VIA ELECTRONIC SUBMISSION

September 28, 2023

Hon. Rob Bonta
Attorney General of California
1300 I Street, 17th Floor
Sacramento, CA 95814

Re: Block Circulation of the Protect Patients Now Act of 2024 (Initiative 23-0021)

Dear Attorney General Bonta:

I am writing on behalf of Consumer Watchdog to urge the Office of the Attorney General to immediately seek declaratory relief from the courts to block the California Apartment Association's so-called Protect Patients Now Act of 2024 (the "Initiative") from being circulated to California voters.[1] Under the guise of protecting patients, the Initiative is an abuse of the initiative process and serves as a blueprint for corporate interests wishing to punish non-profit organizations for their speech and advocacy.

Designed to silence an outspoken proponent of rent control (the AIDS Healthcare Foundation, or "AHF"),[2] the Initiative violates our state and federal constitutions. Allowing such a deceptive and facially invalid measure to be circulated for signatures, let alone placed on the ballot, will only serve to undermine voters' trust in the initiative process. When such a patently unconstitutional initiative is at issue, the Attorney General has the power to commence legal action to relieve himself of the legal duty to prepare a circulating title and summary, based on a judicial determination that the measure is invalid. (*Schmitz v. Younger* (1978) 21 Cal.3d 90, 92–94; *Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769, 780.) For the reasons that follow, the Attorney General should exercise that power here, and prevent the proponents from circulating the Initiative to voters for signatures to place it on the November 2024 ballot.[3]

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[1] The Initiative's campaign website discloses that the so-called "Protect Patients Now" campaign is "sponsored by" the California Apartment Association and that the California Apartment Association is a "top funder." (See https://www.protectcapatientsnow.com/.)

[2] See, e.g., Yes on Prop 21, *Calif. Rent Control Ballot Measure Heads to Voters in Nov.; Campaign Rolls Out 200+ Endorsements*, https://www.aidshealth.org/2020/07/calif-rent-control-ballot-measure-heads-to-voters-in-nov-campaign-rolls-out-200-endorsements/.

[3] The Attorney General's Office has exercised this authority at least as recently as 2015, when it

While the Initiative is cleverly worded as to never explicitly name the AIDS Healthcare Foundation, its description of entities falling under its purview is limited to a class of one.[4] No other individuals or corporations meet the definitions contained in the Initiative.[5]

Perhaps most glaringly, the Initiative violates the United States and California Constitutions as an illegal Bill of Attainder. The Bill of Attainder Clause of the United States Constitution prohibits any "law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." (*Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.* (1984) 468 U.S. 841, 846–47.) This applies to corporate entities as well as individuals. (See *Con. Edison Co. of N.Y., Inc. v. Pataki* (2d Cir. 2002) 292 F.3d 338, 349.) The Initiative reflects one of the hallmarks of a Bill of Attainder—its retrospective focus—by defining past conduct as wrongdoing and then imposing punishment on that past conduct. (*Con. Edison Co. of N.Y., Inc., supra,* 292 F.3d at 349 [citing *Nixon v. Admin. of General Servs.* (1977) 433 U.S. 425].) Further, whether a statute is "punitive" is determined by three factors: "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes; and (3) whether the legislative record evinces a [legislative] intent to punish." (*Selective Serv. Sys.*, *supra*, 468 U.S. at p. 852 [internal citations omitted].)

The Initiative readily meets these criteria. First, as noted above, the Initiative identifies just *one* nonprofit organization, the AIDS Health Foundation. The Initiative then imposes draconian punishments: loss of the ability to collect and spend revenues as it is entitled to do under the federal 340B Discount Drug Program ("340B program"), permanent revocation of "any and all pharmacy licenses, health care service plan licenses, or clinic licenses," and the prohibition of AHF and its owners, officers, and directors from applying for pharmacy and other related health care service licenses for a 20-year period. The law is clear that such punitive measures are unconstitutional, demonstrated by the "grave imbalance . . . between the burden and the purported nonpunitive purpose" of the Initiative. (See *ACORN v. U.S.* (2010) 618 F.3d 125, 138.) Singling out just one organization for these clearly punitive consequences, when many other organizations use 340B funds in similar ways unrelated to housing, makes clear the Initiative's true intentions. Moreover,

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sought declaratory relief from the courts in regard to the blatantly unconstitutional "Sodomy Suppression Act." (See *Harris v. McLaughlin*, No. 34-2015-00176996 (Cal. Super. Ct. 2015), 2015 WL 3877283.)

