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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

AIDS HEALTHCARE FOUNDATION, et al.,

Petitioners and Plaintiffs,

v.

ROB BONTA, in his official capacity as California Attorney General; STATE OF CALIFORNIA; and DOES 1 to 100, inclusive,

Respondents and Defendants.

Case No. 21STCP03149

OPPOSITION TO PETITION FOR WRIT OF MANDATE

Date: May 12, 2022
Time: 9:30 a.m.
Dept: 85
Judge: The Honorable James C. Chalfant

Action Filed: September 22, 2021

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INTRODUCTION

California has a housing supply and affordability crisis of historic proportions. To help address this crisis, last year the Legislature enacted and the Governor signed into law Senate Bill No. 10 (SB 10). Among other things, the bill enacted Government Code section 65913.5, which allows local governments to zone certain parcels for denser housing, irrespective of current local restrictions (including those imposed by local voter initiative). Petitioners contend SB 10 unconstitutionally impinges on the local initiative power, but this Court should deny the petition for multiple reasons.

First, Petitioners' claims are not ripe. Petitioners do not identify any local initiative that has been overridden under the auspices of SB 10. Instead, Petitioners assert only that some hypothetical city or county *might* enact a local law utilizing the provisions of SB 10, which *might* in turn contradict some local initiative, which *might* in turn unconstitutionally restrict those local voters' initiative power. Without any concrete facts to support Petitioners' facial challenge, this Court is being asked to issue an advisory opinion about the hypothetical future operation of a law. There is no reason to decide Petitioner's constitutional claim in a vacuum; any future actions under SB 10 that Petitioners believe to be unconstitutional can and should be evaluated in context.

Second, even were this Court to reach the merits, Petitioners' claims fail. Petitioners' opening brief engages in a detailed analysis of the initiative power, but puzzlingly omits any substantive discussion of the actual issue in this case—whether the Legislature can preempt local ordinances. It can, as courts have repeatedly held. Numerous cases hold that the Legislature can restrict, and even withdraw, the local initiative power to address matters of statewide concern. That is precisely what the Legislature expressly indicated its intent to do with SB 10, by allowing local governments to override local restrictions imposed by local initiative to zone for denser housing in transit-rich areas and urban infill sites. More generally, SB 10 is a valid exercise of the Legislature's power to preempt contradictory local laws. Here, SB 10's grant of authority to local governments preempts any contradictory local ordinance limiting such authority, including those enacted by voter initiative.

At their core, Petitioners' claims misapprehend the distinction between horizontal and vertical limits on the initiative power. The former restricts the ability of the Legislature to override statewide initiatives; the latter, by contrast, authorizes the state to override local initiatives in areas of statewide concern. Petitioners may disagree with the Legislature's policy decision to permit local governments to enact denser housing projects, but that policy is consistent with the California Constitution and decades of precedent.

This Court should deny the petition.

BACKGROUND

I. SB 10

"California is in the midst of a housing crisis." (Joint Request for Judicial Notice (JRJN), p. 103.) "Only 27% of households can afford to purchase the median priced single-family home [and] "[o]ver half of renters, and 80% of low-income renters, are rent-burdened, meaning they pay over 30% of their income towards rent. At last count, there were over 160,000 homeless Californians." (*Ibid*.) "A major cause of our housing crisis is the mismatch between the supply and demand for housing" as "California needs approximately 2.6 million units of housing" including 1.2 million units of affordable housing. (*Id*., pp. 103-104.) And "the state needs 180,000 units of housing built a year to keep up with demand" but "production in the past decade has been under 100,000 units per year, further exacerbating the housing crisis." (*Id*., p. 104.)

The mismatch between supply and demand "involves not just the amount of housing, but the type of housing being built. In recent decades, almost all of the housing built in California was large single-family development (which can be an inefficient use of land) and mid- and high-rise construction (which are expensive to build)." (*Ibid*.) "One strategy to lower the cost of housing is to facilitate the construction of housing types that accommodate more units per acre, but are not inherently expensive to build" like town homes, duplexes, and fourplexes. (*Ibid*.) A 2019 report demonstrated that "even modest densification, such as duplexes and fourplexes, could result in millions more homes." (*Id*., p. 132.) But "[l]ocal zoning restrictions are a barrier to denser housing." (*Id*. p. 104.) "[M]ost jurisdictions devote the majority of their land to single-family zoning and in two-thirds of jurisdictions, multifamily housing is allowed on less than 25

percent of land." (*Ibid.*) And when local governments do try to upzone, "such upzonings typically face several impediments – one of which is the requirement for the upzoning to be analyzed" under the California Environmental Quality Act (CEQA)." (*Ibid.*)

