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M E M O R A N D U M

VIA EMAIL

To: Daniel W. Hancock, Chairman, Little Hoover Commission
Members, Little Hoover Commission

From: James C. Harrison and Kari Krogseng

Date: June 23, 2009

Re: Proposed Recommendations Regarding CIRM (Our File No.: 2297-0)

INTRODUCTION

We represent the California Institute for Regenerative Medicine ("CIRM"). CIRM has asked us to analyze whether the Little Hoover Commission staff's proposed changes to CIRM's structure and operations are consistent with the requirement that Proposition 71 may only be amended to further its purposes. Article II, section 10(c) of the California Constitution prohibits the Legislature from amending an initiative unless the initiative expressly permits legislative amendment. Proposition 71 allows the Legislature to amend the statutory provisions of the act, but only to enhance CIRM's ability to further the purposes of its grant and loan programs. The Little Hoover Commission staff's proposed recommendations would, among other things, drastically restructure CIRM's governance by reducing the size of the board and the terms of board members, concentrating appointment power in a single constitutional officer and transferring virtually all of the Chair's statutory duties to the President. As explained below, these proposed changes do not further Proposition 71's purposes, and could only be accomplished by another ballot measure.

ANALYSIS

A. The Precious Right of Initiative

Article IV, section 1 of the California Constitution vests the legislative power of the state in the Legislature, "but the people reserve[d] to themselves the powers of initiative and referendum" in order "'to tear through the exasperating tangle of the traditional legislative

procedure and strike directly toward the desired end.'" (Cal. Const., art. IV, § 1; Cal. Const., art. II, § 8; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 228-229, quoting Key & Crouch, The Initiative and the Referendum in California (1939) p. 435.) The power of initiative is "'one of the most precious rights of our democratic process,'" and it is the "'solemn duty [of the courts] to jealously guard the precious initiative power.'" (*Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591, citation omitted; *California Family Bioethics Council v. California Institute for Regenerative Medicine* (2007) 147 Cal.App.4th 1319, 1338, citation omitted.) "'[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled.'" (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 776, quoting *Associated Home Builders, supra,* 18 Cal.3d at 591.)

To protect this right, article II, section 10(c) of the California Constitution prohibits the Legislature from amending an initiative, except by placing another initiative on the ballot, unless the measure expressly permits amendment:

> [The Legislature] may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.

"The constitutional limitation on the Legislature's power to amend initiative statutes is designed to 'protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent.'" (*Foundation for Taxpayer & Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1354, 1364, citation omitted.) As the California Supreme Court has recognized, the voters' power to decide whether the Legislature may amend or repeal initiative statutes "'is absolute and includes the power to enable legislative amendment *subject to conditions attached by the voters*.'" (*Amwest Surety Ins. Co v. Wilson* (1995) 11 Cal.4th 1243, 1251, citation omitted, emphasis in original.) Furthermore, "[a]ny doubts should be resolved in favor of the initiative and referendum power, and amendments which *may* conflict with the subject matter of initiative measures must be accomplished by popular vote, as opposed to legislatively enacted ordinance, where the original initiative does not provide otherwise." (*In re Estate of Claeyssens* (2008) 161 Cal.App.4th 465, 470, citations omitted, emphasis in original.)

Courts "shall uphold the validity of [a legislative amendment to an initiative] if, by any reasonable construction, it can be said that the statute furthers the purposes of [the initiative]." (*Amwest, supra*, 11 Cal.4th at 1256.) In determining the initiative's purpose, courts "are guided by, but are not limited to, the general statement of purpose found in the initiative." (*Id*. at 1257.) "'[E]vidence of [an initiative's] purpose may [also] be drawn from many sources, including the historical context of the amendment, and the ballot arguments favoring the measure.'" (*Id*. at 1256, citation omitted.) Courts also rely on the plain meaning of the initiative's text (*Foundation for Taxpayer & Consumer Rights, supra*, 132 Cal.App.4th at 1370),

the legislative analysis (*People v. Cooper* (2002) 27 Cal.4th 38, 46), and judicial declarations of the purpose. (*Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1491).

