DEPARTMENT 85 LAW AND MOTION RULINGS

Case Number: 21STCP03149 **Hearing Date:** May 12, 2022 **Dept:** 85

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AIDS Healthcare Foundation and Redondo Beach v. Rob Bonta and State of California, 21STCP03149

Tentative decision on: (1) traditional mandamus: denied; and (2) declaratory relief: granted in Respondents' favor

Petitioners AIDS Healthcare Foundation ("AHF") and City of Redondo Beach ("Redondo Beach" or "City") seek (1) mandamus and an injunction directing Respondents Attorney General Rob Bonta ("Bonta") and the State of California (collectively, "State") to cease enforcement of Senate Bill No. 10 ("SB 10"), and (2) declaratory relief that SB 10's permission for local governments to disregard local initiative measures violates the right to initiative reserved to the people in the California Constitution.

The court has read and considered the moving papers, opposition, and reply, and renders the following tentative decision.

A. Statement of the Case

1. The Petition

On September 22, 2021, Petitioner AHF filed its verified Petition. Following a stipulation by the parties, Petitioners filed the First Amended Petition ("FAP") on February 9, 2022, and it is the operative pleading. The FAP includes causes of action for (1) traditional mandate and (2) declaratory relief and alleges as follows.

Local initiative measures often concern land-use planning, have guided community development for years, and require a vote of the people to either amend or repeal except in narrow circumstances consistent with the purpose of the initiative. Redondo Beach is among the cities with such ordinances. AHF has spent time, money and effort to help draft and promote some of these initiative measures.

On September 16, 2020, Governor Gavin Newsom signed SB 10 into law, which adds section 65913.5 to the Government Code ("Govt. Code") and allows local governments to adopt ordinances which zone land parcels in transit-rich areas or urban infill sites so that up to ten units of residential density may be developed per parcel. The ordinances need not comply with local restrictions limiting a legislature's ability to adopt zoning ordinances, even when enacted by local initiative. Govt. Code §65913.5(a).

Govt. Code section 65913.5(b)(4) requires a two-thirds vote by the relevant legislative body when such ordinances do supersede zoning restrictions established by local initiative. Once approved, Govt. Code section 65913.5(d)(2) prohibits future legislatures from reducing the density of the affected parcels. SB 10 does not include a severability clause.

AHF and local governments objected to these provisions of SB 10, noting that it effectively provided local governments with a tool to increase housing by overturning the democratic will of residents. Additionally, the California Constitution reserves the powers of initiative and referendum to the people and prohibits the Legislature from amending or repealing an initiative except by the electorate's approval unless the initiative states otherwise. The courts have applied these constitutional rules to local initiatives as well as state initiative. Elections Code sections 9125 and 9217 impose identical restrictions on amendments to county and municipal initiative ordinances.

Petitioners seek (1) a writ of mandate directing Respondent State to cease enforcement of SB 10; (2) injunctive relief enjoining the State from enforcing SB 10, including permitting local government to disregard the restrictions in local initiatives to adopt zoning ordinances free from such restrictions; and (3) declaratory relief against the State that the provisions of SB 10 permitting local government to disregard the substantive and procedural limitations of local initiative measures violate the right to initiative reserved to the people in the California Constitution.

2. Course of Proceedings

On September 28, 2021, AHF served Respondents State of California and Bonta with the Petition, summons, and moving papers. Respondents filed an Answer.

On February 2, 2022, the court entered a stipulated order granting AHF leave to file the FAP adding Redondo Beach as a Petitioner.

Petitioners filed the FAP and Respondents filed an Answer to the FAP on March 14, 2022.

B. Standard of Review

Declaratory relief is the remedy used to test the facial validity of a statute, regulation, or ordinance. *See, e.g.*, Western States Petroleum Assn. v. State Dept of health Services, (2002) 99 Cal.App.4th 999 (traditional mandate and declaratory relief challenging facial validity of Department of Health Service potable water regulations). A challenge of a statute, ordinance, or regulation is facial if it considers only the text of the measure itself, while an as-applied challenge concerns application of the measure to the particular circumstances of an individual. Tobe v. City of Santa Ana, ("Tobe") (1995) 9 Cal.4th 1069, 1084; Sturgeon v. Bratton, (2009) 174 Cal.App.4th 1407, 1418 (citation omitted).

The California Supreme Court has not articulated a single test to determine whether a statute is facially unconstitutional. Guardianship of Ann S., (2009) 45 Cal.4th 1110, 1126; Zuckerman v. State Bd. of Chiropractic Examiners, (2002) 29 Cal.4th 32, 39.) The stricter test requires a demonstration that the statute "inevitably pose[s] a present total and fatal conflict with applicable constitutional provisions." Pacific Legal Foundation v. Brown, (1981) 29 Cal.3d 168, 180-81; *see also* Coffman Specialties, Inc. v. Dept. of Transportation, ("Coffman Specialties") (2009) 176 Cal.App.4th 1135, 1145. Under the more lenient standard sometimes applied, "a party must establish the statute conflicts with constitutional principles 'in the generality or great majority of cases.'" Coffman Specialties, *supra,* 176 Cal.App.4th at 1145 (quoting Guardianship of Ann S., *supra,* 45 Cal.4th at 1126).

Under either test, the petitioner has a heavy burden to show the statute is unconstitutional in all or most cases and cannot prevail by suggesting that in some future hypothetical situation problems may possibly arise for application of the statute. Id. at 1145. Rather, the petitioner must demonstrate that the law's provisions inevitably pose a present total and fatal conflict with applicable constitutional provisions (or other law). Tobe, *supra*, 9 Cal.4th at 1084. The fact that the statute or ordinance "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid...." Sanchez v. City of Modesto, (2006) 145 Cal.App.4th 660, 679. Conversely, a court considering a facial challenge to a procedural scheme must balance the competing interests and may not ignore the procedural scheme's actual standards and uphold the law simply

because a hypothetical situation might lead to a permissible result. California Teachers Assn. v. State of California, (1999) 20 Cal.4th 327, 347.

The court presumes that legislation is constitutional and resolves all doubt in its favor. California Housing Finance Agency v. Ellion, (1976) 17 Cal.3d 575, 594. "As a general matter, so long as a land use restriction or regulation bears a reasonable relationship to the public welfare, the restriction or regulation is constitutionally permissible…We review challenges to the exercise of such power deferentially." California Building Industry Association v., City of San Jose, (2015) 61 Cal.4th 435, 456. Where possible, the enactment must be construed to preserve its constitutional validity. Save Our Sunol, Inc. v. Mission Valley Rock Co., 2004) 124 Cal.App.4th 276, 284.

