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9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SACRAMENTO

12
13 WILLIAM C. VELASQUEZ)
INSTITUTE, a Texas Non-Profit)
14 Corporation, CONGRESS ON RACIAL)
EQUALITY OF CALIFORNIA LEGAL)
15 DEFENSE FUND, a California Non-Profit)
Corporation,)

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Petitioners,

v.

BRUCE McPHERSON, as Secretary of)
State for the State of California, and)
19 GEOFF BRANDT, as the Acting State)
20 Printer with the Office of the State)
Publishing,)

Respondents.

EDWARD J. (“TED”) COSTA, SIDNEY)
S. NOVARESI, ARTHUR LAFFER,)
24 JIMMIE JOHNSON,)

Real Party In Interest.)

CASE NO.:

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PETITIONERS’ PETITION FOR
WRIT OF MANDATE.**

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1 prosecute this action.

2 STATEMENT OF FACTS

3 A. the Apparent “Switch in Time” Regarding the Redistricting Ballot Initiative.

4 The sworn declaration filed in Superior Court by an official of the Department of
5 Justice of the State of California,¹ discloses an disturbing apparent course of conduct
6 regarding a proposed initiative measure submitted to the Secretary of State by the Real
7 Parties in Interest and certified as Proposition 77 for inclusion on the November 8, 2005
8 Special Statewide Election ballot. These claims, if true would undermined the integrity of
9 the initiative process, misled voters who considered support for the proposed initiative, and
10 deprive Petitioners, and their constituents, of their voting and civil rights.

11 There is a very precise and strict procedure for proposing and promoting ballot
12 initiatives: This is necessary so as not to defraud the public as to what is at issue in the
13 proposed initiative.

14 First, a proposed initiative must be submitted to the Attorney General for preparation
15 of a title and summary. The full text must be submitted. See Declaration of Tricia Knight,
16 Initiative Coordinator, State of California Department of Justice, at ¶¶ 2,3 (hereinafter,
17 “Knight Declaration”) (attached as Exhibit “A” to Petitioners’ Request for Judicial Notice;
18 the sworn declaration was previously filed in the Superior Court of California, as reflected
19 in the Request for Judicial Notice).

20 After submission, and to ensure that an accurate summary goes to the Legislature
21 and the People, only technical, non-substantive changes are allowed. Any substantive
22 changes will re-start the entire process. Id. at ¶ 3. This entire structure is designed to
23 ensure the integrity of the initiative process.

24 Once the Attorney General’s office has finalized a title and summary, a copy is sent
25 to the California Secretary of State’s office as well as the Legislature. Id. at ¶ 4. In

26 ¹ Declaration of Tricia Knight filed in Lockyer v. McPherson, et al. (Ted Costa, et al, the Real Parties in
27 Interest) Case No. 05CS00998 (filed Sacramento County, July 8, 2005)

1 addition, a copy is provided to the proponent. Id.

2 In this case, Reapportionment Initiative Constitutional Amendment (the “initiative”
3 and/or the “ initiative”), as originally submitted and approved by the Attorney General
4 would amend Article XXI of the California Constitution by requiring the adjustment of
5 district boundaries to be accomplished by a three-member panel of retired judges,
6 nominated by the Judicial Council and the Legislative Leadership (the Speaker of the
7 Assembly, the Minority Leader of the Assembly, the President Tempore of the Senate and
8 the Minority Leader of the Senate) and selected by lot by the Clerk of the Assembly.
9 The proponent of the redistricting initiative was Edward J. “Ted” Costa, who, along with
10 others, had submitted at least four reapportionment proposals in the past, all of which were
11 unsuccessful. Id. at ¶ 5. In all, since April 2004, a total of 11 proposed initiatives
12 pertaining to the reapportionment of Senatorial, Assembly, Congressional and/or Board of
13 Equalization districts were submitted to the Attorney General. Id.

14 **B. The Substantial and Material Differences Between the Original Initiative**
15 **Approved by the Attorney General and the Proposed Initiative Submitted to**
16 **the Secretary of State**

17 There exists substantial and material differences between the text of the initiatives
18 submitted to the Attorney General (for which he prepared a title and summary of the
19 initiative) and certified by the Secretary of State for inclusion on the California November
20 2005 ballot. These initiative submitted to the Secretary of State were not approved by the
21 Attorney General.

22 The text of the initial proposed initiative was submitted to the Attorney General for
23 the preparation of a title and summary of the measure on or about December 7, 2007.
24 Knight Declaration at ¶ 6. (“Original Initiative”).

25 Section 2 of the proposed Initiative included language for the “Redistricting Reform:
26 the Voter Empowerment Act Initiative Measure to be Submitted Directly to the Voters.”
27

1 Knight Declaration at ¶¶ 6-7, and attached exhibits.

2 This section provides amendments to Articles XXI of the California Constitution.
3 Section 1(c)(2)(A) provides for the nomination of twenty four retired judges to oversee
4 redistricting. The original language of the initiative submitted to the Attorney General
5 provides, in part, that:

6 “In sufficient time to allow the appointment of Special Masters, the Judicial
7 Council shall nominate by lot twenty-four retired judges willing to serve as
8 Special Masters.” Original Initiative, Section 2; Section 1(c)(2)(A) (emphasis
9 added).

10 The section also provides that the two largest political Petitioners in California “shall be
11 equally represented among the nominated retired judges.” Id. (emphasis added).

12 A minor, non-substantive change was received by the Attorney General’s office on January
13 28, 2005. Knight Declaration at ¶ 8. Critically, “no changes to the text” of the initiative
14 were made . . . nor were any sought by Mr. Costa. Id. Equally critical, “[n]o further
15 requests to make changes” to the initiative “were received prior to the issuance of the title
16 and summary for [the] proposed measure.” Id.