In *Amwest Surety Ins. Co. v. Wilson*, 11 Cal.4th 1243, the California Supreme Court concluded that a legislative amendment of Proposition 103, which among other things rolled back insurance rates in California and required the Insurance Commissioner to approve future rate increases, was invalid because it did not further the purposes of the measure. Proposition 103, by its plain terms, "'appl[ied] to all insurance on risk or on operations in this state.'" (*Id*. at 1248, quoting Prop. 103, Ins. Code § 1851.) Proposition 103 also prohibited the Legislature from amending it, "'except to further its purposes by a statute passed in each house by roll call vote entered in the journal, two-thirds of the membership concurring.'" (*Id*. at 1249, quoting Prop. 103, § 8(b).) Notwithstanding these provisions, the Legislature passed a bill to exempt surety insurance from the rate rollback and approval requirements of Proposition 103. The Legislature claimed that the bill furthered the purposes of Proposition 103 by "'clarifying the applicability of the proposition to surety insurance.'" (*Id.* at 1260, quoting Stats. 1990, ch. 562, § 2.) The Court rejected the argument, concluding that the bill represented "an alteration rather than a clarification of the initiative." (*Id*.)

> [I]t was clear that the provisions of Proposition 103 applied to surety insurance. [The bill], therefore, did not further the purposes of Proposition 103 by clarifying whether the proposition applied to surety insurance; instead it altered its terms in a significant respect.
>
> (*Id*. at 1261.)

The Court also rejected an argument advanced by Amwest, an insurance company that challenged Proposition 103. Amwest argued that the bill furthered the purposes of Proposition 103 by reducing the burden on the Insurance Commissioner, who would otherwise have to approve any increase in rates filed by a surety insurer. Noting that a principal purpose of Proposition 103 was to increase the duties of the Commissioner, the Court reasoned that "[a]ttempting to lessen this increase in the regulatory burden on the commissioner by reducing the scope of the initiative, rather than by providing the commissioner with sufficient additional staff and other resources, would seem to run counter to the purpose of Proposition 103." (*Id*. at 1263.)

Although the Court recognized the deference owed to the Legislature (*id*. at 1253), it held that the bill was invalid because it did not further the purposes of Proposition 103:

> In so holding, we do not question the wisdom of the Legislature in enacting [the bill]. [Citation.] The question before us is not whether exempting surety insurance from some of the provisions of Proposition 103 furthers the public good, but rather whether doing so furthers the purposes of Proposition 103. We hold that it does not. Because Proposition 103 expressly permits its provisions to be amended without voter approval, but only when to do so would further the purposes of the initiative, [the bill] is invalid.
>
> (*Id*. at 1265.)

The Legislature also failed in two other attempts to amend Proposition 103. (*Foundation for Taxpayer & Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1354; *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1478 [declaring "constitutionally invalid" a bill that would have permitted insurers to reduce the amount of the insurance rollback required under Proposition 103 by the amount of commissions paid]). Most recently, the Second District Court of Appeal struck down a bill that would have permitted insurers to consider whether a driver was previously insured in determining whether the driver was eligible for a Good Driver discount. The court noted that one of the fundamental purposes of Proposition 103 was to prohibit discrimination against uninsured drivers and to promote available and affordable insurance so that uninsured drivers could become insured. (*Foundation for Taxpayer & Consumer Rights, supra*, 132 Cal.App.4th at 1366.) The court concluded that the bill did not further the purposes of Proposition 103 because it "authorizes a discount only to drivers with a history of continuous, or virtually continuous, insurance coverage." (*Id*. at 1369-1370.) "By specifically focusing on eliminating discrimination against the previously uninsured . . ., the voters made clear that a fundamental purpose of Proposition 103 is to include and extend the protections of Proposition 103 in particular to, and to prohibit discrimination against, the previously uninsured." (*Id*. at 1370.)

The court also found that the bill conflicted with the voters' delegation of rate-making authority to the Insurance Commissioner, who had exercised that authority by adopting a regulation to implement the Good Driver discount. "In enacting [the bill], the Legislature sought to override the Insurance Commissioner's authority to set rates and premiums for automobile insurance." (*Id*. at 1372.) Citing the need for "'specialized agency fact-finding and expertise,'" the court found that Proposition 103 vested the Insurance Commission, rather than the

Legislature, with the authority to set rates. (*Id*., quoting *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 397.)[1]

> The Legislature cannot simply in the guise of amending Proposition 103 undercut and undermine a fundamental purpose of Proposition 103, even while professing that the amendment "furthers" Proposition 103. The power of the Legislature may be "practically absolute," but that power must yield when the limitation of the Legislature's authority clearly inhibits its action.
>
> (*Id*. at 1371, citation omitted.)

