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 REPLY TO PETITIONER'S ANSWER BRIEF ON THE MERITS

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Real Party in Interest Wal-Mart Stores, Inc. ("Walmart") hereby submits its Reply to the Answer Brief on the Merits ("Answer Brief") filed by Tuolumne Jobs & Small Business Alliance ("TJSBA").

I. INTRODUCTION

TJSBA's Answer Brief is remarkable for its omissions. For all practical purposes, it has failed to meet most of Walmart's arguments head-on.

Walmart's Opening Brief on the Merits employed well-established tools of statutory interpretation – legislative history and canons of construction – to show that the Legislature never intended CEQA to apply to voter initiatives. TJSBA *completely* ignored the legislative history of the right of initiative, which shows that the right has always included the power of local governments to adopt voter initiatives without elections. TJSBA also *completely* ignored the legislative history of CEQA, which included the Legislature's repeated consideration and rejection of proposals to apply CEQA to local voter initiatives. Finally, TJSBA addressed only one canon of statutory construction, and it applied that canon incorrectly.

Even assuming that CEQA applied, TJSBA similarly failed to confront cases cited by Walmart on the question of whether a decision to adopt a voter initiative is "ministerial," and therefore exempt from CEQA. Walmart cited Supreme Court and appellate court cases holding that the essential characteristics of "discretionary" decisions, within the meaning of CEQA, are the ability to "deny" or "shape" projects to prevent or mitigate environmental harm based on information discovered during preparation of an environmental impact report ("EIR"). TJSBA did not address either case in its Answer Brief.

Instead, TJSBA relied on only a CEQA Guideline to argue that adoption of a voter initiative is not ministerial because, in adopting it, a city makes a decision to proceed with the project. That argument is not persuasive for several reasons. First, the argument ignores cases that have characterized the "either/or" nature of the duty to adopt a voter initiative or place it on the ballot as "mandatory" or "mandatory and ministerial." Second, it ignores the "functional distinction" between ministerial and discretionary acts. Third, it mischaracterizes the Guideline itself.

Instead of addressing Walmart's authorities and arguments showing that the Legislature never intended CEQA to apply to voter initiatives, TJSBA went straight to a discussion of public policy – why, in its view, CEQA *should* apply. Unless TJSBA can first show that the Legislature intended CEQA to apply to voter initiatives, however, any discussion of public policy is irrelevant.

Furthermore, after leap-frogging legislative intent and statutory construction, TJSBA made deeply flawed public policy arguments. To begin with, the inescapable fact is that no public policy embodied in CEQA would be advanced by applying it to voter initiatives, because local governments could not deny or modify initiatives to mitigate or avoid environmental harm. Furthermore, each of TJSBA's arguments is based on its *ipse dixit* assertions that adoption of voter initiatives serves no public policy, or is contrary to public policy.

The *only* result of applying CEQA would be to strip local governments of the power to expedite the initiative process by adopting voter initiatives – a power that has existed since the inception of the initiative process more than 100 years ago. The exercise of that power

facilitates the right of initiative by expeditiously implementing the will of the electorate that signed the petition. It therefore serves an important and long-standing public policy.

This Court need not resolve diversionary questions of allegedly conflicting public policies in order to resolve this case. This Court can, and should, reverse the decision of the Court of Appeal based on straightforward principles of statutory interpretation. The Legislature repeatedly considered, and rejected, proposals to apply CEQA requirements to voter initiatives. Against that background, the Legislature created a *different* procedure permitting preparation of abbreviated reports analyzing the environmental impacts of voter initiatives. Thus, the Legislature intended that the environmental impacts of voter initiatives be studied, if at all, through the abbreviated report process created by the Elections Code.

The Court of Appeal in this case did *exactly* what this Court refused to do in *DeVita v. County of Napa* ("*DeVita*").[1] It substituted its judgment for that of the Legislature, and it redrew the legislative compromise based upon its own policy preferences. The Court of Appeal thereby erred, and this Court should reverse.

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[1] "Plaintiffs would have us redraw this legislative compromise by concluding that environmental review is mandatory in the case of general plan amendments, and that therefore such amendments cannot be enacted by initiative. We decline to engage in such legislation by judicial fiat." *DeVita v. County of Napa* ("*DeVita*") (1993) 9 Cal.4th 763, 795.

II. ARGUMENT

A. TJSBA's Argument Ignores Well-Established Principles of Statutory Interpretation

1. TJSBA Failed to Address the Plain Meaning of Elections Code Sections 9212 and 9214

This Court has frequently stated the rule that when interpreting a statute, the Court must discover the intent of the Legislature to give effect to its purpose, being careful to give the statute's words their plain, commonsense meaning. *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 919. Discovery of the Legislature's intent begins with the plain meaning of the statute. If the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary. *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632-633.

