Case No. S207173

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

TUOLUMNE JOBS & SMALL BUSINESS ALLIANCE,

Petitioner,

v.

THE SUPERIOR COURT OF TUOLUMNE COUNTY,

Respondent,

WAL-MART STORES, INC.; JAMES GRINNELL,

Real Parties in Interest.

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

REAL PARTY GRINNELL'S REPLY BRIEF ON THE MERITS

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TO THE HONORABLE TANI GORRE CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

James Grinnell, Real Party in Interest in the above-entitled case, respectfully submits this Reply Brief.

I. INTRODUCTION

The Answer Brief filed by Petitioner Tuolumne Jobs & Small Business Alliance ("TJSBA") is largely non-responsive to the arguments made by Real Parties in Interest James Grinnell ("Grinnell") and Wal-Mart Stores, Inc. ("Wal-Mart") that compellingly demonstrate why the Fifth Appellate District's opinion in *Tuolumne Jobs and Small Business Alliance v. Superior Court* (the "Opinion") was incorrectly decided and must be reversed. Instead, the vast majority of TJSBA's Answer Brief simply parrots language from the Opinion and meekly requests affirmance of the Opinion from this Court.

The remaining portions of TJSBA's Answer Brief amount to nothing more than (i) unsubstantiated normative assertions as to what California initiative law should be (as opposed to what it is) that are best directed to the State Legislature and not this Court, and (ii) the use of an irrelevant newspaper article to somehow impune the motives of the Initiative proponent and the voters who signed the Initiative petition. TJSBA's arguments in this regard are not only unsupported by any legal

citation whatsoever, even worse TJSBA's arguments reflect a fundamental misunderstanding of both California initiative law and foundational First Amendment petition, speech and associational freedoms that are at the core of the citizens' exercise of their reserved initiative powers under article II, section 11, subdivision (a) of the Constitution.

As demonstrated below, the Opinion (i) is in direct contravention of, and in fact nullifies, binding decisions of this Court; (ii) nullifies the reserved power of the voters to have a qualified, voter-sponsored land use initiative "immediately adopted" by a city council pursuant to Elections Code section 9214; (iii) amounts to legislating through judicial fiat; and (iv) misconstrues the nature of true "discretion" in the context of the California Environmental Quality Act ("CEQA") (Pub. Res. Code sections 21000 *et seq.*). For these reasons the Opinion should and must be reversed.

II. ARGUMENT

A. The Procedures Provided by the State Legislature to Implement the Voters' Reserved Powers of Initiative Are Set Forth Exclusively in the Elections Code; CEQA Simply Has No Application in this Context

In its Answer Brief, TJSBA fails to even acknowledge the legal briefing provided by Grinnell that compellingly demonstrates that since at least this Court's decision in *Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, an unbroken line of case law has held

that the "procedures" adopted by the State Legislature to implement the voters' reserved powers of initiative ***are exclusively set forth in the Elections Code***, not in the Government Code, not in CEQA, and not in the numerous other Code provisions that may otherwise apply to council-generated action. (*See* Grinnell Opening Brief, pp. 9-27*; Associated Home Builders*, 18 Cal.3d at 594-95 ["[T]he procedures for exercise of the right of initiative are spelled out in the initiative law . . . ."]; *Duran v. Cassidy* (1972) 28 Cal.App.3d 574, 585-86 ["[T]he requirements for lawmaking by the legislative process should not be imposed upon lawmaking by the initiative process."]; *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 145 ["fact finding" procedures contained in other statutory schemes do not apply to the initiative/charter amendment process because "[t]he power [] to amend their city charter through the initiative is derived from . . . the Constitution and is free from any such factfinding prerequisite."]; *Building Industry Association v. City of Camarillo* (1986) 41 Cal.3d 810, 824 [Government Code-imposed findings requirement "establishes guidelines that can be carried out by a city or county government, but which reasonably cannot be satisfied by the initiative process. For this reason, we conclude that the section does not apply to initiative measures."]; *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 778, n. 6, 795 [holding that CEQA does not apply to voter-sponsored initiatives and acknowledging that "once a [local agency] is

presented with a legally valid initiative petition, it may either '[p]ass the ordinance without alteration' or call a special election . . . .'"]; *Chandis Securities Co. v. City of Dana Point* (1996) 52 Cal.App.4th 475, 486 ["[C]ourts have ruled that burdensome statutory requirements mandating a legislative body provide notice, a public hearing and make findings to support its decision, need not be satisfied when the legislation is enacted by the electorate via initiative or referendum."]; *Native American Sacred Site and Environmental Protection Assn. v. City of San Juan Capistrano* (2004) 120 Cal.App.4th 961, 966 ("*NASSEPA*") [holding that CEQA does not apply to a city council adopting a voter-sponsored initiative pursuant to Elections Code section 9214 because "[t]he California Constitution provides that the voters in a city may exercise initiative powers 'under procedures that the Legislature shall provide.' [citation] Section 9214 is part of the statutory scheme set out by the Legislature . . . . A city's duty to adopt a qualified voter-sponsored initiative, or place it on the ballot, is ministerial and mandatory."] *see also MHC Financing Limited Partnership Two v. City of Santee* (2005) 125 Cal.App.4th 1372, 1384 ["[T]he voters who signed the initiative petition here are entitled to have their decision implemented under section 9215, which, like section 9214, manifests the people's power of initiative under the California Constitution."].)