As one of several solutions to this pressing problem, the Legislature enacted SB 10. SB 10 adds one section to the Government Code—section 65913.5. The provision of section 65913.5 at issue here is subsection (a), which states

> 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).) In other words, section 65913.5 allows local governments to override local restrictions, including those imposed by local initiative, in order to zone for denser housing in certain parts of a city or county. "If the ordinance supersedes any zoning restriction established by a local initiative, the ordinance shall only take effect if adopted by a two-thirds vote of the members of the legislative body." (*Id.*, subd. (b)(4).)[1]

Finally, the Legislature found "that provision of adequate housing, in light of the severe shortage of housing at all income levels in this state, is a matter of statewide concern and is not a municipal affair as that term is used in Section 5 of Article XI of the California Constitution. Therefore, this section applies to all cities, including charter cities." (*Id.*, subd. (f).)

II. THIS CASE

Petitioner AIDS Healthcare Foundation filed this lawsuit seeking a writ of mandate and declaratory relief that SB 10 was unconstitutional. (Petition, 9/22/21.) Petitioner Redondo Beach was added in an amended petition filed February 10, 2022, although the allegations in the petition remained unchanged. (First Amended Petition, 2/10/22.)

[1] Other provisions of section 65913.5 define a transit-rich area and urban infill site (*id.*, subd. (e)), exempt projects undertaken under SB 10 from CEQA (*id.*, subd. (a)(3)), provide various other requirements for the local legislative body utilizing SB 10 (*id.*, subd. (b)), exempt land used for open space or land in high-fire zones (*id.*, subd. (a)(4)), and set a sunset date of January 1, 2029 for new ordinances under SB 10 (*id.*, subd. (a)(2)).

STANDARD OF REVIEW

"The standard for a facial constitutional challenge to a statute is exacting." (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 218.) "[P]etitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute. . . . Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." (*Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 267.) Alternatively, even under the most lenient standard, petitioners must demonstrate that the measure "conflicts with [the Constitution] in the generality or great majority of cases." (*Guardianship of Ann S*. (2009) 45 Cal.4th 1110, 1126.)

ARGUMENT

I. PETITIONERS' LAWSUIT IS NOT RIPE

Petitioners' claim that SB 10 will cause local governments to unconstitutionally overturn local initiatives is not ripe. Courts use a two-pronged analysis to determine ripeness, considering "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." (*Pac. Legal Found. v. California Coastal Com*. (1982) 33 Cal.3d 158, 171, citations omitted.) Here, Petitioners' challenge fails both prongs. First, it is not clear whether or when local governments will enact any ordinances related to SB 10. Nor is it clear what those laws would be or how they would allegedly contradict certain local initiatives, as cities could, for example, just use SB 10 to bypass CEQA. Absent such concrete and critical facts, this case presents a purely hypothetical dispute unfit for judicial decision. Second, Petitioners face no hardship in the absence of a court decision, and can challenge any potential future local ordinance it believes to violate the constitution once it is enacted. This case is therefore not ripe.

A. Petitioners Fail the First Prong of the Ripeness Inquiry by Seeking an Advisory Opinion in the Absence of Any Actual Controversy

Under the first prong of the ripeness test, "courts will decline to adjudicate a dispute . . . if the court is asked to speculate on the resolution of hypothetical situations, or if the case presents a contrived inquiry." (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th

1559, 1583, citations omitted.) Moreover, "a controversy must be definite and concrete . . . as distinguished from an opinion advising what the law would be upon a hypothetical set of facts." (*Pac. Legal Found*., *supra*, 33 Cal.3d at p. 171, citations omitted.)

