Case No. A149153

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

JAMES P. WILSON AND MICHAEL HACKETT,
Petitioners and Appellants,

vs.

COUNTY OF NAPA; JOHN TUTEUR, In His Official Capacity as REGISTRAR OF VOTERS FOR THE COUNTY OF NAPA; and DOES 1 through 10, inclusive,
Respondents.

On appeal from A Judgment Entered In Favor of Respondents
Superior Court for the State of California,
County of Napa, Case No.: 16CV000457, Hon. Diane M. Price

BRIEF OF AMICUS CURIAE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF RESPONDENTS COUNTY OF NAPA ET AL.

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, FIRST **APPELLATE DISTRICT, DIVISION** THREE	Court of Appeal Case Number: A149153
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APPELLANT/PETITIONER: JAMES P. WILSON and MICHAEL HACKETT RESPONDENT/REAL PARTY IN INTEREST: COUNTY OF NAPA, JOHN TUTEUR	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

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Date: December 23, 2016

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS

The League of California Cities ("League") and the California State Association of Counties ("CSAC") seek leave to file the attached amicus brief in support of Respondents County of Napa and John Tuteur, its Registrar of Voters ("Registrar").

The League is an association of 474 California cities united in promoting open government and home rule to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life in California communities. The League is advised by its Legal Advocacy Committee, which is composed of 24 city attorneys representing all regions of the State. The committee monitors appellate litigation affecting municipalities and identifies those cases, such as the instant matter, that are of statewide significance.

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The League and CSAC propose the Court consider the attached brief because of their strong interests in ensuring their elections officials may properly administer their official duties when local initiatives are proposed. The League and CSAC are concerned that the position of Appellants, James P. Wilson and Michael Hackett ("Appellants"), would depart significantly from a long line of cases confining election officials' duties when reviewing proposed initiatives for compliance with the Elections Code's "full text" requirement. Both *amici* believe that the Appellants' position would be contrary to the objective, bright-line standard courts have established in interpreting election officials' ministerial duties in reviewing the texts of proposed initiatives. These parties also

believe the subjective, case-by-case standard the Appellants effectively advocate would be unworkable and would cause confusion among elections officials if accepted. The League and CSAC believe their perspectives as statewide organizations would assist the court in understanding the ramifications the acceptance of the Appellants would have for local initiative matters throughout the State.

No party in this action authored this brief in whole or in part. Nor did any party or person contribute money toward the research, drafting, or preparation of this brief, which was authored entirely on a pro bono basis by the undersigned counsel.

Respectfully submitted,

Dated: December 23, 2016

COTA COLE LLP

By: /s/ *Derek P. Cole*
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Attorneys for Amicus Curiae
League of California Cities and
California State Association of
Counties

I. INTRODUCTION

The League and CSAC have authored this amicus brief because of their concerns about the ramifications the position of Appellants would have if accepted on appeal. The initiative at issue, the Water, Forest and Oak Woodland Protection Initiative of 2016 ("Initiative"), would enact significant changes to the County of Napa's ("County") General Plan and Zoning Code. A key feature of the Initiative is its requirement that parties residing within a certain zoning district obtain a discretionary permit before removing oak trees from their properties. Despite imposing this requirement, the Initiative, as submitted, failed to include the provisions of a County plan it would rely upon to establish some of the requirements for the newly required permits. For this reason, the Registrar rejected the Initiative for failure to comply with the "full text" requirement of Elections Code section 9201.

As the League and CSAC explain within, the position the Appellants advance would require a marked departure from the longstanding line of cases holding that elections officials must conduct only ministerial reviews of proposed initiatives. In defiance of the bright-line standard governing such review, the Appellants effectively argue the Registrar should have looked past their failure to include key provisions of the plan that would furnish a number of permit requirements. The Appellants offer several reasons for why their Initiative did not include those provisions. But the Registrar was not authorized to make a subjective determination as to what he thought the Initiative meant or the Appellants intended. The standard the Registrar had to follow was an objective one. Because the omission of the plan's provisions was something he plainly ascertained from the Initiative *itself*, he had no choice but to reject the Initiative.

