 years of age or older and residing in a City voting precinct at least 15 days before an election. Other incorporated provisions of the Elections Code are congruent with, but not necessary to, the elector requirement. For example, only an elector can petition a state court to amend the title assigned to a petition by the city attorney. Cal. Elec. Code § 9204 (West 2012)12). And only a registered voter's signature is valid to qualify a petition for the ballot. Cal. Elec. Code §§ 9207, 9209 (West 2012)12).

Because the Charter's native language settles the matter, the blue brief's discussion of Cal. Elec. Code § 342 is immaterial. *See* Blue Brief at 8-9. If the statute were important, the blue brief discussion would not be persuasive. The bill that amended section

342 came from the California Secretary of State,[9] who is responsible for state election administration. *See*, *e.g.*, Cal. Gov't Code § 12165 (West 2012)12). Nothing in the history of the bill discusses the change from "person or persons" to "elector or electors" in describing Proponents of State ballot measures.[10] At most one could conclude the Secretary of State wanted to prevent any controversy over the definition of Proponent in State elections while leaving municipal law undisturbed. Charter section 903 makes the elector requirement the City's municipal law, and no interpretation of section 342 can be found to the contrary as to any California city.

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[9] The origin is confirmed from the initial legislative committee report on the bill. Assem. Com. on Elec. & Redist., Bill Analysis, Assem. Bill 753 (2009-2010 Reg. Sess.), Apr. 21, 2009, at 2, 7. California legislative committee reports are available on the website of the Legislative Counsel, *http://www.leginfo.ca.gov/bilinfo.html*.

[10] Assem. Com. on Elec. & Redist., Bill Analysis, Assem. Bill 753 (2009-2010 Reg. Sess.), Apr. 21, 2009; Assem. Com. on Approp., Bill Analysis, Assem. Bill 753 (2009-2010 Reg. Sess.), Apr. 29, 2009; Sen. Com. on Elec., etc., Bill Analysis, Assem. Bill 753 (2009-2010 Reg. Sess.), June 16, 2009; Sen. Rules Com., Bill Analysis, Assem. Bill 753 (2009-2010 Reg. Sess.), June 22, 2009; Sen. Rules Com., Third Reading Analysis, Assem. Bill 753 (2009-2010 Reg. Sess.), Aug. 17, 2009; Sen. Rules Com., Third Reading Analysis, Assem. Bill 753 (2009-2010 Reg. Sess.), Sept. 3, 2009; Assem. Concurrence, Bill Analysis, Assem. Bill 753 (2009-2010 Reg. Sess.), Sept. 8, 2009.

Plaintiffs' discussion of other cities' activities is also immaterial. First, none of those cities was interpreting the Chula Vista City Charter, Blue Brief at 10-12, and some facially have municipal law that grants others than electors capacity to be Proponents, *id.* at 10 n.7. Second, municipalities are not authoritative interpreters of the State Constitution or California law. *Lockyer v. City & Cnty. of S.F.*, 95 P.3d 459, 463-64 (Cal. 2004). Third, the passing mentions in court decisions of an organization as a proponent are meaningless unless—and there is no such case—the court was adjudicating whether others than electors may be Proponents; the California Supreme Court aggressively applies a rule that cases are not authority for issues not expressly adjudicated *and* presented by the facts, regardless of suggestive language. *See*, *e.g.*, *People v. Johnson*, 267 P.3d 1125, 1133 (Cal. 2012); *Elisa B. v. Superior Court*, 117 P.3d 660, 666 (Cal. 2004) ("Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered. [Citation.]," quoting *Ginns v. Savage*, 393 P.2d 689, 691 n.2 (Cal. 1964) (citation omitted in original).

B. Abstention Would Be the Correct Response to Any Doubt

Pullman abstention is appropriate when a federal court is asked to determine the meaning of a state statute, or its validity as a matter of state law, as a predicate to determining the validity of the state statute under federal law. *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941). *Pullman* abstention applies to federal court cases challenging state election practices. *Growe v. Emison*, 507 U.S. 25, 34 (1993) (drawing congressional and state legislative district boundaries).