17 Mysteriously, however, the measure changed in significant form after it left the
18 control of the Attorney General: The version submitted to the Secretary of State changed
19 the “Nomination” language to “select” language. The revised version states that the
20 Judicial Council “shall select by lot twenty-four retired judges” willing to serve as Special
21 Masters. Revised Initiative, attached to Knight Declaration as exhibit 9, Section 2; Section
22 1(c)(2)(A) (Emphasis added). The section also provides that the two political parties “shall
23 be equally represented among the selected retired judges.” Id. (emphasis added).

24 The original initiative also provided that a “retired judge selected to serve as a
25 Special Master” was to pledge not to run for election in a district drawn by the judge. This
26 language was changed to read “retired judge appointed to serve as a Special Master”

1 Id.

2 The legislative leadership, the Speaker of the Assembly, the minority leader of the
3 Assembly, the President from Tempore of the Senate and the Minority Leader of the
4 Senate, “shall each nominate” three retired judges “from the pool of retired judges
5 nominated by the Judicial council.” Original Initiative Section 1(c)(2)(C). Each of these
6 legislative leaders would then have one peremptory challenge. Id. From this remaining
7 list of nominees, the Chief Clerk of the Assembly is to draw by lot three persons to serve as
8 Special Masters, with at least one special master from each of the two political parties. The
9 original initiative provided that:

10 if the drawing is unable to produce at least one Special master from each of
11 the two largest political parties, the drawing from the Special Master from the
12 political Party not represented from the list of the remaining nominees shall
13 be made from the original pool of the twenty for retired judges nominated by
14 the Judicial council.

15 This language was changed in the initiative submitted to the Secretary of State to read:

16 If said list of remaining nominees does not include a retired judge from each
17 of the two largest political parties, the drawing from the Special Master from
18 the absent political parties shall be made from the original pool of twenty four
19 retired judges selected by the judicial council.”

20 Id.

21 Thus, the original initiative and the version submitted to the Secretary of State
22 differs substantively and materially, not in mere semantics. The changed verbs potentially
23 mislead voters and persons who were asked to sign these petitions that three different
24 institutions (the Judicial Council, the legislative leadership, or the Clerk of the Assembly)
25 were empowered to “select” the panel of Special Masters. If this “bait and switch” tactic
26 were allowed to stand, it would undermined the integrity of the initiative process, misled
27

1 voters who considered support for the proposed initiatives, and deprive Petitioners, and
2 their constituents, of their voting and civil rights.

3 **C. The Direct, Immediate, and Vital Interests of the Petitioners.**

4 Petitioners represent and serve communities which have been traditionally under
5 represented in the political process, and which are protected the Voting Rights Act.
6 Petitioners have also had a traditional role in encouraging full participation in the political
7 process, including the California redistricting process. They represent constituents most
8 likely to be adversely affected by the change the text of the proposed initiative, and thus
9 have standing to pursue litigation in their own right and to conduct discovery into the legal
10 theories they raise.

11 The William C. Velasquez Institute (“WCVI”) is an organization with a direct, vital
12 interest in this litigation. WCVI is dedicated to the empowerment of disenfranchised
13 voters, especially those in the Latino community. See Petition for Writ of Mandate. To that
14 end, WCVI regularly conducts polls to measure Latino attitudes on the major issues of the
15 day, develops policy positions on those issues, asserted such policy position on behalf of
16 the Latino community, and conducts education campaigns to inform members of the Latino
17 Community on issues that affect them.

18 In addition, WCVI has been actively involved in promoting active participation in
19 the political process, especially of disenfranchised communities. This includes encouraging
20 Latinos to register, vote, and become involved in the political process. *Id.*, at ¶3. More
21 importantly, WCVI has been active in 1990 and 2000 California Redistricting process,
22 including making redistricting mapping technology and data available to communities in
23 California so that they could participate in the restricting process.

24 Moreover, just before June 23, 2005, Antonio Gonzalez first became aware of
25 possible discrepancies between the text attached to the petitions being circulated for
26 signature on behalf of the proposed initiative and the text of the initiative SA2004RF0037,
27

1 Amdt. #1-NS submitted to the Attorney General by the proponents for which the Attorney
2 General prepared the title and summary. On or about June 23, 2005, Mr. Gonzalez, sent a
3 letter on behalf of WCVI, to the Secretary of State and the Attorney General requesting
4 that they investigate the matter and determine if any additional action was required. Id.

5 Similarly, CORE-CA/LDEF is a direct development from the Congress of Racial
6 Equality, and it is an organization with a long-standing, direct and vital interest in securing
7 the rights of voters throughout the state of California. The original antecedent was the third
8 oldest of the major historical Civil Rights organizations of the United States, and was
9 originated in the 1940's by inventing the Non-Violent Freedom Rides and Sit-Ins of the
10 40's, 50'and 60's. It was the antecedents of CORE-CA/LDEF, founded by James Farmer
11 in Chicago in 1942, which introduced (created) the concept of full scale confrontation
12 through Non-Violent Resistance to laws that were immoral but which had been adhered to
13 since the end of Reconstruction and the Plessy-vs-Ferguson decision by which the former
14 Supreme Courts had enshrined the fallacious concept of 'Separate but Equal as the law of
15 the land.

16 CORE-CA/LDEF has also established a Legal Defense and Education Fund, and is
17 therefore uniquely situated – with its widespread membership among the African-American
18 community, to represent that community, which, together with the membership [and
19 populations] represented by the co-Petitioners and, stand to be particularly adversely
20 impacted by the unlawful conduct of the State with respect to voting and redistricting
21 rights.

