



Via TrueFiling

July 16, 2024

The Honorable Chief Justice Patricia Guerrero
The Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

RE: *AIDS Healthcare Foundation v. Super. Ct. (Weber)*, S. Ct. Case No. S285602
Amicus Curiae Letter in Support of Petition for Review

Dear Chief Justice Patricia Guerrero and Associate Justices:

Consumer Watchdog writes, pursuant to California Rules of Court, rule 8.500(g), to urge the Court to grant the AIDS Health Foundation's ("AHF") petition for review. As set forth below, preelection review of Proposition 34 is warranted because it violates express provisions of the United States and California Constitutions, and threatens the health of those living with HIV and our democratic institutions.

I. Interest of Consumer Watchdog

Consumer Watchdog is a nonprofit organization dedicated to providing an effective voice for taxpayers and consumers in an era when special interests dominate public discourse, government and politics. We deploy an in-house team of public interest lawyers, policy experts, strategists, and grassroots activists to expose, confront, and change corporate and political injustice every day, saving Americans billions of dollars and improving countless lives. For decades, Consumer Watchdog has been one of the nation's most aggressive consumer advocates, taking on politicians of both parties and the special interests that fund them.

II. The Threat to Our Health

AHF is a California public benefit corporation. Its mission is to provide medical care and broad-based support to, and advocacy on behalf of, people living with HIV and those at risk of contracting it. To that end, in California AHF provides a range of services to individuals living with HIV, including operating HIV outpatient medical clinics, HIV specialty pharmacies, HIV prevention and testing programs, and thrift stores, and supporting and providing housing for low-income individuals.

Housing stability is essential to individuals living with HIV, as well as preventing the spread of the disease. According to the Center for Disease Control, “[p]owerful HIV prevention and treatment tools help keep people healthy and prevent HIV transmission, but nonmedical factors, known as social determinants of health, also influence HIV-related health outcomes.”¹ A lack of affordable housing options is one such social determinant of health and can undermine access to HIV treatment and prevention services.²

Ending the HIV epidemic in the United States requires implementing integrated solutions that address the comprehensive health, social services, and housing needs of people with HIV and people who could benefit from HIV prevention so they can stay healthy and prevent HIV acquisition or transmission. CDC is actively working with other federal agencies, people with HIV, and other community leaders to implement strategies that increase access to affordable, high-quality housing and support national HIV prevention goals.³

As such, AHF engages in advocacy efforts to protect all aspects of the lives of individuals with HIV, including spearheading rent control efforts

¹ CDC, Issue Brief: The Role of Housing in Ending the HIV Epidemic, <https://tinyurl.com/y5ajakr7>.

² *Ibid.*

³ *Ibid.*

throughout California in order to keep housing affordable and accessible.⁴ That advocacy has earned AHF the ire of the California Apartment Association.

III. Threat to Our Democracy

Under the guise of protecting patients, the California Apartment Association’s so-called Protect Patients Now Act of 2024, designated as Proposition 34 (the “Initiative”), is designed to silence AHF’s rent control advocacy once and for all.

The Initiative violates our state and federal constitutions, is an abuse of the initiative process, and serves as a blueprint for corporate interests wishing to punish nonprofit organizations for their speech and advocacy. This Court should not allow Proposition 34 to appear on the November 2024 ballot.

While Proposition 34 is cleverly worded as to never explicitly name AHF, its description of entities falling under its purview is intended to target a class of one.⁵ No other individuals or corporations meet the definitions contained in the Initiative.⁶ Allowing such a deceptive and facially invalid measure to be

⁴ See, e.g., Justice for Renters, *CA Rent Control Measure Qualifies Early for Nov. 2024 Ballot with Strong Coalition* (July 23, 2023), <https://tinyurl.com/yxkvt49n>; Yes on Prop 21, *Calif. Rent Control Ballot Measure Heads to Voters in Nov.; Campaign Rolls Out 200+ Endorsements* (July 3, 2020), <https://tinyurl.com/9p3fw5uy>; BallotPedia, California Proposition 10, Local Rent Control Initiative (2018), <https://tinyurl.com/4t5aarf6>.

