Case No. B321875

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION TWO

AIDS HEALTHCARE FOUNDATION AND CITY OF REDONDO BEACH,
Petitioners and Appellants,
v.
ROB BONTA, ET AL.
Respondents,

On Appeal from the Los Angeles County Superior Court
Case No. 21STCP03149
The Honorable James C. Chalfant, Department 85

APPELLANTS' OPENING BRIEF

*BEVERLY GROSSMAN PALMER (SBN 234004)
JULIA MICHEL (SBN 331864)
STRUMWASSER & WOOCHER LLP
1250 6th Street, Suite 205
Santa Monica, California 90401
Telephone: (310) 576-1233
Facsimile: (310) 319-0156
E-mail: bpalmer@strumwooch.com
*Counsel of Record

MICHAEL W. WEBB (SBN 133414)
OFFICE OF THE CITY ATTORNEY
CITY OF REDONDO BEACH
415 Diamond Street
Redondo Beach, California 90277
Telephone: (310) 318-0655
Email: michael.webb@redondo.org

Attorneys for Petitioners and Appellants
AIDS Healthcare Foundation and City of Redondo Beach

TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL SECOND **APPELLATE DISTRICT, DIVISION** TWO	COURT OF APPEAL CASE NUMBER: B321875
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 234004 NAME: Beverly Grossman Palmer FIRM NAME: Strumwasser & Woocher LLP STREET ADDRESS: 1250 6th Street, Suite 205 CITY: Santa Monica STATE: CA ZIP CODE: 90401 TELEPHONE NO.: 310-576-1233 FAX NO.: 310-319-0156 E-MAIL ADDRESS: bpalmer@strumwooch.com ATTORNEY FOR (*name*): Petitioners and Appellants	SUPERIOR COURT CASE NUMBER: 21STCP03149
APPELLANT/ PETITIONER: AIDS Healthcare Foundation and City of Redondo Beach RESPONDENT/ REAL PARTY IN INTEREST: Rob Bonta, et al.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [x] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party *(name*): AIDS Healthcare Foundation and City of Redondo Beach

2. a. [x] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	**Nature of interest *(Explain):***
(1)		
(2)		
(3)		
(4)		
(5)		

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: May 30, 2023

Beverly Grossman Palmer
(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2017]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
www.courts.ca.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Statutes

Other Authorities

Constitutional Provisions

INTRODUCTION

When it enacted Senate Bill 10 ("SB 10") in 2021, the Legislature took an unprecedented step to undermine the people's longstanding constitutionally-reserved power of initiative — "a background principle of constitutional and statutory law that dates back to the early 1900s." (*City of Morgan Hill v. Bushey* (2018) 5 Cal.5th 1068, 1087.) The Supreme Court has repeatedly and emphatically declared that this right is one of the "most precious rights of our democratic process," that all doubts must be resolved in its favor, and that this "presumption liberally construing the initiative power [is] a paramount structural element of our Constitution." (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 946.) Despite this, the Superior Court upheld the constitutionality of SB 10, a state law that authorizes local governments to disregard limitations and restrictions in local initiatives when increasing the residential density of specific parcels of property.

The primary purpose of the initiative is to empower voters to do more than merely elect lawmakers, but to actually propose and adopt laws themselves. And, by constitutional design, "[t]he people's reserved power of initiative *is* greater than the power of the legislative body" because, while a legislative body may not bind future legislative bodies, "through exercise of the initiative power the people *may* bind future legislative bodies other than the people themselves." (*Rossi v. Brown* (1995) 9 Cal.4th 688,

715–716). As the Supreme Court has explained, it is this power to prevent a "hostile" government from undoing the exercise of initiative without a vote of the people (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 788) that makes the initiative power *greater* than the power of the legislative body (*Rossi*, 9 Cal.4th at pp. 715–716).

The Superior Court flipped this principle on its head, approving a law that subjugates the binding power of a voter-approved initiative to the whims of local governments, without requiring a vote of the people to effectuate the change or elimination of the existing initiative. This inversion of constitutional principles offends the text, structure, and purpose of the people's constitutionally-reserved initiative power, and is without precedent.

And while the Superior Court correctly observed that the state may preempt local initiatives, either by passing contradictory laws at the statewide level or by "exclusively delegating" the power to legislate directly to local government to the exclusion of the electorate, it incorrectly concluded that SB 10 fell within these limitations on the local initiative power. SB 10 allows local governments to increase residential density without requiring environmental review under the California Environmental Quality Act, but other than that, SB 10 does not *delegate* authority to make zoning decisions—that authority already resides in local hands. Nor does the statute bar the

future exercise of local initiative. Instead, it grants local governments permission to infringe on a critical aspect of the initiative right: the right to enact laws free from legislative amendment, absent a popular vote.

The Superior Court concluded that SB 10 is an example of delegating "exclusive authority" to local government to exercise a power over an area of statewide concern. Yet there is not a single example in the case law of such an "exclusive delegation" where the power delegated is a conventional local government "police power," such as zoning. In fact, the Supreme Court in *Committee of Seven Thousand v. Superior Court* ("*COST*") (1988) 45 Cal.3d 491, 510–511, indicated that legislation permitting action by local government but barring action by initiative in the area of "municipal zoning and land use regulations" would "run afoul" of the constitutional right of initiative. The court below did not meaningfully consider the limitations on the Legislature's power to restrict the right of initiative when it concluded that the Legislature had effectively barred future zoning initiatives along with permitting amendment of existing measures without a vote.

For these reasons, the Superior Court's ruling cannot be sustained. SB 10's purported grant of authority to local governments to amend local initiatives without a vote of the people undermines the people's reserved right of initiative. Under the Superior Court's analysis, so long as the State can articulate a statewide concern—a task susceptible to framing

gamesmanship—then the Legislature may subjugate the local initiative power by permitting local governments to disregard the restrictions in any initiative without a subsequent vote of the electorate, even where the state has not fully occupied the field and even where the initiative reflects an exercise of the classic municipal police power. The Legislature does not have this right to delegate, and therefore this aspect of SB 10 violates Article II, section 11 of the California Constitution.

BACKGROUND ON THE INITIATIVE POWER AND SENATE BILL 10

I. THE CONSTITUTIONALLY-RESERVED RIGHT OF INITIATIVE

The initiative power traces back to California's original 1849 Constitution, which declared that "[a]ll political power is inherent in the people" and from the 1911 Constitutional amendments, which expressly reserved to the voters of California "the authority to directly propose and adopt state constitutional amendments and statutory provisions through the initiative power." (*Perry v. Brown* (2011) 52 Cal.4th 1116, 1140.) The initiative, and the companion direct democracy powers of referendum and recall, were part of a "comprehensive package of voter reforms" enacted during the Progressive era of the early 20th century responding to "popular dissatisfaction with corruption and influence in the state legislature." (David A. Carrillo et. al., California Constitutional Law: Direct Democracy (2019) 92 So.Cal. L.Rev. 557, 565.)

Amid what the Supreme Court characterized as "widespread belief that the people had lost control of the political process" (*Perry*, 52 Cal.4th at 1140 [citing *Independent Energy Producers Assn. v. McPherson* (2006) 38 Cal.4th 1020, 1041–1043; *Horton v. Strauss* (2009) 46 Cal.4th 364, 420–421]), the initiative emerged as a "means of restoring the people's rightful control over their government, by providing a method that would permit the people to propose and adopt statutory provisions and constitutional amendments." (*Strauss*, 46 Cal.4th at p. 421.) The case for amending the Constitution to expressly provide for this right drew key support after the 1910 election of Governor Hiram Johnson, whose inaugural address presented the idea of the initiative as "'arming the people to protect themselves . . . to accomplish such other reforms as they desire, . . . [and] the means as well by which they may prevent the misuse of the power temporarily centralized in the Legislature.'" (*Independent Energy Producers*, 38 Cal.4th at p. 1041 [quoting Gov. Hiram Johnson, Inaugural Address (Jan. 3, 1911) Assem. J. (1911 Sess.) pp. 47–48].)

That same year, in 1911, Proposition 7 was passed. The measure amended article IV, section 1, which vested the state's legislative power in the Senate and Assembly, by adding the powerful statement that "the people reserve to themselves the power to propose laws and amendments to the constitution, and to adopt or reject the same, at the polls independent of the

legislature . . . ." (1AA000221.)[1] Proposition 7 also reserved the initiative and referendum power "to the electors of each county, city and city, city and town of the state," and authorized legislation to "facilitate" the operation of the reserved direct democracy power, but such legislation could "***in no way limit[] or restrict[] . . . the powers herein reserved***." (1AA000223 [emphasis added].)