The Supreme Court developed abstention doctrine to avoid "needless friction" between federal pronouncements and state policies. *Pullman*, 312 U.S. at 500. "[W]hen the state court's interpretation of the statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily." *City of Meridian v. S. Bell Tel. & Tel. Co.*, 358 U.S. 639, 640-641 (1959). Abstention is appropriate even when a federal court feels confident of its interpretation of state law and even when the delay of obtaining a state court decision may cause irreparable harm to a party making a federal

constitutional claim. *Reetz v. Bozanich*, 397 U.S. 82, 86-87 (1970) (reversing three-judge district court's order holding state fishing regulations violated the Fourteenth Amendment, despite immediate consequences for plaintiffs' livelihood).

As declared in the opening line of a unanimous opinion refusing to decide the validity of an Arizona English-only law: "Federal courts lack competence to rule definitively on the meaning of state legislation. . . ." *Arizonans for Official English*, 520 U.S. at 48 (citing *Reetz*, 397 U.S. at 86-87). The high court then criticized both the district court and the Ninth Circuit for refusing to certify a critical question to the Arizona Supreme Court in lieu of abstention. (*Id.* at 75-80.)

The Ninth Circuit "utilizes three criteria for the application of the *Pullman* doctrine. First, the case must touch on a sensitive area of social policy upon which federal courts ought not to enter unless no alternative to its adjudication is open. Second, it must be plain that the constitutional adjudication can be avoided if a definite ruling on the state issue would terminate the controversy. Finally, the possible determinative issue of state law must be uncertain." *Columbia Basin*

Apt. Ass'n v. City of Pasco, 268 F.3d 791, 802 (9th Cir. 2001).[11] In *Columbia Basin*, the Ninth Circuit sua sponte applied *Pullman* abstention to a federal challenge to a municipality's slum-abatement apartment inspection law. *Id*. at 802-06. Both landlords and tenants had challenged the law under the Fourth Amendment and the Fourteenth Amendment. *Id.*

Here, the case touches on a sensitive area of social policy—the state's regulation, congruent with the Charter, of the mechanics of grass roots direct legislation "to protect the integrity and reliability of the initiative process. . . ." *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 191-92 (1999). A constitutional adjudication may be avoided because a definite ruling that others than electors can be Proponents of initiatives would terminate the controversy over the constitutionality of a limitation of access to electors. And although the City Defendants and the State never thought there was uncertainty, if the Court thinks it so much as *possible* that the California

[11] In the same volume of official reports, another panel described the test as follows: "(1) the federal plaintiff's complaint must require resolution of a sensitive question of federal constitutional law; (2) that question must be susceptible to being mooted or narrowed by a definitive ruling on state law issues; and (3) the possibly determinative state law must be unclear." *United States v. Morros*, 268 F.3d 695, 703-04 (2001).

Constitution or Cal. Elec. Code §§ 342 and 9202 compel the City to tolerate other than an elector to be a Proponent of an initiative, it should direct abstention.[12]

In short, if the Court has any lingering doubt about California law, controlling United States Supreme Court and Ninth Circuit authority direct to abstain, to retain federal jurisdiction, and to require the parties to obtain a definitive interpretation from the courts of California before (if necessary) renewing the federal constitutional challenge. *Columbia Basin*, 268 F.3d at 802.

C. Reference to the California Supreme Court Would Be an Alternative

If the Court is uncertain of California law and uuninterested in abstaining, certifying the question to the California Supreme Court under California Rules of Court, rule 8.548 is essentially mandatory. *Arizonans for Official English*, 520 U.S. at 75-80.

[12] If California law or the Charter attempted to regulate advocacy, *Pullman* abstention probably would *not* be appropriate because federal courts are the preferred forum to decide whether state enactments chill First Amendment expression rights. See *Porter v. Jones*, 313 F.3d 483, 492-93 (9th Cir. 2003). But this is a ballot access case, not a freedom of expression case. *See Buckley v. Am. Constitutional Law Found.*, 525 U.S. at 191-92.

II.

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

In this part II, City Defendants will show the legal acts of a Proponent are acts of legislating, exercising the inherent, reserved power of citizens to legislate for the political entity in which they reside. Therefore, nothing in the First Amendment, as applicable to the states since *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940), applies to a state or local law that permits only citizens of a political entity to engage in the legal acts necessary to create a ballot proposition.