The Elections Code sets forth the procedures that a city must follow when presented with a voter initiative. In its Opening Brief, Walmart demonstrated that the plain meaning of Elections Code sections 9212 and 9214 was that a city could, but was not required to, prepare an abbreviated report regarding the environmental impacts of an initiative before deciding to adopt it. Walmart supported its interpretation with a citation to Supreme Court authority, *DeVita, supra,* 9 Cal.4th at p. 794-795 ("[Elections Code section 9111] 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").

TJSBA failed to respond to Walmart's discussion of the plain meaning of Elections Code sections 9212 and 9214. TJSBA also failed to address, much less reconcile its argument with, this Court's characterization and discussion in *DeVita* of the abbreviated report for which Elections Code sections 9212 and 9214 provide.

2. TJSBA Failed to Address the Legislative History of the Right of Local Initiative

"When the statutory language is ambiguous, the court may examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes. Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent." *Pacific Gas & Electric Co. v. County of Stanislaus* (1997) 16 Cal.4th 1143, 1152, internal citations omitted.

In its Opening Brief, Walmart discussed the historical context of the right of initiative, the legislative history of Elections Code section 9214, and the legislative history and context of CEQA. Walmart used those tools to demonstrate that the Legislature had empowered local governments to adopt voter initiatives since the inception of the right of initiative in 1911, that the Legislature had repeatedly considered and rejected proposals to impose CEQA requirements on the local initiative process, and that the Legislature had instead empowered local governments with the *option* to prepare an abbreviated study of the environmental and other impacts of voter initiative.

TJSBA did not respond to any of Walmart's arguments. It utterly failed to address the legislative history or historical context of either the Elections Code or CEQA, repeating the error of the *Tuolumne* Court.

The *Tuolumne* Court explicitly recognized the role of legislative history and historical context in statutory interpretation,[2] but after acknowledging their importance, failed to discuss or analyze either.

3. TJSBA Only Addressed One Canon of Statutory Construction, and Its Discussion of That Canon Was Erroneous

Besides legislative history, courts use well-established canons of statutory construction as aids to divine legislative intent. "When the plain meaning of the statutory text is insufficient to resolve the question of its interpretation, the courts may turn to rules or maxims of construction 'which serve as aids in the sense that they express familiar insights about conventional language usage.' " *Mejia v. Reed* (2003) 31 Cal.4th 657, 663.

In its Opening Brief, Walmart demonstrated how the Opinion deviated from every relevant canon of statutory construction. TJSBA responded in its Answer Brief by misapplying one canon of construction and ignoring the rest.

a. TJSBA and the Court of Appeal Failed to Harmonize the Statutes

TJSBA argued that the Court of Appeal adequately "harmonized" the statutes. In fact, the Court of Appeal did the opposite.

To harmonize statutes, courts read them together to *give effect*, when possible, to all provisions of both statutes. "Where as here two codes are to be construed, they must be regarded as blending into each

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[2] *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2012) 210 Cal.App.4th 1006, 1019; (Opinion at pp. 9-10).

other and forming a single statute. Accordingly, they must be read together and so construed as to give effect, when possible, to all the provisions thereof." *Tripp v. Swoap* (1976) 17 Cal.3d 671, 679, internal citations omitted.

The Court of Appeal did not "harmonize" the two statutes. It found that the "statutes point[ed] in different directions," gave full effect to CEQA, and outlawed governmental adoption of initiatives having a "significant effect" on the environment.[3] *Tuolumne*, *supra*, 210 Cal.App.4th, 1031-1032; (Opinion at p. 26). It conceded that its result was "imperfect." *Ibid.*

The Court of Appeal's holding was more than "imperfect," however. It was dead wrong. *DeVita* and *Native American Sacred Site and Environmental Protection Association v. City of San Juan Capistrano* (2004) 120 Cal.App.4th 961 ("*Native American Sacred Site*") showed how CEQA and the Elections Code could be harmonized to give full effect to both. *Tuolumne* departed from the holdings of both cases, and in so doing, radically curtailed the initiatives that could be adopted pursuant to Elections Code section 9214.