Importantly, Article IV, section 1 established that measures enacted by initiative were not subject to legislative interference: "[N]o act, law, or amendment to the constitution, adopted by the people at the polls *under the initiative provisions of this section*, shall be amended or repealed except by a vote of the electors, unless otherwise provided in said initiative measure." (1AA000222 [emphasis added].) The prohibition on legislative amendment of initiative measures is unique because of its strength. As explained in the Supreme Court's detailed review of the history of the Constitutional initiative provisions in *People v. Kelly* (2010) 47 Cal.4th 1008 ("*Kelly*"), by 1911, 10 states and several local governments in California had granted initiative powers to the electorate. (*Id.*, at pp. 1032–1034.) All of those states except one allowed subsequent legislative amendment of initiatives without a subsequent vote of the people. (*Id.*, at

[1] These provisions are presently codified in Article II, sections 8, 10 and 11.

p. 1033.) In California, San Francisco and Los Angeles adopted initiative provisions around the turn of the century, allowing the local governments to propose amendments to initiatives to the voters. (*Ibid.*) The City of Sacramento, however, provided that initiatives "cannot be repealed or amended, except by a vote of the people." (*Id.* at p. 1034 [quoting Sac. City Charter, art. XII, § 231, as amended Nov. 3, 1903].) As the Supreme Court explained in *Kelly*, in drafting the 1911 ballot measure, the Legislature did not follow the approach of the majority of states, nor the approach of San Francisco or Los Angeles, but instead adopted the Sacramento approach of prohibiting *any* legislative amendment of initiative measures unless the measure specifically authorized such amendment. (*Id.*, at p. 1035 & fn. 38 [citing Stats.1911, ch. 342, § 1, p. 579 & Stats.1912, 1911 Ex.Sess. ch. 31, § 1, p. 127]; see also *id.*, at p. 1034, fn. 35.)

The substance of the 1911 constitutional language has remained intact for the last century. In 1946, voters approved a minor revision to allow the Legislature to propose amendment to or repeal of initiatives to the voters for their approval. (*Kelly*, 47 Cal.4th at pp. 1037–1039; Cal. Const., art. II, § 10 (c).) The constitutional revision process during the mid-1960s considered some options to make it easier to amend initiative statutes, but recommended none. (*Kelly*, 47 Cal.4th at pp. 1039–1042.) Since then, despite several proposals to revise the rules regarding amendment of initiative statutes, none has ever been put before

the voters. (*Id.*, pp. 1041–1042.) Thus, the initiative power, including the prohibition on legislative amendment or repeal of initiatives, remains nearly the same as it was in 1911, including the exercise of those reserved rights by the electorate of cities and counties.

II. THE ENACTMENT OF SENATE BILL 10

Senate Bill 10 was signed into law by Governor Gavin Newsom on September 16, 2021. (1AA000114.) SB 10 adds section 65913.5 to the Government Code, providing that, for parcels located in transit-rich areas or on urban infill sites

> [n]otwithstanding any local restrictions on adopting zoning ordinances enacted by the jurisdiction that limit the legislative body's ability to adopt zoning ordinance, including . . . restrictions enacted by local initiative, a local government may adopt an ordinance to zone a parcel for up to 10 units of residential density per parcel. (1AA000115.)[2]

The statute applies to all cities, including charter cities. (1AA000117.) There are some limitations on the applicability of

[2] When SB 10 was introduced on December 7, 2020, it contained provisions allowing local government to enact zoning ordinances inconsistent with restrictions enacted by local voter initiatives. (1AA000073–000074.) Subsequent Assembly amendments on June 24, 2021 added the two limitations on the power to override an initiative (inapplicability to publicly-owned open space or park lands and the two-thirds majority vote requirement). (1AA000105.) The Senate voted to concur with these amendments on August 30, 2021. (1AA000206.)

SB 10: in order to supersede a restriction established by a local initiative, the ordinance must be "adopted by a two-thirds vote of the members of the legislative body." (1AA000116.) And it does not apply to parcels in very high-fire severity zones unless certain mitigation measures are adopted, nor to "any local restriction enacted or approved by a local initiative that designates publicly owned land as open-space land . . . or for park or recreational purposes." (1AA000115.)

The Legislature recognized that the zoning decisions authorized by SB 10 reflected an exercise of conventional local "police power" regulation. The Senate Committee on Governance and Finance's legislative analysis of SB 10 asserted that "[p]lanning and approving new housing is *mainly a local responsibility*" and "[l]ocal governments use their *police power* to enact zoning ordinances that establish the types of land uses that are allowed or authorized in an area." (AA000130 [emphasis added].) SB 10 does not require any specific zoning action by local governments, but rather creates an exemption from CEQA for zoning pursuant to SB 10 for the enactment of a zoning ordinance consistent with SB by local government.

Having received attention in several legislative reports, SB 10's infringement of the initiative power was a feature of the law, not a bug. For example, the Senate Committee on Governance and Finance Report warned:

> In 1911, California voters amended the Constitution to provide voters the power to enact initiatives and referenda. The voter initiative is a 'reserved power;' it is not a right granted to them, but a power reserved by them. As such, the power of initiative is integral to California's political process. One common way the initiative power is used is to adopt urban growth boundaries or other growth management ordinances. Voters adopt these measures for a variety of reasons, some more noble than others. For example, some are adopted out of environmental concerns, such as preventing sprawl or reducing pressure to convert agricultural land to urban uses, while others are intended to block new neighbors from moving in. SB 10 allows local officials to adopt zoning that allows up to 10 units on a parcel, even if local voters have said they don't want it. . . . Should politicians be able to override the preferences of local voters? (1AA000134; see also 1AA000140.)

Likewise, Assembly Committee reports informed legislators that "this bill enables elected officials to override voter initiatives that have restricted the zoning on these parcels." (1AA000171.)

The Assembly Committee on Local Government Analysis of SB 10 recounted the argument of the City of Santa Monica that the measure "fails to ensure local governments are not able to overturn the democratic will of their residents. For example, in 2014, voters in the City of Santa Monica approved measure LC which was designed to require voter approval for any alternate or new developments on the site of the former Santa Monica Airport, except parks, open space, and recreational areas. Such initiatives are one of the most direct means that voters have of

expressing their will for their communities and allowing an elected body to overturn these initiatives would be an affront to the democratic process." (1AA000184–000185; see also 1AA000171.)

In addition to the comments presented in bill analysis, the Legislature received comments from hundreds of entities, including 16 cities, numerous local organizations, and individuals. (See generally 1AA000229–000663.) A large majority of these comments included their concerns about SB 10's granting of the ability to override existing initiative measures to local government. (See 1AA000229–000663.)

PROCEDURAL BACKGROUND

Appellant AIDS Healthcare Foundation commenced this litigation by filing a Petition for Writ of Mandate on September 22, 2021. (1AA000004.) Appellant City of Redondo Beach joined this litigation as a Petitioner upon the filing of a First Amended Verified Petition on February 16, 2022. (1AA000025.) The operative pleading seeks the issuance of a writ of mandate commanding Respondents to cease enforcement of SB 10, an injunction preventing Respondents from enforcing SB 10, and declaratory relief that the provisions of SB 10 that permit local governments to disregard the substantive or procedural limitations of local initiative measures are in violation of the right to initiative that is reserved to the people in the California Constitution. (1AA000042–000043.)

The parties agreed to proceed on a joint set of agreed exhibits that would serve as the record for the Court, which was filed as a joint Request for Judicial Notice with the Opening Brief. (1AA000067.) These documents included the various legislative drafts and analyses of SB 10. Petitioners also sought judicial notice of five exhibits that were not included in the Joint Appendix, including the legislative history of the Constitutional amendments reserving the right of initiative to the people, comments to the Legislature from the public regarding SB 10, and local land use and zoning initiatives from numerous jurisdictions. (1AA000210.) In their Opposition below, Respondents argued that this matter was not ripe for review, and that SB 10 reflected the Legislature's power to preempt local laws. (2AA001011-001019.) However, Respondents did not challenge Petitioners' arguments that the right to bind the hands of the legislative body was derived directly from the 1911 Constitutional amendments nor that SB 10 permitted local government to amend local initiatives in violation of that right.

The matter came before the Honorable James C. Chalfant, Los Angeles Superior Court, on May 12, 2022. After hearing argument of the parties, the Court adopted its tentative ruling with minor oral modifications, which it subsequently noted on the ruling. (2AA001049, 2AA001067–001068.)

The Court denied the claim for traditional mandate, and issued declaratory relief, stating that "SB 10 is a lawful

preemption of local initiative power that delegates exclusively to local legislative bodies the discretion to adopt an ordinance zoning up to ten units of residential density per parcel if the parcel is located in a transit rich area or an urban infill site, and to override any contrary local zoning initiative if the ordinance is adopted by a 2/3 vote." (2AA001068.)

In reaching this conclusion, the Court relied upon a line of cases evaluating the ability of the Legislature to preempt the exercise of the right of initiative. Specifically, the Court concluded that the Legislature had delegated exclusive authority to city councils and county boards of supervisors to enact zoning ordinances zoning for 10 or fewer units per parcel. (2AA001066.) The Court contended that "[t]he Legislature can address a matter of statewide concern by eliminating existing initiatives, and it follows that it can also allow cities or counties to override such initiatives upon a two-thirds vote of the local body as SB 10 requires." (2AA001065.) The Court's analysis rested upon the view that enactment of the initiative was the greater power, and that permitting amendment of the initiative by local government was the lesser act, encompassed within the Legislature's power to preempt action by initiative in the first instance.