A. Creating a Ballot Proposition Is an Official Act of Legislating, Not Petitioning or Speech Activity

1. The Charter and State Constitution Regulate Legislative Process

To review, the acts that must be carried out by an elector to create an initiative petition are filing the Notice of Intent with the City Clerk, Cal. Elec. Code §§ 9202, 9203; publishing the Notice of Intent before collecting any signatures, Cal. Elec. Code §§ 9205, 9207; providing proof of publication to the City Clerk within ten days after publication, Cal. Elec. Code § 9206; and filing the petition signed by the necessary number of voters within 180 days of the receipt of the

ballot title and summary, Cal. Elec. Code § 9208. The publication required by Cal. Elec. Code § 9205 has no connection to advocacy. Rather, it consists of printing a legal notice in an adjudicated newspaper of general circulation, as public agencies publish notices of meetings and other proposed actions. § 9205(a);[13] see Cal. Gov't Code §§ 6000-6008 (West 2012)12) (newspapers of general

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[13] Cal. Elec. Code § 9205 provides in full:

A notice of intention and the title and summary of the proposed measure shall be published or posted or both as follows:

(a) If there is a newspaper of general circulation, as described in Chapter 1 (commencing with Section 6000) of Division 7 of Title 1 of the Government Code, adjudicated as such, the notice, title, and summary shall be published therein at least once.

(b) If the petition is to be circulated in a city in which there is no adjudicated newspaper of general circulation, the notice, title, and summary shall be published at least once, in a newspaper circulated within the city and adjudicated as being of general circulation within the county in which the city is located and the notice, title, and summary shall be posted in three (3) public places within the city, which public places shall be those utilized for the purpose of posting ordinances as required in Section 36933 of the Government Code.

(c) If the petition is to be circulated in a city in which there is no adjudicated newspaper of general circulation, and there is no newspaper of general circulation adjudicated as such within the county, circulated within the city, then the notice, title, and summary shall be posted in the manner described in subdivision (b).

This section does not require the publication or posting of the text of the proposed measure.

circulation); §§ 6040-6044 (West 2012)12) (regulation of type fonts and other technical matters).

At bottom, then, the legal acts necessary to create an initiative ballot proposition are of the same character as the acts necessary to introduce a bill in Congress or the California Legislature. *See Strauss*, 207 P.3d at 84-85; *Associated Home Builders*, 557 P.2d at 477. "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." *S.F. Forty-Niners*, 89 Cal.Rptr.2d at 396 (Proponent has no First Amendment right to circulate objectively false statements in an initiative petition). Nothing in Charter § 903 or the incorporated statutes prohibits corporations from recruiting, advocating, financing, or otherwise supporting any of those legal acts; or affects any corporate advocacy of the petition; or affects corporate participation in signature gathering; or otherwise limits a corporation's associational or advocacy activities.

2. Regulating Legislative Process Does Not Implicate Plaintiffs' First Amendment Rights

At its core, the blue brief is about "persuading electors to sign petitions in sufficient numbers . . . and then to enact it. . . ." Blue Brief at 7. A *proponent* may do those things, and a Proponent may choose to be a *proponent*, but persuasion is not the function of a Proponent in election law. The laws challenged in the blue brief do not have the effect the blue brief assumes they do.

a. Improper Relegation of Doe v. Reed

What is truly remarkable about plaintiffs' argument is the relegation of *Doe v. Reed*, 130 S.Ct. 2811 to a sideline and a footnote. Blue Brief at 37, 46 n.18. The constitution of the State of Washington reserves to the people the power of initiative and referendum, similarly to the California Constitution. *Doe*, 130 S.Ct. at 2815-16. A Washington referendum petition must be signed by registered Washington voters in number equal to or greater than four percent of the votes cast in the previous gubernatorial election. *Id.* *Doe* considered whether Washington's statute requiring disclosure of public records was invalid to the extent it required disclosure of

referendum petitions, thus revealing who signed the petitions. *Id.* at 2815, 2817. The court concluded there was no violation. *Id.* at 2821.