Pursuant to this unbroken line of settled case law going back decades, it has always been widely understood that CEQA simply has no application to a voter-sponsored initiative – even when such an initiative is immediately adopted by a city council "without alteration" pursuant to Elections Code section 9214. (*Associated Home Builders*, 18 Cal.3d at 594-96; 613-15; *DeVita*, 9 Cal.4th at 778, n. 6; 794-95; *NASSEPA*, 120 Cal.App.4th at 966; 968-69.)

As set forth in Grinnell's Opening Brief at pages 9 through 27, both the Opinion and TJSBA simply ignore and disregard the proper legal inquiry required by this Court's decisions in both *Associated Home Builders* and *DeVita*, and properly adhered to for decades by the Courts of Appeal. As set forth in Grinnell's Opening Brief and above, the question is ***not*** whether CEQA ***itself*** exempts from its statutory requirements voter-sponsored initiatives that are immediately adopted by the city council pursuant to Elections Code section 9214. Nor is the question whether the adoption of the initiative is a "project" under CEQA.

Rather, the issue is whether the exclusive ***"procedures"*** adopted by the Legislature to implement the voters' reserved power of initiative set forth in article II, section 11, subdivision (a), allow the imposition of CEQA on either of the two alternative methods by which voter-sponsored initiatives may be adopted. As stated in Grinnell's Opening Brief and above, pursuant to years of settled law prior to the Opinion, the answer to

this latter question is an unequivocal "no" – the ***procedures*** adopted by the State Legislature to implement the voters' reserved powers of initiative are set forth ***exclusively*** in the Elections Code and CEQA simply has no application in this context. (*See* Grinnell's Opening Brief, pp. 9-27.) TJSBA's failure to even attempt to address these authorities is a telling admission. Because the Opinion is contrary to and in fact nullifies long-standing, settled law in this regard, it should and must be reversed.

B. Both the Opinion and TJSBA Misconstrue and Misapply This Court's *Friends of Sierra Madre* Decision

In its Answer Brief, TJSBA argues that the Opinion "conforms" to this Court's decision in *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165. As stated by TJSBA:

> [T]he Appellate Court's holding merely provides that where a city council decides to adopt a voter-sponsored initiative on its own rather than allow the electorate to make its decision, the city cannot absolve itself of complying with CEQA. As the opinion explains, this conforms to this Court's opinion in *Friends of Sierra Madre* . . . .

(TJSBA Answer Brief, p. 15.) TJSBA's assertions in this regard are wrong for no less than two, equally compelling reasons.

First, despite TJSBA's arguments to the contrary, *Friends of Sierra Madre* simply has ***no application*** to the present case. *Friends of Sierra Madre* concerned Elections Code section 9222, which authorizes the council to place "without petition" a council-generated "measure" on the

ballot. Section 9222 does ***not*** involve the voters' use of the reserved power of initiative contained in article II, section 11(a) of the California Constitution. The initiative power ***is reserved to the people***. (*Amador Valley Union High Sch. Dist. v. Bd. of Eq.* (1978) 22 Cal.3d 208, 228 [purpose of the reserved initiative power is to ***let the people*** "tear through the exasperating tangle of the traditional legislative procedure and strike directly towards the desired end."]; *Robins v. Pruneyard Center* (1979) 23 Cal.3d 899, 907-08 [the ***people's right of petition*** includes the exercise of the reserved initiative power]; *Perry v. Brown* (2011) 52 Cal.4th 1116, 1140 (emphasis added) [stating the initiative power grew out of a "widespread belief that the ***people had lost control of the political process***."].) Elected incumbents who exercise absolute and total discretion to place a measure on the ballot are ***not*** exercising the voters' reserved initiative power. As stated recently by the Court of Appeal:

> As the trial court found, Measure ***BB was a ballot measure, not an initiative; Measure BB was submitted to the voters by way of a City Council resolution placing the proposed ordinance on the ballot,*** not by way of an initiative petition. (Elec. Code § 9201.) The parties agree Measure BB was a ballot measure proposed by the City Council.

(*Chung v. City of Monterey Park* (2012) 210 Cal.App.4th 394, 407 (emphasis added).)

In contrast to the peoples' exercise of their reserved powers of initiative under article II, section 11(a), section 9222 provides the incumbent city council with plenary discretion (1) over the content of the measure; (2) whether to place the measure on the ballot; and (3) when to place the measure on the ballot subject to the terms of section 9222. As this Court said, under section 9222, the council retains the absolute "discretion to do nothing." (*Friends of Sierra Madre*, 25 Cal.4th at 190, n.16.)

