Case No.: S 207173

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

TUOLUMNE JOBS & SMALL BUSINESS ALLIANCE,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF TUOLUMNE,

Respondent,

WAL-MART STORES, INC., JAMES GRINNELL, AND THE CITY OF SONORA,

Real Parties in Interest.

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

Hon. James A. Boscoe, Superior Court Judge
Superior Court of the State of California, County of Tuolumne
Case No. CV56309

REAL PARTY IN INTEREST WAL-MART STORES, INC.'S OPENING BRIEF ON THE MERITS

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Real Party in Interest Wal-Mart Stores, Inc. ("Walmart") hereby submits its Opening Brief on the Merits.

INTRODUCTION

This case arises from the exercise of the reserved constitutional power of initiative under article II, section 11 of the California Constitution. Since its inception more than 100 years ago, the right of initiative has included the right to propose laws for immediate adoption by local legislative bodies, and barring adoption, to have those proposed laws promptly considered by voters in an election.

The opinion of the Court of Appeal in this matter, *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2012) 210 Cal.App.4th 1006, review granted February 13, 2013, S207173 ("*Tuolumne*"), judicially stripped local voters of part of that fundamental right – the right to propose laws for immediate adoption that might affect the environment. The Court of Appeal reached this unprecedented and remarkable result by judicially transforming a local government's decision to adopt an initiative into a "discretionary" act that had never been subject to the requirements of the California Environmental Quality Act (Public Resources Code sections 21000-21177) ("CEQA"). Because, as the Court of Appeal recognized, it is not possible to comply with both CEQA and provisions of the Elections Code governing voter initiatives, the Court of Appeal acknowledged that its holding would preclude cities from directly adopting voter initiatives that affect the environment. In doing so, the Court created a judicially legislated barrier to the electoral process that was never intended or sanctioned by the Legislature.

The *Tuolumne* decision must be reversed because the plain and clear meaning of the statutes governing the initiative process in California must not be overridden by anything other than a Legsilative act. The Court of Appeal erred in numerous, material respects. First, this Court previously held in *DeVita v. County of Napa* ("*DeVita*") (1993) 9 Cal.4th 763 that "procedural requirements" like CEQA are not applicable to the people when exercising their initiative power. *Id.* at p. 787.

Second, CEQA only applies to "discretionary" projects, and the Court of Appeal departed from precedent holding that the decision of a local government to adopt an initiative without alteration, or submit it to a vote, is mandatory and ministerial, not discretionary. The Court of Appeal failed to follow Supreme Court and other appellate court precedent characterizing "discretionary" decisions as those empowering a local government to deny or shape a project to mitigate environmental harm.

Not only is *Tuolumne* contrary to precedent, it is ungrounded in legislative history and intent, and untethered to well established principles of statutory construction. The Legislature has, since 1911, facilitated the people's right of initiative by permitting local governments immediately to adopt initiatives without alteration. The Legislature has never manifested an intent to apply CEQA to the decisions of local governments whether to adopt voter initiatives. On the contrary, it has repeatedly *rejected* bills to apply CEQA to local initiatives.

In addition to its numerous errors, the decision in *Tuolumne* is internally inconsistent. It is premised on the unsupportable proposition

that the Legislature intended to require a time-consuming environmental review of initiatives that would be "meaningless" – meaningless because a local government could never alter an initiative, regardless of what its environmental study revealed. Furthermore, *Tuolumne* holds that initiatives are subject to CEQA, even though a city could *never* comply with CEQA when presented with an initiative.

Finally, even if the *Tuolumne* Court correctly divined and applied a legislative intention to apply CEQA to the local initiative process, the decision must be reversed. The people reserved unto themselves the right of initiative, while delegating only limited powers over the initiative process to the Legislature. The Constitution circumscribes the Legislature's powers over the initiative process to enacting procedures to facilitate the right of initiative. The Legislature may in no way limit or restrict that right. Because the right of initiative has always included the right to have initiatives directly adopted by local legislative bodies, construing CEQA to foreclose the right of direct legislative adoption would impermissibly burden the right of initiative in violation of the California Constitution.

For the reasons discussed below, this Court should reverse the decision of the Court of Appeal, and hold that CEQA does not apply to a local government when enacting a voter-sponsored initiative pursuant to the Elections Code.

STATEMENT OF FACTS

According to the First Amended Petition, Sonora prepared a draft environmental impact report ("EIR") for the expansion of an existing Walmart store (the "Store Expansion"), circulated it for public comment, and received comments. (Appellate Writ Petition, exh. 2, p. 10.) On

June 23, 2010, the Sonora Planning Commission held a public hearing to consider the EIR. The Planning Commission issued a report to the City Council recommending that the City Council certify the EIR and approve the Store Expansion. (*Id.* at para. 11.)

Shortly thereafter, Mr. James Grinnell served a notice of intent to circulate a petition to qualify a voter initiative that would add an ordinance creating a "Specific Plan." (Appellate Writ Petition, exh 2, para. 14.) If adopted, the Specific Plan would permit the Store Expansion, as well as other uses of the property.[1] (*Id.* at exh. 4.)

During a period lasting less than a month,[2] more than 20% of the registered voters in the City of Sonora[3] signed Mr. Grinnell's petition. The City opted to proceed pursuant to Elections Code section 9214, subdivision (c), and it ordered preparation of a report concerning the Initiative. (Appellate Writ Petition, exh. 2, p. 4.) Rather than ordering a special election, the Sonora City Council adopted the Initiative as an ordinance (the "Ordinance"). (*Id.* at p. 13, para. 27.)

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[1] By way of example, permitted uses other than an expanded Walmart store included "Business, professional and trade schools and colleges," "Live/work use," and "Medical, dental and orthopedic clinics or laboratories." (Appellate Writ Petition, exh. 4, pp. 82-83) (table of permitted property uses.)

[2] According to facts alleged in the First Amended Petition, Real Party in Interest James Grinnell served the City with a notice of intent to circulate an initiative petition on June 28, 2010. (Writ Petition, exh. 2, p. 10, para. 14.) The City issued a Title and Summary on July 12, after which collections of signatures could begin. (*Ibid.*) The initiative petition was filed on or about August 9, 2010. (*Ibid.*)

[3] Appellate Writ Petition, exh. 3 at 40:6-9.

STATEMENT OF THE CASE

The Petitioner filed an action on January 10, 2011, in which it sought traditional and administrative mandamus to invalidate the Ordinance. (Appellate Writ Petition, p. 8, para. 14.) The Petitioner named the City of Sonora as Respondent, and both Walmart and Grinnell, the proponent of the initiative petition, as Real Parties in Interest. The City and Walmart demurred to the Petition.

In response, the Petitioner filed a First Amended Petition on April 27, 2011, prior to a hearing on the Demurrers. (Appellate Writ Petition, p. 8, para. 14.) The Petitioner alleged four causes of action in its First Amended Petition, each of which challenged the Ordinance under a different legal theory. Petitioner's First Cause of Action, which is the only one at issue in this proceeding, alleged that the Ordinance violated CEQA because Sonora had not certified an EIR prior to adopting the voter initiative as an ordinance.

The City, Walmart and Mr. Grinnell all demurred to the First Amended Petition. On October 14, 2011, the trial court issued an Order sustaining the demurrer to the First Cause of Action without leave to amend. (Appellate Writ Petition, exh. 1.)

Petitioner filed the Appellate Writ Petition on December 13, 2011. On January 31, 2012, the Court of Appeal issued an alternative writ and order to show cause why the relief prayed for should not be granted. Walmart and the City filed their Returns to the Alternative Writ and Oppositions to the Order to Show Cause on March 1, 2012.

The Court of Appeal filed its decision on October 30, 2012. In the published portion of its decision, the Court of Appeal held that the decision by a city to adopt a voter-sponsored initiative is discretionary.

Therefore, the City could not adopt a voter-sponsored initiative without first complying with CEQA. *Tuolumne*, *supra*, 148 Cal.App.4th at pp. 1024-1025, 1032-1033; Court of Appeal opinion ("Opinion") at pp. 17, 28.

A petition for rehearing was not filed. Cal. Rules of Court, rule 8.504, subd. (b)(3).

Grinnell and Walmart filed Petitions for Review on December 7, 2012. The City filed its Petition for Review on December 10, 2012, in which it joined in the petitions filed by Grinnell and Walmart. This Court issued an order granting the petitions for review on February 13, 2013.

QUESTIONS PRESENTED FOR REVIEW

1. Must a city comply with CEQA before enacting a voter-sponsored initiative pursuant to Elections Code section 9214, subdivision (a)?

