Case No. S207173

Exempt from Fees
(Gov. Code, § 6103)

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

TUOLUMNE JOBS & SMALL BUSINESS ALLIANCE,
Petitioner,

v.

SUPERIOR COURT OF TUOLUMNE COUNTY,
Respondent,

WAL-MART STORES, INC., et al.,
Real Parties in Interest.

After a Decision by the Court of Appeal
Fifth Appellate District
Case No. F063849

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF; PROPOSED *AMICUS CURIAE* BRIEF IN SUPPORT OF REAL PARTY IN INTEREST CITY OF SONORA

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I. INTRODUCTION

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF THE CALIFORNIA SUPREME COURT:

Pursuant to Rule 8.520, subdivision (f), of the California Rules of Court, the League of California Cities hereby respectfully applies for permission to file the attached *amicus curiae* brief in support of Real Party in Interest City of Sonora. This application is timely made within 30 days after the filing of the final reply brief on the merits.

II. NATURE OF INTEREST OF *AMICUS CURIAE*

The League of California Cities (the "League") is an association of 469 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee (the "Committee"), which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance.

The Committee has identified this case as being of such significance because it addresses the statutory duties of a city council when presented with a citizens' initiative petition proposing enactment of a city ordinance. Under Elections Code section 9214, the city council, in such a circumstance, has a duty either to (1) adopt the proposed initiative ordinance, "without alteration," within 10 days after it is presented; or (2) immediately call a special city election on the proposed initiative. In a significant departure from precedent, the Fifth District Court of Appeal held that if a city council seeks to fulfill its statutory duty by adopting the initiative ordinance without change, it may do so only after fully complying

with the requirements of the California Environmental Quality Act ("CEQA") (Pub. Resources Code §§ 21000 *et seq.*). The Fifth District's Opinion ("Opinion") has the potential to significantly alter local voters' exercise of their constitutionally reserved initiative power across the State by effectively divesting city councils of their express statutory authority to adopt a proposed initiative ordinance without amendment.

III. ISSUES ON WHICH THE LEAGUE OF CALIFORNIA CITIES' PROPOSED *AMICUS CURIAE* BRIEF WILL ASSIST THE COURT IN DECIDING THE MATTER

The League believes its perspective will assist the Court in deciding this matter. Counsel for the League has reviewed the briefs filed in this matter to date and the League does not seek to duplicate arguments set forth in those briefs.

Rather, the League seeks to assist the Court by demonstrating that application of CEQA to a city council's exercise of its mandatory and ministerial duty under Elections Code section 9214 – which has remained materially unchanged since its original enactment 100 years ago, and which is modeled on language in the 1911 constitutional amendment reserving the initiative power to the voters – is irreconcilable with the statutory scheme that the Legislature enacted to implement city voters' constitutional power of initiative. The League believes that it will assist the Court by demonstrating how the Fifth District's Opinion is inconsistent with the language and legislative intent of Elections Code section 9214 and how it effectively abridges "one of the most precious rights of our democratic process," namely the people's constitutionally reserved power to propose legislation.

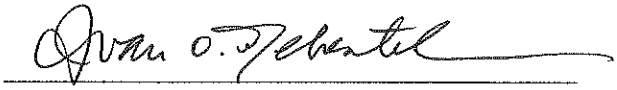
IV. CONCLUSION

Accordingly, the League respectfully requests that the Court grant this application and accept the accompanying proposed *amicus curiae* brief for filing in this matter.

Dated: May 31, 2013

Respectfully Submitted,

RENNE SLOAN HOLTZMAN SAKAI LLP

By: 

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I. INTRODUCTION

The fundamental question presented in this case is whether a city must prepare an environmental impact report ("EIR") under the California Environmental Quality Act ("CEQA") (Pub. Resources Code sections 21000 *et seq.*) when its city council adopts – without alteration – an initiative ordinance proposed by its citizens pursuant to Article II, section 11 of the California Constitution and Elections Code sections 9200 *et seq.* In a dramatic departure from precedent, the Fifth District Court of Appeal answered this question in the affirmative, a decision that significantly compromises the constitutionally reserved right of initiative and, by its own terms, effectively nullifies a key, longstanding provision of the Elections Code providing for the direct adoption by legislative bodies, "without alteration," of voter-sponsored initiative measures.

As explained more fully below, for the past 100 years, California law has provided that when a local legislative body is presented with a certified, voter-sponsored initiative petition signed by at least 15 percent of the voters of the city,[1] the legislative body has a mandatory duty either to adopt the initiative ordinance "without alteration" within 10 days, or immediately order a special election at which the initiative ordinance, "without alteration," will be submitted to a vote of the people. For cities, this requirement is found in California Elections Code section 9214.

The Fifth District's Opinion ("Opinion") is, simply put, irreconcilable with the plain meaning of Elections Code section 9214. Because it can take months for a city to complete the complex and lengthy

[1] In cities with 1,000 or fewer registered voters, the requirement is that 25 percent of the voters, or 100 voters of the city, whichever is the lesser number, must have signed the initiative petition to set in motion the mandatory duties set forth in Elections Code section 9214.

CEQA process – and a city council has no more than 10 days to adopt an initiative ordinance without alteration under Elections Code section 9214 – the Opinion effectively nullifies that provision of section 9214, a result the Fifth District freely acknowledges. (*See* Opinion, p. 26 ["We acknowledge that our holding means the direct-adoption option of Elections Code 9214, subdivision [(a)], will usually not be available for an initiative that would have a significant environmental impact, and an election will usually be required."].)

Critically, section 9214 is an integral part of the Elections Code article that the Legislature enacted to comprehensively – and exclusively – regulate the initiative process for city voters. (Elec. Code § 9200 ["Ordinances may be enacted by and for any incorporated city *pursuant to this article*." (Emphasis added.)].) The Legislature has also determined the appropriate process for reviewing the possible effects of a proposed initiative ordinance – and in doing so, did not choose to extend CEQA to that constitutional process. Rather, Elections Code sections 9212 and 9214 authorize a city council, before deciding whether to adopt a proposed initiative ordinance without change or submit it to the voters, to request a staff report studying the effects of a proposed initiative ordinance in a broad array of areas, including planning and land use, and "any other matters" it chooses to have examined. It is these Elections Code provisions – and not CEQA – that apply here.