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C. Judicial Notice

The parties jointly request judicial notice (hereinafter, "RJN") of (1) SB 10 (2021-2022 Reg. Sess.) as introduced Dec. 7, 2020 (RJN Ex. A); (2) Sen. Amend. to SB 10 (2021-2022 Reg. Sess.) dated Feb. 24, 2021 (RJN Ex. B); (3) Sen. Amend. to SB 10 (2021-2022 Reg. Sess.) dated Mar. 22, 2021 (RJN Ex. C); (4) Sen. Amend. to SB 10 (2021-2022 Reg. Sess.) dated Apr. 13, 2021 (RJN Ex. D); (5) Sen. Amend. to SB 10 (2021-2022 Reg. Sess.) dated Apr. 27, 2021 (RJN Ex. E); (6) Sen. Amend. to SB 10 (2021-2022 Reg. Sess.) dated May 26, 2021 (RJN Ex. F); (7) Assem. Amend. to SB 10 (2021-2022 Reg. Sess.) dated June 14, 2021 (RJN Ex. G); (8) Assem. Amend. to SB 10 (2021-2022 Reg. Sess.) dated June 24, 2021 (RJN Ex. H); (9) Assem. Amend. to SB 10 (2021-2022 Reg. Sess.) dated July 5, 2021 (RJN Ex. I); (10) SB 10 as approved by Newsom on Sept. 16, 2021 (2021-2022 Reg. Sess.) (RJN Ex. J); (11) Sen. Com. on Housing, Analysis of SB 10 (2021-2022 Reg. Sess.) dated March 15, 2021 (RJN Ex. K); (12) Sen. Com. on Governance and Finance, Analysis of SB 10 (2021-2022 Reg. Sess.) dated April 20, 2021 (RJN Ex. L); (13) Sen. Com. on Appropriations, Analysis of SB 10 (2021-2022 Reg. Sess.) dated May 7, 2021 (RJN Ex. M); (14) Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of SB 10 (2021-2022 Reg. Sess.) dated May 22, 2021 (RJN Ex. N); (15) Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of SB 10 (2021-2022 Reg. Sess.) dated May 27, 2021 (RJN Ex. O); (16) Assem. Com. on Housing and Community Development, Analysis of SB 10 (2021-2022 Reg. Sess.) dated June 18, 2021 (RJN Ex. P); (17) Assem. Com. on Local Government, Analysis of SB 10 (2021-2022 Reg. Sess.) dated June 30, 2021 (RJN Ex. Q); (18) Assem. Floor Analysis Unit, Off. of Chief Clerk, 3d reading analysis of SB 10 (2021-2022 Reg. Sess.) dated July 7, 2021 (RJN Ex. R); (19) Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of SB 10 (2021- 2022 Reg. Sess.) dated Aug. 25, 2021 (RJN Ex. S); and (20) Record of Votes on SB 10 (2021-2022 Reg. Sess.) (RJN Ex. T). The court grants the joint request. Evidence Code ("Evid. Code") §452(b).

Petitioners separately request judicial notice (hereinafter, "Pet. RJN") of (1) the voter information guide for the 1911 general election (Pet. RJN Ex. 1); (2) letter and email comments submitted to lawmakers regarding SB10, publicly available in the California State Archives (Pet, RJN Ex. 2); (3) California Proposition 1a, a 1966 revision to the California Constitution (Pet. RJN Ex. 3); (4) Measure DD, incorporated as Article XXVII in the Redondo Beach Charter (Pet. RJN Ex. 4); (5) various initiative measures, and arguments for and against the measures, passed by voters in eighteen cities, obtained from either government websites or "reputable aggregator sites" (Pet. RJN Ex. 5); and (6) the Assembly Committee on Appropriations report on Senate Bill 902 dated August 18, 2020 (Pet. RJN Ex. 6).

State objects to judicial notice of Pet. RJN Exs. 2 and 5. State objects to Ex. 2 on the grounds that letters to legislators are not cognizable legislative history and therefore not judicially noticeable. See Quintano v. Mercury Cas. Co. (1995) 11 Cal.4th 1049, 1062, n. 5; Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc. (2005) 133 Cal.App.4th 26, 38. Petitioners respond that the letters are offered not because they aid in statutory interpretation but because they criticize the initiative override provisions of SB 10, making lawmakers aware of the risks, an argument that is relevant to severance of that provision.

Petitioners confuse relevance with judicial notice. The court cannot judicially notice written objections as legislative history. The letters also are not reasonably subject to dispute as to their accuracy under Evid. Code §452(h). The court declines to judicially notice Exhibit 2.

State objects to judicial notice of Ex. 5 on the grounds that (1) some of the measures are from non-governmental websites that Petitioners claim are "reputable," and (2) Petitioners have not shown which, if any, of the initiatives represent good law, as some are decades old.

Petitioners respond that seven measures were downloaded from government websites, and whether or not they remain good law does not detract from their argument that the initiatives promise that they will remain in effect until the voters change them, not local legislatures. As to initiatives downloaded from reputable aggregator websites, this fact does not affect their status as not reasonably subject to dispute.

The court agrees with Petitioners about the initiatives from government websites and the seven initiatives in Exhibit 5 downloaded from such sites – Dana Point, Encinatas, Napa County, Santee, Santa Monica, Sierra Madre, and Ventura County -- are judicially noticed. Evid. Code §452(b). The court declines to judicially notice initiatives downloaded from other websites as not reasonably subject to dispute. Evid. Code §452(h). The request to judicially notice the initiatives from Belmont, Camarillo, Fillmore, Fremont, Gilroy, Moorpark, Oxnard, Santa Paula, Simi Valley, Solana Beach, and Thousand Oaks is denied.

D. Statement of Facts

1. Constitutional Background

In 1911, the state held a special election for the public to vote on a series of constitutional amendments that received a two-thirds majority vote in both houses of the state Legislature. Pet. RJN Ex. 1, p. 11. Among these was Proposition 7, Senate Constitutional Amendment No. 22, which modified California Constitution Article IV, section 1 to, in pertinent part, reserve for the people the power to propose and vote on laws and constitutional amendments independent of the Legislature. Pet. RJN Ex. 1, p. 12.

This power came in two forms: initiatives and referendums. Pet. RJN Ex. 1, p. 12. If enough electors – at least 8% of the number who voted for governor in the last general election – sign a petition for an initiative and present it to the secretary of state, that initiative would appear on the ballot of the next general election at least 90 days afterwards, or the ballot of a special election that the governor may call beforehand. Pet. RJN Ex. 1, p. 12. Unlike a referendum, once an initiative passes, it is immune from the governor's veto power and cannot be amended or repealed without another vote by electors, unless the initiative itself provides otherwise. Pet. RJN Ex. 1, p. 13, 15.

Proposition 7 also extended the initiative and referendum powers to the electors of each city, county, and town, to be exercised under such procedure as may be provided by law. Pet. RJN Ex. 1, p. 14. While the state and local governments could enact laws to facilitate the operation of this power, such laws cannot restrict that power. Pet. RJN Ex. 1, p. 14.

As one of several amendments to the California Constitution in 1966, the voters repealed Article IV, section 1 and simultaneously added a new version of Article IV, section 1 that once again reserved to the people the powers of initiative and referendum. Pet. RJN Ex. 3, p. 503-06, 512-13. In other amendments, Article IV, section 22 outlined the same procedure for proposing and passing an initiative, section 24 again prohibited the Legislature from amending or repealing an initiative without a vote by electors unless the initiative itself provides otherwise. The one substantive change in 1966 was that while initiatives amending the Constitution still required petitions signed by 8% of electors, petitions for initiatives to amend a statute only required the signature of 5% of electors. Pet. RJN Ex. 3, p. 515. Section 25 again extended the initiative powers to city and county electors subject to procedures outlined by the Legislature. Pet. RJN Ex. 3, p. 515.