2. Is enactment of a voter-sponsored initiative "without alteration" pursuant to Elections Code section 9214 "ministerial," and, therefore, exempt from CEQA?

STANDARD OF REVIEW

This Court independently reviews issues decided by appellate courts. This Court has noted, "[w]e have no need to defer [to the appellate court], because we can ourselves conduct the same analysis. In fact, we have need *not* to defer, in order to be free to further the uniform articulation and application of the law within our jurisdiction." *Smiley v. Citibank* (1995) 11 Cal.4th 138, 146.

The standard of appellate review of an order sustaining a demurrer is well established.

> The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. The court does not, however, assume the truth of contentions, deductions or conclusions of law. The judgment must be affirmed if any one of the several grounds of demurrer is well taken. However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment.

Aubry v. Tri–City Hospital Dist. (1992) 2 Cal.4th 962, 966–967, internal citations omitted; *see also, Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.

BACKGROUND

A. Amendment of the Constitution, and Subsequent Legislative Enactments: Empowering the Electorate with the Right of Initiative

The Legislative history shows that the Legsilature repeatedly considered – and rejected – attempts to apply CEQA to the initiative process. This included rejecting attempts to apply CEQA to the specific context here – the direct adoption of voter initiatives by a local municipality. Instead of applying CEQA, the Legislature adopted a compromise that permitted an abbreviated environmental review of voter initiatives within the requisite time constraints.

The constitutional amendment and related legislation implementing the electorate's right of initiative, referendum and recall arose from rampant corruption in state and local government during the 19th and early 20th centuries. After several high-profile corruption and bribery trials in the early 1900s, California voters elected as governor the progressive candidate Hiram Johnson, who had run on a campaign of

reform. Center for Governmental Studies, *Democracy by Initiative: Shaping California's Fourth Branch of Government* (2d ed. 2008) pp. 3-4. ("*Democracy by Initiative*").

In 1911, California voters approved Governor Johnson's package of reforms by amending the California constitution to empower direct democracy. (*Democracy by Initiative, supra,* at pp. 3-4.) This included the enactment of article IV of the Constitution, which reserved to the electorate the right of initiative.

Article IV, section 1 provided, in pertinent part,

> The legislative power of this state shall be vested in a senate and assembly which shall be designated 'The legislature of the State of California,' but the people reserve to themselves the power to propose laws and amendments to the constitution, and to adopt or reject the same, at the polls independent of the legislature ...[4]

The 1911 constitutional amendment defined the people's first reserved right of legislation as the "initiative." The electorate could propose statewide laws by submitting the required number of signatures, at which point "[t]he law proposed by such petition shall be either enacted or rejected without change or amendment by the legislature ... ."[5] Laws rejected by the Legislature, or upon which the Legislature failed to act, were required to be submitted to the voters for approval or rejection at the next general election, or at the discretion of the governor, at a special election.

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[4] Ballot Pamp., Spec. Elec. (Oct. 10, 1911) text of Prop. 7, Senate Const. Amendment No. 22, p.1, available at: http://library.uchastings.edu/research/online-research/ballots.php

[5] Ballot Pamp., *supra,* at p. 1.

The 1911 constitutional amendment further reserved the initiative power to enact local laws to the electors of each county, city, and town[6] "to be exercised under such procedure as may be provided by law."[7] While granting the legislature the power to legislate "procedures," the amendment explicitly prohibited the legislature or local governments from enacting procedures that would limit or restrict the right of initiative: "This section is self-executing, but legislation may be enacted to facilitate its operation, but in no way limiting or restricting either the provisions of this section or the powers reserved."[8] Thus, the legislative "procedures" authorized by the constitutional amendment are procedures "***to facilitate the exercise of that right***." *Associated Home Builders of the Greater East Bay, Inc. v. City of Livermore* ("*Associated Home Builders*") (1976) 18 Cal.3d 582, 591, emphasis added.

The Legislature promptly enacted procedures to implement the constitutional amendment relating to local initiatives. The Legislature facilitated the right of local initiative by adopting the same, forced choice imposed upon the legislature when presented with a statewide initiative. When a proponent presented a local government with an initiative, the city had only two options: (1) pass the initiative within ten days without alteration; or (2) call a special election "forthwith." Stats. 1911, Ex. Sess., ch. 33, § 1, pp. 131-132.

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[6] By its terms, the constitutional amendment did not affect or limit the powers of charter cities.

[7] Ballot Pamp., *supra,* at p. 1.

[8] Ballot Pamp., *supra,* at p. 1.

The constitutional provisions relating to initiatives have been modified several times since their enactment in 1911. The most significant of these amendments occurred in 1966. Among other things, the 1966 amendment deleted the Legislature's option to adopt statewide initiatives as law.[9] The amendment also deleted the clauses explicitly barring the Legislature from restricting the reserved power of local initiative. As this Court has recognized, "[t]he 1966 constitutional revision was intended solely to shorten and simplify the Constitution, deleting unnecessary provisions; it did not enact any substantive change in the power of the Legislature and the people." *Associated Home Builders, supra,* 18 Cal.3d at p.595, fn. 12. Furthermore, this Court recognized that the deletion of language barring the Legislature from restricting the reserved power of local initiative was being done "solely on the ground that it was surplusage, and that the deletion would be made 'without, in the end result, changing the meaning of the provisions.' (Cal. Const. Revision Com. (1966) Proposed Revision of the Cal. Const., pp. 49-50.)" *Associated Home Builders* at p.595, fn. 12.

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[9] The provision permitting the Legislature to adopt statewide initiatives was rarely used, and the voters abolished the statewide procedure as part of the 1966 amendments. Sen. Com. on Elections, Reapportionment and Constitutional Amendments, Analysis of Sen. Bill No. SCA 16 (2009-2010 Reg. Sess.) July 7, 2009, available at http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0001-0050/sca_16_cfa_20090706_095802_sen_comm.html. One author opined that the so-called indirect initiative was rarely used because, prior to 1967, the Legislature was a part-time legislature, meeting for six months in odd-numbered years. Indirect initiatives therefore required substantial lead times. Stern, *California Should Return to the Indirect Initiative,* 44 Loyola L.A. L.Rev. 671.

The people's reserved right of initiative is now contained in article II of the Constitution. Article II, section 8(a) defines the power of initiative: "The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." Section 11(a) empowers the electors of cities and counties to exercise the right of initiative: "Initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide."

As discussed below, the procedures adopted by the Legislature to facilitate the right of local initiative are now contained in Elections Code sections 9214 and 9215.[10] Elections Code sections 9214 and 9215 continue to impose the same, forced choice on local governments that has existed since 1911: they must promptly enact initiatives, without alteration, or they must submit the initiatives to votes of the people.

B. The Enactment of CEQA

In 1970, approximately sixty years after the creation of California's direct democracy, the Legislature enacted CEQA. CEQA's basic goal of protecting the environment has two broad purposes:

> (1) Avoiding, reducing, or preventing environmental damage when possible by requiring alternatives or mitigation measures (14

[10] Elections Code section 9214 applies when at least 15% of the registered voters sign an initiative petition. It requires that the city adopt the initiative without alteration or present it for decision by voters at a special election. Elections Code section 9215 applies when at least 10%, but less than 15%, of the voters sign the petition. In that case, the city must adopt the initiative without alteration or place it on the ballot at the next regularly scheduled municipal election, unless for some other reason a special election is required. Different minimum thresholds for signatures apply in cities with less than 1,000 voters.

California Code of Regulations section 15002, subdivision (a)(2)-(3).); and

(2) Providing information to decision-makers and the public concerning the environmental effects of proposed and approved activities (14 California Code of Regulations section 15002, subdivision (a)(1).)

Kostka & Zischke, *Practice Under the California Environmental Quality Act* (2d ed. March 2012) § 1.16.

CEQA therefore mandates that public agencies require feasible mitigation measures to minimize environmental damage. Public Resources Code section 21002.1, subdivision (b) states, "[e]ach public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so."

CEQA also requires preparation of an EIR, the purpose of which "is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made." Pub. Res. Code § 21002.1, subd. (b). After preparing an EIR, CEQA then requires the city to "find either that the project's significant environmental effects identified in the EIR have been avoided or mitigated, or that unmitigated effects are outweighed by the project's benefits." *Laurel Heights Improvement Assoc. v. Regents of the University of California* (1988) 47 Cal.3d 376, 391.