The League and CSAC note that the initiative petitions election officials review cover a broad range of subjects and, like the Initiative here, can be complex and far-

reaching in the changes they propose. Election officials do not have the backgrounds or understandings necessary to resolve the subject-specific and often technical interpretation questions that can arise with initiative proposals. It is for good reason, therefore, that courts limit these officials' review to a simple comparison of initiative text with Elections Code requirements. Although the Appellants argue otherwise, the position they advocate would replace the objective standard courts have long required for review of initiatives with a subjective and unworkable one. This Court should reject the invitation to depart from clear precedent.

II. THE ROLES OF CITIES AND COUNTIES ROLES IN THE LOCAL INITIATIVE PROCESS

Californians' fondness for direct democracy is well known and is the subject of frequent commentary and debate.[1] The State's practice of deciding significant policy questions at the ballot box is more than a century old, having begun as a Progressive-era reform under Governor Hiram Johnson. In more recent times, initiatives have been the vehicle for deciding important policy issues, often in a ground-breaking manner. California's landmark 1978 property-tax measure, Proposition 13, has been viewed by many as the herald of a nationwide tax-reform movement. Other well-known initiatives have addressed hot-button social issues such as affirmative action, immigration reform, the death penalty, and the use of marijuana for medicinal purposes.

[1] See e.g., Editorial Board, *The Sad State of California's Direct Democracy*, The Sacramento Bee (Oct. 15, 2016), accessed on Dec. 13, 2016 at http://www.sacbee.com/opinion/editorials/article108297177.html; Hillel Aron, *How California's Ballot Measure Process Got So Kooky*, LA Weekly (Oct. 22, 2016), accessed on Dec. 13, 2006 at http://www.laweekly.com/news/how-californias-ballot-measure-process-got-so-kooky-7526677.

Just as California voters are known for deciding important policy issues through statewide initiatives, they are known for doing the same through their local ballots. Voters considered 730 local measures between 1990 and 2000.[2] The volume of local measures picked up considerable in the past decade and a half. In the most recent election, in November 2016, voters considered 635 local measures.[3] The subjects of these measures were expansive, and included consideration of local taxes of all types, marijuana land uses, growth control, affordable housing, police practices, public-official ethics, and conversion from district to at-large voting systems, among many other significant—and sometimes controversial—subjects.[4]

Cities and counties have a significant interest in the local initiative process. When initiatives are proposed, they are addressed to the respective agencies' legislative bodies—city councils or boards of supervisors—and, when approved, are enacted as ordinances cities and counties must enforce. (Elec. Code, §§ 9100, 9102, 9200, 9202.) The initiative process begins when the proponents submit a notice of intention to their city or county election officials. (*Id*., §§ 9103, 9203.) Thereafter, city attorneys or county counsels prepare an impartial title and summary of the proposed initiatives. (*Id*., §§ 9105(a), 9203(a).) To ensure voters asked to sign initiative petitions may be informed of the initiative's substance and effect, the titles and summaries must appear at the top of each page where voters are asked to sign.[5] (*Id*., §§ 9105(c), 9203(b).) As one court has

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[2] Tracy M. Gordon, *The Local Initiative in California* [Pub. Pol. Inst. Ca. 2004], p. v, accessed on Dec. 13, 2016 at http://www.ppic.org/content/pubs/report/R_904TGR.pdf.

[3] Ben Adler, *Californians to Decide Record-High 635 Local Ballot Measures This November*, Capitol Public Radio [Sep. 26, 2016], accessed on Dec. 13. 2016 at http://www.capradio.org/articles/2016/09/21/californians-to-decide-record-high-650-local-ballot-measures-this-november/.

[4] https://ballotpedia.org/November_8,_2016_ballot_measures_in_California.

[5] To further facilitate voter awareness, the city attorney or county counsel summaries must be published in a newspaper of general of circulation prior to the proponents' collection of signatures. (Elec. Code, §§ 9105(b), 9108, 9205(a).)

recognized, the purpose of the impartial titles and summaries is to "foster a more informed electorate by supplying correct information about the measures appearing on any given ballot." (*Horwath v. City of East Palo Alto* (1989) 212 Cal.App.3d 766, 776.)