In challenging SB 10, Petitioners do not claim that any local government has unlawfully disregarded any initiative or even that it is likely to do so in the future. Rather, Petitioners claim that "[p]otentially scores of local initiatives across the State . . . could be cast aside by local government as a result of the enactment of SB 10." (First Amended Petition, ¶ 5). To prevent these hypothetical future scenarios, Petitioners seek a "judicial declaration as to the legality of SB 10's provisions allowing local governments to disregard the restrictions of local initiative measures applicable to the adoption of zoning ordinances." (*Id*., ¶ 47). Such a declaration represents the sort of "purely advisory opinions" that the ripeness requirement forbids. (*Pac. Legal Found*., *supra*, 33 Cal.3d at p. 170.)

The California Supreme Court has related ripeness to the "actual controversy" standard for declaratory relief, which is designed to ensure that "courts not be drawn into disputes which depend for their immediacy on speculative future events." (*Id*., p. 173). As in *Pacific Legal Foundation*, Petitioners here are "in essence inviting [the Court] to speculate" on the future actions of local governments, "and then to express an opinion on the validity and proper scope of such hypothetical [actions]." (*Id*., p. 172.) In the absence of any real controversy between parties, there is no question before the Court that is suitable for judicial review.

B. Petitioners Fail the Second Prong of the Ripeness Test Because They Face No Hardship in Delaying Adjudication

Petitioners' challenge also fails the second prong of the ripeness test because there is no hardship imposed on them by delaying adjudication. Under the second prong, "the courts will not intervene merely to settle a difference of opinion; there must be an imminent and significant hardship inherent in further delay." (*Communities for a Better Env't v. State Energy Res. Conservation & Dev. Com*. (2017) 19 Cal.App.5th 725, 734, citations omitted.) But here Petitioners face no discernible hardship at any point in the future, as they have not advanced a particularized interest in any threatened initiative.

In *Pacific Legal Foundation*, the California Supreme Court explained that a challenged California Coastal Commission regulation imposed no hardship to coastal landowners because they were "not immediately faced with the dilemma of either complying with the guidelines or risking penalties for violating them; that situation will not arise unless and until they apply for a development permit and suffer the imposition of invalid dedication conditions." (*Id*., p. 172.) And in a second case the California Supreme Court rejected the plaintiff's claim for declaratory relief because plaintiff merely anticipated that a county general plan would affect his property, but there was "no present concrete indication" that the county intended to use or acquire his property for the proposed streets. (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 118.) Here, there is even less indication that Petitioners will face any hardship if adjudication is delayed, and nothing prevents them from challenging any future action by a local government if and when it actually occurs. Therefore, as in *Pacific Legal Foundation*, "the most significant effect of the [challenged provisions] thus far has been to generate a difference of opinion as to their validity, and that is obviously not enough by itself to constitute an actual controversy." (*Pac. Legal Found*., *supra*, 33 Cal.3d at p. 173.) Because Petitioners face no hardship if adjudication is delayed, the challenge also fails the second prong of the ripeness test.[2]

II. WERE THIS COURT TO REACH THE MERITS, PETITIONERS' CLAIM FAILS BECAUSE THE LEGISLATURE CONSTITUTIONALLY MAY LIMIT THE INITIATIVE POWER AND PREEMPT LOCAL LAW IN AREAS OF STATEWIDE CONCERN

Although Petitioners do not identify any local initiatives that governments have overridden under SB 10, it would not matter if they had. The Legislature constitutionally may preempt local laws in areas of statewide concern, which is precisely what it did when it enacted SB 10. Whether analyzed as a limitation on the initiative power itself or under the conflict preemption

[2] Alternatively, this Court could simply decline to address the merits of this dispute. Given that Petitioners seek declaratory relief (First Amended Petition, p. 10), a "court may refuse to exercise the power . . . in any case where its declaration or determination is not necessary or proper at the time under all the circumstances" pursuant to Code of Civil Procedure section 1061. (*D. Cummins Corp. v. United States Fid. & Guar. Co.* (2016) 246 Cal.App.4th 1484, 1490.) The absence of any concrete set of facts to evaluate the issues in this case makes this case suited for a section 1061 ruling. Moreover, a writ of mandate (First Amended Petition, pp. 7-10) is only proper when there is no remedy at law (Code Civ. Proc., § 1086), but nothing would prevent Petitioners from filing a lawsuit if and when a local government utilizes SB 10.

doctrine, SB 10's grant of authority to local governments to override local restrictions to zone for denser housing is constitutional.