In the voter-sponsored initiative context however, the council may ***only*** (1) immediately adopt the initiative, or (2) place it on the ballot. (Elec. Code §§ 9214 and 9215.) The Council ***lacks any discretion*** to "do nothing" but instead must either submit or adopt the measure. (*See Duran,* 28 Cal.App.3d at 579-80 [describing the alternative duty to adopt or submit the initiative as ministerial]; *DeVita*, 9 Cal.4th at 778, n. 6; *NASSEPA* 120 Cal.App.4th at 966, 968.) And unlike a council-authorized "ballot measure," in the voter-sponsored initiative context, when the council does not adopt the initiative, the council ***must*** put it on either the next regularly-scheduled election ballot, or call a "special" election that ***must*** be held within approximately 3 months of certification. (Elec. Code §§ 9214 and 9215.) Thus, unlike a scenario involving a council-sponsored "ballot measure" in which the incumbent city council has plenary control over the entire process – including the "discretion to do

nothing" (*Friends of Sierra Madre*, 25 Cal.4th at 190, n.16), when the voters exercise their reserved initiative powers, the incumbent city council acts as a ministerial agent for the electorate in all circumstances. (*NASSEPA*, 120 Cal.App.4th at 966; 969 ["[T]he city has no discretion and acts as the agent for the electorate."]; *cf. Friends of Sierra Madre*, 25 Cal.4th at 190, n. 16 ["[H]ere the city council had discretion to do nothing, but opted instead to place [the city-council-generated] ordinance on the ballot. None of the alternatives involved on a ministerial act."].)

Second, even where a city council adopts a voter-sponsored initiative pursuant to Elections Code section 9214, ***the initiative still retains its status as a voter-sponsored initiative*** because ***even in this scenario*** Elections Code section 9217 provides that a voter-sponsored initiative adopted by the city council pursuant to Elections Code section 9214 can be amended only by a vote of the people. Thus, when the voters exercise their reserved initiative powers, the city council always acts as a ministerial agent of the electorate and can only "do" what the electorate requests (adopt as submitted, or placed on the ballot). The city council cannot amend voter-sponsored initiatives themselves except through future "permission" obtained by the voters.

It is for these reasons that this Court held "[t]here is [] a clear distinction between voter-sponsored and city-council-generated

initiatives." (*Friends of Sierra Madre*, 25 Cal.4th at 189; *see also Chung v. City of Monterey Park* (2012) 210 Cal.App.4th 394, 406-07.)

Thus, the statement in the Opinion and in TJSBA's Answer Brief that the Opinion's holding "conforms to this Court's opinion in *Friends of Sierra Madre* . . ." (TJSBA Answer Brief, p. 15) is flat wrong. At best, a correct understanding of *Friends of Sierra Madre* demonstrates that it has little to virtually nothing to do with this case. At worst, a correct understanding of *Friends of Sierra Madre* demonstrates itself that the Opinion is simply flat wrong and must be reversed. (*See* Grinnell's Opening Brief, pp. 41-45.)

C. TJSBA's Assertion That the Reserved Initiative Power is Only Manifest When an Election is Held is Contrary to Over 100 Years of Settled Law and is Not Supported by a Single Decision from This Court or the Courts of Appeal

TJSBA asserts, and the Opinion holds, that this Court's *Associated Home Builders* and *DeVita* decisions only apply when an initiative is placed on the ballot for the electorate to vote on because the initiative power purportedly is only manifest when "an election is held." (Opinion, pp. 14, 27-28.) TJSBA summarizes the holding of the Opinion in this regard in its Answer Brief:

> Real parties' argument on this point reveals, once again, their failure to appreciate the importance of elections in the initiative process. The results of an election represent the will of the people. A petition signed by 15

> percent of the voters does not. Without an election, it is simply not possible to say that the people's will requires the important legislative objectives of CEQA to be set aside so a project can be expedited.

(TJSBA Answer Brief, pp. 5, 16 citing the Opinion, pp. 27-28.)

Both TJSBA and the Opinion fundamentally misconstrue the scope of the reserved initiative power as implemented by the "exclusive procedures" adopted by the State Legislature as set forth in the Elections Code. Contrary to both TJSBA and the Opinion, the reserved initiative power is not only manifest when an election is held. Indeed, neither TJSBA nor the Opinion cite to any authority supporting this extraordinary proposition and none exist. This lack of authority is – "like Sherlock Holmes's 'dog in the night-time' which tellingly failed to bark" (*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1380) – evidence itself that the Opinion must be reversed.