[4] The AIDS Healthcare Foundation is the only organization that meets the criteria under the Initiative. (See *California proposal would sideline a prolific ballot measure player*, Politico, Aug. 30, 2023, https://www.politico.com/news/2023/08/30/california-proposal-ballot-measure-00113475.)

[5] Of the 850 entities in California that participate in the federal 340B Discount Drug Program, only one meets the Initiative's criteria, including (1) during any 10–calendar year period in the entity's existence, it spent "more than one hundred million dollars" on "purposes that do not qualify as direct patient care"; (2) the entity is, or was at one time, an owner or operator of "highly dangerous properties," defined as multifamily dwellings; and (3) the entity must also either have, or have had, a license to operate as a health care service plan, pharmacy, or clinic; contract as a primary care case management organization; or contract as a Medicare provider under a Medicare special needs plan. (Section 14124.48(l)(1–4).) This unique set of criteria applies only to AHF, which engages in housing-related campaigns and issues that the California Apartment Association opposes.

the proponents admit the Initiative is intended to punish the AIDS Healthcare Foundation for its past advocacy efforts.[6]

Additionally, the Initiative violates the California Constitution. Article II, Section 12 provides that "No amendment to the Constitution, and no statute proposed to the electors by the Legislature or by initiative, that . . . names *or identifies* any private corporation to perform any function or to have any power or duty, may be submitted to the electors or have any effect." (Emphasis added.) The Initiative plainly identifies a single non-profit corporation to perform specific duties, defining a so-called "prescription drug price manipulator" so narrowly, and with such specific criteria (some of which are entirely unrelated to the provision of prescription drugs), as to apply only to AHF. The Initiative then requires this "identified" organization to perform specific duties, including (1) compliance with the obligation or duty to spend 98 percent of its revenues generated in California from the 340B program on what the Initiative terms "direct patient care," (2) compliance with the obligation or duty to sell pharmaceuticals at a specific price, and (3) compliance with the duty to submit annual reports to four separate state agencies, detailing its statewide and nationwide revenues and expenditures relating to the 340B program.

The Initiative is not saved by its thinly veiled attempts to avoid explicitly naming the AIDS Healthcare Foundation. Caselaw is clear that whether or not an entity is named explicitly, the fact that, on its face, it could *only* apply to the AIDS Healthcare Foundation is enough to render the Initiative in violation of the California Constitution. (Compare *Pala Band of Mission Indians v. Bd. of Supervisors* (1997) 54 Cal.App.4th 565 with *Hernandez v. Town of Apple Valley* (2017) 7 Cal.App.5th 194.) The Constitution prevents this kind of improper initiative from ever being submitted to the voters.

Finally, the Initiative also violates the Equal Protection clause of the U.S. and California Constitutions. (U.S. Const. amend. XIV, § 1; Cal. Const., art. I, § 7.) Equal Protection requires that a law's classification "not be arbitrary but predicated on a real and substantial difference having a reasonable relation to the subject of the legislation." (*California Assn. of Retail Tobacconists v. State of California* (2003) 109 Cal.App.4th 792, 841.) An Equal Protection violation lies where a party alleges that it has been "intentionally treated differently from others similarly situated" and there is "no rational basis for the difference in treatment." (*Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 564–65.) That the Initiative clearly identifies a "class of one" is plainly arbitrary and violates this fundamental constitutional protection.

The proposed Initiative is a poorly veiled direct attempt by the California Apartment Association to silence a political adversary. If it is allowed to be put to the voters, no organization in the future will be safe from similar retribution by monied opponents. The Attorney General should use his authority to request relief from the courts and prevent this unconstitutional initiative from being circulated to the voters.

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[6] See fn. 4, *supra* ("The California Apartment Association and others involved in the latest Weinstein broadside pointed not just to the past statewide ballot losses, but to other activities as well.").

Sincerely,

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Consumer Watchdog