A. By Enacting SB 10, the Legislature Expressly Limited the Local Initiative Power in Order to Address a Matter of Statewide Concern

SB 10 is a constitutional limitation on the local initiative power. The California Supreme Court has repeatedly held that the state can restrict local initiatives, as well as exclusively delegate to local governing bodies authority over matters, notwithstanding conflicting local initiatives. "In matters of statewide concern, the state may if it chooses preempt the entire field to the exclusion of all local control. If the state chooses instead to grant some measure of local control and autonomy, it has authority to impose procedural restrictions on the exercise of the power granted, including the authority to bar the exercise of the initiative and referendum." (*Comm. of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 511.)

The state's restriction of the local initiative power is generally subject to two requirements. First, the Legislature must "act[] within its constitutionally granted authority to legislate on issues of 'statewide concern.'" (*City of Morgan Hill v. Bushey* (2018) 5 Cal.5th 1068, 1078.) Second, there must be a "definite indication" or a "clear showing" of the Legislature's intention to preempt the local initiative power. (*Id.*, pp. 1078-1079.) This is because "[w]hen the Legislature enacts a statute pertaining to local government, it does so against the background of the electorate's right of local initiative, . . . absent clear indications to the contrary." (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 786; *see also Citizens for Plan. Responsibly v. Cty. of San Luis Obispo* (2009) 176 Cal.App.4th 357, 374 ["the ultimate question is one of legislative intent"].) Both requirements are satisfied here.

The Legislature expressly found that SB 10 implicates a matter of statewide concern (§ 65913.5, subd. (f) ["provision of adequate housing, in light of the severe shortage of housing at all income levels in this state, is a matter of statewide concern"]), based on extensive legislative history discussing how local restrictions are contributing to the state's housing crisis. (*See*, *e.g.*, JRJN, pp. 104-105, 114, 125.) And in light of the numerous cases declaring housing and zoning matters of statewide concern (*see*, *e.g.*, *Cal. Renters Legal Advoc. & Educ. Fund v. City of San*

Mateo (2021) 68 Cal.App.5th 820, 849 ["shortfall in housing in California [is] a matter of statewide importance"]; *City of Morgan Hill*, *supra*, 5 Cal.5th at p. 1079 ["zoning and general plans . . . raise issues of statewide concern"]; *Coalition Advocating Legal Housing Options v. City of Santa Monica* (2001) 88 Cal.App.4th 451, 458 [courts have "expressly declared housing to be a matter of statewide concern"]; *Buena Vista Gardens Apartments Ass'n. v. City of San Diego* (1985) 175 Cal.App.3d 289, 306 ["The judiciary has . . . found the need to provide adequate housing to be a matter of statewide concern"]), even Petitioners do not argue here that the state's housing shortage is not a matter of statewide concern.

The Legislature's intent to preempt the local initiative power is similarly unambiguous here. This is not a case where preemption is merely implicit and must be deduced by carefully analyzing the wording of the statute and various other indicia of legislative intent. (*See*, *e.g.*, *DeVita*, *supra*, 9 Cal.4th at pp. 780-784 [examining whether state planning law prohibited local referenda, and concluding the Legislature had no such intention]; *Totten v. Bd. of Supervisors* (2006) 139 Cal.App.4th 826, 833–837 [initiative preempted because Legislature intended to delegate authority for county budget only to Board of Supervisors].) Here, the Legislature's intent to allow local governing bodies, with a two-thirds vote, to override certain local initiatives is express and unambiguous. (*See* Gov. Code. § 65913.5, subd. (a) ["Notwithstanding any local restrictions on adopting zoning ordinances enacted by the jurisdiction that limit the legislative body's ability to adopt zoning ordinances, *including . . . restrictions enacted by local initiative*"], emphasis added.) Even Petitioners do not dispute that the Legislature clearly intended to place restrictions on local initiatives.

Accordingly, because there is no dispute that the Legislature intended to place restrictions on local initiative power in addressing a matter of statewide concern, SB 10 is a valid exercise of the Legislature's power to restrict local initiatives.