C. *Associated Home Builders*

This Court decided *Associated Home Builders*, *supra,* 18 Cal.3d 582, six years after the enactment of CEQA. In *Associated Home Builders*, a developer sued to enjoin enforcement of an ordinance enacted by the voters through an initiative. The initiative ordinance prohibited the city of Livermore from issuing residential building permits until local educational, sewage disposal, and water supply facilities complied with specified standards. *Id.* at p.588. The plaintiff alleged that the initiative ordinance was invalid because the city failed to comply with statutes governing the adoption of zoning or land use restrictions. The city did not, for example, follow state land use laws requiring noticed hearings before the planning commission and legislative body prior to enactment of the ordinance. *Id.* at pp. 590-91.

The trial court invalidated the ordinance based on the failure to comply with state land use laws, and this Court reversed. This Court held that statutory notice and hearing provisions governing zoning and land use ordinances did not apply to an ordinance adopted through a voter initiative. *Associated Home Builders*, *supra,* 18 Cal.3d at p. 588. This Court found that prior precedent applying state zoning statutes to initiative law was wrongly decided, in part, because: (1) zoning statutes were not inconsistent with initiatives; and (2) legislation shall not restrict or limit the constitutional right to the initiative.

The Court held that initiatives and land use regulations were not conflicting because the Legislature never intended zoning laws to apply to the enactment of zoning initiatives. *Associated Home Builders*, *supra,* 18 Cal.3d at p. 594. This Court noted, "[t]he fundamental test as to whether statutes are in conflict with each other is the legislative intent. If

it appears that the statutes were designed for different purposes, they are not irreconcilable, and may stand together." *Id.* at p. 594, fn. 10, internal citations omitted.

Next, this Court noted the provision of the original 1911 constitutional amendment that "legislation may be enacted to facilitate its operation, *but in no way limiting or restricting* either the provisions of this section or *the powers herein reserved.*" *Associated Home Builders, supra,* 18 Cal.3d at p. 595.[11] The Court therefore held that the notice and hearing requirements, if interpreted to bar local initiative land use ordinances, "would be of doubtful constitutionality ... ." *Ibid.*

It was immediately apparent and obvious to Justice Clark that the decision would permit local governments to "bypass" state laws governing council action by adopting local voter initiatives, rather than submitting them to a vote of the people. In his dissent, Justice Clark recognized that the decision

> may provide a loophole for developers to avoid the numerous procedures established by the Legislature which in recent years have made real estate development so difficult. Seeking approval of planned unit developments, land developers with the aid of the building trade unions should have little difficulty in securing the requisite signatures for an initiative ordinance. Because of today's holding that the initiative takes precedence over zoning laws, the legislative scheme of notice, hearings, agency

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[11] As previously discussed, the Court recognized that the particular language had been deleted from the Constitution in the 1966 amendment, but the Court found that the deletion was solely because it was deemed surplusage, and was made without changing the meaning of the Constitution. *Associated Home Builders, supra,* 18 Cal.3d at p. 595, fn. 12.

> consideration, reports, findings, and modifications can be bypassed, and the city council may immediately adopt [a development] or, if the council refuses, the voters may approve.

Associated Home Builders, *supra,* 18 Cal.3d at p. 615 (diss. opn. Of Clark, J.).

D. The Legislative Compromise to Empower Local Governments to Evaluate the Environmental Impacts of Voter Initiatives

Contrary to Justice Clark's prediction, it was voter groups *opposed* to development that embraced and energetically employed the initiative process. Between 1971 to 1990, a total of 202 growth control measures were placed on local ballots in California. Curtin & Jacobson, *Growth Control by the Ballot Box: California's Experience* (1990) 24 Loy. L.A. L. Rev. 1073, 1074.

In response to the ability of slow-growth proponents to pass slow-growth initiatives without any formal review, the building industry made repeated legislative attempts throughout the 1980s to subject voter initiatives to environmental reviews. In a sudden role reversal, proponents of slow-growth initiatives, including environmentalists and preservationists, fought to exempt initiatives from CEQA review and maintain the holding of *Associated Home Builders*.

As discussed below, the Legislature rejected each attempt to apply CEQA to the initiative process.

In 1984, fourteen years after enacting CEQA, the Legislature considered a bill that would have required the proponent of a land use initiative to file a draft environmental impact report or negative

declaration,[12] pursuant to CEQA, before a city could consider the initiative. Unless an initiative proponent filed the required environmental studies, "the petition shall not be examined" by the clerk. Assem. Bill No. 3651 (1983-1984 Reg. Sess.) as introduced Feb. 17, 1984.[13] The California assembly rejected the bill. Assem. Bill No. 3651, 3d reading June 12, 1984, 2 Assem. Final Hist. (1983-1984 Reg. Sess.) p. 2225.

Three years later, in 1987, the Legislature contemporaneously considered two competing bills addressing environmental review of local initiatives. One bill, AB 2003, addressed environmental review in the specific context presented by this case – a decision by local government to adopt an initiative – as well as initiatives submitted to a vote of the people. AB 2003 would have prohibited a city from directly adopting a land use initiative until the city filed a full environmental impact report

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[12] A "negative declaration" is a written statement briefly describing the reasons that a proposed project will not have a significant effect on the environment and does not require the preparation of an environmental impact report. Pub. Res. Code § 21064.

[13] This Court noted in *Quelimane Company, Inc. v. Steward Title Guaranty Company* (1998) 19 Cal.4th 26 that it is unnecessary to request judicial notice of published legislative history. *Id.* at 46, fn. 9. Similarly, this Court has noted that it is unnecessary to request judicial notice of assembly bills. *Stop Youth Addiction v. Lucky Stores, Inc.* (1988) 17 Cal.4th 553, 571, fn. 9, overruled on other grounds ("Simple citations to such published materials would have sufficed."). Based on those admonitions, Walmart is not separately requesting judicial notice of legislative materials cited herein. If any of the cited legislative materials are not readily available to the Court, or for the Court's convenience, Walmart will submit a formal request for judicial notice or provide the cited legislative materials.

or negative declaration pursuant to CEQA. Assem. Bill No. 2003 (1987-1988 Reg. Sess.).

On the same day that the Assembly read AB 2003 for the first time, it also read the competing bill, AB 2202.[14] Assem. Bill No. 2202 (1987-1988 Reg. Sess.). AB 2202 permitted, but did not require, cities and counties to perform a limited environmental review of local initiatives.

When considering AB 2202, the Senate Rules Committee acknowledged that current law "[did] not provide for any review of a proposed initiative by a city or county attorney, or by any city or county agency." Assem. Floor Analysis, 3d reading analysis of Assem. Bill No. 2202 (1987-1988 Reg. Sess.) as amended May 14, 1987, p. 1. In other words, local governments lacked the authority to conduct any formal study before making the forced choice to adopt an initiative or submit it to a vote of the electorate.

In its original draft, the abbreviated environmental study permitted by AB 2202 would have applied solely to land use initiatives. Assem. Bill No. 2202 (1987-1988 Reg. Sess.) as introduced Mar. 6, 1987. Ultimately the bill was broadened to apply to all initiatives. The bill provided a city council or board of supervisors the opportunity to

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[14] *See* Assem. Bill No. 2202, first reading, Mar. 9, 1987, 1 Assem. Final Hist. (1987-1988 Reg. Sess.) p. 1443; Assem. Bill No. 2003, first reading, Mar. 9, 1987, 1 Assem. Final Hist. (1987-1988 Reg. Sess.) p. 1325.

analyze the environmental effects of an initiative prior to considering whether to adopt a land use initiative.[15]

The Legislature enacted AB 2202, which became Elections Code sections 9111 and 9212.[16] This Court has described the abbreviated environmental review as a "legislative compromise," permitting public agencies "to inquire into the environmental impacts of a proposed initiative to the extent consistent with the time requirements of the initiative process." *DeVita, supra,* 9 Cal.4th at pp. 794-795. It "balance[d] the right of local initiative with the worthy goal of ensuring that elected officials and voters are informed about the possible consequences of an initiative's enactment." *Id.* at p. 795.

The Legislature rejected AB 2003, the competing bill to require full CEQA review of initiatives prior to adoption by the local government. Assem. Bill No. 2003, failed passage Jan. 11, 1988, 1 Assem. Final Hist. (1987-1988 Reg. Sess.) p. 1325.

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[15] *See* Assem. Floor Analysis, 3d reading analysis of Assem. Bill No. 2202 (1987-1988 Reg. Sess.) as amended May 14, 1987, p. 2 ("[t]his bill is also intended to provide the city council or board of supervisors fiscal information on a proposed initiative. It will also provide information on the proposed initative's effect on the city's or county's general plan, zoning, or other policies to carry out the city's or county's obligation under state law, prior to the initiative being placed on the ballot and while the city or county still has the option to enact the initiative by local legislation").

