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Via E-Mail and U.S. Mail

Chairman Wagenknecht and Members of
the Board
Napa County Board of Supervisors
1195 Third Street
Suite 130
Napa, CA 94559

Re: Elections Code Section 9111 Report for Napa County Watershed and Oak Woodland Initiative of 2018

Dear Chairman Wagenknecht and Members of the Board:

On behalf of the proponents of the Napa County Watershed and Oak Woodland Initiative of 2018 ("Initiative"), we are writing to object to the Legal Analysis of Napa County Watershed and Oak Woodland Protection Initiative of 2018 prepared by the law firm of Miller, Starr and Regalia ("Miller Starr Report" or "Report"). The Report asserts that it was prepared "pursuant to Elections Code section 9111." However, the purpose of Section 9111 reports is "to better inform the county electorate and the board of supervisors about proposed initiatives" by providing a fair assessment of their fiscal, land use, and other similar impacts and effects. *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 777; Elec. Code, § 9111.

The Report prepared by Miller Starr is not a fair assessment of the Initiative's effects. Rather, it is fundamentally misleading and biased. The Report reads as if it were prepared for an opponent of the Initiative who asked its lawyers to prepare a comprehensive catalogue of every conceivable ground—no matter how flimsy—for challenging the Initiative in court. Indeed, it is a stretch to call the Miller Starr Report a "9111 report" at all. It does not, for instance, ever identify the seven specific impacts and effects that the Legislature itemized as appropriate for consideration in a 9111 Report. Nor does it even purport to set forth an unbiased analysis of the impact of implementing the Initiative. And it contains no discussion of how and to what degree the Initiative will

further its stated goals of ensuring long-term protections for Napa County's oak woodlands, streams, and wetlands that are so essential to the County's future.

The Miller Starr Report's approach is deeply troubling to our clients, as it should be to the Board and to all County voters. In the agenda for the January 30, 2018, meeting at which the Board considered whether to order a 9111 report on the three initiatives that qualified for the ballot, there was no suggestion that the Board would be requesting a report identifying every possible basis for challenging the Initiative. Nor do we recall the Board ordering such a report at the hearing itself. Instead, after hearing extensive comments by concerned members of the public about the Initiative's potential impacts and effects—both good and bad—the Board ordered a report to address the questions raised by County staff and the public pursuant to Elections Code section 9111.

We are not surprised that the Report is—grudgingly—forced to conclude that a court would almost certainly reject the potential legal claims it catalogues. Indeed, despite addressing dozens of potential legal theories, the 79-page Report fails to identify a single legal claim as having a probable chance of success. Moreover, as the Report tacitly acknowledges, nearly every potential claim raised against the Initiative *could be raised with equal force against literally hundreds of provisions of the County Code and the Napa County General Plan* ("General Plan"). Indeed, many of the terms that the Report contends are potentially vague or otherwise unconstitutional appear repeatedly in nearly identical contexts throughout the County's existing Code and General Plan.

Yet, despite largely recognizing the Initiative's validity, the Report presents a one-sided and misleading picture to the public and the Board. The Report repeatedly mischaracterizes the Initiative in an inflammatory manner—falsely suggesting, for example, that it subjects property owners whose trees are destroyed by wildfires to prosecution. Moreover, the Report appears designed to leave readers with the erroneous impression that the Initiative is honeycombed with legal flaws, despite concessions—buried deep within the Report—that it would almost certainly be upheld by the courts.

This firm drafted the Initiative. We have also drafted dozens of other land use initiatives, including Napa County's Measure J and Measure P, and reviewed or consulted regarding hundreds of others. And we have prepared, helped prepare, or reviewed many dozens of Section 9111 reports, including the 9111 report prepared by County staff for Napa County's 2008 Measure P. But we have never seen a Section 9111 Report as one-sided, biased, and wholly unrelated to the statutory purpose of section 9111 as the one prepared by Miller Starr.

Even a cursory comparison with the 9111 report the County prepared for the Save Measure J Initiative in 2008 ("Measure P") shows how fundamentally inconsistent the Miller Starr Report is with Elections Code section 9111. (A copy of the Measure P 9111 Report is attached to this letter for ease of reference.[1]) The Measure P Report, for instance, commences with a summary of the four specific items under section 9111 that the measure implicates. It then systematically examines the impacts and effects of Measure P, including both the potentially positive or beneficial impacts, and the potential negative consequences. And while it briefly mentions some potential legal concerns (*see, e.g.*, Measure P 9111 Report at 1, 7), it does not engage in dozens of pages of conjecture about how terms that appear in Measure P (as well as throughout the County Code and in the present Initiative), might be subject to litigation.

We recognize, of course, that this Board publicly supported and endorsed Measure P. And that it appears that several members may be intending to oppose this Initiative. But the fact that the Board, or individual Board members, support or oppose an initiative does not justify spending public funds on a biased and one-sided report. Indeed, while the constitution protects Board members' right to take a position for or against an initiative, it prohibits them from spending public money to create or disseminate biased and one-sided reports or other information that do not fairly present the facts.

