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9 IN THE UNITED STATES DISTRICT COURT
 10 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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

15 Plaintiffs,

16 v.

17 **DONNA NORRIS, et al.,**

18 Defendants.

09-cv-0897-BEN-JMA

**INTERVENOR STATE OF
 CALIFORNIA'S REPLY BRIEF IN
 SUPPORT OF INTERVENOR'S
 MOTION FOR SUMMARY
 JUDGMENT**

Date: August 8, 2011
 Time: 10:30 a.m.
 Dept: 3
 Judge: The Honorable Roger T.
 Benitez
 Trial Date: N/A
 Action Filed: 4/28/2009

1 **I. THE DISCLOSURE REQUIREMENT IS CONSTITUTIONAL. [COUNT 1]**

2 Plaintiffs' challenge to the disclosure requirement suffers from a fatal shortcoming:
 3 Plaintiffs present no evidence that the requirement places a burden on the First
 4 Amendment rights of those who use the initiative process. Plaintiffs are unable to identify
 5 any proposed initiative anywhere in California that failed for want of a proponent. The
 6 reality is that California has the most active local-initiative system in the country.¹ The
 7 sum of plaintiffs' evidence is that one Californian – plaintiff Larry Breitfelder – now says
 8 that he will never again act as an initiative proponent if his name must appear on the
 9 initiative petition. (Plaintiffs' Opp. at p. 20, l. 26.) This is not enough; it is not even close.
 10 *Cf. Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 197-198
 11 (1999) (“Evidence presented to the District Court, that court found, ‘demonstrated that
 12 compelling circulators to wear identification badges inhibits participation in the
 13 petitioning process.’”)

14 The bulk of plaintiffs' opposition argues that the disclosure provision is subject to
 15 strict scrutiny. (See Plaintiffs' Opp. at pp. 13-20.) This is wrong. An initiative petition is
 16 a non-public forum subject to reasonable government regulation. (See Intervenor's Opp.
 17 to Plaintiffs' Motion for Summary Judgment at pp. 8-11.) Even if an initiative petition
 18 were subject to general First Amendment law applicable to compulsory disclosure statutes
 19 in the electoral context, it would be subject to the exacting scrutiny test recently
 20 announced in *Doe v. Reed*, 130 S.Ct. 2811, 2818 (2010). The challenged disclosure
 21 provision, which applies only to initiative petitions, and to a maximum of three people,
 22 passes either test.

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26 ¹ See Tracy M. Gordon, *The Local Initiative in California* (Public Policy Institute of
 27 California, 2004), p. v. (available at <http://www.ppic.org/main/policyarea.asp?i=5&view=all>);
 28 California Secretary of State, *Report on Municipal Initiative Measures During 2009-2010*
 (EC § 9213) [Waters Decl., Exh. 4].

1 **II. THE REQUIREMENT THAT INITIATIVE PROPONENTS BE ELECTORS IS**
 2 **CONSTITUTIONAL. [COUNT 2]**

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

4 *The initiative petition with its notice of intention is not a handbill or*
 5 *campaign flyer — it is an official election document subject to various*
 6 *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.

7 *San Francisco Forty-Niners v. Nishioka*, 75 Cal.App.4th 637, 648 (Cal.App. 1999)

8 (emphasis added). Because an initiative petition is a legislative document, it is
 9 legitimately limited to members of the legislative body, in this case the electorate. The
 10 distinction between electors and non-electors is manifested in a wide range of elections
 11 statutes. Only electors are allowed to vote. Cal. Const., art. II, § 2. Only electors are
 12 allowed to run for public office. Cal. Const., art. V, § 2 [Governor]; art. IV, § 2(c)
 13 [Legislature]. Only electors are allowed to sign initiative petitions. Cal. Const., art. II, §
 14 8(b). Only electors are allowed to sign nominating papers necessary to qualify candidates
 15 for the ballot. § 8060. And only electors (elected legislators) are allowed to introduce
 16 bills to the Legislature. (Waters Decl. in Opp. to Plaintiffs' Motion for Summary
 17 Judgment, Exh. 5.)

18 Plaintiffs' challenge rests almost entirely on a recent Supreme Court decision which
 19 invalidated a federal law that prohibited all corporate independent expenditures in
 20 connection with federal elections. *Citizens United v. Federal Election Com'n*, 130 S.Ct.
 21 876, 913, 917 (2010). Specifically, plaintiffs rely on the Court's statement that
 22 "Government may not suppress political speech on the basis of the speaker's corporate
 23 identity." *Id.*, 130 S.Ct. at 913. But *Citizens United* did not purport to grant to
 24 corporations a right to perform primarily legislative acts such as proposing an initiative.
 25 (See Intervenor's Opp. to Plaintiffs' Motion for Summary Judgment at pp. 18-19.) The
 26 Ninth Circuit has declined to extend *Citizens United* to corporate speech other than
 27 independent expenditures. *Thalheimer v. City of San Diego*, 2011 WL 2400779, *14 (9th
 28 Cir. 2011).