[16] Elections Code section 9111 applies to county governments when considering voter initiatives, whereas section 9212 applies the identical provisions to city governments when considering initiatives. The same Assembly Bill enacted the predecessors to both statutes. Assem. Bill No. 2202 (1987-1988 Reg. Sess.).

The following year, in 1989, the Legislature considered and ultimately enacted AB 4678. An early draft of AB 4678 again attempted to require a full CEQA review of voter initiatives. Assem. Bill No. 4678 (1987-1988 Reg. Sess.) as introduced Mar. 1, 1988. "[AB 4678], as introduced on March 1, 1988 would have subjected all initiatives considered 'projects' under [CEQA]...to environmental review." *DeVita, supra,* 9 Cal.4th at p. 795.

Yet again, the Legislature rejected legislation to apply CEQA to initiatives governed by the Elections Code. It deleted provisions that would have required CEQA compliance from the bill. As enacted, AB 4678 merely clarified that a city could briefly wait to consider the abbreviated report, prepared pursuant to what is now Elections Code section 9212, before making the forced choice whether to adopt an initiative or submit it for a vote of the electorate. Assem. Bill No. 4678 (1987-1988 Reg. Sess.).

The very following year, in 1989, the Legislature considered Assembly Bill No. 628 ("AB 628"). Like many bills before it, AB 628 would have required an "extensive environmental and economic analysis" for local land use initiatives. *DeVita, supra,* 9 Cal.4th at p. 794. The Legislature rejected this bill, as well. *Id.* at p. 795.

E. *DeVita*

In *DeVita v. County of Napa* ("*DeVita*") (1993) 9 Cal.4th 763, the plaintiffs filed an action challenging a local voter initiative that was adopted by the county's voters to preserve agricultural land. The voter initiative readopted portions of the general plan's land use element and restated certain policies applicable to agricultural land classifications. The measure also added a provision that explicitly restricted changes in

agricultural land use without a vote of the people for a period of 30 years, except under certain specified conditions.

At trial, the plaintiffs contended that (1) general plans could not be amended by initiative and (2) the authority of future boards of supervisors to amend the general plan could not be limited by mandatory voter approval requirements. Following a trial, the trial court found in favor of the defendants, and the Court of Appeal affirmed.

On appeal to the Supreme Court, the plaintiffs contended, among other things, that the initiative was invalid because the initiative had been adopted without required environmental review. This Court held that, although general plan amendments are subject to the requirements of CEQA, general plan amendments adopted through voter initiatives are exempt from CEQA. *DeVita, supra,* 9 Cal.4th at p. 794. This Court further held that Elections Code section 9111,[17] which permits a county government to study and assess the impacts of a proposed initiative, was the means by which a county government could assess the environmental impacts of a proposed initiative "to the extent consistent with the time requirements of the initiative process." *Ibid.*

In rejecting attempts to impose CEQA on the initiative process, this Court noted that the Legislature had repeatedly rejected attempts to require environmental scrutiny of land use initiatives (discussed above in section D). This Court observed,

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[17] Elections Code section 9111 applies to county governments when considering voter initiatives, whereas section 9212 applies to city governments when considering initiatives. The provision providing identical authority for a city to prepare a report concerning an initiative is found in Elections Code section 9214.

> While only limited inferences can be drawn from bills that the Legislature failed to enact, 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.

DeVita, supra, 9 Cal.4th at p. 795, internal citations omitted.

F. *Friends of Sierra Madre*

In *Friends of Sierra Madre v. City of Sierra Madre* ("*Friends of Sierra Madre*") (2001) 25 Cal.4th 165, a city council drafted a proposed ordinance that would have delisted historical properties and placed the ordinance on the ballot pursuant to the statutory authority provided by Elections Code section 9222. The city did not comply with CEQA before doing so. After the voters approved the ordinance, the petitioners sued to set aside and void the ordinance arguing, among other things, that the ordinance was subject to CEQA because the city council had generated it, rather than the electorate. The city argued that CEQA did not apply because the ordinance had been adopted by a vote of the people.

The trial court granted the petition for writ of mandate on procedural grounds relating to the format of, and information in, the ballot. The Court of Appeal affirmed the trial court's order granting the petition for writ of mandate, but on different grounds. The Court of Appeal held that the initiative was not exempt from CEQA because the city used discretion in drafting and proposing the initiative.

This Court affirmed. It began its analysis with the threshold requirement for the application of CEQA. CEQA requirements and procedures are triggered by any proposed public or private project that is

not exempted by statute. *Friends of Sierra Madre, supra*, 25 Cal.4th at p. 184.

> The CEQA requirements apply to discretionary projects carried out or approved by public agencies, including enacting and amending zoning ordinances, issuance of conditional use permits, and approving tentative subdivision maps (Pub. Resources Code, § 21080), but '[m]inisterial projects proposed to be carried out or approved by public agencies' and those the agency rejects or disapproves are expressly exempted from CEQA. (Id., subd. (b)(1) & (5).)

Id. at pp. 185-86.

The question in *Friends of Sierra Madre* was whether an ordinance drafted and proposed *by the city council*, but approved by the voters, was a "project." The city contended that section 15378, subdivision (b)(4) of the CEQA Guidelines[18] exempted the ordinance from CEQA because it was adopted pursuant to a vote of the people. This Court held that the addition of the citation of *Stein* to Guidelines section 15378, subdivision (b)(3) indicated that the exemption would apply only in the *Stein* situation, i.e., when placing an initiative measure on the ballot was a ministerial act compelled by law. *Friends of Sierra Madre, supra*, 25 Cal.4th at p. 189.

The Court then held that the ordinance was discretionary because the city had been under no obligation to draft it and place it before the voters. *Friends of Sierra Madre, supra*, 25 Cal.4th at pp. 189-90. "In

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[18] Section 15378, subdivision (b)(4) provides, "[p]roject does not include: [¶] . . . [¶] (3) The submittal of proposals to a vote of the people of the state or of a particular community. (*Stein v. City of Santa Monica*, (1980) 110 Cal.App.3d 458, 168 Cal.Rptr. 39)[.]"

contrast to the constitutional and statutory obligation to place a properly qualified voter-sponsored initiative on the ballot, here the city council had discretion to do nothing, but opted instead to place the delisting ordinance on the ballot. None of the alternatives involved only a ministerial act." *Id.* at p. 190, fn. 16.

This Court distinguished between a voter-sponsored initiative, and an agency-sponsored ballot measure. In the latter circumstance, CEQA review is required. In the former, it is not. *Friends of Sierra Madre, supra*, 25 Cal.4th at p. 191.

G. *Native American Sacred Site*

In *Native American Sacred Site and Environmental Protection Association v. City of San Juan Capistrano ("Native American Sacred Site")* (2004) 120 Cal.App.4th 961, the petitioner challenged a city's adoption of a voter initiative without CEQA review. Real Party in Interest Pueblo Serra LLC submitted an initiative to the city to amend the city's general plan and rezone two parcels to permit the development and operation of a private Catholic high school. *Id.* at p. 964. After negotiating an implementation agreement with Pueblo Serra to mitigate adverse impacts, the city adopted the initiative pursuant to Elections Code section 9214 along with the implementation agreement.

Initially, the trial court granted the petition for writ of mandate because the Elections Code only permitted the city to adopt the initiative "without alteration." The trial court held that adoption of the implementation agreement constituted an impermissible alteration of the initiative. *Native American Sacred Site, supra*, 120 Cal.App.4th at p. 964. After the trial court's decision, however, the city adopted the original initiative without including the implementation agreement. *Ibid.*

The petitioner filed a second petition for writ of mandate, seeking again to set aside the voter initiative the city directly adopted. The trial court sustained the city's demurrer without leave to amend. *Native American Sacred Site, supra*, 120 Cal.App.4th at p. 965.

The Court of Appeal affirmed, holding that CEQA does not apply when a city directly adopts a voter initiative. *Native American Sacred Site, supra*, 120 Cal.App.4th at p. 965. Specifically, the Court of Appeal held, "[a] city's duty to adopt a qualified voter-sponsored initiative, or place it on the ballot, is ministerial and mandatory." *Id.* at p. 966. Indeed, "[w]hen the electorate undertakes to exercise the reserved legislative power, the city has no discretion and acts as the agent for the electorate." *Id.* at p. 969, citing *Northwood Homes, Inc. v. Town of Moraga* (1989) 216 Cal.App.3d 1197, 1206. Citing *Associated Home Builders*, the Court of Appeal found, "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 ... ." *Native American Sacred Site* at p. 968. Finally, the Court of Appeal further supported its decision by acknowledging that the Legislature did not intend CEQA to apply to Elections Code section 9214. *Id.* at pp. 968-969.