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[3] As discussed below in Section C, the ruling of the Court of Appeal would, if affirmed, necessarily apply more broadly. It would foreclose adoption of any initiative that *might* impact the environment – not just those demonstrated to have a significant environmental impact. Furthermore, because so many local voter initiatives impact the environment, the ruling would effectively outlaw governmental adoption of nearly all county-wide initiatives, and nearly half of city initiatives.

b. The Canons of Construction Ignored by TJSBA Expose the Court of Appeal's Error

i. TJSBA's Argument Renders Elections Code Sections 9214, Subdivisions (a) and (c), Surplusage

One canon of construction ignored by TJSBA is that courts should construe statutes so that no part of either becomes "surplusage." *DeVita*, *supra*, 9 Cal.4th at p. 778; *Mejia, supra,* 31 Cal.4th at p. 663. While not directly addressing the canon of construction, TJSBA cited to the portion of the Opinion suggesting that the abbreviated environmental review would retain relevance, because it could be used to determine whether an initiative might impact the environment, and therefore be subject to CEQA. If a study revealed that an initiative would impact the environment, then, the *Tuolumne* court held, a city would know that it would be required to order an election. *Tuolumne, supra,* 210 Cal.App.4th at pp. 1029-31; (Opinion at pp. 23-25).

That construction would render both subdivisions (a) and (c) surplusage. Elections Code section 9214 empowers cities to adopt ordinances with or without preparing a report concerning the environmental impacts of a voter initiative. If CEQA applies to local voter initiatives, then for every initiative, a city would have to determine whether the initiative might cause "either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." Pub. Res. Code § 21065; Cal. Code Regs., tit. 14, § 15378, subd. (a). Thus, the abbreviated report permitted by Elections Code sections 9212 and 9214, subdivision (c), would not be optional. It, or some other form of environmental study, would be mandatory.

Elections Code section 9214, subdivision (a), would therefore be surplusage because a city could never adopt a voter initiative without first determining whether the initiative might impact the environment. A city would *always* be required to follow the procedure created by section 9214, subdivision (c). Furthermore, as discussed in Walmart's Opening Brief, Elections Code section 9214, subdivision (c), would be surplusage because CEQA mandates a more comprehensive consideration of environmental issues. The optional, abbreviated environmental review contemplated by the Elections Code would never suffice.

ii. TJSBA's Construction Results in Absurd Consequences

TJSBA did not respond to Walmart's assertion that the *Tuolumne* decision results in absurd consequences. The interpretation advocated by TJSBA, and adopted by the *Tuolumne* court, depends on a conclusion that the Legislature intended to compel local governments to conduct extensive and time-consuming environmental review when they have no power to deny or shape a project. Courts have already recognized the absurdity of such a requirement. *See, Mountain Lion Foundation v. Fish & Game Com.* ("*Mountain Lion Foundation*") (1997) 16 Cal.4th 105, 117 ("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"); *Friends of Westwood, Inc. v. City of Los Angeles* ("*Friends of Westwood*") (1987) 191 Cal.App.3d 259 (when a city cannot stop or modify project to mitigate environmental harm, "to require the preparation of an EIR would constitute a useless – and indeed wasteful – gesture").

4. There Is No Evidence That the Legislature Intended to Curtail the Power of Local Governments to Adopt Voter Initiatives When It Adopted CEQA

The *Tuolumne* court characterized the main issue in this case as being one of statutory construction. *Tuolumne, supra,* 210 Cal.App.4th at p. 1017; (Opinion at p. 9). The *Tuolumne* court also acknowledged the importance of "select[ing] the construction that comports most closely with the apparent intent of the Legislature . . ." *Tuolumne* at p. 1019; (Opinion at p. 8).

The crux of both TJSBA's argument, and the Opinion, is that the Legislature intended to curtail significantly the power of local governments to adopt voter initiatives when it enacted CEQA. The problem is that neither cites to any cognizable evidence that the Legislature intended that result.

The *Tuolumne* Court started with the proposition that the Legislature intended CEQA to apply to all discretionary governmental decisions. *Tuolumne, supra,* 210 Cal.App.4th at p. 1018; (Opinion at p. 8). It next acknowledged that statutory requirements applicable to the local legislative body do not apply to the electorate when exercising its initiative power. *Ibid.* Then, the Court held that governmental adoption was not part of the exercise of the initiative power. *Tuolumne* at p. 1022; (Opinion at p. 14) ("This reasoning is based on the constitutional prerogatives *of the electorate.* It logically can have no application where, as here, the public agency decides to take the matter out of the electorate's hands").

The *Tuolumne* Court never persuasively reconciled its conclusion about the legislative intent of CEQA with the legislative intent of

Elections Code sections 9212 and 9214. Its analysis of Elections Code section 9214 was limited to its attempt to find some arguable purpose for an abbreviated report if CEQA would have precluded adoption of an initiative affecting the environment. The *Tuolumne* court reasoned that the abbreviated reports could be used to determine whether an election was necessary. *Tuolumne, supra,* 210 Cal.App.4th at p. 1031; (Opinion at p. 24) ("A better explanation of Elections Code section 9214, subdivision (c), is simply that it allows the council quickly to form a rough idea of what the consequences of the initiative will be, environmental and otherwise, before deciding whether to hold an election or adopt the initiative").[4]

TJSBA's argument is also fundamentally flawed. Without any reference to the legislative history of either the initiative power or CEQA, or any allusion to Walmart's extensive briefing of both, TJSBA made an unfounded assertion regarding legislative intent. TJSBA claimed that, following the enactment of CEQA, the Legislature could not have intended to permit local governments to adopt voter initiatives affecting the environment. TJSBA cited no support for its argument, and cannot successfully rebut Walmart's argument by constructing legislative intent out of thin air.