Judgment was entered on May 27, 2022. Appellants filed a Notice of Appeal on June 24, 2022.

STANDARD OF REVIEW

Evaluating a facial challenge, such as this case, a court considers only the text of the statute itself, not its application to the particular circumstances of an individual. (*Communities for a Better Environment v. Energy Resources Conservation and Development Commission* (2020) 57 Cal.App.5th 786, 812, citations omitted.) To establish the facial invalidity of a statute, "the constitutional problem must be manifest" (*id.*, at p. 813), meaning it conflicts with constitutional principles "in at least the generality or vast majority of cases." (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 218, internal quotations and citations omitted.)[3]

---

[3] The standard for a facial constitutional challenge is "the subject of some uncertainty" (*ibid.*), and some cases describe the test as requiring a "total and fatal conflict" between the statute and applicable constitutional principles. (E.g., *California School Boards Assn. v. State of California* (2019) 8 Cal.5th 713, 723–724.) "Either way, we consider only the text and purpose of the statute" and will not invalidate a statute on a facial challenge based only on suggestions "'that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute.'" (*Ibid.*, quoting *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180-181.) Of course, "[a] person may bring a facial challenge by showing that the subject of [the] particular challenge has the effect of infringing some constitutional or statutory right, but need not necessarily show that he or she has personally suffered this infringement." (*Vergara v. State of California* (2016) 246 Cal.App.4th 619, 643, internal quotations and citations omitted.)

Importantly, this Court should not defer to the Superior Court's interpretation of SB 10, for the interpretation and constitutionality of a statute is a question of law, reviewable de novo. (*Vergara*, 246 Cal.App.4th at p. 642.) "De novo review is also the general standard of review when a mixed question of law and fact implicates constitutional rights." (*Ibid*.)

Nor does this Court owe any deference to the Superior Court's determination that SB 10 preempts local zoning laws, because whether an initiative measure is preempted by state law is also "a pure question of law subject to de novo review." (*City of Watsonville v. State Dept. of Health Services* (2005) 133 Cal.App.4th 875, 882.) "The party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption." (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149.)

ARGUMENT

I. SB 10 DOES NOT "EXCLUSIVELY DELEGATE" DECISIONS ABOUT ZONING TO LOCAL ELECTED GOVERNMENTS, NOR DOES IT "PREEMPT" VALIDLY-ENACTED LOCAL INITIATIVES.

Because the Legislature's enactment of a law authorizing local governments to override valid local initiatives is without precedent, the Superior Court analyzed SB 10 under an amalgamation of inapplicable legal standards, none of which addressed the statute's infringement of the people's reserved initiative right. To start, the Superior Court failed to heed the

repeated instructions of the Supreme Court to defer whenever possible to the exercise of the right of initiative. It further fell of course when it wrongly analyzed SB 10's initiative-override provision under the "exclusive delegation" framework announced in *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491 ("*COST*"). *COST* applies when a given local initiative impermissibly treads on an area that the Legislature has already "exclusively delegated" to local governments and *excluded* action by the electorate through initiative. But SB 10 does not purport to exclude or limit the future exercise of initiative power. Because the effect of finding that the Legislature has "exclusively delegated" decisionmaking authority to a local government is to "preclude action on the same subject by the electorate" (*id.*, at p. 501), the Superior Court's misapplication of the *COST* case then led it to declare, in a conclusion not even argued by Respondents, that SB 10 precludes "future local zoning initiatives" from being enacted, even though SB 10 does nothing of the sort.

The Superior Court also misapplied the specific preemption test applicable to initiatives set forth in *Citizens for Planning Responsibly v. County of San Luis Obispo* (2009) 176 Cal.App.4th 357, which requires demonstrating, *inter alia*, that the Legislature has "so completely occup[ied] the field in a matter of statewide concern that all, or conflicting, local legislation is precluded." (*Id.*, at p. 371.) However, as the Superior Court

recognized, the Legislature has not *fully occupied* the fields of housing and zoning. And SB 10 does not *conflict* with local law; it simply authorizes local government to rely on an exemption from CEQA for the specific type of up-zoning it authorizes. The *only* conflict is with the people's right to maintain their initiative power against legislative amendment without a vote of the people. Because this right is one that is constitutionally preserved, the Legislature *cannot* have "preempted" the right by creating a statutory conflict.

A. The Court Must "Jealously Guard" the Right of Initiative.

The Supreme Court has repeatedly and emphatically established that the right to initiative must be preserved whenever possible. Because the initiative power is not a right "granted the people, but . . . a power reserved by them," and because it is "one of the most precious rights of our democratic process," it is "the duty of the courts to jealously guard th[is] right of the people." (*Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591, [citations and footnote omitted].) Courts *must* "apply a liberal construction to this power wherever it is challenged in order that the right [to local initiative or referendum] be not improperly annulled." (*DeVita*, 9 Cal.4th at p. 776.) Moreover, the court "must '*resolve any reasonable doubts in favor of the exercise of this precious right*.'" (*Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53

Cal.3d 245, 250 [quoting *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 241] [emphasis in *Brosnahan*].) The Superior Court's conclusion that the Legislature could delegate to local governments the power to amend or repeal initiative measures failed to properly apply these bedrock principles that undergird the Supreme Court's analysis of the exercise of the initiative right.

B. The Analysis in *Committee of Seven Thousand* is Inapplicable to the Local Legislative Action Authorized by SB 10.

The Superior Court erred by determining that this case involves "[t]he Legislature's delegation of exclusive authority to local governments to exercise a power over a matter of statewide concern." (2AA001062.) However, the doctrine of "exclusive delegation" does not apply to this legal inquiry. "Exclusive delegation" is the legal framework used to review challenges to a local initiative, not a constitutional challenge to a state law. Under the *COST* inquiry, a court must inquire whether local legislative activity on a particular subject lies in the hands of *both* a local legislative body *and* local electorates (which is generally the case, see *DeVita*, 9 Cal.4th at p. 775[4]) or whether decisionmaking authority on a particular subject rests *exclusively* with "representatives of the people, but not the people

[4] The "local electorate's right to initiative . . . is generally co-extensive with the legislative power of the local governing body." (*Ibid.*)

themselves" (*Pettye v. City and County of San Francisco* (2004) 118 Cal.App.4th 233, 246).

Moreover, SB 10 regulates local land use and zoning, and the Supreme Court has "recognized that a city's or county's power to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state." (*DeVita*, 9 Cal.4th at pp. 781–782.) "There are no cases upholding an exclusive delegation where the authority to legislate derives from a city and county's inherent and constitutionally based police power." (*Citizens for Planning Responsibly v. County of San Luis Obispo* (2009) 176 Cal.App.4th 357, 377.) Yet the Superior Court relied upon "exclusive delegation" to conclude that the Legislature had delegated "exclusive authority" to "a city council or board of supervisors to exercise a particular power," namely "permission to zone for ten or fewer residential units per parcel," and had thereby "preempt[ed] existing or future local zoning initiatives . . . on its subject matter." (2AA001066–001067.)

The State's and Superior Court's misplaced reliance on the "exclusive delegation" doctrine improperly extends the holding of *COST* and disregards subsequent case law clarifying and curtailing the scope of the doctrine. At issue in *COST* was a state statute that delegated discretionary authority to local governments to impose development fees to finance major highway construction—three "transportation corridors" that would be "high-speed, high-volume" facilities that were planned

for eventual incorporation into the state highway system. (45 Cal.3d at pp. 495–496.) A citizens' group proposed an initiative to prohibit the Irvine city council from imposing a new fee—i.e., from exercising the authority newly delegated by the Legislature—without first submitting the fee to a vote of the electorate. (*Id.*, at p. 498.) Because the proposed initiative sought to annul the exercise of power previously delegated to the Irvine City Council by the Legislature, the Court first considered whether the Legislature had delegated authority to impose new fees *exclusively* to the local legislative body, displacing the people's right to legislate by initiative on the same subject. (*Id.*, at pp. 501–509.)

Examining the statute at issue, the Supreme Court noted how the state law specifically authorized "[t]he *board of supervisors* of the County of Orange and the *city council* of any city in that county" to levy new fees to support major highway construction. (*Id.*, at p. 501 [emphasis added].) This, the Supreme Court concluded, was important evidence of "legislative intent to *preclude action on the same subject by the electorate*" (*ibid.* [emphasis added]) that justified the conclusion that the Legislature had delegated the decision to the Irvine city council "exclusively." (*Id.*, at p. 509.)