H. *Tuolumne*

In this case, the petitioner filed a petition for writ of mandate alleging the city violated CEQA when directly adopting a voter initiative without first certifying an environmental impact report. The factual and procedural background, discussed above, is undisputed. The trial court sustained Walmart's demurrer without leave to amend as to petitioner's cause of action alleging the City violated CEQA.

The Court of Appeal specifically disagreed with *Native American Sacred Site* and reversed, holding that the decision by a city to adopt a voter-sponsored initiative is discretionary. The city, therefore, could not adopt a voter-sponsored initiative without first complying with CEQA. *Tuolumne, supra,* 210 Cal.App.4th at pp. 1024-1025, 1032-1033; (Opinion at pp. 16-17, 25-28).

In framing the issue as an "issue of statutory construction," the Court of Appeal purportedly attempted to "ascertain and effectuate legislative intent." *Tuolumne, supra,* 210 Cal.App.4th at p. 1019; (Opinion at p. 9). The Court of Appeal, however, did not analyze the legislative intent of Elections Code section 9214, the statute at issue, beyond a single quote from *DeVita.*

Instead, the Court of Appeal "start[ed] from the proposition that CEQA applies to projects approved by public agencies unless some authority establishes an exemption or exception ... ." *Tuolumne, supra,* 210 Cal.App.4th at p. 1021; (Opinion at p. 13). After finding that CEQA only exempted voter initiatives submitted to a vote of the electorate, the Court of Appeal considered two sources of authority for not applying CEQA to a city adopted voter initiative: "the constitutional power of initiative retained by the people under the 1911 constitutional amendment, and the ministerial-projects exemption . . . ." *Tuolumne* at p. 1022; (Opinion at p. 13).

First, the Court of Appeal concluded that when a city council adopts an initiative pursuant to Elections Code section 9214, the voters' constitutional power of initiative cannot support a CEQA exemption for the project. *Tuolumne, supra,* 210 Cal.App.4th at p. 1023; (Opinion at p. 15). Without referring to the language of the 1911 constitutional

amendment, or its subsequent legislative history, the Court of Appeal found that permitting city council members to adopt laws proposed by a minority of the electorate would be the "antithesis of democracy." *Tuolumne* at p. 1023; (Opinion at p. 15).

The Court of Appeal concluded that the city's decision to adopt the initiative without alteration was a discretionary action. In holding that forced choice required by Elections Code section 9214 was discretionary, the Court of Appeal explicitly disagreed with *Native American Site*. Contrary to *Native American Site*, the Court of Appeal in *Tuolumne* did not interpret Elections Code section 9214 to mandate a ministerial choice between two procedures; instead, the Court of Appeal reasoned that under Elections Code section 9214, a city has a mandatory and ministerial duty to hold an election, "but it never has a mandatory duty to adopt the initiative." *Tuolumne, supra,* 210 Cal.App.4th at p. 1027; (Opinion at p. 19-20). The Court of Appeal, therefore, held that the decision to directly adopt an initiative was discretionary.

Finally, the Court of Appeal recognized two of the problems inherent in its holding. First, the Court of Appeal recognized that Elections Code section 9214 already provides for an abbreviated environmental review. The Court of Appeal reasoned, however, that this abbreviated environmental report provides the city with a "rough idea" of environmental consequences, allowing the city to then decide whether additional environmental review is necessary. *Tuolumne, supra,* 210 Cal.App.4th at p. 1030; (Opinion at p. 24). Second, the Court of Appeal recognized that its holding would nullify Elections Code section 9214 (a) for land use initiatives because a city could not complete an EIR within the mandated time constraints. The Court of Appeal accepted this

nullification because when "statutes point in different directions and must be reconciled with one another, [the results] are bound to be imperfect." *Tuolumne* at p. 1031-1032; (Opinion at p. 26).

LEGAL DISCUSSION

A. Procedural Requirements Enacted by Statute, Including CEQA, Do Not Apply to the Electorate when Exercising Its Initiative Power

In *Associated Home Builders, supra,* 18 Cal.3d at p. 591, the Supreme Court described the history, significance, and consistent judicial interpretation of the constitutionally-based initiative power in California:

> The amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's. Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. Declaring it 'the duty of the courts to jealously guard this right of the people' ... , the courts have described the initiative and referendum as articulating 'one of the most precious rights of our democratic process ... .' '[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.'

Thus, this Court has held that "procedural" requirements enacted by statute (such as CEQA) cannot interfere with the valid exercise of initiative power, which is guaranteed by our state Constitution. *DeVita, supra,* 9 Cal.4th at p. 785. *DeVita* contains a long discussion regarding several statutory procedural requirements applicable to the amendment

of a county general plan, none of which was found to apply to the people acting under the initiative power. The Supreme Court stated the general rule:

> These cases exemplify the rule that statutory procedural requirements imposed on the local legislative body generally neither apply to the electorate nor are taken as evidence that the initiative or referendum is barred. The rule is a corollary to the basic presumption in favor of the electorate's power of initiative and referendum. When the Legislature enacts a statute pertaining to local government, it does so against the background of the electorate's right of local initiative, and the procedures it prescribes for the local body are presumed to parallel, rather than prohibit, the initiative process, absent clear indications to the contrary.

DeVita, supra, 9 Cal.4th at p. 786. The Supreme Court then went on to reject attempts to impose CEQA review requirements on general plan amendments enacted through voter initiatives. *Id.* at pp. 793-795. "[T]he 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. Instead, the Supreme Court held that the ability of a city council to order a report concerning a voter initiative, as was done in this case, "permits public agencies to conduct an abbreviated environmental review of general plan amendments and other land use initiatives in a manner that does not interfere with the prompt placement of such initiatives on the ballot." *Ibid.*

The initiative power includes separate powers to *propose* and enact legislation. Cal. Const., art. II, § 8. This Court has repeatedly characterized the right of initiative as "one of the most precious rights of

our democratic process." *Associated Home Builders, supra,* 18 Cal.3d at p. 591, quoting *Martin v. Smith* (1959) 176 Cal.App.2d 115, 117.

"Initiative 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). The duty of a city council to enact an initiative ordinance without change, or submit it to the voters, has existed without interruption since the Legislature adopted legislation to implement the constitutional amendment in 1911.[19]

B. The Decision to Adopt a Voter Initiative is Exempt from CEQA Because It is Mandatory and Ministerial.

To achieve the objectives of CEQA, the Legislature has mandated the preparation and consideration of an environmental impact report before any public agency approves a project that is not statutorily exempt. *Friends of Sierra Madre, supra,* 25 Cal.4th at p. 184. One such statutory exemption is for "[m]inisterial projects proposed to be carried out or approved by public agencies." Pub. Res. Code § 21080, subd. (b)(1). The forced choice imposed on local governments presented with voter-generated initiatives is ministerial because those governments lack the power to deny or shape the initiatives.

CEQA does not define "ministerial," but in *Mountain Lion Foundation v. Fish & Game Comm.* ("*Mountain Lion*

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[19] Stats. 1911, Ex. Sess. 1911, ch. 33, § 1, pp. 131-132. A similar provision applicable to county initiative ordinances was adopted during the same year. *Ex parte Zany* (1912) 20 Cal.App. 360, 364-365; *see also, Blotter v. Farrell* (1954) 42 Cal.2d 804, 812 (discussing Elections Code section 1711, the statute applicable at the time *Blotter* was decided). The current version of this statute is Elections Code section 9214.

Foundation") (1997) 16 Cal.4th 105, this Court characterized the difference between ministerial and discretionary projects as follows: "The statutory distinction between discretionary and purely ministerial projects implicitly recognizes that unless a public agency can shape the project in a way that would respond to concerns raised in an EIR, or its functional equivalent, environmental review would be a meaningless exercise." *Id.* at p. 117. The Court of Appeal similarly focused on the ability to "shape the project" in *Friends of Westwood, Inc. v. City of Los Angeles* (*"Friends of Westwood"*) (1987) 191 Cal.App.3d 259, 272 (decision is ministerial if a city lacks the power to deny or condition a permit to mitigate environmental impact). "[T]he touchstone is whether the approval process involved allows the government to shape the project in any way which could respond to any of the concerns which might be identified in an environmental impact report." *Id.* at p. 267.