At the outset, and as stated, article II, section 11, subdivision (a) of the Constitution provides that "[i]nitiative and referendum powers may be exercised by the electors of each city or county ***under procedures that the Legislature shall provide.***" Elections Code section 9214 and its predecessors have long been part of the "procedures" adopted by the Legislature to implement the "broader statutory and constitutional scheme of which it is a part." (*MHC Financing,* 125 Cal.App.4th at 1384.) Indeed, the ability of a local agency to immediately adopt a qualified,

voter-sponsored initiative pursuant to the exclusive "procedures . . . spelled out in the initiative law" (*Associated Home Builders*, 18 Cal.3d at 594-95) and "consistent with the time requirements of the initiative process" (*DeVita*, 9 Cal.4th at 794) has been part of the fabric of this State's initiative process for over 100 years. (*See Myers v. Stringham* (1925) 195 Cal. 672 [duty to immediately adopt or submit a validly qualified zoning initiative]; 19 Ops.Cal.Atty.Gen. 94, 96 (1952) ["The statutes providing that county initiatives shall first be submitted to the supervisors are – and can be – only procedural. Their purpose is to give the board of supervisors itself an opportunity to pass the measure. If it does not, it must submit the measure to the people. It must take one action or the other . . . ."]; *Blotter v. Farrell* (1954) 42 Cal.2d 804, 812-13 [describing the predecessor to section 9214, stating "the city council was under a duty to either pass the proposed ordinance immediately or to call a special election for that purpose . . . . [Because the initiative petition was] properly submitted the city council was under a duty to take immediate action."]; *Duran,* 28 Cal.App.3d at 579-80 ["Respondent's duties with reference to the initiative petition appear to be purely ministerial and involve no discretion on his part . . . . [i]f the petition contains a sufficient number of valid signatures to qualify, then the council shall either adopt the ordinance without alteration or immediately order a special election."]; *Associated Home Builders*, 18 Cal.3d at 613-15; 615 ["Because of today's

holding that the initiative [procedures] take[e] precedence over zoning laws, the legislative scheme of notice, hearings, agency consideration, [environmental impact] reports, findings, and modifications can be bypassed, and the city council may immediately adopt the [initiative]. . ."]; *DeVita*, 9 Cal.4th at 778, n. 6 ["[O]nce . . . presented with a legally valid initiative petition, [the local agency] may either '[p]ass the ordinance without alteration' or call a special election. . . ."]; *Mervyn's v. Reyes* (1998) 69 Cal.App.4th 93, 98 [voter-sponsored initiative immediately adopted by the city council]; *NASSEPA*, 120 Cal.App.4th 961, 968 ["More than 15 percent of the city's voters signed the initiative petition. They, on behalf of themselves and the entire city population, are entitled to have their decision implemented under section 9214."]; *MHC Financing*, 125 Cal.App.4th at 1384 [same]; *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 9 ["Under the provisions of [the] Elections Code . . . when a local initiative petition obtains the requisite number of signatures, the local legislative body must take one of three actions [including] [] adopt[ing] the proposed ordinance itself without alteration, [or] submit[ing] the proposed ordinance without alteration to the voters . . . ."].)

Accordingly, this Court and the Courts of Appeal have repeatedly recognized that the right to have a duly-qualified, voter-sponsored initiative immediately passed by the local agency is a manifestation of the reserved initiative power of the voters because it is part of the exclusive

procedures provided by the State Legislature in the Elections Code to implement the constitutional provisions. (*Associated Home Builders*, 18 Cal.3d at 594-95; 613-15; *DeVita*, 9 Cal.4th at 777-78; 778, n. 6; 794; *NASSEPA*, 120 Cal.App.4th at 967; 968; *MHC Financing*, 125 Cal.App.4th at 1384.)

This longstanding judicial recognition is neither novel nor controversial but instead reflects a proper understanding of the design of the State's local initiative process and the attendant First Amendment rights of petition from which the initiative process was born.

City voters "have the right . . . to petition government for redress" and to seek "direct initiation of change . . . through initiative" (*Robins,* 23 Cal.3d at 907-08) by availing themselves of the initiative process set forth in Elections Code sections 9200 *et seq.* Pursuant to these procedures, the proponents first submit the proposed legislation to the city's election official along with a "Notice of Intent" setting forth the reasons for the proposed initiative petition. (Elec. Code § 9202.) The City Attorney then prepares a "Title and Summary" which is required to contain an "impartial statement of the purpose of the proposed measure in such language that the ballot title shall neither be argument, nor likely to create prejudice, for or against the proposed measure." (Elec. Code § 9203(a).) Both the Notice of Intent and the Title and Summary are then required to be published in an adjudicated newspaper or posted in three places within the

city if there is no adjudicated newspaper. (Elec. Code § 9205.) Following publication and/or posting of the Notice of Intent and the Title and Summary, individual petition sections are then prepared and are required to contain the full text of the proposed initiative, the Notice of Intent and Title and Summary, and also adhere to a number of other legally-mandated formatting requirements. (*See* Elec. Code §§ 9203(b); 9209; 100; 101.) Only ***after*** these numerous statutory provisions are adhered to can the initiative proponents and others commence the circulation and signature-gathering process.

These statutory requirements serve important public policy purposes. The requirement that the Notice of Intent be published and/or posted prior to circulation provides "information to the public to assist the voters in deciding whether to sign or oppose the petition." (*Ibarra v. City of Carson* (1989) 214 Cal.App.3d 90, 99 (emphasis in original; emphasis added) "[T]he requirement to give notice of intent prior to commencing circulation serves important purposes ***educating the public about the petition campaign before it begins***." (*Id.* at 99; *Myers v. Patterson* (1987) 196 Cal.App.3d 130, 138 ["[T]he notice-inclusion requirement serves some informational purpose for ***prospective signers of a petition*** . . ."].)

