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.

SUPREME COURT
FILED

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

REAL PARTY GRINNELL'S OPENING BRIEF ON THE MERITS

RUTAN & TUCKER, LLP
JOHN A. RAMIREZ (SBN 184151)
ROBERT S. BOWER (SBN 70234)
PETER J. HOWELL (SBN 227636)
611 Anton Boulevard, Suite 1400
Costa Mesa, California 92626-1931
Telephone: 714-641-5100
Facsimile: 714-546-9035

Attorneys for Real Party in Interest
JAMES GRINNELL

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Tuolumne Jobs and Small Business Alliance v. Superior Court
(Case No. F063849) 2

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 Opening Brief.

I. STATEMENT OF ISSUES

1. Is a city council's adoption of a voter-sponsored initiative subject to only those procedures authorized by Article II, section 11(a) of the California Constitution and set forth in the Elections Code, or is such an action subject to the California Environmental Quality Act ("CEQA") (Pub. Resources Code §§ 21000 *et seq.*)?

2. Assuming *arguendo* that the adoption of a voter-sponsored initiative is not governed exclusively by the Elections Code, is a city council's adoption of a voter-sponsored initiative pursuant to Article II, section 11(a) of the California Constitution and Elections Code section 9214 "ministerial," and therefore exempt from CEQA pursuant to Public Resources Code 21080(b)(1)?

II. INTRODUCTION

The single issue of law presented in this case is whether CEQA applies when a city council adopts a voter-sponsored initiative pursuant to Elections Code section 9214, subdivision (a). As set forth below, the answer to this question is clearly and unequivocally "no."

Indeed, this Court has already effectively rejected the argument that CEQA somehow applies in that context in *Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582 ("*Associated Home Builders*") and *DeVita v. County of Napa* (1995) 9 Cal.4th 763 ("*DeVita*"). The State Legislature has also repeatedly rejected attempts to inject CEQA requirements into the exclusive statutory procedures governing the adoption of voter-sponsored City initiatives set forth in Elections Code sections 9200 *et seq.*

Division Three of the Fourth Appellate District correctly applied *Associated Home Builders* and *DeVita* and properly understood the extensive legislative history rejecting attempts to impose CEQA into the Elections Code in *Native American Sacred Site & Environmental Protection Assn. v. City of San Juan Capistrano* (2004) 120 Cal.App.4th 961, 966, 968-69 ("*NASSEPA*"). In that case, the Fourth Appellate District specifically rejected the argument that CEQA applies when a city council adopts a voter-sponsored initiative pursuant to Elections Code section 9214, subdivision (a).

The Fifth Appellate District's opinion in *Tuolumne Jobs and Small Business Alliance v. Superior Court* (Case No. F063849) (hereafter, the "Opinion") was incorrectly decided because it misconstrued (i) this Court's decisions in *Associated Home Builders* and *DeVita*; (ii) the voters' reserved power of initiative as manifest by article II, section 11 of the

California Constitution and Elections Code sections 9200 *et seq*.; and (iii) the nature of true "discretion" in the context of CEQA. In committing these numerous errors, the Fifth Appellate District also engaged in legislating through judicial fiat by injecting the very CEQA requirements into the Elections Code that the State Legislature itself has repeatedly rejected, time and time again.

For all of these reasons, this Court should reverse the Opinion, affirm the validity of the *NASSEPA* decision, and uphold the decision of the trial court.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

The facts in this case are not in dispute.[1] Wal-Mart Stores, Inc. ("Wal-Mart") proposed expanding its 130,000-square-foot store in the City of Sonora ("City") by constructing a Wal-Mart Supercenter, which would be larger, would sell groceries, and would be open 24 hours a day, seven days a week. The City prepared a draft environmental impact report ("EIR") pursuant to CEQA and circulated it for public comment. The

[1] Indeed, in the Opinion, the Fifth Appellate District explained that "the only question on the first cause of action is whether, as a matter of law, CEQA review is unnecessary when a city approves a project by adopting as an ordinance the text of an initiative presented to it under Elections Code section 9214 with certified signatures of 15 percent of the city's registered voters, thereby avoiding the need for an election on the initiative." (Opinion, p. 7.)

City Planning Commission held a public hearing on the EIR and application, and voted to recommend approval to the City Council. (Appellate Writ Petition, Exhibit Tab 2, p. 9-10; (hereafter "Ex. Tab __, p. __").)

In June of 2010, before the City Council held hearings on whether to certify the EIR and approve the project, Real Party in Interest James Grinnell ("Grinnell"), on whose behalf this Opening Brief on the Merits is filed, submitted a "Notice of Intent" to circulate an initiative (the "Initiative") pursuant to Elections Code section 9202. Grinnell is the official proponent of the Initiative within the meaning of Elections Code sections 9202 and 342. Following receipt of Title and Summary and compliance with the publication requirements of Elections Code sections 9202 and 9203, Grinnell gathered signatures from registered voters of the City pursuant to Elections Code 9208. Following the completion of circulation and submission of the Initiative to the county Registrar of Voters, the Registrar determined the Initiative was signed by more than 15% of the City's registered voters in accordance with Elections Code sections 9210 and 9211. (Ex. Tab 2, pp. 10-12; Ex. Tab 3, p. 55.)

Pursuant to Elections Code section 9214, the City Council agendized and held a public meeting on September 10, 2010 to consider the Initiative. Thereafter, on October 18, 2010, the City Council voted to adopt the Initiative "without alteration" in compliance with Elections

Code section 9214, subdivision (a). (Ex. Tab 2, pp. 12-13; Ex. Tab 3, pp. 68-123.)

B. Procedural Background

Following the City Council's adoption of the Initiative, an entity called the Tuolumne Jobs & Small Business Alliance ("TJSBA") filed a petition for writ of mandate, alleging the Initiative was invalid because it: (1) was adopted by the City Council pursuant to the Elections Code without first complying with CEQA; (2) conflicted with the Sonora General Plan; (3) improperly bound future legislative power; and (4) was administrative and therefore not a proper subject for the initiative process. (Opinion, pp. 4-5.)

Wal-Mart, Grinnell, and the City filed demurrers. The superior court sustained Wal-Mart's demurrer with respect to the first, third, and fourth causes of action and overruled it with respect to the second cause of action (inconsistency with the general plan). The court also overruled a separate demurrer filed by Grinnell. (*Id.*)

On December 13, 2011, TJSBA filed a petition for writ of mandate in the Court of Appeal, Fifth Appellate District. The Court of Appeal ordered briefing and subsequently held a hearing on September 10, 2012. In the previously published portion of the Opinion, the Court of Appeal issued a writ of mandate overturning the superior court's order sustaining the demurrer without leave to amend on the first cause of action. The

Court of Appeal "declined to follow" the *NASSEPA* decision, and instead held that a city council's adoption of a voter-sponsored initiative pursuant to Elections Code section 9214, subdivision (a) was subject to compliance with CEQA. According to the Court of Appeal, because the Initiative was adopted by the City Council without first complying with CEQA, the City's action in adopting the Initiative was invalid.

Petitions for review were timely filed by Grinnell, Wal-Mart, and the City. This Court granted review on February 13, 2013.

IV. ARGUMENT

A. The Standard of Review

This case concerns a challenge to the adoption of a voter-sponsored initiative pursuant to the provisions of the Elections Code that "manifest[] the people's power of initiative under the California Constitution." (*MHC Financing Limited Partnership Two v. City of Santee* (2005) 125 Cal.App.4th 1372, 1384 ("*MHC Financing*").) Therefore, this Court is required to adhere to longstanding judicial policy and "to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled." (*Associated Home Builders,* 18 Cal.3d at 591.) As stated by one court in rejecting an attempt to invalidate a local, voter-sponsored land use initiative:

> Our review of this appeal is also ***strictly circumscribed*** by the long-established rule of according ***extraordinarily broad deference to***

> ***the electorate's power to enact laws by initiative***. The state constitutional right of initiative or referendum is 'one of the most precious rights of our democratic process.' [citation omitted] These powers are ***reserved to the people, not granted to them***. Thus, it is our ***duty*** to . . . 'jealously guard' these powers and construe the relevant constitutional provisions liberally in favor of the people's right to exercise the powers of initiative and referendum.