2. SB 10

On December 7, 2020, Senator Scott Wiener introduced SB 10. RJN Ex. A. As proposed, SB 10 would modify Govt. Code section 65913.5(a)(1) to allow a local government to adopt an ordinance to zone land parcels

in transit-rich areas, job rich areas, and urban infill sites for up to ten units of residential density per parcel. RJN Ex. A. A "transit-rich area" is defined as a parcel within one-half mile of a major transit stop or on a high-quality bus corridor. Ex. A, p. 8. An urban infill site" is defined as a legal parcel in a city where 75% of the adjoining parcels are developed for urban uses and zoned or residential use. Ex. A, p. 8. A "jobs-rich area" is defined as an area identified by pertinent agencies as "high opportunity" and where new housing would shorten commutes or enable residents to live nearer their jobs. Ex. A, pp. 7-8. The local government could adopt the ordinance notwithstanding any local restrictions, even if a local voter initiative limited the local government's ability to do so. Ex. A, p. 1.

Per proposed Govt. Code section 65913.5(a)(2), such an ordinance would not be a "project" as defined by the California Environmental Quality Act ("CEQA"). RJN Ex. A. Govt. Code section 65913.5(a)(3) would create an exception for parcels in high or very high fire hazard severity zones. RJN Ex. A. Govt. Code section 65913.5(d) would apply the new law to all cities, including charter cities, based on a finding that the shortage of affordable housing is a matter of statewide and not a municipal affair as that term is used in California Constitution Article IX, section 5. RJN Ex. A.

An amended version of SB 10 dated February 24, 2021 expanded the CEQA exemption to include any local government's resolution amending its general plan to be consistent with a zoning ordinance passed under Govt. Code section 65913.5(a)(1). RJN Ex. B.

The Senate Committee on Housing analysis of the February 24, 2021 version of SB 10 explains its purpose: to help "ease California's housing crisis" of a shortage of 3.5 million homes, and "move the state away from a sprawl-based housing policy…." RJN Ex. K, p. 55. SB 10 seeks to develop denser housing in single-family zoning. Ex. K, p. 56. Estimates at the time showed that a contributing factor to the housing shortage is a disproportionate emphasis on single-family homes to the exclusion of multi-family housing. Ex. K, p. 57. Increasing density near transit serves to increase ridership of public transportation, reducing greenhouse gases and providing a solution for the housing crisis. Ex. K, p. 57. SB 10 gives cities and municipalities a tool to provide for more housing where it has the most impact, in part by exempting such ordinances from local initiatives and CEQA challenges. Ex. K, pp. 55, 57-58.

Senate analyses of later amended versions of SB 10 reiterate this point – SB 10 aims to address the housing shortage by giving local government a "powerful new tool" to use in their planning by allowing the passage of ordinances immune to local initiatives and CEQA challenges. RJN Ex. L, pp. 66-67; RJN Ex. M, 73-74; RJN Ex. N, pp. 78, 81-82, 87; RJN Ex. O, pp. 92-94; RJN Ex. P, pp. 103-04; RJN Ex. Q, pp. 114-18; RJN Ex. R, pp. 125-26; RJN Ex. S, pp. 132-33.

From the April 3, 2021 version onwards, the analyses of SB 10 noted that it would override local initiatives. For example, the April 20, 2021 Senate analysis of the April 3, 2021 version of SB 10 noted that initiatives are a reserved power of the people often used to adopt urban growth boundaries or other growth management ordinances. RJN Ex. L, p. 68. "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." Ex. L, p. 68. The analysis queried: "Should politicians be able to override the preferences of local voters….?" Ex. L, p. 68.

The analysis of subsequent amendments to SB 10 regularly highlighted the opposition argument that the bill allows cities to override the will of local voters and removes community-driven planning processes. RJN Ex. N, p. 87; RJN Ex. O, p. 99; RJN Ex. P, p. 105; RJN Ex. Q, pp. 118-19; RJN Ex. R, p. 126; RJN Ex. S, p. 138.

A May 26, 2021 amendment to SB 10 removed "job-rich areas" as a category for which local governments could override local voter initiatives to zone parcels for up to ten residential units, leaving only a transit area and an urban infill site as the available locations. RJN Ex. F.[1]

A June 24, 2021 amendment limited the scope of SB 10 by adding an exception. RJN Ex. H. An ordinance authorized by Govt. Code section 65913.5(a)(1) could not supersede local initiatives designating publicly owned land as open-space land or for park or recreational purposes. Ex. H, p. 40. Additionally, if an ordinance adopted under Govt. Code section 65913.5(a)(1) would supersede a zoning restriction adopted by local

initiative, the ordinance would be effective only if the local government passed it by a two-thirds majority vote. Govt. Code §65913.5(b)(4). RJN Ex. H, p. 40.

A subsequent amendment to SB 10 on July 5, 2021 only clarified that the power to adopt zoning ordinances that supersede local initiatives is subject to the two-thirds majority requirement of Govt. Code section 65913.5(b)(4). RJN Ex. I.

The Assembly passed this version of SB 10 on August 23, 2021, the Senate passed it on August 30, 2021, and Governor Newsom signed it into law on September 16, 2021. RJN Ex. J, T.

As enacted, SB 10 provides:

"Notwithstanding any local restrictions on adopting zoning ordinance 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, at a height specified by the local government in the ordinance, if the parcel is" located in a "transit rich area" or an "urban infill site." Govt. Code §65913.5(a)(1).

A "transit-rich area" is defined as a parcel within one-half mile of a major transit stop or on a high-quality bus corridor. Govt. Code §65913.5(e)(1). An "urban infill site" is defined as a legal parcel in an urban city where 75% of the adjoining parcels are developed for urban uses and zoned for residential use. Govt. Code §65913.5(e)(3). SB10 applies to all cities, including charter cities. Govt. Code §65913.5(f). A local ordinance adopted pursuant to SB 10 shall not be a project within the scope of CEQA. Govt. Code §65913.5(a(3).

SB 10 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." Govt. Code §65913.5(4(A), (B). 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." Govt. Code §65913.5(b)(4).

3. <u>Local Initiatives</u>

In 2008, voters in Redondo Beach passed Measure DD, a local initiative that sought to help the public prevent increased traffic congestion, gridlock, and air, noise, and water pollution. RJN Ex. 4. Measure DD requires voter approval on any major change or equivalent combination of minor changes in allowable land use – including projects that increase traffic by a certain threshold or produce more than 40,000 additional square feet of residential, office, or commercial floor area. Ex. 4. Section (g)(3) also requires voter approval for any proposed changes that convert "a nonresidential use to residential or a mixed use resulting in a density of a greater than 8.8 dwelling units per acre whether or not any such unit is used exclusively for residential purposes." Ex. 4, p, 533. The major change only becomes effective if approved by both the City Council and a majority of voters on a ballot measure proposing the change. Ex. 4.

