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MEMORANDUM

To: President pro Tempore Don Perata
The Honorable Deborah Ortiz
The Honorable Jackie Speier
The Honorable Joe Dunn

From: James C. Harrison

Date: June 8, 2005

Re: SCA 13 (Our File No.: 2297-0)

As special counsel to the California Institute for Regenerative Medicine, we have reviewed Orrick, Herrington & Sutcliffe LLP's analysis of SCA 13. Orrick confirmed, as we discussed at the ICOC meeting on Monday, that Section 9(a), which provided that the ICOC "shall ensure" that treatments and therapies are made accessible and affordable to low-income Californians, "would be a significant problem for the issuance of bonds." As Dr. David Kessler and Dr. Michael Friedman, former commissioners of the Food and Drug Administration, noted on Monday, this provision would also be impossible for the ICOC to satisfy.

In response, Senator Ortiz has proposed to modify Section 9(a) to require the ICOC to "seek to ensure" that treatments and therapies are made accessible and affordable to low-income Californians. Based on this language, Orrick concluded that Section 9(a) would not be an impediment to the issuance of bonds by the State. Orrick, however, has not addressed whether this language exposes the CIRM to potential litigation.

We believe that adding a provision to the Constitution to require the ICOC to "seek to ensure" that therapies and treatments are made accessible and affordable to low-income Californians creates a significant risk of litigation.

First, Section 9(a) imposes a requirement on the ICOC, but it does not explain how the ICOC can satisfy the requirement. By enshrining the language in the Constitution, it opens the door to litigants to argue that the ICOC has not met its burden. SCA 13 offers no standard for resolving such a claim and leaves the ICOC at the mercy of a court's interpretation.

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Second, as Dr. Kessler and Dr. Friedman explained, it is impossible for the ICOC to ensure that treatments and therapies are accessible and affordable. It is therefore difficult to understand how the ICOC could “seek to ensure” something that is impossible to ensure.

Third, the opponents of Proposition 71 have made clear that their primary goal is to prevent the ICOC from awarding grants for embryonic stem cell research. Even if Section 9(a) would not impede the State’s ability to issue bonds, it could lay the foundation for a lawsuit to prevent the ICOC from awarding research grants. The Life Legal Defense Foundation sued to invalidate Proposition 71 on the very same ground that was rejected in a challenge to Proposition 10. There, the Court of Appeal rejected the claim that Proposition 10 violated article XVI, section 3, because it found that Proposition 10 was “replete with controls, including the manner of appointment of members of both the CCFC and county commissions, the specificity regarding how tax revenues must be spent, and the annual audit and reporting requirements.”¹ (*California Assoc. of Retail Tobacconists v. State* (2003) 109 Cal.App.4th 792, 820.) Proposition 71 was modeled on Proposition 10 and it includes a host of features designed to ensure that the ICOC and the CIRM operate under the exclusive management and control of the state as state institutions. But unlike Proposition 10, Proposition 71 expressly amended the Constitution to remove any doubt that the Institute is created in state government and has the authority to spend the proceeds of the bonds to fund stem cell research. (Cal. Const., art. XXXV, § 6.) Notwithstanding the existence of this constitutional provision and an appellate opinion that is directly on point, the Life Legal Defense Foundation has essentially blocked the program from proceeding by filing a lawsuit. The opponents of Proposition 71 are committed to stopping the program, irrespective of the merits of their arguments.

Because Section 9(a) imposes a requirement on the ICOC with respect to grant agreements, which will include intellectual property agreements, it opens the door to litigants to seek to enjoin the Institute from awarding grants on the ground that the ICOC failed to “seek to ensure” that any therapies or treatments resulting from the research are made accessible and affordable to low-income Californians. Because Section 9(a) does not explain how the ICOC can satisfy the requirement, it could impede the issuance of grants until a court determines an appropriate standard and considers whether the ICOC has satisfied it. Given their history, the opponents of embryonic stem cell research will seize any opportunity to halt the program in its tracks.

JH:NL

cc: Juan Fernandez, Treasurer’s Office
Robert Feyer, Orrick, Herrington & Sutcliffe, LLP
Peter Hansel
David Panush

¹ We were counsel to the proponent of Proposition 10, Rob Reiner, and along with the Attorney General’s Office, defended Proposition 10 against this constitutional challenge. In addition, we participated in the drafting of Proposition 71.