As the California Supreme Court has repeatedly explained, "[a] fundamental precept of this nation's democratic electoral process is that the government may not 'take sides' in election contests or bestow an unfair advantage on one of several competing factions." *Stanson v. Mott*, 17 Cal.3d 206, 217 (1976). Accordingly, any public funds the County expends regarding the Initiative must be limited to giving a "fair presentation" of "all relevant facts" and cannot be used "to promote a partisan position in an election campaign." *Id.* at 209-10, 220; *see also Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 40 (noting that "argumentative or inflammatory rhetoric" in informational materials prepared by a public agency is an indicator of improper and unconstitutional advocacy).

These requirements and prohibitions have also been codified in the Government Code, which expressly provides that public agencies "may not expend or authorize the expenditure of any … funds . . . to support or oppose the approval or rejection of a ballot measure." Gov. Code, § 54964(a). Rather, funds may be expended only "to provide information to the public about the possible effects of a ballot measure" and *only* if the

[1] The Measure P 9111 Report identifies the "Save Measure J" initiative as Measure O, although it was ultimately placed on the ballot as Measure P.

"information provided constitutes an accurate, fair, and impartial presentation of relevant facts." *Id.*, § 54964(c).

The Miller Starr Report does not come close to satisfying these requirements. If the Report's one-sidedness is not corrected by this Board, the Report will remain a de facto campaign piece. ***Accordingly, we urge the Board to reject this report and to correct these oversights and to provide the required fair analysis of the Initiative***.

In this regard, we note that the email transmitting this and the other Miller Starr Reports asserts that "The Board is required to accept each of the reports, [and] order it filed with the Clerk of the Board." However, there is no such requirement in Elections Code section 9111, and we are unaware of any legal authority or basis for such a requirement. Indeed, if anything, the statutory and constitutional prohibitions on the County funding or promoting one-sided materials on an initiative, requires the County *not* to take any action that could be construed as accepting the Miller Starr Report or adopting it as the County's official position.

SUMMARY

The stated purpose of the Initiative is to "protect the water quality, biological productivity, and economic and environmental value of Napa County's streams, watersheds, wetlands and forests, and to safeguard the public health, safety and welfare of the County's residents." Initiative § 2A. The Initiative achieves this goal by adopting policies for the Agricultural Watershed zoning district to protect forests and tree canopy near streams and wetlands and to ensure the long-term preservation of Napa's oak woodlands. Initiative § 2B. While the Napa County General Plan and its zoning code recognize these same concerns, the proponents of the Initiative—along with the more than 7,000 County voters who signed it—believe that the County's existing stream setbacks and oak protections do not provide sufficient protection. The Proponents also believe that Napa County's water quality, and its signature oak woodlands will not be protected for the long-term unless the County takes serious steps now to preserve these resources for the next generation.

The Miller Starr Report, however, makes little reference to the Initiative's beneficial purposes or the extent to which the Initiative will achieve them. It does not discuss, for example, how ensuring the long-term protection of Napa's watersheds and woodlands will improve water quality and thus help ensure that the County's agricultural and tourism industries continue to thrive. These omissions are particularly disturbing given that the Report repeatedly emphasizes the Initiative's alleged costs and potential liabilities. As detailed below, in many cases it does so on the basis of pure speculation or

interpretations of the Initiative that are so far-fetched that they fly in the face of the Initiative's plain language.

The Report's lack of objectivity is seen in multiple ways. Perhaps the most egregious is the Report's treatment of the Napa's recent horrific wildfires. The Report never considers the possibility that the fires' devastating impacts on oak woodlands and watersheds might make the Initiative's proposed protections of these resources even more critical. Rather, it uses the fires to incite baseless fears about the Initiative's effects. The Report suggests, for example, that the 795 acre Oak Removal Limit could already be reached *if* it includes oaks destroyed by wildfire.

Yet, buried within paragraphs of irrelevant speculation, the Report admits that, in fact, the 795 acres includes only oaks lost to "intentional burning" not to wildfires. Report at 17. The Report also recognizes that the Initiative exempts any oaks removed "by or at the direction or order of a federal or state agency," *a provision which "would, in great part and as a practical matter, exempt from regulation the setting of backfires for the purposes of fighting wildfires in Napa County*." Report at 18. Thus, the Report's insinuation that oaks lost from past or future wildfires would somehow "count" toward the Oak Removal Limit is entirely groundless.

The Report's suggestion that the Initiative could subject landowners "who, through no fault of their own, lose trees due to wildfire" to enforcement actions based on these losses is similarly false and inflammatory. It is inconceivable that the County would take such action and if it did, it would find no support in the language of the Initiative. The Board should not countenance such transparent scare tactics in a Report that is required by law to be fair and objective.

The Report also repeatedly misreads the Initiative's provisions in ways so flagrant it is difficult to believe they are unintentional. For example, the Initiative does not contain "internal contradictions" that "render it impossible for a property owner to obtain a use permit for the removal of oak trees" after the Oak Removal Limit is reached. Report at 2. Rather, it spells out exactly when a use permit is required, when the County can use a more informal permit system, and sets out numerous situations in which oak removal is permitted. The fabricated "contradictions" set forth in the Report cannot be squared with the Initiative's plain language.