The Supreme Court held that a *voter* who signs a petition is engaged in an expressive act that also has legislative significance. *Doe v. Reed*, 130 S.Ct. at 2817-2818. Therefore, the court reviewed the validity of the public records disclosure act under the First Amendment. *Ibid.* In contrast, the legislative acts necessary to commence an initiative petition, although in some senses expressive, should be treated as entirely governmental in character and therefore not subject to First Amendment scrutiny. The court observed in *Doe* that "[t]o the extent a regulation concerns the legal effect of a particular activity in that process, the government will be afforded substantial latitude to enforce that regulation. *Id.* at 2818. In contrast to the compelled disclosure in *Doe*, the elector requirement concerns *only* the legal effect of a particular activity—that is, who may engage in the acts of commencement with valid legal effect. Everything about *Doe* should be read in the context of the long history cited in it of applying the First Amendment to state regulations that suppress advocacy or compel disclosure of advocates. *See id.* at 2817-18.

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

No federal constitutional right compels states to provide for statewide or local direct citizen legislation. *Angle*, 673 F.3d at 1133; *Stone v. City of Prescott*, 173 F.3d 1172, 1174-75 (9th Cir. 1999); *see Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210-11 (10th Cir. 2002). Plaintiffs do not appear to argue otherwise. Of course, states that have initiative processes must not impair First Amendment political speech about the proposals that citizens generate. *Doe v. Reed*, 130 S.Ct. at 2817; *Angle*, 673 F.3d at 1133 n.5.

Challenges to the structures of initiative schemes themselves are normally rejected without the need to apply a First Amendment balancing test. *Molinari*, 564 F.3d 587, recently and effectively illustrates. In *Molinari*, the plaintiffs claimed that New York unreasonably burdened the First Amendment rights clustered around the state's initiative process by allowing legislative bodies to amend popularly passed measures. *Id.* at 590. The Second Circuit held that the chilling effect argument did not even raise a First Amendment issue. *Id.* at 602. The court stated: "As our Sister Circuits (and the

Nebraska Supreme Court)[14] have recognized, plaintiffs' First Amendment rights are not implicated by referendum schemes *per se* (and certainly not by the City Council's amendment of a law previously enacted by a referendum), but by the regulation of advocacy within the referenda process, *i.e.*, petition circulating, discourse and all other protected forms of advocacy. Even if plaintiffs are correct that the enactment of Local Law 51 will make it more difficult for plaintiffs to organize voter initiatives and referenda in the future, 'the difficulty of the process alone is insufficient to implicate the First Amendment, as long as the communication of ideas associated with the [referendum process] is not affected.'" *Id.* It specifically held that First Amendment balancing under *Anderson v. Celebrezze*, 460 U.S. 780, was unnecessary. It distinguished that entire line of authority because "[t]hese cases all involve direct

[14] The Second Circuit quoted *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997), and its analysis referred to: *Stone*, 173 F.3d at 1175; *Save Palisade FruitLands*, 279 F.3d at 1212; *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099 (10th Cir. 2006) (en banc); *Marijuana Policy Project v. United States*, 304 F.3d 82, 84-85 (D.C. Cir. 2002); *Wellwood v. Johnson*, 172 F.3d 1007, 1008-09 (8th Cir. 1999); *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 297 (6th Cir. 1993); and *Pony Lake School District 30 v. State Committee for Reorganization of School Districts*, 710 N.W.2d 609, 624-25 (Neb. 2006).

restrictions on speech or access to the ballot." (*Id.* at 604-05.) And "access to the ballot" can only mean access by candidates, not initiative Proponents, because even a requirement that 15 percent of the registered voters of a political subdivision sign petitions to qualify a ballot initiative does not raise a First Amendment issue. *Id.* at 602, citing *Wellwood v. Johnson*, 172 F.3d at 1008-09. Such a requirement "'in no way burden[s] the ability of supporters of local-option elections to make their views heard.'" *Id.*

This case is like the vast majority of decisions of the Courts of Appeals finding no First Amendment issue in structural regulation of the initiative as a legislative process. At most, regulation of the initiative process may trigger review of whether the challenged regulation in light of the entire statutory scheme "significantly inhibit[s] the ability of initiative proponents to place initiatives on the ballot." *Angle*, 673 F.3d at 1133. Here, plaintiffs produced no evidence that the elector requirement has *ever* inhibited a human being or an organization from placing an initiative on a ballot. If such inhibition occurred, these politically sophisticated plaintiffs, CD ER 02-38, surely could have produced *evidence* of it. Yet they cannot even mount an *argument* of inhibition. Blue Brief at 14-32.