"The intent to exclusively delegate must be clearly shown," but SB 10 reflects no such exclusive delegation. (*Pettye*, 118 Cal.App.4th at p. 245–246.) The Legislature did not vest

authority over zoning *exclusively* in a local legislative body but simply authorized the legislative body to exempt qualified zoning ordinances from CEQA. Indeed, the primary *new* power granted to a local legislative body is the discretion to "override" or amend an existing initiative. Deferring to local decisionmaking does not imply an intent to preclude the power of local voters to act through initiative (*Pettye*, 118 Cal.App.4th at p. 246); intent to allow "overrides" of otherwise validly-enacted initiatives is distinguishable from intent to render all initiatives on the subject void *ab initio*. (See *DeVita*, 9 Cal.4th at p. 779.[5]) Indeed, as discussed further in Section I.C, *infra*, neither the text nor the legislative history of SB 10 reveals any intent to *preclude* direct voter participation in zoning matters. (Gov. Code, § 65913.5, subd. (a)(1).) SB 10 *does not* preclude local zoning initiatives on the same subject, which necessarily distinguishes the statute

---

[5]It is the intent to *entirely* remove the voters' ability to legislate on a particular subject that is the *sine qua non* of "exclusive delegation." (*COST*, 45 Cal.3d at p. 501 [searching for "legislative intent to *preclude* action on the same subject by the electorate."] [emphasis added]; *City of Morgan Hill*,5 Cal.5th at p. 1083 [describing *COST* as "a case where the state statute gives discretion *solely* to the legislative body, to the *exclusion* of the electors."] [emphasis added]; *Pettye*, 118 Cal.App.4th at p. 246 ["Our inquiry is whether a statutory scheme . . . reflects an intention that *only* the representatives of the people, but *not* the people themselves, can make those decisions."] [emphasis added].)

from the laws considered in other "exclusive delegation" cases. (Compare *COST*, 45 Cal.3d at p. 502 with *Blotter v. Farrell* (1954) 42 Cal.2d 804, 811–812 [no "exclusive delegation" where the power to redistrict was shared by city council and the electors], *DeVita*, 9 Cal.4th at pp. 781–782 [no "exclusive delegation" where Legislature did not intend to preclude electors from exercising initiative power to amend general plans, "an act of formulating basic land use policy, for which localities have been constitutionally endowed with wide-ranging discretion."], and *Pettye*, 118 Cal.App.4th at p. 247 [no "exclusive delegation" where "it matters not to the Legislature whether [general assistance grant] standards are adopted by the board of supervisors or the voters."].) As in *DeVita*, SB 10 "itself confirms that the Legislature did not intend to exclude the electorate" entirely from legislating on local zoning matters. (9 Cal.4th at pp. 779–80.)

That is not the only reason why *COST*, even on its own terms, does not support the Superior Court's "exclusive delegation" analysis. In *COST* and the cases it relied on, the statutory authority delegated by the Legislature derived from the *Legislature*'s power to legislate on matters that implicated the Legislature's "exclusive" authority and on topics requiring coordination among multiple cities or jurisdictions, or where the regional or statewide impacts are obvious. (*Mervynne v. Acker* (1961) 189 Cal.App.2d 558, 562 ["The right of the state to exclusive control of vehicular traffic on public streets has been

recognized for more than forty years."]; *COST*, 45 Cal.3d at p. 506 [recognizing that the state law was "designed specifically" to fund transportation facilities "used primarily for travel between cities rather than within cities"]; *Riedman v. Brison* (1933) 217 Cal. 383, 387 [state law governing regional water districts, stating that it was "settled law" that a municipality seeking to join or leave a duly-constituted regional water district was not a municipal affair]; *Met. Water Dist. of S. Cal. v. Whitsett* (1932) 215 Cal. 400, 407 [referring to a Metropolitan Water District of Southern California as "a public instrumentality of legislative creation whose powers and duties may be enlarged, restricted, or abolished at the will of the Legislature" and that "the Legislature has absolute control over this corporation and its affairs."]; *Ferrini v. City of San Luis Obispo* (1983) 150 Cal.App.3d 239, 246 ["The annexation of territory by a city has long been held to be both a legislative matter and one of statewide concern."].)

Here, by contrast, SB 10 authorizes local governments to enact *land use regulations*. Even assuming that the increased housing density in specified "transit-rich" areas could make regional or statewide impacts on California's housing problem, the decision to approve this type of up-zoning is a quintessentially local decision, "a function of local government under the grant of police power contained in California Constitution, article XI, section 7." (*DeVita*, 9 Cal.4th at pp. 781–782 [citations omitted].) The authority for these "land use

decisions derives from this inherent police power, *not* from the delegation of authority by the state." (*Ibid.* [emphasis added]; *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.*, (2013) 56 Cal.4th 729, 742–743 [same]; *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1151 [same].) The zoning authority is an "inherent *preexisting* power[.]" (*City of Riverside*, 56 Cal.4th at p. 745, fn. 8.) Even the Senate Committee on Governance and Finance's legislative analysis of SB 10 acknowledges that "[p]lanning and approving new housing is *mainly a local responsibility*" and "[l]ocal governments use their *police power* to enact zoning ordinances that establish the types of land uses that are allowed or authorized in an area." (1AA000130 [emphasis added].)

Because the authority that SB 10 purports to "delegate"—allowing increased density of up to 10 units per parcel—is one that derives from a local government's own police powers, the statute cannot be upheld under the "exclusive delegation" doctrine. (See *COST*, 45 Cal.3d at pp. 510–511.) Indeed, the recent, post-*COST* cases have confirmed this important limit on the exclusive delegation doctrine, emphasizing that "[t]here are no cases upholding an exclusive delegation where the authority to legislate derives from a city and county's inherent and constitutionally based police power." (*Citizens for Planning Responsibly*, 176 Cal.App.4th at p. 377 [citing cases]; *Ferrini*, 150 Cal.App.3d at p. 248 [finding exclusive delegation over

annexation proceedings and stating "[a]nnexation proceedings do not constitute the exercise of police power because they necessarily affect territories outside the city, while the police power is limited to territory within the city limits."].)

Nor did *COST* address the most unique feature of SB 10: the fact that the law allows local legislative bodies to *override existing* and validly-enacted initiative measures. That is, *COST* found that a state law that had passed *prior* to the proposed initiative had "exclusively delegated" the authority to levy fees to the city council, which *prevented* the electorate from exercising its reserved right of initiative. (45 Cal.3d at p. 497–498.) Indeed, neither the cases *COST* relied on, nor any of the cases applying the "exclusive delegation" doctrine since have varied from this paradigm of invalidating initiatives that seek to exercise authority *already* delegated by the state directly to local government.[6]

---

[6] A small but representative selection of cases proves this point. (E.g., *Riedman v. Brison* (1933) 217 Cal. 383 [proposed initiative held invalid because Metropolitan Water District Act already tasked the "governing body" with power that initiative sought to exercise]; *Simpson v. Hite* (1950) 36 Cal.2d 125, 127 ["proposed initiative" to designate alternative site for court building held invalid because state law already tasked board of supervisors with providing suitable quarters for superior courts]; *Mervynne*, 189 Cal.App.2d at pp. 560–562 [proposed initiative held invalid where measure sought to repeal parking meter ordinances passed by city council; state Vehicle Code already delegated the state's "exclusive control of vehicular traffic" to city

The Superior Court relied heavily on SB 10's implication of a matter of "statewide concern" when it turned to the "exclusive delegation" doctrine to uphold the statute. As the Superior Court held, this "statewide concern" empowered the Legislature to grant local governments the power to override initiatives, pursuant to *COST*'s statement that "[i]n matters of statewide concern . . . . [i]f the state chooses . . . to grant some measure of local control and autonomy, it has the authority to impose procedural restrictions on the exercise of the power granted, including the authority to bar the exercise of the initiative and referendum." (2AA001063–001064, quoting *COST*, 45 Cal.3d at p. 511.)

However, in the sentences immediately preceding that statement in *COST*, in a discussion particularly applicable to SB 10, the Supreme Court acknowledged that this doctrine *would not apply* when the subject matter at issue was "municipal zoning and land use regulations" (*id*., at p. 511) that, just like the local initiatives that SB 10 imperils, are quintessential exercises of the

---

council]; *Ferrini*, 150 Cal.App.3d at p. 246 [charter amendment interfered with exclusive procedure for annexation of territory to a city, authority was vested exclusively in Local Agency Formation Committee, "a creature of the Legislature exercising . . . authority delegated by [state law."]; *City of Burbank v. Burbank-Glendale-Pasadena Airport Authority* (2003) 113 Cal.App.4th 465, 480 [holding initiative invalid because it usurped power that was previously delegated exclusively to the city council under Public Utilities Code].)

inherent police power of local governments. By contrast, the initiative that was found to be preempted by "exclusive delegation" in *COST* and the three cases it cited concerned authority that existed *solely* due to state legislative action. (*COST*, 45 Cal.3d at p. 495 [local taxation to fund major highways]; *Riedman*, 217 Cal. 383, 387 [initiating withdrawal from regional water district, which are instrumentalities of the Legislature]; *Ferrini*, 150 Cal.App.3d at p. 244 [authority to approve, modify, or disapprove annexation proposals delegated to instrumentality of Legislature]; *Mervynne*, 189 Cal.App.2d at p. 562 [delegation of Legislature's "exclusive control of vehicular traffic on public streets"].) Indeed, *COST* expressly instructs courts to read the statement that "legislation which permits council action but effectively bars initiative action may run afoul of the 1911 amendment" reserving the right of initiative as applying in the context of "municipal zoning and land use regulations." (*COST*, 45 Cal.3d at pp. 510–511 [first quoting *Associated Home Builders*, 18 Cal.3d at p. 595].) And yet SB 10, by elevating the power of a legislative body over that of the electorate in the context of zoning and land use regulations, flouts that warning.

