INTRODUCTION

On November 2, 2004, Proposition 71 was approved in a general election. It added Article XXXV to the State Constitution, which among other things, established the California Institute for Regenerative Medicine ("the Institute"). Proposition 71 also added the "California Stem Cell Research and Cures/Bond Act" ("the Act") to the Health and Safety Code commencing with Section 125290.10. The Act created a revolutionary new entity, an "Independent Citizens Oversight Committee" ("the ICOC") that is vested with full power, authority and jurisdiction over the Institute, and commissioned to oversee the disbursal of three billion dollars in funds generated through the sale of general obligation bonds.

The Act violates the California Constitution because the ICOC is not "under the exclusive management and control of the State." California Constitution, Art. XVI, section 3.

The indicia of lack of exclusive state management and control are myriad. For example:

1) the ICOC has no members who are elected or public officials; all members are appointees, appointees of appointees, or delegatees of appointees;

2) while constitutional officers have the authority to appoint some of the members of the ICOC, many of their choices are limited to persons representing specified advocacy groups or executive officers of various institutions and therefore responsive to those advocacy groups or institutions rather than to the constitutional officer who appointed them;

3) the fundamental decisions as to which entities grants may be awarded are controlled by members of Working Groups appointed by the ICOC who are then independent of the ICOC;

4) the Act makes no provision for removal of any member of the ICOC or the Working Groups;

5) the Act contains no criteria on which the ICOC is to base its decisions to makes grants or loans other than that they be recommended by the Working Groups;

6) the Working Groups can recommend, and the ICOC can award, loans or grants for any scientific and medical research and technologies, thus providing no specificity regarding how the money raised by the bonds is to be spent;

7) the Act provides inadequate guidelines for the adoption of standards by or for the ICOC;

8) the Act leaves the fashioning of intellectual property agreements totally within the discretion of the ICOC, thus providing no specificity regarding the Institute's relationships with its grantees in this important area;

9) the Act contains insufficient external controls by other state agencies.

In sum, the Act delegates the disbursal of huge sums of public money to the unfettered discretion of an institution whose governing board and working groups are unaccountable to the public.

Issue Presented

Does the Act violate the California Constitution, Article XVI, section 3, by authorizing the sale of general obligation bonds and

directing the proceeds to be disbursed by an entity not under the exclusive management and control of the state?

Necessity of Writ Relief

Although this may not be, strictly speaking, a case of first impression for this Court, it can be fairly said to be a case of "long time, no see" impression. The last time this Court examined the constitutional provisions about exclusive management and control by the state, and the indicia thereof, was in *People v. San Joaquin Etc. Assoc.*, 151 Cal. 797 (1907).[1] In the present case, the facial unconstitutionality of the Act, and the likelihood of the immediate expenditure of significant public moneys if it is implemented, justify a peremptory writ of mandate in the first instance. Cal.Civ.P.Code Section 1088; *Lewis v. Sup. Ct.*, 19 Cal.4th 1232, 1264-65 (1999) (Baxter, J. concurring) (issuing a peremptory writ in the first instance reflects recognition that, on occasion, immediate judicial action is necessary to prevent or correct unauthorized or erroneous action by the respondent where there is great urgency).

[1] The Court did consider the public vs. private benefits aspects of this section in *California Housing Finance Agency v. Elliott*, 17 Cal.3d 575 (1976)

VERIFIED PETITION FOR WRIT OF MANDATE, PROHIBITION, CERTIORARI AND/OR OTHER APPROPRIATE RELIEF

By this verified petition for a peremptory writ of mandate, Petitioners allege as follows:

1. Petitioner, People's Advocate, is a non-profit public benefit California corporation founded in 1974 by the late Paul Gann and is dedicated to the promotion of government reform through populist activism via the powers reserved to the people, i.e., the initiative process. In the thirty years since its establishment, People's Advocate has qualified 13 state-wide ballot initiatives proposed by petition of the people, including Proposition 13, the famous Jarvis-Gann property tax initiative, and the Davis recall. People's Advocate is governed by an elected five-member Board of Directors. Currently, People's Advocate has 171,000 members and contributors who support its goals and an additional 300,000 households on its mailing list throughout California.

2. Petitioner, National Tax Limitation Foundation, is a California non-profit corporation founded in 1976. Its mission is to engage in educational and research activities to facilitate structural change, reforms and discipline in government at all levels to assure

constitutionally limited government as intended by the Founders of our Nation. The foundation has sponsored and participated in a wide range of activities involving the tax limitation/balanced budget amendment to the U.S. Constitution, state tax limitation measures, line-item veto, reducing the size and scope of federal functions and term limits for state and federal officeholders.

3. As advocates for the citizens of California, Petitioners have a strong beneficial interest in having the California Constitution faithfully followed and in having funds ultimately extracted from taxpayers of the State being spent only by institutions under the exclusive management and control of the State.

4. Respondent Independent Citizens' Oversight Committee is an entity established by the California Stem Cell Research and Cures/Bond Act and unconstitutionally vested with full power, authority and jurisdiction over the California Institute for Regenerative Medicine.

5. Respondent Robert N. Klein is the Chairperson and interim President of the ICOC. Petitioners seek this writ against Mr. Klein in his official capacities.

6. Respondent Arnold Schwarzenegger is the Governor of the State of California. Petitioners seek this writ against the Governor in his official capacity.

7. Respondent Cruz Bustamante is the Lieutenant Governor of the State of California. Petitioners seek this writ against the Lieutenant Governor in his official capacity.

8. Respondent Phil Angelides is Treasurer of the State of California. Petitioners seek this writ against the Treasurer in his official capacity.

9. Respondent Steve Westly is Controller of the State of California. Petitioners seek this writ against the Controller in his official capacity.

10. Each of Respondents Schwarzenegger, Bustamante, Angelides and Westly is authorized under the Act to appoint members of the ICOC.

11. Respondent Angelides has responsibility for all funds deposited in the State Treasury, including funds credited to the California Stem Cell Research and Cures Fund established under the Act.

12. Respondents Angelides, Westly and Klein are purportedly given the power by the Act to authorize the issuance of bonds to fund the operation of the Institute.

13. The Act is contrary to Article XVI, section 3, of the California Constitution in that it mandates the drawing of moneys from the State Treasury for the purpose or benefit of the ICOC, an institution not under the exclusive management and control of the State.