Like city attorneys and county counsels, city and county elections officials perform essential functions in the local initiative process. They maintain the official records concerning the proposed initiatives, identify the number of signatures required to qualify the initiatives, determine if petitions are submitted in proper formats, and examine whether the petitions bear the requisite number of signatures to qualify for the ballot. (Elec. Code, §§ 9103.5, 9107, 9113-9115, 9202.5, 9210, 9214-9215.) Importantly—and as pertinent to this appeal—elections officials also evaluate whether proposed initiative meet the Election Code's "full text" requirement. Specifically, they must determine if the proponents have included "the full text of the proposed ordinance" that the initiative seeks to introduce. (*Id*., §§ 9101, 9202(a).) As with city attorney or county counsel impartial analyses, "[t]he purpose of the full text requirement is to provide sufficient information so that registered voters can intelligently evaluate whether to sign the initiative petition and to avoid confusion." (*Mervyn's v. Reyes* (1998) 69 Cal.App.4th 93, 99.)

III. SUMMARY OF THE INTIATIVE AT ISSUE

As the above discussion indicates, city and county officials have important duties—through both the impartial analyses and review for inclusion of the full initiative texts—to ensure local voters are adequately informed about the nature and effect of proposed initiatives. In light of these duties, the League and CSAC believes a summary of the Initiative's provisions concerning oak preservation, and especially the permitting scheme by which it proposes to effect such preservation, is not only important, but revealing.

The Initiative declares that its purpose is "to protect the water quality, biological productivity, and economic and environmental value of Napa County's streams, watersheds, wetlands and forests, and to safeguard the public health, safety and welfare of the County's residents." (Initiative, § 2(A), Joint Appendix ["JA"] 63.) As concerns oak woodlands, the Initiative's findings declare that such resources have significant scenic, ecological, and other public benefits for County residents and visitors, but are "threatened by development, deforestation, fire and [certain] pathogens…" (*Id*., § 2(B), JA 63.) To address "the combination of human impacts and other hazards" on oak resources, the Initiative proposes to implement a program "to encourage and make possible the long-term conservation of oak trees and oak woodlands within the Agricultural Watershed zone district…." (*Ibid*., JA 63.)

Under the Initiative, an essential component of this program is the requirement that persons whose properties are zoned Agricultural Watershed ("AW"), and larger than five acres in size, obtain an "oak removal permit" before removing certain oak trees.[6] (Initiative, proposed Zoning Code ["ZC"], § 18.20.060(A)(1), JA 66.) The Initiative emphasizes the importance of this permit within its overall scheme by making the permit requirement one mandated not only by a new section it adds to the County Zoning Code, but also by a new policy it includes in the Land Use Element of the County General Plan. (Initiative, § 3.A.(ii) [adding Policy AG/LU-0.6], JA 64.)

The new Zoning Code section, Section 18.20.060, would *prohibit* approval of an oak removal permit if, among other things, "proposed remediation measures are not adequate under subsection (E)" of the section. (Initiative, ZC, § 18.20.060(D), JA 67.)

[6] More specifically, the permit requirement is triggered when a person intends to remove: (1) a single valley oak tree greater or equal to five inches in diameter, measured at 4.5 feet above mean natural grade; or (2) ten or more oak trees of any other species at the same dimensions. (Initiative, proposed Zoning Code amendment, § 18.20.060(A)(1)(a)-(b).)

Subsection (E) of this section, in turn, specifies that the proposed remediation must "at a minimum" include compliance with the best management practices ("BMPs") stated in the Napa County Voluntary Oak Woodland Management Plan—adopted in 2010—during construction activities. (*Id*., ZC, § 18.20.060(E)(1), JA 67.) Subsection (E) also requires, "unless infeasible," that when a party proposes to remove oak trees, the party achieve a three-to-one replacement ratio for the removed trees by either permanently preserving other oak trees on-site *or* replanting oak trees on-site in a manner that achieves the BMPs stated in the Oak Woodland Management Plan. (*Id*., ZC, § 18.20.060(E)(2), JA 67.) These requirements may only be excused in cases of "limited exceptions" and only "to the minimum extent necessary" to address circumstances such as dying or diseased trees; fire protection; the need to comply with a federal, state, or local agency mandates to remove trees; or the avoidance of unconstitutional conditions. (*Id*., ZC, § 18.20.060(F), JA 67-68.)

