Case No. A149153

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

JAMES P. WILSON AND MICHAEL HACKETT

Petitions and Appellants,

vs.

COUNTY OF NAPA; JOHN TUTEUR, in his Official Capacity as REGISTRAR OF VOTERS FOR THE COUNTY OF NAPA; and DOES 1 Through 10, inclusive

Respondents.

Appeal from a Judgment entered in Favor of Respondents
Napa County Superior Court Case No. 16CV000457
Honorable Diane M. Price, Department I, Phone: (707) 299-1130

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF WINEGROWERS OF NAPA COUNTY, NAPA VALLEY VINTNERS, NAPA COUNTY FARM BUREAU, AND NAPA VALLEY GRAPEGROWERS IN SUPPORT OF RESPONDENTS COUNTY OF NAPA ET AL.

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE JUSTICES OF THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT:

Pursuant to California Rule of Court 8.200(c), the Winegrowers of Napa County, Napa Valley Vintners, Napa County Farm Bureau, and Napa Valley Grapegrowers ("Amicus") respectfully request permission to file the attached brief as amicus curiae in order to address issues of great public importance. Amicus have a unique and significant interest in this case because their members are those who would be directly impacted by Appellant's proposed land use initiative (the "Initiative"), including by those certain new, mandatory legal requirements that were required to be included in the Initiative petition under the "full text" rule but were instead omitted by Appellants.

Napa County's agricultural industry is comprised of farmers, ranchers, vineyard and winery owners, vineyard managers, and growers dedicated to protecting Napa County's agricultural heritage by advocating for responsible farming and environmental protection, reliance on sound science, and the enhancement of best practices for sustainable farming and the stewardship of our land. The Winegrowers of Napa County, Napa Valley Vintners, Napa County Farm Bureau, and Napa Valley Grapegrowers are each longstanding Napa County non-profit associations that not only have proven commitments to the protection of Napa County agriculture and the

local wine industry—which creates an economic impact of more than $13 billion annually to the Napa County economy—but also to strong environmental leadership and a healthy local ecosystem. The Amicus organizations collectively represent nearly all of the planted acreage in Napa County.[1]

The Initiative at issue in this case targets and threatens local agriculture, which has long been determined by Napa County's General Plan as the best and highest use of the land. It assumes and attempts to set the false precedent that vineyards cause more damage to waterways than other land uses on the same properties—which is not supported by scientific data—and would only add layers of redundancy and complexity to existing, effective regulations and conservation programs. Moreover, by seeking to impose new restrictions and requirements solely on agricultural lands, the Initiative would place a disproportionate burden on the members of the Amicus organizations, as agricultural operations account for only a fraction of Napa County's total acreage.

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[1] To this point, over 40,000 acres in Napa County have developed farm plans in place geared toward watershed protection through Napa Green (napagreen.org; see also fishfriendlyfarming.org and landsmart.org), as well as additional acreage through other established farm planning programs including the California Sustainable Wine Growing Alliance (sustainablewinegrowing.org). In addition, local property owners' resource stewardship and funding of the Napa River Restoration Project has received national recognition and acclaim from environmental groups, the media, as well as by the United States Environmental Protection Agency in their Learning Module on Watershed Management as an example of successful watershed leadership (napawatersheds.org).

Specific to the issue before this Court, Amicus are particularly concerned about the additional regulatory burden that would be placed on their members, including through the imposition of a new agriculture permitting process, a centerpiece of which is certain proposed remediation requirements that are explicitly made part of the Initiative as new, mandatory legal requirements, but were not included in or otherwise attached to the Initiative when it was circulated for voter signatures. This was a clear violation of the California Election Code's "full text" rule, which protects signers and avoids confusion regarding which laws are being proposed and which are to remain the same.

For the foregoing reasons, we respectfully request this Court grant leave to file the attached amicus curiae brief discussing these critical issues more fully.

No party in this action authored this brief in whole or in part. Nor did any party or person other than amicus curiae contribute money toward the research, drafting, or preparation of this brief, which was authored entirely by counsel for amicus curiae.

Dated: January 3, 2017

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AMICUS CURIAE BRIEF

I. INTRODUCTION

Amicus curiae the Winegrowers of Napa County, Napa Valley Vintners, Napa County Farm Bureau, and Napa Valley Grapegrowers ("Amicus") represent those that would be directly impacted by the proposed land use initiative ("Initiative") at issue in this case. The Initiative, in short, seeks to impose new and additional requirements on agriculture lands in Napa County with respect to oak tree removal. A central component of these requirements is the adoption of a new tree removal permit program for lands that are 5 acres or more in the Agricultural Watershed zoning district. (Initiative § 4, Joint Appendix ["JA"] 66-68.) As part of that new permitting process, the Initiative would impose and require certain, mandatory remediation. (Initiative § 4, JA 67.) It is undisputed, however, that the Initiative petition circulated for voter signatures failed to include any of the actual, particular language of these mandatory remediation requirements. Whether it was through mistake, inadvertence, or a willful act, the failure to include these certain, specific provisions represents a fatal defect requiring the rejection and invalidation of the Initiative.[2]

[2] Appellants are, of course, free to correct this defect, recirculate a corrected petition for voter signatures, and thereby seek to place a measure on a future ballot.