14. The members of the ICOC have been selected, a Chairperson and Vice Chairperson of the ICOC have been elected, and organizational meetings have been held and/or scheduled.

15. There is no adequate remedy at law because the organization, powers, and proposed operation of the ICOC are in clear violation of Article XVI, section 3, of the California Constitution.

16. Petitioner's entitlement to relief is obvious because the violation of the Constitutional provision is clear and unambiguous.

17. This case presents an issue of important public interest and statewide impact, as evidenced by the news reports contained in the Appendix submitted herewith as Exhibits 1 through 10. All of these exhibits are true and correct copies of newspaper articles

downloaded from the newspapers' respective websites. Exhibit 11 is a true and correct copy of the Voter Information Guide for Proposition 71 downloaded from the state's website. Exhibit 12 is a true and correct copy of Section 125290.10 *et seq* of the Health and Safety Code which was downloaded from the state website. Exhibit 13 is a true and correct copy of Senate Bill 18 introduced by Senator Ortiz on December 6, 2004, which was also downloaded from the state website.

18. The matter should be resolved promptly because of the importance in maintaining Constitutional protections over the spending of taxpayers' money, and preventing the unlawful, unnecessary and wasteful expenditure thereof in the organization and operation of a clearly unconstitutional institution.

19. It is urgent that this Court issue an order prohibiting any further organization or operation of the ICOC, including accepting interim funding, awarding of any grants or loans, or causing the issuing of any bonds. Failing to issue a peremptory writ in the first instance will result in the unrecoverable wastage of public moneys, confusion of the public, and a needless and fruitless expenditure of

time and effort by those involved in the organization of the ICOC and those seeking to do business with it.

20. To ensure immediate compliance with the California Constitution and to give a decisive and final answer, this Court is the appropriate tribunal to hear such an important question of law.

21. Petitioners request this Court to issue peremptory writ in the first instance after the requirements for notice are met.

22. Petitioners do not here seek a ruling on the constitutionality of the California Institute of Regenerative Medicine or newly added Article XXXV of the California Constitution.

23. Petitioners base the prayer for relief on this petition verified by Ted Costa and Diane K. Sekafetz, and the attached memorandum of points and authorities, hereby incorporated by reference.

PRAYER FOR RELIEF

Wherefore, Petitioners pray as follows:

That this Court:

A. Issue a peremptory writ of mandate in the first instance commanding Respondent ICOC, its Chairperson, Vice

Chairperson, its other individual members, and any officers, agents, servants, employees, or persons acting at their behest or direction, to cease and desist from any further efforts to organize or operate the ICOC.

B. Issue a peremptory writ of mandate in the first instance commanding Respondents, and any officers, agents, servants, employees, or persons acting at their behest or direction, from spending or releasing any public funds for any purpose connected with, or relating to, the ICOC or its operations.

C. Issue a peremptory writ of mandate in the first instance prohibiting Respondent Angelides from disbursing funds from the State Treasury to, or on behalf of, Respondent ICOC.

D. Issue a peremptory writ of mandate in the first instance prohibiting Respondents from issuing, or causing to be issued, any bonds pursuant to the California Stem Cell Research and Cures Bond Act of 2004, Section 125290.10 *et seq* of the Health and Safety Code.

E. Declare that the California Stem Cell Research and Cures Bond Act of 2004, Section 125291.10 *et seq* of the Health and Safety Code, is unconstitutional.

F. Award Petitioners the costs of this proceeding.

G. Award Petitioners attorneys' fees.

H. Award Petitioners any other and further relief the Court considers proper.

Dated: February 21, 2005

Respectfully submitted,
Life Legal Defense Foundation

By _____
Dana Cody
Attorney for Petitioners

VERIFICATION

I, Ted Costa, a citizen of the United States, a resident of the State of California, and Chief Executive Officer of People's Advocate, have read the foregoing Verified Petition for Writ of Mandate in the First Instance. I have personal knowledge of the facts alleged herein, and I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this ___ day of February, 2005, in_____, California.

_____
Ted Costa, Petitioner

VERIFICATION

I, Diane K. Sekafetz, a citizen of the United States, a resident of the State of California, and Board Member of the National Tax Limitation Foundation, have read the foregoing Verified Petition for Writ of Mandate in the First Instance. I have personal knowledge of the facts alleged herein, and I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this ___ day of February, 2005, in_____, California.

_____
Diane K. Sekafetz

MEMORANDUM OF POINTS AND AUTHORITIES

Petitioners present the following discussion in support of their Request for a Peremptory Writ of Mandate and Immediate Stay.

I. THIS PETITION MERITS THIS COURT'S ORIGINAL JURISDICTION.

Article VI, section 10 of the California Constitution confers on this Court "original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition." The exercise of original jurisdiction is warranted in cases of sufficient public importance. *Legislature v. Eu*, 54 Cal.3d 492, 500 (1991). Where the issues presented are of great public importance and should be resolved promptly, it is appropriate for this Court to exercise its original jurisdiction and take prompt action to maintain the rule of law. *Id*.; *Raven v. Deukmejian*, 52 Cal.3d 336, 340 (1990); *Clean Air Constituency v. California St. Air Resources*, 11 Cal.3d 801, 808, (1974).

The issue presented in this case – whether the ICOC, a commission not under the exclusive management and control of the state, can constitutionally be empowered to spend three billion dollars of state money – is of utmost public importance and urgency. Beginning in November 2004, the Respondents have been at work

organizing the ICOC including the appointment of its members, the election of a Chairperson and Vice Chairperson, holding organizational meetings and scheduling others. By the terms of the Act, three million dollars will be appropriated from the General Fund as a loan for initial administrative and implementation costs.[2] According to the news media, the ICOC has already begun efforts to establish a headquarters for the Institute, and various cities within the state are preparing proposals to lure the Institute to their territory. The ICOC is tasked with beginning to make grants or loans as soon as possible and is poised to request the issuance of general obligation bonds to cover those grants or loans and repay its start-up costs. Various entities are already jockeying for a share of the money the ICOC will disburse. Once these grants are made, or the bonds issued, it will be exceedingly difficult, if not impossible, to put the genie back in the bottle. The funds expended must ultimately be paid back by the taxpayers of the state, and accordingly the petitioners, and every taxpayer in the state, are directly affected. *Perry v. Jordan*, 34 Cal.2d 87, 91 (1949).