Other cities and counties have passed initiatives requiring voter approval of future changes to certain zoning ordinances or planning policies: Dana Point (Pet. RJN Ex. 5, pp. 549, 552, 619), Encinitas (Pet. RJN Ex. 5, p. 622), Napa County (Pet. RJN Ex. 5, pp. 664-83), Santa Monica (Pet. RJN Ex. 5, pp. 691-706), Santee (Pet. RJN Ex. 5, pp. 712-22), Sierra Madre (Pet. RJN Ex. 5, pp. 723-43), and Ventura County (Pet. RJN Ex. 5, pp. 758-77). Ventura County's initiative concerns agricultural, watershed and open space lands exempt from SB 10. Pet. RJN Ex. 5.

E. <u>Analysis</u>

Petitioners seek traditional mandate and declaratory relief on a single issue: whether SB 10 unconstitutionally permits local governments to override local zoning initiatives.

1. Ripeness

The State argues that Petitioners' claims are not ripe. Opp. at 9. The ripeness requirement is a branch of the doctrine of justiciability and presents the courts from issuing purely advisory opinions. Pacific Legal Foundation v. California Coastal Commission, ("Pacific Legal Foundation") (1982) 33 Cal.3d 158, 171 (citations omitted). Ripeness requires consideration of "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Id.

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). "[A] controversy must be definite and concrete . . . as distinguished from an opinion advising what the law would be upon a hypothetical set of facts." Pacific Legal Foundation, *supra*, 33 Cal.3d at 171. The ripeness requirement is similar to the "actual controversy" standard for declaratory relief in which the judgment must decree, not suggest, what the parties may or may not do. Id. at 171.

The State argues that Petitioners' challenge to SB 10 does not claim that any local government has disregarded a local zoning initiative, or even is likely to do so. Petitioners only 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." FAP ¶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." FAP ¶47. The State contends that it is not clear whether or when local governments will enact any ordinances pursuant to SB 10. Nor is it clear whether those ordinances would contradict a local zoning initiative. Absent the concrete fact of a superseded zoning initiative, this case presents a purely hypothetical dispute that the sort of "purely advisory opinion" that ripeness forbids. *See* Pacific Legal Foundation, *supra*, 33 Cal.3d at 170.

In Pacific Legal Foundation, the California Supreme Court addressed a claim for declaratory relief brought by coastal property owners who challenged as a taking (exaction) California Coastal Commission guidelines for issuance of development permits that were designed to ensure public access to the beach. 33 Cal.3d at 169, 170. The challenge occurred before the Coastal Commission applied the guidelines to the property owners. Id. The court held that takings claims were not ripe because they are "impossible to weigh in the abstract" (id. at 172 & n. 7), and it would be "sheer guesswork" to "speculate as to the type of developments for which access conditions might be imposed," and improper to presume that the Commission would "abuse its authority by imposing impermissible conditions on any permits required". Id. at 172, 174. Reply at 7.

The State contends that, similar to Pacific Legal Foundation, Petitioners 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. at 172. In the absence of any real controversy between parties, there is no question suitable for judicial review. Opp. at 10.

Petitioners note that "a facial challenge is generally ripe the moment the challenged regulation is passed". Keystone Bituminous Coal Ass'n v. DeBenedictis, (1987) 480 U.S. 470, 493–44; Bronco Wine Co. v. Jolly, (2005) 129 Cal.App.4th 988, 1034. This is true because a facial challenge considers only the text of the measure itself, not its application to the particular circumstance of a case. Today's Fresh Start, Inc. v. Los Angeles County Office of Education, (2013) 57 Cal.4th 197, 218. "Generally, a facial challenge presents an issue of law and case-specific factual inquiry is not required." Del Oro Hills v. City of Oceanside, (1995) 31 Cal.App.4th 1060, 1076. It is the mere enactment of the law that is unconstitutional, not its application. Id. "The ripeness doctrine, requiring a final decision regarding the application of the regulation to the specific property, only applies to legal attacks on the regulation 'as applied' to a specific property. It does not apply when a property owner challenges the 'facial' validity of the land use regulation." San Mateo County Coastal

Landowners' Assn. v. County of San Mateo, (1995) 38 Cal.App.4th 523, 547, n. 16 (facial challenge to the constitutionality of county initiative requiring submission of local coastal plan amendment to voters was ripe). These principles apply equally to facial constitutional challenges to statutes. Communities for a Better Environment v. Energy Resources Dev. Comm., (2020) 57 Cal.App.5th 786, 812-13. Reply at 6.

Petitioners argue that this rule applies to their facial challenge to SB10 as infringing on the constitutionally protected right of initiative because it eliminates the constitutional prohibition on amending or repealing initiative measures absent a vote of the people. While a final decision applying the Coastal Commission's guidelines to a property owner was necessary in Pacific Legal Foundation, the Legislature made a final decision in SB 10 to authorize local governments to infringe on the right of initiative. Petitioners do not claim that some ordinance might be applied in the future, but rather that the Legislature already has violated the California Constitution by passing SB 10. No factual development is necessary to resolve the pure issue of law in the parties' dispute. The court need only refer to the text of SB10 to decide whether the Legislature has infringed on the right of initiative by permitting local governments to enact ordinances "notwithstanding" a local zoning initiative. Reply at 6-8.

The court agrees with Petitioners. It is the enactment of SB 10 that has been challenged, not the passage of a subsequent local ordinance that interferes with the people's right of initiative. Petitioners allege that SB 10 itself is an invasion of constitutionally protected initiative rights and do not seek an advisory opinion that it would be unlawful for a particular local government to disregard a particular initiative. The ripeness requirement "should not prevent courts from resolving concrete disputes if the consequence of a deferred decision will be lingering uncertainty in the law, especially when there is widespread public interest in the answer to a particular legal question." Pacific Legal Foundation, *supra,* 33 Cal.3d at 170.

The State argues that Petitioners fail the second prong of the ripeness analysis because they face no hardship in delaying adjudication. "[T]he 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., ("Communities") (2017) 19 Cal.App.5th 725, 735 (hardship of statute's limitations on judicial review was not the type of hardship weighing in favor of ripeness). Pacific Legal Foundation explained that the challenged Coastal Commission guidelines 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. at 172. *See also* Selby Realty Co. v. City of San Buenaventura, (1973) 10 Cal.3d 110, 118 (plaintiff's declaratory relief claim merely anticipated that county's general plan would affect his property without a "present concrete indication" that the county would acquire his property for proposed streets).

The State argues that Petitioners face no discernible hardship in delay as they have not advanced a particularized interest to a threatened local initiative. Nothing prevents Petitioners from challenging any future action by a local government if and when it occurs. Opp. at 10-11.