22 CORE-CA/LDEF has also had significant historical involvement in the efforts to
23 enact changes to the law regarding redistricting in both the 1991 and 2001 redistricting
24 processes. In the 1991 California Redistricting that was based on the 1990 Decennial
25 Census, CORE-CA/LDEF submitted a complete set of maps and provided testimony at all
26 of the Assembly and Senate Committee Hearings on Redistricting and also met with the
27

1 Governor's Office to represent basic concerns of the minority "communities of interest."
2 CORE-CA, alongside MALDEF, in the Redistricting after the 2000 Census was one of the
3 only Civil Rights organizations which prepared a complete and comprehensive set of
4 proposed redistricting maps covering the entire state. Some of the CORE-CA
5 recommended lines and concepts were adopted in both the 1991 and 2001 Statewide
6 Redistricting and by the County of Los Angeles in their 1992 and 2002. Redistricting
7 processes.

8 **D. Petitioners Bring Substantial Legal and Factual Material to this Issue.**

9 As discussed in detail below, Petitioners bring critical legal and factual insights to
10 this lawsuit, and would be particularly affected by the outcome of this immensely important
11 issue. Petitioners have raised substantial, serious and unique legal issues, including
12 potential violations of the California Constitution and Elections Code, the Equal Protection
13 Clause of the United States Constitution, and the federal Voting Rights Act. Petitioners,
14 therefore, seek to secure their rights to take discovery in order to investigate the potentially
15 serious allegations raised by Petitioners.

16
17 **ARGUMENT**

18 **I. THE TEXT OF INITIATIVE CERTIFIED BY THE**
19 **SECRETARY OF STATE FOR INCLUSION ON THE**
20 **CALIFORNIA NOVEMBER 2005 BALLOT WAS NOT**
21 **APPROVED BY THE ATTORNEY GENERAL AND SO**
22 **DOES NOT COMPLY WITH THE CALIFORNIA**
23 **CONSTITUTIONS AND ELECTION CODE**
24 **REQUIREMENTS FOR PLACEMENT ON THE BALLOT.**

25 The California Constitution and the Elections Code dictate the requirements for
26 handling the initiative petitions. The California Constitution requires that:

1 Prior to circulation of an initiative or referendum petition for signatures, a
2 copy shall be submitted to the Attorney General who shall prepare a title and
3 summary of the measure as provided by law.

4 Cal. Const., art II, §10(d); see also Cal. Elec. Code §9002; Senate of State of California v.
5 Jones (1999) 21 Cal.4th 1142, 1149, 90 Cal.Rptr.2d 810, 988 P.2d 1089; Zaremborg v.
6 Superior Court (Shelly) (2004) 115 Cal.App.4th 111, 116, 8 Cal.Rptr.3d 723. While the
7 Elections codes speaks of submitting a “draft” of the initiative,² the Constitutional provision
8 makes no such distinction. The Constitution requires that a copy of the initiative to be
9 circulated among petitioners must be first delivered to the Attorney General with the
10 request for the preparation of a title and summary. Cal. Const., art II, §10(d).

11 “The main purpose of [the title and summary] requirements is to avoid misleading
12 the public with inaccurate information.” Zaremborg v. Superior Court (Shelly), supra, 115
13 Cal.App.4th at 116 citing Amador Valley Joint Union High Sch. Dist. v. State Bd. of
14 Equalization (1978) 22 Cal.3d 208, 243, 149 Cal.Rptr. 239, 583 P.2d 1281; see also
15 Clark v. Jordan (1936) 7 Cal.2d 248, 252, 60 P.2d 457.

16 The California Constitution also provides that the “Legislature shall provide the
17 manner in which petitions shall be circulated, presented, and certified, and measures
18 submitted to the electors.” Cal. Const., art II, §10(e).

19 Upon receipt of the petition the Attorney General is required to prepare a “summary
20 of the chief purposes and points of the proposed measure.” Cal. Elec. Code §9004.
21 Immediately upon completion of the title and summary, the “Attorney General shall
22 forthwith transmit copies of the measure and summary to the Senate and Assembly.” Cal.
23 Elec. code §9007. The appropriate legislative committees may then hold public hearings on
24 the subject. Id. However, the section does not grant to the legislature authority to “alter the

25
26 ² Prior to the circulation of any initiative or referendum petition for signatures, a draft of the proposed
27 measure shall be submitted to the Attorney General with a written request that a title and summary of the chief purpose
and points of the proposed measure be prepared. Cal. Elections Code §9002 (emphasis added).

1 measure.” Id.

2 In addition, the Attorney General must submit a copy of the title and summary to the
3 Secretary of State “within 15 days of receipt of the final version of a proposed initiative
4 measure,” or within 15 days after “receipt of the fiscal estimate or opinion prepared by the
5 Department of Finance and the Joint Legislative Budget Committee” if required. Id. The
6 Code further requires that every proposed initiative measure, prior to circulation, shall
7 include at the top of the petition (a) the summary prepared by the Attorney General (on
8 each petition’s page), (b) the summary prepared by the Attorney General (on petition
9 section preceding the text), and (c) the statement “Initiative measure to be submitted
10 directly to the voters” before the Attorney General’s summary. Cal. Elec. Code §9008.

11 Most importantly, the code provides specific formats for petition to be circulated for
12 signatures. The Elections Code requires the specific heading of a proposed initiative
13 measure. Cal. Elec. Code. §9002. In addition, “[a]ny initiative or referendum petition may
14 be presented in sections, but each section shall contain a full and correct copy of the title
15 and text of the proposed measure.” Cal. Elec. Code §9014 (emphasis in the original).