Elections Code sections 9101 and 9105 mandate that the "full text" of a county initiative be included in the petition circulated for voter signatures. "[I]t is imperative that persons evaluating whether to sign the petition be advised which laws are being challenged and which will remain the same." (*Mervyn's v. Reyes* (1998) 69 Cal.App.4th 93, 104.) A long and consistent line of California cases have therefore struck down local ballot measure petitions that failed to comply with the full text requirement. (See *id.* [recognizing an "unbroken line of initiative and referendum cases covering the period 1925 to 1998," each of which invalidated petitions for failing to include the full text].)

Appellants' omissions from the Initiative petition at issue here are of keen interest to Amicus. As with any proposed law, the balancing of the regulatory burdens against the claimed benefits—about which reasonable people may freely disagree—is in the details. Appellants' proposed law is no different. It would not only amend the County's General Plan to establish new "water qualify buffer zones" within the Agriculture Watershed zoning district, but the vast majority of the Initiative is aimed at adopting certain "mandatory requirements" for the stated purpose of "conserv[ing] and protect[ing] oak woodlands." (Initiative § 3(B), JA 64.) It is these new "mandatory requirements," which are to be inserted into the Napa County Code, that stand for *how* the Initiative is to be implemented and *how* exactly Amicus and others will be required to comply. It is in these specific, legal

requirements, including for the newly created tree removal permits and mandatory remediation, where the rubber meets the road.

Yet the so-called "minimum, adequate remediation" that is to be required of Amicus and others if the Initiative is adopted is nowhere to be found in the Initiative petition. Instead, the petition merely incorporates by reference certain, specific provisions contained in an *extrinsic* document, the Napa County Voluntary Oak Woodland Management Plan (2010), which in fact has no binding force or effect today, *but would be enacted into law under the Initiative*. As set forth in more detail below, it is abundantly clear that Appellants were seeking through the Initiative to adopt into law certain, specific remediation requirements. The omission of that specific text here was neither minor nor trivial, and there is no excuse for failing to include the full text of the laws being proposed. "[I]t is the responsibility of the petition proponents to present a petition that conforms to the requirements of the Elections Code." (*Hebard v. Bybee* (1998) 65 Cal.App.4th 1331, 1340-41.) Appellants have failed to do so here.

II. THE INITIATIVE FAILS TO COMPLY WITH THE FULL TEXT RULE, WHICH IS WELL-ESTABLISHED LAW.

Despite their different positions and views on the proper resolution of this case, the parties to this action seem to readily agree on the following key matters of law: (1) that the full text rule requires an initiative petition to "contain[] the full and complete text of everything that will be enacted if the voters approve it" (*We Care—Santa Paula v. Herrera* (2006) 139

Cal.App.4th 387, 390); (2) that ""[t]he purpose of the full text requirement is to provide sufficient information so that registered voters can intelligently evaluate whether to sign the initiative petition and to avoid confusion" (*Mervyn's, supra,* 69 Cal.App.4th at 99); and (3) that "inclusion the text of the measure is by itself sufficient to reduce confusion to a practical minimum." (*We Care, supra,* 139 Cal.App.4th at 391; see also Appellants' Reply Brief at pp. 15-16.)[3] It is not surprising that this would be the case given that the law in this area is so well established. Nor is it surprising that Appellants, who failed to comply with these general, well-accepted principles, would therefore spill a great deal of ink attempting to create the illusion that this case involves a grand dispute that will somehow alter those very same legal principles. It does not.

To the contrary, the key issue here—perhaps the only real issue—is whether Appellants did in fact include in their petition the full text of everything they were seeking to enact into law, such that the purpose of the full text rule (i.e., to avoid confusion) has been achieved. The Initiative, as discussed further below, creates a new permitting regime that mandates compliance with certain, specified "best management practices" ("BMPs"), which are contained in the Napa County Voluntary Oak Woodland

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[3] Although the parties basically agree on the key holding of *We Care*, Appellants mischaracterize the facts of that case and fail to acknowledge the critical differences between the petition at issue in *We Care* and the Initiative at issue here. (See discussion *infra* at II.B.)

Management Plan (2010). The Initiative petition, however, attempted to do so without actually attaching or otherwise describing *any* of the substance of these proposed, new legal requirements. As such, the Initiative plainly failed to attach the "full text" of everything that would be enacted if adopted by the voters.