The Title and Summary requirements are designed to "avoid misleading the public with inaccurate information." (*Lungren v. Superior*

Court (1996) 48 Cal.App.4th 435, 440 *citing Amador Valley Union High School Dist.*, 22 Cal.3d at 243.)

The "full text" and other mandatory formatting requirements are designed to ensure that "registered voters can intelligently evaluate ***whether to sign the initiative petition*** and to avoid confusion." (*Mervyn's*, 69 Cal.App.4th at 99 (emphasis added).)

The State Legislature has enacted these numerous prophylactic and public information provisions to protect the integrity of the initiative circulation process because, particularly at the local level, the legal status of the voter-sponsored initiative is ***transmuted once it has been deemed to have qualified by being circulated among the public and signed by the requisite number of voters.*** Once qualified, the local agency is under a ministerial duty to "either [p]ass the ordinance 'without alteration' or call a[n] . . . election." (*DeVita,* 9 Cal.4th at 778, n. 6.)

Moreover, the act of circulating an initiative is at the core of the right to petition the government for redress of grievances:

> [T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. The 18th-century Committees of Correspondence and the pamphleteers were early examples of this phenomena and the Federalist Papers were perhaps the most significant and lasting example. The tradition of volunteer committees for collective action has manifested itself in myriad community and

> public activities; in the political process it can focus on a candidate or on a ballot measure. Its value is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost.

(*Citizens Against Rent Control v. City of Berkeley* (1981) 454 U.S. 290, 295.) This Court has long recognized this foundational principle underlying our democratic system which, in this State has included the reserved power of initiative for the past century:

> [T]he purpose of the First Amendment is 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Qualification of an initiative measure requires prior evidence of voter support in the form of petition signatures. It follows that the process of solicitation of these signatures, of necessity, involves discussion of the merits of the measure. The circulators themselves thus become unavoidably a principal means of advocacy of the proposal.

(*Hardie v. Eu* (1976) 18 Cal.3d 371, 376; *see also Robins*, 23 Cal.3d at 907-08; *Meyer v. Grant* (1988) 486 U.S. 414, 421-22 ["[T]he circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'"].)

Moreover, and as stated, when a city council immediately adopts a voter-sponsored initiative, the city is always acting as a ministerial agent of the electorate because even in this situation, the initiative can ***only*** be

amended or repealed by a ***subsequent vote of the people***. (Elec. Code § 9217; *see also MHC Financing,* 125 Cal.App.4th at 1388.) Thus, the legislation always retains its status as a voter-generated and voter-sponsored measure whether voted on by the people or approved by the city council.

Thus, it is for these reasons that this Court in *DeVita* recognized the uniformly held understanding that the voters' exercise of the reserved initiative power is manifest not only when an election is held but also when the initiative petition commences circulation: "When the people exercise their right of initiative, the[] ***public input occurs in the act of proposing and circulating the initiative itself,*** and at the ballot box." (*Id.* at 786 (emphasis added).) The fact that the local agency takes advantage of a legislative option created to avoid the public expense of a vote (*Thompson v. Board of Supervisors* (1986) 180 Cal.App.3d 555, 561) does not transmute the nature of the voter-sponsored initiative into some sort of discretionary council action. (*NASSEPA*, 120 Cal.App.4th at 968 ["More than 15 percent of the city's voters signed the initiative petition. They . . . are entitled to have their decision implemented under section 9214, which manifests the power of the initiative reserved to the people under the Constitution."]; *MHC Financing*, 125 Cal.App.4th at 1384 ["[T]he voters who signed the initiative petition here are entitled to have their decision

implemented under section 9215, which, like section 9214, manifests the people's power of initiative under the California Constitution."].)

TJSBA's core (and only) argument to support its claim that somehow the initiative process is only manifest when an election is held, is apparently based on TJSBA's unsubstantiated "belief" that the voter signature numerical requirements of Elections Code section 9214 – which requires an initiative petition to be signed by no less than 15% of the City's registered voters to qualify for immediate adoption or placement on the ballot – is somehow "insufficient" to represent the "will of the people." (*See* TJSBA's Answer Brief, p. 16.) TJSBA's assertions in this regard can be rejected for two equally compelling reasons.

First, TJSBA's argument represents nothing more than an attempt to second guess the legislative prerogatives of the State Legislature in adopting Elections Code section 9214 and allowing a local voter-sponsored initiative to be adopted pursuant to the exclusive procedures set forth in the Elections Code. Of course, it is for the Legislature, and not the courts, to provide the "procedures" to implement the reserved powers of initiative set forth in article II, section 11(a) of the Constitution and the judicial branch may neither nullify nor second guess the Legislature's wisdom in this regard. (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 53 ["The judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies

embodied in such legislation . . . the choice among competing policy considerations in enacting laws is a legislative function."]; *Farmer Bros. Coffee v. Workers' Comp. Appeals Bd.* (2005) 133 Cal.App.4th 533, 543 ["In California . . . the Legislature establishes public policy. Once it has done so, the courts may not simply fashion a policy more to their liking."].)