Accordingly, the First Amendment analysis that led to upholding Nevada's signature requirements in *Angle* does not even apply here. *See Angle*, 673 F.3d at 1133-1134.

Everything in the blue brief's paragraphs that begin "First" through "Ninth" *assumes* regulation of who may be a Proponent also regulates who may advocate. Blue Brief at 14-21. Because that assumption is false, the arguments are immaterial. And the cases cited in those paragraphs do not support any attack on the Charter or California Constitution. *Meyer v. Grant*, 486 U.S. 414 (1988) holds that the First Amendment forbids states from prohibiting compensation of initiative petition signature gatherers. *Id.* at 415-16. Plaintiffs' extracted quotations from *Meyer* and Tenth Circuit decisions preceding the Supreme Court's do nothing to convert the legislative activity of a Proponent into advocacy or association. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), strikes down content regulation of candidates' statements in judicial elections. *Id.* at 788. Neither the case as a whole nor the excerpt quoted at page 16 of the blue brief contains a bridge between regulation of the content of candidates' speech and structural regulation of who may commence the legislative process of bringing a

local initiative measure to vote. The *cf.* citation to *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 477 n.9 (2007) is to an opinion of two justices. *Id.* at 455. And if it were a majority opinion, it would be immaterial for the same reason *Republican Party* is immaterial. *Buckley v. Valeo*, 424 U.S. 1 (1976) reviewed the campaign contribution limits of the Federal Election Campaign Act of 1971 as amended in 1974. *Id.* at 6. It has nothing to do with initiatives, and nothing in it suggests the elector requirement impairs the plaintiffs' ability to associate with one another or with others. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) held the Minnesota Human Rights Act, a form of public accommodations law, did not infringe on the Jaycees' associational rights by prohibiting discrimination against women. *Id.* at 628. The extracted quotation, Blue Brief at 19, assumes an infringement of the right to associate and considers interests that may justify the infringement. *Id.* at 623. But plaintiffs have not crossed the threshold of showing an infringement.

Finally, *Citizens United v. Federal Election Commission*, 558 U.S. 310, 130 S.Ct. 876 (2010) holds that in the context of contributions to independent political action committees,

"Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether." 130 S.Ct. at 886. The word "initiative" appears only in a dissent. *Id.* at 981 (Thomas, J., dissenting). It teaches nothing about whether the elector requirement burdens First Amendment expression or association.

B. The Cases Cited in Plaintiffs' Constitutionality Argument Do Not Apply

The heading of subpart C of the blue brief's argument claims the elector requirement is unconstitutional. Blue Brief at 21. The appended argument assumes plaintiffs have shown the elector requirement imposes a substantial burden on protected First Amendment expression or association. The first four argued reasons at pages 21 to 32 are redundant with subpart B. The fifth, at pages 32 and 33, claims the requirement fails strict scrutiny, a point not to be reached because plaintiffs have shown no substantial burden on First Amendment activities. *Angle*, 673 F.3d at 1133-34.

In the usual jargon, this is a case of first impression. But the novelty of plaintiffs' position goes beyond the usual jargon. There is no record that anybody has ever attacked a state law similar to the elector requirement before. None of the cases cited in plaintiffs'

motion addresses the issue, even in dictum or by implication. City Defendants brief plaintiffs' cases in the order in which plaintiffs cite them.

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

Meyer, 486 U.S. 414, holds that the First Amendment forbids states from prohibiting compensation of initiative petition signature gatherers. *Id.* at 415-16. It is the source of the quotation: "Thus, *the circulation of a petition* involves the type of interactive communication concerning political change that is appropriately described as "'core political speech.'" *Id.* at 421-22 (emphasis

added). Like *Prete*, it says nothing about whether the legal acts essential to creating a ballot proposition are political speech at all. The blue brief's discussion at page 22 abuses *Meyer* in the same way it abuses *Prete*.

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) is a citation within a citation. Blue Brief at 23. In any event, it concerns whether a state can bar a corporation from making campaign contributions to support or oppose a ballot measure. *Bellotti*, 435 U.S. at 767. The cited footnote catalogs corporations' constitutional rights, not one of which is to be an elector, legislator, or Proponent of an initiative. *Id.* at 778 n.14.