(*Pala Band of Mission Indians v. County of San Diego* (1997) 54 Cal.App.4th 565, 573-74 (emphasis added) ("*Pala Band*"); *see also Legislature v. Eu* (1991) 54 Cal.3d 492, 501 [stating this Court's "solemn duty to jealously guard the precious initiative power, and to resolve reasonable doubts in favor of its exercise."]; *Rossi v. Brown* (1995) 9 Cal.4th 688, 695 [same] ("*Rossi*").)

Moreover, because "[t]he California Constitution provides that the voters in a city may exercise initiative powers 'under procedures that the Legislature shall provide[,]'" and because "[s]ection 9214 is part of the statutory scheme set out by the Legislature" (*NASSEPA,* 120 Cal.App.4th at 966), this extraordinarily broad and deferential standard of review that requires courts to uphold the use of the initiative power wherever possible (*Pala Band*, 54 Cal.App.4th at 573-74) unquestionably applies in this case. (*See, e.g., NASSEPA*, 120 Cal.App.4th at 965-966; *MHC Financing*, 125 Cal.App.4th at 1381.) Indeed, the courts have expressly recognized that voter-sponsored initiatives adopted by a city council pursuant to

Elections Code sections 9214 and 9215 are part of the power reserved to the people and may not be improperly annulled:

> California courts have long protected the right of the citizenry under the California Constitution to directly initiate change through initiative, referendum and recall. [citation omitted] The initiative and referendum are not rights granted the people, but . . . power[s] reserved by them. . . . [I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right not be improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.
>
> . . . .
>
> [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.***[2]

(*MHC Financing*, 125 Cal.App.4th at 1381; 1384 (emphasis added); *Perry v. Brown* (2011) 52 Cal.4th 1116, 1140 ("*Perry*").)

As set forth below, TJSBA simply cannot demonstrate that CEQA applies to the City Council's adoption of the Initiative pursuant to Elections Code section 9214 because this Court has already effective

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[2] Elections Code section 9214 addresses voter-sponsored initiative petitions signed by not less than 15 percent of the voters, while Elections Code section 9215 addresses voter-sponsored initiative petitions signed by not less than 10 percent of the voters. The provisions of the two statutes are otherwise identical.

resolved this issue in the *Associated Home Builders* and *DeVita* decisions and because the State Legislature has repeatedly rejected attempts to inject CEQA into the Elections Code procedures governing the processing and adoption of voter-sponsored initiatives.

B. **The Opinion Nullifies this Court's Decisions in *Associated Home Builders* and *DeVita***

For more than 100 years, the California Constitution has reserved and guaranteed to local citizens the power of initiative. (Cal. Const. art. II, § 11.) This plenary, reserved power adds a vital "element of direct, active, democratic contribution by the people" by allowing citizens to ***legislate directly***. (*Amador Valley Union High School District v. State Board of Equalization* (1978) 22 Cal.3d 208, 228 ("*Amador Valley*"); *Robins v. Pruneyard Center* (1979) 23 Cal. 3d 899, 907-08 (emphasis added) ("*Robins*") ["The California Constitution declares that 'people have the right to petition government for redress[]. . . . That right in California is, moreover, vital to a basic process in the state's constitutional scheme – ***direct initiation of change by the citizenry through initiative, referendum and recall.***"]; *MHC Financing,* 125 Cal.App.4th at 1389 [stating same in the context of a voter-sponsored initiative adopted by a city council pursuant to Elections Code section 9215].) To this end, this Court has characterized the purpose of the initiative power as a "legislative battering ram" to allow citizens to "tear through the

exasperating tangle of the traditional legislative procedure and strike directly towards the desired end." (*Amador Valley*, 22 Cal.3d at 228; *see also Perry,* 52 Cal.4th at 1140 [stating the initiative power grew out of a "widespread belief that the people had lost control of the political process."].)

Importantly, California courts uniformly have recognized that the use of the initiative power to directly legislate in the area of land use planning, as is the case here, is not only entirely lawful, but is perhaps the "quintessential" example of the use of that reserved initiative power. This Court and the Courts of Appeal have "specifically recognized that the Legislature conceives land-use planning as legislative action – ***part of the political process*** – and not something distinct from the local legislative function, to be performed by an apolitical planning commission." (*Pala Band,* 54 Cal.App.4th at 573 (emphasis added) [upholding a voter-sponsored initiative establishing a waste disposal facility]; *DeVita*, 9 Cal.4th at 773, n. 3 ["[P]lanning is a legislative undertaking . . . and therefore . . . presumptively the proper subject of popular initiative."].) Indeed, even after the State Legislature's adoption of CEQA in 1970, local voters throughout the State have repeatedly relied upon the use of the reserved initiative power to enact land use policy at the local level – which is precisely what the Initiative sought to accomplish in this case. (*See, e.g., Duran v. Cassidy* (1972) 28 Cal.App.3d 574, 578 ("*Duran*")

[initiative concerning whether a city should own and operate a municipal golf course]; *Associated Home Builders*, 18 Cal.3d at 588 [initiative enacting growth control ordinance]; *Arnel Development Company v. City of Costa Mesa* (1980) 28 Cal.3d 511, 514 [initiative re-zoning various properties to single family residential uses]; *Garat v. City of Riverside* (1991) 2 Cal.App.4th 259, 290-302 *overruled on other grounds in Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743, n.11 [initiative enacting agricultural policies]; *Pala Band*, 54 Cal.App.4th at 570 [initiative authorizing the development of a privately-owned solid waste processing facility]; *NASSEPA,* 120 Cal.App.4th at 964 [initiative authorizing the development of a private religious high school].)

The source of the reserved, local initiative power is found in Article II, section 11 of the Constitution, which provides in relevant part:

> (a) Initiative and referendum powers may be exercised by the electors of each city or county ***under procedures that the Legislature shall provide.***

(Cal. Const., art. II, § 11(a) (emphasis added).)

In the context of municipal initiatives, this Court determined in *Associated Home Builders* and *DeVita* that the "procedures" provided by the Legislature to allow local citizens to exercise their reserved initiative powers are found ***exclusively*** in Elections Code sections 9200 through 9226 (the procedures that were fully adhered to in the present case). This

Court rejected the argument that other provisions of the Government Code and/or the Public Resources Code also apply. (*See, e.g., Associated Home Builders,* 18 Cal.3d at 594 ["[T]he procedures for exercise of the right of initiative are spelled out in the initiative law."].) As set forth below, the Opinion misconstrues, and in fact nullifies, this Court's decisions in *Associated Home Builders* and *DeVita.*

Indeed, the Opinion is premised on the wrong question and it is therefore not surprising that the Opinion arrives at the wrong answer. The Opinion frames the question before it as follows:

> [W]e employ the method used by the Supreme Court: Starting from the proposition that CEQA applies to projects approved by public agencies unless some authority establishes an exemption or exception, we consider the possible grounds for finding an exemption or exception here.

(Opinion, p. 13.)

However, as set forth below, by framing the legal inquiry in this manner, the Opinion misconstrues and disregards the proper legal inquiry required by this Court's decisions in both *Associated Home Builders* and *DeVita.*

Under the legal framework articulated by this Court in *Associated Home Builders* and later followed in *DeVita*, 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, subdivision (a). Nor is the question whether the adoption of the initiative is a "project" under CEQA.

Rather, the issue is whether the ***"procedures"*** adopted by the Legislature to implement the voters' reserved power of initiative set forth in article II, section 11(a), allow the imposition of CEQA on either of the two alternative methods by which voter-sponsored initiatives may be adopted. Pursuant to years of settled law prior to the Opinion, the answer to this latter question is an unequivocal "no."

1. *Associated Home Builders v. City of Livermore*

Beginning with this Court's decision in *Associated Home Builders* in 1976, an unbroken line of case law has held that the "procedures" adopted by the Legislature to implement the voters' reserved power of initiative and referendum are ***exclusively*** set forth in the Elections Code, not in the Government Code, not in CEQA, and not in the litany of other Code provisions that may otherwise apply to council-generated action.