TJSBA cited to *Associated Home Builders of the Greater East Bay, Inc. v. City of Livermore* ("*Associated Home Builders*") (1976) 18 Cal.3d 582 and *DeVita* in the section of its brief addressing legislative

[4] As discussed below in Section C.1., the optional reports provided for in Elections Code section 9212 and 9214(c) could not suffice to comply with CEQA.

intent, but only for the proposition that its "approach" is not inconsistent with either case. Neither case supports an inference that the Legislature intended for CEQA to apply to governmental adoption of voter initiatives. On the contrary, this Court held in *DeVita* 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.

Moreover, neither case expresses a preference for submission for a popular vote over direct adoption by an agency. *See, e.g., Associated Home Builders, supra,* 18 Cal.3d at p. 591; *DeVita , supra,* 9 Cal.4th at p. 786. Nor does either case limit its holding to initiatives adopted through an election. The opposite is true: Justice Clark recognized that the Court's holding would empower local governments to adopt voter initiatives without first complying with other state laws. *Associated Home Builders, supra,* 18 Cal.3d at p. 615 (diss. opn. of Clark, J.) ("Because of today's holding that the initiative takes precedence over zoning laws, the legislative scheme of notice, hearings, agency consideration, reports, findings, and modifications can be bypassed, and the city council may immediately adopt the planned unit development or, if the council refuses, the voters may approve"). Thus, there is simply no basis to infer that the option to submit an initiative to a popular vote is the preferred mechanism to enact voter initiatives.

The legislative history is consistent with *DeVita* and *Associated Home Builders*. As discussed below, the right of a local agency to adopt a voter initiative rather than submit it to a popular vote has existed since 1911.

The *Tuolumne* decision significantly changes the people's right of initiative, without citing any authority that the Legislature intended this result. Furthermore, both TJSBA and *Tuolumne* ignored overwhelming evidence of a *contrary* legislative intent. There is simply no evidence that the Legislature intended to curtail the power of local governments to adopt voter initiatives when it enacted CEQA.

B. TJSBA's Argument That Adoption of a Voter Initiative Is "Discretionary" Ignores Precedent

Walmart cited two cases in its Opening Brief that focused on the critical importance of governmental power to "shape" projects to mitigate or eliminate environmental harm when determining whether projects are "discretionary." *Mountain Lion Foundation, supra,* 16 Cal.4th at p. 117;[5] *Friends of Westwood, supra,* 191 Cal.App.3d at pp. 267, 272.[6] Because Elections Code section 9214 prohibits a city from altering a voter initiative, Walmart argued that a decision to adopt a voter

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[5] *See, Mountain Lion Foundation, supra,* 16 Cal.4th at p. 117 ("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").

[6] *See, Friends of Westwood, supra,* 191 Cal.App.3d at p. 272 ("To properly draw the line between "discretionary" and "ministerial" decisions in this context, we must ask why it makes sense to exempt the ministerial ones from the EIR requirement. The answer is that for truly ministerial permits an EIR is irrelevant. 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").

initiative could not be "discretionary" because a city could not deny or shape a project to mitigate or eliminate environmental harm.

Despite their obvious importance, TJSBA ignored *Mountain Lion Foundation* and *Friends of Westwood* in its Answer Brief. It is reasonable to infer that TJSBA could conceive of no answer to the cases.

Instead of addressing case authority cited by Walmart, TJSBA argued that a decision to adopt a voter initiative is discretionary because the City had a choice whether to hold an election. Because any choice necessarily involves some discretion, TJSBA argued, the choice must necessarily be discretionary. In addition, TJSBA relied on the regulatory definition of "ministerial" in Guidelines section 15369[7] to argue that, by adopting the Initiative, the City made the ultimate decision whether to carry out the Initiative. Therefore, TJSBA argued, the City's decision could not have been "ministerial" within the meaning of the Guidelines.

Neither argument is persuasive. Several cases have characterized the "either/or" nature of the duty to adopt a voter initiative or place it on the ballot as "mandatory and ministerial." *Citizens Against a New Jail v. Board of Supervisors*, 63 Cal. App. 3d 559, 561 (1976), citing *Blotter v.*

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[7] In pertinent part, Guidelines section 15369 provides, "'Ministerial' 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. Section 15369 follows the foregoing quotation with a non-exclusive list of examples of ministerial decisions.