As Petitioners argue (Reply at 8), the hardship prong for ripeness raised in Pacific Legal Foundation is often unnecessary. Communities, *supra,* 19 Cal.App.5th at 736-37. While the court agrees that Petitioners do not face a real hardship from SB 10's infringement on the people's right of initiative -- Redondo Beach's Measure DD would be in direct conflict with SB10 only if the City passed an overriding ordinance – the future application of SB 10 to override zoning adopted by initiative is sufficiently predictable to make a concrete legal dispute. *See* id. at 738-39. Petitioners' claim is ripe.

The State argues alternatively that the court could decline to address the merits of this dispute. A "court may refuse to exercise the [declaratory relief] 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 makes this case unsuited for a declaratory relief ruling. Nor should traditional mandamus be available because it is only proper when there is no adequate remedy at law (CCP §1086) and nothing would prevent Petitioners from filing a lawsuit if a local government passes an ordinance overriding a zoning initiative as authorized by SB 10. Opp. at 11, n. 2.

The court may refuse to entertain a declaratory relief claim only when there is a basis in fact to conclude that the declaration is not necessary or proper; any doubt should be resolved in favor of granting declaratory relief. Warren v. Kaiser Foundation Health Plan, Inc., (1975) 47 Cal.App.3d 678, 683. The ripeness requirement is similar to the actual controversy standard for declaratory relief (Pacific Legal Foundation, *supra*, 33 Cal.3d at 1710), and the court sees no reason to decline to decide Petitioners' declaratory relief claim.

2. The People's Right to State and Local Initiatives

Petitioners expend considerable discussion on the people's right to initiative. When the Constitution was amended in 1911 to expressly reserve the right to initiative, it defined the scope of the power. "[T]he 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." RJN Ex. 1, p. 12. Once adopted, "[n]o act, law or amendment to the constitution, initiated or adopted by the people . . . initiated or 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." RJN Ex. 1, p. 13. "The initiative and referendum powers of the people [were] further reserved to the electors of each county, city and county, city and town of the state, to be exercised under such procedure as may be provided by law." RJN Ex. 1, p. 14 ("This section is self-executing, . . . [and] legislation may be enacted to facilitate its operation, but in no way limiting or restricting either the provisions of this section or the powers herein reserved."). Pet. Op. Br. at 10.

The 1966 revision of the California Constitution enshrines the same reserved initiative power in fewer words. *See* Associated Home Builders, Inc. v. City of Livermore, ("Associated Home Builders") (1976) 18 Cal.3d 582, 595, n. 12 (1966 constitutional revision of initiative power "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).[2] "The 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. IV, §1. "The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." Cal. Const. art. II, §8(a). 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).[3] Finally, "[i]nitiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide." Cal. Const., art. II, §11(a). Pet. Op. Br. at 11.

The restrictions on amending initiatives are inextricably intertwined with the reserved right of initiative. "The 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, ("Proposition 103") (1998) 64 Cal.App.4th 1473, 1484. The Supreme Court has observed that "voter-adopted initiative statutes in California [are] far more insulated from adjustment than in any other jurisdiction…." Kelly, *supra,* 47 Cal.4th at 1039. This right has been consistently held also to apply to local initiatives. *See, e.g.,* Rossi v. Brown, (1995) 9 Cal.4th 688, 715-16 (upholding county charter prohibiting amendment of initiative); DeVita v. County of Napa, ("DeVita") (1995) 9 Cal.4th 763, 788 (upholding both initiative and Elections Code provision forbidding county supervisors from amending general plan amendments enacted by initiative). Pet. Op. Br. at 10.

In numerous cases, the Supreme Court has made clear that the constitutional right to initiative must be preserved whenever possible. The initiative is not a right "granted the people, but . . . a power reserved by them. Declaring it 'the duty of the courts to jealously guard the right of the people' [citation], the courts have described the initiative and referendum as articulating 'one of the most precious rights of our democratic process' [citation]." Associated Home Builders, *supra,* 18 Cal.3d at 591; DeVita, *supra,* 9 Cal.4th at 776; California Cannabis Coalition v. City of Upland, (2017) 3 Cal.5th 924, 936 ("we resolve doubts about the scope of the initiative power in its favor whenever possible, and we narrowly construe provisions that would burden or limit the exercise of that power"). Pet. Op. Br. at 9-10.

The Constitution thus reserves the initiative power for city and county residents to enact the laws of their choosing, under procedures that the Legislature may establish, but these procedures could "in no way limit[] or restrict[] . . . the powers herein reserved." RJN Ex. 1, p. 14. Although the Legislature may establish procedures for the exercise of the initiative power, it cannot limit or restrict that power beyond the constitutional floor. The scope of the authorization to establish "procedures to facilitate the exercise of that right" consists of the circulation of petitions, the calling of elections, and other procedures required to enact an initiative measure. Associated Home Builders, *supra, 1*8 Cal.3d at 591-92. As the Supreme Court has stated: "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." Rossi, *supra,* 9 Cal.4th at 715-16 (emphasis in original); *see also* DeVita, *supra,* 9 Cal.4th at 788. Pet. Op. Br. at 11-12; Reply at 9.

The State does not dispute any of these general statements of law.

3. The Nature of Petitioners' Claim

Petitioners opening brief relies on case law holding that the Legislature cannot override the people's initiative to create state law and that local governments cannot override local voters' initiative to create ordinances.

The plain language of SB10 provides that government may adopt an ordinance to zone a parcel for up to ten units of residential density "notwithstanding any local restriction on adopting zoning ordinances. . . including . . . restrictions enacted by local initiative." RJN, Ex. J, p. 49. The significance of this provision is clear: so long as the local legislative body has the 2/3 super-majority vote required by Government Code section 65913.5(b)(4) (Ex. J, p. 50), it can disregard any zoning set by initiative at a density lower than ten units per parcel or initiative-based voter approval requirements for zone changes or general plan amendments. Pet. Op. Br. at 14.

A grant to local governments of the power to disregard restrictions in local initiative measures is equivalent to granting them the authority to legislatively amend or repeal that initiative. In discussing the constitutionally reserved initiative power, the Supreme Court held that "an amendment [of an initiative] includes a legislative act that changes an existing initiative statute by taking away from it." Kelly, *supra,* 47 Cal.4th at 1026-27. "An 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." Proposition 103, *supra*, 64 Cal.App.4th at 1485. In Kelly, the Supreme Court found that a statute imposing quantity limits on medical marijuana "takes away from rights granted by the initiative statute [the Compassionate Use Act]", which allowed for possession of an unspecified reasonable quantity for medical needs. 47 Cal.4th at 1043. Pet. Op. Br. at 14-15.

Petitioners conclude that SB10's blanket allowance for local government to zone parcels for ten units of housing despite any applicable restrictions in an initiative measure clearly takes away from the local initiative by terminating its applicability to the parcel in question, functionally amending the law. As an illustration, Measure DD was approved by the voters of Petitioner Redondo Beach in 2008, amending the 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." Pet. RJN Ex. 4. Measure DD's purpose 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." Id. SB 10 would allow Redondo Beach's City Council to make a zone change permitting ten units per parcel without the required vote under Measure DD. Pet. Op. Br. at 15-16.