Notably, the court cited with approval the appellant's concession that "'[a] valid amendment to Proposition 103 must not only further its purposes in general, but it cannot do violence to specific provisions of Proposition 103. So even if an amendment can be shown to further its purposes, it may nonetheless be invalid if it violates a specific primary mandate.'" (*Id*. at 1370, quoting appellant.) The court then found that the proposed amendment "does violate this primary mandate of Proposition 103 and, accordingly, it cannot 'reasonably' be found to further the purposes of Proposition 103." (*Id*.)

B. <u>Application to Proposition 71</u>

Unlike many ballot measures, Proposition 71 expressly permits the Legislature to amend its statutory provisions (except for the Bond Act). To protect the will of the voters, however, Proposition 71 only permits amendments that enhance CIRM's ability to achieve its mission:

> The statutory provisions of this measure, except the bond provisions, may be amended to enhance the ability of the institute to further the purposes of the grant and loan programs created by the measure . . . .
>
> (Prop. 71, § 8.)

[1] Likewise, another panel of the Second District Court of Appeal noted that an amendment that essentially removed ratemaking discretion from the Insurance Commissioner by requiring that he or she follow a certain formula contradicted Proposition 103's purpose of making the Insurance Commissioner "an elected rather than appointed position, thus making the Commissioner responsive to the voters, not the Legislature." (*Proposition 103 Enforcement Project, supra*, 65 Cal.App.4th at 1486-1487.)

This provision, which restricts the Legislature's ability to amend Proposition 71, mirrors one of the initiative's primary purposes as stated in section 2(a) of the constitutional portion of the initiative: "To make grants and loans for stem cell research, for research facilities, and for other vital research opportunities . . . ." (Cal. Const., art. XXXV, §2(a).) Indeed, "'[t]he overarching subject of Proposition 71 is stem cell research and funding.'" (*California Family Bioethics Council, supra,* 147 Cal.App.4th at 1342, quoting trial court.)

For the purposes of article II, section 10(c), which prohibits the Legislature from amending an initiative unless the initiative so permits, amendments include "'. . . any change of the scope or effect of an existing statute, whether by addition, omission, or substitution of provisions . . . .'" (*Franchise Tax Bd. v. Cory* (1978) 80 Cal.App.3d 772, 776, quoting Sutherland, Statutory Construction (4th ed. 1972) § 22.01, p. 105.) Each of the Little Hoover Commission's proposed changes listed below would directly amend Proposition 71's provisions and undermine the voters' intent, thus requiring another ballot measure under article II, section 10(c) and section 8 of Proposition 71:

- Reduce the size of the board from 29 members to 15 members;
- Add four "independent" members, either scientists who are not affiliated with grant applicants or citizens;
- Reduce board members' terms from six or eight years to four years;
- Authorize: (a) the Governor to appoint 11 of the 15 members, (b) the University of California to appoint two members; and (c) the Legislature to appoint two members, and thus eliminate appointments by specified University of California chancellors, the Lieutenant Governor, the Treasurer, and the Controller;
- Reduce the quorum threshold for ICOC decisions regarding grants from 65% to 50%;
- Eliminate the Chair's statutory duties and clarify that the President oversees all day-to-day operations;
- Elect the Chair and Vice-Chair from among the 15 members as opposed to electing them from outside the board;
- Preclude the Chair and Vice-Chair from receiving salaries; and
- Reduce the threshold for legislative amendment of Proposition 71 from 70% to a majority vote.

1. Restructuring the Board Would Not Further the Purposes of Proposition 71

The Commission's staff proposes a drastic restructuring of the ICOC and CIRM. They would reduce the size of the Board from 29 to 15 members, thereby eliminating nearly half of the scientific, commercial, and patient advocacy experts who currently serve on the Board. (*See* Health & Saf. Code, § 125290(a).) In addition to reducing the number of experts on the Board, the Commission would also add four "independent" board members who are either unaffiliated scientists or citizens.