⁵ Christopher Cadelago, *California proposal would sideline a prolific ballot measure player* (Aug. 30, 2023), Politico, <https://tinyurl.com/brkpa5d9>.

⁶ Of the approximately 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

placed on the ballot will only serve to undermine voters' trust in the initiative process and our legal institutions.

The California Constitution prevents this kind of improper initiative from ever being submitted to the voters.

The presence of an invalid measure on the ballot steals attention, time and money from the numerous valid propositions on the same ballot. It will confuse some voters and frustrate others, and an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure, tends to denigrate the legitimate use of the initiative procedure.

(American Federation of Labor v. Eu (1984) 36 Cal.3d 687, 697 (“AFL”).)

This Court has jurisdiction to address this matter now. Any elector “may seek a writ of mandate alleging that an error or omission has occurred, or is about to occur” in “the printing of[] a ballot” or “other official matter, or that any neglect of duty has occurred, or is about to occur.” (Elec. Code, § 13314, subs. (a)(1)–(2).) This Court’s action before August 12, 2024, the date on which the Secretary of State will send materials to the printer for the November 2024 ballot, will protect the integrity of the ballot.

IV. Proposition 34 Violates the United States and California Constitutions

Perhaps most glaringly, the Initiative violates the United States and California Constitutions as an illegal Bill of Attainder. (U.S. Const., art. I, §§ 9–10; Cal. Const., art. I, § 9.) Because such a law may never be enacted under either the state or federal constitutions, it thus should not be presented to the voters. (*See AFL*, 36 Cal.3d at pp. 697, 706 [removing

primary care case management organization; or contract as a Medicare provider under a Medicare special needs plan. (Initiative, 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.

initiative measure from the ballot that violated federal constitutional provisions].)

The Bill of Attainder Clause of the United States Constitution prohibits any law that singles out an entity and “legislatively determines guilt and inflicts punishment upon [it] 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 [internal citations omitted].) These protections apply to corporate entities as well as individuals. (*Con. Edison Co. of N.Y., Inc. v. Pataki* (2d Cir. 2002) 292 F.3d 338, 349.)

As noted above, the Initiative clearly applies to just *one* nonprofit organization, AHF. Moreover, the proponents make no secret that the Initiative is intended to punish AHF and only AHF for its past advocacy efforts.⁷ The Initiative effectuates this single-entity targeting by 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.⁸

The Initiative embodies another central hallmark of a Bill of Attainder—its retrospective focus—by defining past conduct as wrongdoing and then imposing harsh and extreme 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, 472–473].) 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,

⁷ See, e.g., fn. 5, *supra* (Referring to AHF President Michael Weinstein, “supporters unveil[ed] an early November 2024 slogan: ‘Stop the Weinstein scam.’ . . . 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.”); see also BallotPedia, California Proposition 34 (2018), <https://tinyurl.com/mryv36ze> (proponents admit Proposition 34 targets Michael Weinstein and the AIDS Healthcare Foundation).

⁸ See, e.g., fn. 6, *supra*.

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].) “[A] statute need not fit all three factors to be considered a bill of attainder; rather, those factors are the evidence that is weighed together in resolving a bill of attainder claim.” (*Con. Edison*, 292 F.3d at p. 350 [internal citations omitted].) Moreover, an initiative need not specifically use the name of the targeted entity to fall within the constitutional prohibition. (*Foretich v. U.S.* (2003) 351 F.3d 1198, 1217.)