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 standards. In many instances, consistent with the constitutionally reserved initiative power, voters were expressly advised that the provisions would persist unless voters changed the law. *See* Pet. RJN Ex. 5.

Petitioners argue that 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. Petitioners conclude therefore that SB 10 violates the constitutional power of initiative. While Petitioners "cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as the particular application of the statute," there is no application of SB 10's permission for local government to override local initiatives that is consistent with the prohibition on initiative amendment. *See* Pacific Legal Foundation, *supra,* 29 Cal.3d at 181. Pet. Op. Br. at 15-16.

Petitioners admit that a local initiative could permit local government amendment but argue that they need only meet the lesser facial constitutional test requiring them to "establish the statute conflicts with constitutional principles 'in the generality or great majority of cases.'" *See* Coffman Specialities, *supra,* 176 Cal.App.4th at 1145. The fact that a local initiative may hypothetically permit amendment does not detract from the fact that, by allowing local government to enact a zoning ordinance notwithstanding restrictions imposed by local initiative, SB 10 generally permits local government to amend local initiatives without a vote of people and infringes on the people's power to legislate by initiative. Pet. Op. Br. at 16.

The State properly criticizes (Opp. at 16-17) Petitioners' opening brief, which blends local and state initiative power and does not meaningfully address state preemption of local laws. There is a 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 can (and does) preempt local initiatives (vertical). The cases cited by Petitioners are largely about horizontal limits and inapplicable. *See*, *e.g*., Proposition 103, *supra,* 64 Cal.App.4th at 1486 (statute unconstitutionally amended Proposition 103, a state initiative concerning insurance rates); Kelly, *supra,* 47 Cal.4th at 1012 (statute improperly amended Proposition 215, which is California's Compassionate Use Act); Rossi v. Brown, *supra,* 9 Cal.4th at 712-14 (city charter cannot prohibit local initiative repealing utility tax); *see also* DeVita, *supra*, 9 Cal.4th at 788 (upholding general plan initiative to preserve open land as consistent with state law).[4]

The Legislature constitutionally may preempt a local initiative in areas of statewide concern, including local land use, as a matter of state/local preemption. Safe Life Caregivers, *supra*, 243 Cal.App.4th at 1044. As the California Supreme 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 v. Bushey, ("City of Morgan Hill") (2018) 5 Cal.5th 1068, 1079.

In reply, Petitioners clarify the nature of their claim. They seek to halt the Legislature's delegation of authority to local governments to override constitutionally protected initiative rights. Reply at 6-7.

4. Preemption

a. Governing Law

State preemption of local legislation is established by article XI, section 7 of the California Constitution which provides that "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with genera l laws . "If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void. Sherwin-Williams Co. v. City of Los Angeles, ("Sherwin-Williams") (1993) 4 Ca1.4th 893, 897.

State law fully occupies an area when the Legislature has expressly manifested its intent to fully occupy the area or has impliedly done so in light of one of the following indicia of intent: (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local

ordinance on the transient citizens of the state outweighs the possible benefit to the locality. Sherwin-Williams, *supra*, 4 Cal.4th at 897.

An ordinance or regulation contradicts state law when it is inimical to or cannot be reconciled with state law. O'Connell v. City of Stockton, (2007) 41 Cal.4th 1061, 1068. A contradiction does not exist when the state law provides a general concept, and the local ordinance or regulation reasonably interprets or defines the general concept. County of Tulare v. Nunes, (2013) 215 Cal.App.4th 1188, 1202. Even if the state law and the ordinance apply to similar subject areas, there is no contradiction so long as the regulation "does not prohibit what the statute commands or command what it prohibits." Sherwin-Williams, *supra*, 4 Cal.4th at 902. However, when a state law contains a specific provision, the regulation or ordinance may not contradict that provision in any way. Ex Parte Daniels, (1920) 183 Cal. 636, 641–48.

"The 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." Citizens for Planning Responsibly v. County of San Luis Obispo, ("Citizens") (2009) 176 Cal.App.4th 357, 371.

The Legislature's delegation of exclusive authority to local governments to exercise a power over a matter of statewide concern is principally at issue in this case. The local electorate's right to initiative and referendum is generally co-extensive with the legislative power of the local governing body. City of Morgan Hill, *supra,* 5 Cal.5th at 1079. The legislative decisions of a local government body are presumed to be subject to initiative or referendum absent a clear showing to the contrary. Id. Such a clear showing to override the initiative power exists where the Legislature limits the local legislative body's discretion so that its task is administrative, not legislative, and where it delegates legislative authority exclusively to the local legislative body, thereby preventing the local electorate from acting by initiative. Id. (*citing* Committee of Seven Thousand v. Superior Court, ("Committee of Seven Thousand") (1988) 45 Cal.3d 491, 511-12. A party claiming that state law preempts a local ordinance or regulation bears the burden of demonstrating preemption. Big Creek Lumber Co. v. County of Santa Cruz (2006) 38 Cal.4th 1139, 1149.

In this case, it is undisputed that SB 10 clearly seeks to usurp the local electorate's initiative power by expressly providing that local governing bodies, with a two-thirds vote, may override local zoning initiatives. Govt. Code §65913.5(a). Given this clear indication, the issue becomes whether the Legislature lawfully preempted the local initiative power by delegating authority exclusively to the local legislative body's discretion. As the party asserting preemption, the State has the burden of proof.

b. Exclusive Authority Delegated on a Matter of Statewide Concern

The State argues that SB 10 constitutionally delegates exclusive authority to a city council or board of supervisors to address zoning for parcels up to ten units by preempting local zoning laws, including those imposed by initiative, in an area of statewide concern.

In deciding whether an issue is a matter of statewide concern, the court should avoid compartmentalizing an area of governmental activity as entirely a municipal affair or one of statewide concern. California Federal Savings & Loan Assn. v. City of Los Angeles, (1991) 54 Cal.3d 1, 17. The test hinges on the identification of a convincing basis for legislative action originating in extra-municipal concerns, one justifying legislative suppression based on sensible, pragmatic considerations. Id. at 18. The probability that a land use requirement will have regional or statewide impacts supports the contention that the Legislature possesses the constitutional authority to limit the power of initiative if it chooses to do so. DeVita, *supra,* 9 Cal.4th at 784.

"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." Committee of Seven Thousand, *supra*, 45 Cal.3d at 511.

The State contends that SB 10 addresses an area of statewide concern, noting that the Author's statement in support of SB 10 argues that "California is in the midst of a housing crisis." RJN Ex. P, 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." Ex. P, p. 103. "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. Ex. P, pp. 103-04. "[T]he 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." Ex. P, p. 104. Opp. at 7.

The author's statement in support of SB 10 contains some dubious assertions. The general "housing crisis" trumpeted by the author – and by the Legislature over the past decade -- is imprecise. It is hard to see how there is an overall general need for housing where California has suffered a net loss of population over the past several years, including both the urban areas of Los Angeles and San Francisco. It is also naïve for SB 10's author to rely on the state's 160,000 homeless persons to demonstrate a need for housing because that population has other more important factors at play, including drug and alcohol addiction and mental health.