In *Associated Home Builders,* the voters adopted a voter-sponsored "growth control" land use initiative. (*Associated Home Builders*, 18 Cal.3d at 589.) An association alleged – just as TJSBA argued here in the context of CEQA – that the initiative was invalid because it was adopted pursuant to the Elections Code provisions only, and did not comply with the "notice and hearing" provisions contained within the State's Planning

and Zoning Law, which purportedly regulated the adoption of "all" zoning and land use regulations. The trial court agreed:

> The superior court concluded that notice and hearing must precede enactment of any ordinance regulating land use. Since Livermore passed its ordinance pursuant to the procedures specified in the statutes governing municipal initiatives (Elec. Code §§ 4000 *et seq.*)[3] which do not provide for hearings before the city planning commission or council, the court held the ordinance invalid.

(*Id.* at 590-91.)

This Court reversed, holding:

> [T]he procedures for exercise of the right of initiative are spelled out in the initiative law. . . .

(*Id.* at 594-95.) This Court explained that "the Legislature never intended the notice and hearing requirements of the zoning law to apply to the enactment of zoning initiatives" (*id.* at 594) as evidenced by the fact that the notice and hearing provisions of the Zoning Law were "inconsistent with the regulations that the Legislature has established to govern enactment of initiatives" (*id.* at 596). In the words of this Court:

> The notice and hearing provisions of the present zoning law . . . . are ***inconsistent*** with the regulations that the Legislature has established to govern enactment of initiatives. . . . [W]e conclude that [Government Code] sections 65853-65857 do not apply to initiative action, and that the Livermore

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[3] Former Elections Code sections 4000 *et seq.* have been re-codified as Elections Code sections 9200 *et seq.*. (Stats. 1994, Ch. 920.)

> ordinance is not invalid for noncompliance
> with those sections.

(*Id.* at 596 (emphasis added).)

The rule of law established by *Associated Home Builders*, is that the "procedures" adopted by the Legislature pursuant to Article II, section 11 of the Constitution to govern the two alternative methods of enactment of voter-sponsored initiatives – adoption by the voters at an election or immediately by the city council acting as ministerial agents of the electorate – ***are exclusively contained within the Elections Code***. (*See DeVita,* 9 Cal.4th at 786, 794 (emphasis added) [the Government Code and CEQA requirements do not apply to the voter-sponsored initiative process because, in addition to other reasons, "[w]hen 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."]; *Mervyn's v. Reyes* (1998) 69 Cal.App.4th 93, 98 ("*Mervyn's*") [voter-sponsored initiative immediately adopted by the council pursuant to the Elections Code and not CEQA or Government Code]; *Duran*, 28 Cal.App.3d at 585-86 ["Unless constitutionally compelled, the requirements for lawmaking by the legislative process should not be imposed upon lawmaking by the initiative process."]; *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."]; *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."].)

Associated Home Builders is unequivocal that there are two alternative methods of enacting voter-sponsored initiatives, and those two methods are ***exclusively*** contained within the Elections Code. Indeed, the dissent expressly recognized that the majority opinion stands for the proposition that CEQA does not apply where a city council immediately adopts a voter-sponsored initiative pursuant to Elections Code section 9214:

> The zoning law and the initiative law conflict in a number of respects. Fundamentally, the zoning statutes contemplate that to achieve orderly . . . land use regulation any change in zoning ordinances is not to be made until the experts in the field have had an opportunity to evaluate the effects of the change after noticed hearing and report. . . . ***The environmental impact report*** might show potential increases in automobile congestion and air pollution which might result because adoption of the ordinance. . . . Because of the short time limitation in the initiative, the proposed

> initiative ordinance must be adopted without the notice, hearings and reports the Legislature has required for zoning changes. The initiative law conflicts with the zoning law by permitting the voters ***or the city council*** to adopt the ordinance without compliance with the [above-referenced] specified procedures. . . .

(*Associated Home Builders,* 18 Cal.3d at 613-14 (emphasis added) (dis. opn. of Clark, J.).) The dissent then summarized the legal import of this Court's holding:

> The conflict between the two statutes is clear. The zoning laws establish an administrative process which must be followed prior to the legislative act of adopting an ordinance. The initiative statutes leave no room to carry out the administrative function. . . .
>
> It is ironic that today's decision, reviewing a 'no growth' ordinance, may provide a loophole for developers to avoid the numerous procedures established by the Legislature which in recent years have made real estate development so difficult. Seeking approval of planned unit developments, land developers with the aid of the building trade unions should have little difficulty in securing the requisite signatures for an initiative ordinance. Because of today's holding that the initiative [procedures] take[] 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 [initiative]*** . . . .

(*Id.* at 615 (emphasis added).)

The dissent's use of the word "reports" clearly referred back to "[t]he environmental impact report" mentioned earlier in the portion of the opinion. (*Id.* at 614.) Importantly, *Associated Home Builders* was issued ***over six years after*** the State Legislature's adoption of CEQA in 1970. (*See id.* at 613.)

Significantly, when this Court issued its opinion in *Associated Home Builders*, the constitutionally-based power to have a proposed voter-sponsored initiative be "immediately passed" had long been part of the fabric of this State' initiative procedure. (*See 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."]; 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 . . . ."]; *Myers v. Stringham* (1925) 195 Cal. 672 [duty to adopt or submit a validly qualified zoning initiative].)

Thus, until the Opinion was handed down, California law was settled: The "exclusive" procedures by which a voter-sponsored initiative

could be adopted (immediately by the city council or by the voters at an election) were contained in the Elections Code, and neither CEQA nor any other provisions of law not contained within the Elections Code applied in those circumstances.

The Opinion unsettled the law by incorrectly holding that *Associated Home Builders* and its progeny apply only when a voter-sponsored initiative is placed on the ballot. (Opinion, p. 9.) In doing so, the Opinion failed to grasp the full significance of *Associated Home Builders* and ignored the dissent's clear enunciation of the legal import of the majority opinion.

Whereas this Court in *Associated Home Builders* found that the inconsistencies between the state zoning law and the Elections Code provisions governing the initiative compelled the conclusion that the zoning law provisions did not apply to initiatives (*Associated Home Builders*, 18 Cal.3d at 596), the Opinion simply ignored the major inconsistencies between CEQA and the Elections Code provisions governing the initiative. Indeed, the Opinion concedes that under its holding, an agency will ***not*** be able to comply with the deadlines in Elections Code section 9214 if it undertakes CEQA review, and therefore the agency will ***not*** be able to directly adopt the initiative – it will be forced to call an election in virtually all cases. (Opinion, p. 26.) The Opinion thus reads into initiative law requirements that are inconsistent

with the requirements the Legislature has established to govern the enactment of voter-sponsored initiatives, thereby nullifying a portion of state law by precluding the direct-adoption option of section 9214. By doing so, the Opinion violates the holding in *Associated Home Builders*, and nullifies the right to have a land use initiative immediately adopted by a city council without years of CEQA analysis – a right that has been part of the fabric of this state's initiative powers for nearly 100 years. (*See, e.g., MHC Financing,* 125 Cal.App.4th at 1384 [stating, where the city council adopted a voter-sponsored initiative, "the 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."]; *Mervyn's*, 69 Cal.App.4th 93 [city council adopted voter-sponsored land use initiative without first complying with CEQA].)

2. ***DeVita v. County of Napa***

The Opinion also misconstrues this Court's decision in *DeVita v. Napa*. In reaffirming that local general plans could be amended by initiative, in *DeVita* this Court undertook a thorough analysis of whether voter-sponsored initiatives were subject to CEQA and concluded that they were not. Indeed, the *DeVita* analysis is even more compelling than *Associated Home Builders* for the conclusion that a voter-sponsored initiative, even when adopted by a city council, is not subject to CEQA.