Appellants, in response, offer only platitudes, arguing that the full text rule is (or should be) limited to a measure's "bare text." But even that argument ignores reality: it cannot be reasonably disputed that the certain, specified provisions of the Voluntary Oak Woodland Management Plan omitted from the Initiative petition provided to voters were, in fact, part of the "bare text" that Appellants sought to enact through the initiative process. Given the serious potential for confusion caused by failing to attach these proposed, new provisions of law, there is simply no way the Initiative complies—substantially or otherwise—with the Elections Code's full text requirement. The trial court's decision should therefore be upheld.

A. The Initiative's Express Incorporation of Specific Provisions of the Napa County Voluntary Oak Woodland Management Plan (2010) and Proposal for Mandatory Compliance With Those Provisions Required that They Be Attached to the Initiative Petition.

Appellants rely extensively on *We Care, supra,* 139 Cal.App.4th 387, which stands only for the general proposition that an initiative petition must include the full and complete text of everything the proposed ordinance seeks to enact. (See *id.* at 390-91 [full text requirement mandates the attachment of

everything constituting the "text of the measure proposed to be enacted" (emphasis added)].) Appellants do not—and cannot—dispute this well-established rule. Instead, they seek to convince this Court that their Initiative does not "enact" certain, specific provisions of the Napa County Voluntary Oak Woodland Management Plan, but rather merely references those provisions as "flexible planning tools." (Appellants' Reply Brief at p. 5.) Appellants' post-hoc rationalization, however, is completely inconsistent with the plain language of the Initiative itself, which elevates compliance with the previously *voluntary* provisions of the Oak Woodland Management Plan into *mandatory* legal requirements. As such, these specific provisions of the Oak Woodland Management Plan are indeed part of the text of the proposed measure to be enacted, and were therefore required to be attached to the Initiative petition presented to Napa County voters.

The Voluntary Oak Woodland Management Plan was adopted via a resolution of the Napa County Board of Supervisors in 2010. (Napa County Board of Supervisors Resolution No. 2010-137, JA 233-34.) The very first section of the plan clearly specifies that its purpose is to "focus on voluntary actions":

> The focus of this Plan is on achieving oak woodlands conservation through voluntary, collaborative action by private and public landowners, public agencies, non-profit and other community organizations, and community volunteers. This Plan establishes the foundation upon which agencies, conservation groups and non-profits will take the lead in working with

> willing landowners, seeking grants, preparing and holding conservation easements, and designing and implementing stewardship plans to preserve and restore Napa County's oak woodlands. It is anticipated that Napa County, local cities and towns, Napa County Regional Park and Open Space District, the Land Trust of Napa County, Napa County Resource Conservation District, U.S. Natural Resources Conservation Service, and other non-profit conservation organizations will use this Plan as a basis for cooperation.

(Napa County Voluntary Oak Woodland Management Plan (2010), JA 134-35.) The document makes clear that is intended merely as a resource for various agencies and other groups interested in conservation of oak woodlands, and in no way imposes binding legal requirements. (*Id.*)

The Initiative, however, converts certain portions of the Voluntary Oak Woodland Management Plan into something else entirely. First, the Initiative creates a new "Oak Removal Permit Program" by adding § 18.20.060 to the Napa County Code. The Program, in short, requires landowners in certain agricultural zones to obtain an "Oak Removal Permit" before removing oak trees from their property under several circumstances. (Initiative § 4, JA 66.) The Initiative then specifies the mandatory contents for an Oak Removal Permit application, one of which is "[p]roposed conditions of approval and remediation measures." (Initiative § 4, JA 67.) The Initiative further expressly provides that an Oak Removal Permit application shall not be approved if the proposed remediation measures do

not comply with the requirements of § 18.20.060(E). In turn, § 18.20.060(E) specifies:

> Remediation. At a minimum, adequate remediation under subsection (D)(3) of this section **shall** include:
>
> 1. Compliance with the best management practices for tree protection during construction activities **set forth in** Appendix D, Section 1 of the Napa County Voluntary Oak Woodland Management Plan (2010); and
>
> 2. Replacement of removed oak trees or oak woodlands at a 3:1 ration or permanent preservation of comparable oak trees or oak woodlands at a 3:1 ratio by:
>
>   a. Permanently preserving comparable oak trees or oak woodlands on-site through dedications, conservation easements, or similar measures; or
>
>   b. Replanting and monitoring of replacement oak trees on-site pursuant to a plan that ensures replacement of failed plantings and complies with the best management practices for Maintenance, Restoration, and Rehabilitation of Oak Woodlands **set forth in** Appendix D, Section 3 of the Napa County Voluntary Oak Woodland Management Plan (2010).

(Initiative § 4, JA 67 (underlining and bold emphasis added).)

Thus, in short, the Initiative creates a mandatory permitting process for the removal of oak trees and specifies that a permit shall not be granted unless it includes adequate remediation measures, which—in order to be considered adequate—shall comply with certain, specific BMPs "set forth in" Sections 1 and 3 of Appendix D of the Napa County Voluntary Oak

Woodland Management Plan (2010). Indeed, the plain language of the Initiative clearly and unequivocally mandates compliance with the enumerated BMPs.