[2] Section 125290.70(b)

These consequences can be forestalled only by this Court entertaining and granting this petition before the Act is further implemented. *Greener v. Workers' Comp. Appeals Bd.*, 6 Cal.4th 1028, 1045 (1993). For the reasons that follow, Petitioners urge this Court to prohibit any further organization or operation of the ICOC and the spending of any money by, or on behalf of, the ICOC.

II. THE INDEPENDENT CITIZENS' OVERSIGHT COMMITTEE IS NOT UNDER THE EXCLUSIVE MANAGEMENT AND CONTROL OF THE STATE AS A STATE INSTITUTION AND THEREFORE ITS FUNDING WOULD BE UNCONSTITUTIONAL

A. Whether An Entity Is Under The Exclusive Management And Control Of The State Is Determined Through A Case-Specific Evaluation Of The Applicable Executive And Legislative Controls

Article XVI of the California Constitution, Section 3, provides in part:

> No money shall ever be appropriated or drawn from the State Treasury for the purpose or benefit of any corporation, association, asylum, hospital, or any other institution not under the exclusive management and control of the State as a state institution….

While no substantial body of law has developed around this section, the courts have on several occasions enumerated some of the important criteria bearing on requirement for exclusive management and control. In *People v. San Joaquin Etc. Assoc.*, 151 Cal. 797

(1907), this Court considered the identical language of the predecessor of this section, Section 22 of Article VI of the Constitution of 1879, in connection with legislation that created a state agricultural society, declared it to be a state institution, and organized the state board of agriculture and charged it with the exclusive management and control of the state agricultural society as a state institution. Local agricultural districts were also formed as public corporations.

The Court found that the provisions of the act clearly evinced an intention to make the district associations public corporations. Each was to be managed by a district board of agriculture whose members were appointed by the governor. The enabling legislation declared that each district association was to be recognized as a state institution, and that the board was to have exclusive control and management of the institution for and in the name of the state. The legislature assumed to exercise full power over these associations. *Id.* at 804. All of these considerations led the Court to find that the associations were public agencies of the state, within its exclusive management and control, and charged with the performance of a part of the functions of the state government. (*Id*. at 805).

A similar situation arose in *Board of Directors v. Nye*, 8 Cal.App. 527 (1908), where funding for the Women's Relief Corps Home Association was attacked because the Home was allegedly not under the exclusive control and management of the state. The court noted the factors that prompted its finding that the legislature intended to make the home a state institution under the exclusive management and control by the state:

> …The act provides, as seen, for the appointment of a board of directors of said home by the governor of the state. It provides that the executive shall fill by appointment all vacancies occurring in the board of directors from whatever cause. It requires the board and other officers to keep an account of its receipts of money and of all expenditures, and provides that no money shall be drawn on the fund established by legislative appropriation for its support or the support of its inmates except it be done in the manner authorized by law for the payment of all other claims against the state. It provides that a verified report, containing a statement of the receipts and expenses of the home and the condition thereof, etc., shall be by the board of directors transmitted to the governor on the fifteenth day of August of each year…. The single fact that the power of the removal of a director is placed by the act with the executive of the state is itself plainly indicative of the intention of the legislature to make it a state institution *under the exclusive management and control of the state.* The other provisions of the act emphasize this intention…. (Emphasis the court's) (*Id*. at 532-33)

A more detailed explication of factors to be considered is found in the more recent case of *California Assn. of Retail Tobacconists v.*

State of California, 109 Cal.App.4th 792 (2003). The court began its analysis by setting forth the underlying rationale of Section 3:

> The exclusive management and control condition evinces the constitutional concern that the appropriation of funds to autonomous entities independent of state controls may not always further legitimate state purposes and interests. This interpretation is consistent with the excerpts of the debates of the California Constitutional Convention in 1879, of which the trial court took judicial notice. That material shows that the Convention delegates were concerned that even if a legitimate public purpose existed for the expenditure of taxpayer funds, those funds should generally be expended only on programs and services for which the state retained the ability to manage and control the delivery of those programs and services. (Citation omitted)
>
> Exclusive management and control of the state includes those elements of governance assigned to the executive and legislative branches. The executive power includes the power of appointment, removal, supervision and management. The legislative power includes the power to appropriate funds and to establish funding priorities. (Citations omitted). Whether an entity is under the exclusive management and control of the state is determined through a case-specific evaluation of the applicable executive and legislative controls." (*Id*. at 816-17)

The question at hand was whether the California Children and Families Act of 1998, Health and Safety Code, section 130100 *et seq*, satisfied Article XVI, section 3. The act created a statewide California Children and Families Commission ("CCFC") and county commissions, and provided a new state tax on tobacco products to be

used exclusively to fund the operations of these commissions. In summarizing its reasons for upholding the Act, the court said:

> …The Act is replete with controls, including the manner of appointment of members of both the CCFC and county commissions, the specificity regarding how tax revenues must be spent, and the annual audit and reporting requirements. Moreover, the CCFC and county commissions are subject to stringent external statutory controls imposed by the State Controller, the Department of Finance, the Bureau of State Audits and a myriad of statutory requirements. Additionally, the implementation of the Act shows that the CCFC and county commissions are public entities under state control. Finally, the Act and the official voter pamphlet show the electorate intended to create the CCFC and county commissions as state agencies. (*Id*. at 820)

To summarize the teachings of these cases, the four major factors to be considered in determining if the state has exclusive management and control of an institution are: (1) the intent in creating the institution; (2) the control exercised over the persons who spend the money, particularly the powers to supervise and remove them; (3) the specificity concerning how standards will be developed and how the money will be spent; and (4) other manifestations of control such as supervision and intervention by other state agencies. A consideration of these factors, individually and collectively, demonstrates that the ICOC is not under exclusive management and control of the state.

B. Proposition 71 Intended To, And Did, Establish An Institute Free From State Control And Management

The very name of the committee organized to govern the Institute strongly suggests, if it does not compel, the conclusion that those favoring Proposition 71 did not want the Institute or its governing committee to be under the control of elected officials, but rather independent of them. The governing committee is the **Independent Citizen's** Oversight Committee. That the name means what it says – the committee is to be independent -- is clear from the powers given to the ICOC by the enabling legislation, Section 125290.10 *et seq*, of the Health and Safety Code. As stated in Section 125290.15:

> There is hereby created the Independent Citizen's Oversight Committee, hereinafter, the ICOC, which shall govern the Institute and is hereby vested with *full power, authority and jurisdiction over the Institute*. (Emphasis added)

This simple and absolute grant of exclusive management and control of the Institute to the ICOC is enlarged upon in Section 125290.40 where the functions to be performed by the ICOC are spelled out to include:

> (a) Oversee the operations of the Institute.
> (b) Develop annual and long-term strategic research and financial plans for the Institute.