Petitioners generally argue that unlike *Committee of Seven Thousand*, where the Supreme Court found that the Legislature had delegated certain powers exclusively to the local governing body to raise fees for transportation projects, here the Legislature is putting limits on the initiative power rather than removing it entirely. (*See* Opening Brief (OB) 17.) This is a distinction

without a difference. Because the Legislature could have addressed a matter of statewide concern by eliminating voter initiatives on the subject entirely, it could also do less and allow cities or counties to override such initiatives only upon a two-thirds vote of the local body as SB 10 requires. For example, in *City of Santa Clara v. Von Raesfeld* (1970) 3 Cal.3d 239, 243, the city's voters enacted a bond law that allowed the city to sell bonds at no more than 6% interest, but interest rates soon rose such that the bonds could not be sold at that rate. The Legislature then amended the Government Code to allow the sale of certain previously authorized bonds at a maximum interest rate of 7% without the necessity of further election, and the city council adopted a resolution ordering the sale of the bonds with a 7% interest rate. (*Id*., pp. 243-244.) But the city manager refused to sell the bonds because "the sale and issuance of the bonds at a higher rate of interest must first be submitted to and approved by the qualified voters in accordance with the city charter." (*Id*., p. 244.) After determining the matter to be an issue of statewide importance, and that the bond sale would comply with state law, the Supreme Court ordered the manager to sell the bonds. (*Id*., pp. 247-248.) "Since the Legislature, consistent with . . . the Constitution . . . , could eliminate entirely the requirement of voter approval of the revenue bonds . . ., it follows that it could do the lesser act in allowing the bonds to be issued at a higher rate of interest under the limited conditions of [the Government Code] section." (*Id*., p. 248.) So too here can the Legislature do the lesser, and allow local governments to override certain voter initiatives to address the statewide housing shortage.

B. SB 10 Preempts Any Local Law That Contradicts Its Terms

Additionally, Petitioners' claims fail for the similar—but separate—reason that SB 10 constitutionally preempts any local ordinances that contradict its terms, including those enacted by voter initiative. Under the California Constitution, a city or county may only enact policies that are "not in conflict with general laws." (Cal. Const., art. XI, § 7.)[3] "A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either

[3] As noted above (p. 8), the Legislature expressly declared "that provision of adequate housing . . . is a matter of statewide concern and is not a municipal affair as that term is used in Section 5 of Article XI of the California Constitution." (Gov. Code, § 65913.5, subd. (f).) Accordingly, SB 10 applies "to all cities, including charter cities." (*Ibid.*)

expressly or by legislative implication." (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897) (cleaned up).

This case presents an instance of the "contradictory" form of preemption. Specifically, for the same reasons as discussed in section II.A, there is a current conflict between section 65913.5 and any local law that contradicts its terms. For example, as described by Petitioners, Redondo Beach's Measure DD "amend[s] the Redondo Beach City Charter to require voter approval prior" to certain zoning changes for more dense housing projects. (*See* OB 15; *see also* Petitioners' RJN, p. 534 [requiring vote of people on any land use change].) This conflicts with 65913.5, subdivision (a), which provides that "[n]otwithstanding any local restrictions on adopting zoning ordinances," including those "enacted by local initiative," a local government may enact an ordinance "to zone a parcel for up to 10 units of residential density per parcel." Because Measure DD "prohibits what the state enactment demands"—allowing rezoning for denser housing upon supermajority vote of the local body—it is "contradictory or inimical" to section 65913.5. (*City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.* (2013) 56 Cal.4th 729, 743.) Because a local law cannot prohibit a local legislative body from doing what state law expressly permits it to do, SB 10 preempts Measure DD and any other local measure that contradicts section 65913.5's grant of authority to local governments.[4]

For a preemption analysis, it makes no difference that the preempted local ordinance was enacted by local voters. Just as they have upheld state limitations on local initiative power, courts have repeatedly held that the Legislature can preempt local initiatives that conflict with state law. (*See*, *e.g.*, *City of Watsonville v. State Dep't of Health Servs*. (2005) 133 Cal.App.4th 875, 881, 883-884 [finding preempted Watsonville's anti-fluoridation Measure S because "[t]here is an actual conflict in this case because state law fully occupies the area of fluoridation of public water systems. . ."]; *Bldg. Indus. Assn. v. City of Oceanside* (1994) 27 Cal.App.4th 744, 771-772 [striking down local growth control initiative because of a facial conflict with state housing

[4] Of course, this is unlikely to have any immediate practical effect given that the City is one of the Petitioners here and therefore is unlikely to seek to override Measure DD's restrictions. But this simply further demonstrates how this case is not ripe—not any constitutional infirmity.