Moreover, by its own terms, CEQA does not apply in this situation. Prior to the Fifth District's Opinion, courts had concluded that when a legislative body carried out this statutory "either/or" duty, it was merely acting as an agent of the voters in the exercise of their (the voters') constitutionally reserved right of initiative, and performing a purely ministerial act exempt from the requirements of CEQA. The same held

true regardless of whether the legislative body was submitting the measure to the voters by way of a special election, or was itself adopting the ordinance without change.

The state of the law in this area, prior to the Opinion, was hardly surprising. Unlike the situation where a city council exercises its discretion to place on the ballot an ordinance embodying its own policy judgments – and therefore has complete freedom to determine the subject matter of the ordinance, to whom it will apply, under what circumstances, and all other aspects of the legislation – a city council that performs its longstanding statutory duty of adopting a voter-sponsored initiative ordinance must do so without the discretion to alter that ordinance in any manner. This action is a quintessential example of a ministerial act. As this Court has confirmed with respect to the application of CEQA, there is a "clear distinction between voter-sponsored and city-council-generated initiatives." (*Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 189.)

The effect of the Fifth District's new interpretation is an impermissible diminution of the voters' fundamental right of initiative – not a strengthening of that right, as the Opinion contends – which, contrary to the Court of Appeal's holding, is indeed implicated whether the city council places a qualified voter-sponsored measure on the ballot or adopts the measure itself. Whatever the merits of the Fifth District's concerns about "[d]evelopers' strategy of obtaining project approvals without environmental review *and* without elections" (Opinion, p. 6), a decision to repeal or modify a statute rests with the Legislature, which has repeatedly declined to burden the electorate's reserved initiative power with additional procedural hurdles of the sort judicially erected by the Opinion.

The Court should reverse the decision of the Fifth District Court of Appeal and, consistent with the well-reasoned decision in *Native American*

Sacred Site and Environmental Protection Assn. v. City of San Juan Capistrano (2004) 120 Cal.App.4th 961 ("*Native American Sacred Site*"), hold that a city is not required to comply with CEQA before adopting directly, "without alteration," an ordinance enacting a voter-sponsored initiative pursuant to Elections Code section 9214, subdivision (a).

II. STATEMENT OF FACTS

In this case, Sonora voters submitted to their city council a qualified initiative petition proposing a city ordinance. Pursuant to Elections Code section 9214, subdivision (a), the Sonora City Council adopted the ordinance without alteration, rather than submit the initiative ordinance to the electorate. Petitioner challenged the initiative ordinance, claiming that the Sonora City Council was required to comply with CEQA before adopting the ordinance. In the interest of economy, *amicus curiae* League of California Cities adopts the more complete Factual History set forth in the Opinion of the Fifth District Court of Appeal.

III. ARGUMENT

The Fifth District's Opinion places a new and significant restriction on the fundamental right of California voters to propose legislation for adoption by their local governing body. The Opinion attempts to justify this incursion on the "precious right" of initiative first by drawing a sharp distinction between proposed initiative measures as to which there is an "actual election," and those that are adopted, without alteration, by a city council. The Opinion then concludes that only in the former instance is the constitutional right of initiative implicated. The Opinion misses the mark on this key, foundational point and, as a result, goes on to reach an erroneous conclusion dictated by that faulty premise.

As discussed below, both the right of the voters to propose legislation to be adopted directly by their legislative body, and the concomitant ability of the legislative body to adopt directly such an initiative ordinance without change, have been essential parts of the voters' reserved power of initiative for more than a century. The Opinion's stated contrary view that the direct-adoption option actually "subvert[s] the constitutional goals of the initiative process" (Opinion, p. 6) is simply not borne out by the case law and legislative history. It is the review process established in the Elections Code – rather than CEQA – that was intended to provide a city council with information about the effects of a proposed initiative ordinance, so that it could make an informed decision about whether to adopt the measure unchanged, or submit it, without alteration, to the voters. Moreover, even if the Legislature had intended to extend CEQA to the voters' reserved power of initiative, the direct-adoption alternative is a quintessential example of a mandatory and ministerial act exempt from CEQA.

A. THE COURT OF APPEAL ERRED IN CONCLUDING THAT CEQA TRUMPS THE SPECIFIC PROVISIONS OF THE ELECTIONS CODE GOVERNING THE PEOPLE'S CONSTITUTIONALLY RESERVED RIGHT OF INITIATIVE

1. Elections Code Section 9214 is an Integral and Longstanding Part of the Statutory Scheme Enacted by the Legislature to Promote and Implement the People's Reserved Power of Initiative

In 1911, California citizens adopted Proposition 7, enshrining the power of initiative in the State Constitution. The Supreme Court has recognized that this power is not one granted to the people, but rather is "a power reserved by them." (*Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591.)

Accordingly, it is "the duty of the courts to jealously guard this right of the people" – which has been described by the courts as articulating "one of the most precious rights of our democratic process" – and long-standing judicial policy has been "to apply a liberal construction to this power wherever it is challenged in order that the right [to local initiative or referendum] be not improperly annulled." (*Ibid.*)

In reserving the power of initiative, Californians have also recognized that legislation is required to promote and implement this power at the local level. Accordingly, article II, section 11, subdivision (a), of the California Constitution provides that "[i]nitiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide." (Cal. Const., art. II, § 11, subd. (a).)

Pursuant to this provision, the Legislature has enacted a comprehensive and detailed statutory scheme establishing the precise – and exclusive – procedures to implement and promote the electorate's initiative power. For cities, those procedures are codified in Chapter 3 of Division 9 of the Elections Code. (Elec. Code §§ 9200 *et seq.*) These Elections Code provisions govern all aspects of the initiative process, including the process for initiating an initiative ordinance, the format and circulation of the petition, and the qualifications for petition signers, among many others. (See *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 786 [general statutory requirements imposed on legislative bodies do not apply to the electorate in exercising its initiative power].)