16 Chase v. Brooks (1986) 187 Cal.App.3d 657, 232 Cal.Rptr. 65 (the petitions at issue were
17 fatally defective for not including the complete text of the ordinance on which the
18 referendum was sought); Creighton v. Reviczky (1985) 171 Cal.App.3d 1225, 217
19 Cal.Rptr. 834 (referendum petition did not contain full text of ordinance sought to be
20 repealed).

21 The signed petitions must be submitted to the local elections official who must
22 certify the signatures on the petitions. Cal. Elections Code. §9030. The initiative is
23 proposed by “presenting to the Secretary of State a petition that sets forth the text of the
24 proposed statute or amendment to the Constitution . . .” Cal. Const., Art. II, §10(b), who
25 must then submit the measure at the next general or special election (at least 131 days after
26 it qualifies). Cal. Const., Art. II, §10(c). However, the Elections code specifically requires

1 that:

2 Officers required by law to receive or file in their offices any initiative or
3 referendum petition shall not receive or file any initiative or referendum
4 petition not in conformity with this article.

5 Cal. Elec.Code §9014.

6 The proponents of the proposed initiative filed for a version of the initiative for
7 certification by the Secretary of State which had different text from the initiative filed with
8 the Attorney General.

9
10 **II. THE DEFECTS IN THE INITIATIVE**
11 **CERTIFIED BY THE SECRETARY OF**
12 **STATE ARE SIGNIFICANT CHANGES**
13 **FROM THE INITIATIVE SUBMITTED TO**
14 **THE ATTORNEY GENERAL AND DOES**
15 **NOT AMOUNT TO SUBSTANTIAL**
16 **COMPLIANCE WITH THE ELECTIONS**
17 **CODE.**

18 There is a judicial policy to apply a liberal construction to the power of initiative and
19 referendum wherever it is challenged in order that the right be not improperly annulled, and
20 if doubts can reasonably be resolved in favor of the use of this reserve power, courts will
21 preserve it. Chase v. Brooks (1986) 187 Cal.App.3d 657 , 232 Cal.Rptr. 65, citing
22 Assembly v. Deukmejian, 30 Cal.3d 638, 652. However, the doctrine of substantial
23 compliance cannot save a petition that misinforms the voters or fails to inform the voters of
24 information necessary to "exercise intelligently their rights"
25 Ruiz v. Sylva (2002) 102 Cal.App.4th 199, 125 Cal.Rptr.2d 351, quoting Clark v. Jordan
26 (1936) 7 Cal.2d 248, 252, 60 P.2d 457, 106 ALR. 549. Nor may it be "relied upon to save

1 carelessly or negligently prepared petitions." Id; California Teachers Assn. v. Collins
2 (1934) 1 Cal.2d 202, 205, 34 P.2d 134.

3 The courts have held that technical defects of form may be excused if the petitions
4 substantially comply with the requirement. Ibarra v. City of Carson (1989) 214 Cal.App.3d
5 90, 262 Cal.Rptr. 485. See, e.g., California Teachers Assn. v. Collins (1934) 1 Cal.2d 202
6 (where the only defects were the failure to include the short title in the appropriate type, and
7 on the first page of the petition, there was nevertheless substantial compliance with the
8 statute); Ruiz v. Sylva, supra, 102 Cal.App.4th 199 (although the reasons for recall and
9 responses by the recall targets were not printed in uniform type as required by the elections
10 code, they were valid under the doctrine of substantial compliance since the only deviation
11 was the type of the printing).

12 Here, the requirements of both the Constitution and statutory provision concerning
13 the information to be included on proposed initiative petitions are "intended to and do give
14 information to the electors who are asked to sign the initiative petitions."

15 California Teachers Assn. v. Collins, 1 Cal.2d 202, 204. "Where the purpose of the
16 statutory requirement is to give information to the public to assist the voters in deciding
17 whether to sign or oppose the petition, the substantial compliance argument is often
18 rejected and strict compliance held essential." Ibarra v. City of Carson (1989) 214
19 Cal.App.3d 90, 99, 262 Cal.Rptr. 485 (signatures obtained before a notice of intent was
20 posted in three public places since there was no newspaper of general circulation in the city,
21 were properly disqualified, even though the notice was published in a newspaper of general
22 circulation in the county); See also Clark v. Jordan (1936) 7 Cal.2d.248, 60 P.2d 457, 106
23 ALR 549 (including a title for a proposed initiative which was misleading in that it did not
24 accurately describe all of the purposes of the initiative was fatally defective and was not in
25 substantially compliance with the Constitution and statute); Hebard v. Bybee (1998) 65
26 Cal.App.4th 1331, 77 Cal.Rptr.2d 352 (while the proponents of the referendum were free to
27

1 include the number and text of the Ordinance (with no title), the statute did not allow the
2 proponents to include an inaccurate title); Chase v. Brooks (1986) 187 Cal.App.3d 657, 232
3 Cal.Rptr. 65 (the petitions at issue were fatally defective for not including the complete text
4 of the ordinance on which the referendum was sought); Creighton v. Reviczky (1985) 171
5 Cal.App.3d 1225, 217 Cal.Rptr. 834 (referendum petition did not contain full text of
6 ordinance sought to be repealed).

7 The text of the proposed initiative submitted to the Attorney General contemplates a
8 new method for readjusting the district boundaries for the California Assembly, Senate,
9 Congressional delegation, and Board of Equalization. The proposed initiative would have
10 the district lines drawn by a panel of Special Masters made up of retired Judges. The
11 proposed initiative submitted to the Attorney General included language wherein the
12 Judicial council and the Legislative Leadership (i.e., the Speaker of the Assembly, the
13 minority Leader of the Assembly, the President from Tempore of the Senate and the
14 Minority Leader of the Senate) would “nominate” retired California State and Federal
15 judges for possible service as Special Masters. This language was changed to provide that
16 the Judicial council and the Legislative Leadership would “select” retired judges for such
17 possible service.