Second, TJSBA and the Opinion's assertion that "[t]he results of an election represent the will of the people [] [a] petition signed by 15 percent of the voters does not" (TJSBA Answer Brief, p. 16 citing the Opinion, pp. 27-28) is not supported by a single decision of any court of this State and is nonsensical in the first instance. Indeed, this assertion simply ignores the fact that many local elections that are and have been held in this State on local elected offices and local ballot measures have involved local voter turnout totals ***that approximates the 15% signature requirement of Elections Code section 9214.***

For example, in the most recent and highly contested City of Los Angeles Mayoral election a mere 20.8% of registered voters cast ballots out of over 1.8 million registered voters. (*See* City of Los Angeles, City Clerk Election Archives for March 5, 2013, http://ens.lacity.org/clk-/elections/clkelections329182041_04252013.pdf.) At the June 5, 2012, election there was approximately a 15.2% voter turnout to vote on the City of Compton's Measure B. (*See* County of Los Angeles Registrar of

Voters Website, Statements of Votes Cast, http://www.lavote.net-/Voter/Statement_Vote_Cast.cfm.) On March 5, 2013, approximately 17.7% of registered voters casted ballots for the City of Bell's contested council member seat and similarly approximately 18.4% turned out for the City of Cudahy's contested council member seat. (*Id.*) Additionally, on November 8, 2011 various cities in the County of Los Angeles held local municipal elections to fill contested council member or mayoral seats and many of these elections resulted in voter turnout of approximately 15%. (*Id.; see also* Los Angeles Registrar of Voters Website, Statements of Votes Cast, http://www.lavote.net-/Voter-/Statement_Vote_Cast.cfm [identifying various local elections throughout Los Angeles County where total voter turnout approximates the 15% signature requirement of Elections Code section 9214].)

Elections occurring in the County of Los Angeles are not outliers. Indeed, over fifty cities throughout the State regularly have voter turnout at elections that range from 10% to 29% of total registered voters. (Zoltan L. Hajnal et al., *Municipal Elections In California: Turnout, Timing, and Competition*, Public Policy Institute of California, 2002, p. vii.) The County of Riverside recently had an election on March 12, 2013 where voter turnout was 15.2%. (*See* County of Riverside Registrar of Voters Website, Past Election Results, http://www.voteinfo.net/archive.asp.) Also, on November 8, 2011 various cities in the County of Riverside held

municipal elections with voter turnout below 20%. (*Id.* [*e.g.*, City of Riverside City Council Seat -19.4%; City of Riverside Measure I – 18.9%; City of Coachella – 12.9%].) On March 12, 2013, the County of San Diego had an election for the 40th Senate District seat where the voter turnout was 15.0%. (*See* County of San Diego Registrar of Voters Website, Past Election Results, http://www.sdcounty.ca.gov-/voters/Eng/E2013.shtml.)

Thus, as the foregoing illustrates, there is simply no support for the extraordinary assertion that "[t]he results of an election represents the will of the people [] [a] petition signed by 15 percent of the voters does not." (TJSBA Answer Brief, p. 16, citing Opinion, pp. 27-28.) For over 100 years the State Legislature has expressly authorized voter-sponsored initiatives to be immediately adopted by a city council pursuant to the exclusive procedures set forth in Elections Code section 9214 and its predecessor statutes. This ability to "tear through the exasperating tangle of the traditional legislative procedure and strike directly towards the desired end" (*Amador Valley*, 22 Cal.3d at 228) through the immediate adoption provisions of section 9214 has long been held to "manifest[] the power of the initiative reserved to the people under the Constitution." (*NASSEPA*, 120 Cal.App.4th at 968; *MHC Financing*, 125 Cal.App.4th at 1384; *DeVita*, 9 Cal.4th at 794.) For this reason, the Opinion must be reversed.

D. The State Legislature Has Repeatedly Rejected the Result Sought by TJSBA and Imposed by the Opinion Through Judicial Fiat

In its Answer Brief, TJSBA simply ignores the fact that in the decades since the issuance of the *Associated Home Builders* and *DeVita* decisions, not only has the Legislature itself refused to amend the Elections Code to insert specific CEQA compliance requirements into the Elections Code in the context of a city council choosing to adopt a voter-sponsored initiative pursuant to section 9214, but in fact just the opposite has occurred. Time and time again, when presented with the opportunity to insert specific CEQA or similar environmental review requirements into the Elections Code, the Legislature has refused to do so. The express legislative mandate that CEQA does not apply to voter-sponsored initiatives adopted by a city council pursuant to Elections Code section 9214 is evidenced by the irrefutable decades-long legislative and judicial track record set forth in Grinnell's Opening Brief at pages 33 through 37 and as acknowledged by this Court in *DeVita*. (*DeVita*, 9 Cal.4th at 794-95.) Again, TJSBA's refusal to even attempt to grapple with this legislative history is telling.