Despite these criticisms, SB 10's comments section legitimately points out that the state's role in housing is to ensure that cities and counties plan for and approve new housing. Ex. P, p. 104. Cities and counties are required by law to include a housing element in their general plan which must demonstrate how the community will accommodate its share of the region's housing needs, particularly low and moderate cost housing. *See* Ex. P, p. 104. The mismatch between supply and demand "involves not just the amount of housing, but the type of housing 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)." Ex. P, p. 104. "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." Ex. P, p. 132.

The SB 10 comments point out that "[l]ocal zoning restrictions are a barrier to denser housing." Ex. P., 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." Ex. P, p. 104. Many local governments are motivated to increase density in their housing as part of their mandatory housing element, but when they try to "upzone" they face impediments such as the requirement that the upzoning be analyzed under CEQA. Ex. P, p. 104.

From these comments, it seems plain that SB 10 is intended as a tool for local governments to address the low and moderate cost housing which they are required by statute to implement in the housing element of their general plan. *See* RJN Ex. Q, p. 114 (discussing housing element law requiring local jurisdictions to address unmet demand for housing); RJN Ex. R, p. 125 (bill would help cities address housing burdens on lower income households). To allow local governments to make use if this tool, the Legislature expressly found that SB 10 implicates a matter of statewide concern. "[The] 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…" Govt. Code §65913.5(f).

The State points out that numerous cases declare 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 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"). Opp. at 12-13.

The State's position is overbroad. These cases do not stand for the proposition that housing and zoning issues are always a matter of statewide importance, only that they can be depending on the statute at issue. This was the California Supreme Court's point in California Federal Savings & Loan Assn. v. City of Los Angeles, where it held that the court should not compartmentalize in deciding whether a matter is of statewide concern. 54 Cal.3d at 17. Nonetheless, the court agrees that the SB 10's tool for local government to use in addressing the low- and moderate-cost housing which they are required to implement in the housing element of their general plan is a matter of statewide interest. This housing is likely to have regional and statewide effects which take it out of the purely municipal affair which zoning generally has been. *See* DeVita, *supra,* 9 Cal.4th at 784 (probability that a land use requirement will have regional or statewide impacts suggests statewide importance).

In their opening brief, Petitioners argue that the issue is not answered by initiative preemption cases which consider limitations on the ability of the electorate to enact an initiative measure such as Committee of Seven Thousand, *supra,* 45 Cal.3d at 491. Such limitations are found only where the state's plenary power over matters of statewide concern is sufficient authorization for legislation barring local exercise of initiative for matters exclusively delegated to a local legislative body. Id. at 511-12.

According to Petitioners, these principles are inapplicable because SB 10 does not preclude the enactment of an initiative; it undermines the ability of an initiative to bind the hands of future legislative bodies (Rossi v. Brown, *supra,* 9 Cal.4th at 715), and to prevent subversion of that right by hostile future government. DeVita, *supra,* 9 Cal.4th at 788. SB 10 does not preempt the right to initiative. Instead, it authorizes cities and counties to treat valid initiatives as non-binding and carve out exemptions for them. There is no judicial authority for such a proposition, which places both the Legislature and local governments in a position of superior power to the people in a manner that is unauthorized by the Constitution. Pet. Op. Br. at 17.

Petitioners embellish on this argument in reply. SB 10 does not foreclose use of the initiative power in any circumstance and instead alters the scope and durability of that power, allowing local government to abrogate the initiative right. The Legislature may legislate procedures for the exercise of the local initiative right, but may not, by legislation, change these powers. The Constitution establishes that initiatives may not be amended absent a vote of the people. Rossi v. Brown, *supra, 9* Cal.4th at 715-16. Reply at 11.

Petitioners argue that SB 10 fundamentally differs from state laws that limit the use of the local initiative power, and which declare that laws that do not comply with its requirements are void. *See, e.g*, Govt. Code §66300(b) (expressly precluding county or city electorates from exercising initiative or referendum in certain subject areas). They distinguish Committee of Seven Thousand, *supra,* 45 Cal.3d at 491, as establishing the principle that the Legislature may delegate authority to local government to enact legislation to the exclusion of the initiative power in areas of statewide concern. Unlike the law in that case, SB 10 does not alter who may legislate or limit the enactment of any initiative. Instead, it delegates a power to amend initiatives. This amendment issue was not addressed in Committee of Seven Thousand or any case cited by the State. Reply at 10-11.

As the State contends (Opp. at 13-14), Petitioners' distinction between the Legislature's ability to limit the initiative power to enact, as opposed to amend, in a matter of statewide interest is immaterial. The 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. *See* City of Santa Clara v. Von Raesfeld, ("City of Santa Clara") (1970) 3 Cal.3d 239, 248 (since Legislature could constitutionally eliminate requirement of voter approval of revenue bonds, it could do the lesser act in allowing the bonds to be issued at a higher rate of interest).

Petitioners argue that the elimination of the future exercise of the initiative power is fundamentally different from granting permission to the local legislative body to overturn an initiative that was valid at its enactment. Cases in this line of authority focus on who may make law, not who may decide to abrogate existing initiatives. *See, e.g.*, DeVita, 9 Cal.4th at 780-81; Pettye v. City and County of San Francisco, (2004) 118 Cal.App.4th 233, 245-247; City of Burbank v. Burbank-Glendale-Pasadena Airport Auth., (2003) 113 Cal.App.4th 465, 478-80. Reply at 11-12.

Again, Petitioners are mixing local initiative authority with state initiative authority. It makes no difference for purposes of preemption whether there is an existing initiative which is amended or eliminated by state law – as

opposed to limiting the enactment of an initiative -- so long as the Legislature has addressed a matter of statewide concern. Otherwise, the Legislature could never act where a local initiative has been passed. As the State argues, if the state did not have the authority to preempt existing local initiatives, it would be nearly impossible to regulate 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. Opp. at 16.

Petitioners' case citations do not aid them. The cases all concern whether a local initiative is consistent with state law without discussing Petitioners' enactment/amendment issue. *See* DeVita, 9 Cal.4th at 780-81 ((upholding general plan initiative to preserve open land as consistent with state law); Pettye v. City and County of San Francisco, (2004) 118 Cal.App.4th 233, 245-247 (initiative requiring in kind, not cash, homeless benefits did not conflict with state statute because the latter did not exclusively delegate issue to board of supervisors); City of Burbank v. Burbank-Glendale-Pasadena Airport Auth., (2003) 113 Cal.App.4th 465, 478-80 (airport zoning was matter of statewide concern and initiative which conflicted with statute delegating powers exclusively to city council was preempted).