Farrell (1954) 42 Cal.2d 804, 812-13. Stated somewhat differently, the Court in *Citizens for Responsible Behavior v. Superior Court* stated, "once an initiative measure has qualified for the ballot, the responsible entity or official has a mandatory duty to place it on the ballot," subject to "[a]n obvious statutory exception [that] permits the legislative body to avoid this necessity by adopting the measure itself. . . " 1 Cal.App.4th 1013, 1021 & fn.4.

"A city's duty to adopt a qualified voter-sponsored initiative, or place it on the ballot, is ministerial and mandatory." *Native American Sacred Site, supra*, 120 Cal.App.4th 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.

Furthermore, TJSBA's arguments ignore the "functional distinction" between ministerial and discretionary acts recognized by the Court of Appeal in *Friends of Westwood.* As a result, the outcome advocated by TJSBA – that an EIR be required prior to adoption of a voter initiative – would make no sense. A local government could never deny or modify an initiative based upon information uncovered through preparation of an EIR. To use the words of this Court, preparation of an EIR would therefore be "a meaningless exercise." *Mountain Lion Foundation, supra,* 16 Cal.4th at p. 117.

Nor is Guidelines section 15369 controlling. TJSBA argued that the exercise of *any* discretion in deciding whether to approve a project renders the decision discretionary, but in fact Guidelines section 15369 is not so absolute. Section 15369 refers to decisions "involving *little* or no

personal judgment by the public official as to the wisdom or manner of carrying out the project." (Emphasis added). A decision to adopt a voter initiative fits within this definition, because the local government merely acquiesces in legislation demanded by electors who have signed the initiative.

TJSBA also argued that adoption of a voter initiative is discretionary, within the meaning of the Guidelines, because a city government makes a decision "whether" the initiative should proceed when it adopts an initiative, rather than submitting it to the voters. That reads the Guideline out of context. The decision to adopt a voter initiative is different in kind and character from discretionary acts that could be affected through preparation of an EIR, because a city has no ability to deny or shape the initiative.

C. Applying CEQA to a Local Government's Decision Whether to Adopt an Ordinance Would Prevent Adoption of Most Local Voter Initiatives

TJSBA claimed that requiring CEQA compliance would not "nullify" Elections Code section 9214 for two reasons. TJSBA first argued that a city could enact its own legislation after complying with CEQA. A city's enactment of its own legislation has nothing to do with Elections Code section 9214, however, which only applies to voter initiatives. TJSBA next spent four pages explaining that CEQA would not apply to voter initiatives adopted through elections. That point has never been disputed by any party in this case, and is irrelevant. The question presented by this case is whether *Tuolumne* would impermissibly curtail the power of cities to adopt voter initiatives pursuant to Elections Code section 9214, subdivisions (a) and (c).

The *Tuolumne* Court held that CEQA would only prevent adoption of voter initiatives that would significantly affect the environment – a conclusion that severely understated the impact that requiring CEQA compliance would have on the local initiative process.

1. If Affirmed, *Tuolumne* Would Prohibit The Adoption Of Any Voter Initiative That Might Cause Either A Direct Physical Change In The Environment, Or A Reasonably Foreseeable Indirect Physical Change In The Environment

TJSBA attempted to minimize the effect of the Opinion by arguing that it would only prohibit adoption of voter initiatives for which preparation of an EIR would be required. The Court of Appeal likewise seemed to think that its holding would be limited to such initiatives, i.e., initiatives that would have a significant impact on the environment. Neither TJSBA nor the Court of Appeal properly analyzed how a local government could determine which initiatives would require preparation of an EIR. In fact, the procedures required merely to determine *whether* an EIR would be required are incompatible with the Elections Code.

If CEQA applies, then upon receipt of *every* voter initiative, a city would be required to comply with Guideline sections 15060 to 15061 by conducting a preliminary review of the initiative. Cal. Code Regs., tit. 14, §§ 15060-15061. This preliminary review would include determining whether an initiative would be a "project" within the meaning of CEQA, i.e., an activity that may cause "either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." Pub. Res. Code § 21065; Cal. Code Regs., tit. 14, § 15378, subd. (a).

If an initiative constituted a "project," then CEQA would next require a city to determine what type of environmental document would be required. To make that determination, a city would be required to prepare an "initial study," which is an analysis prepared to determine whether a negative declaration or an EIR must be prepared for the project. Cal. Code Regs., tit. 14, § 15365. A negative declaration would be required if the initial study revealed no possible significant impact.[8] An EIR would be required if, based on the initial study, a fair argument could be made that an initiative might have a significant effect on the environment. *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 82.[9]

The Court of Appeal stated that a local government could determine whether an initiative would have a significant environmental impact by preparing an optional report pursuant to Elections Code section 9214, subdivision (c). Such a report would not satisfy the requirements of CEQA, however. CEQA imposes numerous requirements on preparation of an initial study, including a discussion of mitigation measures and consultation with other responsible agencies to

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[8] Cal. Code Regs., tit. 14, §§ 15063, 15102.