The Report similarly mischaracterizes California law. Perhaps the most obvious example is the Report's claim that one sentence in the Initiative violates a prohibition against "indirect" legislation. Report at 3. In fact, identical language was considered and *expressly upheld* by an appellate court in a challenge to a different initiative. *Pala Band*

of Mission Indians v. Bd. of Supervisors (1997) 54 Cal.App.4th 565. Even though no other appellate decision has *ever* questioned *Pala's* holding, the Report nevertheless opines that the holding is "highly questionable" and that the language is vulnerable to legal attack. Report at 45. While this may be the litigation position that the Report's authors have taken in some other case or intend to take, no neutral analysis could come to this conclusion.

In this regard, a comparison to the 9111 Report that County Staff prepared for Measure P is particularly telling. Measure P contained the identical language that the Miller Starr Report contends is unconstitutional. *See* Measure P, Section 3(D), attached to Measure P 9111 Report. However, the 9111 Report for Measure P never suggests that this provision is unconstitutional. Nor, despite the alleged risk of litigation that Miller Starr claims this language creates, did any party challenge this provision after County voters enacted Measure P—with the express support of this Board. Nor to our knowledge, has any published case considered such a challenge since *Pala Band* expressly rejected it in 1997.

Finally, the pervasive tenor and approach of the Miller Starr Report seems intended to give the public the false impression that the Initiative is legally flawed. The Report spends more than 50 pages discussing dozens of "potential legal defects" and even insinuates that "the Board might conclude that all or a portion of the Initiative would likely or potentially be invalid as a matter of substantive law." Report at 3. Yet, nothing in the Report would remotely support a finding that the Initiative would "likely" be held invalid in whole or in part. Rather, the Report is repeatedly forced to concede that the Initiative would likely be *upheld* against challenge—concessions it buries deep in the text where they might be easily overlooked.

To give just one example, the Report repeatedly suggests that the Initiative violates somebody's equal protection rights (the Report does not make clear exactly whose). Yet, in the end, it admits that equal protection challenges to land use policies are "difficult to sustain," that such policies will be upheld if they are "rationally related to a legitimate government interest," that the Initiative's goals are entirely legitimate, and that, accordingly, the "legal risks appear to be low." Report at 16. The Report then adopts this same misleading approach for every far-fetched legal claim that could theoretically be brought against the Initiative. And it fails to disclose that these same types of legal claims could *potentially* be brought against *any* land use initiative or regulation, including most of the zoning and general plan policies adopted by the County.

Ultimately, the Report's conclusion that there "is a <u>significant likelihood</u> the Initiative could be challenged" (Report at 3) says less about the validity of the Initiative

than about the litigation strategy of those opposed to efforts to protect Napa's watershed and oak woodlands. As Miller Starr is well aware, any County land use policy *could* be *challenged*, but that does mean the challenge will succeed. In the case of an adopted initiative, it merely means the litigants have the resources to try to stop the initiative's policies from being implemented, despite the fact that a majority of the County voted in favor of them. And the legal standard for succeeding in such a challenge is very high. Under California law, it is the duty of the courts to "jealously guard" the initiative power, and initiatives "'must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears.'" *Rossi v. Brown* (1995) 9 Cal.4th 688, 711.

DISCUSSION

I. The Report's Analysis of the Alleged Legal Risks Is One-Sided and Misleading.

The purpose of a Section 9111 report is to provide an objective assessment of the fiscal and land use "impacts" of a proposed initiative. Elec. Code, § 9111; *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1041 (reports "balance the right of initiative with the goal of informing voters and local officials about the potential consequences of an initiative's enactment"). The bulk of the Miller Starr Report, however, is devoted, not to an analysis of the Initiative's "impacts," but to a laundry list of every conceivable legal challenge that could *potentially* be brought against it.

Moreover, the Report's legal "analysis" is entirely one-sided. First, the Report contains lengthy discussions of potential claims, only to grudgingly conclude that the claims have no merit. Second, it repeatedly mischaracterizes the Initiative's provisions in a manner that can only mislead the public about their effects. Third, it claims that the Initiative violates California election law despite case law that shows the opposite. Finally, it presents a litany of the Initiative's alleged inconsistencies with the General Plan that fall apart on the barest scrutiny. Thus, the Report in no way constitutes the "accurate, fair, and impartial presentation of relevant facts" required by law. Gov. Code, § 54964(c).

A. The Report Repeatedly Identifies Claimed Litigation "Risks" Only to Ultimately Conclude that Initiative Is Valid.

1. The Initiative Is Not Vague.

The Report begins with an extended discussion of the "vagueness doctrine," asserting that several of the Initiative's provisions "might be deemed impermissibly vague." Report at 9. In particular, it claims that a provision "might be" vague if it contains a "necessity" standard, or uses the word "feasible," "oak woodland," "canopy," "wetland," or "residence or other structure." *Id.* at 9-16. Yet, ultimately, the Report concludes that no significant concerns exist.

Courts interpret initiatives "using the same principles that govern construction of legislative enactments," such as the County's zoning code and General Plan. Report at 7. Yet, the Initiative terms the Report identifies as unduly "vague" are used by the County in precisely the same manner. For example, the word "feasible"—which is subject to two full pages of analysis in the Report—appears at least 36 times in the County code, and the word "infeasible" appears at least 5 times. The Initiative's requirement that off-site oak mitigation be "as close as feasible" to the parcel (§ 18.20.060(A)(3)) is legally no different from the County's requirement that wetlands be protected and enhanced "to the maximum extent feasible" (County Code § 18.40.170(D)(1)). Thus, it is not surprising that the Report ultimately concedes that it is "most unlikely" that this term would be held unconstitutionally vague. Report at 11. It then goes on to make similar findings for most of the other terms. Report at 13 ("low risk" that "oak woodland" is unconstitutionally vague); *id.* ("very low" risk regarding "canopy"); *id.* 14 ("canons of construction" would uphold County interpretation of "wetland").