Moreover, consideration of the oak removal permit is expressly declared to be a discretionary project subject to review under the California Environmental Quality Act ("CEQA," Pub. Res. Code, § 21000 et seq.). (*Id*., ZC, § 18.20.060(C), JA 67.) Although the Initiative does not specify, it presumably mandates CEQA review to ensure, among other things, that the BMPS specified in the Oak Woodland Management Plan may serve as mitigation measures to eliminate or reduce any significant environmental impacts associated with the proposed permit.

Consequently, the adoption of the Oak Woodland Protection Plan's BMPs is *expressly* an important component of the overall regulatory scheme the Initiative establishes for protecting the County's oak woodlands. Plainly, knowledge of what those BMPs are and would require are things voters would need to know to "intelligently evaluate whether to sign the initiative petition and to avoid confusion." (*Mervyn's*, *supra*, 69 Cal.App.4th at p. 99.)

IV. ARGUMENT

Because voters could not reasonably appreciate the full effect of the Initiative without understanding the role BMPs would play in the oak-removal permit process, the League and CSAC believe the Registrar's rejection of the Initiative was proper under well-established case law. In the League and CSAC's view, a contrary holding in this appeal would force elections officials to make the type of subjective, case-by-case evaluations courts have long held such officials may not make in reviewing initiative petitions.

As State Supreme Court precedent firmly establishes, an election official's duties in reviewing a proposed initiative are purely ministerial. (*Ley v. Dominguez* (1931) 212 Cal. 587, 602; *Farley v. Healy* (1967) 67 Cal.2d 325, 327.) The Supreme Court holdings "foreclose elections official decisions that are discretionary or go beyond a straightforward comparison of the submitted petition with the statutory requirements for petitions." (*Alliance for a Better Downtown Millbrae v. Wade* (2003) 108 Cal.App.4th 123, 133.) Election officials are authorized only to determine if the procedural requirements for an initiative have been satisfied and no more. (*Lin v. City of Pleasanton* (2009) 176 Cal.App.4th 408, 420.)

Here, although the Appellants argue the County Registrar went beyond his ministerial authority in considering Appendix D of the Oak Woodland Management Plan part of the Initiative's "text," the opposite is true. *On its face*, the Initiative's proposed Section 18.20.060 of the County Zoning Code requires that remediation requirements for an oak removal permit "shall include" compliance with the Oak Management Plan's BMPs during construction activities. (Initiative, ZC, § 18.20.060(E)(1), JA 67.) *On its face*, this proposed section also specifies that compliance with such BMPs is necessary to achieve a three-to-one replace ratio for oak tree loss when the applicant does not choose

to permanently preserve comparable, on-site oak trees. (*Id*., ZC § 18.20.060(E)(3, JA 67).) Without such compliance, the Initiative specifies *on its face* that remediation would not be "adequate" and that an oak removal permit cannot be issued. (*Id*., ZC § 18.20.060(D)(3), JA 67.)

In concluding the portions of the Oak Woodland Management Plan the Initiative referenced were part of the Initiative's text, the County Registrar engaged in precisely the type of "straightforward comparison" of the Initiative and applicable law that was required. (*Alliance for a Better Downtown Millbrae*, *supra*, 108 Cal.App.4th at p. 133.) He plainly saw that the Initiative relied on the Plan's BMP requirements as a *substantive* requirement for which a permit applicant would need to achieve compliance and that the relevant text of the Plan's appendix was not included with the petition. Unlike in *Alliance for a Better Downtown Millbrae*, upon which Appellants heavily rely, the Registrar did not "exercise adjudicative powers and consider extrinsic evidence" in making his determination. (*Id*., at p. 136.) To the contrary, the violation of the full text requirement was glaringly apparent from the Initiative itself.