First, it cannot be disputed that the Initiative repeatedly uses the word "shall" with respect to compliance with the BMPs. "The word 'shall' is ordinarily 'used in laws, regulations, or directives to express what is mandatory.' 'May,' on the other hand, is usually permissive." (*Hogya v. Superior Court* (1977) 75 Cal.App.3d 122, 133 [internal citations omitted, emphasis added].) Second, the Initiative not only makes specific references to provisions within an extrinsic document (calling out the BMP's by name, location, and date), but expressly states that compliance with the BMPs shall be as they are "set forth in" those specific sections of the Napa County Voluntary Oak Woodland Management Plan. (Initiative § 4, JA 67.) It is difficult if not impossible to imagine a more direct and plain way to require compliance with certain, specific requirements enumerated in an extrinsic document. There simply is no alternative interpretation.

Further, because these provisions of the Initiative are unambiguous, they must be interpreted according to their plain meaning; there is no basis to even consider Appellants' post-hoc offerings. (*Citizens to Save California v. FPPC* (2006) 145 Cal.App.4th 736, 747 ["If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs"]; see also *Lungren v. Deukmejian* (1988)

45 Cal.3d 727, 735 ["If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature"].) Appellants' newly self-proclaimed intent to not "lock in" the BMPs via Initiative—which is nowhere to be found in the language of the Initiative itself—also happens to be completely irrelevant. (*Taxpayers to Limit Campaign Spending v. FPPC* (1990) 51 Cal.3d 744, 764 ["The motive or purpose of the drafters of a statute is not relevant to its construction, absent reason to conclude that the body which adopted the statute was aware of that purpose and believed the language of the proposal would accomplish it. The opinion of drafters or of legislators who sponsor an initiative is not relevant since such opinion does not represent the intent of the electorate and we cannot say with assurance that the voters were aware of the drafters' intent" (emphasis added, internal citations omitted)]; see also *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 589 ["In construing a statute we do not consider the motives or understandings of individual legislators who cast their votes in favor of it. Nor do we carve an exception to this principle simply because the legislator whose motives are proferred actually authored the bill in controversy" (internal citations omitted)]; *Bertolozzi v. Progressive Concrete Co.* (1949) 95 Cal.App.2d 332, 335 [holding that ordinance drafter's argument that the chosen language did not effectuate true intent was irrelevant, as meaning of ordinance was clear on its face and therefore "there [was] no room for extrinsic evidence of its meaning"].)

Appellants also blithely claim that their failure to include the omitted provisions of the Voluntary Oak Woodland Management Plan (2010) in the Initiative petition is inconsequential. Far from it, in fact, especially for those such as Amicus who would be forced to comply with the Initiative's proposed permitting regime. The BMPs incorporated into the Initiative are not, as Appellants allege, limited to so-called "trivial matters" such as acorn soaking, but rather include robust requirements that bring real world impacts on the property and property rights of those regulated. These requirements, which would be enacted into binding law under the Initiative, include:

> - Install high visibility fencing around the RPZ [root protection zone[4]] of any tree or cluster of trees with overlapping canopy that are identified on an approved grading plan as needing protection. The fencing should be four-feet high and bright orange with steel t-posts spaced 8 feet apart.
> - Do not grade, cut, fill or trench within the RPZ.
> - Do not store oil, gasoline, chemicals, construction materials, or equipment within the RPZ.
> - Do not store soil within the RPZ.
> - Do not allow concrete, plaster, or paint washout within the RPZ.
> - Do not irrigate within the RPZ or allow irrigation to filter into the RPZ.
> - Plant only drought tolerant species within the RPZ.

(Appendix D, Section 1 of the Napa County Voluntary Oak Woodland Management Plan (2010), JA 226.)

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[4] The RPZ amounts to a substantial area, as it is defined as being "roughly one third larger than the drip line (or outermost edge of the foliage based on the largest branch)."

Appellants also fail to address the fact that, although these requirements may currently be accessible on the County's website, this won't necessarily always be the case, which will certainly lead to further, substantial confusion. As discussed *supra*, the Napa County Voluntary Oak Woodland Management Plan (2010) was adopted by the Napa County Board of Supervisors via resolution in 2010. Just as the Board of Supervisors had the power to adopt the Voluntary Oak Woodland Management Plan, the Board also has the general authority to amend, replace, or entirely rescind the Plan at any time, for any reason. However, in the event that the Initiative was adopted by the voters and the Board was to later exercise its authority to rescind the Plan, such action might technically "wipe out" the Voluntary Oak Woodland Management Plan (2010), but it would not—and could not—remove or otherwise change an Oak Removal Permit applicant's legal obligation under the Initiative to comply with the BMPs as "set forth in" in Sections 1 and 3 of Appendix D of that Plan.