To the extent that the Report concludes otherwise, its findings are baseless. For example, the Report asserts that the provision permitting the County to issue an oak removal permit where "necessary" to "ensure economically viable use" of a parcel "might be deemed impermissibly vague." Report at 9. The County Code, however, contains hundreds of "necessity" standards. For instance, replanting of vineyards is exempted from certain regulations where any "re-engineering of existing terraces is *necessary* to correct existing erosion or water quality problem." County Code § 18.108.055(A). The County may grant an exception to its conservation regulations where "the encroachment if any, is the *minimum necessary* to implement the project." *Id.*, § 18.108.040(A)(5). And, in a provision nearly identical to the Initiative's, the County Code provides that the County may grant a variance where "*necessary* for the preservation and enjoyment of substantial property rights." *Id.*,§ 18.128.060(A)(3).

Certainly, if the County can make a "necessity" determination under that provision, it can make one under the Initiative. *See Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 598 (directing that the courts "should construe enactments to give specific content to terms that might otherwise be unconstitutionally vague"). For the County to conclude otherwise would mean that it must also find that many of its basic land use regulations are void for vagueness. Fortunately, the Supreme Court has rejected such challenges. *See County of Nevada v. MacMillen* (1974) 11 Cal.3d 662, 673 (noting that the phrase "necessary and proper" has been held to be an entirely permissible "'nonmathematical standard'" that regulates a "'wide spectrum of human activities'" and that "'standards of this kind are *not* impermissibly vague'") (citation omitted); *accord Creighton v. City of Santa Monica* (1984) 160 Cal.App.3d 1011, 1016, 2019-20 (city properly adopted ordinance clarifying and implementing initiative requiring rental control board to "finance its *reasonable and necessary* expenses by charging landlords annual registration fees . . . [and] to request and receive funding *when and if necessary*") (emphasis added).

Likewise, while the Report suggests that the distinction between "streams" and "wetlands" causes "confusion" (Report at 14), this distinction is commonplace. The County's General Plan, for example, provides that projects "shall avoid impacts to wetlands to the extent feasible." General Plan at CON-31. It also provides that the County shall "[e]ncourage the retention of large woody debris in streams to the extent consistent with flood control considerations." *Id.* at CON-26. The County's zoning code likewise references both streams and wetlands, without suggesting such terms are ambiguous or interchangeable. *See* County Code § 18.40.170(D)(1) ("*All wetlands, pools, pond areas or similar lands with resource value, shall be protected in their natural state and enhanced to the maximum extent feasible*."); § 18.108.030 (defining stream to include "[a]ny watercourse which has a well-defined channel with a depth greater than four feet and banks steeper than 3:1 and contains hydrophilic vegetation, riparian vegetation or woody-vegetation including tree species greater than ten feet in height").

The Initiative is no more "confusing" on this point than the existing County land use regulations. Surely, the County staff reports for the dozens of staff-proposed enactments did not contain lengthy discussions about how these terms *could* be subject to litigation. Thus, there is no legitimate basis for including such lengthy discussion in a 9111 Report when the voters propose such an enactment.

2. The Initiative Raises No Equal Protection Issues.

The Report's extended discussion of equal protection issues is similarly misleading. Recognizing that equal protection challenges to land use regulations are

reviewed under a highly deferential standard, the Report concludes that the likelihood of a successful equal protection claim is "low." Yet it undertakes two separate analyses of this essentially non-existent "risk," as well as including it as a "significant potential legal defect" in its summaries. Report at 3, 15-16, 36-37, 50.

The suggestion that the Initiative's exemption for replantings within the footprint of existing vineyards is somehow "unconstitutional" is especially absurd. *See* Report at 36. As a practical matter, if a field is currently planted, there will rarely, if ever, be mature trees within its footprint that would even be affected by the Initiative's tree removal limitations. Plus, given the unique and important role of vineyards to Napa County agriculture, there is an ample rational basis for providing an additional exemption for agricultural lands. *See, e.g.*, *Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 713 (zoning ordinance is presumed valid and "'will not be held unconstitutional if its wisdom is at least fairly debatable and it bears a rational relationship to a permissible state objective'"); *Breneric Associates v. City of Del Mar* (1998) 69 Cal.App.4th 166, 186-187 ("Under the rational relationship test, the legislative action will be upheld unless 'the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.'").

Moreover, to the extent this provision creates an exemption for vineyards that have all discretionary permits prior to the Initiative's effective date, it mirrors other provisions that apply to *all* property owners. Section 18.20.080 provides that the Initiative's restrictions do not "apply to projects or activities for which the owner or applicant has obtained . . . all legally required discretionary permits from the County necessary for it to proceed, prior to the effective date of the Napa County Watershed and Oak Woodland Protection Initiative of 2018." Yet, the Report—inexplicably—makes no mention of this provision.