It is the Appellants, rather, who advocate for the consideration of extrinsic evidence in support of the Initiative. Nowhere is this more apparent than in their discussion regarding the nature of BMPs, which they argue are "flexible" and thus subject to improvement. (Appellants Opening Brief, 38-39.) While the County staff responsible for preparing the Oak Woodland Mitigation Plan may or may not believe that to be true, an elections official cannot be expected to have sufficient experience or understanding to make that determination himself. In this case, whatever the Appellants' intent may have been concerning how the Plan's BMPs might evolve after the Initiative's adoption, the Initiative clearly stated that the BMPs that *then* existed would be used as substantive requirements for approval of oak removal permits. Because the provisions of the Plan that contained those *existing* BMPs were not included, the County Registrar could readily determine that a critical part of the Initiative was missing. This omission

involved more than just the absence of "information an informed voter would want." (*We Care—Santa Paula v. Herrera* (2006) 139 Cal.App.4th 387, 391.) It left voters without the ability to review the provisions that would govern how ranchers, farmers, vintners, and others in AW-zoned properties could meet some of the remediation requirements necessary for obtaining oak removal permits.

Thus, although the Appellants argue the County Registrar's rejection of the Initiative exceeded his ministerial duty to review the Initiative for statutory compliance, it is actually *their* interpretation that would violate that standard. Essentially, the Appellants advocate that the Registrar should have understood the BMPs were somehow not as important to, or a necessary component of, a full understanding of the Initiative's overall scheme when the plain language of the Initiative stated otherwise. The Appellants thus expected the Registrar to engage in the type of subjective analysis that might ordinarily be reserved for planning officials, city attorneys, or county counsels. Most, if not all, election officials would not have the background to make such an interpretation.

Indeed, the land use and environmental regulations of the Initiative at issue are just a few of broad subjects for which the local initiative process has been used. The complexity of these and many other subjects local governments regulate is beyond the customary expertise election officials can be expected to have. Such officials and their staffs are trained only in the procedural requirements governing initiatives and the other elections they administer—and even these requirements are laden with their own complexities. It is for good reason, therefore, that the cases interpreting the full text requirement forbid elections officials from making judgment calls about the initiatives they review. Elections officials do not have, nor should be expected to have, the qualifications necessary to make such determinations.

Viewed in this light, this Court should have little difficulty concluding that the Registrar acted properly in rejecting the Initiative. The express language of the Initiative

adopted the Oak Woodland Mitigation Plan's BMPs as substantive requirements for obtaining the oak removal permit the Initiative required. A straightforward review of the Initiative revealed, however, that the Initiative did not include the relevant portions of the Plan. Because this defect was apparent from the text of the Initiative itself, it would not have been proper for the Registrar to have certified the Initiative. In rejecting the Initiative, the Registrar clearly acted consistently with well-established case authority prohibiting him from exercising his subjective judgment to excuse the Initiative's critical omission.

For these reasons, a ruling from this Court affirming the rejection of the Initiative would neither break new ground nor be exceptional in any regard. Such a ruling would only add to a long, unbroken line of cases confining election officials to purely ministerial reviews of proposed initiatives. If a contrary ruling were issued, in contrast, it is difficult to envision how election officials would understand how to discharge their duties when faced with a situation as in this case, in which substantive components of an initiative are stated in documents outside the initiative text itself. What standards would govern when election officials should conclude the other documents are part of the initiative text and when they should not? How, moreover, could election officials answer that question given the broad scope of subjects initiatives might cover and given their lack of expertise in those subjects? And in light of the more than 500 cities and counties in the State, how could a reasonable degree of uniformity be achieved such that initiative proponents in different jurisdiction would be subject to the same standards?

As there are no reasonable answers for any of these questions, the folly of the Appellants' position is easily apparent. If accepted, the Appellant's position would be unworkable and would only cause confusion among election officials statewide. This Court should accordingly decline to expose cities and counties to such anomalous results and reaffirm the clear, bright-line standard that has governed election officials' duties for several decades.

V. CONCLUSION

For the reasons described above, the League and CSAC request that the Court affirm the Superior Court decision below.

Respectfully submitted,

Dated: December 23, 2016

COTA COLE LLP

By: /s/ *Derek P. Cole*
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League of California Cities and
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Counties

CERTIFICATE OF COMPLIANCE

I certify that pursuant to California Rules of Court, rule 8.204, the attached brief is proportionately spaced, has a typeface of Times New Roman 13 point or more. I further certify that the attached brief contains 3,652 words as calculated by the Microsoft Word 2010 word processing program, which is within the 14,000-word limitation imposed for Respondents' briefs.

Dated: December 23, 2016

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