policy]; *N. Cal. Psychiatric Soc'y v. City of Berkeley* (1986) 178 Cal.App.3d 90, 105-106 [finding preempted a Berkeley local initiative which prohibited electroconvulsive therapy because it "is in direct conflict with the Legislature's intention" that the treatment be available].) In fact, the *Northern California Psychiatric Society* case is factually analogous to the situation here—in both situations the state passed a law providing an option for a certain practice (there, electroconvulsive therapy, and here, local government's power to provide for denser housing) while a local initiative sought to ban the practice entirely. Just as in *Northern California Psychiatric Society*, any local initiative that sought to prohibit what the Legislature expressly allowed—i.e., allowing local governments to override restrictions to provide for higher density housing—is preempted.

The state's ability to preempt local law (including local initiatives) is hardly remarkable. Without the state's ability to preempt local law, it would be nearly impossible for the state to regulate in certain areas of statewide concern. But this is not the law—California's constitutional design and decades of case law provide that the state may override contradictory local laws in areas of statewide concern. "[I]f the state Legislature has restricted the legislative power of a local governing body, that restriction applies equally to the local electorate's power of initiative. . . . If the rule were otherwise, the voters of a city, county, or special district could essentially exempt themselves from statewide statutes." (*Mission Springs Water Dist. v. Verjil* (2013) 218 Cal.App.4th 892, 920.) Because SB 10 constitutionally preempts contrary local laws, Petitioners' claims fail.

Whether viewed as a limitation on local initiative power and state preemption of conflicting local ordinances, SB 10 is a constitutional exercise of the Legislature's power to regulate in areas of statewide concern. For these reasons, if the court elects to reach the merits of Petitioners' claims, it should deny the petition.

C. Petitioners Fail to Meaningfully Address Preemption

Petitioners' brief, which speaks generally about the voters' initiative power but does not meaningfully address state preemption of local laws, largely misses the point. At bottom, Petitioners misunderstand the difference between horizontal and vertical limits on the power of

voter initiatives. While the Legislature cannot invalidate state initiatives, and local governments generally cannot ignore local initiatives (horizontal limitations), the Legislature certainly can (and does) preempt local initiatives (vertical). (*See infra*, pp. 12-16.) The cases that Petitioners cite in their brief are largely about horizontal limits and are therefore inapplicable. (*See*, *e.g*., OB 10, 14, citing *Proposition 103 Enforcement Project v. Quackenbush*, 64 Cal.App.4th 1473, 1486 [holding that Legislature had improperly overridden Proposition 103, a state initiative]: OB 10-11, citing *People v. Kelly* (2010) 47 Cal.4th 1008, 1012 [Legislature improperly amended Proposition 215, California's Compassionate Use Act]; OB 12, citing *Rossi v. Brown* (1995) 9 Cal.4th 688, 712-714 [city charter cannot prohibit local taxation initiative].)[5]

Finally, Petitioners cite an older case to suggest that the Legislature can do little more than modify the procedures by which local initiatives are enacted. (*See* OB 12-13, citing *Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582.) But as later courts noted, the referenced language was "dicta" and "was limited to the context of matters of municipal concern; that is, a state law cannot interfere with the constitutional right to municipal initiative on wholly municipal matters, but can override the power of municipal initiative on statewide matters." (*Safe Life Caregivers v. City of Los Angeles* (2016) 243 Cal.App.4th 1029, 1043-1045.)[6]

And in any event, the California Supreme Court has since made abundantly clear that the Legislature constitutionally may preempt a local initiative in areas of statewide concern, including local land use. As the Court explained, "[a]lthough zoning and general plans implicate local concerns and are often addressed by local governments, these arrangements also raise issues of 'statewide concern.' So the Legislature has the constitutional power to enact laws limiting local government power over land use." (*City of Morgan Hill*, *supra*, 5 Cal.5th at p. 1079; *Safe Life Caregivers*, *supra*, 243 Cal.App.4th at p. 1044 ["That the power of municipal initiative can be

[5] And even the cases that Petitioners cite recognize that state law constitutionally can preempt local initiatives (albeit without finding the local ordinance preempted in that particular case). (*See* OB 10-12, citing *Higgins v. City of Santa Monica* (1964) 62 Cal.2d 24, 27 [local initiative on oil drilling not preempted by state law on a factual basis because the state has not "wholly occupied the field . . . of the use of . . . tidelands for the production of oil and gas"].)