> (c) Make final decisions on research standards and grant awards in California.
> * * * * *
> (f) Establish policies regarding intellectual property rights arising from research funded by the Institute.
> (g) Establish rules and guidelines for the operation of the ICOC and its working groups.
> (h) Perform all other acts necessary or appropriate in the exercise of its power, authority, and jurisdiction over the Institute.
> (i) Select members of the working groups.
> (j) Adopt, amend and rescind rules and regulations to carry out the purposes and provisions of this chapter, and to govern the procedures of the ICOC….
> * * * * *
> (l) Request the issuance of bonds from the California Stem Cell Research and Cures Finance Committee and loans from the Pooled Money Investment Board.
> (m) May annually modify its funding and finance programs to optimize the Institute's ability to achieve the objective that its activities be revenue positive for the State of California during its first five years of operation without jeopardizing the progress of its core medical and scientific research program.

The provisions of the Act clearly do not evince an intention to make the ICOC a public agency. *Cf. People v. San Joaquin Etc. Assoc.*, 151 Cal. at 805. Just the contrary is true. It is hard to imagine a more definitive declaration of independence from other state authorities. The ICOC makes its own rules and makes the final decisions on how it will disburse the funds made available to it. It selects the Chairperson, Vice Chairperson, and President of the

Institute and may delegate broad powers to them.[3] These officers and other employees of the Institute are exempt from Civil Service.[4] And there is further evidence of a lack of state control and management. Among its other plenary powers, the ICOC may retain outside counsel,[5] enter into any contracts or obligations which are authorized or permitted by law,[6] determine the total number of authorized employees of the Institute,[7] and set the compensation for its officers and employees.[8] The grants and loans made by the ICOC are not subject to competitive bidding, and, other than limited exceptions, the Public Contract Code does not apply to contracts let by the Institute.[9]

Finally, the desire for independence is evidenced by Section 8 of the Proposition which provides that the Act may not be amended earlier than the third full calendar year following its adoption, and then only be a supermajority vote of 70% of the membership of both houses of the Legislature and signature by the Governor.

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[3] Section 125290.45(b)(1)
[4] Article XXXV, Section 7
[5] Section 125290.45(a)(2)
[6] Section 125290.45(a)(4)
[7] Section 125290.45(b)(1)
[8] Section 125290.45(b)(4)
[9] Section 125290.30 (f)(3), (4)

In addition to the language of the Act itself, the arguments contained in the official ballot pamphlet made clear that the ICOC would be free from the control and management of the state. In the Argument Against Proposition 71, its opponents stated: "Most importantly, the fine print specifically prohibits the Governor and Legislature from exercising oversight and control over how this money is spent – or misspent." (Exhibit 11, Argument Against Proposition 71). It is significant that the proponents of Proposition 71 failed to contradict this argument. *Legislature v. Eu*, 54 Cal.3d 492, 505 (1991) ("Nonetheless, we find it significant that the proponents failed to contradict the opponents' . . . . argument."). They did not attempt to contradict it because that is exactly what was intended – the Governor and the Legislature were to have no say with respect to how the three billion dollars raised by the bonds was to be spent.

C. The Members Of The ICOC Are Not Subject To State Management Or Control

The executive power component of exclusive management and control includes the power of appointment, removal, supervision and management. *California Assn. of Retail Tobacconists*, 109 Cal.App.4th at 817. That the ICOC was intended to, and will, be independent of this executive power is demonstrated by the manner of

the selection of its members and their subsequent freedom of action. There are twenty-nine members of the ICOC. Five of the twenty-nine are appointed by the Chancellors of the University of California at San Francisco, Davis, San Diego, Los Angeles and Irvine, and must be executive officers of their respective campuses[10]. These five members are thus appointees of appointees (the Chancellors) of appointees (the Trustees of UC). They owe their primary allegiance to the Chancellor of their respective campus, not to any elected official. Even then, once appointed, they do not answer to the chancellors. No one who answers directly to the people has any control over them.

Twelve of the members must each be an executive officer of (1) a California university other than the five UC campuses, or (2) of a California non-profit academic and research institution that is not part of U.C., or (3) of a California life-science commercial entity. One member from each category is to be selected by the Governor, Lieutenant Governor, Treasurer and Controller[11]. Once again, if these members are under anyone's management and control, it is the entity of which they are executives, not the person who appointed them.

[10] Section 125290.20(a)(1)
[11] Section 125290.20(a)(2)

Moreover, each of these members may delegate his or her duties to another executive officer of his or her institution.[12] Such a delegate would be even further removed from any control by anyone who answers to the people.

The Governor, Lieutenant Governor, Treasurer, and Controller also each appoint two additional members, one from each of a specified "disease advocacy group."[13] The Speaker of the Assembly and the President Pro Tem of the Senate each appoint one member from additional disease advocacy groups.[14] Again, it is to their advocacy group, not the state official who appointed them, that these members would owe their primary allegiance. Once appointed, these members would be entirely free of any management and control by an elected official. One measure of how much control likely can be exercised, and for how long, is to consider the community of interests between the entity supposed to exercise control and the person being controlled. When those interests diverge and the person putatively being controlled holds his own interests as paramount, any effective control is lost.

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[12] Section 125290.20(a)(2)(D)
[13] Section 125290.20(a)(3)
[14] Section 125290.20(a)(4, 5)

The final two members, the Chairperson and the Vice Chairperson, are elected by the other 27 members.[15] They are thus appointed by appointees or their delegates and not by elected officials answerable to the people. The great majority, if not all, of the members are affiliated with entities that stand to benefit, directly and indirectly, from the grants and loans they award. Despite these relationships, prohibitions against conflicts of interest are almost non-existent.[16]

This committee structure is a far cry from that found to indicate state control in *California Assn. of Retail Tobacconists*, 109 Cal.App.4th at page 822:

> …Unlike a private entity, only elected officials can appoint the members of the commissions and membership of the commissions must include public officials. Consequently, the commissions are either directly or indirectly accountable to the people.