Moreover, the Initiative's limited exceptions for telecommunication facilities is reasonable given the County's recognition that such infrastructure is critical to the local economy and to its emergency response system. *See* General Plan E-10 ("Policy E-16: The County supports the expansion of energy and telecommunication services . . . to all areas of the county where these services are needed to support the development of locally appropriate jobs and services, including home-based businesses."); County Code § 18.119.080 (A) (providing that "[a]ll radio, television and voice communication facilities providing service to government or the general public shall be designed to survive a natural disaster without interruption in operation."). Likewise, solar facilities are integral part of state and local efforts to conserve energy and reduce greenhouse gas emissions.

See General Plan at SV-7 (elements of sustainability include "renewable resources such as solar energy); CON-48 ("Policy CON-70: The County shall seek to increase the amount of energy produced through locally available energy sources, including establishing incentives for, and removing barriers to, renewable and alternative energy resources (solar, wind) where they are compatible with the maintenance and preservation of environmental quality."). Thus, the limited exceptions for such facilities are not unconstitutional, but entirely reasonable.

3. The Initiative Is Not Preempted.

The Report likewise concedes that the Initiative in not preempted by state law, but only after an extended discussion of all the ways it theoretically might be. Indeed, the Report ultimately recognizes that the Initiative is not preempted by state forestry law, housing law, or any other law. Report at 29 (finding "little risk a court would deem the Initiative to be preempted by the California Forest Practice Act and rules"); *id.* at 30 (concluding that "[t]o a great extent, this preemption concern [related to low-income housing] does not appear applicable to the Initiative"); *id.* at 32 (state law regarding accessory dwelling units "does not invalidate the Initiative"); *id.* at 33 (Initiative provides "an extra layer of protection to water resources" and does not conflict with state groundwater law); *id.* at 33 (Initiative does "not appear" to frustrate regional water quality regulations). Given the Report's conclusion that the Initiative is valid, it is puzzling why the Report spends nearly eight pages entertaining baseless *potential* preemption claims.

The Report's repeated claim that the Initiative could be preempted by the "Oak Woodlands Protection Act" (Report at 2, 25, 50) is similarly bewildering. In the first place, its analysis does not discuss the Oak Woodlands Protection Act at all, but Public Resources Code section 21083.4, a provision of the California Environmental Quality Act ("CEQA"). Report at 25-27. Moreover, buried within the Report's three-page discussion of this CEQA provision is the critical acknowledgment that it "does not expressly preempt local law." Report at 27. In fact, section 21083.4(g) explicitly states that it "*shall not be construed as a limitation* on the power of a public agency to comply with [CEQA] or any other provision of law." Thus, the provision clearly does not preempt local regulation of oak woodlands and indeed expressly permits it. The Report's suggestion to the contrary, and its repeated suggestion that Initiative is preempted by the "Oak Woodlands Protection Act," is entirely groundless.

4. The Report Repeatedly Recognizes the Legal Validity of the Initiative , but only After improperly Spending Multiple Pages Discussing Numerous other Baseless Claims.

In addition to the examples above, the Report also raises numerous other legal issues, only to conclude that they present no issue at all. For example, the Report states that the Initiative "recognize[s] and respect[s], to large degree, the private property rights protected under the state and federal constitutions." Report at 33. We agree.

The Report also acknowledges that the Initiative's assumptions and goals are reasonable: "Here, the intent of the Proponents is to set a quantifiable limit on future removal of oak woodlands that is roughly in line with expected vineyard development in the future." Where, as here, a land use regulations "addresses a legitimate public interest, is reasonable, and has evidentiary backing," it will almost certainly be upheld. Report at 35. Likewise, the Report grudgingly acknowledges that the Initiative's enforcement provisions are "fairly standard." Report at 37. Indeed, they are in most respects very similar to other County enforcement provisions. *See, e.g.,* § 18.108.140.

Numerous other examples abound. *See, e.g.*, Report at p. 47 ("The Initiative does not violate the terms of the *DeHaro* Settlement Agreement"); Report at 50 ("it would appear that the Initiative would not unduly interfere with any planned infrastructure projects").

B. The Report Repeatedly Makes Unsubstantiated Claims Based on Misreadings of the Initiative's Clear Language.

1. The Report's Claims that Wildfires Affect the Oak Removal Limit and that the Initiative Would Somehow Hold Property Owners Liable for Wildfires Is Misleading and Contrary to the Plain Language of the Initiative.

One of the most irresponsible elements of the Report is its attempt to use the recent wildfires to incite baseless fears about the Initiative's impacts.

The Report asserts, for example, that it is "unclear" whether wildfires "would effect a 'removal' of oak woodlands that count toward the Oak Removal Limit." Report at 16. *But the Report then goes on to admit that the answer is not unclear at all*: the Initiative defines tree "removal" to include only the "intentional burning" of trees and does not include the removal of dead trees. Report at 16-17. Moreover, the Limit does not include oaks removed "by or at the direction or order of a federal or state agency."

Initiative, § 18.20.060(G). Thus, the Initiative not only exempts trees lost from wildfires, it would also "as a practical matter, exempt from regulation the setting of backfires for the purposes of fighting wildfires in Napa County." Report at 18.