Indeed, the initial section of that statutory scheme unambiguously provides that "[o]rdinances may be enacted by and for any incorporated city *pursuant to this article*." (Elec. Code § 9200 (emphasis added).) That legislative judgment leaves no room for a court to import additional

provisions of law to implement the constitutional process for proposing and adopting initiative ordinances.

An integral part of this legislative scheme prescribes the duties of a city council when presented with an initiative petition that contains the required number of valid signatures to qualify for a special election. Elections Code section 9214 provides in pertinent part:

> If the initiative petition is signed by not less than 15 percent of the voters of the city . . ., and contains a request that the ordinance be submitted immediately to a vote of the people at a special election, the legislative body shall do one of the following:
> (a) Adopt the ordinance, without alteration, at the regular meeting at which the certification of the petition is presented, or within 10 days after it is presented.
> (b) Immediately order a special election, . . ., at which the ordinance, without alteration, shall be submitted to a vote of the voters of the city.
> . . . .

(Elec. Code § 9214.)

In its Opinion, the Fifth District acknowledges that when a development project is approved by means of a ballot initiative placed on the ballot by voters and subsequently adopted by them in an election, the project is exempt from CEQA review. The Opinion concedes that this settled conclusion is compelled by precedent of this Court holding that "procedures that would restrain the voters' power to enact their will must give way." (Opinion, p. 9.)

But the Opinion then draws a sharp distinction between that scenario – i.e. when there is an "actual election" as a result of a voter-sponsored initiative presented to a city council pursuant to Elections Code section 9214, subdivision (b) – and the situation presented here, where a city council, pursuant to Elections Code section 9214, subdivision (a), itself

adopts the initiative as an ordinance, without alteration. In this latter scenario, the Opinion holds that the "constitutional prerogatives of the electorate" – i.e. the constitutional power of initiative – is inapplicable because there has been no election.

In other words, the Fifth District justifies its markedly different, less protective treatment of voter-sponsored initiative measures adopted by a governing body by concluding that an ordinance proposed by the voters pursuant to their reserved constitutional power that is not ultimately presented to the voters at an election does not implicate the reserved right of initiative because the public agency has "take[n] the matter out of the electorate's hands." (Opinion, p. 14.) It is on this critical foundational piece that the Fifth District has stumbled.

Critically, the constitutional right of initiative, for more than 100 years, has encompassed not only those voter initiatives that are ultimately presented to the voters at an "actual election," but also embraced those initiatives proposed by the voters through the initiative process that are directly adopted by a city council, the voters' elected representatives, without an election, in the manner statutorily prescribed by Elections Code section 9214, subdivision (a). Indeed, this "direct adoption" provision appears to have been enacted by the Legislature to immediately implement the 1911 constitutional amendment reserving to the voters the power of initiative. As originally enacted, the implementing statute read, in pertinent part:

> Ordinances may be enacted by and for any incorporated city or town of the state in the manner following: Any proposed ordinance may be submitted to the legislative body of such city or town by a petition filed with the clerk of such legislative body after being signed by qualified electors of the city or town not less in number than the percentages hereinafter required. . . . If the petition accompanying the

> proposed ordinance be signed by electors not less in number than twenty per cent of the entire vote cast within such city or town for all candidates for governor of the state, at the last preceding general election at which such governor was voted for, and contains a request that such ordinance be submitted forthwith to a vote of the people at a special election, then the legislative body shall either:
>
> (a) Pass such ordinance without alteration at the regular session at which it is presented and within ten days after it is presented; or,
>
> (b) Forthwith, the legislative body shall proceed to call a special election at which such ordinance, without alteration, shall be submitted to a vote of the electors of the city or town.

(Stats. 1911, Ex. Sess. 1911, ch. 33, § 1, pp. 131-132, a true and correct copy of which is attached as Appendix A to this brief.) A similar provision applicable to county initiative ordinances was adopted during the same year. (*Ex parte Zany* (1912) 20 Cal.App. 360, 364-365.)

Importantly, this provision was modeled on the language of Proposition 7 itself, addressing the duties of the Legislature when presented with a proposed initiative statute:

> The law proposed by such [initiative] petition shall be either enacted or rejected without change or amendment by the legislature, within forty days from the time it is received by the legislature. . . . If any law so petitioned for be rejected, or if no action is taken upon it by the legislature within said forty days, the secretary of state shall submit it to the people for approval or rejection at the next ensuing general election.[2]

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[2] Given that California voters themselves, in adopting Proposition 7, approved a provision essentially identical to that contained in Elections Code section 9214, Petitioner's suggestion that section 9214 is somehow inconsistent with the initiative power recognized in Proposition 7 is plainly without merit.

(Ballot Pamp., Gen. Elec. (Oct. 10, 1911) text of Prop. 7.)[3]

Accordingly, the provisions of Elections Code section 9214 are – and for 100 years have been – an integral part of the procedural scheme effectuating the local initiative process. To effectively nullify the direct-adoption option of Elections Code section 9214, subdivision (a), as the Opinion does, is to do damage to a right that the courts are duty-bound to "jealously guard." The Fifth District's Opinion – which judicially eviscerates a procedure that has been in place for over a century – cannot be permitted to stand.

In *Native American Sacred Site*, the Fourth District Court of Appeal implicitly rejected the very distinction drawn in the Opinion, explaining that the "10-day period in which to adopt a voter-sponsored initiative is a speedy effectuation of the will of the people." (*Native American Sacred Site, supra*, 120 Cal.App.4th at p. 967.) Importantly, the Fourth District correctly observed that the implementation by a city council of an initiative ordinance bearing the requisite number of signatures "manifests the power of initiative reserved to the people under the Constitution." (*Id.* at p. 968).