It is axiomatic that, unlike a resolution or ordinance passed by the Board of Supervisors, which can generally be amended or repealed at any time, an Initiative locks the adopted ordinance into place unless or until it is amended or repealed by a vote of the people. (Cal. Elec. Code § 9125 ["No ordinance proposed by initiative petition and adopted either by the board of supervisors without submission to the voters or adopted by the voters shall be repealed or amended except by a vote of the people, unless provision is

otherwise made in the original ordinance"]; see also Initiative § 10, JA 71 [Initiative may be amended or repealed only by Napa County voters].) Thus, by failing to attach the relevant, newly enacted portions of the Voluntary Oak Woodland Management Plan (2010) as part of the Initiative petition, there exists the real potential for what amounts to an underground regulation. Legal requirements, however, simply cannot be allowed to exist in the ether, and permit applicants must not be forced to comply with certain, specific legal requirements that are not part of the written law or even worse, perhaps not even available for review at the time an application is submitted. As the California Supreme Court very recently confirmed:

> "[P]ersons who seek to develop their land are entitled to know what the applicable law is at the time they apply for a building permit. City officials must be able to act pursuant to the law, and courts must be able to ascertain a law's validity and to enforce it." (*Lesher, supra*, 52 Cal.3d at p. 544.) That is why cities are directed to make their general plans available to the public. (§ 65357, subd. (b).) Public access has little value if the general plan's policies are not readily discernible.

(*Orange Citizens for Parks and Recreation v. Superior Court of Orange County* (Dec. 15, 2016, S212800) __ Cal.4th__.)

Once again, Appellants protest that such an outcome would never come to bear here because their intent was merely to reference the BMPs as "flexible planning tools," not to lock in the specific BMPs outlined in the 2010 Plan. Even assuming *arguendo* that this purported intent was not belied by the plain language of the Initiative (see *supra*), Appellants fail to explain

how the Oak Removal Permit process would function if the Oak Woodland Management Plan or the referenced BMPs were replaced and/or repealed. Indeed, Appellants' "flexible planning tool" theory completely crumbles in the event that the Oak Woodland Management Plan and/or the BMPs contained therein are subsequently repealed entirely by the Board of Supervisors. In order to obtain a permit under the Initiative, permit applicants would still be required to propose "adequate" remediation measures. However, without the BMPs, neither the landowner applicants nor the County would have any definition of what constitutes "adequate" remediation. Who would decide what is adequate? Would it be left to the unfettered discretion of the planning director? And, if Appellants are to be taken seriously with their post-hoc "flexible planning tool" explanation, what are the parties in such circumstances supposed to make of the language in the Initiative that mandates certain "minimum" requirements as "set forth in" in a document that no longer exists?

Appellants' last ditch proposal that the incorporated BMPs be treated as a living, ever-changing requirement is therefore not just inconsistent with the plain language of the Initiative—which unambiguously seeks to enact and impose certain, specific legal requirements "set forth in" an extrinsic and currently voluntary management plan—but it is also completely illogical and unworkable. Permitting processes must have standards such that those regulated may reasonably know how to comply, and regulators do not have

unfettered discretion to grant or deny permits impacting important property rights. This is exactly the type of confusion that the full text requirement is meant to avoid.

B. *Lin* and *We Care* are Distinguishable, as Neither Case Involved the Omission of a Document Containing Specific, Legally Mandated Requirements.

Appellants argue that *We Care, supra,* 139 Cal.App.4th 387 and *Lin v. City of Pleasanton* (2009) 176 Cal.App.4th 408, support their position that they were not required to attach the mandatory policies enacted by, and explicitly incorporated into, their Initiative. Appellants, however, fail to account for critical differences in these cases that make them wholly distinguishable, and in so doing, advance a circular and completely backwards explanation of the full text requirement. In fact, neither of these cited cases support Appellants' position that their Initiative did not "enact" the specified BMPs incorporated into the Initiative's proposed Oak Removal Permit process.

First, Appellants' characterization of the alleged omission at issue in *We Care* is fundamentally incorrect. The initiative considered by the court in *We Care* proposed a simple, standalone addition to the City of Santa Paula's General Plan to require that the city obtain voter approval before approving certain, limited amendments to the general plan's land use element. (*We Care, supra,* 139 Cal.App.4th at 389.) The city clerk rejected the initiative petition because "the clerk found that although the petition

includes the proposed language that would be inserted into the general plan, it does not show where in the general plan it would be inserted; what parts of the land use element would be changed; or the current text of the land use element." (*Id.* at 389.) In reversing the city clerk's decision, the court noted that, despite the city clerk's apparent belief to the contrary, the initiative in question did not actually change or prevent from being changed any portion of the city's general plan. Instead, it simply added a discrete, standalone voter approval requirement, the entirety of which was included in the initiative petition:

> We Care's petition does not omit the text of an incorporated exhibit or any other portion of the proposed enactment. Instead, the petition contains the full and complete text of everything that will be enacted if the voters approve it. . . . [T]he amendment does not change any land use or density designated in the general plan. Nor does it even purport to prohibit any change in land use or density. It simply adds a provision to the general plan requiring that any increase in density for projects involving 81 or more acres be approved by popular vote. The petition contains the full text of the measure. There is no need to include any portion of the general plan. Certainly, the passage of We Care's initiative will affect the general plan. But [the full text rule] does not require that a petition include the text of every plan, law or ordinance the measure might affect.