In *DeVita* this Court first focused on Elections Code section 9111. Like its parallel provision applicable to cities (section 9212), section 9111 allows a county board of supervisors to order a report on an initiative's effects prior to either adopting the proposed initiative outright ***or*** placing it on the ballot.[4] (*DeVita*, 9 Cal.4th at 794-96.) This Court stated that "Elections Code section 9111 represents a legislative effort to balance the right of local initiative with the worthy goal of ensuring that ***elected officials*** and voters are informed about the possible consequences of an initiative's enactment." (*Id.* at 795.) This Court stated:

> [Section 9111] . . . . provides . . . that during the circulation of a countywide initiative petition, ***or before voting on whether to adopt an initiative measure***, a board of supervisors 'may [request a study on the initiative's effects].' [¶] [S]ection 9111 was part of a package of amendments . . . designed to better inform the county electorate ***and the board of supervisors*** about proposed initiatives. . . . Assembly Bill No. 2202 was apparently intended to accomplish two objectives: (1) 'to provide voters with an impartial analysis of proposed initiative measures'; and (2) ***to provide the board and the electorate*** 'the opportunity to make ***an informed decision*** on a proposed initiative . . . .'

(*Id.* at 777-78 (emphasis added).) In the footnote to this passage, this Court expressly recognized that a local legislative body could immediately adopt a qualified initiative:

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4 Elections Code section 9111 pertains to County initiative measures, and is the parallel provision of Elections Code section 9212, which applies to cities.

> Elections Code section 9116 provides that, once a board of supervisors is presented with a legally valid initiative petition, it may either ***'[p]ass the ordinance without alteration'*** or call a special election. . . .

(*Id.* at 778, n. 6 (emphasis added).) This Court then went on to conclude that the report preparation procedures set forth in Elections Code section 9111 indicate a clear legislative intent that this "30-day study" was the exclusive vehicle by which a local body could review the potential environmental impacts of a voter-sponsored initiative ***and that full CEQA review was neither feasible nor required.*** To hold otherwise, this Court indicated, would be totally inconsistent "with the time requirements of the initiative process." (*Id.* at 794.) As stated by this Court:

> Elections Code section 9111 allows for an assessment of . . . a measure's effect on [various topics]. This section would permit the board of supervisors to inquire into the ***environmental impacts*** of a proposed initiative to the extent ***consistent with the time requirements of the initiative process.***

(*Id.* at 794 (emphasis added).) Thus, this Court held that further CEQA review was neither required nor contemplated by the Elections Code.[5]

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[5] The Opinion concedes that under its holding, an agency will not be able to comply with the deadlines in Elections Code section 9214 if it is required to undertake CEQA review, and thus the agency will be forced to call an election in virtually all cases. (Opinion, pp. 25-27.) Again, the fact that the Opinion would nullify state law by precluding the direct adoption option of section 9214 is yet another reason the Opinion must be reversed. (*Rossi,* 9 Cal.4th at 694 ["[T]he role of the court is to apply a statute or constitutional provision according to its terms . . . ."].)

This Court then noted that legislative history clearly supported its holding. After exhaustively analyzing the role of Elections Code section 9111 in providing a vehicle by which a legislative body could determine a proposed initiative's environmental impacts "consistent with the time requirements of the initiative process" (*id.* at 794) before either "[p]ass[ing] the ordinance" or "call[ing] a special election" (*id.* at 778, n. 6), this Court specifically focused on the fact that the Legislature had considered, but rejected, several proposed bills that would have expressly required extensive environmental review of voter-sponsored initiatives. (*Id.* at 794-95.) In light of this clear history, this Court concluded that "the defeat of attempts to impose more stringent environmental review requirements on land use initiatives provides additional corroboration that the Legislature did not intend such requirements to obstruct the exercise of the right to amend general plans by initiative." (*Id.* at 795.)

The Opinion fails to acknowledge the core reasoning underlying *DeVita's* holding. First, Elections Code section 9212 parallels precisely section 9111, the only difference being it applies to a city council rather than a board of supervisors. Prior to choosing whether to adopt a proposed initiative or place it on the ballot, section 9214, subdivision (c) allows the city council to order a section 9212 report on the proposed initiative's effects, which must be presented to the council within 30 days after the clerk certifies the sufficiency of the initiative petition. The

section 9212 report serves as the exclusive vehicle by which the council can "make an informed decision on a proposed initiative" (*Id.* at 778) by "inquir[ing] into the environmental impacts of a proposed initiative to the extent consistent with the time requirements of the initiative process" (*id.* at 794 (emph. added)). Thereafter, the city council may only "[p]ass the ordinance without alteration or call a special election." (*Id.* at 778, n. 6.) That is the only range of actions the city council has; it may adopt the initiative unchanged or it may place it before the electorate unchanged. There are no other options.

Indeed, the legislative history underlying the predecessor to section 9212 makes clear the purpose of the statute is to "authorize the city council . . . ***before enacting a proposed measure*** or calling a special election . . . to refer an initiative measure to any city agency for a report . . . on the effect of the proposed measure upon a city's general plan, among other matters." (Assem. Bill No. 2202 (1987-1988 Reg. Sess.) as introduced March 6, 1987, ("AB 2202"), pp. 7-8, set forth in Grinnell's Motion for Judicial Notice ("Grinnell RJN"), Exhibit "A".)

Thus, as this Court's decision in *DeVita* makes clear, the Elections Code section 9212 report, and not CEQA, is the ***exclusive vehicle*** by which a city council can "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.)

Importantly, several proposed legislative amendments that were rejected by the Legislature and analyzed by this Court in *DeVita* (*id.* at 794-95), would have expressly required environmental review of voter-sponsored initiatives by inserting specific references into the "procedural" requirements set forth in the Elections Code. Proposed Assembly Bill No. 4678 ("AB 4678") would have provided that no adopted initiative would be deemed to be effective until full environmental review was completed. (Grinnell RJN, Exhibit "B".) Proposed Assembly Bill No. 628 ("AB 628") expressly cited CEQA and would have amended the Elections Code to expressly allow for 90 days to complete environmental review prior to a city council choosing to either adopt the proposed initiative or place it on the ballot. (Grinnell RJN, Exhibit "C".) Of course, neither of these bills were adopted by the Legislature, and this Court found the Legislature's rejection to be compelling corroboration that the Legislature intended that CEQA ***not*** apply to voter-sponsored initiatives. Further, because AB 628 would have imposed its environmental analysis requirements prior to a city council deciding ***either*** whether to adopt an initiative or place it on the ballot pursuant to section 9214,[6] but was also rejected by the

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[6] Assembly Bill 628 stated as follows:

> Action on the measure at the close of the public hearing shall be pursuant to subdivisions (a) and (b) of Section 3709, Section 3710, and Section 3711, if

Legislature, the precise rationale of this Court in *DeVita* compels the conclusion that CEQA does not apply to voter-sponsored initiatives ***adopted*** by a city council. As stated by this Court:

> Several attempts have been made to amend the Elections Code in the years following the 1987 enactment of the predecessor to section 9111 to require environmental scrutiny.
>
> . . . .
>
> [T]he defeat of attempts to impose more stringent environmental review requirements on land use initiatives provides additional corroboration that the Legislature did not intend such requirements to obstruct the exercise of the right to amend [land use plans] by initiative. Elections Code section 9111 represents a legislative effort to balance the right of local initiative with the worth goal of ensuring that ***elected officials*** and voters are informed about the possible consequences ***of an initiative's enactment.***

(*DeVita*, 9 Cal.4th at 794-95 (emphasis added).)

As the foregoing demonstrates, the Opinion: (i) ignores the core reasoning and holding of *DeVita*; and (ii) has, by judicial fiat, "amended" the Elections Code in a manner that has been repeatedly rejected by the

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> applicable, or pursuant to subdivisions (a) and (b) of Section 4010 and Section 4011, if applicable.

(AB 628, as introduced on February 14, 1989, p 4.) As relevant here, previous Elections Code section 4010, subdivisions (a) and (b) allowed for either immediate adoption or placement on the ballot, and is now codified as Elections Code section 9214. (Stats. 1994, Ch. 920.)