Moreover, subsequent decisions have clarified and significantly scaled back *COST*'s discussion of the presence of some element of statewide concern. (E.g., *Citizens for Planning Responsibly*, 176 Cal.App.4th at p. 372 ["[A] state statutory

scheme does not restrict or preempt the power of the initiative simply because it implicates matters of statewide concern."].) In *DeVita*, the Supreme Court specifically clarified that "we never suggested in *COST* that courts are to automatically infer that a statutory scheme restricts the power of initiative or referendum merely because some elements of statewide concern are present." (*Id*. at pp. 780–781.) In an admonition that is particularly pertinent to the present case, the Court emphasized that "it is erroneous to assume that a statute or statutory scheme that both asserts certain state interests and defers in other respects to local decisionmaking implies a legislative intent to bar the right of initiative. Rather, courts must inquire concretely into the nature of the state's regulatory interests to determine if they are fundamentally incompatible with the exercise of the right of initiative or referendum . . . ." (*Id*. at p. 781; see also *Independent Energy Producers Assn.*,38 Cal.4th at p. 1033 ["California decisions that have held, in a variety of contexts, that language in the California Constitution establishing the authority of 'the Legislature' to legislate in a particular area must reasonably be interpreted to include, rather than to preclude, the right of the people through the initiative process to exercise similar legislative authority."].)

Defining what constitutes a matter of "statewide concern" continues to be an elusive and difficult task, and often turning on how an issue is strategically framed. (E.g., *Pettye*, 118

Cal.App.4th at p. 246 [noting that "the state/local dichotomy is one of degree" and that "[w]hether the subject is viewed as statewide or local depends on how one frames the inquiry. Here, if the question is whether the welfare of the indigent poor is a statewide concern, the answer is yes. But if the question is whether, because of the magnitude and uniqueness of the single homeless adults congregating in San Francisco, the City emphasizes a G.A. program that provides 'care' instead of 'cash' grants, the issue looks very local."] [citations omitted].) Just because the provision of housing sounds like a "statewide concern" does not mean there is a statewide interest in having local zoning decisions be made by local elected leaders as opposed to local initiatives.

Here, as the Superior Court found, the State's regulatory interest is not "housing" or "zoning" writ large, but rather ensuring local governments could satisfy the requirements of the housing elements of their general plans. (2AA001064.) However, there is nothing fundamentally incompatible with that interest and requiring local legislative bodies, after approving up to 10 units of housing on urban infill sites that local restrictions would otherwise prohibit, to submit that question for a vote of the people in order to preserve the integrity of the electorate's reserved right of initiative. This is not a situation where preserving the initiative right would threaten the county's ability to fund state-mandated programs or require voters (who are not

immersed in day-to-day budgeting decision) to make reasoned judgments on the complex financial management of government (*Totten v. Board of Supervisors* (2006) 139 Cal.App.4th 826, 839), or like *Simpson*, where the state law *mandated* a particular result and exercise of the initiative power would have undone performance of supervisors' state-imposed duty to furnish suitable quarters for state courts. (36 Cal.2d at pp. 127, 132.)

As the legislative history of SB 10 reveals, there is no intent to bar the exercise of the initiative power itself, and the Legislature acknowledged numerous additional causes of the housing shortage that SB 10 sought to address, including existing local zoning restrictions unrelated to any initiative, limited multi-family housing in most jurisdictions, and the need to comply with CEQA for upzoning. (1AA000170.) The Legislature created a tool for local governments to address these constraints in SB 10, but in so doing granted local governments a right that the Legislature could not grant: the right to amend initiatives enacted by their own electorate without a subsequent vote. This is not exclusive delegation and cannot be analyzed under the *COST* framework.

C. The Superior Court's Application of the Inapposite "Exclusive Delegation" Doctrine Resulted in the Erroneous Declaration that SB 10 Bars "Future Local Zoning Initiatives."

The Superior Court, without any analysis or argument from Respondents, also pronounced that SB 10 preempts "*future* local zoning initiatives by delegating exclusive authority to a city council or board of supervisors in its subject matter." (2AA001066–001067 [emphasis added].) This conclusion followed from the Superior Court's erroneous application of *COST* to SB 10's novel initiative "override" provision, but even applying *COST* on its own terms cannot counsel such an outcome.

As discussed above, "exclusive delegation" fundamentally addresses whether a decision can be made by a local government *and* a local electorate, or whether the Legislature has vested authority to legislate on a particular matter in the hands of local governments alone, to the exclusion of the electorate. The doctrine assumes that by delegating authority "exclusively" to a local government, the Legislature has *prohibited* a local electorate from subsequently exercising its reserved power of initiative over that same subject. (See *supra*, pp. 30, 33–34 & fn. 6 [citing cases].) Indeed, when courts conclude that the Legislature has "exclusively delegated" authority to legislate to a local government, they invalidate the initiative or prevent it from reaching the ballot because the initiative is beyond the power of the electorate to enact. (E.g., *COST*, 45 Cal.3d at p. 512 [proposed

measure was beyond the initiative power because electorate sought to exercise authority delegated to local legislative bodies "specifically and exclusively"]; *City of Burbank* 113 Cal.App.4th at p. 480 [same].)

"The first step," in the *COST* analysis, which the Superior Court ignored here, "is to look at the words of the statute." (*Pettye*, 118 Cal.App.4th at p. 245.) SB 10 provides:

> Notwithstanding any local restrictions on adopting zoning ordinances enacted by the jurisdiction that limit the legislative body's ability to adopt zoning ordinances, including, subject to the requirements of paragraph (4) of subdivision (b), restrictions enacted by local initiative, a *local government may* adopt an ordinance to zone a parcel for up to 10 units of residential density per parcel, at a height specified by the *local government* in the ordinance, if the parcel is located in . . . (A) A transit-rich area [or] (B) An urban infill site." (Gov. Code, § 65913.5, subd. (a) [emphasis added].)

This language offers no indication that *only* a city council (or a board of supervisors) can upzone parcels in transit-rich or urban infill areas, i.e., that the "intent was to preclude [future] action by initiative or referendum." (*COST*, 45 Cal.3d at p. 501 [noting "generic language such as 'governing body' or 'legislative body' supports a weaker inference than a specific reference to boards of supervisors and city councils."].) Indeed, by providing that a "local government" may zone a parcel for up to 10 units of housing but then setting forth specific requirements that only apply to a "legislative body" (Gov. Code, § 65913.5, subd. (b)), the

term "local government" must refer to a "legislative body" *and* "local electorate." Nor does the legislative history provide the "clear" indication necessary to overcome "the constitutionally based presumption that the local electorate could legislate by initiative on any subject on which the local governing body could also legislate." (*DeVita*, 9 Cal.4th at p. 777.) This is particularly noteworthy considering that when the Legislature has sought to preclude the use of a local initiative power in an area related to zoning, it has done so expressly. (See, e.g, Gov. Code, § 66300, subd. (b) [expressly precluding county or city electorates from exercising initiative or referendum to downzone residential parcels except under specific circumstances, among other restrictions].) Absent the requisite intent to preclude the electorate from enacting ordinances that would zone transit-rich areas or urban infill sites for up to 10 units of housing, it was legal error for the Superior Court to conclude that similar "future zoning initiatives" were preempted. (*COST*, 45 Cal.3d at p. 501; *Pettye*, 118 Cal.App.4th at p. 246 ["Our inquiry is whether a statutory scheme . . . reflects an intention that *only* the representatives of the people, but *not* the people themselves, can make those decisions."] [emphasis added].)

D. Traditional Preemption Principles Likewise Do Not Apply, Because the Legislature Has Not Occupied the Field of Housing and Zoning, and SB 10 Does not Itself Preempt Any Local Law.

As articulated in *Citizens for Planning Responsibly*, "[t]he power of the initiative may be preempted in three ways: (1) the Legislature may so completely occupy the field in a matter of statewide concern that all, or conflicting, local legislation is precluded; (2) the Legislature may delegate exclusive authority to a city council or board of supervisors to exercise a particular power over matters of statewide concern, or (3) the exercise of the initiative power would impermissibly interfere with an essential governmental function." (176 Cal.App.4th at p. 371.) Because the Legislature has not delegated "exclusive authority" over local zoning matters to an elected legislative body, and for the reasons articulated in Section I.B, *supra*, option (2) cannot not apply here. Nor does option (3) apply to SB 10—indeed, this theory was never argued below.[7] Hence, for SB 10 to preempt local initiatives as Respondents urged, it must "so completely occupy the field in a matter of statewide concern that all, or conflicting, local legislation is precluded." (176 Cal.App.4th at p. 371.)