Citizens United, 130 S.Ct. 876, discussed at page 24 of the blue brief, addresses corporate contributions to independent political action committees. *Id.* at 886. Plaintiffs' broad reading of *Citizens United* lacks justification in the text or facts of the case and cannot be sustained against the Ninth Circuit's understanding of the case as limited to contributions to independent committees. *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1125-26 (9th Cir. 2011). *American Tradition Partnership, Inc. v. Bullock*, 132 S.Ct. 2490 (2012) is a

grant-vacate-remand case that merely enforces *Citizens United* without adding new content.

Fed. Election Comm'n v. Mass. Citizens for Life, 479 U.S. 238 (1986) involves federal election campaign contribution limits, not ballot initiatives. *Id.* at 241. Plaintiffs cite a portion of the plurality opinion that has nothing to do with initiatives. Blue Brief at 27, citing *Massachusetts Citizens* 479 U.S. at 255.

Buckley v. Valeo, 424 U.S. 1, has nothing to do with initiatives. *Id.* at 6. It is cited at page 29 of the blue brief for the indisputable propositions that the First Amendment has a clause protecting freedom of association, *id.* at 15, and that membership disclosure laws can unduly burden the right of association, *id.* at 64. *Buckley* then upholds mandatory campaign contribution disclosure. *Id.* at 66-68.

NAACP v. Alabama, 357 U.S. 449 (1958) concerns privacy of membership lists of nonprofit advocacy organizations. *Id.* at 462. It has nothing to do with initiatives, so its citation at page 29 of the blue brief adds nothing.

Simmons v. United States, 390 U.S. 377 (1968) arises from an armed robbery of a federally insured financial institution. *Id.* at 379. The cited part at pages 29-30 of the blue brief concerns whether a

defendant can be compelled to give testimony that could be used against him at trial in order to assert a Fourth Amendment claim of illegal search. *Id.* at 391, 393.

Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006), cited at page 30 of the blue brief, holds that Congress did not violate the First Amendment by requiring law schools that object to military discrimination against homosexuals to allow on-campus military recruiting or forfeit all federal financial assistance. *Id.* at 51, 70.

Bourgeois v. Peters, 387 F.3d 1303 (11th Cir. 2004) concerns magnetometer searches conducted as a condition of allowing protestors to attend a demonstration on public property. The cited section at page 30 of the blue brief criticizes the municipality for compelling protestors to undergo an illegal search in order to participate in protected First Amendment activity. *Id.* at 1324.

Lefkowitz v. Cunningham, 431 U.S. 801 (1977), cited at page 30 of the blue brief, held unconstitutional a New York law that immediately discharged from office any officer of a political party who refused to waive the Fifth Amendment right against self-

incrimination in an investigation of his conduct in office. *Id.* at 802-803, 807, 808.

Dolan v. City of Tigard, 512 U.S. 374 (1994) is a Fifth Amendment takings case. *Id.* at 377. It mentions the doctrine of unconstitutional conditions, but it does not even stand for the balancing test proposition cited in plaintiffs' memorandum. *Id.* at 385. The reference to *Dolan* at page 31 of the blue brief is unhelpful.

United States v. Midgett, 342 F.3d 321 (4th Cir. 2003), cited at page 32 of the blue brief, is a criminal case in which the trial court erroneously compelled the defendant to choose between the right to represent himself and the right to testify on his own behalf. *Id.* at 322. *United States v. Scott*, 909 F.2d 488 (11th Cir. 1990) is identical. *Id.* at 488-489.

In sum, plaintiffs *assumed* that a Proponent is a proponent who engages in First Amendment speech or association, then cited cases discussing why limiting the right to engage in those acts violates the First Amendment. Plaintiffs neither cite authority nor provide reasoning why the legal acts necessary to create an initiative ballot proposition are speech or association. The blue brief's cited authority does nothing to clothe plaintiffs' naked assumption with any fabric of

reasoning or precedent. Plaintiffs have simply not made a recognizable First Amendment argument.