18 However, there are important legal distinctions between the terms “nominate” and
19 “select” which could tend to confuse potential signatories of petitions and which make the
20 acceptance of the proposed initiative to the Secretary of State fatally defective.

21 Blacks Law Dictionary defines Nominate as: “To name, designate by name, or
22 appoint. To name designate or propose for election or appointment.” Blacks Law
23 Dictionary, at 1199 (revised fifth edition). Select is defined as “to take by preference from
24 among others; to pick out; to cull.” Id, at 1219. Thus, while the term “nominate” may
25 include the concept of appointing a retired judges, it also includes the concept of proposing
26 judges for selection by others. The term “select” is more restrictive, indicating a specific
27

1 designation among a number of candidates.

2 More importantly, the election statutes indicate that to nominate is to propose
3 candidates for election by the electorate. See Cal. Elec. Code § 8000 et seq. (provides for
4 the nomination of candidates for direct primaries to state wide public offices); Cal. Elec.
5 Code §10220 et seq. (provides for the nomination of candidates for local city election).
6 Compare Cal. Elec. Code §7100 (each congressional nominee shall “designate one
7 presidential elector and shall file his name and address with the Secretary of State); see also
8 Cal. Elec. Code §§7152 and 7354 (the official statement for the appointment of the
9 members to the Democratic and Republican state central committee distinguishes between
10 qualification as a member by appointment by the appropriate central committee,
11 nomination, or election to office, and the member of the central committee is asked to strike
12 out “parts inapplicable”)

13 The distinction between “select” and “nominate” is present in other legal arenas.
14 See, e.g., Cal. Rules of Court Appendix Div. 1 § 17(d) (in providing for the nomination of
15 grand jurors, Judges are encouraged to select candidates from the list provided by the jury
16 commissioner or otherwise to employ a nomination procedure to ensure broad-based
17 representation from the community); Cal. Gov. Code § 19995.6 (“Employees shall be
18 *nominated* for the award by the directors of the various state departments and agencies and
19 the Governor shall *select* from the persons so nominated the person to whom he or she shall
20 make the award.”) (emphasis added).

21 Courts also have made distinctions between the words “select” and “nominate”.
22 See Doyle v. Board of Supervisors of Contra Costa County (1988) 197 Cal. App.3d 1358,
23 243 Cal.Rptr. 572 (the Job Training Partnership Act requires the creation of Private
24 Industrial Councils (PIC) in given “service delivery area” to provide job training by the
25 private sector to youths and unskilled adults. The council is created by the chief elected
26 official of the “service delivery area,” who are also responsible the selection of council
27

1 members. The selection of council members are made from lists of nominations offered to
2 the officials by business organizations and other interested organizations in the service
3 delivery area); Reich v. Local 89, Laborers’ Int. Union of North America, AFL-CIO, 36
4 F.3d 1470 (9th Cir. 1994) (In a challenge to a Union election, the Union membership had
5 made a number of nominations, six nominees of which were disqualified. During a
6 meeting to nominate replacement candidates, the chairman selected three individuals from
7 the union members present and allowed them to nominate the replacement candidates. The
8 court ruled the election void and ordered a new election for the offices where he entire
9 Union membership could make nominations).

10 The distinction between the two words is a significant one that is misleading to the
11 voters signing the petition. This creates a substantive difference in language.

12 The language in the petition circulated and signed by the voters contain text which
13 now indicates the Judicial Council and Legislative leadership will “select” retired judges.
14 This can mislead voters to believe either that the Judicial Council, a body independent of
15 political influences, will “select” the judges, or that the legislative leadership, who will
16 represent the partisan interest of voters will “select” judges.

17 This is different from a system in which the Judicial Council and legislative
18 leadership “nominate” retired judges for selection by some else at a later time.

19 As mentioned above, the courts have rejected proposed initiatives and referendum
20 where text has been omitted, Chase v. Brooks (1986) 187 Cal.App.3d 657, 232 Cal.Rptr.
21 65; Creighton v. Reviczky (1985) 171 Cal.App.3d 1225, 217 Cal.Rptr. 834, or where the
22 title is misleading or inaccurate, Clark v. Jordan (1936) 7 Cal.2d 248, 60 P.2d 457, 106
23 A.L.R. 549; Hebard v. Bybee (1998) 65 Cal.App.4th 1331, 77 Cal.Rptr.2d 352 . How
24 much more defective is an initiative which contains changes not approved by the Attorney
25 General which are confusing, misleading and distort a prior text reviewed by the Attorney
26 General. The text submitted for qualification of the initiative for placement on the ballot
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1 differed substantively from the text approved by the attorney General for circulation, and
2 thus, violated the clear and unambiguous directions of California law as upheld by the
3 courts.

4
5 **III THE ACTIONS OF PROPONENTS OF THE PROPOSED**
6 **INITIATIVE MAY HAVE PERPETRATED A FRAUD**
7 **UPON THE PEOPLE OF THE STATE OF CALIFORNIA**

8 The proponents of the Proposed Initiative circulated a version of the petition which
9 was distinctly different from the version submitted to the Attorney General for preparation
10 of the title and summary of the measure. See Declaration of Tricia Knight. Letter of
11 William P. Wood, Undersecretary of State, to Louis Mauro Senior Assistant Attorney
12 General Dated July 1, 2005 (hereinafter “Wood Letter”), Exhibit B to Petition for Writ of
13 Mandate, and incorporated herein by reference. The Wood letter states, in part:

14 The initiative in question has been given the title “Reapportionment. Initiative
15 Constitutional Amendment.” by your office. We have been informed by the
16 proponent that the text printed on the petitions that were circulated for this
17 initiative differs from the text that was submitted to your office for the
18 preparation of the Attorney General’s title and summary.