The Fifth District, in concluding that CEQA trumps the Elections Code provisions governing the initiative process, has in effect declared that the law does not mean what it says, and has substituted its own view of what the law ought to be, explaining that Elections Code section 9214, subdivision (a) really means nothing more than "[t]he 15-percent minority's power is merely to demand an *opportunity* for the exercise of sovereignty by the voters at an election." (Opinion, p. 15.) This Court should reject

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[3] A copy of the Ballot Pamphlet for the October 10, 1911 general election is available through the University of California Hastings College of the Law Library Web site at http://library.uchastings.edu/research/online-research/ballots.php.

this misreading of California law, and make clear that CEQA does not apply to this critically important aspect of the people's constitutionally reserved initiative power.

2. Requiring That a City Council Comply with CEQA Before Adopting an Initiative Ordinance Pursuant to Elections Code Section 9214 Cannot Be Reconciled With, and Would Amount to an Effective Repeal of, That Statutory Provision

Elections Code section 9214 provides that a city council that intends to adopt an initiative ordinance rather than submit it to the voters must do so within 10 days, a requirement that has been part of this law since its adoption 100 years ago. Requiring that a city council comply with the complex and lengthy CEQA process before it adopts the measure is irreconcilable with this provision, and would effectively read it out of Elections Code section 9214. The Fifth District's Opinion acknowledges as much.

As noted, the CEQA process requires that – absent an applicable exemption – a city conduct an "Initial Study" to determine the extent of environmental review that will be required for a proposed project, and based on the results of that study, either conduct a full EIR, or issue a negative declaration. If a full EIR is required, it must explain the effects that a proposed project is likely to have on the environment, identify ways that environmental damage can be avoided or mitigated, identify reasonable alternatives to the project, and enable the city council to make findings confirming its consideration of the EIR's mitigation measures. If the project has a significant effect on the environment, the agency may approve the project only if it determines that (1) it has eliminated or substantially reduced all significant environmental effects if feasible, and (2) any

unavoidable significant effects on the environment are acceptable due to overriding concerns.

The time for completing this CEQA process is measured in months, not days. A city council simply cannot – as the Fifth District acknowledges – adopt a proposed initiative ordinance within 10 days of the initiative petition being certified if it must first comply with this lengthy CEQA process. By its own terms, the Opinion operates as an implicit repeal of this provision of Elections Code section 9214, a result that this Court should reject.[4] (See generally *Board of Retirement v. Superior Court* (2002) 101 Cal.App.4th 1062, 1067 [noting the presumption against repeals by implication].) Indeed, to the contrary, this Court should liberally construe Elections Code section 9214 to promote, not detract from, the reserved power of initiative. (*Midway Orchards v. County of Butte* (1990) 220 Cal.App.3d 765, 774.)

Moreover, putting the time constraints aside, applying CEQA in this situation would be requiring an exercise in futility. By its terms, Elections Code section 9214, subdivision (a), mandates that the city council adopt the measure "without alteration." Accordingly, regardless of what the EIR may have revealed, the city council would be powerless to amend the ordinance to address those concerns. Moreover, it would be nonsensical to require a

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[4] Indeed, this 10-day deadline is just one of the many challenging deadlines imposed on the voter-sponsored initiative process. For example, the Elections Code includes strict deadlines for publication and notice (§ 9206), for obtaining signatures on the petition (§ 9208), and for providing the ballot title and summary to the elections official (§ 9203). In 2000, Elections Code section 9214 was amended to further promote the voter-sponsored initiative process by eliminating the need for a city council to introduce the ordinance prior to adopting it. (Stats. 2000, ch. 55 (S.B. 1424), § 17.) Complying with CEQA would add several months to this process, contrary to the legislative mandate to act expeditiously on voter-sponsored initiative measures.

city to identify reasonable alternatives to the initiative ordinance, since the council would be required by section 9214 to adopt the ordinance without change, regardless of the alternatives that might exist.

This Court should not assume that the Legislature intended such an absurd result, which would undermine the protections afforded the initiative process under the Elections Code. (See *DeVita v. County of Napa, supra*, 9 Cal.4th at p. 779 [court should not construe an Elections Code section in a manner that would render it meaningless]; see generally *Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal.App.4th 47, 55 [explaining that a statute should be interpreted to produce a reasonable, rather than an absurd, result].) Rather, as the court in *Native American Sacred Site* emphasized, "it is plain that voter-sponsored initiatives are not subject to the procedural requirements that might be imposed on statutes or ordinances proposed and adopted by a legislative body, regardless of the substantive law that might be involved." (*Native American Sacred Site, supra*, 120 Cal.App.4th at p. 968, citing *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, supra*, 18 Cal.3d at p. 596; *Duran v. Cassidy* (1972) 28 Cal.App.3d 574, 585-586; *Bayless v. Limber* (1972) 26 Cal.App.3d 463, 470.)

If Petitioner seeks a different result due to its concerns about abuses of the initiative process by developers wishing to circumvent CEQA, its recourse is with the Legislature. As the court in *Native American Sacred Site* explains, however, the Legislature has to date expressed no interest in subjecting the reserved initiative power to procedural requirements outside those imposed by the Elections Code:

> [A]ttempts to amend the Elections Code to subject voter-sponsored initiatives to CEQA control have failed. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 794, 38 Cal.Rptr.2d 699, 889 P.2d 1019.) "While only limited inferences can be

> drawn from bills the Legislature failed to enact [citation], the defeat of attempts to impose more stringent environmental review requirements on land use initiatives provides additional corroboration that the Legislature did not intend such requirements to obstruct the exercise of the right to amend general plans by initiative." (*Id.* at p. 795, 38 Cal.Rptr.2d 699, 889 P.2d 1019.)

(*Native American Sacred Site, supra*, 120 Cal.App.4th at p. 968; see *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 594-595 ["the procedures for exercise of the right of initiative are spelled out in the initiative law."]; *Duran, supra*, 28 Cal.App.3d at pp. 585-86 quoting *Bayless v. Limber, supra*, 26 Cal.App.3d at pp. 469- 470 ["Unless constitutionally compelled, the requirements for law-making by the legislative process should not be imposed upon law-making by the initiative process."].)