C. Plaintiffs' Argument Lacks Legal Reasoning

The position of the individual plaintiffs is as far afield as that of the plaintiffs in *Molinari*, 564 F.3d 587. Charter § 903 expressly makes them eligible to sponsor initiatives, so the ban argument at pages 22-23 of the blue brief does not apply. Neither Charter § 903 nor any other law purports to regulate anything plaintiffs speak or publish about an initiative measure, so the disfavored speakers' speech argument at pages 23-26 of the blue brief does not apply. The speech-by-proxy argument fails for at least two reasons. First, none of the cited authorities suggests that a person who might (or might not) speak for a corporation has standing to assert a legally competent corporation's claim of First Amendment rights. *See* Blue Brief at 27-28, citing *Citizens United*, 130 S.Ct. at 897-98, 913; *Meyer*, 486 U.S. at 424; *Fed. Election Comm'n v. Mass. Citizens for Life*, 479 U.S. at 255 (plurality opinion). In fact, the individual plaintiffs do not appear to argue they have a First Amendment claim derivative of the corporate plaintiffs'. Blue Brief at 27, 32-33. Second, the argument assumes that the legal act of signing a petition and delivering it to the

City Clerk to create an initiative is speech, which City Defendants refuted *ante* at 30-35. Finally, the unconstitutional condition argument at pages 29-32 of the blue brief relies on claims that the corporate plaintiffs are put to a choice between expression and privacy of association, so it does not apply

The corporate plaintiffs also do not raise a First Amendment claim. The disfavored speaker, proxy, and unconstitutional condition arguments are surplusage. Charter section 903 bans corporations along with all natural persons who are not electors of the City from engaging in the conduct of commencing an initiative petition. If the legal acts that create an initiative measure to be circulated among voters were speech, balancing under *Anderson v. Celebrezze*, 460 U.S. 780 would be required. But, as City Defendants established *ante* at 30-35, those legal acts are not speech. They are acts of legislating reserved to the electors of the City.[15]

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

III.

IF THE FIRST AMENDMENT APPLIED, THE ELECTOR REQUIREMENT PASSES MUSTER

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

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

Storer v. Brown, 415 U.S. 724 (1974) is a landmark in constitutional jurisprudence of candidate ballot access, a jurisprudence that is helpful here. *Storer* considered a California law that required, among other things, a voter registered as a party member to disaffiliate from the party for a full year before being eligible to run for office as an independent. *Id.* at 726-27. The court applied an Equal Protection Clause analysis. *Id.* at 730. It recognized "as a

practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Id.* The court expected it would be "very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases; and the rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause." *Id.* "Decision in this context, as in others, is very much a 'matter of degree,' [citation], very much a matter of 'consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.'" *Id.* The court upheld the restriction. *Id.* at 736-37.

In *Anderson v. Celebrezze*, 460 U.S. 780, the Supreme Court considered the constitutionality of an Ohio statute that required an independent candidate for President of the United States to file campaign papers 229 days before the general election, a date also before the Ohio partisan primary election. *Id.* at 783. In a 5-4 decision, *id.* at 806, the court adopted a First Amendment

associational model to analyze the burden on candidates and voters of such an early filing deadline, *id.* at 787 n.7. Nevertheless, the majority cited *Storer*, quoted the language recognizing the right of states to regulate elections and ballot access, *id.* at 788, and appended a footnote stating: "We have upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself" *id.* at 788 n.9. And it adopted the *Storer* analytical process: "a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." *Id.* at 789.

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

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

Amendment burden of revealing the identity of an otherwise anonymous advocate. *Id.* at 2818.

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

If signing and delivering a proposed petition to the City Clerk were advocacy under the First Amendment, plaintiffs still would not prevail. Charter § 903 does not impose an outright ban on corporate political speech, *see* Blue Brief at 22-23, but rather bans only the acts of creating and filing the proposed legislation. Given the narrow scope of prohibited conduct, the fact that the prohibition is part of regulating the basic election process, and the broad scope of permissible conduct, the Court would be required to apply the balancing test under *Anderson v. Celebrezze*, 460 U.S. at 789. Plaintiffs' ban and disfavored speaker arguments, *see* Blue Brief at 22-27, ignore the entire line of ballot access cases and therefore provide no basis for reversal. Applying the balancing test would sustain the elector requirement.