[9] The third type of environmental document to be considered in every other circumstance would be a mitigated negative declaration. A mitigated negative declaration may be prepared when a possible significant impact could be avoided or substantially mitigated to insignificance by changing the project. Pub. Res. Code § 21080(c); Cal. Code Regs., tit. 14, § 15070. A mitigated negative declaration could never be employed with regard to a voter initiative because a city would be prohibited from altering, or requiring alterations to, the initiative. Elections Code § 9214.

obtain their recommendations whether to prepare an EIR. Cal. Code Regs., tit. 14, § 15063, subd. (d)(4) and (g).

Having conducted an initial study, the only way that a city could adopt an initiative would be if no EIR was required. If the city concluded, as the result of its initial study, that an initiative would not have a significant effect on the environment, then CEQA would require the city to prepare a negative declaration. Pub. Res. Code section 21064; Cal. Code Regs., tit. 14, § 15371. CEQA requires public notice and a minimum of 20 to 30 days of comment prior to adoption of a negative declaration, however. Pub. Res. Code section 21091, subd. (b); Cal. Code Regs., tit. 14, § 15073, subd. (a).

Thus, there is no way for a local government to comply with CEQA's mandatory procedures for determining whether a project will have a significant environmental impact, while at the same time complying with the Elections Code requirement that the city either adopt the initiative within 40 days following certification or immediately order a special election. Elections Code §§ 9212, 9214. Because a city could not comply with CEQA's requirements to conduct an initial study and issue a negative declaration within the time required to order an election, affirming *Tuolumne* would effectively strip local governments of the power to adopt *any* local initiative that *might* cause "either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment."

2. Affirming *Tuolumne* Would Prohibit Local Government Adoption of Most County Voter Initiatives, and Nearly Half of City Voter Initiatives

An empirical study of the local initiative process reveals that most county voter initiatives, and nearly half of city voter initiatives, would be subject to CEQA if this Court were to affirm *Tuolumne*. According to a study conducted by the Public Policy Institute of California, more than 730 voter initiatives were presented to city and county governments between 1990 and 2000.[10] Of those, approximately 80% of the initiatives presented to county governments involved issues that would likely affect the environment to such an extent that CEQA would apply.[11] Nearly 40% of voter initiatives presented to cities bear classifications suggesting that CEQA could apply.[12] Thus, even if *Tuolumne* would not prevent adoption of *all* voter initiatives, the impact would nevertheless be profound.

D. TJSBA's Public Policy Arguments Are Meritless

The crux of TJSBA's argument is that the public policy promoted by CEQA, protection of the environment through the mitigation of environmental impacts,[13] is too important to permit local governments to

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[10] Gordon, *The Local Initiative in California* (2004) Public Policy Institute of California, p. v, *available at* http://www.ppic.org/content/pubs/report/R_904TGR.pdf.

[11] *Id.* at p. 25 (data for initiatives classified as "growth cap or boundary," "zoning," "open space," and "private projects").

[12] *Id.* at 24-26 (data for "land use," "environment," and "housing" initiatives).

[13] *See,* Pub. Res. Code §§ 21000-21002.

forego environmental review when adopting voter initiatives. TJSBA presupposes that the 100-year old statutory scheme permitting local governments to adopt voter initiatives is either contrary to public policy, or advances no public policy.

TJSBA's argument is flawed. It is not credible to suggest that a statutory scheme originally enacted more than 100 years ago advances no public policy. It is even less tenable to posit that a statutory scheme of such tenure is *contrary* to public policy – as the Court of Appeal did when it characterized governmental adoption of a voter initiative as "the antithesis of democracy." *Tuolumne, supra,* 210 Cal.App.4th at p. 1023; (Opinion at p. 15).

1. No Public Policy Would be Served by Applying CEQA to Decisions to Adopt Voter Initiatives

Although TJSBA and *Tuolumne* rely heavily on public policy arguments, the ruling in *Tuolumne* does ***nothing*** to further the public policy of CEQA. The purpose of CEQA is to force agencies to modify projects to mitigate environmental harm where possible, or to make an informed decision to proceed without mitigation. 14 Cal. Code Regs. § 15002, subd. (a); Pub. Res. Code § 21002.1, subd. (b).