19 Id.

20 Moreover, the changes to the text of the proposed initiative made by proponents of
21 the initiative are quite extensive. See Exhibit C to Petition for Writ of Mandate,
22 incorporated herein by reference, side by side comparison of differences between the
23 proposed initiative submitted to the Attorney General, and the text of the proposed initiative
24 circulated among the voters for signatures, included in a memo by Gibson Dunn and
25 Crutcher, counsel for proponents of the initiative, attached as Exhibit C to the Attorney
26 General’s Petition for Writ of Mandate (hereinafter “Side by Side Initiative Revisions”).

1 There are eleven changes listed in Side by Side Comparison of Initiative Revisions. These
2 include changes to “select” rather than “nominate” retired judges by the Judicial Council
3 and Legislative leaders, see Art. XXI, §§1(c)(2)(A), 1(c)(2)(B), 1(c)(2)(C), changes to the
4 certain time deadlines, see Art. XXI, §§1(c)(2)(C) and 1(c)(2)(E), and other changes, see
5 Art. XXI, §§1(c)(2)(F), 1(g), and 1(h).

6 These changes do not reflect correction of typographical errors, misspellings, minor
7 word omissions, or other technical problems. The changes appear to reflect a conscious,
8 systematic series of changes designed to correct substantive deficiencies or problems in the
9 proposed initiative submitted to the Attorney General. There is no record to indicate that
10 the proponents of the initiative ever advised the Attorney General or the Secretary of State
11 of these changes prior to July 1, 2005. Yet proponents of the proposed initiative circulated
12 the revised version among voters for signatures, a version of the proposed initiative not
13 reviewed by the Attorney General. In addition, the proponents of the initiative circulated
14 the petitions with the title and summary prepared by the Attorney General, even though the
15 Attorney General had not reviewed the petition circulated by the proponents of the initiative
16 or prepared the title and summary of the measure for the circulated petition.

17 The elections code provides:

18 Every person is guilty of a misdemeanor who:

19 (a) Circulating, as a principal agent, or having charge or control of the
20 circulation of, or obtaining signatures to, any state or local initiative,
21 referendum or recall petition, intentionally misrepresents or intentionally
22 makes any false statement concerning the contents, purport or effect of the
23 petition to any person who signs, or who desires to sign or who is requested
24 to sign, or who makes inquiries with reference to it, or to whom it is presented
25 for his or her signature.

26 Cal. Elec. Code §18650; see also Cal. Elec. Code §18660 (person who “make any false
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1 affidavit concerning any initiative, referendum, or recall petition or the signatures appended
2 thereto” can be fined or imprisoned).

3 At minimum it appears that the proponents misrepresented that the text of the
4 proposed initiative included in the circulated petition was submitted to the Attorney
5 General and that the title and summary were prepared for the text which accompanies the
6 petition. In addition, the circulated revised language for the proposed initiative
7 misrepresents the method by which the retired judges are “selected” to the Special Masters
8 Panel. Whether these misrepresentations were negligently or intentionally made has yet to
9 be discovered.

10 In addition, the penal code provides:

11 (a) Every person who knowingly procures or offers any false or forged
12 instrument to be filed, registered, or recorded in any public office within this
13 state, which instrument, if genuine, might be filed, registered or recorded
14 under any law of this state or of the United States, is guilty of a felony.

15 (b) Each instrument which is procured or offered to be filed, registered , or
16 recorded in violation of subdivision (a) shall constitute a separate violation of
17 this section.

18 Cal. Penal Code §115.

19 In this instance, if the proponents of the initiative filed with the Secretary of State a
20 petitions containing the revised text of the proposed initiative while representing that it was
21 the text reviewed by the Attorney General, and for who he prepared a title and summary as
22 required under Cal. Elec. Code §9004, it would appear they may have filed a false
23 documents and could be guilty of a felony.

24 Even if proponents of the proposed initiative did not act intentionally, at a minimum,
25 by revising the text of the proposed initiative, circulating the petition as complying with the
26 elections code, and submitting it to the Secretary of State for certification and placement on
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1 the November ballot, they have perpetrated a fraud upon the People of the State of
2 California.

3
4 **IV BECAUSE THE INITIATIVE AFFECTS THE VOTING**
5 **RIGHTS OF THE CITIZENS OF CALIFORNIA, AND RAISE**
6 **POTENTIAL VIOLATIONS OF THE FOURTEENTH**
7 **AMENDMENT OF THE U.S. CONSTITUTION AND THE**
8 **VOTING RIGHTS ACT, THE ANALYSIS OF COMPLIANCE**
9 **WITH CALIFORNIA STATUTE ARE SUBJECT TO STRICT**
10 **SCRUTINY**

11 Under the terms of the proposed initiative, the readjustment of the California
12 districts for Assembly, Senate, Congress and the Board of Equalization are to take place in
13 2006. However, the only data available upon which to base the readjustment of district
14 boundaries is the 2000 census data. The problem is the data will be six years old, with the
15 new census data to begin within four years of the proposed redistricting process. Because
16 different demographic and regional segments of California's population grow at different
17 rates, districts drawn using 2000 census will potentially violate the one person one vote
18 strictures of the Fourteenth Amendment of the United States Constitution. See
19 Reynolds v. Simms, 377 U.S. 533 (1964); White v. Wieser, 412 U.S. 783 (1973).