The Initiative readily meets these criteria. Proposition 34 requires AHF to perform specific and punitive duties that would render AHF’s continued operation impossible, including spending 98 percent of its revenues generated in California from the federal 340B Discount Drug Program (“340B program”) on what the Initiative self-servingly defines as “direct patient care” (leaving a two percent margin for operating expenses). Specifically, the Initiative would terminate AHF’s ability to collect and spend revenues as it is legally entitled to do under the 340B program, permanently revoke “any and all pharmacy licenses, health care service plan licenses, or clinic licenses,” prohibit AHF and its owners, officers, and directors from applying for pharmacy and other related health care service licenses for a 10-year period, and revoke AHF’s tax-exempt status for a 10-year period. (Initiative, Section 14124.47(b)(1)–(5).)

Proposition 34 would, and appears intended to, guarantee AHF’s demise while, “viewed in terms of the type and severity of burdens imposed,” would further no “nonpunitive legislative purposes.” (*Selective Serv. Sys.*, *supra*, 468 U.S. at p. 852.)

Singling out just one organization for a public execution, when many other organizations use 340B funds in similar ways unrelated to housing, makes clear the Initiative’s true intentions. The “grave imbalance . . . between the burden and the purported nonpunitive purpose” of the Initiative render it unconstitutional. (See *ACORN v. U.S.* (2010) 618 F.3d 125, 138 [internal citations omitted].)

For similar reasons, the Initiative also violates the California Constitution. Article II, Section 12 provides that “[n]o 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.” (Cal. Const. art. II, § 12 [emphasis added]; see also *Calfarm Insurance Co. v. Deukmejian* (1989) 48 Cal. 3d 805, 834 [“We reject the contention that the inclusion of nonprofit corporations is inconsistent with the purpose of the constitutional prohibition.”].)⁹

Importantly, Article II, section 12 of the California Constitution commands that no proposed initiative statute that violates its provisions “**may be submitted to the electors** or have any effect.” (Emphasis added.) As this Court recently reaffirmed, preelection review of such an initiative “is proper for challenges that go ‘to the power of the electorate to adopt the proposal in the first instance.’” (*Legislature of the State of Cal. v. Weber* (2024) 549 P.3d 884, 891, quoting *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 667.)

The Initiative is not saved by its thinly veiled attempts to avoid explicitly naming AHF. Under Article II, Section 12 of the California Constitution whether or not an entity is named explicitly, the fact that, on its face, Proposition 34 *only applies* to AHF is sufficient to render it in violation of the California Constitution. (See *Calfarm*, 48 Cal.3d at p. 833 [article II, section 12’s intent was to prohibit initiatives that either name *or identify*, without necessarily naming, a corporation to perform any function or to have any power or duty].)

Finally, the Initiative also violates the Equal Protection clause of the U.S. and California Constitutions. (U.S. Const. amend. XIV, § 1; Cal. Const.,

⁹ While the constitutional prohibition was intended to bar “the conferring of special privilege upon some organization sponsoring the initiative,” the Initiative demonstrates the parallel problem of punishing an identified corporation through the imposition of specified duties that apply solely to that corporation. (*Calfarm*, 48 Cal.3d at p. 833.)

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." (*Cal. Assn. of Retail Tobacconists v. State of Cal.* (2003) 109 Cal.App.4th 792, 841.) An Equal Protection violation lies where a party 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.) That the Initiative clearly identifies a "class of one" is plainly arbitrary and violates this fundamental constitutional protection. (*Ibid.*)

V. Conclusion

The proposed Initiative is a poorly veiled 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. This Court should prevent this unconstitutional initiative from being placed on the ballot.

Sincerely,



Jerry Flanagan
Consumer Watchdog
Litigation Director

CERTIFICATE OF SERVICE

I, Kaitlyn Gentile, am employed in the County of Los Angeles, California. I am over the age of 18 years and not a party to the within action. My business address is 6330 San Vicente Boulevard, Suite 250, Los Angeles, California 90048.

On July 16, 2024, I served Consumer Watchdog's Amicus Curiae Letter in Support of Petition for Review on all counsel of record via the Court's electronic filing system, operated by TrueFiling.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 16, 2024, at Los Angeles, California.



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