Specifically, the state committee, the CCFC, had seven members, three of whom were appointed by the governor, two of whom were appointed by the Speaker of the Assembly, and two of whom were appointed by the Senate Rules Committee.[17] The

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[15] Section 125290.20((a)(6)
[16] Section 125290.30(g)
[17] Sec. 130115, Health & Safety Code

Secretary of the California Health and Human Services Agency and the Secretary for Education served as ex officio nonvoting members of the commission.[18] A county commission came into existence only upon the passage of an ordinance by the board of supervisors spelling out in considerable detail how the commission was to operate.[19] Each county commission was to have between five and nine members, all appointed by the county board of supervisors. One member had to be a member of the board of supervisors, and two had to be county health officials.[20] The manner in which members of the county commissions could be removed, and the length of their terms, were up to the board of supervisors.[21] The county commission had to adopt a strategic plan consistent with any guidelines adopted by the CCFC,[22] and submit it to the CCFC.[23] There were many additional specific requirements on how the county commissions could operate.[24]

The ICOC committee structure is massively distinguishable from those in *California Assn. of Retail Tobacconists*. It much more

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[18] Sec. 130110(c), Health & Safety Code
[19] Sec. 130140(a)(1), Health & Safety Code
[20] Sec. 130140(a)(1)(A)(i, ii), Health & Safety Code
[21] Sec. 130140(a)(1)(B), Health & Safety Code
[22] Sec. 130140(a)(1)(C)(i), Health & Safety Code
[23] Sec. 130140(a)(1)(F), Health & Safety Code
[24] Sec. 130140(a)(1)(C) , *et seq*), Health & Safety Code

closely resembles those condemned in *State Board v. Thrift-D-Lux Cleaners,* 40 Cal.2d 436, 449 (1953) ("Where the Legislature attempts to delegate its powers to an administrative board made up of interested members of the industry, the majority of which can initiate regulatory action by the board in that industry, that delegation may well be brought into question."), and *Bayside Timber Co. v. Board of Supervisors,* 20 Cal.App.3d 1, 14 (1971) ("It is an age-old principle of our law that no man should judge or otherwise officially preside over disputed matters in which he has a pecuniary interest."). The fact that many of the "interested members of the industry" are appointed by the Governor or other elected state officials is of little consequence is illustrated by *Johnson v. Michigan Milk Marketing Board*, 295 Mich. 644, 295 N.W. 346 (1940), a case relied on in *Bayside Timber*.

Johnson involved the constitutionality of a milk marketing board set up to, among other things, regulate the price of milk in Michigan. The board had five members: the commissioner of agriculture by virtue of his office, and four members to be appointed by the governor, two of whom were to be milk producers, one of whom was to be a distributor, and one of whom was to be a consumer. Notwithstanding that the latter four members were appointed by the

governor, and could be removed by him for good cause, and that no one had asserted that the board had acted unfairly, the court found that "the fact remains that the act requires the appointment of a board, a majority of whose members have a direct pecuniary interest in the matters submitted to them." (*Id*. at 657). The court held that the composition of the board violated the state constitution:

> In order that the administration of the milk industry may be conducted in a fair and impartial manner, it is essential that the board be impartial in its composition. The act is fatally defective in its provision for the appointment of the personnel of the board. (Citing *Carter v. Carter Coal Co.*, 298 U.S. 238, 310 (1936) (*Id*. at 657)

The Act at issue here goes far beyond the loosest of conventional conflicts of interest norms. It actively promotes voting for a member's own interest. For example, the Act provides that: "A member of the ICOC may participate in a decision to approve or award a grant, loan or contract to an entity for the purpose of research involving a disease from which a member of his or her immediate family suffers or in which the member has an interest as a representative of a disease advocacy organization."[25]

[25] Section 125290.30(g)(1)(B)

The blatant conflicts of interest that are built into the ICOC by the Act are thus objectionable not only because they raise unanswerable questions about the impartiality of the committee, but also because they demonstrate that the members of the ICOC are not under the exclusive control and management of the state, nor are they likely to have the state's interests primarily in mind. Almost by definition, the representatives of the "disease advocacy groups" are going to advocate that grants be made to advance progress in finding treatment for the particular disease they advocate, whether or not such grants would most effectively advance the state's interest to: "Maximize the use of research funds by giving priority to stem cell research that has the greatest potential for therapies and cures." (Exhibit 11, Proposition 71, Sec. 3).

Assume, for example, that it became apparent that the overall interests of the state and its citizens would be most advanced if most or all of the money available was awarded for grants to fight one disease, for example, cancer, because of the large number of citizens who would be positively affected, the costs of treatment that would be saved, and a high probability of success. In other words, the "bang for the buck" would be greatest if all of the available resources were

devoted to one task. How could the representatives of other disease advocacy groups be expected to turn their backs on their constituencies and vote for this common interest rather than their own special interest? They could not. How could a vote on such a proposition possibly appear to be an impartial one? It could not.

The rules under which the ICOC is to operate, and the moneys it disburses, are "decreed exclusively by persons pecuniarily interested" in the stem cell industry. *Cf. Bayside Timber*, 20 Cal.App.3d at 10. This is even more true of the members of the Working Groups, as discussed below. Both the members of the ICOC and the members of the Working Groups are much more likely to pursue their own agendas, and those of the entities that they represent, than the state's or the taxpayers'.

Finally, the independence of the members of the ICOC from any executive management or control is further assured because they serve a fixed term[26] and cannot be removed by those who appointed them.[27] The fact that the power to remove a member of the ICOC is denied by the Act to the Governor or any other elected state official is

[26] A majority of the members have eight year terms; the remainder have six year terms. Section 125290.20(c)(1). They thus are likely to serve longer than the persons who appointed them.
[27] Section 125290.20(c)(1)

itself plainly indicative of the intention of the electorate to remove the ICOC from the exclusive management and control of the state. *Cf. Board of Directors v. Nye*, 8 Cal.App. at 533.

This scheme of insuring the independence of the ICOC from outside control was carefully crafted by the proponents of Proposition 71, no doubt to reinforce the mandate of Article XXXV, section 4, that the Institute's funds "shall not be subject to appropriation or transfer by the Legislature or the Governor for any other purpose."

But the proponents of Proposition 71 were not finished with their building of an edifice that isolated the management and control of the Institute's funds from outside political forces. They provided Working Groups far removed from the influences of any such forces to act as gatekeepers for the awarding of any grants.