However, as the Superior Court correctly concluded, "no court has found that the state fully occupies the field of local

---

[7] (2AA001067–001068 [final order, crossing out sentences related to this issue at the request of Petitioners, with no opposition from Respondents].)

land-use planning." (2AA001068, fn. 5; see also *City of Watsonville v. State Dep't of Health Servs*., (2005) 133 Cal.App.4th 875, 881, 883–884 [anti-fluoridation measure preempted where "an actual conflict" exists "because state law fully occupies the area of fluoridation of public water systems . . . ."]; *Northern California Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90, 108 [local initiative prohibiting electric shock therapy pre-empted where the field of electric shock therapy "has been fully occupied and pre-empted by general state law"].)

Even applying more general preemption principles, SB 10 does not itself conflict with the local initiative measures it allows a local legislative body to "override." To reiterate, Article XI, section 7 of the California Constitution allows counties and cities to make and enforce within their limits "all local, police, sanitary, and other ordinances and regulations not in conflict with general laws" and "[t]his inherent local police power includes broad authority to determine, for purposes of the public health, safety, and welfare, the appropriate uses of land within a local jurisdiction's borders." (*City of Riverside*, 56 Cal.4th at p. 738.) "Consistent with this principle, when local government regulates in an area over which it traditionally has exercised control, such as the location of particular land uses, California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is *not*

preempted by state statute." (*Id.* at p. 743 [quotations omitted]; *id.*, at p. 744 ["In addition, [w]e have been particularly reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another."] [quotations omitted].)

"A conflict exists if the local legislation [1] duplicates, [2] contradicts, or [3] enters an area fully occupied by general law, either expressly or by legislative implication." (*City of Riverside*, 56 Cal.4th at p. 743 [quotations and citations omitted].) As the party asserting preemption, Respondents have the burden of demonstrating the conflict. (*Citizens for Planning Responsibly*, 176 Cal.App.4th at p. 371.) Below, Respondents claimed only that "[t]his case presents an instance of the 'contradictory' form of preemption" (2AA001017).

"[L]ocal legislation is 'contradictory' to general law when it is inimical thereto." (*City of Riverside*, 56 Cal.4th at p. 743 [quotations omitted].) However, "[t]he 'contradictory and inimical' form of preemption does not apply unless the ordinance *directly requires* what the state statute forbids or prohibits what the state enactment demands." (*Ibid.* [emphasis added].) "Thus, no inimical conflict will be found where it is reasonably possible to comply with both the state and local laws." (*Ibid.*) For example, in *City of Riverside*, the Court concluded that California's medical marijuana statutes did not

preempt a local ban on facilities that distribute medical marijuana because "[n]either the [state law] *requires* the cooperative or collective cultivation and distribution of medical marijuana that Riverside's ordinance deems a prohibited use of property within the city's boundaries. Conversely, Riverside's ordinance requires no conduct that is forbidden by the state statutes." (*Id.*, at p. 755, citing *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, 866 [ordinance banning sale of firearms or ammunition on county property was not "inimical" to state statutes contemplating lawful existence of gun shows; ordinance did not require what state law forbade or prohibit what state law demanded].)

Like the statutes at issue in *City of Riverside*, SB 10 allows—but does not *require*—approval of 10 units of housing on a single parcel. (Gov. Code, § 65913.5, subd. (a)(1).) It allows local governments to "override" existing initiatives, but does not *demand* that they do so. The local initiatives that SB 10 targets (2AA000760–2AA000837; 2AA000875–000894; 2AA000902–000917; 2AA000923–000933; 2AA000934–000954; 2AA000969–000988), "require[] no conduct that is forbidden by the state statute[]." (*City of Riverside*, 56 Cal.4th at p. 755.) And it does not prohibit existing, validly-enacted local zoning restrictions from remaining good law. (Cf. *Citizens for Planning Responsibly*, 176 Cal.App.4th at p. 373 ["An expressed intent to allow local regulation, or an express recognition of local regulation, is

convincing evidence that the state legislative scheme was not intended to occupy the field"] [quoting *City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264, 276]; *Big Creek Lumber*, 38 Cal.4th at p. 1157 ["preemption by implication of legislative intent may not be found when the Legislature has expressed its intent to permit local regulations. Similarly, it should not be found when the statutory scheme recognizes local regulations."] [quotations omitted].) For SB 10 to meet the standard for "contradictory" preemption and overcome the presumption against preemption that is particularly strong in the area of land use, where localities have traditionally exercised control (*City of Riverside*, 56 Cal.4th at p. 743), it would have to *require* approval of proposals to build up to 10 housing units on a parcel of land in located in transit-rich areas or on urban infill sites, which it does not do. Because SB 10 is a permissive statute only, no local initiative can inimically conflict with it, so SB 10 does not "contradictorily" preempt any local law.

II. SB 10 IS UNCONSTITUTIONAL ON ITS FACE BECAUSE IT AUTHORIZES LOCAL GOVERNMENT TO OVERRIDE RESTRICTIONS ENACTED BY THE PEOPLE'S VALID EXERCISE OF THE INITIATIVE POWER.

In upholding SB 10 as validly "preempting" the people's reserved power to enact local initiative measures and preserve those measures against future hostile local governments, the Superior Court applied an improper and wrongly constrained construction of the initiative right and failed to adhere to the

consistently repeated instruction of our Supreme Court that constraints on the power of initiative must be construed narrowly. Indeed, the lower court's ruling is founded on an entirely improper construct: that the right to preserve an initiative from being overridden by a local elected legislative body is a "lesser" power than the right to enact the initiative in the first instance. Rather, as the Supreme Court has recognized—and as scholars have likewise observed—since it was adopted in 1911, the initiative power in California has always included the strongest protection against legislative amendment. Thus it was error for the Superior Court to conclude that the state's ability to preempt the right of local initiative necessarily includes delegating the "lesser" power to allow local government to amend or even repeal a local initiative. (E.g., 2AA001089–001090.) The initiative's ability to bind the hands of future governing bodies is what makes the initiative power *greater* than the legislative power possessed by the governing body itself. (See Manheim & Howard, *A Structural Theory of the Initiative Power in California* (1999) 31 Loy. L.A. L. Rev. 1165, 1197-1198 [reviewing limitations on amendment of initiatives and concluding that "this restriction on legislative amendment of initiatives means that the people's direct legislative power is greater than the more indirect exercise of that power by intermediaries such as elected representatives], *c.f. Rossi v. Brown* (1995) 9 Cal.4th 688, 715–716.) The Superior Court failed to accord proper deference to the

exercise of this right and to protect the people's right of local initiative from being gutted by the state granting local governments the power to ignore limitations enacted by local initiative.

A. The Constitutionally-Reserved Initiative Power Includes the Power to Bind Future Legislative Bodies by Preventing Legislative Amendment or Repeal.

As set forth at page 13 above, the right of initiative arose out of the people's distrust in government. The goal of expressly reserving this power was to give the people a tool to accomplish reforms and protect themselves from abusive governmental practices, and to "prevent the misuse of the power temporarily centralized in the Legislature.'" (*Independent Energy Producers*, 38 Cal.4th at p. 1041 [quoting Gov. Hiram Johnson, Inaugural Address (Jan. 3, 1911) Assem. J. (1911 Sess.) pp. 47–48].)

Part and parcel of the constitutionally reserved right of initiative are restrictions on amending or "undoing what the people have done," lest politicians would be able to simply override initiatives and render the entire people's reserved right a nullity. That is, "[t]he purpose of California's constitutional limitation on the Legislature's power to amend initiative statutes is to 'protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent.'" (*Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1484.) In this way,

"voter-adopted initiative statutes in California [are] far more insulated from adjustment than in any other jurisdiction." (*Kelly*, 47 Cal.4th at p. 1039.) And this protection has also been consistently held also to apply to local initiatives, because the power to bind the hands of future governing bodies at the local level "has its roots in the constitutional right of the electorate to initiative, ensuring that successful initiatives will not be undone by subsequent hostile boards of supervisors." (*DeVita*, 9 Cal.4th at p. 788 ; see also *Higgins v. City of Santa Monica* (1964) 62 Cal.2d 24, 30 [local initiative prohibiting oil drilling in tidelands may only be amended with a vote of the people, recognizing that difficulty in changing law "is merely a characteristic of the kind of legislative system the Constitution of this state has ordained."]; *Rossi*, 9 Cal.4th at pp. 715–716 [construing initiative power in city and holding that "the reserved power of initiative *is* greater than the power of the legislative body . . . [because] the people *may* bind future legislative bodies other than the people themselves] [emphasis original].)