Legislature as acknowledged by this Court in *DeVita.* The Opinion must be reversed for this additional reason.[7]

C. The Opinion Misconstrues the Voters' Reserved Power of Initiative Because the Voters' Reserved Power is Not Only Manifest When an Election is Held

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, p. 14; pp. 27-28.) In so holding, the Opinion fundamentally misconstrues the scope of the reserved initiative power.

Contrary to the Opinion, the reserved initiative power is not only manifest when an election is held. Indeed, the Opinion cites no authority for this extraordinary proposition and none exist.

At the outset, article II, section 11(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

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[7] Thus, the Opinion's statement that "[t]hese holdings indicate that, when there is an actual election, procedures that would restrain the voters' power to enact their will must give way" (Opinion, p. 9) reflects a fundamental misunderstanding of the ***two*** procedural mechanisms the Legislature has chosen to "manifest" (*MHC Financing*, 125 Cal.App.4th at 1384) the voters' reserved powers of initiative. As stated, under *Associated Home Builders* and *DeVita*, pursuant to Elections Code section 9214, whether a city council chooses to adopt a voter-sponsored initiative ***or*** place it on the ballot, in both circumstances CEQA simply does ***not*** apply.

provide." Elections Code section 9214 and its predecessors – which have allowed for city council adoption following qualification of a voter-sponsored initiative for over one hundred years – has 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.) Thus to assert – as the Opinion does – that the exercise of the reserved initiative power is somehow only manifest when an election is held is in fact the functional equivalent of nullifying the express prerogatives of the State Legislature in adopting Elections Code section 9214 to implement the reserved constitutional power. Of course, the judicial branch may neither nullify nor "second guess" the wisdom of the Legislature when it comes to adopting policy that is clearly within the purview of the legislative branch. (*Santa Monica Beach Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 962 ["Courts have nothing to do with the wisdom of laws or regulations, and the legislative power must be upheld unless manifestly abused so as to infringe on constitutional guaranties."].)

NASSEPA is on point and instructive in this regard. There, petitioner attempted to invalidate a city council's adoption of a voter-sponsored initiative in part because the city council adopted the measure after the 10 day period set forth in Elections Code sections 9214,

subdivisions (a) and (c) had expired.[8] Rejecting the petitioner's assertion that the expiration of the 10-day period to adopt the initiative invalidated the city's power to adopt the initiative, the court stated: "Considering the intent of the section and the broader statutory and constitutional scheme of which it is a part, that is an absurd result that we cannot countenance." (*NASSEPA*, 120 Cal.App.4th at 967.) The court then rejected petitioner's claim – one that mirrors the arguments made by TJSBA and wrongly adopted by the Fifth Appellate District in the Opinion – that their argument had nothing to do with the rights of the voters. As stated by the court:

> [T]he only reasonable explanation for a 10-day period in which to ***adopt*** a voter-sponsored initiative is a ***speedy effectuation of the will of the people.***
>
> . . . .
>
> [W]e are not persuaded by plaintiffs' related claim that their 'appeal has nothing to do with the rights of the voters . . . .' ***It has everything to do with those rights. 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, which manifests the power of the

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[8] As stated, Elections Code sections 9214, subdivisions (a) and (c) require that, if a city council desires to adopt a voter-sponsored initiative measure, it must do so within 10 days after the initiative is presented to it, or within 10 days following the receipt of the report authorized by Elections Code section 9212.

> initiative reserved to the people under the Constitution.

(*NASSEPA*, 120 Cal.App.4th at 967; 968 (emphasis added).) Thus, the *NASSEPA* court properly understood that the voters' exercise of their reserved initiative powers is not only manifest when an election is held, but also when a city council chooses to adopt the initiative pursuant to Elections Code section 9214.

Ibarra v. City of Carson (1989) 214 Cal.App.3d 90 ("*Ibarra*") also illustrates this fundamental point. There, the court invalidated a number of signatures that were obtained prior to the time the local proponents posted the notice of intent to circulate the petition as required by former Elections Code section 4003 (now Elections Code section 9205). (*Id.* at 99-100.) The court stated that the purpose of the posting requirement was to "give information to the public to assist the voters in deciding whether to sign or oppose the petition." (*Id.* at 99.) The court further stated:

> The purposes of the notice requirement may include (1) giving the voters a chance to study the issue ***before*** being approached by circulators and (2) giving potential opponents an opportunity to educate the voters or organize an opposition campaign.
>
> . . . .
>
> [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 98; 99 (emphasis in original; emphasis added).) Thus, consistent with settled law, the *Ibarra* court recognized the voters' reserved initiative petition powers are manifest not only when an election is held, but also during the circulation process.[9] Indeed, the State Legislature has enacted numerous provisions in the Elections Code to protect the integrity of the circulation process precisely because, particularly at the local level, ***the legal status of the 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. (*See, e.g., Mervyn's,* 69 Cal.App.4th at 99 [requiring proposed initiative measures to contain the full text of the proposed measure "so that registered voters can intelligently evaluate whether to sign the initiative petition and to avoid confusion."].) 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.)

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[9] The *Ibarra* court also correctly recognized the Elections Code allows those opposing the proposed initiative to mount an opposition campaign to persuade voters to withdraw their signatures from the proposed initiative. (*Ibarra*, 214 Cal.App.3d at 98, n. 6; *see also* Elections Code section 9602.) This is further corroboration that the Legislature understands that the initiative process is manifest not only when an election is held, but also during petitioning and signature gathering phase. (*See 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.'"].)

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. As stated by this Court: "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); *see also Robins,* 23 Cal.3d 899, 907-08.)

Moreover, 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 measure whether voted on by the people or approved by the city council. 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 966 ["A city's duty to adopt a qualified voters-sponsored initiative, or place it on the ballot, is ministerial and

mandatory."].) Yet, the Opinion turns this understanding of California initiative law on its head.

D. <u>The State Legislature Has Repeatedly Rejected Attempts to Inject CEQA Into the Voter-Sponsored Initiative Process and the Opinion's Imposition of CEQA in This Context Amounts to Legislating Through Judicial Fiat</u>

Of course, *Associated Home Builders* and *DeVita*, by themselves, are sufficient reason to reject the Opinion's contravention of the plain terms of the Elections Code and settled law. But there is more. 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 an initiative pursuant to section 9214, in fact, it is just the opposite. 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, and has, instead, further streamlined the voter-sponsored initiative process to eliminate any possibility of CEQA compliance. 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 an ***irrefutable decades long legislative and judicial track record***:

- As stated, in 1987, the Legislature adopted AB 2202 (Grinnell RJN, Exhibit "A"), which "authorizes the city council . . . before enacting a proposed measure or calling a special election" (*id.*) to request a "30-day study" on an initiative's effects. In *DeVita*, this Court held that the "30-day study" authorized by AB 2202 permitted a proposed initiative's environmental impacts to be reviewed "consistent with the time requirements of the initiative process" (*DeVita*, 9 Cal. 4th at 794) and before ***either*** "pass[ing] the ordinance" or "calling a special election" (*id.* at 778, n. 6).

- Cognizant of the holding of *Associated Home Builders,* as well as the fact the Elections Code provisions governing the enactment of voter-sponsored initiatives have never required CEQA compliance (*People v. McGuire* (1993) 14 Cal.App.4th 687, 694 ["The Legislature is deemed to be aware of statutes and judicial decisions already in existence and to have enacted or amended a statute in light thereof."]), in the years following the 1987 enactment of AB 2202, the Legislature considered two proposed changes to the Elections Code, AB 4678 and AB 628 (Grinnell RJN, Exhibits "B" & "C"), both of which would have imposed more extensive, time-consuming environmental review requirements on voter-sponsored initiatives by amending the "procedures" set forth in the Elections Code. The Legislature rejected these proposals. (*See DeVita*, 9 Cal.4th at 794-95.) This Court concluded that by adopting AB 2202 and

later rejecting AB 4678 and 628, the Legislature clearly intended that the "30-day study" serve as the exclusive vehicle by which a council could inquire into an initiative's environmental impacts consistent with the strict initiative time frames, and that CEQA was simply inapplicable to the voter-sponsored initiative process. (*Id.* at 794.)