Thus, the speculation that *if* oaks destroyed by wildfires counted toward the Oak Removal Limit, the Limit would already be reached, serves no legitimate point—except a political one that is *not* appropriate for a County report. The Report's own analysis show that the Initiative does not support this interpretation. In fact, as the Report later notes more moderately, the County to date has approved the removal of only 22 acres of oak woodland that would count toward the 795 Oak Removal Limit. Report at 36.

The Report makes similarly spurious and inflammatory claims when discussing the impacts of wildfires on water quality buffer zones. Within buffer zones, the Initiative clearly allows property owners to remove downed, dead and dying trees, and to remove trees to create firebreaks, to protect public safety, and at the direction of an agency to "alleviate an existing hazardous condition, or abate a public nuisance." Initiative, § 18.20.050(C). Property owners can also readily obtain an oak removal permit to remove oak trees for these reasons even after the Oak Removal Limit is reached. § 18.20.060(E). Thus, the Report's suggestion that the Initiative would somehow prevent property owners from removing trees destroyed by wildfires is baseless. Report at 20.

In fact, the Report concedes that tree removal is allowed within water quality buffer zones where "necessary to avert an imminent threat to public health and safety" or comply with state or local fire or fuel break requirements, but then proposes, for no reason, that this provision is limited to "firefighters." Report at 19. The Report then suggests that a property owner who "through no fault of his or her own, suffers a loss of trees due to wildfire" could be prosecuted for this loss. *Id.* This is patently absurd. Nothing in the Initiative can remotely be read to hold property owners liable for wildfires that destroy trees *anywhere* on their property. The Report's suggestion otherwise is irresponsible, and simply serves to show its partisan nature. *See Vargas*, 46 Cal.4th at 40 (noting that "argumentative or inflammatory rhetoric" is an indicator of improper and unconstitutional advocacy in government informational materials).

2. The Initiative Does Not Conflict with Measure J.

The Report's attempt to paint the Initiative as incompatible with Measure J is similarly groundless. The Report notes that the "Initiative does not directly amend Measure J's provisions." Yet it repeatedly claims that, its intent, while "unclear," *could be* to nullify Measure J and that *if* "this result is intended," the Initiative is "misleading." Report at 6.

Nullifying Measure J, however, is clearly not the effect or "intent" of the Initiative. In fact, the Initiative states that it "Builds on the Legacy of Measure J" by protecting oak woodlands and adopts a goal to "help ensure the long-term sustainability of agriculture in Napa County" by preserving the natural environment. Initiative, § 3(A). Thus, the Initiative is fully compatible with agriculture and with Measure J.

For example, the Initiative allows existing agricultural uses to continue, excluding from its provisions all projects that have received all discretionary approvals prior to its effective date. Its stream buffers and oak mitigation provisions are designed to *protect* County watersheds and help ensure the long-term viability of agriculture in the County. The Initiative does not apply at all in the Agricultural Preserve district. Moreover, the oak removal permit program does not even begin to operate until 795 acres of oak woodlands have been removed, a figure that was selected to allow full build-out of vineyard development under the planning horizon of the current General Plan. And even after the Oak Removal Limit is reached, the Initiative gives the County discretion to permit additional tree removal in a number of varied circumstances, including where oak removal is necessary to allow economically viable use of the property for agriculture.

3. The Initiative Is Not internally Inconsistent.

The Report also manufactures alleged "inconsistencies" that simply do not exist. Contrary to the Report's claim, it is not "unclear" whether the "Initiative would effectively ban the right of a property owner to remove more than five oak trees within a ten year period." Report at 24. Rather, the Initiative clearly states when an oak removal permit is required and when the permit must be in the form of a County use permit (for removal of more than 10 trees in a 12-month period). The Initiative's limits on tree removal for agricultural use after the Oak Removal Limit is reached (five trees over a 10-year period), are consistent with the Initiative's goals of allowing significant oak removal for agricultural purposes until the Limit is reached, then protecting the remaining oak woodlands to the extent feasible.

Moreover, the following "summary" provided in the Report is simply erroneous:

> After the 795-acre limit is reached, the County only may issue oak removal permits if: (1) the tree removal will take place on properties that are a minimum of 160 acres; (2) the tree removal is necessary to ensure that agricultural use of the parcel will be economically viable; and (3) if certain other findings can be made, as detailed in Section II of this

> Memorandum. The ten exceptions referenced above would apply to this permitting requirement as well.

Report at 2. In fact, provisions (1) and (2) apply *only* to the exception for agricultural use. None of the ten other specific exceptions for oak removal are limited by the size of the parcel or the economic necessity of the exception. *See, e.g.*, Section 18.20.050(C). For example, there is no minimum lot size or numerical limit for oak removal for fuel breaks, home construction, or access roads. The Report's suggestion otherwise is patently misleading.

4. The Initiative Raises No Due Process Issues.

The Report's suggestion the Initiative denies property owners a hearing is similarly untrue. The Report suggests that the Initiative somehow impliedly *excludes* existing County hearing provisions in making violations of the Initiative subject to existing County enforcement provisions. In fact, County counsel recommended referencing these provisions to ensure consistency with existing County enforcement policies, including those governing a right to a hearing. *Shaw v. People ex rel.Chiang* (2009) 175 Cal.App.4th 577, 598 (courts "do not examine [statutory] language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment").