Respondents below did not contest that these protections to local initiatives originate directly in the 1911 Constitutional amendments defining the scope of the initiative power. As Proposition 7 of 1911 provided, "the people reserve to themselves the power to propose laws. . . independent of the legislature" (1AA000221) and, once adopted, no initiative "shall be amended or repealed except by a vote of the electors, unless otherwise

provided in said initiative measure." (1AA000222.) These amendments expressly reserved the right of initiative to local electorates, as well, and did not subject that right to any lesser degree of protection. (1AA000223.) The 1911 amendments made crystal clear that while the right to initiative was "*self-executing*," legislation could be enacted to facilitate it, "but *in no way limiting or restricting* either the provisions of this section or *the powers herein reserved*." (1AA000223 [emphasis added].) This final clause of the 1911 amendments—prohibiting limitation or restriction of power of initiative—"preclude[s] either the State Legislature, the people of a city through a charter amendment, or the legislative body of any city, from withholding or nullifying the initiative and referendum powers reserved by the Constitution . . . ." (*Lawing v. Faull* (1964) 227 Cal.App.2d 23, 28.)

Today's Constitution enshrines these same reserved powers. (Cal. Const. art. IV, § 1 ["[t]he legislative power of this State is vested in the California Legislature . . . but the people reserve to themselves the powers of initiative and referendum"]; Cal. Const. art. II, § 8(a) ["[t]he initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them."].) Like the previous versions, today's Constitution reserves the right of initiative to local electorates, as well. (*Id.*, § 11(a).) And most importantly, echoing the 1911 Proposition 7 and its ballot materials, which informed voters that initiative measures could not be vetoed, amended, or repealed

except by the people (1AA000222, 1AA000224 [emphasis added]), today's text also expressly limits legislative amendments absent a further vote of the people, stating the Legislature "may amend or repeal an initiative statute by another statute that become effective *only* when approved by the electors *unless* the initiative statute permits amendment or repeal without their approval." (Cal. Const. art. II, § 10(c) [emphasis added].) [8]

The only change to the 1911 initiative provisions was the 1946 amendment to allow the Legislature to proposed amendments to initiatives for a vote of the people, which "preserve[d] to the people their primary right to approve or reject all such measures." (*Kelly*, 47 Cal.4th at p. 1038 [quoting Ballot Pamp., Gen. Elec. (Nov. 5, 1946) argument in favor of Prop. 12, pt. 1, p. 12.) The Supreme Court emphasized that even this "slight modification" "also carefully preserved article IV's original

---

[8] As the Supreme Court held in *Associated Home Builders,* 18 Cal.3d 582, the 1966 constitutional revision "was intended solely to shorten and simplify the Constitution, deleting unnecessary provisions; it did not enact any substantive change in the power of the Legislature and the people. The drafters of the revision expressly stated that they proposed deletion of the clauses barring the Legislature from restricting the reserved power of municipal initiative solely on the ground that it was surplusage, and that the deletion would be made 'without, in the end result, changing the meaning of the provisions.'" (*Id.*, at p. 595, fn.12, quoting Cal. Const. Revision Com. (1966) Proposed Revision of the Cal. Const., pp. 49-50; see also 1AA000710–000738 [1966 ballot materials].)

strict safeguards by requiring the electorate's approval of any legislative proposal to amend or repeal." (*Kelly*, 47 Cal.4th at p. 1039.)

As *DeVita* illustrates, *in addition* to the constitutional limitations on legislative amendment of initiatives, there has also been a *statutory* limitation on legislative amendment "included in substantially the same form in every amendment and restatement of the legislation governing the procedures for local initiative since 1912." (*Brookside Investments, Ltd. V. City of El Monte* ("*Brookside*") (2016) 5 Cal.App.5th 540, 551.) As Division 7 of this Court elaborated, just two months after adoption of the constitutional amendments providing for the initiative and referendum process, the Legislature approved an act to allow for "direct legislation by cities and towns," Setting forth procedures for the exercise of the right expressly reserved in the Constitution. (*Id.*, at p. 550.) This statute protected ordinances proposed by initiative from being "repealed or amended *except by a vote of the people*, unless provision otherwise be made in the ordinance itself." (*Id.*, at p. 551 [emphasis added] [quoting Stats. 1912, 1st Ex. Sess. Ch. 33, pp. 132–133].) This statutory language adopted so soon after the 1911 Constitutional amendment reflects the Legislature's original understanding of the scope of the constitutionally-reserved right: that no ordinance proposed by initiative "shall be repealed or amended except by a vote of the people, unless provision otherwise be made in the ordinance

itself." (*Id*. at pp. 550–551 [quoting Stats. 1912, 1st Ex. Sess. Ch. 33, p. 132–133].) "The considered judgment reflected in these statutory provisions concerning the scope of the Legislature's authority to establish procedures to implement the exercise of the initiative power is entitled to 'significant weight and deference by the courts.'" (*Id*. at p. 552 [quoting *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180].)

Though not disputed by Respondents, it bears reiterating that SB 10's grant of authority to override initiatives cannot be considered an exercise of the Legislature's authority to regulate the *procedures* governing exercise of the initiative power. In *Associated Home Builders*, the Supreme Court indicated the scope of this authority was limited to "procedures to *facilitate* the exercise of that right," such as rules for the "circulation of petitions, the calling of elections, and other procedures required to enact an initiative measure." (18 Cal.3d at pp. 591–592 [emphasis added].) Procedures designed to *facilitate* the initiative right cannot have the effect of *abridging* the right, as SB 10 does here. (*Lawing*, 227 Cal.App.2d at p. 28.)

The Constitution thus reserves the initiative power for city and county electorates, and that reserved power includes the power to determine what the law should be, and the conditions under which it may be amended. Unless the local electorate has granted a local legislative body authority to amend, an initiative "may be amended or repealed only by the electorate." (*Rossi*, 9

Cal.4th at p. 714.) The reason is simple: "The people's reserve power of initiative *is* greater than the power of the legislative body. The latter may not bind future Legislatures [citation], but by constitutional and charter mandate, unless an initiative measure expressly provides otherwise, an initiative measure may be amended or repealed only by the electorate. Thus, through exercise of the initiative power the people *may* bind future legislative bodies other than the people themselves." (*Id.*, at pp. 715–716 [emphasis in original]; see also *Higgins*, 62 Cal.2d at p. 30 [city initiative requiring voter approval for amendment is "a characteristic of the kind of legislative system the Constitution of this state has ordained."].) As the courts have consistently recognized, the ability to insulate a law from override by a future hostile legislative body is a fundamental power that only the people hold. (See *DeVita*, 9 Cal.4th at p. 788.) SB 10 improperly authorizes local government to abridge that power.

The Superior Court wrongly faulted Appellants for focusing on what it called "horizontal limits" rather than "vertical limits." (2AA001084.) According to the lower court, "[w]hile the Legislature cannot invalidate state initiatives, and local governments generally cannot ignore local initiatives (horizontal limitations), the Legislature can (and does) preempt local initiatives (vertical)." (2AA001084.) However, as discussed at length in Section I, *supra*, SB 10 does not reflect the Legislature's exercise of its "vertical" preemption authority, but rather

represents the Legislature granting to local government the authority to violate the "horizontal" limitation. But the Legislature does not have the power to delegate the breach of the initiative right, because *the people* reserve the right of initiative at all levels of government, and that right includes the ability to protect the initiative from amendment by hostile government bodies. (*DeVita*, 9 Cal.4th at p. 788; see also *id.* at p. 789; *Builders Assn. of Santa Clara-Santa Cruz Counties v. Superior Court* (1974) 13 Cal.3d 225, 231 ["We see no difference in principle between an initiative which bars a city council from repealing newly enacted zoning restrictions, and one which freezes existing restrictions; either, to be effective, must limit the power of a hostile city council to evade or repeal the initiative ordinance."].)

The Superior Court also fundamentally erred in its reliance on *City of Santa Clara v. Von Raesfeld* (*Santa Clara*) (1970) 3 Cal.3d 239, for the proposition that "[t]he Legislature can address a matter of statewide concern by eliminating existing initiatives, [so] it follows that it can also allow cities or counties to override such initiatives upon a two-thirds vote of the local body as SB 10 requires." (2AA001089, citing *Santa Clara*, 3 Cal.3d. at p. 248.) First, *Santa Clara* did not involve an initiative petition; rather the city council of a charter city submitted a proposal for the issuance of revenue bonds to voters as required by the city charter. (3 Cal.3d at p. 243.) Because the voters in that city were

not responding to a petition, *nothing* in the case speaks to the constitutional right to protect an initiative from legislative amendment.