(*Id.* at 390.)

The situation here is fundamentally different. Unlike the alleged omission at issue in *We Care,* the omitted BMPs are not simply another plan, law, or ordinance that the Initiative "might affect." Instead, these omitted

provisions are an inextricable part of a brand new, detailed permitting regime to be adopted by the Initiative, which expressly mandates compliance with their specific provisions.

Oddly enough, Appellants even appear at one point to concede that *We Care's* holding in no way excuses their failure to attach the relevant portions of the Oak Woodland Management Plan to their Initiative and, in fact, that the exact opposite is true. Appellants themselves state:

> A petition, the court [in *We Care*] held, was not required "to contain more than the bare text of the measure" except in two circumstances: (1) where a measure expressly adopts policies "by nothing more than a reference to headings, titles or numbers;" (2) where it includes "an incorporated exhibit."

(Appellants' Reply Brief at p. 10 [emphasis added].) As discussed *supra*, the Initiative here, without question, "adopts policies 'by nothing more than a reference to headings, titles or numbers'" by enacting the extrinsic policies contained in the specified BMPs into law. Thus, even under Appellants' own characterization of the holding in *We Care*, they were unquestionably required to attach the proposed policies to the Initiative itself.

Lin, supra, 176 Cal.App.4th 408, similarly fails to support Appellants' position that their Initiative does not "enact" the omitted BMPs. As an initial matter, Appellants are generally correct that a similar analysis applies to both initiative and referendum petitions, and that cases involving referendum petitions are therefore sometimes instructive in cases such as this one.

Indeed, referenda and initiatives both have full text requirements aimed at avoiding confusion during circulation and thereafter. However, Appellants insistence that *Lin* stands for the proposition that *initiative proponents* are not required to attach any document that is not introduced by "magic words" expressly incorporating said document is disingenuous at best. For starters, such a statement completely ignores critical differences between the initiative and referendum processes.

When voters elect to circulate a referendum petition, they are absolutely stuck with the law exactly as it was adopted by the city council or county board of supervisors; proponents have very little time to gather up all of the materials that constitute that adopted law in order to circulate a petition to their fellow voters *within 30 days* that is both accurate and complete. *Lin* and other similar cases therefore hold that proponents of a referendum are generally required to include in their petition: (1) the text of the "main" ordinance as adopted by the governing body; (2) any materials that are physically attached to that ordinance at adoption; and (3) any materials that are expressly incorporated by reference, whether physically attached at adoption or not. The courts' reasoning in these cases is that use of "magic" language incorporating a document by reference signals to proponents, voters, clerks, and even courts that a purely extrinsic document is nevertheless part and parcel of the law that was adopted by the governing body, and must therefore be attached to the petition provided to voters. (*Lin,*

supra, 176 Cal.App.4th at 419 ["[Proponent] had no direct control over the drafting of the ordinance and it would place an unreasonable burden on her and other referenda proponents to determine whether additional documents that were neither included nor incorporated by reference ought to be included in the referendum petition"].)

This "magic words" analysis for referenda, however, does not apply in the context of an initiative petition. Nor has any court even hinted that it should apply. Unlike a referendum—where the law is drafted (and already adopted) by the governing body such that proponents have no control over the contents of the petition—an initiative is drafted by *the proponents themselves.* The text of an initiative is completely within the exclusive control of the proponents. It is proponents, and no one else, that get to decide which laws they are proposing. Thus, determining the "full text" to be included in an initiative petition is far simpler and more straightforward: the petition must include any and all text that will be the law if the voters sign the petition and approve the measure. "Magic words," therefore, simply do not have the same import. Nor should they, as the drafting exercise is not focused on what was previously adopted by the city council or board of supervisors (and must subsequently be faithfully reproduced in a referendum petition), but is instead focused on what the new law will be if initiative proponents are successful (and must therefore be provided to voters in an initiative petition). Indeed, a holding that initiative proponents are only

required to attach those policies or other extrinsic documents that are preceded by "magic words" would essentially nullify the full text rule in the context of initiative petitions; by simply drafting the initiative to avoid use of "magic words," initiative proponents would be able to avoid attaching anything, even those documents that are part and parcel of the law being enacted, as is the case here.