These proposals fly in the face of the voters' intent. Proposition 71's statement of purpose explicitly states that the initiative would "[c]reate an Independent Citizen's Oversight Committee composed of representatives of the University of California campuses with medical schools; other California universities and California medical research institutions; California disease advocacy groups; and California experts in the development of medical therapies." (Prop. 71, § 3.) The plain text of the initiative clarifies how the voters intended to construct the Board. (Health & Saf. Code, § 125290.20(a); *Foundation for Taxpayer & Consumer Rights, supra*, 132 Cal.App.4th at 1370 [determining purpose of initiative from plain meaning of initiative's text]).) The analysis of Proposition 71 by the Legislative Analyst also states that "[t]he institute would be governed by a 29-member Independent Citizen's Oversight Committee (ICOC), comprised of representatives of specified UC campuses, another public or private California university, nonprofit academic and medical research institutions, companies with expertise in developing medical therapies, and disease research advocacy groups," and the argument in favor of Proposition 71 reiterated that "[r]esearch grants will be allocated by an Independent Citizen's Oversight Committee, guided by medical experts, representatives of disease groups, and financial experts." (Prop. 71, legislative analysis; argument in favor of Prop. 71.)

The First District Court of Appeal, which upheld Proposition 71 against a variety of constitutional challenges, noted that the initiative contains "stringent qualifications for appointment designed to ensure that all members possess appropriate experience and expertise and that persons knowledgeable in the various disease groups that may benefit from the research are represented." (*California Family Bioethics Council, supra*, 147 Cal.App.4th at 1332-1333.) It also noted that Proposition 71 "imposes rigorous qualifications for those who may serve on the ICOC and its working groups. The obvious intent is to require that those responsible for participating in the decisionmaking process and allocating research funds be knowledgeable in the applicable fields of science and medicine." (*Id*. at 1344.) These findings make clear that the voters' intent was to utilize a large number of experts as board members, not uninvolved scientists or citizens. "In approving Proposition 71 *the voters determined that grants and loans should be awarded by the experts who comprise the ICOC, chosen in the manner specified in the Act*." (*Id*. at 1358, emphasis added.) In response to an argument that Health and Safety Code section 125290.30 should be reconciled with the state's more general conflict of interest laws, the court found that this course of action "would both rewrite the Act and defeat the very purpose of the qualifications for appointment to the ICOC." (*Id*. at 1367.) "[B]y approving Proposition

71 the voters have determined that the advantages of permitting particularly knowledgeable persons to decide which research projects to fund outweigh any concerns that these decisions may be influenced by the personal or professional interests of those members, so long as the members do not participate in any decision to award grants to themselves or their employer." (*Id*. at 1368.)

The fact that the Commission's proposal would maintain representation from universities, research institutions, the biotechnology sector, and patient advocacy organizations does not change this analysis. The size of the Board, which is similar to both the UC Regents (26 members) and the Judicial Council (28 members), was intended to ensure not only that CIRM has the expertise necessary to encompass the entire scientific and medical research pipeline from discovery to clinical application, but also to provide a diversity of viewpoints that enriches debates and improves outcomes. The proposal to reshape the Board puts at risk the quality of debate and decisions. It would reduce the expertise and diversity of viewpoints on the Board and it is at odds with the voters' express intent that CIRM be governed by a large board comprised of individuals with diverse views and expertise.

Finally, the Commission proposes to reduce board members' terms from six or eight years to four years. (*See* Health & Saf. Code, § 125290.20(c)(1).) As its name implies, the Board was designed to be "independent." By providing for six and eight year terms, the voters sought to protect the Board's scientific mission and also provide stability for CIRM to pursue its ambitious mandate. Like the proposal to reduce the size of the Board, the proposal to reduce terms would not further the intent of the voters; it would frustrate it.

2. <u>Shifting Appointment Authority Would Not Further the Purposes of Proposition 71</u>