- In *DeVita* this Court held that the "defeat" of proposed AB 4678 and 628, coupled with the adoption of the AB 2202 "30-day study," compellingly demonstrated that, by express legislative design, CEQA simply does not apply to the voter-sponsored initiative process at all. (*DeVita*, 9 Cal.4th at 794-95; *see also by analogy Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1107 ["The rejection of a specific provision contained in an act as originally introduced is 'most persuasive' that the act should not be interpreted to include what was left out."].) Importantly, both the majority and dissenting Justices in *DeVita* recognized that voter-sponsored initiatives could be "immediately" adopted without CEQA compliance. (*DeVita*, 9 Cal.4th at 778, n. 6; *Id.* at 800-01 (dis. opn. of Arabian, J.) ["[T]he law requires that the [legislative body] ***either enact the proposed ordinance*** . . . or submit it to the voters."].)

Lastly, the Legislature has had 10 years to legislatively repudiate the outcome in *NASSEPA* – which, citing *Associated Home Builders* and *DeVita*, specifically held that CEQA did not apply when a city council

adopted a voter-sponsored initiative pursuant to Elections Code section 9214, subdivision (a) – but has not done so. Thus, in light of this multi-decade judicial and legislative track record, it must be presumed that the Legislature has volitionally acquiesced in the courts' construction of the Elections Code and the holdings of *Associated Home Builders*, *DeVita* and *NASSEPA*. (*Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 65; *Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified School District* (1978) 21 Cal.3d 650, 659; *Cal-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 178.)

In this regard, it was simply not within the proper judicial province of the Fifth Appellate District to act as a "super-legislature" and to "judicially insert" CEQA and environmental analysis requirements into the Elections Code that the State Legislature itself has rejected at every opportunity, time and time again. The Opinion ignores the doctrine of stare decisis (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455), as well as judicially overrides the Legislature's conscious acquiescence to, and approval of, the decisions of this Court. The Opinion also ignores the constitutionally-compelled mandate that court's are to preserve – not "override" – the voters' reserved power of initiative, which has included, for the past 100 years, the ability of the voters to obtain "immediate action" by having the city council adopt a voter-sponsored initiative. (*Associated Home Builders*, 18 Cal.3d at 582 ["If

doubts can reasonably be resolved in favor of the use of this reserved power, courts will preserve it."].) The Opinion also "strikes-out" the strict time periods and the Legislature's ***express authorization*** for "immediate adoption" – ***without CEQA*** – contained not only in Elections Code sections 9214 and 9215, but also by implication in sections 9116 and 9118 (pertaining to counties) and sections 9310 and 9311 (pertaining to districts). Simply stated, the Fifth Appellate District was not authorized to "insert" text into the Elections Code that does not exist:

> ***In the construction of a statute*** or instrument, the . . . judge is simply to ascertain and declare what is in terms or in substance contained therein, ***not to insert what has been omitted, or to omit what has been inserted*** . . . .

(Code of Civ. Proc. § 1858 (emphasis added); *In re Miller* (1947) 31 Cal.2d 191, 199 [same]; *Rossi,* 9 Cal.4th at 694 (emphasis added) [in initiative context "the role of the court is to apply a statute or constitutional provision ***according to its terms***, ***not*** read into it exceptions or qualifications that are not supported by the language of the provision . . . we begin with . . . ***the plain language of the [provisions] which govern the exercise of the initiative.***"].) Accordingly, the Opinion must be reversed.

E. Applying CEQA to Voter-Sponsored Initiatives is Unworkable

In addition, applying CEQA to voter-sponsored initiatives is unworkable. Under California law, city voters wishing to exercise their reserved power to legislate through the initiative process provided in article II, section 11(a) of the Constitution must first draft the proposed legislation and then submit it, along with a "notice of intent to circulate" to the city attorney. (Elec. Code §§ 9201, 9202, 9203.)[10] Following the city attorney's preparation of the title and summary, and following publication of the title and summary and notice of intent, the initiative proponent is free to commence circulation of the initiative among the voters of the jurisdiction. (Elec. Code § 9207.)

After completion of circulation among the voters, the petitions are then filed with, and examined by, local elections officials to determine whether the initiative has "qualified" by obtaining the signatures of ten or fifteen percent of the voters of the city. (Elec. Code §§ 9210, 9211, 9214, and 9215.) If the initiative is deemed to have been signed by no less than fifteen percent of the voters of the city, then the city council must do one of the following:

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[10] The Elections Code contains separate but similar chapters governing state initiatives (*see* Elec. Code §§ 9000-9096), general law county initiatives (*see* Elec. Code §§ 9100-9190), and general law city initiatives (*see* Elec. Code §§ 9200-9295).

> (a) Adopt the ordinance, without alteration
>
> . . . .
>
> (b) Immediately order a special election
>
> . . . .
>
> (c) Order a report pursuant to Section 9212 at the regular meeting at which the certification of the petition is presented. When the report is presented to the legislative body, the legislative body shall either adopt the ordinance within 10 days or order an election pursuant to subdivision (b).

(Elec. Code § 9214.)

Thus, by express legislative mandate, the decision to either adopt or place on the ballot must be made no later than 40 days after certification. The Legislature has expressly provided only one permissible extension of time of 30 days, pursuant to subdivision (c), to prepare a section 9212 report. The statute permits no other extension.

In stark contrast, as set forth in Governor's Office of Planning and Research's CEQA Technical Advice Series, *Circulation and Notice under the California Environmental Quality Act*, (*see* Grinnell RJN, Exhibit "D") virtually no CEQA process can be ***completed*** in 40 days. Where there is a clear conflict between statutory schemes, this Court in *DeVita* and *Associated Home Builders* held that (i) the reserved power of the electorate to secure immediate action must be upheld and cannot be thwarted by CEQA, and (ii) that the Elections Code section 9212 report is

the exclusive vehicle by which a local agency can review the potential environmental impacts of a qualified voter-sponsored initiative.[11]

F. City Council Adoption of a Voter-Sponsored is Ministerial and Therefore Exempt From CEQA

1. The Fact That a City Council Has "Procedural Discretion" Under Elections Code Section 9214 Does Not Make Its Adoption of a Voter-Sponsored Initiative Discretionary

Even if this Court were to conclude that the Elections Code does not provide the exclusive procedure for processing a voter-sponsored

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[11] The Opinion, of course attempts to avoid this result by wrongly nullifying the ability of a City Council to adopt a voter-sponsored initiative under Elections Code section 9214. (Opinion, p. 26.) However, it would be an equally unsupportable outcome for the strict 40-day time frame set forth in the Elections Code to also be "nullified" and to instead, allow a city council to adopt a voter-sponsored initiative only ***after*** CEQA review is completed. This Court has characterized the initiative as a "legislative battering ram" to allow citizens to "tear through the exasperating tangle of the traditional legislative procedure and strike directly towards the desired end." (*Amador Valley,* 22 Cal.3d at 228.) Indeed, this Court has recognized the purpose of the initiative power is to bypass "hostile" city councils. (*DeVita*, 9 Cal.4th at 788; *Perry*, 52 Cal.4th at 1140.) If the Elections Code were interpreted to allow CEQA to be adhered to prior to a city council adopting a voter-sponsored initiative, in the future a hostile city council would be expressly permitted to thwart the people's reserved initiative power by engaging in a sham process of "considering" adoption of a voter-sponsored land use initiative but only following years' worth of CEQA analysis and likely litigation regarding the validity of the negative declaration or EIR adopted for the initiative. Given the number of reported decisions in which a hostile city council or board of supervisors has refused to process a qualified voter-sponsored initiative based on allegations that the initiative is substantively invalid, this outcome is virtually guaranteed. (*See Save Stanislaus Area Farm Economy v. Board of Supervisors* (1993) 13 Cal.App.4th 141, 148 [collecting cases].)

initiative, a city council's adoption of a voter-sponsored initiative pursuant to Elections Code sections 9214 is nevertheless "ministerial," and is therefore not subject to CEQA for this additional reason.