For this additional reason, the Opinion must be reversed.

E. TJSBA Misunderstands the True Nature of "Discretion" in the Context of CEQA

As is the case with virtually the entirety of TJSBA's Answer Brief, TJSBA simply ignores the authority and briefing provided in Grinnell's Opening Brief at pages 40 through 50 that compellingly demonstrates that, under the functional test adopted by this Court to determine whether a project is "discretionary" or "ministerial," the adoption of a voter-sponsored initiative is clearly "ministerial" because even if an EIR were prepared on the initiative the council would have no authority to shape the project in a way that would respond to concerns raised in an EIR and therefore CEQA review would be a meaningless exercise. (*See Mountain Lion Foundation v. Fish and Game Com.* (1997) 16 Cal.4th 105, 117; Grinnell Opening Brief, pp. 48-50 [collecting cases].) TJSBA's citation to CEQA Guideline section 15369 (TJSBA Answer Brief, pp. 13-14) simply misses the mark because, as has been demonstrated, there is no exercise of discretion by a local agency with a voter-sponsored initiative – the electorate undertakes to exercise its reserved legislative power ***unilaterally*** by simply circulating and signing the initiative petition. (*See DeVita,* 9 Cal.4th at 786 ["When the people exercise their right of initiative, then public input occurs in the act of proposing and circulating the initiative itself, and at the ballot box."].) Once a sufficient percentage of voters have signed the petition, the city council must perform one of

two ministerial acts. In doing so, the council acts as the ministerial agent for the voters. (*Northwood Homes, Inc. v. Town of Moraga* (1989) 216 Cal.App.3d 1197, 1206 ["When the electorate undertakes to exercise the reserved legislative power, the city ***has no discretion*** and acts as the agent for the electorate."]; *NASSEPA*, 120 Cal.App.4th at 966-69.)

Under the functional test adopted by this Court for determining whether a private party can legally compel approval of a project without any changes which might alleviate adverse environmental consequences, a city council's adoption of a voter-sponsored initiative is clearly ministerial. (*See Leach v. City of San Diego* (1990) 220 Cal.App.3d 389, 394 ["[F]or truly ministerial permits an EIR is irrelevant. No matter what the EIR might reveal about the terrible 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."]; *Friends of Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, 308 ["[P]ermit approval is discretionary if the agency has authority to condition the permit in environmentally significant ways."]; *Central Basin Municipal Water District v. Water Replenishment District of Southern California* (2012) 211 Cal.App.4th 943, 949 ["CEQA does not apply to ministerial actions – actions in which the agency is not permitted to shape the process to address environmental concerns."]; *Health First v. March*

Joint Powers Authority (2009) 174 Cal.App.4th 1135, 1143 [stating same].)

For these reasons, and for the additional reasons set forth in Grinnell's Opening Brief at pages 40 through 48, the Opinion should be reversed.

F. TJSBA's Normative Assertions Designed to Impugn the Motives of Grinnell and the Voters Who Signed the Initiative Reflect a Gross Misunderstanding of Core First Amendment Principles that Are Attendant to the Voters' Exercise of Their Reserved Powers of Initiative

TJSBA's remaining arguments amount to little more than normative assertions designed to impugn the motives of Grinnell and the voters who signed the Initiative Petition. As stated by TJSBA:

> Adopting the CEQA exemption rule announced by the court in [*NASSEPA*] and reversing the Appellate Court in this matter . . . will encourage and embolden developers to employ the California initiative process in communities with supporting legislative bodies in order to thwart CEQA and ultimately exclude the public and the decision makers from having any say over the design of major development projects.
>
> Here, Walmart, itself neither a citizen nor a voter of Sonora, and supporter Grinnell convinced the Sonora City Council to approve specific plan legislation approving a retail development project without an election, without due process, and without completing environmental review, under the guise of democracy in action.

(TJSBA Answer Brief, p. 2.) Respectfully, TJSBA's assertions in this regard are not only wrong, but are instead as "wrong as wrong can be" on every single issue.

First, to the extent TJSBA is admonishing this Court to not adopt what TJSBA calls the "CEQA exemption rule announced by the court in [*NASSEPA*]" (TJSBA Answer Brief, p. 2), TJSBA again misunderstands the fact that the *NASSEPA* decision is entirely consistent with and in fact implements this Court's *Associated Home Builders* and *DeVita* decisions. Thus, what TJSBA is really requesting is that this Court reverse over 35 years of binding case law and judicially override the Legislature's repeated refusal to inject CEQA into the voter-sponsored initiative context. Aside from its apparent dislike for Wal-Mart, TJSBA offers no reason whatsoever – much less a compelling reason – for such a sweeping, unsupportable result.