The holding of the Court of Appeal will not result in more thorough environmental review of voter initiatives. Nor will it result in the mitigation of environmental harm. A local government cannot do anything to protect the environment by preparing an EIR prior to adopting a voter initiative. Requiring CEQA compliance would therefore serve no purpose.

Unsurprisingly, TJSBA cited to no authority showing that the Legislature intended CEQA to force agencies to conduct an extensive

environmental review that could never be implemented or utilized. The expenditure of public resources on such a meaningless exercise would serve no policy interest whatsoever.

2. Local Government Adoption of Voter Initiatives Pursuant to Elections Code Section 9214 Is Not Contrary to Public Policy

TJSBA cited the *Tuolumne* Court's opinion that "[t]he results of an election represent the will of the people. A petition signed by 15 percent of the voters does not" to support its contention that a local agency's ability to directly adopt a voter initiative excludes the electorate from the decision making process. *Tuolumne, supra,* 210 Cal.App.4th at p. 1028; (Opinion at pp. 27-28).

Neither TJSBA nor the *Tuolumne* Court provided any foundation for this position. The right of cities directly to adopt voter initiatives, and the right of the voters to present their initiatives for a popular vote, have always existed in tandem. (Opening Brief at p. 7-11[14]). Since 1911, the predecessors of Elections Code sections 9214 and 9215 have always imposed the same forced choice on local governments: to promptly adopt voter initiatives without alteration, or submit them to a popular vote. Since it was originally enacted in 1911, the Legislature has reenacted Elections Code section 9214 five times, and amended it nine times, most recently in 2000. West's Ann.Cal.Elec. Code § 9214. There is simply no evidence that the Legislature ever considered an agency's

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[14] *See*, specifically, Ballot Pamp., Special Elec. (Oct. 10, 1911) text of Prop. 7, Senate Const. Amendment No. 22, p. 1, available at: http://library.uchastings.edu/reearch/online-research/ballots.php; Stats. 1911, Ex. Sess., ch. 33, § 1, pp. 131-132.

direct-adoption alternative to undermine public policy, or expressed a preference for adoption by popular vote, and the legislative history supports the opposite conclusion.

Furthermore, TJSBA's claim that declining to apply CEQA to voter initiatives precludes the electorate from opining on proposed projects overlooks the critical fact that it is a *voter* who proposed the Initiative and it was *voters* who signed the Initiative petition.

3. To the Extent That Existing Statutory Schemes Manifest Competing Public Policies, the Legislature Should Resolve Any Conflict, Not the Courts

The most credible argument that TJSBA could (but did not) make is that the CEQA and the Elections Code manifest conflicting public policies. As discussed in Walmart's Opening Brief, there is no conflict between CEQA and the Elections Code, or between the public policies each statutory scheme seeks to promote. To the extent any conflict exists, however, the Legislature – not the courts – must resolve competing public policies. *Cassel v. Superior Court* (2011) 51 Cal.4th 113, 124 ("Where competing policy concerns are present, it is for the Legislature to resolve them").

E. Elections Code Section 9214 Is Not Unconstitutional

TJSBA concluded its argument with a "one liner," in which it makes the unfounded assertion that Elections Code section 9214 is unconstitutional. Answer Brief at p. 24 ("Indeed, if anything, the legislative-body adoption process contained in Election [sic] Code §9214 appears to exceed the scope of the Constitution which limits approval of initiatives 'by the electors' not by the legislative body should it not want to refer the issue to the electors").

The Court should disregard this argument because TJSBA has not properly presented it. Rule of Court 8.204(a)(1)(B) requires that a brief "[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority. . ." This is not a mere technical requirement. It is designed "to lighten the labors of the appellate [courts] by requiring the litigants to present their cause systematically and so arranged that those upon whom the duty devolves of ascertaining the rule of law to apply may be advised, as they read, of the exact question under consideration, instead of being compelled to extricate it from the mass." *Opdyk v. Calif. Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830-31, fn. 4, quoting *Landa v. Steinberg* (1932) 126 Cal.App. 324, 325.

TJSBA's remarkable assertion that Elections Code Section 9214 is unconstitutional violates this rule. The assertion is contained at the end of a section of the brief with the heading, "CEQA Compliance Does Not Nullify Elections Code Section 9214," which has nothing to do with the constitutionality of legislative adoption of initiatives.

Furthermore, when a point is asserted without argument and authority for the proposition, "it is deemed to be without foundation and requires no discussion by the reviewing court." *Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647. TJSBA's assertion that empowering local governments to adopt voter initiatives violates the Constitution is contained entirely within one sentence buried at the end of seemingly unrelated argument. TJSBA cited no legal authority in support of the argument, nor does it provide any discussion beyond the one sentence, itself. Such a conclusory presentation is insufficient to attack the

constitutionality of a statutory scheme that has been in effect for more than 100 years.