The proposed changes would eliminate the power of the Lieutenant Governor, the Controller, and the Treasurer to make appointments to the ICOC board and reduce the appointment authority of UC Chancellors. (*See* Health & Saf. Code, § 125290.20(a).) It would concentrate the appointing power in the hands of the Governor, who would appoint 11 of the 15 board members. This amendment would thus negate the voter's intent to disperse and balance the appointment authority among four constitutional officers, the Legislature, and the Chancellors of the UC campuses with medical schools, in order to protect the Board's scientific mission. The Legislative Analyst's analysis of the initiative specifically noted that "[t]he Governor, Lieutenant Governor, Treasurer, Controller, Speaker of the Assembly, President Pro Tempore of the Senate, and certain UC campus Chancellors would make the appointments to the ICOC." (Prop. 71, legislative analysis.) One can well imagine that the voter's intent to support stem cell research through the grant and loan program could be easily defeated if a governor opposed to stem cell research obtained nearly all the appointment authority – particularly if the length of board members' terms were reduced. Such a scenario runs contrary to the historical context behind the voter's approval of Proposition 71, which arose out of, as the argument in favor of Proposition 71 stated, "political squabbling" that "severely limited funding for the most

promising areas of stem cell research." (Argument in favor of Prop. 71.) The voters created a number of protections to ensure that CIRM would be insulated from this type of political influence, and concentrating appointment authority in the hands of one political officer runs contrary to that intent.

3. Reducing the Quorum Requirement Would Not Further the Purposes of Proposition 71

Proposition 71 expressly defines a "quorum" to be 65% of those members of the governing board who are eligible to vote. (Health & Saf. Code, § 125292.10(s).) This requirement, like the dispersal of appointment authority and the length of members' terms, serves to protect the agency from being captured by a minority. Furthermore, like the size of the board, the quorum requirement ensures that a diversity of views will be represented in the Board's decisions and a high probability that the quorum will be comprised of reasonable representation from each of the appointment categories. The proposal to reduce the quorum from 65% to 50% would undermine this design and the voters' intent, as expressed by the plain language of Proposition 71.

4. Shifting the Chair's Duties to the President Would Not Further the Purposes of Proposition 71

By the plain language of Proposition 71, the voters intended to create an executive chair who would provide financial leadership and a president who would provide scientific leadership. (Health & Saf. Code, § 125290.20(a)(6).) The Little Hoover Commission staff's proposal would shift nearly all of the Chair's authority to the President, require that the Chair and Vice Chair be appointed from among the 15 board members, and strip the Chair and Vice Chair of their salaries. Far from enhancing CIRM's ability to carry out its mission, this proposal would undermine the agency's ability to function effectively. In *Amwest*, the California Supreme Court determined that a bill that decreased the duties of the Insurance Commissioner did not further the purposes of Proposition 103 because a principal purpose of Proposition 103 was to increase the duties of the Commissioner and "[a]ttempting to lessen this increase in the regulatory burden on the commissioner by reducing the scope of the initiative, rather than by providing the commissioner with sufficient additional staff and other resources, would seem to run counter to the purpose of Proposition 103." (*Amwest, supra*, 11 Cal.4th at 1263.) Here, Proposition 71 carefully allocated responsibilities for CIRM's scientific and financial missions to different individuals in order to best support the grant and loan programs. Salaries were provided for the Chair and Vice Chair in order to attract the best talent. An attempt to transfer all duties to the President and to strip the Chair and Vice Chair of salaries "run[s] counter to the purpose of Proposition" 71. It would also do violence to a specific mandate of Proposition 71, and is thus not a valid amendment. (*Foundation for Taxpayer & Consumer Rights, supra*, 132 Cal.App.4th at 1370.)

5. Reducing the Threshold for Legislative Amendment Would Not Further the Purposes of Proposition 71

Finally, the proposal to reduce the threshold for legislative amendment of Proposition 71 from 70% to a majority vote cannot be accomplished without another ballot measure. (*See* Prop. 71, § 8.) This provision goes to the core of the voter's initiative power under section II, section 10(c), and cannot be amended without another ballot measure. The voters' power to decide whether the Legislature may amend or repeal initiative statutes "'is absolute and includes the power to enable legislative amendment *subject to conditions attached by the voters*.'" (*Amwest, supra*, 11 Cal.4th at 1251, citation omitted, emphasis in original.) Moreover, the voters sought to protect CIRM from political influence in a number of ways, as described above. Section 8's provision for legislative amendments, but only under certain circumstances, is one mechanism by which the voters sought to protect Proposition 71. Any amendment to Section 8 would run contrary to Proposition 71's purposes.

CONCLUSION

The Little Hoover Commission's proposals would effect drastic and disruptive changes to CIRM's governance and operating systems. Such changes run counter to the voters' intent, and do not further Proposition 71's purposes. They could, therefore, only be accomplished by another ballot measure.

JH:MEM
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