C. The Initiative Also Fails to "Substantially Comply" With the Elections Code Because Substantial Compliance Requires *Actual* Compliance with Respect to the Substance of Every Reasonable Objective of the Statute.

As discussed *supra*, the Initiative failed to *actually* comply with the Elections Code's full text requirement. It did not *substantially* comply with this important legal requirement either.

Under the doctrine of "substantial compliance," courts may, under certain limited circumstances, excuse technical deficiencies in the form and format of an initiative or referendum petition. (*California Teachers Assn. v. Collins* (1934) 1 Cal.2d 202, 204.) However, in this context substantial compliance "'means *actual* compliance in respect to the substance essential to every reasonable objective of the statute.'" (*Assembly v. Deukmejian* (1982) 30 Cal.3d 638, 649 [quoting *Stasher v. Harger-Haldeman* (1962) 58 Cal.2d 23, 29].) "A paramount concern in determining whether a petition is valid despite an alleged defect is whether the purpose of the technical requirement is frustrated by the defective form of the petition." (*Id.* at 652.) Thus, the doctrine of substantial compliance has been applied sparingly to excuse only very minor, technical deficiencies such as use of the wrong font size (*California Teachers Assn., supra,* 1 Cal.2d 202) or incorrect typeface (*Ruiz v. Sylva* (2002) 102 Cal.App.4th 199).

Courts have found the doctrine inapplicable, however, where the failure to comply with statutory requirements resulted in voters receiving less information than they would have had there been actual, technical compliance. (See, e.g. *Ruiz, supra*, 102 Cal.App.4th at 213 ["One reason to distinguish between information and emphasis when applying the substantial compliance doctrine is that the latter is necessarily content neutral"]; see also *Clark v. Jordan* (1936) 7 Cal.2d 248, 252 [rejecting substantial compliance]; *Mervyn's, supra,* 69 Cal.App.4th at 99 [same]; *Nelson v. Carlson* (1993) 17 Cal.App.4th 732, 740-741 [same]; *Billig v. Voges* (1990) 223 Cal.App.3d 962, 967 [same]; *Chase v. Brooks* (1986) 187 Cal.App.3d 657, 660 [same]; *Creighton v. Reviczky* (1985) 171 Cal.App.3d 1225, 1232 [same].) Indeed, we are not aware of any court that has *ever* found that a petition that failed to include mandatory text—and thereby deprived signers of information—substantially complied with the Elections Code. (See, e.g., *Hebard, supra,* 65 Cal.App.4th at 1340-41 [invalidating referendum petition that omitted *three words* from the title of the referred ordinance].)[5] Appellants' statement

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[5] *Costa v. Sup. Ct.* (2006) 37 Cal.4th 986 did not, as Appellants suggest, excuse the omission of part of an initiative's full text. Indeed, the facts in *Costa* are readily distinguishable from the facts here. In *Costa*, initiative proponents submitted a version of their redistricting measure to the Secretary of State for title and summary, but printed a slightly different version on the petition provided to signers due to a clerical mistake by an assistant on the campaign. (*Id.* at 997-99.) Thus, because all signers received the same language in the petition as would be enacted into law, the question before the court was not whether the signers were disadvantaged by the difference between the version filed for title and summary and the one they saw on the petition, but whether the title and summary prepared by the Attorney General for the petition accurately reflected the text of the measure that went to the signers (i.e., did the signers get all the information they were entitled to, including an accurate and impartial title and summary). (*Id.* at 1023-24.) Because the differences in the texts were so minimal that the titles and summaries were not impacted, the Court applied the substantial compliance doctrine to save the petition. (*Id.* [noting that because the purpose of the relevant statute is to ensure that the Attorney General's title and summary is

that courts have invalidated petitions on full text grounds only where the omitted text was "critical" are at best misleading, as they cannot point to a single reported case where a court excused a full text violation on the grounds that the omitted text was minor or insignificant. This is because, as Appellants themselves concede, the objective of the full text rule (i.e., to provide information to voters and avoid confusion) can only be achieved by including the complete text of everything that will be enacted if the Initiative is approved.

Appellants also incredibly state that their failure to attach the specific provisions of the Voluntary Oak Woodland Management Plan to be enacted into law was unimportant and should be excused because signers of the Initiative petition "apparently did *not* have a 'keen interest' in the details of oak remediation," and if they did, they could have "satisfied it by locating the provisions on-line or in the Plan itself." (Appellants' Reply Brief at p. 37.) This argument shows a complete disregard for the very purpose of the full text requirement. Proponents of an initiative are required to include *the entirety* of the law they seek to enact or repeal so that signers know exactly how the law in question operates, so that those impacted by the proposed law know how to comply, and so that elections officials do not have to guess at which portions of the law may have been of interest to those signing the petition. This is why even far less egregious violations of the full text rule than the one at issue here have resulted in the invalidation of the defective petition.