3. The Elections Code, Rather than CEQA, Authorizes the Process for Examining the Environmental Effects of Proposed Measures

There is another compelling basis for concluding that the Court of Appeal erred in applying CEQA here: the Legislature itself has authorized a procedure separate from CEQA for examining the possible effects of a proposed initiative ordinance.

Elections Code sections 9212 and 9214, subdivision (c), authorize a city council – prior to determining whether to adopt a proposed initiative ordinance without change or submit it to the voters – to request a staff report studying the effects of a proposed initiative ordinance in a broad array of areas, including planning and land use, and "any other matters" it chooses to have examined. Elections Code section 9212 requires that these studies be completed within 30 days, in appreciation for the compressed timeframe that governs the initiative process.

In adopting these sections, the Legislature struck the balance it views as appropriate. If the Legislature intended that additional environmental review were appropriate, it would have done so expressly in section 9212. It has not done so. CEQA simply does not apply in this situation.

B. THE CITY COUNCIL'S DUTIES UNDER SECTION 9214 ARE MANDATORY AND MINISTERIAL, AND THEREFORE EXEMPT FROM CEQA

There is a second, independent basis for concluding that CEQA does not apply in this situation. The adoption of such an initiative measure by a city council in this manner plainly constitutes a ministerial act that CEQA itself expressly exempts from the requirements of that statute.

1. Overview of CEQA's Statutory Framework

CEQA establishes a complex and lengthy process for assessing the environmental impacts of a government agency project. CEQA provides for an "Initial Study" process to determine what level of environmental review is required, a process that takes up to 30 days. (Pub. Resources Code § 21080.2.) If the Initial Study concludes that an environmental impact report is required, CEQA allows up to one year to complete and certify an EIR. (Pub. Resources Code § 21151.5(a)(1)(A).) Even for the negative declaration process, CEQA permits up to six months to complete that process. (Pub. Resources Code § 21151.5(a)(1)(B).)

If an EIR is required, it must provide public agencies and the public in general with information about the potential effects that a proposed project may have on the environment and "[i]dentify the ways that environmental damage can be avoided or significantly reduced." (CEQA

Guidelines, Cal. Code Regs., tit. 14, § 15002.)[5] The EIR must also "describe feasible measures which could minimize significant adverse impacts" (CEQA Guidelines, § 15126.4, subd. (a)(1)) and "describe a range of reasonable alternatives to the project" (CEQA Guidelines, § 15126.6, subd. (a)).

In addition, Public Resources Code section 21081 requires a public agency to make certain specific findings attesting to its consideration of the mitigation measures identified in the EIR. If the project has a significant effect on the environment, the agency may approve the project only upon finding that it has "[e]liminated or substantially lessened all significant effects on the environment where feasible" and that any remaining unavoidable significant effects on the environment are "acceptable due to overriding concerns" specified in section 15093 of the CEQA Guidelines. (CEQA Guidelines, § 15092, subd. (b)(2).)

Notably, Public Resources Code section 21080, subdivision (b)(1) expressly exempts from this complex process "[m]inisterial projects proposed to be carried out or approved by public agencies." (Pub. Resources Code § 21080, subd. (b)(1).) As explained below, and contrary to the holding of the Fifth District, a city council's adoption of an initiative ordinance under the compulsion of section 9214, subdivision (a), is a ministerial act exempt from the requirements of CEQA.

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[5] The term "CEQA Guidelines" refers to the regulations for the implementation of CEQA authorized by the Legislature (Pub. Resources Code § 21083), codified in title 14, sections 15000 *et seq.* of the California Code of Regulations, and "prescribed by the Secretary of Resources to be followed by all state and local agencies in California in the implementation of [CEQA]." (CEQA Guidelines, § 15000.)

2. When a City Council Exercises Its Mandatory Duty Under Elections Code Section 9214, It is Acting as An Agent of the Voters and is Performing a Ministerial Act

Courts have recognized that the duties imposed by Elections Code section 9214 are mandatory and ministerial. (See *Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1021 & fn. 4; see also *Citizens Against a New Jail v. Board of Supervisors* (1976) 63 Cal.App.3d 559, 561.) In particular, courts have recognized that when a legislative body acts as an agent of the voters in the furtherance of their power of initiative – rather than acting in its legislative capacity to generate and craft an ordinance of its own design – the legislative body is performing a ministerial act that is exempt from CEQA. That is precisely the capacity in which the Sonora City Council acted here when it exercised its duties under section 9214.

In *Stein v. City of Santa Monica* (1980) 110 Cal.App.3d 458, the petitioners asserted that a city council's submission to the voters of a charter amendment in response to an initiative petition was a discretionary act subject to CEQA. (110 Cal.App.3d at p. 460.) The petitioners argued that the electorate was an agent of the city, and since the voters' action in adopting the measure involved an exercise of discretion, the city council's action was subject to CEQA. (*Id* at p. 461.)

The *Stein* court concluded that this argument was "totally unacceptable" and explained that, to the contrary, when the council was presented with an initiative petition, and placed it on the ballot, it was acting merely as an agent of the electorate, and performing a ministerial function that was exempt from CEQA. (*Stein, supra*, 110 Cal.App.3d at p. 461.)

In *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, the Supreme Court also recognized this distinction. That case

addressed whether a decision of a city council to submit to the voters an ordinance of its own creation – rather than one presented to it pursuant to the initiative petition process – involved an exercise of discretion subjecting it to the CEQA process. In discussing the holding in *Stein*, the Supreme Court explained that because "the city [in *Stein*] acted only as the agent of the electorate, the proposal was not a project of a public agency. It was therefore a nondiscretionary activity not contemplated by CEQA." (25 Cal.4th at p. 187.) The California Supreme Court concluded, however, that there is a "clear distinction between voter-sponsored and city-council-generated initiatives," and held that state law did not intend to "exempt initiatives generated by a public agency from CEQA." (*Id.* at p. 189.)