Assuming that the Court is willing to consider TJSBA's assertion, the Court should give it short shrift. The initiative power includes separate powers to *propose* and enact legislation. Cal. Const. art. II, § 8. The California Constitution explicitly empowered the Legislature to enact statutes governing the exercise of the local initiative power, and Elections Code section 9214 is a valid exercise of that power. Article II, Section 11, subdivision (a), of the California Constitution provides, in pertinent part, "[i]nitiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide."

Thus, the Constitution specifically delegates to the Legislature the power to enact statutes governing the exercise of the initiative powers in cities. "The 1911 amendment, in reserving the right of initiative to electors of counties and cities, authorized the Legislature to establish procedures to facilitate the exercise of that right." *Associated Home Builders, Inc. v. City of Livermore*, *supra,* 18 Cal.3d at p. 591. The Legislature enacted Elections Code Section 9214 and other provisions contained within Sections "9200 et seq." pursuant to that delegation of powers.

Furthermore, the Legislature enacted legislation permitting local government adoption of voter initiatives at a time when the Constitution explicitly empowered the Legislature to adopt statewide initiatives. (*See*, Opening Brief at pp. 8-9.) Thus, the Legislature properly and legally empowered local governments to adopt voter initiatives. TJSBA has

failed to explain how the Legislature's enactments violate any provision of the Constitution.

III. CONCLUSION

"The exercise of initiative and referendum is one of the most precious rights of our democratic process." *Mervynne v. Acker* (1961) 189 Cal.App.2d 558, 563. Thus, "[i]f doubts can reasonably be resolved in favor of the use of [the initiative] power, courts will preserve it." *Id.* at pp. 563-64, citing *Blotter v. Farrell, supra,* 42 Cal.2d at p. 809.

The Court of Appeal in this case erred by deviating from that fundamental principle. It found doubts about the use of the initiative power, and then resolved them *against* the use of initiative.

In part, the Court of Appeal's error stemmed from its attempt to segregate the power of local governments to adopt initiatives from the initiative process. The legislative history and historical context reveal that governmental adoption is, and always has been, an integral part of the right of initiative. The power has existed since the inception of the initiative process, and been reaffirmed and preserved through numerous reenactments and amendments.

Through one such amendment, the Legislature created a process by which cities could, if they chose to do so, conduct abbreviated environmental reviews of proposed initiatives prior to adopting them. That process would have been surplusage if the Legislature intended CEQA to apply.

Tuolumne is poorly reasoned, unsound and wrongly decided. This Court should reverse the Court of Appeal's decision in *Tuolumne*.

Respectfully submitted,

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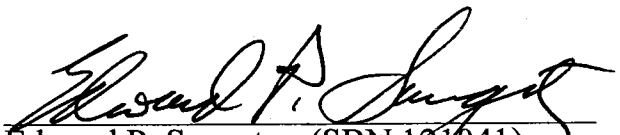
Dated: May 6, 2013 By: 

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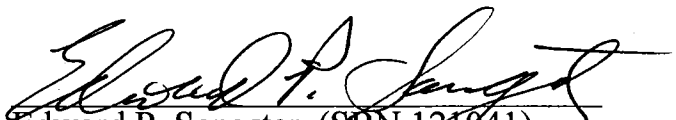
IV. CERTIFICATE OF WORD COUNT

The text of this brief consists of 6,761 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Respectfully submitted,

K&L GATES LLP

Dated: May 6, 2013 By: 

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PROOF OF SERVICE

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 **May 6, 2013**, I served the foregoing document(s):

REAL PARTY IN INTEREST WAL-MART STORES, INC.'S REPLY 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

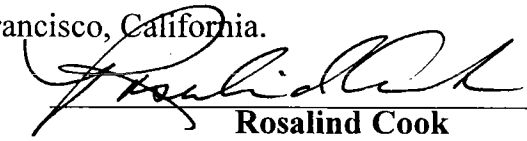
[XX] **BY MAIL (By Following Office Business Practice):** By placing a true copy thereof enclosed in a sealed envelope(s). I am readily familiar with this firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary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

[ ] **BY ELECTRONIC MAIL:** I am personally and readily familiar with the business practice of the firm for the preparation and processing of documents in portable document format (PDF) for e-mailing. I prepared said document(s) in PDF and then caused such documents to be served by electronic mail to the above addressees.

[ ] **BY FEDERAL EXPRESS**: I deposited such envelope in a box or other facility regularly maintained by Federal Express, an express service carrier, or delivered to a courier or driver authorized by said express service carrier to receive documents in an envelope designated by the said express service carrier, addressed as above, with delivery fees paid or provided for, to be transmitted by Federal Express.

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

Executed on May 6, 2013, at San Francisco, California.



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