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objective and accurate, and the error "did not adversely affect the accuracy or completeness of the Attorney General's ballot title and summary with regard to the version of the measure that was circulated," there was actual compliance with the purpose of the law].) In other words, the Court determined that all signers received the same information they would have received had proponents actually complied with the statutory requirements. That is not the case here.

For example, in *Hebard, supra,* 65 Cal.App.4th 1331, a referendum petition challenging an ordinance altering a land use designation in a city's general plan merely misstated the title of the ordinance by inadvertently omitting *three words*. (*Id.* at 1338-40.) The Court of Appeal nevertheless invalidated the referendum petition. In failing to include the full title of the ordinance, the Court held that the petition failed to adequately inform voters which land was involved and thereby deprived them of vital information. (*Id.* at 1340-41.) Proponents in that case argued that the petitions missing *three words* should be accepted because the City could not prove that voters were actually confused by the omission. The Court firmly rejected this argument, holding that evidence of voter confusion was wholly unnecessary:

> [E]vidence of actual voter confusion was not necessary to the court's determination that the misstated title failed to satisfy the reasonable objectives of the statute.

(*Id.* [determining that compliance with the Elections Code is a legal issue and not a factual one]; *Mervyn's, supra,* 69 Cal.App.4th 93, 104 [same].)

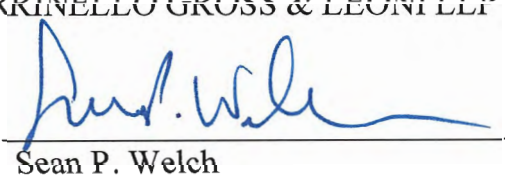
Appellants' arguments about lack of signer "interest" in the contents of the Oak Woodland Management Plan are similarly misplaced. Whether individual signers would or would not have signed the Initiative had they been provided the complete text is not the test. The standard is an objective one: was the required information provided or was it not. If it was not, there can be no compliance, substantial or otherwise. To apply the doctrine to excuse Appellants' failure to include the BMPs in their petition would be unprecedented.

III. CONCLUSION

For the foregoing reasons, the Winegrowers of Napa County, Napa Valley Vintners, Napa County Farm Bureau, and Napa Valley Grapegrowers urge this Court to affirm the judgment below and confirm that the Initiative was properly rejected by the County Registrar of Voters for its failure to include the full text, in violation of the Elections Code.

Dated: January 3, 2017

NIELSEN MERKSAMER
PARRINELLO GROSS & LEONI LLP

By: 
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DECLARATION OF SEAN P. WELCH
IN CERTIFICATION OF BRIEF LENGTH

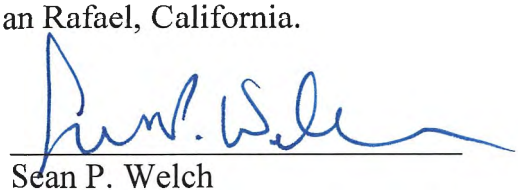
Sean P. Welch, Esq., declares:

1. I am licensed to practice law in the state of California, and am the attorney of record for Amicus Curiae Winegrowers of Napa County, Napa Valley Vintners, Napa County Farm Bureau, and Napa Valley Grapegrowers in this action. I make this declaration to certify the word length of Amicus Curiae Brief.

2. I am familiar with the word count function within the Microsoft Word software program by which the Opening Brief was prepared. Applying the word count function to the Opening Brief, I determined and hereby certify pursuant to California Rules of Court Rule 8.204(c) that Amicus Curiae Brief contains 6,093 words, and is within the word count limit imposed by Rule 8.204(c).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and of my own personal knowledge except for those matters stated on information and belief and, as to those matters, I believe them to be true. If called as a witness, I could competently testify thereto.

Executed on January 3, 2017, at San Rafael, California.



Sean P. Welch

PROOF OF ELECTRONIC SERVICE

I, the undersigned, declare under penalty of perjury that:

I am a citizen of the United States employed in the County of Marin. I am over the age of 18 and not a party to the within cause of action. My business address is 2350 Kerner Blvd., Suite 250, San Rafael, CA 94901. I am readily familiar with my employer's practices for collection and processing of correspondence for mailing with the United States Postal Service and for pickup by Federal Express.

On January 3, 2017, I effected electronic service of the foregoing document(s) described as APPLICATION FOR LEAVE TO FILE AMICUS BRIEF AND AMICUS BRIEF OF WINEGROWERS OF NAPA COUNTY, NAPA VALLEY VINTNERS, NAPA COUNTY FARM BUREAU, AND NAPA VALLEY GRAPEGROWERS IN SUPPORT OF RESPONDENTS COUNTY OF NAPA, ET AL. on the interested parties listed on the attached Service List.

Executed in San Rafael, California, on January 3, 2017.

I declare under penalty of perjury, that the foregoing is true and correct.

Paula Scott

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