San Bernardino Associated Governments v. Superior Court (2006) 135 Cal.App.4th 1106 also distinguished between a legislative body's decision to submit to the voters legislation of its own creation – a discretionary action subject to CEQA – and its actions as a mere agent in the initiative process, which are ministerial and exempt from CEQA. In *San Bernardino*, a state statute authorized "each county board of supervisors to create or designate a local transportation authority" and empowered the authority to "impose a sales tax in the county to fund local transportation needs," subject to voter approval. (135 Cal.App.4th at p. 1110.) The San Bernardino Board of Supervisors (the "Board") designated the San Bernardino Associated Governments ("SANBAG") as the authority. (*Id*) SANBAG approved a measure authorizing the sales tax and requested that the Board submit the measure to the voters. The Board placed the measure on the ballot, after determining that its action was exempt from CEQA. (*Id.* at p. 1111.)

An action was filed challenging the failure to conduct a CEQA analysis before placing the measure on the ballot. The court distinguished

Sierra Madre, explaining that the "[t]he city council in that case acted in a discretionary manner because it proposed and generated the ballot measure itself." (135 Cal.App.4th at p. 1117.) Notwithstanding the close relationship between the Board and SANBAG, the *San Bernardino* court rejected the CEQA challenge. The court determined that the Board's action in submitting the measure to the voters was purely ministerial, relying on the *Stein* court's agency analysis:

> In *Stein*, it was the citizens group, acting through the petition power, which made the underlying decision to ask the voters to approve that measure. In the same way, the Measure was an activity undertaken by SANBAG, not by the County. The County, despite its earlier participation as one of many SANBAG members, was merely the agent of SANBAG when it later placed the Measure on the ballot, as provided by [Public Utilities Code] section 180201.

(*Id.*)

Thus, when a city council is performing its mandatory duty under Elections Code section 9214, whether submitting the proposed initiative ordinance to the voters or adopting it without alteration, it is acting merely in the capacity of an agent performing its statutory – and ministerial – obligations on behalf of the electorate, as was the case in *Stein* and *San Bernardino*. In that capacity – and unlike the situation in *Sierra Madre* – the city council plays no role in the initial decision to propose the ordinance, to craft its contents, or otherwise control the policies embodied in the proposed ordinance. It is performing a solely ministerial function, and is therefore exempt from the requirements of CEQA. In holding that a city must conduct CEQA review prior to implementing a voter-sponsored initiative – just as it would in the case of a city council-generated initiative – the Fifth District fails to account for the fundamental, constitutionally based distinction that exists between initiatives sponsored by the voters and

those generated by a council itself, which embody the council's own policy judgments.

This conclusion is supported by the well-reasoned decision in *Native American Sacred Site*, which the Fifth District declined to follow. In that case, a city council was presented with a proposed initiative ordinance. Rather than submit it to the voters, the city council – like the Sonora City Council here – chose to adopt it pursuant to Elections Code section 9214, subdivision (a). The plaintiff challenged the council's action, asserting that the council could not adopt the ordinance under Elections Code section 9214 without first complying with CEQA. The trial court rejected the challenge, and the plaintiff appealed.

The Fourth District concluded that a city council's decision under Elections Code section 9214, subdivision (a), to adopt an initiative measure rather than submit it to the voters was ministerial, and thus not subject to CEQA. The court persuasively explained:

> "When the electorate undertakes to exercise the reserved legislative power, the city has no discretion and acts as the agent for the electorate. In such event, the enactment of the initiative measure is excluded from CEQA compliance." (Quoting *Northwood Homes, Inc. v. Town of Moraga* (1989) 216 Cal.App.3d 1197, 1206.)

(120 Cal.App.4th at p. 969.) The Fourth District also correctly noted that implementation of an initiative measure by a city council pursuant to Elections Code section 9214, subdivision (a), has "everything to do with [the rights of the voters]," in that such ministerial action "manifests" the people's power of initiative.

The reasoning of *Native American Sacred Site* is sound, and compels the conclusion that the City Council of Sonora was not required to comply

with CEQA prior to performing the ministerial act of adopting the challenged ordinance under Elections Code section 9214, subdivision (a).[6]

IV. CONCLUSION

For all of the foregoing reasons, *amicus curiae* League of California Cities respectfully requests that this Court reverse the decision of the Fifth District Court of Appeal and hold that a city is not required to comply with CEQA before adopting directly, "without alteration," an ordinance enacting a voter-sponsored initiative pursuant to Elections Code section 9214, subdivision (a).

Dated: May 31, 2013

Respectfully Submitted,

RENNE SLOAN HOLTZMAN SAKAI LLP

By: _____

Randy Riddle
Ivan Delventhal
Attorneys for *Amicus Curiae*
League of California Cities

[6] In these challenging budgetary times for local governments, a legislative body's determination to adopt an initiative ordinance without change, rather than submit it to the voters, will most likely be based on purely practical considerations, such as the significance of the changes proposed to be made by the initiative ordinance when balanced against the high costs of conducting a special election, as well as the council's informed judgment about the level of community support the measure enjoys. Accordingly, the Court should give short shrift to the governmental conspiracy scenario portrayed in Petitioner's Answer Brief on the Merits.

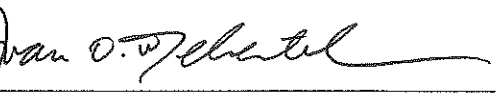
CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.504(d)(1), counsel certifies that the foregoing brief contains 6,062 words, as counted by the Microsoft Word 2010 word-processing program used to prepare the brief, excluding the cover information, tables, and this certificate.

Dated: May 31, 2013

Respectfully Submitted,

RENNE SLOAN HOLTZMAN SAKAI LLP

By: 

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APPENDIX A

THE

STATUTES OF CALIFORNIA

AND

AMENDMENTS TO THE CONSTITUTION

PASSED AT THE

EXTRA SESSION OF THE THIRTY-NINTH LEGISLATURE

1911

BEGAN ON MONDAY, NOVEMBER TWENTY-SEVENTH, AND ENDED ON SUNDAY, DECEMBER TWENTY-FOURTH, NINETEEN HUNDRED AND ELEVEN

SACRAMENTO

FRIEND WM. RICHARDSON - - - SUPERINTENDENT STATE PRINTING

1912

Application of act to chartered cities.