Besides an inability to "shape the project," ministerial projects are characterized by an inability to say "no" to the project. *Friends of Westwood* noted that the inability to "deny" as characterizing ministerial projects:

> No matter what the EIR might reveal about the terrible environmental consequences of going ahead with a given project the government agency would lack the power (that is, the discretion) to stop or modify it in any relevant way. The agency could not lawfully deny the permit nor condition it in any way which would mitigate the environmental damage in any significant way.

Friends of Westwood, supra, 191 Cal.App.3d at p. 272.

Tuolumne departs from the principles of both *Mountain Lion Foundation* and *Friends of Westwood.* It is the ability to "deny" or "shape the project" that differentiates between ministerial and

discretionary decisions. When an initiative petition is signed by at least 15% of the voters of a city, the city council must either adopt the initiative as an ordinance, ***without alteration***, or immediately order a special election. Elections Code § 9214, emphasis added.[20] Thus, a city presented with a voter-sponsored initiative can neither "deny" nor "shape the project." As this Court noted, without the ability to "shape the project" the environmental review required by the Court of Appeal in *Tuolumne* would be a "meaningless exercise."

The *Tuolumne* Court held that "[n]o ministerial duty dictated the city's decision to adopt the initiative instead of submitting it to the voters." *Tuolumne, supra,* 148 Cal.App.4th at p. 1024; (Opinion at p. 17). In other words, *Tuolumne* holds that the City's decision was discretionary merely because it chose between two alternatives. "Here, the city council did decide that the project should be carried out, and in doing so used its discretion and political judgment in concluding that the decision about whether it should be carried out should not be left to the voters." *Tuolumne* at p. 1024; (Opinion at p. 17).

The Elections Code explicitly prevents a city from denying or shaping a project proposed through an initiative, so its decision is necessarily "ministerial." The fact that a local government faces a forced choice between one of two alternatives does not make that choice

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[20] Before deciding which to do, a city council can request preparation of a report concerning the impact of the initiative pursuant to Elections Code section 9212. The report must be received within 30 days following certification of the sufficiency of the initiative. Elections Code § 9212. After receiving the report, a city council must either adopt the ordinance without alteration or order a special election. Elections Code § 9214, subd. (c).

discretionary, because neither option permits the government to deny or modify the initiative. In reaching its conclusion the *Tuolumne* Court overlooks previous judicial interpretations of "ministerial" within the context of CEQA.

C. The Reasoning of *Tuolumne* Violates Every Relevant Canon of Statutory Construction

The fundamental task and "paramount consideration" of statutory construction is to ascertain legislative intent to effectuate the purpose of the law. Code Civ. Pro. § 1859; *Legislature v. Eu* (1991) 54 Cal.3d 492, 505 ("*Eu*"); *People v. Cruz* (1996) 13 Cal.4th 764, 774-775. This Court has held:

> Our first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. A statute should be construed whenever possible so as to preserve its constitutionality.

Walnut Creek Manor v. Fair Employment and Housing Commission (1991) 54 Cal.3d 245, 268 ("*Walnut Creek Manor*"); quoting *Dyna-Med Inc. v. Fair Employment & Housing Com.* (1978) 43 Cal.3d 1379, 1394, internal citations omitted.

1. Statutes Must Be Construed According To Their Plain and Ordinary Meaning

To ascertain the Legislature's intent, courts start with the words of the statute, given their plain, ordinary meaning. If the statutory language is clear and unambiguous, the court need go no further. Only if the language is susceptible to more than one reasonable interpretation will the court look to maxims of statutory construction and extrinsic aids. *Mejia v. Reed* (2003) 31 Cal.4th 657, 663 ("*Mejia*"); *Hoechst Celanese Corp. v. Franchise Tax Bd.* (2001) 25 Cal.4th 508, 519.

The plain meaning of Elections Code section 9214 is clear. The face of the statute provides for an environmental report within 30 days following certification of the initiative. The face of the statute plainly states that the city "shall" do one of the following three options: (1) directly adopt a voter initiative; (2) order a special election; or (3) order a report – which could include an abbreviated environmental report – and then choose either option one or two within the time constraints identified on the face of the statute. Elections Code § 9214, subd. (a)-(c). Choosing between the three options is mandatory. A fourth option for CEQA review does not exist.

Additionally, the Elections Code plainly states that the city must adopt an initiative "without alteration." The plain meaning of "without alteration" does not include altering a project to adopt mitigating measures, a requirement of CEQA.

The plain meaning of Elections Code section 9214, therefore, provides for a specified environmental review within explicit time constraints. Additionally, on its face, section 9214 prohibits the City

from acting outside the scope of the three specified options and prohibits the City from applying any mitigating measures.

The plain meaning of "ministerial" is also clear. CEQA exempts ministerial projects from environmental review. As previously discussed, this court has already characterized "discretionary" decisions – the converse of "ministerial" ones – as those which would permit an agency to "shape" the project. *Mountain Lion Foundation, supra,* 16 Cal.4th 105, 117. Another court has characterized a "ministerial" decision as the inability to deny a project or condition approval in any way which would mitigate environmental damage. *Friends of Westwood, supra,* 191 Cal.App.3d 259, 272. In light of such precedent, the Court of Appeal had no need to resort to a novel interpretation of the term.

But it did, relying upon a phrase contained within the CEQA Guidelines that provides an exemption for such "ministerial" decisions. Pub. Res. Code § 21080(b)(1). The CEQA Guidelines define "ministerial" as something that

> describes a governmental decision involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project. The public official merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision. A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out.

Cal. Code Regs., tit. 14, § 15369. The Court of Appeal in *Tuolumne* held that the City's decision to adopt the Initiative was discretionary because it was under no obligation to adopt it. It found that the City *had*

exercised its subjective judgment in deciding to carry out the Store Expansion, but that decision was wrong. Once presented with the Initiative, the City had no power to deny the Store Expansion, nor could it "shape" it.

2. Statutes Must Be Harmonized So That No Part of Either Becomes Meaningless or Surplusage

Statutes should be construed, whenever possible, so that all may be harmonized and have effect with reference to the whole system of law, so that no part of either becomes "surplusage." *DeVita*, *supra*, 9 Cal.4th at p. 778; *Mejia, supra,* 31 Cal.4th at p. 663. Statutory interpretations that would require one or another to be ignored must be avoided. Courts should assume that the Legislature is aware of existing, related laws and intends to maintain a consistent body of rules. *Fuentes v. Workers' Compensation Appeal Board* (1976) 16 Cal.3d 1, 7. With regard to the peoples' initiative power, "[i]f doubts can reasonably be resolved in favor of the use of [the initiative] power, courts will preserve it." *Mervynne v. Acker* (1961) 189 Cal.App.2d 558, 563-64; *Eu, supra,* 54 Cal.3d at p. 501.

(i) *Tuolumne* Repeats the Mistake Made in *Hurst v. City of Burlingame* By Creating and Resolving a Conflict that Does Not Exist

Since this Court's decision in *Associated Home Builders, supra,* 18 Cal.3d 582, courts have consistently applied the foregoing principles to avoid conflicts between the right of initiative and statutory procedures regulating governmental action outside of the initiative process. Prior to *Associated Home Builders,* the Supreme Court had held in *Hurst v. City of Burlingame* (1929) 207 Cal. 134 that statutes requiring a notice and

hearing to enact municipal zoning and land use ordinances applied to initiatives. Consequently, the Supreme Court held in *Hurst* that "[t]he initiative law and the zoning law are hopelessly inconsistent and in conflict as to the manner of the preparation and adoption of a zoning ordinance." *Id.* at 141.

This Court overruled *Hurst* in *Associated Home Builders*. With regard to the purported conflict, this Court held, "[f]irst, *Hurst*, erroneously contriving a conflict between state zoning statutes and the initiative law, set out to resolve that presumed conflict. No conflict occurs, however; the Legislature never intended the notice and hearing requirements of the zoning law to apply to the enactment of zoning initiatives. *See* Comment, *The Initiative and Referendum's Use in Zoning* (1976) 64 Cal.L.Rev. 74, 104-105; *Associated Home Builders*, *supra,* 18 Cal. 3d at p. 594, footnote omitted.

Similarly, until *Tuolumne*, every case considering whether CEQA and the Elections Code conflicted has found that CEQA does not apply to voter-generated initiatives. *See*, e.g., *Native American Sacred Site, supra,* 120 Cal.App.4th 961; *DeVita, supra,* 9 Cal.4th 763; *Sierra Madre, supra,* 25 Cal.4th 165.