CEQA expressly provides that its provisions do not apply to ministerial projects. (Pub. Res. Code § 21080(b)(1).) Thus, even assuming *arguendo* that the procedures set forth in the Elections Code are not the "exclusive" procedures that govern a city council's processing of a voter-sponsored initiative, a city council's adoption of a voter-sponsored initiative is still exempt from CEQA if that adoption is "ministerial" rather than "discretionary."

In this regard, the Opinion misreads this Court's decision in *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165 ("*Friends of Sierra Madre*"). There, this Court held that a city council's decision to place ***its own measure*** on the ballot (referred to as a "council-sponsored ballot measure" among practitioners), as opposed to a voter-sponsored initiative, was a discretionary decision, not a ministerial act, and therefore subject to CEQA. The holding of this Court in *Friends of Sierra Madre* is, of course, logical because when a city council considers its own measure: (i) the electorate has not yet undertaken the exercise of its reserved initiative power; and (ii) the council is acting in an entirely discretionary manner – it can decide to adopt the measure, to submit it to

the voters, or to abandon the measure altogether. None of that is true when a city council is presented with a voter-sponsored initiative.

Moreover, *Friends of Sierra Madre* concerned a city-council-generated ***ballot measure***, not a voter-sponsored ***initiative*** and that was the dispositive point on which the decision turned. (*Friends of Sierra Madre*, 25 Cal.4th at 188-89.) Indeed, a council-generated ballot measure – such as that at issue in *Friends of Sierra Madre* – is ***not*** a constitutionally-based voter-sponsored initiative that flows from the reserved powers set forth in article II, section 11(a) of the Constitution. (*Chung v. City of Monterey Park* (2012) 210 Cal.App.4th 394, 406-07.) Thus, when the city argued that the council was exercising only "procedural discretion" in putting its city-council-generated measure on the ballot, this Court rejected that claim, noting:

> In contrast to the constitutional and statutory obligation to place a properly qualified voter-sponsored initiative on the ballot, here the city council had ***discretion to do nothing***, but opted instead to place the [city-council-generated] ordinance on the ballot. ***None of the alternatives involved only a ministerial act.***

(*Friends of Sierra Madre*, 25 Cal.4th at 190, n.16 (emphasis added).)

The critical difference expressly noted by this Court between voter-sponsored initiatives and city-council-generated ballot measures is significant, because it explains why the Opinion is wrong. Specifically, because the City here was presented with a voter-sponsored initiative,

section 9214 limited the council's action to one of two ministerial choices – the council could either adopt the initiative without change, or submit it to the voters without change.[12] Thus, although the council had "procedural discretion," in the sense that it could choose which of two ministerial acts it would take, it had to do one or the other – the council did not have the discretion to "do nothing," which is the dispositive factor that would make the council's choice discretionary, and thus subject to CEQA. (*Friends of Sierra Madre*, 25 Cal.4th at 190, n. 6.) It is for these reasons that this Court held ***"[t]here is a clear distinction between voter-sponsored and city-council-generated initiatives***." (*Id.* at 189 (emphasis added).)

Although the Opinion cites to *Friends of Sierra Madre*, the Opinion does not rely on the voter-sponsored/city-council-generated distinction drawn there. Rather, the Opinion holds that a city council's adoption of a voter-sponsored initiative pursuant to Elections Code 9214, subdivision (a) is discretionary rather than ministerial, and therefore subject to CEQA. (Opinion, p. 13.)

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[12] As stated, section 9214 provides that before taking either action, a city council may order a report pursuant to section 9212. Section 9212 provides that the council may refer a proposed initiative to city agencies for a report covering various topics, including the measure's potential environmental impact. The report must be presented within 30 days after the sufficiency of the initiative petition is certified by the clerk.

To reach that holding, the Opinion erroneously relies on CEQA Guidelines section 15378, subdivision (b)(3). (Opinion at p. 13.) Section 15378, subdivision (b)(3) simply provides that a "project" does not include the submittal of a voter-sponsored initiative to a vote of the people. That is the very distinction made in *Friends of Sierra Madre.* (*Friends of Sierra Madre,* 25th Cal.4th at 191.) However, the Opinion cites that language and then leaps to the conclusion that because section 15378, subdivision (b)(3) does not expressly mention voter-sponsored initiatives ***adopted by a city council,*** CEQA must deem such initiatives to be projects and therefore subject to its provisions.

The Opinion thus effectively applies the rule of statutory construction *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another). That application is inappropriate for several reasons.

First, the Opinion relies not upon the CEQA statutes, but upon a CEQA Guideline developed by the Office of Planning and Research and prescribed by the Secretary of Resources. (14 Cal. Code Regs., § 15000.) No legislative intent to subject voter-sponsored initiatives adopted by a city council to the provisions of CEQA can be gleaned from this Guideline. (*See by analogy Ralph's Grocery Co. v. Department of Food & Agriculture* (2003) 110 Cal.App.4th 694, 699.)

Second, and more importantly, section 15378, subdivision (b)(3) limits the definition of "project" as it does simply because that was the factual situation presented in the two cases cited in the section: *Friends of Sierra Madre* (placement of a discretionary, council-sponsored measure on the ballot) and *Stein v. City of Santa Monica* (1980) 110 Cal.App.3d 458, 461-62 (adoption of a voter-sponsored initiative by the voters). Neither case dealt with a voter-sponsored initiative adopted by the city council. Thus, the fact that the Guideline does not mention voter-sponsored initiatives adopted by a city council hardly evinces an intent (by the Secretary of Resources, much less the Legislature) to exclude that factual scenario from the CEQA exemption described in section 15378, subdivision (b)(3).

Moreover, with a city-council-generated ballot measure, the electorate does not exercise a legislative approval role ***until after*** the city council voluntarily exercises its discretion to defer a legislative question to the voters. (*See Fullerton Joint Union High School Dist. v. State Bd. of Educ.* (1982) 32 Cal.3d 779, 796 [an agency's decision that requires voter approval ***after*** the initial decision and approval of the agency is a project subject to CEQA].)

In contrast, there is no prior exercise of discretion by the 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."].) Thus, the Opinion's suggestion that initiative powers are not exercised unless an election "actually take[s] place" is unfounded. (Opinion, pp. 12; 12-15.) Once a sufficient percentage of voters has signed the petition, the city council must perform one of two ministerial acts. In doing so, the council acts as the 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."].)

The city council's limited procedural discretion to choose between two ministerial actions does not convert those ministerial actions into discretionary actions. To hold otherwise, as the Opinion does, would mean that even where the council chooses to submit a voter-sponsored initiative to the voters, that action would also be "discretionary," and therefore subject to CEQA, because the council had the "discretion" to adopt the initiative rather than to submit it to the voters.

The Opinion recognizes that such a result is inconsistent with this Court's holdings that voter-sponsored initiatives submitted to the voters are not subject to CEQA, and it tries to avoid that result by proclaiming in conclusory fashion that CEQA review would not apply in that situation.

(Opinion, p. 23.) It is well settled, however, that where an activity involves an approval that contains elements of both a ministerial action and a discretionary action, the activity will be deemed to be discretionary and thus subject to CEQA. (14 Cal. Code of Regs., § 15268(d); *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 270-71 ("*Friends of Westwood*").) Thus, if, as the Opinion holds, it is a discretionary act under section 9214 for the council to adopt a voter-sponsored initiative, but it is a ministerial act to submit that initiative to the voters, the entire activity must be deemed to be discretionary, and both options would be subject to CEQA. Consequently, the Opinion must be reversed because it directly undercuts the holdings of this Court. (*See, e.g., DeVita*, 9 Cal.4th at 793-795 [submittal of a voter-sponsored initiative to a vote of the people is not subject to CEQA].)

The Opinion also tries to distinguish the two options under section 9214 by repeatedly claiming that a court could order a recalcitrant council to submit an initiative to the electorate, but could not order the council to adopt it. (Opinion, pp. 18-19, 22.) That attempted distinction also misses the mark, for it is long-settled that although a court can compel a council to ***exercise*** its discretion where it refuses to act at all, a court cannot order that the agency exercise its discretion ***in a particular manner.*** (*Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 222 (citing *Hollman v. Warren* (1948) 32 Cal.2d 351, 355).) Thus, a court could

order that a recalcitrant council comply with section 9214 – either adopt the initiative measure or submit it to a vote of the people. However, the court could not order that the council do one of those things (submit the measure to the voters) to the exclusion of the other (adopt it outright). That is a matter within the procedural discretion of the city council.