[6] Also, unlike here, the Legislature "never intended" for the procedural requirements at issue in *Associated Home Builders* even "to apply to the enactment of zoning initiatives." (*Associated Home Builders*, *supra*, 18 Cal.3d at p. 594.)

limited by the state in matters of statewide concern is an adjunct of the law of state/local preemption"].) And the scope of that constitutional power is not limited to merely regulating procedure, but extends to overriding the local initiative power, where—like with SB 10—the Legislature clearly intends to do so.[7] (*City of Morgan Hill*, *supra*, 5 Cal.5th at pp. 1078-1079, *Comm. of Seven Thousand*, *supra*, 45 Cal.3d at p. 511.)

For the above reasons, this Court should deny the petition because SB 10 constitutionally limits local initiative power and preempts any conflicting local ordinances.

III. WERE THIS COURT TO FIND THE STATUTE UNCONSTITUTIONAL THE OFFENDING PROVISION WOULD BE SEVERABLE

Even if the provisions of SB 10 affecting the initiative power were unconstitutional (which they are not), they would be severable from the remainder of the statute. Petitioners point to the lack of a severability clause and a nearly 100-year old United States Supreme Court case to argue that this indicates a lack of severability (OB 18), but Petitioners are incorrect. "[I]t is clear that severance of particular provisions is permissible despite the absence of a formal severance clause." (*Legislature v. Eu* (1991) 54 Cal.3d 492, 535; *Alaska Airlines, Inc. v. Brock* (1987) 480 U.S. 678, 686 [finding silence as to severability "is just that—silence—and does not raise a presumption against severability"].)

Courts evaluate whether "the invalid provision [is] grammatically, functionally, and volitionally separable." (*California Redevelopment Ass'n v. Matosantos* (2011) 53 Cal.4th 231, 270-271) (cleaned up). "Grammatical separability . . . depends on whether the invalid parts can be removed as a whole without affecting the wording or coherence of what remains." (*Ibid*.) "Functional separability depends on whether the remainder of the statute is complete in itself." (*Ibid*.) "Volitional separability depends on whether the remainder would have been adopted by the legislative body had the latter foreseen the partial invalidation of the statute." (*Ibid*.)

[7] Petitioners' citation (OB 12) to *Lawing v. Faull* (1964) 227 Cal.App.2d 23, 28 is therefore inapposite as it dealt with municipal rather than statewide affairs, and also related to home rule provisions for charter cities, a claim that Petitioners do not raise.

SB 10 easily passes this test. Although not analyzed by Petitioners, the statute is grammatically severable with minor edits to subsections (a)(1) and the deletion of (b)(4) of 65913.5. Excising the strikethrough language in (a)(1) leaves a perfectly coherent sentence:

> "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. . . ."

So does the removal of (b)(4):

> "~~If the ordinance supersedes any zoning restriction established by a local initiative, the ordinance shall only take effect if adopted by a two-thirds vote of the members of the legislative body."~~

And these edits leave a statute that is complete in itself, simply allowing cities to bypass CEQA in zoning for new denser housing.

Moreover, as to volitional severability, the legislative history of SB 10 demonstrates that one of the primary concerns motivating the Legislature in enacting SB 10 was to bypass CEQA for these upzonings. (*See*, *e.g*., JRJN, p. 125 [discussing how upzonings face "several impediments – one of which is the requirement for the upzoning to be analyzed under CEQA" and analyzing the current requirement of multiple levels of CEQA review].) Indeed, every single bill analysis mentions the CEQA exemption as one of the primary features of the bill. (*See*, *e.g*., JRJN pp. 55, 57-58, 66-67, 73-74, 82, 87, 92-94, 103-104, 114-118, 125, 133.) Volitional severability is therefore met as maintaining the CEQA exemption would preserve this feature. And Petitioners make no attempt to explain why the Legislature would not have preferred that part to nothing, and would instead have declined to enact the valid law without the invalid portion.

Accordingly, even were the statute unconstitutional, the offending portion is severable.

CONCLUSION

This Court should deny the petition.

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