The *Tuolumne* court found the CEQA and the Elections Code to be inherently incompatible. It frankly acknowledged that in a typical situation, its holding would make it "impossible to comply with CEQA before the time for making a decision expired, since an EIR cannot be prepared, made available for public comment, and certified" within the time constraints applicable to initiatives. *Tuolumne, supra,* 210 Cal.App.4th at p.1031; (Opinion at p. 25-26). The Court further acknowledged that its holding would effectively nullify a city's ability to

directly adopt any initiative that might have a significant impact on the environment. *Tuolumne* at p. 1031; (Opinion at p. 26). Even if a city defied the time constraints of Elections Code section 9214 and prepared an EIR, it would still be impossible for a city to comply with the mitigation requirements of CEQA because the city could not alter an initiative. Pub. Res. Code § 21002.1, subd. (b); Elections Code § 9214.

The conflict contrived by the Court in *Tuolumne* was unnecessary. The Elections Code sets forth procedures governing initiatives, including procedures for environmental review that are consistent with the people's right to prompt consideration of their initiatives. CEQA does not apply to initiatives.

(ii) *Tuolumne* Makes the Abbreviated Report Pursuant to Elections Code Section 9212 and 9214 (c) Surplusage

After unnecessarily finding a statutory conflict, the *Tuolumne* decision violated a well-established canon of statutory construction. The reports authorized by Elections Code Section 9212 and 9214, subdivision (c) permit public agencies "to inquire into the environmental impacts of a proposed initiative to the extent consistent with the time requirements of the initiative process." *DeVita v. County of Napa, supra,* 9 Cal.4th at pp. 794-795. If CEQA applies, however, then the optional report contemplated by the Elections Code would always be subsumed within the mandatory preliminary review and initial study required by CEQA. CEQA would *always* require an evaluation as to whether a project might significantly impact the environment before a city could adopt an initiative. But as discussed below, the evaluation and determination

required by CEQA could not be performed within the 30-day window for study permitted by the Elections Code.

CEQA requires a public agency first to conduct a "preliminary review" within 30 days following an application – which in this case would be a voter initiative – to determine whether the proposed action is a "project," and if so, whether it is exempt from CEQA. Guidelines, 14 Cal. Code Regs. sections 15060-15061. If an agency determines that a proposed activity would be a "project" and not exempt from CEQA, then the public agency has another 30 days to prepare an "initial study" to determine whether the project may have a significant effect on the environment. Guidelines, 14 Cal. Code Regs., section 15063. "Many agencies routinely exceed the time limits for preparing an initial study and adopting a negative declaration, but there are no statutory sanctions for such violations." Kostka & Zischke, *Practice Under the California Environmental Quality Act* (2d ed. March 2012) § 6.9, citations omitted.

If a local government determines that an initiative constitutes a project, but would not adversely affect the environment, then the local government would be compelled to follow another mandatory process, including public notice and comment, before adopting a negative declaration. Guidelines, 14 Cal. Code Regs. section 15074, subd. (b). The local government would be required to provide a minimum of 20 to 30 days time for public comment before adopting a negative declaration Pub. Res. Code § 21091, subd. (b). The adoption of a negative declaration could take up to 180 days (Public Resources Code section 21151.5, subdivision (a)(1)(B); Guidelines, 14 California Code of Regulations section 15107) and would require a city to consult with all responsible agencies and trustee agencies. Pub. Res. Code § 21080.2.

The following excerpt further exposes the violation of the canon of construction by the *Tuolumne* Court: "[w]e see nothing in Elections Code section 9214 to indicate that the subdivision (c) report is intended to operate to the exclusion of any other form of environmental review . . . ." *Tuolumne, supra,* 210 Cal.App.4th at p. 1030; (Opinion at p. 24). That observation turns an established canon of construction on its head. If CEQA applies, an optional report pursuant to section 9214, subdivision (c) would be surplusage because a more thorough (and time-consuming) analysis would be required under CEQA just to determine whether an initiative might impact the environment.

The Court of Appeal surmised that a report pursuant to section 9214, subdivision (c) might be used to "show the council that it should not adopt the initiative because of possible environmental or nonenvironmental consequences. It might show that the initiative should not be adopted absent more extensive environmental (or other) review." *Tuolumne, supra,* 210 Cal.App.4th at p. 1030; (Opinion at p. 24). The Court's reasoning cannot be correct for at least two reasons. First, it would convert the optional report under section 9214, subdivision (c) into a mandatory prerequisite to council adoption of an initiative. Second, while holding that CEQA applies, it would create a process for conducting environmental review that did not meet the requirements of CEQA.

Either CEQA applies, or it does not. If CEQA applies, then a local government must fully comply with all of its provisions. If a local government must comply with CEQA, then the report contemplated by Elections Code sections 9212 and 9214, subdivision (c) would be surplusage.

In summary, the Court of Appeal in *Tuolumne* erred by first, finding an irreconcilable conflict where none needed to be found, and second, by rendering provisions of the Elections Code surplusage.

3. Statutes Must Be Construed to Ascertain and Effectuate Legislative Intent

If uncertainty exists when construing statutes based upon their plain language, the court should then consider the legislative history, the wider historical circumstances of their enactment, and the consequences flowing from a particular interpretation. *Walnut Creek Manor, supra,* 54 Cal.3d at p. 268. If the Court determines that CEQA and Elections Code section 9214 cannot reasonably be reconciled based upon their plain language, an examination of the legislative history and purpose of the two statutes supports *Native American Sacred Site*'s conclusion that CEQA does not apply to Elections Code section 9214.

To begin, there is no evidence that the Legislature ever intended CEQA to apply to any part of the initiative process. On the contrary, as discussed above, the legislative history reveals that the Legislature *rejected* attempts to impose CEQA requirements on local initiatives at the *same time* it was empowering local governments to prepare abbreviated reports pursuant to Elections Code section 9212. By inserting CEQA requirements into Elections Code section 9214, the Court of Appeal rewrote the express provisions of the statute in a manner which the Legislature had repeatedly declined to do. Making precisely the same argument that this Court soundly rejected in *DeVita*, the decision of the Court of Appeal "would have us redraw this legislative compromise by concluding that environmental review is ***mandatory***" for

all directly-adopted land use initiatives. *DeVita*, *supra*, 9 Cal.4th at p. 795, emphasis added.

(i) The Inclusion of One Thing In A Statute Excludes Any Other

"In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." Code Civ. Pro. § 1858. The enumeration of particulars in a statute implies the intentional exclusion of any omitted item. *Garson v. Juarique* (1979) 99 Cal.App.3d 769, 774.

In Elections Code section 9214, subdivision (c), the Legislature empowered a city to postpone its decision whether to adopt an ordinance, or submit it to voters, for 30 days in order to obtain a report pursuant to section 9212. The section permits a city council "to conduct an abbreviated environmental review of . . . land use initiatives in a manner that does not interfere with the prompt placement of such initiatives on the ballot." *DeVita*, *supra*, 9 Cal.4th at p. 795. The Elections Code expressly mentions a particular means of providing an environmental review, creating a strong inference that the Legislature intended the enumerated method to be exclusive. Indeed, CEQA existed at the time the Legislature enacted Elections Code sections 9212 and 9214 subdivision (c), but the Legislature failed to apply it to either statute.

(ii) Words or Qualifying Provisions Cannot be Judicially Inserted Into a Statute

In construing a statute, courts may not insert qualifying provisions or rewrite the statute to conform to or accomplish a purpose or assumed intention that does not appear on the statute's face, or from its language or legislative history. *In re Hoddinott* (1996) 12 Cal.4th 992, 1002.

The Elections Code permits a city council to choose between directly adopting an ordinance, ordering a special election, or ordering a report pursuant to Elections Code section 9212. Elections Code § 9214. *Tuolumne* inserts qualifying language into the Elections Code – namely, the direct adoption alternative only applies to initiatives that will not have a significant environmental impact.

The Legislature explicitly provided a means for a limited environmental review that did not unduly burden the initiative power – a means that does not include CEQA. This Court should follow its own direction and "decline to engage in such legislation by judicial fiat." *DeVita, supra,* 9 Cal.4th at p. 795.

(iii) Judicial Views Cannot be Substituted for Those of the Legislature

In *DeVita* this Court observed that the Legislature had considered and rejected several proposed bills that would have applied CEQA review to voter-sponsored initiatives, and held that the Legislature did not intend for CEQA to obstruct the exercise of the initiative power. *DeVita, supra,* 9 Cal.4th at pp. 794-795. The *Tuolumne* decision ignores this Court's observations in *DeVita,* and improperly limits the holding of *DeVita* and its predecessors to initiatives adopted by popular vote. *Tuolumne, supra,* 210 Cal.App.4th at p. 1019; (Opinion at p. 9).