C. The Report's Suggestion that the Initiative Violates Initiative Law Is Baseless.

The Report also raises numerous potential claims regarding the Initiative's consistency with election law, only to recognize that such claims would be far-fetched and contrary to established law.

For example, the Report notes that an initiative "cannot interfere with the efficacy of an essential governmental power." Report at 38. Pages of analysis, however, lead only to the unsurprising conclusion that the Initiative does *not* do this: "It is likely that a court would uphold the Initiative against claims it impaired an essential governmental function." Report at 38-39.

The Report spends another five pages analyzing a single sentence that was expressly upheld by an appellate court. The Initiative provides:

> The County of Napa is hereby authorized to amend the County of Napa General Plan, all specific or community plans, the County Code, including the Zoning Code, and other

> ordinances, polices and plans, including climate action plans, affected by this Initiative as soon as possible as necessary to ensure consistency between the provisions adopted in this Initiative and other sections of the General Plan, specific or community plans, the County Code, including the Zoning Code, and other County ordinances, policies, and plans.

Initiative, § 7(G). The Initiative upheld in *Pala* contained nearly identical language:

> The County of San Diego is hereby authorized and directed to amend other elements of the General Plan, sub-regional plans, community plans, Zoning Ordinance, and other ordinances and policies affected by this initiative as soon as possible and in the manner and time required by State Law to ensure consistency between this initiative and other elements of the County's General Plan, sub-regional and community plans, Zoning Ordinance and other County ordinances and policies.

Pala, 54 Cal.App.4th at 595 (quoting § 7(D) of Proposition C at issue). In fact, *Pala* rejected exactly the challenge raised by the Report, holding that this provision was not "indirect legislation," and was not "beyond the scope of the electorate's power." *Id.* at 576-78.

The Report takes issue with *Pala's* reasoning, claiming that it is "highly questionable." In fact, *Pala* has been cited more than a dozen times by California's appellate courts and its holding on this issue has never been questioned. And nearly identical versions of this provision have been included in countless initiatives since *Pala*, including Napa's 2008 Measure P, which was endorsed by the Board of Supervisors. Yet the 9111 Report prepared for Measure P never suggested that this language raised any legal issue. The Report's attempt to do so here, and to discount an appellate decision that unequivocally establishes its validity, is simply more evidence of Miller Starr's bias.

Moreover, the primary difference between the Initiative here and Proposition C in *Pala*, is that the Initiative "authorizes," but does not "direct" the County to take any specific action. Thus, the Report's suggestion that the Initiative improperly "directs" future legislative action is even more untenable.

D. The Initiative Is Consistent with the General Plan.

The Miller Starr Report also exhaustively analyzes the Initiative's non-existent "inconsistencies" with the Napa County General Plan. Despite acknowledging that "*there is no clear evidence of any internal inconsistency*," the Report goes on for pages entertaining hypothetical concerns that the Initiative "potentially frustrates" General Plan policies. Report at 52, 57.

In doing so, the Report ignores the widely recognized fact that "policies in a general plan reflect a range of competing interests." *Orange Citizens for Parks & Recreation v. Superior Court* (2016) 2 Cal.5th 141, 157 (citation and internal quotation marks omitted). The courts therefore have held that a county "must be allowed to weigh and balance [its] plan's policies when applying them," and has "broad discretion to construe its policies in light of the plan's purposes." *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 142. Thus, as with general plan provisions enacted by the Board, the County (and the courts) are required to interpret the Initiative's policies as consistent with the rest of the General Plan. And an amendment is valid unless "a reasonable person could not conclude that the plan is internally consistent." *Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1195-96 (holding that local governments have "broad discretion to weigh and balance competing interests in formulating development policies, and a court cannot review the wisdom of those decisions under the guise of reviewing a general plan's internal consistency"); *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 719 (noting that "it is beyond cavil that no project could completely satisfy every policy stated in the [general plan], and that state law does not impose such a requirement").

Since the Report itself begrudgingly admits that this standard is met here (*see* Report at 52), the Report's pages of speculation to the contrary are nothing more than improper advocacy against the Initiative. Indeed, the Report tries in vain to find some inconsistency somewhere. For example, it spends several pages coming to the unremarkable conclusion that the "Initiative appears to be consistent" with the General Plan's affordable housing policies. Report at 52-53. It then raises the possibility that the Initiative "might frustrate" policies regarding second-unit construction, only to dismiss it, finding: the "oak removal permitting process cannot apply to the County's approval of second units," which "moot[s]" any possible inconsistency. Report at 54-55; Initiative, § 18.20.060(G); *accord* § 6(A). .

Next, the Report claims that the Agricultural Watershed policies in the Initiative are not depicted on the General Plan Land Use Map. But while maps and policies must

be consistent, there is no requirement that *every* general plan policy appear on the Land Use map. In fact, while citing to Policy AG/LU-112, the Report fails to mention the very *next* policy in the *existing* General Plan, which states:

> Policy AG/LU-113: **The Land Use Map is presented as a general illustration of the policies of the General Plan and is not intended to reflect every policy direction**. Specific review of applicable policies is necessary to determine the precise land use potential of any site.