20 In addition, the different population growth rates for certain protected minorities
21 create the potential for vioaltions of the Section 2 and Section 5 of the Voting Rights Act,
22 42 U.S.C. §1973; Thornburg v. Gingles, 478 U.S. 30 (1986).

23 **A. Use of the 2000 Census Data in a 2006 Redistricting Process Will Result in a**
24 **Violation of the One Person One Vote Rule of the U.s. Constitution.**

25 The Equal Protection Clause requires substantially equal legislative representation
26 for all citizens in a State regardless of where they reside. Reynolds v. Simms, 377 U.S. 533,
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1 561 - 568 (1964). Legislators represent people, not areas, so weighting votes differently
2 according to where citizens happen to reside is discriminatory. 377 U.S. 562-563. See also
3 White v. Wieser, 412 U.S. 783 (1973) (in redistricting Congressional districts deviations of
4 greater than one percent between the largest and smallest Congressional district violation
5 the Equal Protection clause of the Fourteenth Amendment).

6 California's population increases approximately 16 percent each year. See Exhibit
7 2, Hanson, Bridges, Marcus, Vlahos, Rudy, LLP, Legal and Procedural Questions
8 Regarding Proposed Mid-Decade Redistricting in California, at 2, attached and
9 incorporated herein by reference; See also Exhibit 3, Staff Report, California Assembly
10 District Representation Committee, Tom Unberg Chair, Analysis of Mid-Decade
11 Redistricting. "In 2000 that equated to about 560,000 people, 'roughly equal to a city the
12 size of Bakersfield or a state the size of Vermont.'" Exhibit 2, at 2.

13 Moreover, the different segments of the California population grew at different rates
14 between the 1990 and 2000 censuses. The total California population grew at a rate of
15 13.8% between 1990 and 2000 (from 29,760,021 persons in 1990 to 33,871,648 persons in
16 2000). Declaration of Steve Ochoa, ¶ 5 (hereinafter the Ochoa Declaration).

17 During the same period, Latino and Asian populations in California grew at much
18 faster rates. The California Latino population grew by 42.6% (from 7,687,938 Latinos to
19 10,966,566 Latinos). Ochoa Declaration, at ¶6. Asian grew at a rate of 38.5% (from
20 2,710,353 Asians in 1990 to 3,752,596 Asians in 2000). Id, at ¶9.

21 The African American total population grew, although not as fast as the total
22 California population. The African American population grew at a rate of 4.3% (from
23 2,092,446 African Americans in 1990 to 2,181,926 African Americans in 2000). Id, ¶8.
24 The White population, however, actually decreased between 1990 and 2000. The White
25 population decreased by 7.1% (from 17,029,126 in 1990 to 15,816,790 in 2000). Id, at ¶7.

26 Moreover, different counties (i.e. regions of the state) also grew or decreased at
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1 different rates. See Exhibit 2 to the Declaration of Steve Ochoa, ¶¶ 10 and 11. For
2 example: the total population for San Benito and Placer Counties grew at rates of 45.1%
3 43.8%, respectively. Id, at ¶11. On the other hand, the total population of Inyo and Modoc
4 Counties fell by 1.8% and 2.4%, respectively. Id.

5 Thus, by the time the 2006 redistricting process occurs, districts will large Latino
6 and Asian populations will be underrepresented since district drawn with 2000 data will not
7 take into account the faster grow rates of those communities. Similarly, district which
8 contain predominately White population will be overrepresented given the decreasing
9 nature of White population grown (shrinkage).

10 As a result, this court must strictly scrutinize the validity of the proposed initiative
11 since it touches on fundamental right to vote of not only minority citizens but of all
12 Californians. “The right of suffrage is a fundamental matter in a free and democratic
13 society. . . . [A]ny alleged infringement of the right of citizens to vote must be carefully and
14 meticulously scrutinized. 377 U.S. at 562-563.

15 **B. Use of the 2000 Census Data in a 2006 Redistricting Process Will Result in a**
16 **Violation of the Section 2 of the Voting Rights Act.**

17 Section 2 of the Voting Rights Act provides, in part, that

18 (a) No voting qualification or prerequisite to voting or standard, practice, or
19 procedure shall be imposed or applied by any State or political subdivision in
20 a manner which results in a denial or abridgement of the right of any citizen
21 of the United States to vote on account of race or color, or in contravention of
22 the guarantees set forth in section 1973b(f)(2) of this title, as provided in
23 subsection (b) of this section.

24 42 U.S.C. §1973(a); Thornburg v. Gingles, 478 U.S. 30, 47 (1986) (the essence of a 2 claim
25 is that a certain electoral law, practice, or structure interacts with social and historical
26 conditions to cause an inequality in the opportunities enjoyed by black and white voters to
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1 elect their preferred representatives. This Court has long recognized that multimember
2 districts and at-large voting schemes may “operate to minimize or cancel out the voting
3 strength of racial [minorities in] the voting population”).

4 Where the Latino and Asian populations are growing at rates more than twice as fast
5 as the California population as a whole, the potential under representation of minorities in
6 district created using 2000 data is substantially increased. The larger the Latino, Asian, and
7 to a lesser extent African American communities mean that such communities will be
8 entitled to more district that the 2000 data would indicate. This is likely to result in
9 violation of Section 2 of the Voting Rights since more geographically compact district
10 should be created than are indicated by the outdated 2000 data.