SEC. 2. This act is not intended to apply to those cities having a freeholders' charter, adopted under the provisions of section 8 of article XI of the constitution, and having in such charter provision for the recall of elective officials by the electors.

Repeal of former law.

SEC. 3. Section one (1) of an act entitled "An act adding three new sections to an act entitled 'An act to provide for the organization, incorporation and government of municipal corporations,' approved March 13, 1883, to be numbered 10, 11 and 12 and relating to the government of municipal corporations and providing for the recall, initiative and referendum," and approved March 14th, 1911, is hereby repealed.

CHAPTER 33.

An act to provide for direct legislation by cities and towns, including initiative and referendum.

[Approved January 2, 1912.]

The people of the State of California do enact as follows:

Direct legislation by municipal corporations.

SECTION 1. Ordinances may be enacted by and for any incorporated city or town of the state in the manner following:

Initiative; ordinance proposed by electors.

Any proposed ordinance may be submitted to the legislative body of such city or town by a petition filed with the clerk of such legislative body after being signed by qualified electors of the city or town not less in number than the percentages hereinafter required. The signatures to the petition need not all be appended to one paper. Each signer shall add to his signature his place of residence and occupation, giving street and number, where such street and number, or either, exist, and if no street or number exist, then such a designation of the place of residence as will enable the location to be readily ascertained. Each such separate paper shall have attached thereto an affidavit made by a qualified elector of the city or town, and sworn to before an officer competent to administer oaths, stating that the affiant circulated that particular paper and saw written the signatures appended thereto; and that according to the best information and belief of the affiant, each is the genuine signature of the person whose name purports to be thereunto subscribed, and of a qualified elector of the city or town. Within ten days from the date of filing such petition, the clerk shall examine, and from the records of registration, ascertain whether or not said petition is signed by the requisite number of qualified electors, and he shall attach to said petition his certificate showing the result of said examination. If by the clerk's certificate the petition is shown to be insufficient, it may be supplemented within ten days from the date of such certificate by the filing of additional papers, duplicates of the

original petition except as to the names signed. The clerk shall, within ten days after such supplementing papers are filed, make like examination of the supplementing petition, and if his certificate shall show that all the names to such petition, including the supplemental papers, are still insufficient, no action on the petition shall be mandatory on the legislative body; but the petition shall remain on file as a public record; and the failure to secure sufficient names shall be without prejudice to the filing later of an entirely new petition to the same or similar effect. If the petition shall be found to be sufficient, the clerk shall submit the same to the legislative body at its next regular session. If the petition accompanying the proposed ordinance be signed by electors not less in number than twenty per cent of the entire vote cast within such city or town for all candidates for governor of the state, at the last preceding general election at which such governor was voted for, and contains a request that such ordinance be submitted forthwith to a vote of the people at a special election, then the legislative body shall either:

(*a*) Pass such ordinance without alteration at the regular session at which it is presented and within ten days after it is presented; or,

Election.

(*b*) Forthwith, the legislative body shall proceed to call a special election at which such ordinance, without alteration, shall be submitted to a vote of the electors of the city or town.

If the petition be signed by electors not less in number than ten per cent of the entire vote cast for all such candidates for governor at the last preceding election when such candidates for governor were voted for, and the ordinance petitioned for is not required to be, or for any reason is not, submitted to the electors at a special election, and is not passed without change by said legislative body, then such ordinance, without alteration, shall be submitted by the legislative body to a vote of the electors at the next regular municipal election.

Ballots used at elections.

The ballots used when voting upon said proposed ordinance shall have printed thereon the words "Shall the ordinance (stating the nature thereof) be adopted?" Opposite such proposition to be voted on, and to the right thereof, the words "Yes" and "No" shall be printed on separate lines, with voting squares. If an elector shall stamp a cross (X) in the voting square after the printed word "Yes," his vote shall be counted in favor of the adoption of the ordinance, and if he shall stamp a cross (X) in the voting square after the printed word "No," his vote shall be counted against the adoption of the same. If a majority of the qualified electors voting on said proposed ordinance shall vote in favor thereof, such ordinance shall thereupon become a valid and binding ordinance of the city or town, and be considered as adopted upon the date that the vote is canvassed and declared by the canvassing board, and go into effect ten days thereafter. Such ordinance shall have the same force and effect as one passed by the legislative body of the city or town, except that no ordinance proposed by

petition as in this section provided, and thereafter passed by the vote of the legislative body of the city or town without submission to a vote of the people, or voted upon and adopted by the people, shall be repealed or amended except by a vote of the people, unless provision otherwise be made in the ordinance itself. Any number of proposed ordinances may be voted upon at the same election in accordance with the provisions of this statute; *provided*, that there shall not be held under this statute more than one special election in any period of six months. If any measure be submitted upon an initiative petition of registered voters, as hereinbefore provided, the persons filing said petition shall have the right, if they so choose, to present and file therewith a written argument in support thereof not exceeding three hundred words in length, which argument shall be printed upon the sample ballot issued for said election. Upon the same ballot shall also be printed any argument of not exceeding three hundred words in length in opposition thereto which may be prepared by the legislative body. If the provisions of two or more ordinances adopted at the same election conflict, then the ordinance receiving the highest number of affirmative votes shall control. The legislative body of the city or town may submit to the people, without a petition therefor, a proposition for the repeal of any adopted ordinance, or for amendments thereto, or for the enactment of any new ordinance, to be voted upon at any succeeding regular or special municipal city or town election, and if such proposition so submitted receive a majority of the votes cast thereon at such election, such ordinance shall be repealed, amended or enacted accordingly. Whenever any ordinance or proposition is required by this statute to be submitted to the voters of a city or town at any election, the clerk of the legislative body shall cause the ordinance or proposition to be printed and he shall mail a copy thereof, enclosed in an envelope with a sample ballot to each voter at least ten days prior to the election. All the provisions of this statute are to be liberally construed for the purpose of ascertaining and enforcing the will of the electors. The enacting clause of an ordinance passed by the vote of the electors shall be substantially in the following form: "The people of the city (or town) of ——— do ordain as follows:". When a special election is to be called under the terms of this section, it shall be held not less than thirty nor more than sixty days after the date of the presentation of the proposed ordinance to the legislative body, and shall be held as nearly as may be in accordance with the election laws of the state; *provided, however*, that, to avoid holding more than one such election within any six months, the date for holding such special election may be fixed later than sixty days, but at as early a date as practicable after the expiration of such six months; *provided, further*, that when under any of the terms of this statute fixing the time within which a special election shall be held it is made possible to hold the same within six months prior to a regular munic-

Arguments.