Second, TJSBA's derogatory view of the alleged use of the initiative process by "developers" or those who support expanded retail development, like Grinnell, illustrates precisely why this Court exists to "jealously guard" (*Legislature v. Eu* (1991) 54 Cal.3d 492, 501) the voters' use of the reserved initiative power. The very existence and efficacy of reserved, core constitutional powers does not depend on whether the political cause of Grinnell and other alleged "Wal-Mart supporters" is one deemed unfavorable by TJSBA or any other

governmental entity or private association for that matter. "[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." (*Citizens Against Rent Control*, 454 U.S. at 294.) The availability to utilize the reserved initiative process is available to all citizens equally in this State – regardless of whether those citizens seek to preserve land for open space (*Mervyn's v. Reyes* (1998) 69 Cal.App.4th 93), to develop land for a private religious school uses (*NASSEPA*), to repeal existing tax policy (*Rossi v. Brown* (1995) 9 Cal.4th 688), or to seek the development of land for economically productive uses (*Pala Band of Mission Indians v. County of San Diego* (1997) 54 Cal.App.4th 565) as is the case here.

Third, the use of the initiative process in the manner at issue in this case does not "thwart CEQA" or "ultimately exclude the public and the decision makers from having any say over the design of major development projects." (TJSBA Answer Brief, p. 2.) The reporting procedure authorized by Elections Code section 9212 permits a city council "to inquire into the environmental impacts of a proposed initiative to the extent consistent with the time requirements of the initiative process" (*DeVita*, 9 Cal.4th at 794), before either "[p]assing the ordinance" or "call[ing] a special election (*id.* at 778, n. 6). And far from "excluding the public" as asserted by TJSBA, "[w]hen the people exercise their right of initiative, the[] public input occurs in the act of proposing

and circulating the initiative itself." (*Id.* at 786.) Under our system of government, this is necessarily so because "the process of solicitation of [initiative] signatures, of necessity, involves discussion of the merits of the measure" (*Hardie*, 18 Cal.3d at 376) and "the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech'" (*Meyer,* 486 U.S. at 421-22). Further, those citizens who are opposed to the legislative goals of the initiative's proponent and circulators can mount an opposition campaign during the circulation process in an effort to persuade voters to withdraw their signatures from the proposed initiative. (*Ibarra,* 214 Cal.App.3d at 98, n. 6; Elec. Code § 9602.)

Fourth, to the extent TJSBA is intimating that the hypothesized financial backers of the Initiative are allegedly operating with "bad motives" (TJSBA Answer Brief, pp. 3-4), not only is such a suggestion repugnant to the very essence of the initiative process for those reasons set forth above, but such an assertion is also contrary to the longstanding rule of law that "the validity of legislation does not turn on legislative motive." (*County of Los Angeles v. Superior Court* (1975) 13 Cal.3d 721, 728.) Further, it has long been settled that a State may not prohibit a private corporation (whether a for-profit like Wal-Mart or a not-for-profit like the Sierra Club) from financially supporting or opposing the circulation and adoption of a proposed initiative any more than it could prohibit an

individual from financially supporting or opposing the circulation and adoption an initiative. (*First National Bank of Boston v. Bellotti* (1978) 435 U.S. 765, 790.) "[T]he fact that advocacy may persuade . . . is hardly a reason to suppress it: The Constitution 'protects expression which is eloquent no less than that which is unconvincing.'" (*Id*; *see also Meyer*, 486 U.S. at 421-22 [the use of paid initiative circulators is protected as core political speech under the First Amendment].)[1]

For all of these reasons, TJSBA's request – based on irrelevant *ad hominem* attacks on the very nature of the initiative process – that this Court reverse decades of settled law and effectively impose, by judicial fiat, a procedural requirement that the State Legislature itself has refused to adopt time and time again, should and must be rejected.

III. CONCLUSION

The *NASSEPA* decision was correctly decided and the Opinion should be reversed.

Dated: April 30, 2013

RUTAN & TUCKER, LLP
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[1] It should be noted that the Record contains no evidence as to the existence or identity of any financial supporters of the Initiative in this case. But even if the Record did contain such evidence, for the reasons stated above, such evidence would be irrelevant and would have no bearing on the outcome of this case.

CERTIFICATE OF WORD COUNT

(Cal. Rule of Court 8.504(d)(1))

The text of this Petition for Review consists of 6,932 words, including footnotes, as counted in Microsoft Word, Version 2007 used to generate the brief.

Dated: April 30, 2013

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PROOF OF SERVICE BY U.S. MAIL

(*Tuolumne Jobs & Small Business Alliance v. Superior Court of Tuolumne County, et al* Supreme Court Case No. S207173)

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed by the law office of Rutan & Tucker, LLP in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 611 Anton Boulevard, Suite 1400, Costa Mesa, California 92626-1931.

On May 1, 2013, I served on the interested parties in said action the within:

REAL PARTY GRINNELL'S REPLY BRIEF ON THE MERITS

by placing a true copy thereof in sealed envelope(s) addressed as stated on the attached mailing list.

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Executed on May 1, 2013, at Costa Mesa, California.

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

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