11 **C. The Failure to Follow California Constitutional and Statutory**
12 **Requirements for Placing on the Ballot a Proposed Initiative Changes Which**
13 **Change a Voting Practice or Procedure (Redistricting) Requires Preclearance**
14 **by the Justice Department Before the Initiative under Section 5 of the Voting**
15 **Rights Act as it Affect Four California Counties.**

16 Section 5 of the Voting Rights Act requires that covered jurisdictions to submit
17 changes to voting practices or procedures to the United States Attorney General or the
18 United States District Court for the District of Columbia for an administrative or judicial
19 review and “preclearance” of the voting change prior to their implementation. 42 U.S.C.
20 §1973c. This includes changes to election laws, practices, or procedures that are the result
21 of court order. The proposed initiative is a proposed change in a voting practice or
22 procedure covered under Section 5.

23 Changes to the referendum process as within the scope of Section 5. *See* 28 C.F.R. §
24 51.13(j) (Any change affecting the necessity of or methods for offering issues and
25 propositions for approval by referendum.); see also Young v. Fordice, 520 U.S. 273, 284
26 (1997) (citing Allen v. State Bd. of Elections, 393 U.S. 544, 566-69 (1969) (even
27

1 administrative changes which are apparently minor, are nevertheless, subject to the Section
2 5 preclearance provisions).

3 Four counties in California (Monterey, Yuba, Kings, and Merced) are
4 political subdivisions covered by and subject to the Section 5 preclearance provisions of the
5 Voting Rights Act. Thus, any changes in a voting practice or procedure as it affects these
6 four counties cannot be enforced unless such a voting change has received the requisite
7 approval or preclearance under Section 5.

8 Here, the Proposition 77, a proposition to change a voting practice or procedure (the
9 California Redistricting process), has been certified for placement on the ballot without the
10 text proposed initiative having been submitted to the Attorney General as required by the
11 Constitution and Elections Code. This in itself is a change in a practice or procedure. This
12 deviation from the normal initiative process, as it affect a voting procedure, must be
13 precleared by the Justice Department.

14 A covered political subdivision can submit the voting change to the United States
15 Attorney General for a determination that such a change does not have the purpose and will
16 not have the effect of retrogressing minority voting strength. (See Reno v. Bossier Parish
17 Sch. Bd., 528 U.S. 320 (2000) (retrogression of minority voting strength occurs when the
18 proposed voting change results in a denial or abridgment of the right to vote.) If the
19 United States Attorney General does not object within 60 days following the submission,
20 the voting change can then be implemented. 28 C.F.R. § 51.1(a)(2). The covered
21 jurisdiction can also obtain a declaratory judgment from the United States District Court for
22 the District of Columbia that the voting change does not have the purpose and will not have
23 the effect of retrogressing minority voting strength. However, the voting change cannot be
24 implemented or enforced in any election in a covered political subdivision until Section 5
25 preclearance is obtained. 28 C.F.R. § 51.10.

26 **V. CONCLUSION**

1 For the reasons set forth herein, petitioners request that this court set this matter for
2 hearing at the earliest time consistent with its calendar. Petitioners further request that this
3 Court grant Petitioner Petition for Writ of Mandate, and issue a peremptory writ of mandate
4 commanding the Secretary of State for the State of California to decertify Proposition 77,
5 and inform the election officials of each County in the State of California that Proposition
6 77 has been decertified; command the Secretary of State for the State of California, to
7 remove any and all materials pertaining to Proposition 77 or Initiative No. SA2004RF0037,
8 Amdt #1-NS from the Secretary of State's website and prohibit the Secretary of State from
9 posting any further such materials on the website; and command the Secretary of State and
10 the Acting State Printer not allow any materials pertaining to Proposition 77 or Initiative
11 No. SA2004RF0037, Amdt #1-NS to appear in (1) Voter Information Guide for the
12 November 8, 2005, Special Election, or (2) on the ballot for the November 8, 2005, Special
13 Statewide Election.

14
15 Dated: July 18, 2005

Respectfully submitted by:
LUNA & FAJARDO

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18 By: _____
19 Richard P. Fajardo
20 Attorney for WCVI
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PROOF OF SERVICE

1 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

2 I am employed in the County of Los Angeles, State of California. I am over the age of 18
3 and not a party to the within action; my address is 3540 WILSHIRE BLVD., SUITE 417, LOS
4 ANGELES, CA 90010.

5 On June 19, 2005, I served the foregoing document described as **NOTICE OF**
6 **MOTION; MOTION TO REQUEST LEAVE TO AMEND THE ANSWER**
7 **GRANTING DEFENDANT CONANT LEAVE TO FILE AN AMENDED ANSWER**
8 **TO THE ABOVE CAPTIONED CASES AND DEFEND THE ACTION,**
9 **DECLARATIONS OF BENJAMIN CONANT AND MEMORANDUM OF POINTS**
10 **AND AUTHORITIES IN SUPPORT THEREOF**, on interested parties in this action
11 attached to this document in the attached mailing list:

12 Mark Sharf
13 15821 Ventura Blvd., Suite 275
14 Encino, California 91436

15 (By Mail) I deposited such envelope in the mail at Los Angeles, California. The envelope
16 was mailed with postage thereon fully prepaid, and was addressed as listed above.

17 (BY FACSIMILE) I caused a copy of such document to be transmitted via facsimile
18 machine. The fax number of the machine from which the document was transmitted was
19 (213) 383-1311. The number of the fax machine to which the document was transmitted is
20 The fax transmission was reported as completed and without error.

21 (BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of addressee
22 at SEE ABOVE.

23 Executed on July 19, 2005 at Los Angeles, California.

24 (STATE) I declare under penalty of perjury under the laws of the State of California that
25 the above is true and correct.

26 (FEDERAL) I declare that I am employed in the office of a member of the bar of this Court
27 at whose direction the service was made.

28 _____
MARTA CERVANTES