D. It Is The Working Groups, Not The ICOC, That Exercise Effective Control Of The Awarding Of Grants

The Working Groups to be established by the ICOC further separate the actual work of the Institute and the ICOC -- the making of grants -- from control by the state or its elected officers by interjecting another layer of people into the decision making process, people who are totally isolated from, and not dependent upon or

controlled by, anyone putatively acting on behalf of the state.[28] And when the totality of the enabling statute is carefully considered, it is apparent that the members of the Working Groups hold the real power and authority in the awarding of grants. In making any grants, the ICOC is entirely guided and controlled by the Working Groups. As provided in Section 125290.50(d): "The ICOC *shall* consider the recommendations of the working groups in making its decisions on applications for research and facility grants and loan awards and in adopting regulatory standards." (Emphasis added). There is no provision in the statute that provides for, or permits, the ICOC to consider or make an award of a grant absent a recommendation from the Working Groups.

In this respect, the Working Groups are analogous to the logging practice committees found wanting in *Bayside Timber Co.*, *supra*. In that case, the court held that:

> The content of the rules under which private logging operations are conducted is decreed exclusively by persons pecuniarily interested in the timber industry, i.e., timber owners and operators. The ultimate basis of this exclusive control rests in the hands of the "private timber ownership," two-thirds of which must agree

[28] While the Working Groups include "disease advocacy" members of the ICOC, these are in the distinct minority. Secs. 125290.55(a), 125290.60(a).

> before *any* proposed rule may be adopted. Ordinarily such rules are formulated by the four timber owners or operators of the forest practice committee, but they may nevertheless be drafted by the district's private timber ownership. The rules are submitted to the State Board of Forestry which may approve or disapprove them. *It is noteworthy that the board is powerless itself to promulgate any forest practice rule. It may only approve or disapprove those which are submitted.*
>
> It follows that without agreement of the "private timber ownership," no power in California has authority to impose rules to insure reasonable environmental and public protection from logging abuses. (20 Cal.App.3d at 10, emphasis added).

In the present case, no power in California, certainly not the executive or the legislative, has authority to impose rules for the development of standards or the awarding of grants under the Act.

Of particular significance is the power wielded by the 23 member Scientific and Medical Research Funding Working Group. This Group is empowered to perform the following functions[29] – functions that are paramount in the operation of the Institute:

> (1) Recommend to the ICOC interim and final criteria, standards and requirements for considering funding applications and for awarding research grants and loans.
> (2) Recommend to the ICOC standards for the scientific and medical oversight of awards.
> * * * * *
> (4) Review grant and loan applications based on the criteria, requirements and standards adopted by the ICOC

[29] Section 12590.60(b)

> and make recommendations to the ICOC for the award of research, therapy development, and clinical trial grants and loans.

The Scientific and Medical Research Funding Working Group thus performs the most critical functions in attempting to carry out the avowed purposes of the Institute: "To make grants and loans for stem cell research, for research facilities and for other vital research opportunities to realize therapies, protocols, and/or medical procedures that will result in, as speedily as possible, the cure for, and/or substantial mitigation of, major disease, injuries and orphan diseases." (Article XXXV, Section 2(a)). And this critical control is exercised not by the Working Group but by a subset of only fifteen of its members. These fifteen are not ICOC members and must be "scientists nationally recognized in the field of stem cell research," and *only* these fifteen "shall score grant and loan award applications for scientific merit." Since these fifteen members represent 65.2% of the Working Group membership, they can recommend a grant regardless of any objections of the other eight members. They can even block the submission of any minority report to the ICOC.[30]

[30] The eight non-scientist ICOC members of the Working Group account for slightly less than the 35% required for the submission of a minority report. Section 125290.50(d).

These fifteen do not have to be citizens, residents or taxpayers of California. So what it comes down to is this: fifteen persons with no ties to the state, not in any way beholden to any state officials, and far removed from any state management or control by the state, effectively determine how three billion dollars of California taxpayers' money is to be spent.

Section 125290.50(e)(3) of the Act states that:

> Because the working groups are purely advisory and have no final decision-making authority, members of the working groups shall not be considered public officials, employees or consultants for purposes of the Political Reform Act (commencing with Government Code section 81000), Government Code sections 1090 and 19990, and Public Contract Code sections 10516 and 10517.

The provision that the members of the working groups are not public officials or employees has real significance on the nature of the management and control that can be exercised over them by the state. They are specifically declared to not be state employees and are freed from many of the conflicts of interest laws that apply to state employees for the protection of the public. The ICOC members who are also members of the Working Groups are thus given further license to pursue their own narrow interests without regard for the

interest of the state.[31] However, the idea that the working groups are purely advisory and have no final decision-making authority, while perhaps technically correct, is meaningless because it ignores their enormous importance as the gatekeepers – it is only what they recommend to the ICOC that will result in a grant, and their recommendations will be judged by standards that they themselves recommend. They have an unassailable and uncontrollable chokehold on the entire process.

The members of the Working Groups are not appointed by any elected official, but by the members of the ICOC. The term of their appointment is long -- six years -- and they may serve a maximum of two terms.[32] There is no provision that they may be removed by anyone. Once appointed, they are free agents.

While the ICOC itself may have the final decision-making authority on the awarding of grants, that authority is largely illusory, or, at the least, very circumscribed. In any event, the decisions on

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[31] The Working Groups are to include a total of 12 members who are also ICOC members representing disease advocacy groups. Since there are only 10 such ICOC members, all of them, plus the Chairman of the ICOC who also is a member of the Working Groups, will receive the benefits of this further shielding from conflicts of interest laws.

[32] Section 125290.50(b)

how the money to be drawn from the State Treasury is to be awarded to the various entities represented by the members of the ICOC, and others like them, are far removed from the exclusive management and control of the State.

E. There Is No Specificity On How The State Funds Must Be Spent

Just as the powers of the ICOC, the manner in which its members are selected, and the part played by the Working Groups all point unerringly to a conclusion that the ICOC is not subject to those exclusive management and control elements assigned to the executive, the total lack of specific direction as to how the money must be spent shows that the legislative elements are also missing. The Official Title and Summary and the other materials of the Voter Information Guide (see Exhibit 11), the "Findings and Declarations" and the "Purpose and Intent" of Proposition 71 and the Act enacted by it make it seem that the money will be spent on stem cell research. But the ICOC is not so limited.