Petitioners attempt to distinguish City of Santa Clara, *supra*, 3 Cal.3d at 239, where a city obtained voter approval to issue municipal bonds as required by its charter. Id. at 243. The resolution authorized a 6% maximum interest rate, but rates increased rapidly after the election and bonds could not be sold at that rate. Ibid. The Legislature amended the Government Code to allow sale of bonds at a maximum interest rate of 7% without a new election, but the city manager refused to issue the bonds in the absence of an election as required by the city charter. Id. at 243-44. The California Supreme Court concluded that no election was necessary to sell the bonds at the higher 7% rate. Id. Petitioners contend that City of Santa Clara based its holding on the fact that "voter approval of the present bonds was not compelled by the Constitution," distinguishing Peery v. City of Los Angeles, (1922) 187 Cal. 753 in which the Constitution required the sale of the bonds in the first instance and thus the rate could not be changed without an election. Id. at 249. Reply at 12.

Petitioners' attempted distinction is unavailing. City of Santa Clara held that state law controlled over the city charter as a matter of preemption because the bonds for sewer projects were a matter of statewide concern. 3 Cal.3d at 245-46. The court interpreted the statute as consistent with the Legislature's constitutional authority and noted that, since the Legislature could constitutionally eliminate a requirement of voter approval of revenue bonds, it could do the lesser act in allowing the bonds to be issued at a higher rate of interest). Id. at 248. While Petitioners are correct that the court rejected an argument that the electorate had vested rights in the city charter requirement of voter approval on the ground that voter approval was not compelled by the California Constitution (id. at 249), the California Constitution also does not compel any voter approval for a state law to preempt a local initiative, whether the initiative is existing or proposed.

Petitioners argue that it is not enough to identify a matter of statewide concern. The State also has the burden of identifying the field which it is claimed the state fully occupies. While the State's opposition discusses a general statewide interest in housing, it does not suggest that the state fully occupies the field of housing. SB 10, which leaves matters entirely in the hands of local governments, does not indicate that the Legislature has fully occupied any field to the exclusion of local legislative authority. Pet. Op. Br. at 17; Reply at 13.

Petitioners are confusing the first of the bases why the Legislature may preempt -- the Legislature may so completely occupy the field in a matter of statewide concern that all, or conflicting, local legislation is precluded -- with the second basis in which the Legislature may delegate exclusive authority to a city council or board of supervisors to exercise a particular power over matters of statewide concern. *See* Citizens, *supra,* 176 Cal.App.4th at 371. There is no requirement that the Legislature intend to occupy the field of housing to delegate to local governments permission to zone for ten or fewer residential units per parcel.

Whichever test for facial challenge applies, SB 10 addresses an issue of statewide concern -- Petitioners do not contend otherwise – and preempts existing or future local zoning initiatives by delegating exclusive authority to a city council or board of supervisors on its subject matter.

c. Conflict Preemption

The State also argues the third basis for initiative preemption: the exercise of the initiative power would impermissibly interfere with an essential governmental function." Citizens, *supra,* 176 Cal.App.4th at 371. The State contends that Petitioners' claims fail because 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. Opp. at 14-15.

The State argues that there is a conflict between Govt. Code section 65913.5 and any local law that contradicts its terms. For example, 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. Pet. RJN, Ex. 4, p. 534. This conflicts with Govt. Code section 65913.5(a)'s provision 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 ten 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 Govt. Code section 65913.5. *See* 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 Govt. Code section 65913.5's grant of authority to local governments. Opp. at 15.

According to the State, 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, 883-84 (Watsonville's anti-fluoridation Measure S preempted 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, 771-72 (local growth control initiative invalid because of a facial conflict with state housing policy]; N. Cal. Psychiatric Soc'y v. City of Berkeley, (1986) 178 Cal.App.3d 90, 105-06 (Berkeley local initiative prohibiting electroconvulsive therapy preempted as "in direct conflict with the Legislature's intention" that the treatment be available).[5]

Petitioners reply that SB10's only conflict appears to be with the Constitution, which prohibits legislative amendment of initiatives, not with any local law. None of the cases cited by the State finding initiatives preempted due to conflict with state law presents a situation like SB 10. Moreover, the State never addresses Petitioners' core constitutional argument that the exercise of the right of initiative under the California Constitution includes the right to foreclose amendment by future governing bodies. A statute cannot preempt the existence of a right guaranteed by the Constitution. Long Beach Unified Sch. Dist. v. State of California, (1990) 225 Cal.App.3d 155, 184. Reply at 14.[6]

Petitioners' argument has been addressed *ante* with respect to delegation by the Legislature to a local government's exclusive authority. The Legislature's ability to foreclose enactment of initiatives for matters of statewide interest includes the ability to amend existing initiatives. Where an initiative conflicts with SB 10's provisions, it impermissibly interferes with an essential governmental function and is preempted.

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F. Conclusion

The FAP's claim for traditional mandamus is denied. The Petition's claim for declaratory relief is granted. The court declares 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. Govt. Code §65913.5(a)(1), (b)(4).

The State's counsel is ordered to prepare a proposed judgment, serve it on Petitioners' counsel for approval as to form, wait ten days after service for any objections, meet and confer if there are objections, and then submit the

proposed judgment along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for June 23, 2022 at 9:30 a.m.

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[1] Petitioners assert (Pet. Op. Br. at 8, n. 4), and the State does not contest, that the Senate and Assembly amended SB 10 multiple times between December 7, 2020 and June 24, 2021 but none of these amendments are relevant to this case. *See* RJN Ex. B-G. With the exception of the May 24, 2021 narrowing of Govt. Code section 65913.5(a), the court agrees.

[2] In Associated Home Builders, the California Supreme Court rejected application of zoning law procedure to zoning initiatives because it would "overlook a crucial distinction: that although the procedures for exercise of the right of initiative are spelled out in the initiative law, the right itself is guaranteed by the Constitution." 18 Cal.3d at 594-96.

[3] The California Supreme Court described the Legislature's authority to amend an initiative statute after approval by the voters as a "slight modification" of the 1911 reservation of the initiative power. People v. Kelly, ("Kelly") (2010) 47 Cal.4th 1008, 1039.

[4] Associated Home Builders was limited to matters of municipal concern. Safe Life Caregivers v. City of Los Angeles, (2016) 243 Cal.App.4th 1029, 1045. 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." Id. (citation omitted). *See* Opp. at 17.

[5] The State argues that Northern California Psychiatric Society is factually analogous. In both situations, the state passed a law providing an option for a certain practice (electroconvulsive therapy and local government power to provide for denser housing). In both situations, any local initiative that seeks to prohibit what the Legislature expressly allowed is preempted. Opp. at 15-16.

Petitioners properly distinguish Northern California Psychiatric Society, which concerned a local initiative criminalizing the use of electric shock treatment within the city. 178 Cal.App.3d at 97. After examining numerous state statutes relating to the provision of psychiatric care, the court concluded that they "manifest[ed] a clear legislative intent to occupy the field of psychiatric care, treatment, services and facilities in general," and that the field of electric shock therapy "has been fully occupied and preempted by general state law." Id. at 108. Unlike the regulation of psychiatric treatment, no court has found that the state fully occupies the field of local land-use planning. *See, e.g.*, City of Morgan Hill, *supra*, 5 Cal.5th at 1079 (noting that general plans raise both state and local concerns). Reply at 12-14.

[6] Given that SB 10 does not violate the California Constitution, the court need not address the parties' severance arguments.