Tellingly, *Tuolumne* contains no discussion of the legislative history or historical context surrounding the right of initiative, the power of local governments to adopt initiatives, or Elections Code sections 9214 and 9212.

The Court of Appeal, instead, made a policy decision that the purpose of CEQA should trump the more than 100-year-old power of local governments to adopt voter initiatives – a decision unsupported by the language of the statutes, the legislative history, or historical context. The *Tuolumne* court considers the ability of a city council to directly adopt a voter initiative an "anomalous consequence" because it allows "a small fraction of a local electorate, combined with a majority of a city council" to adopt legislation. *Tuolumne, supra,* 210 Cal.App.4th at pp.1031-32; (Opinion at p. 26).[21] But that consequence is precisely what the people envisioned when they reserved the right of initiative unto themselves by amending the Constitution in 1911. It is also precisely what the Legislature envisioned when it gave a city council the unqualified power to adopt voter initiatives more than 100 years ago.

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[21] The Court of Appeal in *Tuolumne* characterized the actions of the voters and the City Council, here, as "nullify[ing] state law under conditions in which the local electorate as a whole has not been given a voice." *Tuolumne, supra,* 210 Cal.App.4th at p.1031-32; (Opinion at p. 26). Obviously, however, even a majority of voters exercising their right of initiative would never have the power to "nullify" state law. The question is not whether the local electorate can nullify state law, but, rather, whether CEQA applies.

(iv) A Sensible Construction Must be Used to Avoid an Absurd Result

The *Tuolumne* Court mandates that cities apply CEQA to initiatives they directly adopt, but admits it is typically impossible for any city to apply CEQA to an initiative. Indeed, it is always impossible.

Regardless of time constraints, a city could never comply with CEQA's mitigation mandates because a city cannot alter an initiative. Additionally, *Tuolumne* largely renders the Elections Code provisions providing for the preparation of an abbreviated study of environmental impacts largely surplusage, because such review would never be sufficient to comply with CEQA.

Conducting the expensive and time-consuming environmental review required by CEQA, when a local government lacks any power to deny or shape a project, would be a "meaningless exercise" and an anomalous consequence. "The intent to create such an illogical and confusing scheme cannot be attributed to the Legislature. In fact, it is a duty of the courts to construe statutes so as to avoid such an absurd result, if possible ... ." *Landrum v. Superior Court* (1981) 30 Cal.3d 1, 9. This Court should reverse the absurd result dictated by the Court of Appeal's opinion.

D. The Court of Appeal Erroneously Concluded That Adoption of an Initiative was the "Antithesis of Democracy"

The Court of Appeal explained its unprecedented view that empowering legislative adoption of initiatives without elections was anti-democratic as follows:

> The 15 percent minority's power is merely to demand an opportunity for the exercise of sovereignty by the voters at

> an election. To be sure, this is a vitally important power without which the voters' will often would not ultimately be expressed. It does not mean, however, that any constitutional principle allows 15 percent of a city's voters plus a majority of the city council to defeat state law. Far from carrying out the objectives of the 1911 constitutional amendment, that result would undermine those objectives: The amendment aims to allow a majority of voters to step in when they find that their elected representatives have failed them. It was not designed to allow a small minority of voters representing only themselves to obtain, via petition, a policymaking power exceeding that of the majority's elected representatives. To hold otherwise would authorize rule by a few — the antithesis of democracy.

Tuolumne, supra, 210 Cal.App.4th at p. 1023; (Opinion at p. 15).

The Court of Appeals' curious derision of the right to have initiatives immediately adopted without a vote cannot be reconciled with the 1911 constitutional amendment. As previously discussed, the 1911 constitutional amendment *explicitly* empowered the Legislature directly to adopt voter initiatives without a vote of the people, and the Legislature has always empowered local governments to adopt voter initiatives without holding elections. Nothing about the 1911 constitutional amendment or the 100-year-old law is the "antithesis of democracy." Nor can the *Tuolumne* Court's characterization be squared with this Court's characterization of the 1911 amendment, which empowered direct adoption of initiatives, as "one of the outstanding achievements of the progressive movement of the early 1900's." *See, Associated Home Builders, supra,* 18 Cal.3d at p. 591.

E. Requiring Local Governments to Perform a Protracted and "Meaningless" Environmental Review Would Unconstitutionally Impair the Electorate's Reserved Right of Initiative

If the Court in *Tuolumne* was correct in holding that the Legislature intended to apply CEQA to voter generated initiatives, then the Legislature's application of CEQA violated the California Constitution.

The Legislature can enact procedures to facilitate the people's exercise of the right of initiative. *Associated Home Builders, supra,* 18 Cal.3d at p. 595. It lacks the power to restrict or impair that right. This Court has recognized that the Legislature cannot use its power to legislate "procedures" to "effectively bar" the local initiatives. *Ibid.* ("legislation which permits council action but effectively bars initiative action may run afoul of the 1911 amendment").

This Court's observation in *Associated Home Builders* actually understated the limitation on the Legislature's power. The people circumscribed their delegation of legislative power over the right of initiative. The only power that the people delegated to the Legislature was the power to "facilitate" the right of initiative. Thus, in *Friends of Sierra Madre* this Court observed, without deciding the issue, that "imposing CEQA requirements on such [voter-generated] initiatives might well be an impermissible burden on the electors' constitutional power to legislate by initiative. (Cal. Const., art. II, §§ 8, 11.)" *Friends of Sierra Madre, supra*, 25 Cal.4th at p. 189. Similarly, this Court observed that, "the notice and hearing provisions of the state zoning law, if interpreted to bar initiative land use ordinances, would be of doubtful

constitutionality." *Associated Home Builders, supra,* 18 Cal.3d at p. 595.

The right of initiative includes the right to propose laws, as well as the right to enact them. A legislative procedure that permits local governments to adopt proposed initiatives facilitates the people's exercise of their reserved right of initiative. Applying CEQA and all time requirements and procedures would impede, not facilitate the initiative power. This Court has characterized the purpose of the initiative power as a "legislative battering ram" to allow citizens to "tear through the exasperating tangle of the traditional legislative procedure and strike directly towards the desired end." *Amador Valley Union High School District v. State Board of Equalization* (1978) 22 Cal.3d 208, 228. To affirm *Tuolumne* would be to disarm the people of their battering ram.

Therefore, even if *Tuolumne* correctly held that the Legislature intended to prevent a local government from adopting a proposed initiative without first complying with CEQA, this Court should reverse because the people never delegated the power to adopt such legislation to the Legislature.

CONCLUSION

For the reasons discussed above, this Court should reverse *Tuolumne* and hold that CEQA does not apply to local governments when adopting voter-generated initiatives.

Respectfully submitted,

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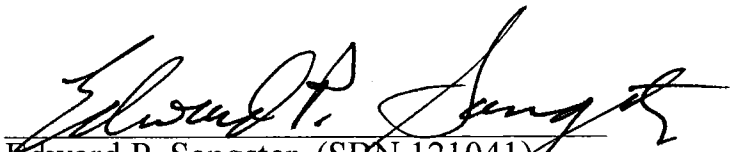
Dated: March 14, 2013 By: 

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CERTIFICATE OF WORD COUNT

The text of this brief consists of 12,511 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Respectfully submitted,

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STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO

I am employed in the county of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is **K&L Gates, Four Embarcadero Center, Suite 1200, San Francisco, CA 94111.**

On **March 14, 2013**, I served the foregoing document(s):

REAL PARTY IN INTEREST WAL-MART STORES, INC.'S OPENING BRIEF ON THE MERITS

together with an unsigned copy of this declaration, on all interested parties in this action addressed and sent as follows:

SEE ATTACHED LIST

[XX] **BY MAIL (By Following Office Business Practice):** By placing a true copy thereof enclosed in a sealed envelope(s). I am readily familiar with this firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I placed such envelope(s) for collection and mailing on that date following ordinary business practice.

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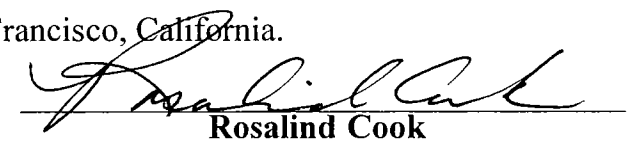
I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 14, 2013, at San Francisco, California.



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