The ICOC can fund *any* "scientific and medical research and technologies" – whether or not it relates to stem cell research -- if it is recommended by two-thirds of a quorum of the Scientific and Medical Research Funding Working Group who believe that a research

proposal is a "Vital Research Opportunity,"[33] i.e., "a substantially superior research opportunity vital to advance medical science."[34] This escape hatch removes virtually any restraints on the way in which the ICOC can spend the money raised for it through the issuance of general obligation bonds. The Act thus does not satisfy another of the factors relied on by the court in *California Assn. of Retail Tobacconists*, 109 Cal.App.4th at 823. As such, it violates the constitutional principle that any delegation of legislative authority must be accompanied by "safeguards adequate to prevent its abuse." *Bayside Timber, 20 Cal.App.3d at 11*.

The same untrammeled latitude is given to the ICOC in the setting of the standards by which it shall be governed. The ICOC is "to develop its own scientific and medical standards , notwithstanding [various sections of the Health & Safety Code], *or any other current or future state laws or regulations* dealing with the study and research of pluripotent stem cells and/or progenitor cells, or other vital research opportunities, except Section 125315 (Emphasis added). The ICOC, its working committees, and its grantees shall be governed solely by the provisions of this act in the establishment of standards, the award

[33] Section 125290.60(c)(1)(D)
[34] Section 125290.10(y)

of grants, and the conduct of grants awarded pursuant to this act."[35] What more powerful rejection of legislative authority can be made than telling the legislature: "you can't touch us now, and you can't touch us later."

F. There Are No Guidelines For Establishing Standards For Licensing Of Intellectual Property

Just as the ICOC has complete control over the grants that it makes, it has complete control over the agreements it reaches with regard to intellectual property generated as a result of those grants. The ICOC is to establish standards for intellectual property agreements guided only by the vague admonition to "balance the opportunity of the state of California to benefit from the patents, royalties, and licenses that result from basic research,….with the need to assure that essential medical research is not unreasonably hindered by the intellectual property agreements."[36] In other words, the ICOC is at total liberty to preserve or give away the intellectual property fruits of the vast sums that it will award in grants and loans. This lack of any management or control by the state over this potential source of revenue is particularly troublesome because most of the members of

[35] Section 125290.35(a)
[36] Section 125290.30(h)

the ICOC and the Working Groups have close ties to those entities that are most likely to receive the grants under which the intellectual property will be created, and are most likely to benefit from generous terms. In a situation so rife with potential conflicts of interest, only the most stringent and specific statutory guidelines could insure that the state exercised any effective management and control of this important aspect of the ICOC's operations. *People ex rel Lockyer v. Sun Pacific Farming Co.*, 77 Cal.App.4th 619, 634 (2000).

That the Act is lacking in appropriate guidelines, and that this is a matter of great public importance, are demonstrated by the introduction by Senator Ortiz, a supporter of Proposition 71, of Senate Bill 18, Exhibit 13 in the Appendix. Among other efforts to correct the obvious deficiencies of the Act, Senate Bill 18 attempts to supply the guidelines not found in the Act. This effort appears to be directly in conflict with Section 8 of Proposition 71, and demonstrates both the public awareness of the lack of control exercised by the state, and the inability of the state to do anything about it.

G. The ICOC Is Free Of Statutory Controls Beyond Those Established By The Act

In *California Assn. of Retail Tobacconists*, *supra*, the court made much of the myriad of controls that the state exercised over the

commissions beyond those established by the Act itself (e.g., intervention by the State Controller, the State Auditor, the Department of Finance and the State Treasurer to monitor the manner in which the money was spent by the commissions) in finding that the State maintained exclusive management and control of the commissions. *See, e.g.*, 109 Cal.App.4th at 824-26. Any such controls are lacking in the Act at issue here. For example, in connection with audits and financial controls, the Act only provides that the ICOC issue an annual financial audit and provide it to the State Controller for review and a public report,[37] and to a Citizen's Accountability Oversight Committee, to review and make *recommendations* on the Institute's financial practices and performance.[38] No intervention by the State Controller, Auditor, Finance Department or Treasurer is contemplated. All actual power and control are reserved to the ICOC.

To summarize, the Act was intentionally and successfully designed to make the ICOC entirely independent of state control, not just outside the *exclusive* management and control of the State. The State has no control over the members of the ICOC or the members of the Working Groups who disburse the moneys raised by the bonds to

[37] Section 125290.30(b)
[38] Section 125290.30(c)

be issued, the State has no say in the manner in which the funds are disbursed, the State has no say in the manner in which the ICOC manages its intellectual property rights, and the State can exercise no effective external controls on the operations of the ICOC or the Institute.

H. A High Standard For Management And Control Of The Spending Of State Funds Should Be Imposed When The Stakes Are High

The court in *California Assn. of Retail Tobacconists*, *supra*, did not reach the conclusion that the CCFC and the county commissions were under the management and control of the state in a vacuum. It reached that conclusion in the context of a situation where the funds to be spent on and by the commissions were not the general funds of the state, but taxes levied only on purchasers of tobacco products, the very individuals towards whom the programs funded were particularly aimed. It was not a raid on the general fund, and the management and control of the money raised and spent was more easily exercised. If the programs were successful, the tax money to fund them would evaporate and non-smoking taxpayers would not be burdened. Even with these limits on the program, the court had to analyze the

numerous factors and make the findings referred to above before it could conclude that the constitutional requirements were met.

The present case is very different. The state funds to be disbursed by the ICOC will come from the State Treasury where the proceeds of the bonds are to be deposited. The redemption of the bonds, and the payment of interest on them, is estimated to be in the neighborhood of six billion dollars. All of these dollars have to come from the state's taxpayers whether they are affected by the program or not. The breadth, impact and expense of the program enabled by the Act demand that the most stringent standards for state control and management be present to protect the taxpayers from abuse. This is all the more important because of the rampant conflict of interest problems created by the Act. As pointed out above, the Act does not come close to meeting the standards set in *California Assn. of Retail Tobacconists*, let alone surpass them.

Basically, Proposition 71, and the Act it enabled, permitted its proponents to use the initiative process to gain control over the spending of substantial state funds on causes dear to their hearts whether or not that spending would be in the best interest of the state and all of its citizens. Such an arrangement does not square with the

intent of the authors of Article XVI, section 3, that: "even if a legitimate public purpose existed for the expenditure of taxpayer funds, those funds should generally be expended only on programs and services for which the state retained the ability to manage and control the delivery of those programs and services." *California Assn. of Retail Tobacconists* , 109 Cal.4th at 816.