The first step of analysis is to determine "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." *Anderson v. Celebrezze*, 460 U.S. at 789. The sole asserted injury is

deprivation of the capacity to be a proponent of an initiative. Blue Brief at 21. The speech by proxy argument at pages 27-28 of the blue brief identifies the real content of the injury: a corporation or a natural person who is not a City elector must persuade a City elector to commence the initiative process. The unconstitutional condition argument at pages 29-32 of the blue brief is illogical. It relies on the unstated premise that a corporation could persuade *only* one of its members to commence the initiative process and attempts then to reason that the elector requirement therefore compels a corporation to forfeit the right of privacy of its membership list. Plaintiffs' papers below contained no statement of purportedly undisputed fact and contained no evidence that, assuming a nonprofit corporation with members is involved, only members of such a corporation could be persuaded to sponsor an initiative measure. And if plaintiffs had articulated the fact essential to their unconstitutional condition theory, they probably would have recognized it as nonsense and would not have made the argument. The asserted injury, then, is only this: any natural person who is not an elector of the City and any organization must persuade an elector to commence the initiative process. Plaintiffs' papers say nothing about what would be just, beneficial, or

important in allowing corporations and other strangers to sponsor initiatives, or what is unjust or harmful in the elector requirement.

The second step is to "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson v. Celebrezze*, 460 U.S. at 789. An alternative shorthand is the concept of "an important regulatory interest" discussed in *Angle*, 673 F.3d at 1135 (Nevada's interest in assuring some minimal statewide support for an initiative justified requiring sponsors to gather signatures from all congressional districts). "The First Amendment permits states 'considerable leeway' in regulating the electoral process, provided their choices do not produce 'undue hindrances to political conversations and the exchange of ideas.'" *Id.*, citing *Buckley v. Am. Constitutional Law Found.*, 525 U.S. at 191-92.

California's primary interest, and the primary interest of its municipalities like the City, is that only the people themselves shall exercise the right of self-government reserved in the initiative. The

California Supreme Court has explained that interest and its history. "'The amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's.' The progressive movement, both in California and in other states, grew out of a widespread belief that 'moneyed special interest groups controlled government, and that the people had no ability to break this control.'" *Strauss*, 207 P.3d at 84 (citation omitted). The Southern Pacific Railroad was a particular target because people believed it corruptly controlled local and state public officials, including judges. *Id.* The 1911 ballot pamphlet concluded with this argument: "'Are the people capable of self-government? If they are, this amendment should be adopted. If they are not, this amendment should be defeated.'" *Id.* at 84, n.18.

Nothing could be more essential to the grass roots democracy principles undergirding the initiative than that general corporations (e.g. Southern Pacific Railroad) and nonprofit corporations functioning as moneyed special interest groups (e.g. PACs) not be allowed to be Proponents of ballot propositions. Electors have a stake in the future of the City; general corporations have interests only in

their profits, and nonprofit corporations have interests only in their missions, which may be antithetical to the interests of the City's electors.

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

There are corollary pragmatic interests. Municipalities in particular should not be forced to incur the expense and controversy of the initiative qualification process and an election unless a bona fide member of the body politic cares enough about a proposition to serve as a Proponent. There is enough cynicism about how the

statewide initiative process has evolved; letting special interest groups be the legal Proponents of initiatives can only discredit the process. For example, if a strip club's business interests were targeted by a circulating initiative, it could become Proponent of petitions for a dozen competing initiatives on the same subject, hoping to destroy the citizen initiative process by confusion. While the strip club could importune its employees to do the same, the pragmatic deterrent resides in the respect most human citizens have for their democracy, a respect that does not necessarily carry with full value into an organization that may or may not be controlled by citizens.

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

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

s/ Charles A. Bird

McKENNA LONG & ALDRIDGE, LLP
Attorneys for Appellees Donna Norris, et al.

CERTIFICATE OF COMPLIANCE

I, Charles A. Bird, appellate counsel to Donna Norris, et al., certify that the foregoing brief is prepared in proportionally spaced Times New Roman 14 point type and, based on the word count of the word processing system used to prepare the brief, the brief is 11,670 words long.

s/ Charles A. Bird

STATEMENT OF RELATED CASES

Appellees Donna Norris, et al., are unaware of any related cases as defined by applicable rules.

9th Circuit Case Number(s) [ ]

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