Reference to people by legislative body without petition.

Copies sent to voters.

Time of holding elections.

ipal election, the legislative body may in its discretion, submit the proposed ordinance at such regular election instead of at a special election. Except an ordinance calling or otherwise relating to an election, no ordinance passed by the legislative body of a city or town, except when otherwise specially required by the laws of the state, and except an ordinance for the immediate preservation of the public peace, health or safety, which contains a declaration of, and the facts constituting its urgency and is passed by a four-fifths vote of the legislative body of a city or town, and no ordinance granting a franchise shall go into effect before thirty days from its final passage; and if, during said thirty days, a petition, signed by qualified voters of the city or town equal to ten per cent of the entire vote cast therein for all candidates for governor of the state at the last preceding general election at which a governor was voted for, protesting against the passage of such ordinance, be presented to the legislative body, the same shall thereupon be suspended from going into operation, and it shall be the duty of the legislative body to reconsider such ordinance. If said legislative body shall thereupon not entirely repeal said ordinance, it shall submit the same to a vote of the electors either at a regular municipal election or a special election to be called for the purpose, and such ordinance shall not go into effect or become operative unless a majority of the voters voting upon the same shall vote in favor thereof. Such petitions and the provisions of the law relative to the duty of the clerk in regard thereto and the manner of voting thereon, shall conform to the rules provided herein for the initiation of legislation by the electors.

Submission to people of ordinance passed by legislative body.

In cities or towns having a mayor (or like officer), with the veto power, the passage of an ordinance petitioned for by the electors, followed by its veto by the mayor (or like officer) and the failure of the legislative body to pass the same over such veto, shall be deemed and treated as a refusal of the legislative body to pass the ordinance, within the meaning of this statute; and a vote of the legislative body in favor of the repeal of an ordinance previously passed (but protested against by the electors as herein provided for) followed by a veto of such repeal by the mayor (or like officer) and the failure of the legislative body to pass said repeal over said veto, shall be deemed and treated as a refusal to repeal the ordinance so protested against. In such city or town the date of approval of an ordinance by the mayor or like officer (or of the expiration without his action thereon of the time within which he may veto the same, if such expiration of time for his action without his approval or veto has the effect of making the ordinance a law) shall be deemed the date of final passage of the ordinance by the legislative body, within the meaning of this statute. Any duty herein in terms, or by reasonable implication, imposed upon the legislative body in regard to calling an election, or in connection therewith, shall be likewise imposed upon any mayor, or any other officer having any duty to per-

Effect of veto by mayor.

Date of final passage.

form connected with the elections, so far as may be necessary to fully carry out the provisions of this statute.

Application of act to chartered cities.

SEC. 2. This act is not intended to apply to those cities having a freeholders' charter adopted and ratified under the provisions of section 8 of article XI of the constitution, and having in such charter provision for the direct initiation of ordinances by the electors.

Repeal of former law.

SEC. 3. Sections 2 and 3 of the act approved March 14th, 1911, entitled "An act adding three new sections to an act entitled 'An act to provide for the organization, incorporation and government of municipal corporations,' approved March 13, 1883, to be numbered 10, 11 and 12 and relating to the government of municipal corporations and providing for the recall, initiative and referendum," are hereby repealed.

CHAPTER 34.

An act to amend an act entitled "An act to provide for the organization and government of irrigation districts and to provide for the acquisition or construction thereby of works for the irrigation of lands embraced within such districts, and, also, to provide for the distribution of water for irrigation purposes," approved March 31, 1897, by adding a new section thereto to be numbered 28½, and providing for the recall of elective officers of irrigation districts.

[Approved January 2, 1912.]

The people of the State of California do enact as follows:

Irrigation districts.

SECTION 1. A new section is hereby added to an act entitled "An act to provide for the organization and government of irrigation districts and to provide for the acquisition or construction thereby of works for the irrigation of the lands embraced within such districts, and, also, to provide for the distribution of water for irrigation purposes," approved March 31, 1897, to be numbered 28½ and to read as follows:

Recall of officers.

Section 28½. The holder of any elective office of any irrigation district may be removed or recalled at any time by the electors; *provided*, he has held his office at least six months. The provisions of this section are intended to apply to officials now in office, as well as to those hereafter elected. The procedure to effect such removal or recall shall be as follows: A petition demanding the election of a successor to the person sought to be removed shall be filed with the secretary of the board of directors of such district, which petition shall be signed by registered voters equal in number to at least twenty-five per cent of the highest vote cast within such district for candidates for the office, the incumbent of which is sought to be removed, at the last general election in such district at

Petition for removal.

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I, the undersigned, am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 350 Sansome Street, Suite 300, San Francisco, California, 94104. On May 31, 2013, I served the following documents(s) by the method indicated below:

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF; PROPOSED *AMICUS CURIAE* BRIEF IN SUPPORT OF REAL PARTY IN INTEREST CITY OF SONORA

☒ by placing the document(s) listed above in a sealed envelope(s) with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited in the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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Court of Appeal

Clerk of the Court
Court of Appeal, Fifth District
2424 Ventura Street
Fresno, CA 93721

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 31, 2013, at San Francisco, California.

Rochelle Redmayne