If allowed to stand, the Act, and the proposition that spawned it, could set a dangerous precedent. It would encourage others whose private interests coincide to some degree with public interests to hijack the initiative process and use lavishly funded and promoted propositions to establish entities under their own control to pursue those private interests with public funds without concern about interference from the state in controlling and managing how those funds were to be spent.

III. A PEREMPTORY WRIT OF MANDATE IN THE FIRST INSTANCE SHOULD BE ISSUED

A writ of mandate is appropriate for challenging the constitutionality of a proposition passed by the electorate when the validity of the proposition is of considerable general public interest and the questions raised must be resolved promptly. *Bramberg v. Jones*, 20 Cal.4th 1045, 1054 ((1999); *Hotel Employees & Restaurant*

Emps. Int. Un. v. Davis, 21 Cal.4th 585 (1999); *Legislature v. Eu*, 54 Cal.3d 492, 500 (1991); *Raven v. Deukmejian*, 52 Cal.3d 336, 340 (1990).

Proposition 71 authorized the issuing of three billion dollars of general obligation bonds, and established the ICOC as the entity with exclusive control over how the funds thus raised would be spent. The amount involved, the manner in which the moneys will be spent, and the makeup and operation of the ICOC are matters of considerable general public interest, as evidenced by numerous news reports, including Exhibits 1 through 10 in the Appendix.[39] They are of particular interest to Petitioner and other California taxpayers because it is their taxes that will be used to redeem the bonds and pay the interest thereon. *Perry v. Jordan*, 34 Cal.2d 87, 91 (1949).

Taxpayers have a right to challenge an unconstitutional statute, and to object to any expenditure of funds thereunder, by writ of mandate to this Court. *Raven v. Deukmejian*, 52 Cal. 3d 336, 340 (1990); *Common Cause v. Board of Supervisors*, 49 Cal. 3d 432, 439 (1989); *Cal. Code Civ. Proc.* § 1086.

[39] These articles are being offered not to prove the truth of the matters asserted but to show that there is great public interest.

There is no adequate remedy at law. "[M]andamus may be invoked in those cases where remedy by any other form of action or proceeding would not be equally as convenient, beneficial, and effective." *Ross v. Bd. of Educ.*, 18 Cal. App. 222, 225 (1912); *see also Harbach v. El Pueblo De Los Angeles State Historical Monument Comm'n*, 14 Cal. App. 3d 828, 837 (1971) (Mandamus "will ordinarily be issued where a legal duty is established and no other adequate means exist for enforcing that duty"). Clearly, no other adequate means exists to obtain the relief sought by this Petition.

A. The Writ Should Be Issued In The First Instance

Under Cal. Civ. P. Code § 1088 and other applicable law, this Court should issue a peremptory writ in the first instance. A court may issue a peremptory writ in the first instance "when petitioner's entitlement to relief is so obvious that no purpose could reasonably be served by plenary consideration of the issue, for example, when . . . there has been clear error under well-settled principles of law and undisputed facts – or where there is an unusual urgency requiring acceleration of the normal process." *Lewis v. Superior Court,* 19 Cal. 4th 1232, 1241 (1999); *see also Alexander v. Superior Court,* 5 Cal. 4th 1218, 1223 (1993); *Ng v. Sup. Ct.*, 4 Cal. 4th 29, 35 (1992) (clear

error under established law and unusual urgency are factors for *Palma* procedure).

This Petition presents a textbook case for issuing the writ in the first instance. The entitled relief is obvious: prevent implementation of an unconstitutional Act. Moreover, as explained earlier, there is unusual urgency – the members of the ICOC have been selected, steps are being taken to organize and fund the ICOC, and plans are being made to award grants and issue bonds, all of which will involve the improper spending of the taxpayers' money. Once sold, the bonds cannot be reversed or rescinded.

Because Petitioner has effected personal service of this petition and a notice of an application for a writ of mandate in the first instance on the Respondents on this date and seek a peremptory writ of mandate in the first instance, Petitioner respectfully requests this Court to give *Palma* notice to Respondents. *Palma v. U.S. Industrial Fasteners, Inc.*, 36 Cal. 3d 171, 178 (1984); *see also Ng*, 4 Cal. 4th at 35 (1992) (*Palma* procedure proper when "there has been clear error under well-settled principles of law and undisputed facts . . . or when there is an unusual urgency").

A peremptory writ may issue in the first instance when at least ten days is given and each party has sufficient opportunity to be heard. Cal. Civ. P. Code § 1088. *Palma,* 36 Cal. 3d at 180. In this case, ten days notice is being given to allow the Respondents sufficient time to be heard. Additionally, as noted above, unusual urgency exists.

CONCLUSION

The Act creates an entity, the ICOC, which is entrusted with raising and spending three billion dollars in state, i.e., taxpayer, money. The ICOC is given full power, authority and jurisdiction over its own operations. It is not under the exclusive control and management of the state, contrary to the requirements of Article XVI, section 3 of the California constitution. It should not be permitted to proceed any further in derogation of that constitutional mandate. Accordingly, Petitioner respectfully requests that this Court grant the relief sought in the Verified Petition for a Peremptory Writ of Mandate in the First Instance.

CERTIFICATE OF WORD COUNT

I, the undersigned counsel for Petitioner, relying on the word count function of Microsoft Word, the computer program used to

prepare this brief, certify that the above document contains 9,876 words.

February ___, 2005 _____
Dana Cody

CERTIFICATE OF SERVICE

I, the undersigned counsel for Petitioners, certify that I caused the foregoing verified petition for writ of mandate, prohibition, certiorari and/or other appropriate relief to be served by personal service on The Independent Citizens Oversight Committee, 5855 Horton Street, Emeryville, CA 94608; Robert N. Klein, Chairperson, The Independent Citizens Oversight Committee, 5855 Horton Street, Emeryville, CA 94608; Governor Arnold Schwarzenegger, State Capitol Building, Sacramento, CA 95814; Lieutenant Governor Cruz Bustamante, State Capitol Building, Room 1114, Sacramento, CA 95814; Phil Angelides, Treasurer of the State of California, 915 Capitol Mall, Room 110, Sacramento, CA 95814; Steve Westly, Controller for the State of California, 300 Capitol Mall, Suite 1850, Sacramento, CA 95814, and the Office of the Attorney General, 1300 "I" Street, P.O. Box 944255, Sacramento, CA 94244-2550, on

February ___, 2005 _____
Dana Cody