2. The Opinion Misconstrues the Nature of "Discretion" in the Context of CEQA

Moreover, to determine whether an agency action is ministerial or discretionary for purposes of CEQA, this Court has applied a functional test:

> The statutory distinction [under CEQA] 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 . . . environmental review would be a meaningless exercise.

(*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 117, citing *Friends of Westwood*, 191 Cal.App.3d at 267) Moreover, the law has long been settled:

> CEQA does not apply to an agency decision simply because the agency may exercise some discretion in approving the project or undertaking. Instead to trigger CEQA compliance, ***the discretion must be of a certain kind***; it must provide the agency with the ***ability and authority*** to 'mitigate . . . environmental damage' to some degree.

(*San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924, 934 (emphasis added).)

Under this functional test, when a private party can legally compel approval of a project without any changes which might alleviate adverse environmental consequences, the project is ***ministerial.*** Where the agency possesses enough authority (discretion) to deny or modify the project on the basis of environmental consequences that an EIR might conceivably uncover, the permit process is ***discretionary*** within the meaning of CEQA. (*Friends of the Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, 302; *see also 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].)

With a voter-sponsored initiative, as here, initiative proponents could legally compel a recalcitrant city council to either adopt the measure "***without alteration***," or submit it to a vote of the people "without alteration." (Elec. Code § 9214(a) and (b).) Even if an EIR were prepared on the project, the council would have ***no authority to shape the project in a way that would respond to concerns raised in an EIR***, and therefore environmental review would be a meaningless exercise. (14 Cal. Code

Regs., § 15003(g) ["The purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind. . . ."].)

Thus, under the functional test applied by this Court and others, a voter-sponsored initiative is ministerial rather than discretionary whether adopted by the electorate or the legislative body of the agency. Accordingly, even assuming *arguendo* that the adoption of a voter-sponsored initiative is not governed exclusively by the Elections Code, a voter-sponsored initiative is exempt from CEQA even if directly adopted by the city council.

G. The *NASSEPA* Decision was Correctly Decided and the Opinion Must be Reversed

For all of the foregoing reasons, the *NASSEPA* decision was correctly decided and the Opinion must be reversed. The holding of *NASSEPA* is squarely in line and consistent with this Court's holdings in *Associated Home Builders* and *DeVita*, and is consistent with a 35-year legislative track record:

> The California Constitution provides that the voters in a city may exercise initiative powers 'under procedures that the Legislature shall provide.' . . . . 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. . . .

> Furthermore, attempts to amend the Elections Code to subject voter-sponsored initiatives to CEQA control have failed.

(*NASSEPA*, 120 Cal.App.4th at 966; 968.)

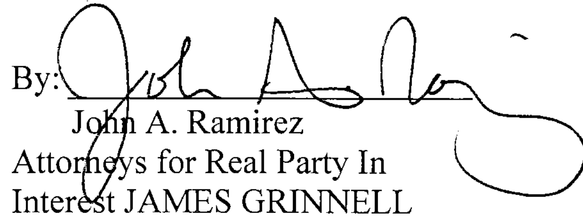
The present case involves facts virtually identical to those in *NASSEPA*. Grinnell and the City's voters circulated and qualified a voter-sponsored Initiative pursuant to Elections Code sections 9200 *et seq.* When the qualified Initiative was presented to the city council for consideration pursuant to Elections Code section 9214, the council adopted the Initiative pursuant to section 9214, subdivision (a). Pursuant to years of settled law and clear statutory authority, CEQA simply does not apply in this context.

V. CONCLUSION

For all of these reasons, the Opinion should be reversed.

Dated: March 8, 2013

RUTAN & TUCKER, LLP
JOHN A. RAMIREZ
ROBERT S. BOWER



By: ______________________
John A. Ramirez
Attorneys for Real Party In Interest JAMES GRINNELL

CERTIFICATE OF WORD COUNT

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

The text of this Petition for Review consists of 11,856 words, including footnotes, as counted in Microsoft Word, Version 2007 used to generate the brief.

Dated: March 8, 2013

RUTAN & TUCKER, LLP
JOHN A. RAMIREZ
ROBERT S. BOWER

By:
John A. Ramirez
Attorneys for Real Party In Interest JAMES GRINNELL

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(*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 March 11, 2013, I served on the interested parties in said action the within:

REAL PARTY GRINNELL'S OPENING BRIEF ON THE MERITS

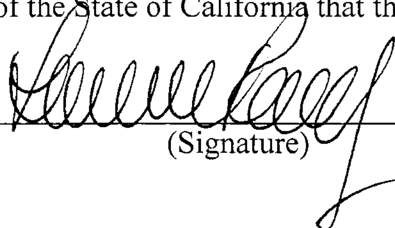
by placing a true copy thereof in sealed envelope(s) addressed as stated on the attached mailing list.

In the course of my employment with Rutan & Tucker, LLP, I have, through first-hand personal observation, become readily familiar with Rutan & Tucker, LLP's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice I deposited such envelope(s) in an out-box for collection by other personnel of Rutan & Tucker, LLP, and for ultimate posting and placement with the U.S. Postal Service on that same day in the ordinary course of business. If the customary business practices of Rutan & Tucker, LLP with regard to collection and processing of correspondence and mailing were followed, and I am confident that they were, such envelope(s) were posted and placed in the United States mail at Costa Mesa, California, that same date. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on March 11, 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.

Lauren Ramey
(Type or print name)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Mailing List

Steven A. Herum, Esq. Brett S. Jolley, Esq. Ricardo Z. Aranda, Esq. Herum Crabtree 5757 Pacific Avenue, Suite 222 Stockton, CA 95207	Counsel for Petitioner, Tuolumne Jobs & Small Business Alliance Telephone: (209) 472-7700 Facsimile: (209) 472-7986
Richard Matranga, Esq. City Attorney City of Sonora 94 N. Washington Street Sonora, CA 95370	Counsel for Respondent, City of Sonora Telephone: (209) 532-2657 Facsimile: (209) 532-2739
Clerk of the Superior Court Tuolumne Superior Court 41West Yaney Avenue Sonora, CA 95370	Respondent
Edward P. Sangster, Esq. K&L Gates LLP Four Embarcadero Center, Suite 1200 San Francisco, CA 94111	Counsel for Real Party In Interest, Wal-Mart Stores, Inc. Telephone: (415) 882-8200 Facsimile: (415) 882-8220
Randy Edward Riddle, Esq. Renne Sloan Holtzman & Sakai LLP 350 Sansome St #300 San Francisco, CA 94104	Counsel for League of California Cities Amicus Curiae for Real Party in Interest Telephone: (415) 678-3800 Facsimile: (415) 678-3838
Timothy A. Bittle, Esq. Howard Jarvis Taxpayer Assn. 921 Eleventh Street, Suite 1201 Sacramento, CA 95814	Counsel for Howard Jarvis Taxpayers Association and Citizens in Charge Amicus Curiae for Real Party in Interest and Respondent Telephone: (916) 444-9950 Facsimile: (916) 444-9823
Cory Jay Briggs, Esq. Briggs Law Corporation 99 East "C" Street, Suite 111 Upland, CA 91786	Counsel for CREED-21 Amicus Curiae for Petitioner Telephone: (909) 949-7115 Facsimile: (909) 949-7121
Timothy R. Busch Chairman of the Board & Co-Founder JSerra Catholic High School 26351 Junipero Serra Road San Juan Capistrano, CA 92675	Amicus Curiae Telephone: (949) 493-9307 Facsimile: (949) 493-9308

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Anthony Francois, Esq.
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814

Counsel for Amicus Curiae, Pacific Legal Foundation

Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Clerk of the Court
Court of Appeal, Fifth District
2424 Ventura Street
Fresno, CA 93721