General Plan, AG/LU-67 (emphasis added). The Report's complete disregard of this policy, and its claim that "[a]t worst," the lack of mapping "creates an inconsistency in the General Plan," make it sound more like a litigation brief than a neutral account of the Initiative's true impacts.

The Report then insinuates that the Initiative conflicts with General Plan policies favoring agricultural uses. But the existing Policy AG/LU-4 specifically notes that "agricultural lands" includes "lands used for grazing and watershed/open space." *See* Report at 55. Protection of streams and oak woodlands is critical to ensuring healthy farmlands and healthy watersheds as the General Plan acknowledges: "The County recognizes that preserving watershed open space is consistent with and critical to the support of agriculture and agricultural preservation goals." General Plan, CON-23, Policy CON-4; *see also* CON-30 (Policy CON-24: "Maintain and improve oak woodland habitat to provide for slope stabilization [and] soil protection . . . ."); CON-10 (stream set-backs help "protect lands from excessive soil loss and maintain or improve water quality of watercourses by minimizing soil erosion from earthmoving, vegetation removal, and grading activities related to agriculture and structural projects"). The Napa County Voluntary Oak Woodland Management Plan (2010) likewise recognizes that protecting oak woodlands has significant agricultural benefits, helping to "improve air and water quality, slow runoff, prevent erosion, mitigate flooding, . . . and benefit vineyard owners through pest management." *Id.* at 8. Yet, the Report disregards all of these provisions, giving the distinct impressions that its purpose is not to present an even-handed account of how the Initiative might further existing General Plan policies, but only to fabricate potential conflicts.

Other claimed inconsistencies are similarly specious. For example, the Report claims that the Initiative is inconsistent with Policy CON-26 and page SV-4 in the Summary and Vision Chapter, ignoring the fact that the Initiative *amends* these policies and pages to *ensure* consistency. *See* Initiative, § V(C)(iv); § V(A)(i). Likewise, the suggestion that the Initiative could create a "vertical inconsistency" is unintelligible, as it

fails to identify a single General Plan policy that the Initiative is inconsistent with or to explain how the adoption of "more restrictive" stream setbacks would create any inconsistency at all. *See* Report at 61-67.

In short, in analyzing general plan consistency, the Report is grasping at straws. The Initiative is entirely consistent with the General Plan and the Report presents no evidence to the contrary.

II. Because the Miller Starr Report Is Not Accurate, Fair, or Impartial, the Board Should Reject It as a 9111 Report and Refuse to Authorize the Expenditure of Public Funds for Its Preparation.

A Section 9111 report is designed to "better inform the county electorate and the board of supervisors" about the "impacts" of a proposed initiative. *DeVita*, 9 Cal.4th at 777; Elec. Code, § 9111. It thus serves the same purpose as the official title and summary and other ballot materials prepared by the County and must, like them, be non-partisan and fair.

A ballot summary, for example, must be "true and impartial, and not argumentative or likely to create prejudice for or against the measure." *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 243. And it must "avoid misleading the public with inaccurate information." *Id.*; *Costa v. Superior Court* (2006) 37 Cal.4th 986, 1023 (summary must provide an "accurate and objective description of the general subject matter of the initiative"). Likewise, ballot materials "cannot favor a particular partisan position," be "'false [or] misleading,'" or contain language that "'signals to voters" the government's view "'of how they should vote, or casts a favorable light on one side of the [issue] while disparaging the opposing view.'" *McDonough v. Superior Court* (2012) 204 Cal.App.4th 1169, 1174 (citations omitted).

As a report prepared with public funds, a Section 9111 Report is subject the same standards of fairness, truthfulness, and impartiality, both under the Government Code and under the Constitution. Specifically, the County "may not expend or authorize the expenditure of any of the funds . . . to support or oppose the approval or rejection of a ballot measure." Gov. Code, § 54964(a). Rather, funds may be expended only "to provide information to the public about the possible effects of a ballot measure" and *only* if the "information provided constitutes an accurate, fair, and impartial presentation of relevant facts." *Id.*, § 54964(c).

In short, as the California Supreme Court has emphasized, any materials relating to an initiative that are paid for by public funds must provide a "fair presentation" of "all

relevant facts" and the government may not "'take sides' in election contests or bestow an unfair advantage on one of several competing factions." *Stanson,* 17 Cal.3d at 220. "[E]ven when a publication or communication imparts useful information and does not expressly advocate a vote for or against a specific . . . ballot measure, the expenditure of public funds to prepare or distribute the communication is improper when the 'style, tenor and timing' [citation] of the publication demonstrates that the communication constitutes traditional campaign activity." *Vargas,* 46 Cal.4th at 27.

As detailed in Section I, above, the Miller Starr Report is not an "accurate, fair, and impartial presentation of the relevant facts" (Gov. Code, § 54964(c)), but a largely one-sided legal attack. It repeatedly mischaracterizes the Initiative and presents a biased and misleading legal analysis. Moreover, its style and tenor are not neutral but appear calculated to incite opposition to the Initiative. The Board should therefore reject it as a 9111 Report and refuse to authorize public funds for its preparation or further dissemination.

Conclusion

For the foregoing reasons, the we respectfully urge the Board to reject the Miller Starr Report and to correct the Report's inaccuracies regarding the Initiative and provide the public with the fair presentation of impacts that the law requires.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

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