1 In the present case, California has drawn a functional line between electors (who can
2 propose and vote on initiative proposals) and non-individuals (who cannot). The First
3 Amendment does not prohibit that distinction. See *Thalheimer*, 2011 WL 2400779, *14.

4 **III. THE CHALLENGED STATUTES ARE NOT UNCONSTITUTIONALLY VAGUE.**
5 **[COUNTS 3-5]**

6 A statute's vagueness exceeds constitutional limits if its "deterrent effect on
7 legitimate expression is both real and substantial, and if the statute is not readily subject to
8 a narrowing construction by the state courts." *California Teachers Ass'n v. State Bd. of*
9 *Educ.*, 271 F.3d 1141, 1151 (9th Cir. 2001) (internal citation and ellipsis omitted). For
10 several reasons, plaintiffs have not met their burden to establish that the challenged
11 statutes chill any substantial amount of protected speech.

12 First, California has the most active local initiative system in the country.

13 Second, the typical vagueness challenge is to a statute that imposes criminal or civil
14 sanctions. See *Buckley v. Valeo*, 424 U.S. 1, 40-41 (1976) (criminal sanctions for
15 violations of Federal Election Campaign Act); *Grayned v. City of Rockford*, 408 U.S. 104,
16 106 (1972) (civil fine for violation of noise ordinance); *Human Life of Washington Inc. v.*
17 *Brumsickle*, 624 F.3d 990, 1020 (9th Cir. 2010) (civil penalties and criminal sanctions for
18 violation of state campaign finance disclosure law). Here the challenged statutes impose
19 neither criminal nor civil sanctions. The only negative consequence of not complying
20 with the challenged statutes is disqualification of an initiative proposal. But the proposal
21 can always be re-submitted, which is what happened here.

22 Third, recognizing that there is some ambiguity in all statutes, California courts have
23 developed a doctrine of "substantial compliance" to protect the rights of those who
24 propose initiatives:

25 [T]echnical deficiencies in referendum and initiative petitions will not
26 invalidate the petitions if they are in "substantial compliance" with
27 statutory and constitutional requirements. A paramount concern in
28 determining whether a petition is valid despite an alleged defect is
whether the purpose of the technical requirement is frustrated by the
defective form of the petition.

1 *Assembly of State of Cal. v. Deukmejian*, 30 Cal.3d 638, 652 (1982). The doctrine of
2 substantial compliance has been invoked on several occasions to forgive minor mistakes
3 in petitions. *See California Teachers Assn. v. Collins*, 1 Cal.2d 202, 204 (Cal. 1934)
4 (court orders registrar of voters to file initiative petition whose title was set out in 12-point,
5 as opposed to 18-point, type); *Deukmejian, supra*, 30 Cal.3d 638, 646, 651 (referendum
6 petitions asking for signers' "address as registered to vote," as opposed to "residence
7 address" required by Elections Code, accepted for filing in light of long-standing practice
8 of county registrars to accept such petitions); *Zarembert v. Superior Court*, 115
9 Cal.App.4th 111, 119 (Cal.App. 2004) (omission of short title on each page of referendum
10 petition does not disqualify petitions where each page contained statement "Referendum
11 Against an Act Passed by the Legislature").

12 The bottom line is that ambiguities in statutes will not bar initiative proposals so
13 long as the clearly legitimate scope of a statute is complied with. Unfortunately for the
14 plaintiffs in the present case, they could not take advantage of this doctrine because
15 California law is clear that petitions that omit the names of the initiative's proponents
16 must be rejected. *See* 83 Ops.Cal.Atty.Gen. 139, 142 (2000) ("the city clerk is required to
17 reject a petition that does not contain a notice of intent with the name or names of the
18 proponents of the initiative"; *Myers v. Patterson*, 196 Cal.App.3d 130, 138-39 (1987).
19 But this is not an indictment of the California local initiative system, which remains wide-
20 open, robust, and open to all electors.

21 The record is clear that the challenged statutes do not impose a substantial chill on
22 protected speech. Any remaining ambiguities in the statutes can be resolved by California
23 courts using well-established rules of statutory interpretation. As a result, plaintiffs'
24 vagueness challenge fails.

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CONCLUSION

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

Dated: August 1, 2011

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Case Name: **Chula Vista Citizens, et al. v.
Donna Norris, et al.**

No. **09-cv-0897-BEN-JMA**

I hereby certify that on August 1, 2011, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**INTERVENOR STATE OF CALIFORNIA'S REPLY BRIEF IN SUPPORT OF
INTERVENOR'S MOTION FOR SUMMARY JUDGMENT**

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 1, 2011, at Sacramento, California.

George Waters
Brenda Apodaca

Declarant

/s/ George Waters
/s/ Brenda Apodaca

Signature