The dispute in *Santa Clara* arose because the resolution putting the bond to voters specified a maximum interest rate of 6%, and due to rapid inflation, the bonds could not be sold at that rate. (3 Cal.3d. at p. 243.) The Legislature then enacted a statute authorizing government to sell previously authorized bonds at a 7% rate without requiring an election; respondent city manager refused to do so. (*Id.* at p. 244.) Respondent argued that the city's charter provision requiring an election for new bonds was a constitutional requirement under the home rule provisions. (*Id.* at p. 248 [citing Const. art. XI, § 5, subd. (a)].) The Supreme Court rejected this argument, because even though the city had home rule authority, "it does not follow that all laws and regulations enacted pursuant to that authority are elevated to the status of a constitutional provision." (*Id.* at p. 248.) Because these bonds were not the type of bond requiring voter approval under the Constitution, the Legislature could permit even a charter city to disregard election requirements in a city charter and raise the interest on the bonds without a new election. (*Ibid.*) It is therefore entirely unremarkable that the city could vary the interest for which it sold the bonds to the higher rate authorized by the Legislature; this was in no way an amendment of a local initiative proposed by petition and voted upon by the people. The

constitutional provisions regarding the initiative power are not even discussed in the case.

The Superior Court seized on the statement that "[s]ince the Legislature . . . could eliminate entirely the requirement of voter approval of the revenue bonds in issue, it follows that it could do the lesser act in allowing the bonds to be issued at a higher rate of interest." (2AA001089 [quoting *Santa Clara*, 3 Cal.3d at p. 248].) The Court analogized that the "lesser act" of allowing a slightly higher interest rate on already-approved bonds was akin to the legislative amendments of local initiatives permitted by SB 10. But this analogy lacks any legal grounding. *Santa Clara* is not about an initiative and does not consider the constitutionally reserved right of initiative and the power to insulate a measure from legislative amendment, so to assume it applies here would contravene the Supreme Court's repeated instruction to *broadly* construe the initiative power and *narrowly* construe all limitations on it. (E.g., *Associated Home Builders*, 18 Cal.3d. at pp. 595–596.) And the analogy fundamentally ignores that the power to prevent legislative amendment is not "lesser" —the power to require a vote of the people to amend an initiative indicates the power of initiative is *greater* than that exercised by the legislature itself, and it has been a hallmark of California's initiative right since 1911.

By enacting SB 10, a statute that purports to grant local government authority to override a duly-adopted initiative

measure, the Legislature has exceeded its constitutional authority to provide procedures for the exercise of the right of initiative and unconstitutionally infringed the right of local initiative that is reserved to the people in the Constitution.

B. SB 10 Plainly Allows Local Government to Amend or Repeal an Initiative and is Facially Unconstitutional.

The plain language of SB 10 provides that government may adopt an ordinance to zone a parcel for up to 10 units of residential density "*notwithstanding any local restriction* on adopting zoning ordinances. . . including . . . *restrictions enacted by local initiative*." (1AA000115 [emphasis added].) The significance of this provision is clear: so long as the local legislative body can obtain the required 2/3 super-majority vote required by Government Code section 65913.5, subdivision (b)(4) (1AA000115), it can disregard any existing zoning set by initiative at a lower density than ten units per parcel or initiative-based voter approval requirements prior to zone changes or General Plan amendments. The authority to override the restrictions in local initiatives is an unconstitutional incursion into the people's reserved power of initiative, which, as set forth above, includes the power to prohibit legislative repeal or amendment without a vote of the people.

Neither Respondents nor the Superior Court disagreed with Appellants' contention that SB 10 permitted local

government to "amend" existing local initiative measures without a vote of the people. The law on amendment of initiatives is unambiguous: "an amendment [of an initiative] includes a legislative act that changes an existing initiative statute by taking away from it." (*Kelly*, 47 Cal.4th at pp. 1026–1027.) *Proposition 103 Enforcement Project*, *supra*, explains that "[a]n amendment of an initiative may be accomplished by some action other than by the subsequent enactment of a statute; the question is whether the action in question adds to or takes away from the initiative." (64 Cal.App.4th at p. 1485; see, e.g. *Franchise Tax Board v. Cory* (1978) 80 Cal.App.3d 772, 774–777 [budget bill requiring specific audit standards unconstitutionally amended the Political Reform Act by "chang[ing] the scope or effect of an existing statute."].)

SB 10, through its blanket allowance for local government to zone parcels for 10 units of housing *in spite of any applicable restrictions* in an existing initiative measure clearly "takes away from" the local initiative by terminating its applicability to the parcels in question, functionally amending the law by changing its scope. As an illustration, Measure DD was approved by the voters of Petitioner City of Redondo Beach in 2008, amending the Redondo Beach City Charter to require voter approval for zone changes that "significantly increase traffic, density or intensity of use;" and "changing a nonresidential use to residential or a mixed use resulting in a density of greater than 8.8 dwelling units per

acre." (1AA000742.) The stated purpose of Measure DD was to "(g)ive the voters of Redondo Beach the power to determine whether the City should allow major changes in allowable land use, as defined below, by requiring voter approval of any such proposed change, and, thereby ensure maximum public participation in major land use and zoning changes proposed in the City." (1AA000740–000741.) SB 10 would allow for a zone change permitting up to 10 units per parcel without the required vote under Measure DD. There are numerous other initiatives in the state that set zoning or land use standards or require a vote of the people prior to changing zoning or permissible development from the current standards, which would be effectively amended by local government acting under SB 10 to enact a zoning ordinance without following these restrictions. (E.g., 2AA000760–000832 [Dana Point]; 2AA000833–000837 [Encinitas]; 2AA000875–000894 [Napa County]; 2AA000902–000917 [Santa Monica]; 2AA000923–000933 [Santee]; 2AA000934–000954 [Sierra Madre]; 2AA000969–000988 [Ventura County].) In many instances, consistent with the constitutionally-reserved initiative power, voters were expressly (and correctly) advised that the provisions would persist unless voters changed the law, or that voter approval of changes would be required in the future. (See 2AA000830-000831 [advising voters the future amendments to plan would require a vote]; 2AA000834 [measure requires a public vote on up-zoning]; 2AA000908 [advising voters that

measure requires voter approval for future development]; 2AA000925 [telling voters that measure ensures voters have the final say on General Plan].) SB 10 allows local government to amend these laws and thereby undermine the valid exercise of initiative power that established these laws in the first place.

As a matter of law, SB 10 violates the constitutional power of initiative by permitting local governments to amend initiatives without voter approval. Any zoning ordinance enacted "*notwithstanding*" an existing restriction in a local initiative is an unconstitutional amendment of that initiative, because it either affects the scope of the measure or takes away from its applicability. While Appellants "cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as the particular *application* of the statute," there exists no application of the provisions of SB 10 allowing "override" of local initiatives that is consistent with the prohibition on initiative amendment. (*Pacific Legal Foundation v. Brown*, 29 Cal.3d at p. 181.) While there could be a local initiative that permits legislative amendment, to demonstrate that a law is facially unconstitutional, "a party must establish the statute conflicts with constitutional principles 'in the generality or great majority of cases.'" (*Coffman Specialties*, 176 Cal.App.4th at p. 1145.) The fact that there is hypothetically a local initiative that would permit amendment does not detract from the case set forth above: Generally, by allowing local government to enact a

zoning ordinance *notwithstanding restrictions imposed by local initiative*, SB 10 permits local government to amend local initiatives without a vote of people, infringing on the people's power to legislate by initiative.

CONCLUSION

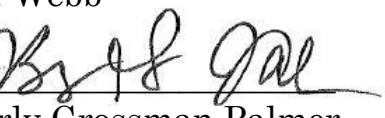
SB 10's purported authorization to local governments so that they may choose to ignore substantive or procedural restrictions in local initiatives grants these local governments the authority to amend initiatives absent a vote of the people. The Legislature cannot delegate this authority to local governments, because the Constitution reserves to the people the right to vote on local governments' amendments to an initiative. SB 10 does not exclusively delegate authority to local government, nor does it preempt local law. The provision of SB 10 that allows for local governments to override the restrictions in existing initiative measures is facially unconstitutional and must be struck down.

Date: May 30, 2023

Respectfully submitted,

STRUMWASSER & WOOCHER LLP
Beverly Grossman Palmer
Julia Michel

OFFICE OF THE CITY ATTORNEY
CITY OF REDONDO BEACH
Michael W. Webb

By: 
Beverly Grossman Palmer

Attorneys for Appellants and Petitioners AIDS Healthcare Foundation and City of Redondo Beach

CERTIFICATE OF COMPLIANCE WITH RULE 8.204(C)(1)

I certify that, pursuant to California Rules of Court, rule 8.204(c)(1), the attached Appellant's Opening Brief is proportionally spaced, has a typeface of 13 points or more, and contains 12,681 words, as determined by a computer word count.

Date: May 30, 2023

Respectfully submitted,

STRUMWASSER & WOOCHER LLP
Beverly Grossman Palmer
Julia Michel

OFFICE OF THE CITY ATTORNEY
CITY OF REDONDO BEACH
Michael W. Webb

By: 
Beverly Grossman Palmer

Attorneys for Appellants and Petitioners AIDS Healthcare Foundation and City of Redondo Beach